

LAW AND DEVELOPMENT
IN SRI LANKA
AN HISTORICAL PERSPECTIVE
1796 - 1978

(A thesis submitted to the University of London as an
Internal Student of The School of Oriental and African
Studies for the Degree of Doctor of Philosophy)

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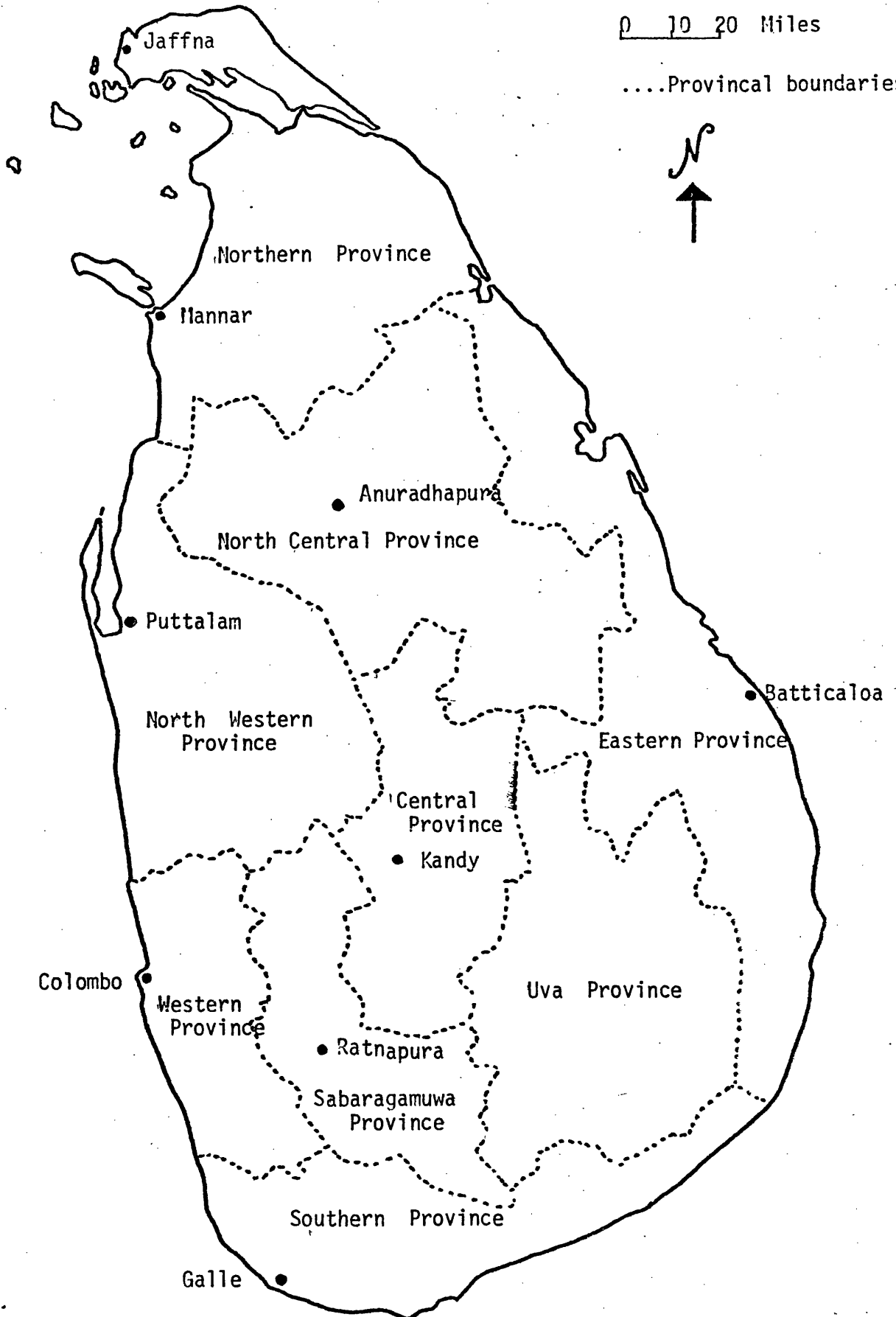


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The Abstract

The focus of this work is to examine the way the law has been used in the development of Ceylon (called Sri Lanka, after 1972), both during the British Colonial period (1796-1948) and thereafter. Each chapter in this thesis deals with the relationship of law and the resulting changes. This thesis has been divided into five parts. Part A provides a brief historical introduction into the period under review. Part B examines three main areas relevant to the culture of the inhabitants of Ceylon, namely, Religion, Education and Language. The three chapters which make up that part deal with the impact of Colonial Laws and policies. Part C considers the twin developments of Constitutional reforms and Judicial reforms on the Island. The constitutional progression of Sri Lanka from a Colony to Independence is examined within a historical framework. The social factors relevant to each historical stage of Constitutional development is considered as an introduction to Constitutional reform. Part D deals with the role of Law and policy in Economic development. The focus of the three chapters in this part includes, the reform of property ownership (both Immovables and Movables), reform of Banking, reform of Institutional Aids to Economic development and aspects of Revenue reform. Finally, Part E attempts to draw appropriate conclusions (while explaining the role of law in development), in the light of the observations that were made in the first thirteen chapters of this thesis.

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C.O.54.351 (29/3/1860)	
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C.O.54.380 (23/10/1863)	
C.O.55.115 (21/1/1868)	

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All England Reports	All. E.R.
Appeal Cases	A.C.
British Judicial Commissioners for Kandyan Provinces ..	B.J.C.
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East African Law Reports	E.A.L.R.
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King's Bench Reports	K.B.
New Law Reports (Ceylon)	N.L.R.
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Part A

An Introduction.

Chapter 1 An Historical Introduction to the Study. Page§1-12

Chapter I

An Historical Introduction to the Study

The recorded history of the Island of Sri Lanka goes back to 483 B.C. ¹ It is alleged that the Island was discovered by a group of exiles from Bengal during that year, and that they, under a Prince known as Vijaya, founded the first Kingdom in Sri Lanka, with Vijaya ² as the first Sovereign of that Island. According to the Mahavamsa, ³ quoting ancient Pali commentaries, the passing away of the Buddha and the arrival of Vijaya and his followers took place on one and the same day. ⁴ This also marked the commencement of what has now come to be known as the Sinhalese race. The Mahavamsa attributes the name Lanka to a death bed dialogue between Buddha and Sakra (the keeper of the heavens according to the Buddhist scriptures), moments before the passing away or Parinibbhana of Buddha in 483 B.C. Addressing Sakra, Buddha is alleged to have said:

"My doctrine, O Sakra, will eventually be established in the Island of Lanka; on this day, Vijaya, eldest son of Sinha Bahu, king of Sinhapura in the Lata country, lands there with seven hundred followers, and will assume the sovereignty there. Do thou, therefore, guard well the king and his train and the Island of Lanka"? ⁵

This dialogue explains both the origins of the name Lanka and the origins of the Sinhalese race as an off-shoot of the inhabitants of Sinhapura the subjects of King Sinhabahu. The present name of the Island is a mere constitutional recognition of that ancient name. The prefix 'Sri' provides an article of veneration which preceeds the name 'Lanka'. The history of the Island between the reign of King Vijaya and its assumption of Dominion Status or Independence in 1948, was punctuated by sporadic invasions from foreign lands. Until 1505 A.D. such invasions came mainly from the kingdoms around the Southern end of India. As a result of such invasions an indigenous group of persons, known as the Tamils formed nearly 12% of the total population on the Island, at Independence, in 1948. Those who claim descent from the original group of exiles who had arrived with Vijaya, in 483 B.C., formed

nearly 70% of the population at Independence. These were the Sinhalese. The difference in their cultural, ethnic, religious and linguistic attributes became a basis for the identification of these two groups as two separate indigenous communities on the Island. The vast disparity in their population strengths relegated the Tamils to the position of an ethnic minority, yet one with deep historical roots on the Island. This single factor appears to play a central role in the problems concerning education, language and constitutional development on the Island.

The foreign invasions between 483 B.C. and 1505 A.D. were largely from South India. These periodic invasions did not measurably destabilise the existing socio-political compact of early [Sri] Lankan Society. A great many scholars have produced a large number of works about that period from a socio-political standpoint.⁶ Apart from snippets of information on the legal systems of ancient Lanka, gleaned from these writings, there is no comprehensive work exposing the laws and legal institutions of the pre-Kandyan period.⁷ However, the jurisprudence of the Kandyan Legal System received considerable exposition during the early days of British rule. In addition to Sir John D'Oyly's⁸ work on the Constitution of The Kandyan Kingdom, Sawyer's Digest of Kandyan Law⁹ and Armour's Notes on Kandyan Law;¹⁰ two scholars, Panabokke and Le Mesurier, translated into English in 1880 the Nithiniganduwa,¹¹ a compilation of the substantive Laws of the Kandyan Kingdom. For one thing, the available information does not go beyond the recognition that the Sri Lankan kings were in the classical mould of the European monarchs and of the Roman Emperors. They were the supreme law-givers, autocratic and dictatorial in their outlook. They always had advisory councils which they appointed from persons of a select caste. By the effluxion of time, that caste became recognised as the highest caste in the land. By 1815, when the last Sri Lankan king was deposed and exiled, the highest caste had come to be known as the Radala caste.

Despite the autocratic nature of their rule, many Sri Lankan monarchs earned the reputation of having established and operated a legal system based on universal concepts of justice borrowed largely from religious beliefs. In this case they were derived from the Buddhist religion.¹² A commentator had observed that:

"there are---indications that the Sinhalese kings decided cases according to Law. Thus, Aggabodhy is said to have 'stopped the way of those who set false cases' by deciding them according to decrees issued to enforce discipline among the priesthood." 13

There was also a hierarchical court structure: final appeal lay to the Sovereign's Court, in which the monarch himself, with his advisers, would preside. 14 Parallel to these formal institutions for the adjudication of disputes there were the councils for conciliation or Gamsabhavas. 15 The Colebrooke-Cameron Reforms of 1833 recommended their retention 16 and in fact they fall now under The Conciliation Boards Act of 1958. 17

The Mahavamsa, 18 the 'Great Chronicle of Ceylon History', which has come down to this day by being periodically updated in the form of a historical diary, describes the access to justice in the Court of King Elara (205-161 B.C.). It is said that:

"The King administrated justice between friends and foes with an equal measure. He had in his chamber a large bell which hung above the head of his bed. The bell was connected with a long rope which extended to the perimeter of the Royal Palace. This device was so established as a result of King's interest in making him available at all times to settle disputes and render justice. Persons may ring the bell by pulling its lengthy rope. This would signal the Monarch that a worthy subject of his, had come in search of justice." 19

Right up to the end of the Sri Lankan Kingdoms in 1815, the available evidence 20 suggests that there was a well-established system of justice and that there were channels open for ready and easy access to it. Until the 17th century the Island was ruled by several kingdoms. By the 17th century these several kingdoms in the Maritime Provinces had either become absorbed into the colonial administration of the Portuguese, or had been rendered ineffective by it, leaving the Kandyan Kingdom to survive until its conquest by the British in 1815. The fertility of the soil and the availability of water resources supported a largely agrarian economy. There were no industries and the only export product that remains recorded in history until the Portuguese conquest was the rice grain, known as Paddy.

The year 1505 A.D. saw the first arrival of a Western colonising power in Sri Lanka. That was the Portuguese. Their arrival heralded the conquest of the Maritime Provinces on the Island, and they remained there until 1656 A.D. The Portuguese changed the name of the Island to Ceylon, while the hinterland still retained the name of Lanka, which until 1815, frequently interchanged it, with Sinhale, the land of the Sinhalese. The one and a half centuries of Portuguese rule on the Island were punctuated by frequent forays into the hinterland. Each attempt to conquer the rest of the Island was repulsed by the Sri Lankan Kings. During their rule, the Portuguese espoused two principal aims. First was the conversion of the Maritime population to the Roman Catholic faith; second was the exportation of cloves, cinnamon, cardomans and coconut (to a lesser extent) to Europe. They showed no interest in introducing a viable administrative structure or an effective and just legal system. They attempted to a large extent to hold the colony either by conversion or by coercion and at times by both. Nothing of their legal system survived their rule which came to an end in 1656.

The conquest of the Maritime Provinces of Ceylon by the Dutch in 1656 produced a bloody spectacle.²¹ The Dutch found nothing of substance by way of a socio-political or legal infra-structure worthy of adoption. The Dutch, therefore, commenced to work from a 'bottom-up' position, with care and diligence, to establish a viable administrative structure and a legal system to make the colonisation of the Maritime Provinces an orderly process. They introduced an effective system of civil administration and of education. They embarked on a scheme for the clarification of titles to land and the registration of titles in what referred to as 'Thombus'. The Roman Dutch Legal System which the Dutch introduced recognised the twin principles for the perfection of imperfect titles: Usucapio and Longi Temporis Praescriptio. This secured to the Maritime Provinces the certainty that titles to land were immutable, which proved to be a valuable incentive to Dutch investments in the Maritime Provinces. Furthermore, unlike the Portuguese, the Dutch adopted a policy of appeasement with the Sri Lankan Kings in the hinterland. This provided the much needed stability for those provinces. In addition, the Dutch established a Scholarchal Commission which was responsible

for the establishment of a well-organised educational system, and a system for the registration of births, marriages and deaths on the Island. ²² The Portuguese maintained church registers for these three events but limited them to those who professed the Roman Catholic faith. The Dutch, on the other hand, made the registration of these three matters a concern of the State and therefore, provided its facility to all, irrespective of religion.

The greatest contribution which the Dutch made to the Island's administration was the introduction and the establishment of the Roman Dutch Law, which has to a large extent survived as the Common Law of Sri Lanka today. The colonisation of the Maritime Provinces by the Dutch came to an end in 1796. As a result of the defeat of the Dutch at Colombo in that year, the Maritime Provinces were handed over to the British East India Company under a Treaty of Capitulation. ²³ The British East India Company administered the Maritime Provinces until 1802. In that year, the administration of the Maritime Provinces passed into the hands of the British Government. Thus Ceylon became a Crown Colony, and remained as such until her Independence one hundred and forty-six years later in 1948.

By a Proclamation dated 23rd September, 1799 ²⁴ Governor North extended the application of the Roman Dutch Law and the Dutch legal institutions into the British Period. ²⁵ Subsequently, after the capture of the Kandyan Provinces in 1815, the application of the Roman Dutch Law was extended to the former Kandyan Kingdom. ²⁶ The British Administration in Ceylon appeared to recognise the value and standing of the Roman Dutch Law. Although the Roman Dutch Law was not declared to be applicable to the nationals of the United Kingdom while residing in Ceylon, the Courts by 1886 ²⁷ had extended its application to everyone, including the Europeans, found on the Island.

The principal theme of this dissertation covers the period between 1796 and 1978. During this period, and particularly after 1802, the Island experienced a number of historical events which have a direct relevance to the subject matter of this dissertation. The annexation of the Kandyan Kingdom by the British Administration of the Maritime Provinces in 1815 marked the first occasion when the Island as a whole came under the rule of a single political authority. The Convention ²⁸ under which the Kandyan Provinces became a part of the British Empire, was to become an issue of some controversy, regarding the position of Buddhism and Buddhist Temporalities during the 19th century. The attitude of the British Administration towards the Temple

Lands ²⁹ became an issue of great significance for the plantation industry, which was to commence with coffee plantations around 1840. Prior to that period, the Island had experienced a revolt against British Rule: the rebellion of the Kandyan Chiefs in 1818. The 1818 rebellion appears to have had a profound impact on the attitude of the British Administration upon certain obligations it had undertaken under the Convention of 1815. In particular, the British Administration after 1818 took a less enthusiastic posture towards the commitment it had made in 1815 to protect the Buddhist religion. In Article 5 of the Kandyan Convention of 1815, Governor Brownrigg on behalf of the British Crown accepted the obligation to ensure that:

"The Religion of Boodhoo (i.e. Buddhism) professed by the chiefs and inhabitants of these provinces is declared inviolable and its rites Ministries (i.e. Priests) and places of worship are to be maintained and protected." ³⁰

However, by 1833, the British Government had obtained a report from a Commission of Enquiry consisting of Messrs. Colebrooke and Cameron. The Commission reported ³¹ separately on the reform of the then existing colonial administration on the Island and on the reform of the Judicial system respectively. The 1833 Charter of Justice, ³² which resulted out from this Report, provided a legal infra-structure and a system of adjudication which was to survive to a large measure until today. It certainly survived Independence, as no substantive changes were introduced into the structure established in 1833 until the Administration of Justice Law was enacted in 1973. ³³ The Instructions ³⁴ issued under the Colebrooke-Cameron Report and sent by the Colonial Office to the British Governor in Ceylon, may be considered as the first Constitution of Ceylon. That Constitution remained effective until the Crewe-McCallum reforms ³⁵ were introduced nearly eighty years later, in 1911.

During the operation of the Colebrooke Constitution the British Administration faced a second revolt against its rule, in 1848. By that time, colonial economic expansion had begun and the British Administration was beginning to be actively engaged in displacing the land tenure systems that were operating in the Kandyan Provinces. ³⁶ This activity was largely connected with the need to acquire land for

the expanding plantation industry on the Island. It was also seen as a strategy to reduce the economic, social and political importance of the Buddhist clergy who were suspected of playing a sinister role in both the 1818 and in the 1848 uprisings. Apart from the British Administration's interest in securing land, by 1869, it had become involved in the spread of education on the Island. However, ever since the days of Governor North, at the beginning of the 19th century, the British Administration appears to have given both direct and indirect encouragement to the Missionaries to have them utilise their own skills and resources to provide a sound vernacular and an Anglo-vernacular education to the Island's children. The British Administration, as a possible inducement for greater involvement in educating the native population on the Island, left the Missionaries free from any Government control. The British Administration foresaw that the Missionary involvement in Native education could lead to the conversion of the nation into Christianity through education.

Constitutional development in Ceylon appears to have proceeded rather swiftly after 1911. The Crewe-McCallum Reforms of 1911 were succeeded by the Temporary Constitution of 1921.³⁷ Both Constitutions introduced into the Island the notion of elections, admittedly upon a very limited franchise. There was a further expansion of the elective principle in the Manning Reforms of 1924. Not until the elections of 1931, however, under the Donoughmore Constitution, did the Island experience 'Universal Adult Suffrage'. The Donoughmore Constitution³⁸ produced a universal model of democratic government, through an Executive Committee system, which proved a remarkable success. Its success was related to the need to bring several diverse communities, particularly, the Sinhalese and the Tamil Communities, together, in the art of Government. The Donoughmore Constitution stood as the pen-ultimate point of Constitutional advancement before Independence. That Constitution was modelled upon recommendations made in a Report issued by a Royal Commission of Enquiry which held its hearings in Ceylon in 1928, under the Chairmanship of Lord Donoughmore. The ultimate point of Constitutional advancement leading up to Independence was reached as a result of the recommendations made by the Soulbury Commission in 1945. This resulted in the enactment of the Ceylon Independence Act in 1947,³⁹ which gave Ceylon her Independence on February 4th, 1948.

Two years prior to the grant of Independence a new political party known as the United National Party (U.N.P.) had been formed out of the Ceylon National Congress (established in 1915) and the Sinhala Mahasabha (established in 1937). The U.N.P. formed in 1946, was elected to power in 1947 and therefore was responsible for receiving the Instruments of Independence from the British Government.

The period between 1948 and 1952 saw very little constitutional change, except the passage of the Ceylon Citizenship Act in 1949.⁴⁰ By this Act the Government effectively disenfranchised nearly 10% of the population who were descended from the indentured coolie labour, brought into the Island by the British Administration during the mid-~~nineteenth~~ century to work on the British owned plantations. This was made possible by the fact that, unlike other colonial constitutions which were drafted for the purpose of granting Independence, the Ceylon Independence Act had left the issue of Citizenship out of the Act, leaving that matter to be determined by the legislature after the grant of Independence. At the 1952 elections the United National Party was returned to power with an increased majority under a new leader, Mr. Dudley Senanayake, who only a few months before had succeeded his late father, Mr. Stephen Senanayake, as the leader of the party. Almost a year before the 1952 elections, a political controversy had occurred among the leadership of the United National Party and one Mr. S.W.R.D. Bandaranaike, the then Minister of Local Government, leader of the House and deputy leader of the party had resigned from these three positions to form a new political party in opposition called the Sri Lanka Freedom Party (S.L.F.P.), in 1951. The S.L.F.P. in essence was a resuscitation of the Sinhala Mahasabha which Mr. Bandaranaike had once led and which in 1946 had merged with the Ceylon National Congress to form the ruling United National Party.

The period between 1952 and 1956 was an important one. During that period both the S.L.F.P. and the U.N.P. had begun to project the idea of 'Sinhala' being declared the only official language on the Island. This marked the commencement of a new political controversy on the Island which had by now come to be known as the 'Language problem'. The Federal Party, a party of Tamil-speaking persons seeking to establish a Federal State in Ceylon was formed in 1949. The Marxist

parties that had existed from the '30's joined ranks with the Federalists at that time to form a lobby against the proposal for declaring the Sinhala language as the only official language on the Island. However, at the 1956 elections the U.N.P. suffered a crushing defeat. Mr. Bandaranaike, at the head of a coalition of several political parties, formed a government and within a few months parliament enacted the Official Language Act of 1956,⁴¹ declaring Sinhala to be the only official language of the Island. The period between 1956 and 1958 was charged with communal tension. During a serious outbreak of communal violence between the Sinhalese and the Tamils, the Government passed the Tamil Language (Special Provisions) Act of 1958.⁴² This Act provided certain concessions to the Tamil speaking people.

Mr. Bandaranaike was assassinated on the 25th of September, 1959. Between September, 1959 and July, 1960 the Island passed through a politically unstable period. The General Elections of March 1960 failed to produce a majority Government. The U.N.P. Administration which took office in April of that year was defeated during a vote on the 'Throne Speech'. The ensuing elections in July 1960 returned the S.L.F.P. into power with a comfortable majority. At these elections, the leadership of the party was assumed by Mrs. Bandaranaike, who had no previous political experience of any sort - elective or administrative. However, she became the Prime Minister for the first time in 1960.

The period between 1960 and 1965 was principally concerned with averting a serious economic crisis on the Island. A great number of laws providing for a stronger central control of the Island's economy and laws, to facilitate centralised direction of economic activities, were passed. The era of the public corporations and statutory boards commenced during these five years of S.L.F.P. rule. But the most critical political issue which the Island faced during this period was the nationalisation of schools.⁴³ This placed the Government upon a collision course with the Catholic church, and a confrontation was avoided only by the timely intervention of the late Pope Paul VI through his emissary, Valerian Cardinal Gracias of India. During these five years the Government passed a series of Tax Laws which clearly indicated that the Island's economy was bad. At the General Elections of 1965 the S.L.F.P. was defeated and the U.N.P. took office at the head of a seven-party coalition in a National Government in

March of that year.

The National Government was concerned with keeping the coalition together throughout its five years in office. One of the coalition partners was the Federal Party, which had canvassed for a Federal State to be established on the Island. The principal political debate that arose during the last two years of the National Government concerned the sovereignty of the Parliament of Ceylon. The Privy Council had some years previously delivered its opinion in Ranasinghe v. The Bribery Commissioner.⁴⁴ In that advice Lord Pearce had declared that section 29(2) of Ceylon's Independence Constitution was unalterable. The argument proceeded that that sub-section encapsulated the racial, ethnic, religious and language rights of the diverse communities which formed the nation. The acceptance of the Independence Act by these communities through their representatives in 1947 had been conditional upon those guarantees being fixed and made unalterable. Therefore, the Privy Council considered that that sub-section should be regarded as "unalterable under the Constitution". This Privy Council view questioned the sovereignty of Ceylon's Constitution and of Parliament functioning under it. The 1970 elections were fought inter alia upon that issue. The S.L.F.P., from the opposition, submitted to the electorate that the introduction of a new Constitution was the solution and therefore asked the electorate to provide that party with a mandate to draft a new Constitution through a Constituent Assembly. The S.L.F.P. did not believe that Parliament had a power to draft a Constitution which did not contain the entrenched provisions contained in Section 29(2). The U.N.P., however, thought that while Parliament had the power to promulgate a new Constitution omitting section 29(2), it could not alter the sub-section under the existing Constitution. For these and other reasons, the General Elections resulted in the S.L.F.P, with its Marxist partners, being voted into office in 1970.

The period between 1970 and 1977 was the most interesting period in the political history of Ceylon. Between 1970 and 1972 the Parliamentarians, sitting as members of a Constituent Assembly, drafted, adopted and promulgated a new Constitution, by means which were not within the contemplation of the preceding Constitution. Between 1972 and 1977 the Government engaged itself in introducing a complex programme for the reform of both immovable and movable property on the Island.

It also introduced a number of pieces of social legislation such as the ceiling on incomes, ⁴⁵ the creation of novel social units called the Janawasas ⁴⁶ and a whole collection of laws which were designed to alter the socio-economic foundations of the nation. In addition, the Government restructured the basis for the settlement of disputes on the Island by moving away from adjudication and towards conciliation. ⁴⁷ Above all, the Government created new concepts of proprietary rights as alternatives to the concept of ownership. The creation of the 'Tenant-Cultivator' ⁴⁸ is a good example of these new alternatives. The Law recognised in the 'Tenant-Cultivator' a group of proprietary rights which dwarfed and eclipsed the traditional rights of an owner. The programme for the reform of property holdings had a wide ambit. It embraced not only Dry Land, ⁴⁹ Paddy Land, ⁵⁰ and Housing Property, ⁵¹ but also included tea, rubber and coconut estates ⁵² owned by multi-national corporations. The latter was responsible for creating a plantation economy on the Island during the middle of the *Nineteenth* century. The Law nationalising these estate-lands created the Land Reform Commission as an agent of the Government to receive, take over and maintain the land. This duty was shared with the Plantation Corporation and various other Public Corporations and Boards. This new arrangement indicated that the country had come a full-circle, and the land that had once been extracted from the nation through the instrumentality of the law at the time, was now being returned to the nation through the same instrumentality, namely, the law.

The S.L.F.P. Government was subjected to a crushing defeat at the 1977 General Elections. For the first time in Ceylon's history, the 1977 Elections voted a single party, with no coalition partners, into office: that was the U.N.P. The U.N.P. in contesting the General Election had called for an electoral mandate to change the 1972 Constitution, not through a Constituent Assembly but through Parliament itself. The result, therefore, was the promulgation of a new Constitution in 1978. The 1978 Constitution ⁵³ introduced a presidential system of Government which appears to blend the constitutional models of both France and of the United States of America. Besides producing this amalgam, the Constitution of 1978 introduced a complex form of voting for all electoral processes. ⁵⁴ The system which was introduced for voting marries both the concept of proportional representation and the principle of redistribution of votes.

The method thus provided replaced the traditional 'first past the post' form of elections, which appeared to have created a fixed pattern for replacing the U.N.P. with the S.L.F.P. and vice-versa at successive General Elections of Sri Lanka. This kind of change after each five-year period, with a concomitant change in political ideology, could be harmful for development. In this sense the Island waits anxiously for the next General Elections, which is scheduled to be held no later than 1983. This exposition is merely to provide a historical framework for the study that will follow in the next thirteen chapters. Most significant historical incidents whether legal or political, will be considered in the body of this work. The discussion will focus principally on law and its relationship to development within a historical period commencing in 1796 and extending up to 1978. The work will conclude by attempting to examine the relationship of Law to Development. However, the theme that will be pursued throughout this work is one that espouses the notion that the role of law is merely to legitimise policy leaving the task of implementation to locally based social institutions which the law may create and establish for that purpose. The study of law and development is a study of the characteristics of development and an analysis of the modalities which the law and legal institutions provide for translating those characteristics into normative propositions, which could aid the particular social institutions in implementing them. This raises a two-tier analysis of the role of law in development. The concluding chapter will offer a deeper analysis of this theme for the purpose of isolating some essential elements relevant for a theory of law and development.

Part B

Colonialism and Culture: The background
of Underdevelopment

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Chapter 3: Education and Aculturation. Page 59-125.
Chapter 4: Language and Development. Pages 126-182.

CHAPTER 2

Land, Religion and Under Development

I. An Introduction

Buddhism becomes relevant to Development in the Ceylonese context, particularly, when one examines the methods used by the British Administration in Ceylon for the acquisition of land to establish a plantation economy. After it was agreed by the British Government that as a matter of colonial policy the new Crown Colony shall have a plantation based economy, the next step was to find land suitable to implement that policy. The land in the Maritime Provinces raised some basic problems which made them unavailable for the new plantation industry. For one thing, the Maritime Provinces had been colonised since 1505; first by the Portuguese (1505-1656) and then by the Dutch (1656-1796) and, therefore, land in those geographical areas of the new colony had become utilised to the fullest extent. The second problem was that ownership of land in the Maritime Provinces was governed by the Roman Dutch Law and under that law much of the land was found to be 'tied up' by the institution of Fideicommissum. Untying of such land was found to be a somewhat difficult problem. The British Administration, however, found room in the Maritime Provinces to introduce the Liberian coffee plant which was to become by 1845 a major export product. The Liberian coffee plant required humidity and warmth, as it had found in its mother country, Liberia. The Maritime Provinces provided those ideal conditions. However, stricken with blight, the coffee industry, by 1875, had begun to be replaced by the Tea Industry as the Principal export product. It was the introduction of the Tea plant in Ceylon which made Buddhist temporalities an element in the Colonial Development of Ceylon. The Tea plant, unlike the coffee plant, required a higher elevation because of

its need to grow in a cooler environment. The Maritime Provinces, therefore, proved unsuitable for the Tea plant and the British administration in Ceylon was at this stage compelled to look towards the Kandyan provinces in its search for land.

In the Kandyan provinces, most of the unproductive land was found to be a part of that vast land mass owned and possessed by the Buddhist Temples. They were a part of the land received as gifts from the Kandyan kings either in the form of Dewalagam (gifts to Dewalas) or Viharagam (gifts to the Buddhist clergy) and the rest were the result of gifts made by devotees. The problem which the British Administration faced was one of providing a legal basis for the appropriation of these lands. The Temple Lands Registration Ordinance of 1856 and the Commission created under it may be considered as having the greatest significance in providing this much needed legal basis for dismantling the economic empire of the Buddhist clergy.

Aside from the Temple Lands the rest of the unutilised or under utilised land were Nindagam lands. These were lands gifted by the Kandyan kings to worthy citizens of the Kingdom, for work or services rendered to the Kandyan monarchs. Strategy conceived by the British Administration in Ceylon towards obtaining these lands for the plantation economy was a special one. This is to be found in the Services Tenures Ordinance of 1870.

The two Ordinances of 1856 and of 1870 provided for the absorption of hill-country land which lay within the boundaries of the former Kandyan Kingdom. But some of the land that the Administration required fell outside the former Kingdom of Kandy and those were governed by the Roman Dutch Common Law of the Island. To cater for this problem the British Administration passed a third Ordinance, in 1876; namely a law to amend the Law regulating the entail and settlement of immovable property on the Island. This struck at the roots of the institution of Fideicommissum.

This chapter will deal with all three Ordinances and shall attempt to show how the colonial policy towards obtaining land for the establishment of a plantation economy was carried out, within a framework of law. Nonetheless, it is important to recognise the large questions of policy which underlined the strategies conceived. As a question of fact, the attitude of the United Kingdom Government towards the Buddhist religion, may appear to be a factor which may have influenced the colonial policy towards the Buddhist religion. An opinion tendered by Sir John Stephens, the Legal Adviser to the Colonial office in 1844 seems to support this view.

II. The Early Relationship between the Buddhist and the British:

The cultural heritage of the Sinhalese race springs from Buddhism and Buddhistic thought. To that extent it is correct to say that Sinhalese culture and Buddhist cultures are inextricably interwoven.¹ "From the time of the conversion of Devanampiyatissa,² Buddhism, as the state religion, was intimately connected with the Kings, who seem to have occupied towards it a position very similar to that held by the English Kings with respect to the Church of England."³ The Crown was considered as the lay head of the religious institutions. There being no supreme ecclesiastical ruler, like the Pope or the Archbishop of Canterbury, the Monarch was entitled to interfere not only in matters concerning the temporalities but also in matters of doctrine and discipline.⁴ Hayley⁵ describes a number of instances where the Sinhalese Kings had disciplined the Priests by disrobing them.

The effect of Article 5 of the Kandyan Convention,⁶ in so far as the Kandyans were concerned, was to have the British government take the place of the Kandyan kings. During the early period of British rule,⁷ the British government played its part as the Protector of the Buddhist faith without noticeable reluctance.⁸ As for instance,

it has been recorded that, in 1819, the Chief Priest of the Malwatta Vihare requested the payment of his customary allowance from the British Administration of the Kandyan Provinces. Sir John D'Oyly, the then British resident in Kandy, recommended the continuation of the payments which the Malwatta Temple had received under the Kandyan Kings.⁹ Yet another instance could be found in 1838, when the District Court of Kandy dismissed the Chief Priest of the Huduhumpala temple from that position. It was alleged that he, being a member of the Siamese sect,¹⁰ had left that sect and had joined the Amarapura sect.¹¹ The temple in question being a place following the traditions of the Siamese sect of Buddhism, could not accommodate the Chieftancy of a priest from the Amarapura sect. The change of sect by the Chief Priest did not change the sect to which the temple belonged.¹² Therefore, the court dismissed the convert from his position as the Chief Priest of that temple. Again in 1820, the Judicial Commissioner's Court¹³ held that, where the incumbent of a temple died and other priests of that temple petitioned the Lieutenant-Governor for the appointment of one of their members, the Lieutenant-Governor must, as the Kandyan kings did, appoint the one chosen by the petitioners although he may rank junior to the rest of the clergy at that temple in age or in learning or in both.

Until the Proclamation¹⁴ of the 21st November, 1818, promulgated after the first rebellion against British rule, the British Administration made their policies sufficiently flexible to accommodate the Buddhist religion and its institutions. A few days after the signing of the Kandyan Convention,¹⁵ Governor Brownrigg, in a despatch to The Earl of Bathurst, The Secretary of State for the Colonies, wrote:

"The 5th article [of the Convention] confirms the superstition of Boodhoo in a manner more emphatical than would have been my choice. But as the ... secure possession of the country hinged upon this point, I found it necessary to quiet all uneasiness respecting it, by article of guarantee couched in the most unqualified terms."¹⁶

The Kingdom of Kandy had never permitted the intrusion of other religions until the accession of the members of the Nayakkar dynasty¹⁷ to the Kandyan throne. That was in 1782. Even thereafter, the temples of the Hindu gods occupied a secondary position while Buddhism remained under the protection of the Crown.¹⁸ Since 1815, the British Government had come under mounting pressure, particularly, from those missionaries who had already been admitted to the Maritime Provinces. The Baptists came in 1812, the Wesleyans in 1814, the American missionaries in 1816, and the Church Missionary Society in 1818. The last mentioned appeared to have had the heaviest political clout.¹⁹ Their collective complaint was that the British Government had failed to facilitate their missionary work in the hinterland. Indeed the British Government, true to their difficult commitment under the Kandyan Convention, had barred the entry of missionaries to the hinterland - the Kandyan provinces.

Disillusioned by the rebellion of 1818, pushed by the lobbyists for the Church Missionary Society²⁰ in London, Governor Brownrigg included a curiously worded article, in the Proclamation, of 1818.

Article 16 reads:

"As well the priest as all the ceremonies and processions of the Budhoo religion shall receive the respect which in former times was shown them; at the same time it is in nowise to be understood that the protection of Government is to be denied to the peaceable exercise of all other persons of the religion which they respectively profess, or to the erection under due license from His Excellency of places of worship in proper situations."

The absence of the commitment to maintain the inviolability 'of the religion of the Boodhoo' was a significant omission from the Proclamation of 1818. The crucial issue was whether the obligations assumed by the British government, under that Convention, could be cognizable in a court of law. Although the Kandyans maintained²¹ that it created a

legal obligation binding upon the British to observe the Articles of that Convention, the British government placed it no higher than a framework within which a new political association between the Kandyan chiefs and the new British administration could be spun. Professor de Silva,²² while commenting on the Convention wrote:

"The peculiar form taken by the Convention of 1815 reflected the political factors operating at that time. The concessions made to Kandyan interests in that document were granted because the political situation suggested these as essential to the purpose of conciliating groups who had rendered valuable assistance to the British. Thus the Kandyan Convention preserved intact the powers and privileges of the Chiefs, the laws, customs and institutions of the country and what in the eyes of the Kandyans was more important than all else ... the Buddhist religion. The fifth clause of the Convention, employing language described by Brownrigg as being "more emphatical than would have been my choice," declared that "the religion of Budhoo, professed by the Chiefs and inhabitants of these provinces is declared inviolable, and its rites, ministers and places of worship are to be maintained and protected" . . . Only by making it clear that the fifth clause of the Convention would be scrupulously observed could the British gain the adherence of the Bhikkhus^{22a} and chiefs."²³

It is important to note that the Convention was signed by the Kandyan chiefs on the one side and Governor Brownrigg on the other. At the time of signing the Convention, the Kandyan Kingdom was recognised by the British government as a sovereign State. By Article 2 of the Convention, the signatories purported to depose the King and, under the constitutional conventions applicable to Kandy, the sovereign powers vested thereafter in the body of the Ministers of the State - namely, the Adhikarams, the Adigars and the Dessaves who in fact were the officers of the Kandyan Kingdom and the signatories on behalf of that Kingdom. It may, therefore, be said that under International Customary Law²⁴ the Kandyan Convention stands as a Treaty binding

the two parties. Its ratification by the British Houses of Parliament sets the seal of validity and, therefore, in Public International Law it should be recognised as a Treaty of State Succession, namely, the succession of Great Britain to the sovereignty of the deposed King of Kandy.

The preamble to the Convention reads:

"At a Convention ... between ... Brownrigg, Governor ... acting in the name and on behalf of His Majesty George the Third ... on the one part, and the Adigars, Dessaves and other principal Chiefs of the Kandyan provinces"

The legal significance of treaties entered into between the British Crown and the colonial chiefs has been the subject of much penetrating research.^{24a} The conclusion reached both by the colonial courts^{24b} and by the British Courts^{24c} was that such treaties are not legally enforceable under the English Law, being in the nature of Acts of State. Against that background it is now necessary to examine Basnayake Nilama v. The Attorney General,^{24d} the only decision in which the Ceylon Courts were called upon to determine the enforceability of Article 5 of the Kandyan Convention. The facts are clear. The plaintiff was an officer in charge of the Wallahagoda Dewale in Gampola. As an immemorial custom during the month of Esala, in 1912, he conducted the Esala perahera. The perahera or procession consisted of elephants and tom-tom beaters. Since 1912, the Government Agent, using powers conferred upon him by section 69 of the Police Ordinance^{24e} and section 64 of the Local Boards Ordinance,^{24f} had issued the licence to conduct the perahera, with the limitation that strict silence was required to be observed from within 100 yards in both directions of the Muhammadan mosque situated on Ambagamuwa Street, in Gampola. The plaintiff challenged that restriction. He argued that the obligation assumed by the British Government under the Kandyan Convention of 1815 could not be

amended by the aforementioned Ordinances. The plaintiff argued that the beating of the tom-toms from the Dewale to the Mahaveli River for the 'water cutting ceremony' and back according to ancient rights, must be unbroken. Therefore, the restriction placed by the Government Agent in pursuance of the said Ordinances, the plaintiff alleged, constituted a violation of the particular obligation undertaken by the British Government under the Kandyan Convention. The Acting District Judge of Kandy, Sir Paul E. Pieris, upheld the plaintiff's claim. Summarising his^{24g} judgment, Shaw, J., said in the Divisional Court:^{24h}

"The Learned Acting District Judge having heard a large quantity of verbal evidence, and having received in evidence a large number of documents, found that this Esala Perahera was a rite of the religion of Buddha which was undertaken to be maintained and protected under the Convention, and that the accustomed route of the perahera and the continuous performance of the music was an essential part of the rite, and held that the Kandyan Convention constitutes a law or compact binding and unalterable in all following times, however urgent might be the motives, and however extreme the exigency demanding the alteration of it."²⁴ⁱ

Against this decision the Attorney-General appealed to the Divisional Court.^{24j} That court unanimously allowed the appeal on the grounds that the Kandyan Convention being in the nature of a treaty between two sovereigns, was not cognizable before a municipal court. De Sampayo, J., after examining a number of colonial and English decisions, wrote:

"... and it should, I think, be held that, if the provisions of the Police Ordinance, 1865, and local Boards Ordinance, 1898, in respect of licences for processions and tom-toms in any way contravene the Kandyan Convention, which, as I have already ventured to express my opinion, they do not, neither the District Court nor this Court has jurisdiction to enforce the Convention as against the Ordinances."^{24k}

The unanimous decision of the Divisional Court falls into line with a line of decisions stretching back to the 18th Century; to the The Nabob of the Carnatic v. The British East India Company.^{24L} Some^{24m} of the eighteenth and early 19th century decisions quite clearly make the point that treaties and agreements in the nature of treaties were not to be the subject of a dispute before a Municipal Court. The position naturally differs when the treaty becomes incorporated into a legislation. This argument too appears to have been raised by the Respondents before the Divisional Court, in the present case. The Respondent's counsel took the point that the Kandyan Convention was not in the nature of a Treaty but was in effect a piece of legislation, binding the Crown. Accepting that contention, Shaw, J., held that, like any other legislation, the present legislation had in effect been impliedly repealed by the later Police Ordinance of 1865²⁴ⁿ and by the Local Boards Ordinance of 1898.^{24o} These were the Ordinances which empowered the Government Agent to restrict the rights of citizens to meet in an assembly and march on the streets by requiring licences for such activities. It is to this aspect of the Respondent's argument that the Learned Judge referred, when he said:

"What the court was here asked to construe and to enforce were alleged rights under the Proclamation of March 2, 1815. In my opinion this Proclamation is not a Treaty. The Treaty or Convention was entered into prior to the Proclamation, and is contained in a separate document signed by the various chiefs of the Kandyan provinces. . . . The Proclamation affirming what was agreed to by the Convention appears to me to be a piece of legislation by His Majesty, who then had the sole power of legislating in the ceded provinces, to give effect to the agreements arrived at, and is subject to be construed and enforced by the Courts in the same manner as any other act of legislation."^{24p}

The two learned judges, Shaw and De Sampayo, covered both flanks of the argument. If it was a treaty, then according to De Sampayo, J. the matter cannot be

litigated before a municipal tribunal. This is trite law. If it was a legislative enactment, then presumably in the absence of an entrenched provision, that agreement could be varied impliedly by a subsequent enactment. This too was trite law. But the socio-political implications of this decision, delivered by the Divisional Court on February 2nd, 1915, could be seen in the Buddhist-Muslim riots of that year. The Buddhist-Muslim riots commenced on the 29th May, 1915. Commenting on the riots and linking it directly to the decision of the Divisional Court in Basnayake Nilame v. A.-G., Sir Ponnambalam Ramanathan^{24q} wrote:

"The Buddhist were in utter despair when they perused the judgments of the Supreme Court Judges. 'How shall we hereafter celebrate our national and religious festivals in our own country without molestation? Who has ever opposed us in our own Kandyan provinces except the newly arrived Muslims?' they cried."^{24r}

Fortunately, for the Muslim community, subsequent events concerning the Tamil population helped to erase the enmity generated from these riots and by the time of Independence, in 1948, lines for social confrontation had been differently drawn. It was no longer a Buddhist-Muslim conflict but a Sinhala-Tamil conflict which influenced the destiny of the newly independent nation of Ceylon.

III. Land Tenures Under the Kandyan Law

It must be mentioned that the Kandyan legal system was based upon the concept of status arising out of birth and caste. Locked into the caste structure were property rights. The sense of belonging to a particular caste was often associated with a property right. Political power, not to be divorced from religious power, rested on property rights. The confiscation of property

which was associated with a number of offences under the Kandyan laws was a 'hard-hitting' punishment. To understand this, one must briefly examine the system of tenures in the Kandyan legal system. The British government, it will be shown later, understood that the control and re-distribution of temple property, which in fact was based upon a tenurial system, diluted and demoted both the political power and the religious power which the temples wielded in the Kingdom of Kandy. This presented the government with a neat stratagem to by-pass their commitment to Buddhism under Article 5 of the Convention, without actually breaching it. To some extent this situation formed the corner-stone of British colonial policy towards the Buddhist religion. The development strategy thus conceived was to result in cultural and religious problems for the post-independence period in Ceylon, culminating in the enactment of a number of laws aimed towards the reversal of the socio-economic directions inherited from the Colonial period.

It is said that the village communities which formed the basis for the system of tenure in the Kandyan legal system could be regarded as a 'phenomena of considerable antiquity'.²⁵ The idea of communal ownership of land appears to pre-date the concept of the 'universal dominium of the sovereign' in Western Jurisprudence.²⁶ For many centuries,²⁷ the Sinhalese Kings were regarded in law as 'Lords Paramount of the Soil'. All property was derived from the Monarch and the property without an owner reverted back to his Treasury.²⁸ Describing the tenurial system under the Kandyan law, Dissanayake and de Soysa²⁹ wrote:

"The Kings granted lands and even whole villages to Temples and Dewales. These villages were known as Viharagam and Dewalagam. The Kings also made grants of lands and villages to individual relatives, courtiers and chiefs. These lands were known as Nindagam. The Ninda proprietors had to perform services to the King and furnish a certain quota of men for the King in time of war, but the tenants in those villages performed their services or paid their contributions direct to their Ninda Lord. The lands so granted were not only forest and waste lands, Malapala and Nilapala and confiscated lands but also included villages already tenanted. These villages were known as Koralegam. The grantees of such villages became their overlords and those who held lands subject to their overlords came to be known as Nilakarayas or tenants."³⁰

The entire kingdom was thus classified under five types of land tenure systems. First, the Gabadagam or Royal villages. These were the sources from which the king derived his income for his own maintenance. People who worked on his fields and his lands in the Gabadagam received no direct recompense. But they were the grantees of other lands on the condition that they rendered the Gabadagam free labour. After 1815, the former Gabadagam fell under the various Crown Lands Ordinances³¹ which formed the basis for the plantation industry.³²

Second, the Koralegam. These were lands gifted by the King to his chieftains for services of an extraordinary nature rendered to the King; viz. victory in battles, putting down insurrections or rendering aid during floods. The gift in the case of a Koralegam was in the nature of a gesture. The land in question was often tenanted land, owned by the King, as Gabadagam.

Since these tenants held licences from the King, the new lord of the land - now a Koralegam - had no right of dispossession. The services were rendered directly to the King or through the new lord, indirectly to the King. In law, the tenants were referred to as Paraveni-pangu-karayo. Although the economic benefit to the lord of the Koralegam was nominal, given the correct attitude, the Paraveni-pangu-karayo could constitute a powerful constituency providing a substantial political force, even against the King. The insurrection against the last King of Kandy in 1815 and the rebellions of 1818 and 1848 against the British arose out of dissident Korales of the Koralegams.

Third, the Viharagams. These were lands gifted outright to the temples. The tenants of such lands were of two kinds. Their tenures were somewhat different from one another. They were the Paraveni-pangu-karayo and the Maruveni-pangu-karayo. The Buddhist Temporalities Ordinance of 1905³³ defined them in this way:

"Paraveni panguwa - shall mean an allotment of land held by one or more hereditary tenants subject to the performance of service or rendering of dues to a temple, and

Maruveni panguwa - shall mean an allotment of land held by one or more tenants-at-will under a temple and subject to the performance of service or rendering of dues to a temple."³⁴

The difference between this type of tenure involving Temple lands and other types of tenures was that the tenants owed their economic power, not to the King, directly or indirectly, but to the incumbent Priest of a temple and to his disciples. The Ordinance No. 8 of 1905³⁵ defined the incumbent of a temple as:

" 'Temple' shall mean Vihare, Dagoba and Dewale and shall include the Dalada Maligawa and the Atamasthane at Anuradhapura, and

'Incumbent' shall mean the chief resident priest of a temple".

This economic power which the temples wielded, over a large number of inhabitants, was one of the reasons why the British administration thought it unwise to promote the cause of Buddhism. In fact the Colonial policy towards the control and re-distribution of temple property had the direct effect of diluting the economic and the political power of the Buddhist clergy.

Fourth, the Dewalagam. These were lands given to Dewales. The intimacy in law and in fact between the Dewalagams and the Viharagams were such that they were treated as inter changeable legal concepts. The British government treated the two institutions as one and the law relating to Buddhist Temporalities applied equally to both types of tenures. There too the incumbents of the Dewale wielded an economic power over the tenants.

Fifth, the Nindagams. These were lands granted to individuals, who were required to perform certain services to the King. The King's ministers were all Nindagam holders. Their economic power was derived from the tenants or Nilakarayas who performed certain services to the Ninda - Lord. In Perumal et al v. Dambagahagedara Korale,³⁶ the plaintiff alleged that the land was given, verbally, by the King to his ancestors as Nindagam for providing dancers to the King. The land in question was, he said, originally a Gabadagam a Royal village. The plaintiff, the Ninda - Lord had not recently performed any services to the King, (now the British Crown). On appeal before the Judicial Commissioners for Kandy, it was held that Nindagam land was, unlike other tenures, held at the will and pleasure of the King, who frequently "changed them from one favourite to another".³⁷ Therefore, as the particular services for which the land was originally gifted were no longer rendered, because they were no longer needed, the Crown as the successor to the King, could repossess the land.

It could be given out to different Ninda - Lords for different services. But until then, the land remained Crown land and under the Crown Lands Ordinance. This decision was correct and followed the Kandyan law regarding Nindagams. Unlike the Koralagam, Viharagam and Dewalagam, the Nindagams could be changed at the will of the Crown. The Koralagams were seldom changed because it was not an economic unit but merely a token of Royal recognition.³⁸ As we shall see later, the foregoing decision was a useful legal weapon in the hands of the British Administration to turn some Nindagam property into Crown lands and then make them available for the commencement of the plantation industry which became the preserve of British companies.

IV. The Control and Re-Distribution of Temple Property:

(a) The Strategies Conceived

The control and the re-distribution of temple properties served British policy, possibly in three ways. Firstly, the reduction of the total extent of temple lands reduced in proportion the capital available for the temples to propagate the religion. To an extent it reduced the comforts of the clergy and increased their dependence on the British administration. Secondly, by releasing the tenants or the Paraveni and Maruveni sharers, the British government effectively reduced the extent of the political power wielded by the incumbent priests. It reduced their constituents, their dependants, over whom the incumbents exercised economic control. Thirdly, it created a vast 'Land Bank' of Crown property which could be made available for economic exploitation by the plantation industry. It would be convenient to examine the laws affecting the control and re-distribution of temple property in the light of these three goals.

As a developmental strategy, these laws were used, well, towards laying down a viable economic substratum, in the form of land available for colonial exploitation. In the absence of expanding industries, the plantation industry became the basis for the colonial economy in Ceylon. It is towards this end that the policy of control and re-distribution of temple land appears to have been directed.

By Article 21 of the Proclamation of 21st November, 1818,³⁹ the British Government declared that:

"The Governor, desirous of showing the adherence of Government to its stipulation in favour of the religion of the people, exempts all lands which now are the property of temples from all taxation whatever"

The foregoing article was strengthened by a Proclamation of the 18th September, 1819.⁴⁰ In that Proclamation, the Government declared that:

"Whereas by our proclamation bearing date, the 21st day of November, 1818, we did declare that all lands which then were the property of temples should be exempted from all taxation whatever, The persons having the charge of the revenues of every temple ... shall, and they are hereby required, to deliver into the Revenue Commissioner ... a list of lands of all descriptions which did belong to the said temples, under their respective charge, at the date of the said proclamation Within twelve months from this date; where upon the said lands shall be registered by the Revenue Commissioner, if he is satisfied that such lands are the property of the said temple ... and a certificate of such enregis- tration shall be granted by such Revenue Commissioners ... the production of which shall alone be considered sufficient proof that such land is exempted from taxation."⁴¹

This for the first time introduced governmental control over temple property. The incumbents did not take this intrusion into their preserve with equanimity.

As they were not too conversant with the art of litigation before a British court, using English principles of Constitutional Law, the constitutionality of the Proclamation was never tested. But the incumbents reacted by adopting the posture of ascetics, by ignoring such secular demands. By a subsequent Proclamation of 21st May, 1822,⁴² the British government warned the incumbents that failure to register might end their right to exemption from tax and might even place their title to property in jeopardy. By the earlier Proclamation,⁴³ the government reserved the power to refuse registration where "the Revenue Commissioner ... is not satisfied that any land was the property of such temple". In that event, the Proclamation required the Revenue Commissioner to submit the matter "to the consideration of the Board of Commissioners, who shall direct a proper course of inquiry into the validity of the claim, and report the same to us, The Governor, for our decision how the said land is to be considered." Considerable difficulties were faced by the incumbents when attempting to establish their land claims before the commissioners. The lands inherited by the incumbents were lands gifted to them by the Kings of Kandy, not several decades earlier but several centuries before. In most cases the gifts were made verbally by the monarch, which was not evidenced by any written document. If the commissioners were to question their title, the incumbents would now be placed in considerable difficulties while attempting to establish their claims. The point must, therefore, be made, that insofar as the registration went, the temples were placed squarely at the mercy of the commissioners who could, if they thought necessary, find every justification for refusing to register a claim. It may be suggested that policy often played a predominant part in the process of registration at times even eclipsing the available rules.

The principal Proclamation⁴⁴ of 1819 had a carefully worded clause controlling gifts to temples. The clause made it unlawful to donate or bequeath "any land whatsoever to or for the use of any temple ... without having first ... received a licence in writing to give or bequeath the same". A violation of this caveat made such land not "to be considered as the property of a temple, but shall be given to the nearest heir of the person who has disobeyed the law ... provided he sues for the same before the Judicial Commissioner ... within twelve months ... or else the land shall become forfeited to the Crown." This prohibition placed the British government upon a collision course with the religious susceptibilities of the Kandyan Buddhists. For one thing it was considered to be a spiritual prerogative to give some property to the temple at one's death bed. That property could be land, and therefore it placed quite clearly, an unavoidable duty upon the family of a dying Kandyan to carry that wish through. There was often little or no time left to rush out and seek a licence from the competent authority to make that death-bed donation legal. For another, no heir, would under the social constraints and the recognised mores of a Kandyan household sue for a return of such property, if a death-bed gift was subsequently declared void. Considered within this social and religious framework, it is evident that the ultimate destination of such property was not the temple but the 'Land Bank' of the Crown. By 1846, the relationship between the government and the Buddhists had become sufficiently strained that the British Administration thought it necessary to propose a Bill 'to provide for the management of Buddhist Vihares and Dewales in the Kandyan provinces."⁴⁵

Although the British Administration was performing the tasks formerly undertaken by the Sinhalese Kings, in providing a military guard for the Tooth Relic, and in the Governor himself attending the ceremonies associated

with the annual exposition of the Tooth Relic, their interference with the temple property was considered to have no previous precedent. No Sinhalese King had ever attempted to control and redistribute temple property. Therefore, a clearer statement of the role expected from the British government was urgently required. The Bill of 1846 was meant to re-state that role in unmistakable terms. The legislature passed that Bill unanimously and it was subsequently dispatched to the United Kingdom, for ratification. Commenting on the Bill, Dissanayake and DeSoysa⁴⁶ wrote:

"It was framed on the principle that government was not only bound to secure the Buddhists against molestation and injury in their persons or in their property on account of their religious observances, but were bound to advance further, and to enact and execute laws, having for their express object the more easy, convenient, and orderly celebration of the Buddhist rites and ceremonies."⁴⁷

The pith of the Ordinance was to make the government's involvement in the activities of the Buddhists more intimate. The enactment of this Bill was naturally regarded as a significant victory for the Buddhists of Ceylon. Unknown to them, "the propriety of a Christian government acting as head of the Buddhist church began to be questioned",⁴⁸ both in Ceylon and in the United Kingdom. As expected, the Colonial Secretary, Earl Grey, "refused to advise the Queen"⁴⁹ to confirm the said enactment⁵⁰... as he declined to admit that the Convention of 1815 was capable of being interpreted in the manner put forward by the framers of the Ordinance."⁵¹ On the 30th August, 1847, Viscount Torrington, the then Governor of Ceylon, informed the Legislative Council⁵² that Ordinance No. 10 of 1846 had been rejected by Her Majesty's Secretary for the Colonies. He informed the members that Earl Grey,

had written to say that " ... to separate the British government from all active participation in the practice of heathen worship, they⁵³ conceive to be a plain and simple, though urgent duty",⁵⁴ of the British government. The Bill would have required the British government to participate in the "appointment and removal of priests and the internal discipline of the ministers of the Buddhist religion",⁵⁵ and would further require the active British participation in protecting the proprietary rights of the Buddhists. The Governor concluded⁵⁶ his report to the Legislative Assembly by emphasising that hereinafter the Buddhist 'Church' will be treated "as any (other) corporate body"⁵⁷ in the country. Following this statement of policy, the government withdrew totally from participating in Buddhist affairs. By 1847, the government ceased to pay any allowances to priests, which they had previously done as a continuation of an ancient custom of the Kandyan Kings. The priests were left to regulate their activities, discipline their order and execute their regulations as best as they could.⁵⁸ The refusal to recommend the adoption of the Bill of 1846 and the consequent change of attitude towards the Buddhist religion may be seen as a result of a legal opinion given by Sir John Stephens to the Colonial Office on July 4th, 1845. The importance of that opinion in understanding the change in the British attitude towards Article 5 of the Convention, merits extensive reproduction here. Sir John Stephens wrote:

"The conquest of Kandy, was, I fear, an unprincipled aggression on an independent people. It was one step in that progress which has created our eastern empire of which, I believe, the best that could be said is, that we have made ... atonement by the right use of our powers, for the inequity of the means by which we obtained it. When the Kandyan monarch was deposed and his family and chiefs exiled, and his whole country confiscated, to avenge an insult with which, apparently, he had nothing to do, the conquered naturally

enough thought that we should make war on their religions in the same spirit as on their political state. To dispell that alarm the Convention declared the 'religion of Budhoo inviolable' and that the British government were 'pledged to the maintenance and protection of the rites, Ministers, and places of worship of the national religion of the people.' We further under took that due respect should be paid to their Priests, ceremonies and processions.

Founding himself on this language, W. Buller declares it to be 'undeniable' that the British government placed itself 'in the precise position of the Kandyan government that is, at the head of the national religion as its chief authority and guardian.' He says that the British government pledged itself 'to watch over the interests of that religion so that they should not suffer from the corruption of its Ministries, or from the indifference of the people that its rites should be kept up with due and punctual solemnity' - that we undertook that the 'national religion should not be left to shift for itself but should be maintained and protected by the whole weight of the secular power'. He describes the British government as the 'avowed defender of the Buddhist faith which is neglected and betrayed by them.'

Nothing, I think, but an inveterate habit of viewing all subjects sarcastically could have induced the chief legal advisor of the local government to address it in such a strain at this period. It seems superfluous to refute by argument assertions of this kind in behalf of which no argument is aduced. The words of the Treaty have scarcely anything in common with this gloss on them. The object of the Treaty cannot justify such an expression of the plain meaning of its words. That object was to reassure, on the subject of their religion people from whom we had taken everything else. The Treaty did not and could not, mean that King George III should succeed to the religious duties and character of the King of Kandy and that the defender of the Christian faith should in the same sense become the defender of the Buddhist faith. The Treaty meant merely (and every inhabitant of the country knew that it meant merely) this - if you will surrender to Great Britain all its secular dominion you may keep up your religion. If you will deliver up to us your

treasury, your temple lands shall be inviolate. If you will become subject of our King he will permit no one to interrupt your religious officers or to despoil your priest or your temples. How maintenance and protection can be supposed to have meant all that W. Buller ascribes to those words is a question which he has not answered, and which, I believe, is unanswerable by anyone else. He stands quite alone among the local authority in his views, and I think they may be safely laid aside as untenable." 58a

As a strategy for the disintegration of the monastic order this attitude towards the Buddhist religion proved an effective recipe. The priests, unlike in the past, had no means "of compelling attendance, and no power of inflicting penalties for non-attendance"⁵⁹ before the monastic colleges, having the authority to discipline them. This hostile policy generated a sense of hopelessness among the Buddhists which escalated into open rebellion with ease.⁶⁰ But the psychological damage done both to the Buddhists and to the British government was to leave an indelible mark upon the future relationship of these two important groups for the next Century, in fact until independence in 1948. During the next 100 years the British Administration in Ceylon pushed forward their strategy for economic development, through the plantation industry, which needed land and more fertile land. It is in this light that the Temple Lands Registration Ordinance⁶¹ and the Services Tenures Ordinance⁶² require scrutiny.

(b) The Temple Lands Registration Ordinance of 1856.

The Temple Lands Registration Ordinance (hereinafter referred to as the Ordinance of 1856) laid down six basic principles.

First: the Ordinance empowered the Governor to appoint "one or more persons, not exceeding three in number who shall be the Commissioner or Commissioners for carrying into effect the provisions of this Ordinance."⁶³

Second: Under the Ordinance, the Commissioner(s) were "authorised and required to inquire into the boundaries of all lands, of whatsoever description ... belonging or alleged to belong to or in possession of all Vihares and Dewales within any district of the Kandyan provinces, to which the privilege of exemption from taxation of temple lands extended."⁶⁴

Certain procedures attending that determination were made statutory.⁶⁵

Third: The Ordinance made it lawful for such Commissioners "to inquire and determine the right and title of any such temple to exemption from taxation in respect of any lands alleged to belong thereunto".⁶⁶

However, the Ordinance expressly prohibited the Commissioners from settling disputes as to title "between any such temple and any person (except differences or disputes between such temple and Our Lady the Queen)".⁶⁷

Fourth: By Section 14 of the Ordinance, the Commissioners were required to be, "guided by equity and good conscience only, and by the best evidence that can or may be procured, although not such as would be required or be admissible of ordinary cases; nor shall they be bound by the strict rules of law in any case." The Ordinance laid down rules for summoning witnesses and penalties for non-appearance.⁶⁸

Fifth: The Commissioners, having first satisfied themselves as to the title and the boundaries of the temple and Dewale land, were thereafter required to draw up a registry of lands and have them registered at the Kachcheri⁶⁹ of the area where the land was situated.⁷⁰ At the request of the persons who were in charge of the revenues of such lands, the Commissioners were empowered to issue certificates of registration. Such certificates were declared as proof of exemption from taxation, "and no other proof of exemption shall in any case be admitted or received in any court."⁷¹

Sixth: It was made clear, in the preamble of the Ordinance, that the law herein enacted was supportive of the decisions made by the British government in 1819,⁷² to exempt lands from taxation. This Ordinance was merely a means by which the government intended to determine the boundaries of such lands before exemption from taxation was granted to them.

(c) The Effect of the Complexities of the Buddhist Ecclesiastical Law on Colonial Development

Within the framework of these six principles, the Ordinance of 1856 came into effect on the first of January, 1857. It is important to lay stress on two principal difficulties. As matters lay in 1857, the temples and the Dewales were placed in a very difficult position to establish their titles. It would have been even more difficult to establish their precise boundaries, particularly when one realises that the Kandyan Kingdom had no survey maps or experienced surveyors. The application of these provisions to the temples and Dewales of the Maritime Provinces could have been significantly easier; for the Dutch maintained an effective survey department during their administration of the Maritime Provinces. But the Ordinance of 1856 was limited, in its application, to the Kandyan Provinces. The second difficulty was in establishing title to land, not by the Kandyan Law, but by the Buddhist Ecclesiastical Law, to the satisfaction of a lay Commissioner, or Commissioners, who in fact were of foreign origin, being British, with little or no understanding of the religious framework within which the particular ecclesiastical law was conceived. The succession rules under the Buddhist Ecclesiastical Law rested on two distinct and different bases - the Sishiyanu Sishya Paramparawa⁷³ (hereinafter referred to as S.S.P.). and the Sivuru Paramparawa⁷⁴ (hereinafter referred to as S.P.). The two lines of succession could lead to very different results.

In S.S.P., the intention to introduce a line of succession based on that type of succession must be born out in the original dedication of the property in question. Words such as "to X and his pupils in their generations" would constitute an S.S.P. succession.⁷⁵

In Saranakara Unnanse et al v. Indraajoti Unnanse et al,⁷⁶ the Supreme Court recognised four types of pupils mentioned in the ancient texts. These were:

"(i) Pabbajjantevasika is a pupil who has been admitted by robing to the Pabbajja (or Samenara) ordination by his preceptor, or Upagghaya. ...

(ii) With regard to the second class of pupils, Upasampadantevasika, this is a pupil who receives the upasampada ordination from his preceptor. ...

(iii) The third class of pupils is the Nissayanevasika.⁷⁷ ...

(iv) The fourth class of pupillage is Dhammantevasika.⁷⁸ ... All four classes of pupils are alike pupils under the Buddhist Sacred Law, i.e., they rank as pupils of the priests who have been robed, ordained, instructed them, or given them a nissaya. But, for purposes of the pupillary succession,⁷⁹ unless a distinction has been made in the instrument of dedication, I understand that the first two forms of pupillage are alone regarded. This is natural, as these establish a permanent relationship; whereas the last two imply only a temporary and transient relationship."⁸⁰

Relying on the available case-law⁸¹ and the opinions of commentators,⁸² Hayley⁸³ distinguished S.S.P. from S.P. in this way:

"The main distinction between the two forms of succession is that in S.S.P. the successor, whether nominated by the incumbent or selected by operation of law, bases his claim on spiritual relationship or nomination as a priest, while in the S.P. the right depends upon blood relationship, and the person entitled to succeed need not at the time of the death of his predecessor be in robes, although he must be robed before he can assume the incumbency."⁸⁴

The S.S.P. is regarded as the normal method of succession. In Sangharatana Unnanse v. Weerasekera,⁸⁵ the Divisional Court held that, where the terms of the original dedication of property are such that it is not clear as to which method of succession the donor preferred, the assumption is that succession to property should be governed by S.S.P. rather than by S.P. The Divisional Court recommended this rule not only for the Kandyan Provinces but also for the Maritime Provinces of the Island.

The purpose of this excursus into succession under the Buddhist Ecclesiastical Law was merely to show its complexity. This sufficiently indicates the difficulties the persons entitled to the revenues of the temples and the Dewales faced when attempting to establish their titles before the Commissioners functioning under the Ordinance of 1856. For they were all nurtured in a different legal system functioning within a different legal culture.

Although the Ordinance of 1856 stated clearly that the purpose of the Commission was, indeed, to put the decisions reached in 1819⁸⁶ into effect, there is strong circumstantial evidence to suggest that the Commission was merely an element in the overall development strategy chartered by the Colonial Administration of Ceylon.

(d) The (Declared) Policies of the British Administration.

Although the Commission commenced its work in 1857, even in 1865 its work remained incomplete. Recommending⁸⁷ the continuation of the work of the Commission to the Legislative Council of Ceylon, Sir Hercules Robinson, the Governor said:⁸⁸

"I am happy to inform you that the labours of the Temple Lands Commissioners are nearly completed; but I find that at the present rate of progress, the survey, the early completion of which forms an essential part of the scheme, would take six or seven years. In order, therefore, that the labours of the Commissioners may not be thrown away, I have authorized the Survey-General to enter into a contract for the survey of the Temple Lands, not yet surveyed, at the rate of 75,000 acres per annum. It is calculated that the survey will be completed at this rate in about two years, at a cost of upwards of £22,000; but a considerable portion of this expense will be recovered from the temples under the terms⁸⁹ of the Ordinance No. 10 of 1856, and the whole government outlay will be far more than re-couped by the sale of lands which have been set free of temple claims by the adjudication of the Commissioners."⁹⁰

By 1865, with the opening of the coffee plantations, a sense of land hunger was beginning to set in. The manipulative processes available to the Commission while functioning correctly within the ambit of the Ordinance of 1856, were thought adequate to free sufficient temple land for development - i.e., to provide for an expanding plantation industry. But, by 1872, the planters had begun to fan out into the Tea Planting Industry. The early experiments had proved successful and Sir William Gregory⁹¹ promised the Legislative Council in September, 1872⁹² that he would arrange "two experts in the manipulation of tea"⁹³ to come from India to help the Ceylon Planters for a couple of years. By 1874, the success of the tea planting industry had begun to blossom and Sir William was able to tell the Legislative Council that "tea has already been tried to some extent, and its undoubted excellence has encouraged applications for a large amount of forest land to be employed in its cultivation."⁹⁴

The hunt for land was now on and the prime target appeared to be temple property. In 1870, the British Administration in Ceylon passed into law, The Service Tenures Ordinance,⁹⁵ (hereinafter referred to as the Ordinance of 1870), which became law on the 1st February of that year. The structure of this Ordinance⁹⁶ bears a close similarity to the Ordinance of 1856.⁹⁷ The 1870 Ordinance primarily rested on five principles.

- First: The preamble carried the intention of freeing the Kandyan peasants from service obligations to temples and the Dewales. The British Administration in Ceylon declared that the retention of service tenures was "repugnant to the Constitution of the Colony and ... tends to check its advancement and improvement."
- Second: Under the Ordinance, Commissions of one or three persons were appointed.⁹⁸ They were required⁹⁹ to determine, and compile a list of property, names of their proprietors, the names of the Nilakarayas¹⁰⁰ and to ascertain the nature of their Pangu¹⁰¹ - whether it is Paraveni¹⁰² or Maruveni.¹⁰³ The Commissioners were further required to determine and list the type of services which the Nilakarayas were required to perform,¹⁰⁴ to the proprietors.
- Third: The Ordinance required the Commission to assess "The annual amount of money payment for which such services may be fairly commuted at the time the registries are made."¹⁰⁵ The Ordinance made that determination 'final and conclusive' in any future proceedings.¹⁰⁶
- Fourth: The Nilakarayas were given the right, by Section 14, to apply, if they so desire to have their tenures commuted to one of tenancies at a rent fixed by the Commissioners according to their 'determination'¹⁰⁷ under Section 10 of the Ordinance.

Fifth: Once the Commissioners had made an order under Section 15, to have the tenures commuted to one of tenancies at a fixed rent, that decision was final and conclusive. Thereafter, the tenure became a nullity, and the relationship of a Nilakaraya and a Proprietor became one of tenant and Land Lord under a fixed rent. The Ordinance of 1870 seems to establish this relationship for ever; being a statutory tenancy, it would not be within the landlord's power to alter the terms of the arrangement, such as by raising the rent at a future point of time.

Within the framework of these five principles, the British Administration in Ceylon appointed a Commission in the Kandyan provinces. The key to its success from the British point of view was the rent. The lower the rent that was fixed under Section 10, the greater was the chance of tempting the Nilakarayas to break ancient and traditional ties with their proprietors and seek a commutation of their tenures into tenancies. This would in turn tempt the Kandyan landlords to submit to the economic pressures surrounding them and decide to sell and alienate ancestral property. The obvious and only buyer of such property was the Crown, which was merely acting as a real property agent for the plantation industry. Viewed in this light the developmental strategy of the British government becomes clear. The Ordinance of 1870, like the Ordinance of 1856, thus appears principally as a legal instrument contrived to achieve a desired economic goal. The British Administration, however, attempted to conceal this developmental strategy by recommending the Ordinance of 1870 to the Legislative Council upon different grounds. On the eve¹⁰⁸ of the presentation of the Bill to the Council, Sir Hercules Robinson, the Governor, informed¹⁰⁹ its members:

" ... that the services to be performed in respect of such tenures are varied in character and differ in every village. They appear in the Nindagamas to include every description of labour which one man can perform for another as a cultivator, artisan or menial, whilst in the temple villages, in addition to the performance of the usual agricultural and menial tasks, there are allotted to the Nilakarayas, irrespective of their superstitious feelings, the temple services, consisting of repairing the temples and idols, furnishing the daily guards, carrying the images at festivals, and providing musicians and devil dancers. The whole system, in short, is described by those who have carefully watched its effects, as degrading to humanity. Under it men are bought and sold with the land - industrial enterprise is blighted - agricultural improvement is barred - litigation is encouraged - oppression is legalized - and, in the case of temple tenants, the freedom of conscience is interfered with." 110

By 1876,¹¹¹ two new elements had been added to the expansion of the plantation economy of Ceylon. One was tea. The Governor, Sir Hercules Robinson informed the Legislative Council¹¹² in 1872 that British experts had found the sample tea grown in the highlands "of such quality as to warrant a more extensive cultivation of the plant".¹¹³ He particularly emphasised the importance of tea, at this juncture, for it could be grown at a much higher elevation than coffee and therefore would open up much of the hitherto unused land in the Kandyan provinces.¹¹⁴ This naturally intensified even more, the need to find more available land in the Kandyan provinces. The second element was the introduction of Liberian coffee. By 1876, Sir William Gregory, the then Governor, was able to inform the Legislative Council¹¹⁵ of the success which the planters had with Liberian coffee. Being a product of hot and humid Liberia, the coffee plant grew best in

the Maritime Provinces. With cinnamon, cocoa, cardamons, black pepper and vanilla already established as economic crops there,¹¹⁶ the introduction of Liberian coffee placed new pressures on land in the Maritime Provinces as well.

(e) New Strategies for Colonial Development

The developmental strategies surrounding the registration of temple lands¹¹⁷ and the abolition of tenures,¹¹⁸ had, by 1876, become spent. The Government was therefore persuaded to move in a new direction. Both in the Maritime Provinces and in the Kandyan provinces, land remained 'tied'¹¹⁹ to a single line of succession through several generations (as did the land of the well-known Thellusson family¹²⁰ in England). The English law of trusts settled that problem by an Act of 1800, which is known variously as the Thellusson Act and the Accumulation Act. Under that Act property in England can now be limited only to a succession by a 'life in being', that could succeed within 21 years of the death of the testator. If no person nominated by the testator comes into being, to claim the trust within 21 years of the settler's death, the income thus accumulated will go, free of the trust, to the person entitled to it upon intestacy.¹²¹ The Thellusson Act served a very real purpose in the United Kingdom to release land which had come to be regarded as being under the 'dead hand'. The British Administration in Ceylon identified the Fidei Commissum¹²² in the Maritime Province, and 'settled and entailed'¹²³ property in the Kandyan provinces, with the proverbial 'dead hand'. It was the belief of the Government that, by releasing land from the grasp of these two 'dead hands', further land would be available both in the Maritime Provinces and in the Kandyan Provinces for the two new crops - (Liberian) coffee and tea respectively.

Sir William Gregory, the Governor, in 1873,¹²⁴ informed¹²⁵ the Legislative Council that in the view of his administration the Fidei Commissum was a bad institution for development. He said:

"It so happens that in a series of years a miserable piece of land or a building devolves upon some 20 or 30 heirs. No one in particular is interested in looking after the property; permanent improvement is simply out of the question".¹²⁶

He proposed to have legislation drafted not only to limit the Fidei Commissum to a single generation¹²⁷ but also to make provisions for the termination of that institution, contrary to the aims and aspirations of the testator.¹²⁸ To say at the same time, as Sir William did,¹²⁹ that the Governor did not intend to interfere with the "essential particulars" of the Roman-Dutch Law pertaining to this institution, seems to be hypocritical. The Dutch institution of Fidei Commissum was a borrowing from the Roman law of property. The social importance of Fidei Commissum must be evaluated against the significance given to family and family property among the ancient societies, both of Holland and of Rome. Some modification must necessarily occur to keep development abreast with the march of time, but to limit the institution to one generation, coupled with the provision of legal instrumentalities to breach the testator's aims and aspirations, may clearly amount to a total negation of that institution. To do so, as the Government of Sri Lanka did¹³⁰ in 1975, with a clean sweep in order to facilitate their land reform programme, was perhaps a little less dishonest than to do so to facilitate the expansion of the plantation industry under the guise of native development. Turning away from the Maritime Provinces and towards the Kandyan Provinces, Sir William, in 1876, lamented the way that the Buddhist temples were

flaunting and wasting their property.¹³¹ On the 13th September of that year, in his address to the Legislative Council, the Governor told its members of a proposed Ordinance regarding 'settled and entailed property' and its effect on the Kandyan provinces. He said:

"It will of course be prospective in its operation, but powers may be given in it to trustees to dispose of real property already held by temples and other religious institutions."

The Governor, with reference to future legislation regarding Buddhist institutions, had this to say:

"I have constituted a commission to enquire into the manner in which the Buddhist temporalities are administered. I am not prepared at present to state, until this enquiry is terminated, whether legislation will be necessary; but if so, you may rest assured that it will be framed so as to maintain scrupulously two principles: that the government shall in no way identify itself or have any concern whatever with the Buddhist religion, and that the principles of the Convention of 1815 will be upheld in the spirit and in the letter."¹³²

This passage refers directly to the Buddhist Temporalities Acts; the first of the series, enacted in 1889, was replaced by another in 1905, which was in turn replaced by a third in 1931. Both the 1889 enactment and the 1931 enactment resulted from Commissions of Enquiry, while the 1905 Ordinance was intended to be an improvement on the 1889 Ordinance and was based on experience and advice. These will be considered later, but it is important to indicate at this stage that the policies and the goals of the Buddhist Temporalities Acts were conceived within a very different framework from that which guided the administration in drafting the foregoing Ordinances concerned with the control and re-distribution of property. Into this latter category will fall 'The Entail and Settlement Ordinance 1876'

(hereinafter referred to as the Ordinance of 1876), which has a particular relevance to the idea of 'cutting off the dead hand'. That, in fact, was the last of the property-oriented Ordinances which were to emerge at this particular stage of colonial history in Ceylon.

In announcing¹³³ to the Legislative Assembly the Bill which became Ordinance No. 11 of 1876,¹³⁴

Sir William Gregory said:

"I am satisfied by the experience of five years that the enormous and unimproved - and, as they now stand, unimprovable - territorial possessions of the Buddhist temples in the Kandyan districts are a bar to general advancement, that they afford the means of malversation, and should no longer be held in the 'dead Hand'." ¹³⁵

It is important at this stage to examine the Ordinance of 1876 with a view to assessing the extent to which its operation did in fact effect the release of land from the grasp of the 'dead hand'. By Section 2 of the Ordinance any restriction upon alienation of property for a period longer "than the lives of a person (or persons) who are in existence or en ventre sa mere at the time" when such restriction was placed was declared null and void. By Section 3, the avoidance was restricted to the period exceeding the life span and not to the whole instrument. By Section 4, a District Judge was empowered to release the restriction on alienation, under certain conditions, even during a valid period of restriction or prohibition. Under Section 5 "any person entitled to the possession or to the receipt of the rents and profits of any immovable property now or which may hereafter become subject to such entail, Fidei Commissum, or settlement as aforesaid, ... may apply to the District Court by petition in a summary way" to have the powers vested in a judge of that

court under Section 4 exercised, for the purposes of having the land released for sale or lease. Section 5 applied, as did the entire Ordinance, to both Kandyan and Maritime Provinces. However, the Ordinance as a whole was subject to a limitation placed in Section 12. That section excluded the application of the Ordinance "to any immovable property held or possessed ... for the benefit of any ... temple, or any charitable, religious or educational institution". Although this may at first sight appear to exclude temple property, contrary to that indication, the Ordinance in fact helped the priests, who were by now made impecunious, having been deprived of government grants since 1847,¹³⁶ to rise to the temptation and sell their land. The legal twist was this. Under the Kandyan system, whether by pupillary succession¹³⁷ (S.S.P.) or by succession through blood¹³⁸ (S.P.), temple lands were the private property of the incumbent. In a very careful judgment of the Supreme Court, in 1882, in Ratnapala Unnanse v. Sejo Seibu Sejo Abdul Cader,¹³⁹ it was laid down that the ownership of lands and other offerings vested in the 'incumbent'. In Charles v. Appu¹⁴⁰ the Divisional Court expressed the view that temple property was not 'Res Sacrae' and therefore could be sold in execution of a judgment debt incurred by the incumbent. These and other decisions¹⁴¹ were relied upon by Hayley¹⁴² when he wrote that:

"The practical ownership of the lands and offerings dedicated to various temples vested in the incumbent or body of priests resident in the temple; and any surplus of revenue, after needs of the temple and the resident priests had received provision, came to be regarded as the private property of the priests, whose capacity for ownership the civil law does not seem to have denied, ..."¹⁴³

The exclusion of the application of the Ordinance of 1876 to temple property was in fact of no real consequence. The goals earmarked by the British Administration in Ceylon in its policy statement¹⁴⁴ was in no way affected by the provisions of section 12 of the Ordinance. As to non-temple property, the Ordinance offered a splendid escape route. In the words of the Government,¹⁴⁵ the "restrictions upon alienation are found to be prejudicial both to individuals and the community, for such property is seldom improved by the life tenant."¹⁴⁶ The success of the Ordinance of 1876 was significant. Reporting to the Legislative Council¹⁴⁷ in 1880,¹⁴⁸ Sir James Longden examined the land sales undertaken by the British Administration in Ceylon to the plantation industry over a period of 12 years. Between 1867 and 1876, the Governor stated that the Government had received an average annual revenue of Rupees 639,145.00. But in 1877, alone the government was able to find sufficient land to the value of 1,550,983 Rupees. In 1878 the value of land sold to the plantation industry was 1,282,403 Rupees while in 1879 the sales had fallen to Rupees 694,030 reaching a plateau. These figures represent the amount of land which the Government's 'Land Bank' had acquired, each year, to sell to the plantation industry. The years 1877 and 1878 appear to have seen the early effects of the Ordinance of 1876. By 1879, its effect had begun to wane and the sales had returned to normal. Even then, commenting on the 1879 figure, Sir James remarked that it was:

"still amounting to a sum which may be favourably compared with the average of the 10 years preceeding 1877."¹⁴⁹

Although the precise figures of the extent of the land acquired by the Temple Land Commission are not available there is, however, some circumstantial evidence^{149a} indicating the enormity of the Commission's success in obtaining land for the plantation industry. In a despatch from the Governor, Sir Henry Ward, in 1859, to the Secretary of State for the Colonies, he reported on the success of the Temple Lands Commission over the preceding two years of its life. In his report, Sir Henry submitted a breakdown of the expenses incurred by the Commission over the preceding two years as pounds 1,993., 12 shillings and eight pence and the total value of the land collected as pounds 20,990.8sh.5½ pence. The report further stated that out of a total extent of 9,875 acres of Highland, the Commission had recognised the title to merely 1,704 acres while absorbing into the Crown's 'Land Bank' 8,171 acres or nearly 80% of the total land mass surveyed during that period. These figures should provide a good indication as to the percentage of land the Commission succeeded in confiscating for the 'Land Bank'.

V. The Shutting of the Stable Door ... The Buddhist Temporalities Law

All the stratagems designed towards setting up a plantation economy, particularly, towards finding the land which, indeed, was a basic requirement, seem to have been clearly successful. In the process, the British Administration in Ceylon had in fact caused a considerable degree of concern and consternation to the Buddhist community. Conscious of this fact, the British Government attempted to placate the Buddhists and the priests by working towards the production of a comprehensive code which could help towards protecting whatever remained of the original lands of the temples. The stable door was now to be closed, the horse having fled for greener pastures. No more was there the need for land to

satisfy the requirements of the planting community. The coffee plantations were put in some difficulties by the onset of a leaf disease, but the tea, cocoa, cinnamon, black pepper and cinchona industries were all enjoying an unprecedented boom in the Colony.¹⁵⁰ Since the refusal¹⁵¹ of the Secretary of State for the Colonies *to recommend the Royal* assent to Ordinance No. 2 of 1846,¹⁵² the Administration's policy was one of complete disassociation from the affairs of the 'Buddhist Church'. In its trail this included the cancellation of government grants to priests as from 1847, and leaving the temple property solely in the hands of the priests - the 'incumbents' - of the Vihares.¹⁵³ This two-pronged policy proved to be a most effective formula for underdevelopment of the temple lands and for the dismantling of the centres of Buddhist power in the Kandyan provinces. The monastic orders were faced with an acute crisis of discipline. The violators of monastic orders were no longer amenable to the disciplinary boards set up by their various sects. For there was no effective method of summoning them before the boards, and clearly none by which the disciplinary orders could be carried out.¹⁵⁴ Until 1815, the Kandyan Kings, and thereafter, the British Government, had helped monastic orders in the policing tasks attending the activities of the monastic disciplinary boards. After 1847 there was no such help forthcoming from the British Government. Indiscipline and misbehaviour diminished the morals and the nerve of the clergy to protect, not only their own rights, but also those of the Sinhalese people. In turn, the respect and devotion which the priesthood traditionally commanded from the people was also lost. Associated with these events was the malversation of temple property.

Unable to structure a viable programme for the development of temple property, by 1898, the British Government was anxious about the extent to which the 'Buddhist Church' had been reduced both in its spiritual power and in its economic power. The effective implementation of the laws designed towards the control and re-distribution of temple property had taken its course with increasing success and by 1888 a stable foundation for the launching of a plantation economy had in fact been laid. Although, Earl Grey, the Colonial Secretary, in his letter to the Governor giving reasons why the British Government was unwilling to approve the Ordinance No. 2 of 1846, had promised to give the Buddhist community "a sound working constitution", for almost forty years; since 1847, there had been no movement among the British Administration in that direction.¹⁵⁵ In frequent addresses to the Legislative Council, Governors had reminded themselves of the implementation of Lord Grey's promise, but no concrete steps had thus far been taken in that direction, until 1889. Had the 1889 Ordinance been enacted before the implementation of the Ordinances for the control and re-distribution of temple property, much of the temple lands could have been saved and indeed developed; and that would accordingly have slowed the pace towards creating a plantation economy in Ceylon. The Buddhists, concerned with the rate of loss of temple property, made several attempts to arrest that rate, but the Supreme Court repeatedly ruled that the ordinary devotees had no legal interest in the property.¹⁵⁶ For the property was entirely in the ownership and possession of the incumbents. Temple property was their private property and they clearly had the power to do what they wished with it. Even in 1877 the Buddhists were agitating for that Constitution which Earl Grey had promised in 1847. Sir William Gregory informed the Legislative Council¹⁵⁷ on the 7th May 1877 that he:

" ... thought, however, that it was advisable not to take any steps in the matter until the Buddhists themselves claimed the interferences of the government. Since then I have received constant complaints from influential members of that religion" ¹⁵⁸

The year 1877 was the first complete year of operation of the Ordinance of 1876. That was also a peak year for land sales, followed by another new record level in 1878.¹⁵⁹ The Buddhist Temporalities Bill, however, did not appear until 1889 - for another twelve years. The horse, by that time, had truly fled. On the eve¹⁶⁰ of the presentation of the first Buddhist Temporalities Bill, in 1888, the then British Governor, Sir Hamilton Gordon, was somewhat apologetic in his lament:¹⁶¹

"Since the withdrawal, many years ago, of all control by the government over the temporal affairs of the Buddhist religious foundations in this colony, great and scandalous abuses have prevailed in their management. The well-disposed of that community are unable to check these abuses, owing to the want of any efficient machinery for exercising control in such matters. It appears to have been ruled by the courts that incumbents of the different Vihares and Dewales are not, in the ordinary sense of the word, trustees, and that the Buddhist inhabitants of any locality have not that pecuniary interest in the temple property which alone would entitle them to call in question before a court of law the abuse of the property by the incumbent for the time being ... The monastic colleges, indeed, can administer discipline, and degrade and disrobe priests, but they can only do so in the case of priests personally attending before them; and as they have no means of compelling attendance, and no power of inflicting penalties for non-attendance, it may be presumed that delinquent incumbents do not pay much attention to any citation issued by those bodies. ... It is almost unnecessary for me to recall to mind the fact that, when the connection of the Government with the Buddhist Temporalities was severed, it was fully admitted by Her Majesty's Government that it became an obligation, at the same time, to give to the

Buddhist religious community a sound working constitution, which was fully recognised more than forty years ago Had it been imagined possible that any serious delay would occur in providing it, measures would probably have been taken to prevent the plunder of movable and immovable property, and the waste of annual revenues, in the interval." 162

The first Buddhist Temporalities Law¹⁶³ was enacted in 1889 (hereinafter referred to as the Ordinance of 1889). As mentioned earlier, the main objective of the Ordinance was to protect what little land was now left for the Buddhist Temples and Dewales. The Ordinance first divided the Island into Provinces, Districts and Sub-Districts.¹⁶⁴ Each District was given a Committee comprising members elected by each of its Sub-Districts.¹⁶⁵ Each of the Sub-Districts was required to return one member.¹⁶⁶ The Ordinance laid down in nine sections the procedures involved in summoning a meeting of the voters who are qualified to vote,¹⁶⁷ the qualifications of such voters¹⁶⁸ and the qualifications of the candidates¹⁶⁹ and similar matters.¹⁷⁰ The role played by the District Committee was supervisory.¹⁷¹ They were required to compile a register by recording the names of the temples, their lands, their trustees, the nature of the Pangus,¹⁷² the average annual rents and other incomes, the types of services due and such other accounting desiderata.¹⁷³ The District Committee had two principal tasks. First, it was required by section 17 to elect a trustee for each of the temples within that district. The qualifications for such trustees were co-terminous with the qualifications for membership of a District Committee.¹⁷⁴ In addition, the trustee must be one who is a member of the particular sect¹⁷⁵ of Buddhism to which the temple in question belongs.¹⁷⁶ Second, the District Committee was required to superintend the activities of the trustee.

The Committee could suspend the trustee for neglect or misconduct,¹⁷⁷ and cause the Provincial Committee¹⁷⁸ to prosecute or dismiss him.¹⁷⁹ The Ordinance had provisions to enable the Provincial Committees to order the payment of a remuneration to the trustees.¹⁸⁰ By section 20,

"all property, movable and immovable, belonging or in any view appertaining to or appropriated to the use of any temple, together with all the issues, rents and profits of the same, and all offerings made for the use of such temples ... shall vest in the trustee of such temple, subject, however, to any leases and other tenancies, charges and incumbrances affecting any such immovable property"

In seven paragraphs attached to that section,¹⁸¹ the Ordinance limited the purposes for which the temple property so entrusted could be lawfully used. By section 21 the trustees were required to maintain detailed accounts and other disbursements. Each half year, the trustees were required to submit these accounts to the District Committees and they could if necessary forward the accounts to the Provincial Committees for further investigation.¹⁸² The Provincial Committees had the power to apply to the District Court to have an auditor appointed.¹⁸³ In order to maintain the strict observance of these accounting procedures and other procedures that were required to insure that the aims and objects of this Ordinance were carried out, the Provincial Committee was authorised to order:

"the payment of such share of the expenses incurred in carrying out the provisions of this Ordinance"¹⁸⁴

The trustees, may, with the consent of the Provincial Committee, "demise for any term not exceeding twenty years, all or any of the lands vested in him under the provisions of this Ordinance."¹⁸⁵ It is, however, important to stress that the Ordinance left no power in any of the persons or committees it mentions, to sell and dispose of temple land. Section 20(a)-(f) laid down a developmental strategy of a limited nature within which the temple property could, for the first time since 1846, be used exclusively for religious purposes. The personal element of ownership was abolished. A collective responsibility for the upkeep of the Buddhist temples and its lands was created. The basic voting unit in this structure was at the sub-district level. Each sub-district elected one person to sit on the District Committee. It is the latter which elected and appointed the trustees. At the apex of the structure was the Provincial Committees for which the voting power was given to the District Committees and to the trustees of the temples in the whole province.¹⁸⁶ By section 31 membership at the Provincial level was limited to five persons and their qualifications were closely circumscribed. They must be of the male sex, must have completed their twenty-fifth year and must "not have been convicted of any infamous crime".¹⁸⁷ Three of the five members were elected by the members of the District Committees and the rest by the trustees of the whole province.¹⁸⁸ The Ordinance laid down elaborate procedures for these elections.¹⁸⁹ In eleven sections¹⁹⁰ the Ordinance chartered the Rights and Powers, Duties and Liabilities of the Provincial Committees. In the last section¹⁹¹ any alienation of temple property, between the passing of this Ordinance and the appointment of the trustees for the temples under it was declared null and void.

In forty nine sections, after forty three years, the British Administration fulfilled their promise to give the Buddhist community a viable constitution. This framework has withstood many decades. The Buddhist Temporalities Ordinance of 1905¹⁹² merely altered the manner of electing the trustees. By section 17 of that Ordinance, one or three (not more) trustees may be elected for every temple, at a meeting called for that purpose by the District Committee, at which all residents in the village to which the temple is attached shall be entitled to vote.¹⁹³ The Buddhist Temporalities Act of 1931¹⁹⁴ made it possible for the incumbent of a temple to nominate a priest or a lay person to be a trustee,¹⁹⁵ but such nomination must be reported to the Public Trustee forthwith.¹⁹⁶ Under this Ordinance, the roles played by the District Committees and the Provincial Committees were suppressed and were replaced by the Public Trustee.¹⁹⁷

By maintaining the general supervisory power in the hands of the Government, through the Public Trustee, the British Administration had unwittingly come full circle. At least nominally, the state participation in the development, care and control of the temple lands had by now become a reality. This law was maintained throughout the colonial period and is still the law in Sri Lanka.¹⁹⁸

Although an incumbent could move the courts to have his incumbency legally recognised, any claim regarding temple property must be made by the trustee of the temple in that capacity.¹⁹⁹ A number of decisions of the Supreme Court,²⁰⁰ stretching from the time of the first Buddhist Temporalities Ordinance of 1889 until the present day, have separated the priesthood from temple property.

This naturally is different and distinct from what the Ordinance refers²⁰¹ to as 'pudgalika' (or personal) property of the priests, which indeed was their own. But this was of a very limited nature and as a problem of development has little or no relevance.

It must be emphasised that the key to the development of temple property was its transference from the hands of the priests and into the hands of lay trustees. This was also the key to its protection and to its enhanced productivity. By 1889, the time had elapsed for any meaningful development of the temples which having now been denied government grants from 1847, suffered an acute shortage of capital for investment. The availability of capital was indeed a necessary prelude to development. The temples were, therefore, placed wholly within a framework of what Frank²⁰² would call, the 'Development of under-development'. When these strategies for under-development were compared with the strategies for development of the Christian religious establishments,²⁰³ the Buddhists were placed in a permanent state of conflict with institutions which were associated with the British Government. At least to some small measure this could explain both the nationalisation of schools,²⁰⁴ the sterling companies²⁰⁵ and their estates,²⁰⁶ during the sixties and the seventies of this century. The larger conflict in fact, which arose out of the alleged treatment of the Buddhists was the language issue. Sinhala language was not only the language of the Sinhalese people, but was also the language of the religion. Although the Buddhist 'gathas'²⁰⁷ were in the ancient Pali language, unlike Sanskrit, Pali had no particularised script of its own. Therefore, the 'gathas' were written in the Sinhala script. The religion was communicated in Sinhala. And the culture of the Sinhalese race was a Buddhist culture. In this sense,

Christianity as a whole stood in sharp contrast, in that it espoused a western oriented culture expressed in a western language using the Roman script. In effect Sinhala language and Buddhism were inseparable. This fact underlines the language debate which will be examined later. The aspect of Buddhism, which received the closest attention here, was its relation to the economic base of the Colonial Administration, the creation of the plantation economy, and the legal means used for the control and redistribution of Temple Lands to provide for the planting fraternity. Leaving the language debate for a later chapter,²⁰⁸ it would be relevant to examine next the use of education as an instrument for religious and cultural conversion. This necessarily formed an element in the composite plan towards bringing about cultural and religious colonisation of the Island. These two aspects of colonisation, as later events were to show, became central to the political stability of the Island during the colonial period, and thereafter to maintain and strengthen the social, economic and the legal institutions inherited from that period. These aspects may appear with some degree of clarity from the succeeding chapters of this work.

CHAPTER 3

Education and Aculturisation

I. An Introduction

Colonial education policy in Ceylon appears to have had two basic objectives. First, it was declared at the time of Lord North,¹ that the colonial policy was to use education as an instrument for the conversion of the whole Ceylonese nation into protestant christianity.² This in fact resulted in placing the colonial education policy along a collision course with the Buddhist and the Hindu religious communities. Secondly, linked to the colonial education policy was the aim to create a new class of persons, about whom MacCaulay wrote in his minute³ on colonial education, with particular reference to India. He said:

"I feel ... it is impossible for us with our limited means, to attempt to educate the body of the people. We must at present do our best to form a class who may be interpreters between us and the millions we govern - a class of persons Indian in blood and colour, but English in taste, in opinions, in morals and in intellect."⁴

It must be said at once that this two-pronged education policy was in keeping⁵ with the colonial attitudes of the times and was no different to the education policies planned and executed by other colonial powers such as France, Holland, Portugal or Spain for their own overseas territories, during the late 18th and the early 19th centuries.

The second objective of colonial policy was to a large measure successful. By the time of independence, in 1948, Ceylon had witnessed the growth of a class of persons, small in number, whose cultural and attitudinal assumptions were borrowed from alien cultures. By 1948, this small group had formed a class of power-brokers in Ceylon akin to the Comparadore class⁶ which Mao-tse-tung⁷ identified in pre 1949 Chinese society. Through such a class, the British Administration ruled the native population of the Island. After Independence, it was hoped that this group of persons shall chart a course for the country's future, in which the English language, and western cultural values and attitudes shall have a place of prominence on the Island.

Passe⁸ surveyed⁹ the place of English on the Island. He found¹⁰ that those who spoke on the eve of Independence against the prominent position in which the English language was held in Ceylon, hailed from a distinct and an identifiable group in the Ceylonese society of the time. Passe attributed to this opposition a sense of guilt which they had felt by seeing in them as persons who have been singled out by history to reap, and thus enjoy, the benefits of their English education.¹¹ He mentioned the attitudes of the Ceylonese towards culture: "Our ballroom dances, the games we play, the music we hear, the films we see and the clubs and hotels we go,"¹² have all been absorbed easily by this class of persons. "When the heat and dust of controversy have subsided, it will be realised that more than a hundred years of English education have left their ineradicable impress in our ways of thinking and feeling."¹³ Commenting on the lowering of the standards of English, Passe placed the blame squarely on the policy of the colonial government, particularly during the last decade, in

providing opportunities to those who came from non-English speaking homes to learn English.¹⁴ He said: "Briefly, it is a lowering of the average attainment in English due to the spread of English education among classes to whom it is a foreign tongue."¹⁵

Passe's main contention was that English was then coming to be used by all and sundry, and not being regarded as the exclusive preserve of those who were English in every aspect, except by birth and parentage.¹⁶ He was concerned with use of idioms, intonations, "for speaking, and listening, reading and writing are parts of the same skill."¹⁷ In concluding his examination of the social attributes of English education in Ceylon, at the point of independence, he wrote:

"In Ceylon, with the exception of a small minority of priests and pundits, practically all those who have any claim to be called educated are 'English educated'. Wealth and power are concentrated in the hands of this small percentage of the population."¹⁸

Since Passe's article was published in 1943, a process leading towards the de-stabilisation of this small minority together with a reduction of their political power was commenced, by the implementation of the Official Language Act of 1956¹⁹ and three²⁰ other supportive measures. These provisions and their social consequences shall form the core of the next chapter. The present chapter shall consider the social and legal aspects of colonial education policy and what has been aptly described by Rev. C.N.V. Fernando, O.M.I., as the "missionary enterprise."²¹ An examination of the colonial policy on education and its close association with the "missionary enterprise" could explain the enactment of the Assisted Schools and Training Colleges (Special Provisions) Act of 1961,²² culminating in the nationalisation of the denominational schools on the Island. The present chapter shall deal

in chronological order, the educational policies from 1796, laying emphasis at each stage upon the two colonial objectives: of converting the population into Christianity and creating a narrow class of power-brokers to keep the English language and culture both prominent and alive.

II. The Formative Period of Colonial Education Policy: Vacillation and Uncertainty of Objects and Goals.

(a) What did the British inherit from the Dutch Administration?

Under the Treaty of Capitulation²³ signed between the British and the Dutch on the 15th February, 1796, the Dutch clergy and other ecclesiastical servants were permitted²⁴ to continue their work "among the public of the reformed faith"²⁵ as they had done during the Dutch period. Although there are neither records nor writings about the way the Portuguese administration between 1505-1656 A.D. conducted their educational policy, some significant writings have emerged out of the Dutch period. Pridham²⁶ in his writings²⁷ on the Dutch policy towards education has pointed out that education under the Dutch was wholly conducted within a religious framework. Pridham wrote:

"Each school had from two to four teachers in proportion to the number to be taught. Every 10 scholars were at the same time under the care of a Superintendent, who examined alike their proficiency and the conduct of the teachers. There was likewise an annual visitation by the Dutch clergy, each of whom had the schools in a particular diocese committed to his charge."²⁸

The Dutch administration had established a Scholarchal Commission which was composed of inter alia, the Dissave or The Collector of the Colombo District.²⁹ The latter was the highest ranking European functionary who stood next, in line of precedent to the Dutch Governor. The Commission had a number of subsidiary tasks such as resolving problems concerning consanguinity and issuing marriage certificates. But the principal task for which the Commission remained responsible was the supervision of the educational establishment established by the Dutch. In this sphere, the Commission appointed one clergyman and a layman from each of the diocese and mandated them with the authority of the State to tour the schools within their diocese on behalf of the Commission. Each such group was responsible for visiting between 30-40 schools.³⁰ Describing the organisational aspects of these visitations Rev. Palm³¹ wrote that notice of these annual visits were given to each school district by public announcements made through 'tom-tom' beaters and 'village-criers'. The announcement required all students (both past and present) teachers and parents to assemble on the morning of the appointed day. During the morning, Rev. Palm wrote, the two Commissioners - now in the role of inspectors - examined the present students: "in reading, in writing, in repeating their catechism and the Ten Commandments, the creed, the Lord's prayer and other prayers."³² In addition there were questions asked from the students about other subjects too.

During the afternoon sessions, Rev. Palm wrote, that the students who had left school during the past three years or less, known as Nieuwe Largeerden (newly discharged) were examined. These Nieuwe Largeerden were required during their first three years of discharge to attend the school twice a week for

continued instructions in religion and have his Largeerden (the certificate) signed. During the latter part of the afternoon the Commission took time to examine the Oude Largeerden (old discharged). These are students who had been discharged from the school during the past 4-6 years. They too were required to continue their religious instructions but not as frequently as it was required of the Nieuwe Largeerdens.

Although education was free, heavy fines were imposed on parents whose children had missed school during the weekdays and church during the Sundays.³³ The Commissioners by the end of the afternoon engaged in auditing these accounts, admonishing teachers and dismissing them where necessary. The Commissioners may during such a session appoint new teachers and determine who among the students in the final year qualify to be discharged.³⁴ These became the Nieuwe Largeerdens. Having completed these tasks by dusk, the clergyman among the Commissioners conducted a mass and preached to the congregation before departing for the next village where they began the same kind of routine the next morning. At the end of their tour of 30-40 schools, the Commissioners were required to file a report with the Scholarchal Commission in Colombo, for submission to the Governor. These reports were eventually sent to Holland. This description suggests an organised educational system with a strong religious accent which the British Administration in Ceylon inherited from the previous Dutch Administration in 1796. Although schools came to a standstill between the Capitulation in February, 1796 and the arrival of the first British Governor in October 1798, the educational infra-structure remained dormant but intact during those two years.³⁵ The Administration

which ruled the Island between 1796 and 1798 was a Military Administration. Their mandate was to hold the newly conquered territory as best as they could for the British East India Company. The Company's administrators during these two years stopped the payment of salaries to the school teachers and had in addition stopped the grants-in-aid to the schools.³⁶ The Dutch educational system was wholly Government sponsored through grants-in-aid and was free.³⁷ But it was in a total sense religious.³⁸ It was well organised but ran within a strict bureaucratic framework created and held together by the State.

(b) The Pre-Colebrooke-Cameron Period: 1799-1832

In 1799 North appointed the Rev. James Cordiner, the Church of England Chaplain to the British Armed Forces, as the Superintendent of Schools.^{38a} Fired with an enthusiasm for converting the natives to the Protestant faith, the Governor, in 1800, claimed from the British Government a budget of £5,000 for scholastic and ecclesiastical purposes.³⁹ By January 1800, three preparatory schools had been opened in Colombo and the Colombo Academy (which subsequently became the present Royal College) was established by 1802.⁴⁰ Schools for orphans and foundlings had been opened in Galle, Jaffna and Trincomalee in 1801.⁴¹ Several schools for the children of the Roman Catholic faith, too, had begun in Colombo, by 1801.⁴² Alarmed by the growing expenditure for education in their newest colony, the then Colonial Secretary, by a despatch of 30th January, 1803, reduced the Education and Ecclesiastical budget of the Island drastically, to £1,500.⁴³ The result was that parochial schools lost their grants-in-aid with the consequent effect that education, particularly religious education, entered a lean period.⁴⁴ Although by the personal

intervention of Cordiner, while on leave in England, the British Government agreed to re-consider⁴⁵ the budget, leading Governor North's administration swiftly into a severe financial crisis. However, by 1805, due to strong representations from religious revivalists in England, the British Government instructed Governors Maitland (1805-1812) and Brownrigg (1812-1820) to take remedial steps towards promoting religious education yet again on the Island.⁴⁶ The British Administration in Ceylon while seeking support for the education and ecclesiastical budget, admitted the Baptists in 1812, the Wesleyans in 1814, the American Missionaries in 1816, and the Church Missionary Society in 1818⁴⁷ into the Island and encouraged them to establish schools on the Island. The government appointed a successor⁴⁸ to Rev. Cordiner, as the Archdeacon for Ceylon, in 1818, and placed all government (i.e. non-denominational) schools under him.⁴⁹ The years between 1818 and 1832 appear to have been the difficult years for religious education. Describing the education process introduced by the missionaries, Sir James Tennent,⁵⁰ the then Colonial Secretary in Ceylon, wrote:

"The students reside uninterruptedly under the same roof with their instructors, and although no renunciation of idolatry and no formal declaration of Christian beliefs is insisted on as a preliminary to admission, still each inmate is required, as a matter of discipline, to be present at the morning and evening devotions of the school, to attend the Christian worship in the chapel of the college. To participate in their own religious observances ... is regarded in the student as a disciplinary offence; and so far from this regulation being looked upon as a despotic interference with religious freedom, it is regarded by the students only as a well understood condition of their admission to a Christian institution, and one with which they voluntarily comply, in order to secure a participation in all the advantageous of the college."⁵¹

The success among the Tamils had been exceptional.⁵² But the penetration into the Sinhalese community was slow and was arduous.⁵³ The missionaries found the Buddhists, who are, to a person, Sinhalese: "shielded from interference, priesthood of Buddhism exerting an undisputed influence over their minds" ⁵⁴ As for the Kandyans, the missionaries found an impenetrable wall of myth, superstition and fear surrounding them.⁵⁵

Sir James Tennent Wrote:

"Ignorant and uninstructed themselves, the Kandyan peasantry, on the arrival of the Christian missionaries, were apparently insensible of any advantages to their children derivable from education; and so Christianity found no access to their villages, it became impracticable to establish schools with adequate hopes of success, as no Christian teachers could be found to officiate; and no stranger, however eligible, could have compassed the attendance of a single Kandyan class."⁵⁶

When comparing⁵⁷ the missionary achievements among the Sinhalese Buddhist community with such achievements among the Tamil community, the missionaries were proud of their success in spreading the word of the gospel, dismantling caste barriers and educating Tamils in the English language. The Sinhalese-Buddhists found no immediate incentive to learn English from the only place they could, namely from the missionaries. Unless the potential converts had on their own sought conversion the missionaries found it difficult, if not impossible⁵⁸ to awaken the conscience of the Sinhalese-Buddhists to seek conversion. It is in this light that the recommendation⁵⁹ regarding the employment of natives and of education made by the Colebrooke-Cameron Commission in 1831⁶⁰ required consideration.

III. The Colebrooke-Cameron Recommendations on Education

(a) An Introduction

The Commissioners, having first taken note of the peculiar traits of the Kandyan generally and the Buddhists - who are Sinhalese - in particular, thought it necessary to ferret them out from their own social burrows, by inducements rather than by force.⁶¹ They found in them a caste-conscious Buddhist group, insensible to the developing opportunities surrounding them.⁶² The Commissioners recommended the suppression of certain types of public offices and the retention of others which should be open to the native population.⁶³ Thereafter, they recommended that:

"The offices which may be retained should be adequately remunerated, and declared open to all classes of inhabitants, without reference to caste or to other qualifications than respectability and fitness for employment. A competent knowledge of the English language should however be required in the principal native functionaries throughout the country. The prospect of future advancement to situations now exclusively held by Europeans will constitute a most powerful inducement with the natives of high caste to relinquish many absurd prejudices, and to qualify themselves for general employment. With this view, it would be highly expedient that the intention of the government to open the civil service to His Majesty's native subjects should be publicly declared."⁶⁴

Unlike the Donoughmore⁶⁵ and the Soulbury⁶⁶ Commission reports, the Colebrooke-Cameron recommendations did not result in legislation. The recommendations were in the nature of advisory opinions influencing the formulation of colonial policy applicable to the Island. The Commissioners' recommendations regarding education were intended to supplement their foregoing recommendations on native employment. The substantial reliance which they recommended the government should place upon missionary educational enterprise marked the commencement

of an era of state participation in schools not capable of providing an English education. The British Administration in Ceylon thereby commenced a programme leading towards isolating the majority Sinhalese-Buddhist community from the rest of the population.

The programme chartered for education led to the creation of two principal streams of education on the Island. These were the vernacular education which adopted one of the two vernacular languages (Sinhala or Tamil) as the medium of instruction and the anglo-vernacular education which used the English language as the medium of instruction. Accordingly, there began to appear two distinct categories of schools on the Island. Those that followed the vernacular stream provided the students with little or no knowledge of the English language. Those that adopted the anglo-vernacular stream conducted all their classes in every subject in English. In addition, they provided instructions in the English language and literature. Further, instructions were given in both vernacular languages too. Some vernacular schools did provide English language instructions, but those were limited to an hour a day at the most, while the medium of instructions on all other subjects was in the vernacular. This plan naturally made the knowledge of English of a student educated in an anglo-vernacular school, far superior, to one with a vernacular education. It is this factor which, in later years, gave rise to the formation of elite groups characterised by their close association with the English language and western culture.

The support which the government gave to the denominational schools, therefore, was limited to those organised by the Christian missionary societies. Because they alone, for some seventy years, at least until the

end of the 19th century, held a monopoly over anglo-vernacular education on the Island. The government justified its decision to opt out of anglo-vernacular education, thus leaving it entirely in the hands of the missionaries, by relying on a passage from the Colebrooke-Cameron Report. It was this:

"As the English missionary societies have formed extensive establishments in various parts of Ceylon, it would be unnecessary to retain the government schools in situations where English instruction may already be afforded." ⁶⁷

However, the missionaries had concentrated on providing a vernacular education generally, with only a few centres for anglo-vernacular education in: Colombo, Jaffna, Galle and Batticalo. ⁶⁸ Their immediate concern was mainly in the field of translating; ⁶⁹ namely, translating the Bible and other scriptures into both Tamil and Sinhala. It is somewhat curious that the Commissioners, with full knowledge of the limited interests of the missionaries, thought it necessary not to recommend to the Government the strengthening and the expansion of a state-sponsored system for anglo-vernacular education, using the available state schools system as a starting point, but to recommend a course of events which led to State participation in the propagation of a parochial system of anglo-vernacular education for Ceylon. The counter thrust which resulted from these events, ironically, were to produce an angry Sinhalese-Buddhist group a hundred years later, in whose hands the hopes and aspirations of the Christian missionaries were to end, somewhat abruptly, in 1960. ⁷⁰ The ill-advised passage in the Commission's report was this:

"The English missionaries have not very generally appreciated the importance of diffusing a knowledge of the English language through the medium of their schools, but I entertain no doubt that they will co-operate in this object." ⁷¹

III (b) Schools Commissions - a Response to
Colebrooke-Cameron Reforms

The British Administration's response to these recommendations was the appointment of a Schools Commission⁷² in 1834 to support the missionary effort in the English educative process of the natives. This first Education Commission, by 1841, became seriously afflicted by "disagreement, confusion and mismanagement".⁷³ Sir William MacKenzie dissolved the first Commission in 1841 and replaced it with The Central School Commission for the Instruction of the Population of Ceylon.⁷⁴ This second school Commission remained in effective existence until 1869, spanning a period of relative economic boom on the Island. By 1843, the Commission, as the agents of the British Administration in Ceylon had planned an extensive aid programme for schools.⁷⁵ Inevitably, much of the aid appears to have gone towards aiding and strengthening the English educational enterprise in the Tamil-speaking areas of the North while the Kandyan-Buddhist Sinhalese areas remained, in this sense, comparatively under-developed.⁷⁶ The prime reason for this deficiency could be traced to the second Kandyan Rebellion, which took place in 1848, which, for the second time in thirty years,⁷⁷ caused a souring of the relationship between the British Administration and the Kandyan people. By 1848, the economic boom on the Island was on the wane. The falling of coffee prices, as a result of sharp competition from Javanese and Brazilian coffee plantations, forced the British Administration to pause and re-assess its contributions to education.⁷⁸ This resulted in the appointment of a Committee in 1848 to study the ways and means by which government could reduce expenditure on native education on the Island. The recommendations made by this Committee came to be known as the 'Tennent Plan for Education'.⁷⁹

The author of this Plan was Sir James Tennent, the then Colonial Secretary on the Island and the plan devised was to run the existing system of education "on a reduced scale of expense but with greater efficiency."⁸⁰ The Plan, therefore, left a greater margin for the use of external support, which inevitably came from missionary sources. By 1860, even the vernacular schools which the government had succeeded in keeping within the secular educational stream, became absorbed into the missionary educational enterprise, thus leaving the whole field of education in the care and control of the various missionary organisations on the Island. The missionary programme for education was guided by the resolutions adopted at a conference of missionaries⁸¹ held in South India, in 1858. The missionaries there resolved that the taking over of vernacular education, both in India and in Ceylon, were essential elements in their programme for uplifting the whole mass of natives towards christianity.⁸² The offer of vernacular education made by the government was considered as an important development in their programme, and the missions accordingly accepted this gift, with gratitude to the almighty. The result, therefore, was a classic polarisation of the two competing contenders for the spiritual emancipation of the natives of Ceylon - the Christians and the Buddhists. Behind these protagonists stood their supporters of whom the Tamils and the Sinhalese were to fight the final battles after independence.

The second Schools Commission of 1841 began to show signs of aging by 1865. It was beginning to be accused of "factionalism, sectarianism and denominational bias".⁸³ Therefore, on the 14th October, 1865, as a result of a motion approved in the Legislative Council,⁸⁴ a Commission of Enquiry was appointed, and

its report,⁸⁵ clearly found that the second Education Commission, had outlived its usefulness.⁸⁶ Accordingly, in 1869, the Commission was dissolved and the government appointed a single officer, who was also made the head of a government department and thereby made responsible to the Governor, to run the educational system for Ceylon.⁸⁷ After a careful analysis of the attitude of the British Administration towards education after 1869, Jayaweera concluded:

"In theory, the State and not the missionaries was in control of the provision of educational facilities; the latter seemingly had no hand in the shaping of a policy; and secular instruction was given priority over religious instruction. In practice, however, since the state found mission schools not only economical but also indispensable it gave them as much encouragement and as little interference as possible. It even withdrew its schools from areas whose needs were adequately supplied by missionary educational institutions."⁸⁸

In support of these conclusions, Jayaweera quotes from official sources⁸⁹ that, while government schools had increased from 64 in 1869 to 474 in 1897, the mission schools receiving aid had jumped from 21 in 1869 to 1172 by 1897. He finds⁹⁰ that "in 1880 there were only 4 aided Buddhist schools in receipt of a grant of Rs. 53,270. compared with 805 schools run by Christian communities with a government grant of Rs. 174,420."⁹¹ By 1873, the polarisation of the two religious communities had resulted in enmity and in that year the Protestants were drawn to a public debate with the Buddhist community. This debate, known as "the great Panadura debate,"⁹² helped to arouse the conscience of the Buddhists. The Ceylon Times reported

this debate, which attracted the attention of Colonel Henry Steele Olcott,⁹³ an American Civil War veteran. His arrival on the Island on May 15th, 1880, commenced a new chapter for Buddhism in Ceylon.⁹⁴ Joined later by Madam Blavatsky,⁹⁵ Olcott formed the first Buddhist organisation ever to be formed in Ceylon: the Buddhist Theosophical Society⁹⁶ (B.T.S.) in 1880. Under the banner of the B.T.S., the Buddhists managed to increase their aided schools from 4 in 1880 to 249 by 1915. The inspiration given by the B.T.S. resulted in a second organisation, primarily concerned with the propagation of Buddhism. That was the Young Men's Buddhist Association⁹⁷ of 1891.

Even by 1900, there were only 16 government schools in the English medium and 484 vernacular schools. The grant-aided mission schools for that year, however, were 142 in the English medium and 1186 in the vernacular.⁹⁸ The mission schools were teaching a little less than $\frac{2}{3}$ of the school-going population of the Island.⁹⁹ This by itself should provide no cause for complaint: after all, the missionary educational enterprise had a longer history than the Buddhist attempt. But what caused the greatest consternation among the Buddhists was that schooling in the missionary schools involved the subjection of all students to the religious instructions of the Christian denomination to which the school belonged. The Buddhists were, therefore, asking for the enactment of a 'conscience clause', as they feared that the influence of Christian religious instructions might lead to conversion of their children or at least in the dilution of their religious fervour for Buddhism. The traditional temple educators and their pirivenas were condemned. Even the Colebrooke-Cameron report refused to recognise them as educational¹⁰⁰ institutions and Sir James Tennent¹⁰¹ described temple education in this way:

"In their hands education was of the lowest description; and the priests themselves were but a stage in advance of their pupils." ¹⁰²

The openings ¹⁰³ promised in the Colebrooke-Cameron Commission were tied to an English education and, as such, the key to political and social power was held by the missionaries. The Buddhist, ¹⁰⁴ an organ of the Buddhist Theosophical Society, published in 1892 a complaint that:

"When Buddhist and Hindus establish schools of their own in their own centres and apply for grants-in-aid fulfilling the requirement ... the missions opposed with might and main and for the most part successfully, the registration of these schools." ¹⁰⁵

By 1903, the Buddhists had cut many inroads into the field of education, to the anger and dismay of the missionaries. The latter had begun to refer to the Buddhist schools, in their published annual reports, as "opposition schools". ¹⁰⁶ Even the government of the day was getting alarmed at the developing antagonism and, in the census report of 1901, ¹⁰⁷ it flatly declared that unless there was, on the Island, an education system which recognised the demands of nearly 85% of the population, ¹⁰⁸ the pandering to the needs of a 10% ¹⁰⁹ could lead to conflicts of alarming proportions. The almost complete monopoly over English education held by the Christian missionaries at the dawn of the present century, enabled them to produce a ruling elite, drawn mostly from families of a non-representative nature. For those who supported the missionary cause came either from the very upper crust of the native society, who were eager to reach the centres of political and social power, correctly and securely, or from the

under-privileged, usually of the lower castes, for whom the only way out of their miserable social cul-de-sac was to learn the language which could provide them with the means of escape. The large middle class was, therefore, left to ponder by the wayside, and this eventually formed the backbone of the Buddhist revivalist movement which was to usher in the changes that were conceived in the sixties and the seventies of this century. This isolation of those who were educated in English from the main stream of native society was largely responsible for the creation of a counter ideology against the denominational schools system. By 1906 sufficient influence was found among the Buddhist Sinhalese community, supported by the work of Sri Aramuga Navalar,¹¹⁰ the founder of the Hindu Saiva Paripalana Sabhai,¹¹¹ to force the government to enact a 'conscience clause'.

III (c) The Wace Commission: A new twist to Colonial Education

Emulating the partnership of local authorities in England¹¹² and experiments successfully carried out between 1861 and 1871 in India,¹¹³ the British policy towards vernacular education as from 1871 was concerned in drawing the Village Communities and other local bodies¹¹⁴ into a partnership with the British Administration in Ceylon. The Village Communities Ordinance, of 1871¹¹⁵ empowered the inhabitants of village communities "to make such rules as they may deem expedient", inter alia:

"For construction and repairing school rooms for the education of boys and girls, and for securing their attendance at school".¹¹⁶

In addition, by 1882, the government proposed an amendment to the Municipal Councils Ordinance,¹¹⁷ so as to facilitate the provision of necessary funds by these local government institutions "for the creation and repair of school buildings".¹¹⁸ The Administration's intention was to get the local government institutions to provide the physical facilities for the vernacular schools while the government, directly, from the taxpayers' money, would pay the school teachers their salaries.¹¹⁹ The collapse of the coffee plantations due to leaf diseases in 1880 forced the government to freeze the education budget, by 1882.¹²⁰ It was, however, pointed out by Mr. P. Ramanathan from inside the Legislative Council¹²¹ and by the Catholic Church, on behalf of the missionaries, from outside¹²² that this would place an intolerable burden upon the taxpayer, who in any case was generally quite poor. In its memorandum the Catholic Church, however, failed to hide its selfish motives. The memorandum read:

" ... it would tax the supporters of denominational schools who were already paying for the educational facilities provided in their schools and which would finance a non-Christian education to which his co-religionists had conscientious objections." ¹²³

The missionary influence in the formulation of the government policy appears ultimately to have prevailed. The Ordinance which finally emerged in 1884¹²⁴ merely empowered the local government institutions to run the existing schools, but gave them no power to levy a special education tax on the inhabitants. Except for the Kandy municipality and the Muslim efforts in Puttlam, government schools shut one by one, either to be re-opened as mission schools or to be merely abandoned.¹²⁵ The Galle Central School was taken over

by the Bishop of Colombo and was re-opened as the "All Saints English School".¹²⁶ The Galle Girls School was re-opened by the Wesleyans.¹²⁷ The schools in Badulla and Gampola were shared between the Church Missionary Society and the Wesleyans.¹²⁸ It became a field day for the missions, sharing the schools that had remained non-denominational until 1884. Dr. Swarna Jayaweera commenting on these activities wrote:

"The government closed its English schools (other than Royal College, the Agricultural School and the Railway Night School) on the 31st December, 1884, and the Puttlam schools alone were opened by the local school board in January, 1885. ... Ultimately, after 1884 neither the central government nor the local government bodies retained any connection with the provincial English Schools. The missionaries were quick to seize the opportunities and many of these schools were finally handed over to these agencies."¹²⁹

In the budget for the financial year of 1900-1901, the Governor Sir West Ridgeway had set apart Rs. 869,837. as compared to Rs. 474,387 in 1890.¹³⁰ The lion's share of this money, naturally, went towards the financing of denominational schools. Those who had either embraced Christianity or those who had preferred to run the risk of their children being either converted or made into 'bad Buddhists',¹³¹ found the denominational schools acceptable. The majority either received no education or sent their children to Temple schools with little or no hope of engaging in any kind of economic advancement within the framework¹³² set by the Colonial Administration in Ceylon. The agitation mounted by the combined efforts of the Sinhala-Buddhists and the Tamil-Hindu communities had an impact on the British Administration in Ceylon. On the 18th October, 1900, the Governor proposed¹³³ a new start towards a

new policy of Government participation in education which resulted in the establishment of the Wace Commission, in 1904. The Commission primarily observed that three-fourths of the school going population between the age of 6-15 years stayed at home. The Commission identified two reasons for this. First, the insufficiency of schools in the traditional Buddhist and Hindu areas. Second, the fear harboured by the parents of conversion of their children into Christianity. In the light of the fact that the education vote on the Island was steadily rising,¹³⁴ the Commissioner found that good education was being given to a minority while no education was available to the majority.

In 1905, the Commissioners¹³⁵ reported to the government proposing a number of important changes:

- (1) The Commissioners recommended compulsory education to those between the years of 6 and 15 years of age, and
- (2) They considered it absolutely essential that some protection be given to the Buddhists by enacting a 'conscience clause'.
- (3) Village Committees created under the Village Communities Ordinance of 1871 should be designated as District School Committees.
- (4) Where there were no Village Committees, the Commissioners suggested that District School Committees be created, corresponding to the District which had been carved out as administrative units for the Island.
- (5) As for finance, the Commission recommended that in place of a special education tax, $\frac{2}{3}$ of the Road Tax, which was a local tax, should be diverted for education.

III (c) (i) The First Recommendation of the Wace Commission: Financing Education

The first recommendation resulted in two significant pieces of legislation:

(a) The Town Schools Ordinance of 1906,¹³⁶ and

(b) The Rural Schools Ordinance of 1907.¹³⁷

(a) First, under the Ordinance of 1906¹³⁸ the Governor was authorized to vest a power upon local authorities by Proclamation:¹³⁹

" ... if they shall consider it expedient so to do, to make provision ... for the establishment and maintenance of one or more schools within the limits of their jurisdiction for the instruction of children in the vernacular languages." ¹⁴⁰

The Ordinance further empowered the local authorities to make by-laws regarding the education of children within their own communities.¹⁴¹ These by-laws inter alia, could make attendance at schools compulsory, for children of a specified age.¹⁴² Failure to see that their children attended¹⁴³ the schools provided under this Ordinance, made the parents liable to a fine,¹⁴⁴ unless they were able to establish that "other adequate and suitable" arrangements for their child's education had in fact been made.¹⁴⁵ The geographical area of operating the Ordinance of 1906 was tied to the areas demarcated by the Small Towns Sanitary Ordinance of 1892.¹⁴⁶ Under the latter Ordinance, by section 2, the Government could by proclamation bring any town or village mentioned in the schedule within the ambit of the¹⁴⁷ Ordinance. The schedule defines an extensive geographical area,¹⁴⁸ covered mostly by local Boards and Village Communities

and in four instances covered by the existing municipalities of Galle, Colombo, Kandy and Jaffna. Past experience of failures in the State education policy due to financial difficulties appear to have received no attention in the Wace Committee Report. The Ordinance of 1906 failed to provide any financial support to the local authorities which were called upon to run the vernacular schools. The Municipal Councils Ordinance of 1910¹⁴⁹ seemed a weak apology for this monumental omission on the part of the Colonial Administration. By section 45(1) of the Ordinance of 1910 the Government empowered the Municipalities to expend municipal funds for varying purposes including:

"(d) the maintenance of schools in accordance with the provisions of 'The Town Schools Ordinance, 1906'"¹⁵⁰

Unhappily, the municipal funds were not available to the various local authorities which were not Municipalities¹⁵¹ but which in effect carried the brunt of the task of providing vernacular education for the bulk of the population on the Island. By 1916, the local authorities were avoiding their responsibilities in a massive way. Their complaint was money. The Municipal Councils, except the one in Kandy, were avoiding their responsibilities upon the grounds that the available educational facilities for the vernacular stream were adequate and sufficient and, therefore, they were arguing that any extra schools opened and run by them could prove superfluous and therefore wasteful.¹⁵² Regarding this stance taken by the Municipal Council of Galle, the Government had found that there were in fact grossly inadequate facilities for vernacular education, outside the mission

schools, and therefore threatened to issue a writ of Mandamus against the Council. Responding to an opinion sought by the Government as to whether there were sufficient grounds for seeking a writ of Mandamus, the Attorney-General advised that such a step would prove fruitless because the Ordinance of 1906 was merely permissive, in that it created a Power coupled with a Privilege and not a Power coupled with a Duty to exercise it. The dead-lock thus created by the posture taken by the local authorities¹⁵³ necessitated the passing in 1916 of an Ordinance to amend 'The Town Schools Ordinance of 1906'.¹⁵⁴ This amendment empowered¹⁵⁵ the Government to take back those schools which were being abandoned¹⁵⁶ by the local authorities.¹⁵⁷ Many such schools were continued as vernacular schools, particularly in Colombo, while many ceased to function as schools and were lost to the nation.

(b) Second, under the Rural Schools Ordinance of 1907¹⁵⁸ a more viable arrangement than the one found under Ordinance of 1906 was established. Under the Ordinance of 1907 the government intended to provide education to 'Rural¹⁵⁹ and Planting¹⁶⁰ Districts' of the Island. For that purpose, 'every revenue district and every province which was not divided into revenue districts¹⁶¹ were, for the purposes of the Ordinance declared to be school districts. Further divisions were permitted in village communities where there were clearly marked 'headmen's districts'.¹⁶² This sub-division made administration of the schools possible without much difficulty. Each division or sub-division was given a District School Committee¹⁶³ comprising: the Government Agent or his Assistant as the Chairman,¹⁶⁴ a representative of the Director of Public Instruction or the Director himself,¹⁶⁵ one of the headmen nominated

by the Government Agent,¹⁶⁶ and one or more persons interested in education, from the District nominated by the Governor.¹⁶⁷ By section 10¹⁶⁸ of the Ordinance a fund for financing the schools of each district was created; a factor which was prominently absent from the Ordinance of 1906. The infra-structure thus provided gave the vernacular education enterprise of the government a significant head start. But as years went by, it was found, that the Wace Commission's recommendation that two-thirds of the Road Tax which in fact was a part of the revenues of the Local Bodies be allotted¹⁶⁹ for the schools under this Ordinance, was scaled down to one-third by the Ordinance and did not in any event exceed Rs. 115,000.¹⁷⁰ This proved to be grossly inadequate and the government was called upon to support these institutions in a substantial way. The government provided Rs. 50,000 (1917-1918), Rs. 75,000 (1918-1919), Rs. 200,000 (1919-1920) and the same sum again for the financial year 1920-1921.¹⁷¹ Suddenly, in 1921, there was a severe financial crisis and the government's contribution dropped, from Rs. 200,000 in 1920-1921 to Rs. 15,000 for the 1921-1922 financial year.¹⁷² That effectively ended the vernacular educational enterprise under the 1907 Ordinance. Both Ordinances quite clearly ended in frustrating the education and the future aspirations, both of the Sinhalese-Buddhist community and those of the Tamil-Hindus. Somehow the Tamil community seemed to have come to terms with the missionary educational enterprise more readily than did the Sinhalese Buddhists. For the Census Reports for the year 1921 show¹⁷³ that, while 8.5% of the Ceylon Tamils were literate in English, there were only 1.3% of the Kandyan Sinhalese who were literate in that language. The English literacy rate of the Tamils in fact had

overtaken even the English literacy rate of the low-country Sinhalese by 2.6%. The low-country Sinhalese with a large Christian population were claiming a mere 5.9% literacy rate in 1921, despite the abundance of English mission schools in the Maritime Provinces. The collapse of the particular educational programmes which commenced in 1906 and 1907 effectively left the missionary educators with an open field. The Government's refusal to finance the Island's education as a national service, rather than considering it as a localised responsibility, appears quite clearly as the cause for this great tragedy. Summing up the social consequences of this giant step backwards,

Dr. Swarna Jayaweera commented:

"The decision to hand over the English schools was also a development policy of restricting English education to a social elite which could pay for this privilege, and as the extract from the D.P.I.'S174 report indicates, it was unlikely that the Administration would expend its energies in fostering the interest of the local authorities in English Education".175

III (c) (ii) The Second Recommendation of the Wace Commission: The Conscience Clause.

The second recommendation of the Wace Commission was to protect the Sinhalese-Buddhists' children from being exposed to the proselytising influences of the Christian clergy. The Government accepted this recommendation and in the Ordinance of 1906 and 1907 it enacted a well-structured 'conscience clause' to carry it out. It must be said at the outset that the 'conscience clause' was limited to government vernacular schools, thus leaving the mission schools, both of the English and of the vernacular streams, unaffected by it.

Having said that, it must be emphasized, that the introduction of the 'conscience clause' in 1906 (and in 1907) served as a starting point for its extension into missionary schools in 1920.¹⁷⁶ Although the effect of the clause was clearly marginal within the framework of the 1906 and the 1907 Ordinances, its enlargement by later legislation¹⁷⁷ was to cause a profound change in the attitude thus far shown to English education by the majority - Sinhala Buddhists - on the Island. To this, reference will be made later, but the Clause itself requires some comment now.

The 'conscience clause' in the two Ordinances¹⁷⁸ were similarly drafted. In the Town Schools Ordinance of 1906, section 9(1) spelt out the prohibition in this way:

"No religious instruction shall be given in any school established under section 6¹⁷⁹ of this Ordinance."

By sub-section (2) of that section certain exceptions were formulated. Under those exceptions, government vernacular schools were empowered to provide religious instructions if to the satisfaction of the local authorities, the schools' managements had made adequate provision to ensure:

- "(a) That religious instruction is given only during the times specified in the school time table.
- (b) That religious instruction is not given to pupils of other denominations than that to which the school belongs, if their parents do object to the giving of such instructions.
- (c) That pupils who do not attend religious instruction are employed in other studies during the hours allotted to religious instruction;

- (d) That in the case of such pupils if their parents object to their being present in the room where religious instruction is given, are either allowed to study in some other part of the school premises during the hours when such instruction is given or their presence in the school during such hours is excused; and
- (e) That a copy of sub-section (2) of this section in the English, Sinhalese, and Tamil languages is conspicuously posted up in the school." 180

III (d) The Steps Towards the First Education Reform Act

Despite these carefully-worded protections, the Town Schools System and the Rural and Planting Communities Schools Systems, for reasons explained earlier, failed. The Controller of Census,¹⁸¹ in his report for the year 1911, lamented that 60% of the male population and 90% of the female population were still illiterate.¹⁸² A very large number of the illiterates hailed from the Kandyan provinces, therefore from among the Sinhala-Buddhists. Commenting further,¹⁸³ the Controller of Census wrote that education in other countries lead to religious controversies. In Ceylon the problem was not that, but competition, one denomination competing with another for the capture of the educational system, with a monopolistic desire for converting the natives into one or another of the Christian view-points. At the centre of this scramble was the colonial education system, which now began to receive the blame from every side. The Bridge Committee¹⁸⁴ of 1912, reporting on the English Secondary Schools, cautioned the government that it was 'time for the State to call a halt to the unplanned expansion of denominational schools' as that policy was 'highly detrimental to the efficiency and entirely prejudicial

to the economy' of the Island.¹⁸⁵ Even the missionaries were now beginning to search their conscience. They had realised that the educational policy, in the name of Christianity, had left a very large portion of the native population illiterate. Their only success was to create a small elite, growing gradually unaccustomed¹⁸⁶ to their own cultural heritage. The American mission, in 1905, perhaps stirred into action with developments in negro education in the United States,¹⁸⁷ expressed the view that:

"We shall never have thorough going steady progress until government takes absolute charge of the education of the children of this Island. Missionary bodies did in the earlier days serve a useful end in assisting government, but that time has quite gone by now. I am sure that the present grant-in-aid schools of our mission so far from being any real advantage are a great detriment."¹⁸⁸

The Wesleyan Synod¹⁸⁹ and the Anglican Mission¹⁹⁰ joined this new onslaught from an unexpected quarter, against the educational policy of the British Administration in Ceylon. The Buddhist, who had no more than 25 years of existence as an organised group, concerned with education,¹⁹¹ were struggling in 1915 to keep their 249 schools open.¹⁹² These were all grants-in-aid schools, being devoid of any financial sources outside the country to support them. The founding of the Buddhist Theosophical Society in 1880 opened the way for the establishment of a Sinhala-Buddhist lobby in support of their demands. This was followed by the establishment of The Maha Bodhi Society in 1891. Until 1906, the Buddhist revivalists lacked a media for expression and in that year, The Baudhaya was published as a weekly newspaper. This was followed by The Dinamina in 1907 which was published daily,

except on Sundays. A more radical Sinhalese nationalist newspaper, The Sinhala Jatiya was founded in 1910. The editor of that newspaper was Mr. Piyadasa Sirisena, a renowned author and a Sinhalese scholar, who managed to spark a new light through his writings¹⁹³ among the Buddhist Sinhalese on the Island. That newspaper developed later into a beacon for socio-political changes on the Island. Pressed from all sides, the Governor Sir William Manning, decided to overhaul the entire educational policy in 1920. While addressing a deputation of school managers, who had sought an interview with the Governor to protest the government's educational policy, Sir William said that: "Except in the case of such schools as those which had a majority of pupils of the particular denomination, it was the policy of the government gradually to replace denominational by government schools."¹⁹⁴ On the 20th November, 1919, the government placed the Education Bill before the Legislative Council. Although the Bill received the Governor's assent on the 19th February, 1920, its commencement was delayed until 1st January, 1924, due to unprecedented opposition which the government faced from the missionary societies on the Island. It is necessary to examine the structure and the contents of that Ordinance, before stating the objections raised by the missionaries against its implementation.

III (e) The Education Ordinance of 1920: Its Objectives and Provisions

The Ordinance¹⁹⁵ had six parts. Parts I and II provided an infra-structure upon which the implementation of the educational policy of the government would rest. By section 3 of the Ordinance a Department of Education presided over by a single Director of Education was established for the first time. The department was designated an organ of the government and the Director was designated a functionary of the government. Besides the Director, by section 4, other government servants were appointed to be its officers.¹⁹⁶ The Officers of the Department were made responsible directly to the Governor, to the exclusion of all others. By section 5, the Director was required to formulate regulations for approval by a Board of Education and to see that they were effectively implemented. The Director was further required, by the same section, to submit a report to the Governor, before the month of April in each year, reporting:

"On the state of every educational establishment supported or aided by public funds under the provisions of this Ordinance, and such report shall be printed and laid before the Legislative Council."¹⁹⁷

By section 6 a Board of Education was established which composed of:

"... not less than sixteen or more than twenty members nominated by the Governor, of whom the Director and the Assistant Director and two Unofficial (i.e. elected) members of the Legislative Council shall be four."

By section 7, it was clearly stated that the functions of the Board, "shall not be administrative or executive" but merely advisory. But by section 10, the Board was

empowered to make regulations which when adopted would result in what would be known as 'a code'. Section 10(1) described in seventeen sub-sections the areas in which the Board may make regulations, embracing every important aspect of education on the Island.

The principal objection to the provisions of the Ordinance was based on the fear that the Ordinance marked the commencement of an attempt to nationalise the denominational schools on the Island. In a pamphlet under the innocent banner of "The New Education Policy of the Ceylon Government"¹⁹⁸ the Roman Catholic Church expressed its fears of a possible violation of human rights. It said:

"... our right to Catholic schools, staffed by Catholic teachers under Catholic management, wherever the number of Catholics is sufficient to enable us to open such schools; and our right to such share in the funds of the colony which are set apart for education as the number of children attending our schools and the results obtained in the examinations held by government entitle us to are inalienable."¹⁹⁹

In fact, as it finally turned out, it was not the Christians who needed to fear, but the Buddhists. For, despite the fact that 60% of the population were Buddhists with 25% Hindus and 10% Christians,²⁰⁰ the Board which ultimately formulated the government's policy into 'a code',²⁰¹ had a very different representation. The first Board to be appointed under this Ordinance, composed of: one Hindu, one Muslim, three Buddhists and 15 Christians, including its four ex-officio members.²⁰² Soon after its constitution, the Board began to function both in an advisory capacity, and (by virtue of its responsibility for formulating an education code) in an extensive policy making capacity.

Part III of the Ordinance concerned the religious aspect. By section 13 it was declared that no student shall be refused admission into any assisted school, which necessarily includes the denominational schools (as they all receive grants-in-aid):

" ... on account of the religion, nationality, race, caste, or language of such applicant or of either of his parents".

By section 14, all religious instruction in every government school was prohibited unless it has been authorised by the Director of Education.

Section 15 contained a wide 'conscience clause'. Sub-section (1) of that section read:

"It shall not be required as a condition of any child being admitted into or continuing in an assisted school that he shall attend or abstain from attending any Sunday school or any place of religious worship, or that he shall attend any religious observance or any instruction in religious subjects in the school or elsewhere, from which observance or instruction he may be withdrawn by his parent or guardian, or that he shall attend the school on any day exclusively set apart for religious observance by the religious body to which the parent belongs." 203

The 'conscience clause' in the Ordinances of 1906 and 1907 did not affect the denominational schools. But the Conscience Clause²⁰⁴ of the 1920 Ordinance did. By sub-section (2) the Ordinance imposed a further limitation: it required denominational schools to limit their religious observances either to the first period of the day or to the last period of instruction; so that the scholars of other religions may either arrive late or leave early, thus avoiding their presence during the times at which religious instruction of another faith was being conducted. The same sub-section required

the schools to display prominently and at prominent places, the foregoing times so that it would be widely known at what times the scholars of a different faith should withdraw from the school, if their parents so wished. The Christian missionaries were united in their opposition to the 'conscience clause'. Not only the Catholics but every missionary agency opposed the 'conscience clause'. The Catholic based their opposition upon a broad argument based on fundamental human rights. Namely, the right to give a Christian education to all, equally, and without discrimination. The other Christian denominations based their opposition on the socio-religious effect on the native population. The Wesleyan Methodist Mission Society, articulated their objections in this way:

"This is a serious matter for all missionary societies working in Ceylon, for the policy is quite revolutionary. It will ultimately lead to a closing of a large number of our schools.²⁰⁵ Conditions have changed.²⁰⁶ Government has entered more largely into direct vernacular education and sets aside increasing grants for it. The villagers are no longer dependent on the missions for their schools as once they were. Hence the feeling of indebtedness to the missions is not so of being the sole benefactors of the people ... The main value of the mission village school today is that it gives us the opportunity of elementary Christian teaching on a large scale and so keeps active the leaven of Christian knowledge and ideas which have been so powerful an influence in the life of the people."²⁰⁷

Despite these protestations, the 'conscience clause' in this form passed into the 1939 Education Ordinance.²⁰⁸ But the opposition mounted by the Christian missionary societies succeeded in delaying the promulgation of the 1920 Ordinance for more than four years.²⁰⁹

Part IV of the Ordinance appears to have been fashioned out of the Ordinance of 1907, the Rural and the Plantation Districts Schools Ordinance.²¹⁰ Part IV in effect provides the basic infra-structure for the implementation of the Education Code and for the disbursement of the grants-in-aid, provided by the Department of Education. By section 17 Education Districts are carved out and section 18 creates Education District Committees to make by-laws, at the community level, for the implementation of the general educational policy formulated by the Board of Education.²¹¹ By section 27:

"Such moneys as may from time to time be granted by the Legislative Council from general revenue for the purpose shall be allocated by the Director amongst the Education District Committees."²¹²

The Education District Committee was required to act as a basic 'accounting unit' and as such was largely responsible for the efficient running of the schools in each area. The membership on the District Education Committees had to be not less than six and not more than eight. Two of the members were required to be nominated by the local authorities at the community level while the rest were nominated by the Governor. This necessarily meant that the Board of Education could, not in their rule-making capacity under section 10 but in their advisory capacity under section 7, exert a considerable influence over the composition of the District Educational Committees across the Island. It must be emphasised, that the composition of the Board, was therefore, an important concern for the Buddhists, who felt cheated by the allocation to them of three only out of the twenty places²¹³ recognised under the Ordinance. In Part V, the

Ordinance re-enacted those provisions from the 1907 Ordinance, which were central to the provisions of education to Estate Schools. Part VI of the Ordinance was concerned with matters of general concern, such as 'powers of inspection',²¹⁴ jurisdiction in respect of offences committed under the by-laws²¹⁵ and the powers of the magistrates to enquire into them.²¹⁶ The central issue for the Sinhala-Buddhists was the fact that Christians who comprised 10% of the population, had yet again ascended to a position of power and therefore appeared to control the destinies of the 60% Buddhists on the Island. Summing up this increasing hostility between the two religious groups, Jayaweera²¹⁷ wrote:

"The cry in the country gradually tended to be Buddhist schools for Buddhist children and Hindu schools for the Tamils. The Christian missionary was no longer met by an apathetic indifference but by mounting hostility. Efforts were made to associate the national spirit with the old national faiths and loyalty to the ancestral religion was proclaimed necessary to true patriotism, conversion was declared an act of treachery".²¹⁸

IV. The Education Bill of 1939: Aftermath of the Donoughmore Reforms.

The Education Ordinance of 1920 came into force under a cloud of suspicion and uncertainty. Governor Manning, who piloted the Bill through the Legislative Council was also concerned with having his proposals for constitutional reforms considered by that same assembly, in 1923. The Manning Reforms,²¹⁹ passed by the Legislative Council on the eve of the Promulgation of the Education Ordinance in 1924, were totally rejected by the Sinhala majority. In rejecting those reforms, the Sinhalese, who were to an extent divided along religious

lines²²⁰ visa-vis the Education Bill, closed their ranks, against a common enemy, the British Administration. What angered the Sinhalese people most was the fact that Tamils who comprised of 12% of the population, were given 8 reserved seats in the Legislative Council while the Sinhala majority who formed 68% were left with sixteen seats.²²¹ Besides this tacit irritant, the Manning Reforms created a special communal (Tamil) seat in Colombo to represent a Tamil speaking population of 24,600, while ignoring the 51,000 Moors and Indians living there.²²² The government's failure to allocate a special communal (Sinhalese) seat for the 27,000 Sinhalese living in the Eastern Province created an unprecedented hostility against the Tamil population throughout the Island.²²³ Pushed to a posture of political hostility from two sides, the Sinhala-Buddhists mobilised themselves, virtually against three fronts - the missionaries, the Tamils and the British. In this mood, the Sinhalese as a group met the Donoughmore Commission in 1928, to express their concerns. The Commission, with a Fabian socialist bias,²²⁴ considered the Sinhalese demands with understanding. While correcting some of the tendencies shown in the Manning Reforms, the Donoughmore Commission recommended a novel form of Government based on a Committee system. It recommended the replacement of the Legislative Council by an elected State Council and the formation of Executive Committees out of its members. Each of these Committees were made responsible for executing the policies of the government as departments of State performing ministerial functions.²²⁵ So, on the 9th of July, 1931, the Executive Committee on Education was constituted under the Donoughmore Constitution.²²⁶ By 1933 the State Council had realised

some of the inequities of the education system and decided to divest the Board of Education of its rule-making powers and invest them on the Executive Committee for Education which in fact was now a representative body. The totally unrepresentative nature of the Board of Education by this time had become a source of embarrassment for the government and therefore a motion in the following form was introduced in 1933:

"That in view of the rights and powers enjoyed by the Executive Committee of Education, this House is of opinion that Ordinance No. 1 of 1920 should be so amended as to divest the present Board of Education of its rule making power." ²²⁷

Although the Board of Education was subjected to almost Island-wide condemnation, the supporters of the denominational schools system mounted a massive campaign to maintain the composition and the powers of the Board intact. Despite the substantial points of demerit the Board had accumulated over the years, the changes envisaged in the motion of 1933 were effectively delayed until 1939. Understandably, the Christians and the Tamils had benefited from the system which had prevailed under the Ordinance of 1920 and therefore it was in their interest to strive towards maintaining it. It was found that in one year the Board had granted Rs. 1,283,000. for the schools in Jaffna, while the rest of the Island, containing nearly 70% of the total population, had received only Rs. 257,000.²²⁸ During the course of the years, the Board had been responsible for maintaining an uneven policy of affording opportunities for schooling across the Island. In the Northern Province: 1 school per 45 students was provided,

while in the Southern Province it was 1 in 130. In Uva it was 1 in 300, in Sabaragamuwa 1 in 600, in the North Western Province 1 in 400, in the Central Province 1 in 100 and in the Eastern Province 1 in 213. It was only in the Western Province where the capital of Colombo was situated that the ratio was 1 in 50.²²⁹ While the Northern Province was the bastion of Tamil culture and the homeland of the Tamil people, Uva, Sabaragamuwa and the Southern Provinces were the strongholds of the Buddhists and the Sinhalese people of the Island. The main opposition came from the Roman Catholics and, as a last desperate bid to delay the transfer of power from the Board of Education to the Executive Committee on Education, the opponents of this measure moved a motion in 1938 to table the Bill until a Commission of enquiry had an opportunity to investigate and report to the government on the possible effect of this change on education. That motion was defeated with 33 against and 13 in support of the motion²³⁰ to table. The Bill was thereafter passed and received the Governor's assent on July 18th, 1939. As a concession to the fears expressed by the denominational schools, the rule-making power of the Executive Committee was excluded from such regulations as those which: "... shall be made under this section in pursuance of any policy aimed against any particular assisted denominational school(s) ...".²³¹ By section 6 of the Ordinance²³² the powers of the Board were strictly circumscribed and were limited to the giving of advice to the Director of Education. Under section 3(1) of the Ordinance, the duties of the Department of Education were to execute the provisions of the Ordinance within a framework provided by the Executive Committee. For, under section 32 (1), it was the responsibility of the Executive Committee (and not the Board as previously²³³ ordained) to make Regulations, thus constituting an

'Education Code' for the Island. The central issue which differentiates the 1920 Ordinance from the 1939 Ordinance is that, while the rule-making power and the financial control on Education was held by an unrepresentative body - the Board of Education - under the former, the latter leaves these two key elements in the hands of a group of elected representatives of the people. This presented a major breakthrough for the majority group.

V. The 1947 Ordinance

Although the Bill²³⁴ became Law in 1939, the clamour for a Commission of Enquiry continued to gain momentum. The Minister of Education²³⁵ at the time (a Sinhalese patriot, an Oriental Scholar, a Buddhist and a skilled politician) informed the State Council on April 14th, 1940 that a Commission of Enquiry under his Chairmanship would be appointed.²³⁶ He named twenty-three members for the Commission, including all the members of the Executive Committee on Education. The mandate given to the Committee was to 'investigate the defects in the present education system and recommend measures of reform necessitated by the changed conditions in the country.'²³⁷ Certain sections of the public complained that the very participation of the Executive Committee on the Commission was a prelude to staging a massive cover-up of the errors and omissions of the Administration.²³⁸ The Commission's answer was that, on the contrary, the Executive Committee was there to answer charges and, with their "intimate knowledge of the problems of educational policy and administration, could greatly help in directing the investigations along useful channels."²³⁹ In 1943, the Commission reported

by a majority in favour of maintaining the dual system with the government schools system under direct State control and the denominational system under missionary control existing side by side.²⁴⁰ To many,²⁴¹ the decision to maintain the status-quo-ante, came as no surprise. In commenting on the dual system of education, generally, Dr. Swarna Jayaweera wrote:

"Antagonism was openly manifested, but the political and economic needs of colonial rule ensured that the dual system could not be dislodged from its eminence in the educational field while the social values inculcated over decades of education guaranteed it the support of the local elite. Educational institutions were also structured to function as instruments of colonial policy but consumer demand often exerted new pressures for expansion at secondary and higher level during this period. A dualistic structure of schools based on linguistic differentiation had been created by nineteenth century policies directed towards creating a small western-oriented elite. The same objectives as well as the social dynamics of prestigious educational institutions led to the perpetuation of this dualism in the first half of the twentieth century."²⁴²

The 1947 Ordinance,²⁴³ which resulted from this report on education, made no attempt to consider the social dimensions of the developing communal and religious conflicts on the Island. In a sense the 1947 Ordinance may have played a part in heightening the frustrations of the Sinhala-Buddhists on the Island. By section 3 the assisted schools were given the right, perhaps for the first time, to refuse admission to a pupil, on the grounds that "there are no facilities at the school for teaching him in the medium of the language through which ... he is required to be taught". This provided a splendid escape route to shut out students from rural

families whose knowledge of the English language was poor or who did not speak the language with the ease and confidence of those who spoke 'the English of the Colombo schools'. This section provided a classic recipe for social stratification. The future contest was not merely between the vernacular-educated and the Anglo-vernacular group, but between two factions drawn from among the Anglo-vernacular group. This type of social distillation inevitably led to the formation of a small but powerful group of elitists, from which the future political leaders of the country were drawn. The substantial danger to this small but powerful group of elitists came from the fact that, as each day passed the majority opposing them tended to grow in numbers - pushing the elite group into a cocoon of isolation. It was this isolationism which the English-educated elites enjoyed during the first eight years of independence - until the passage of the Official Language Act in 1956.²⁴⁴ The profound void which separated them from the rest became un-bridgable without cutting away the base of their support. That, indeed, was the monopoly which the elite had over the English language, a matter which will be examined in a later chapter. Returning again to the Ordinance of 1947, while central control over the affairs of the denominational schools were strengthened²⁴⁵ and expanded,²⁴⁶ the Ordinance scaled down the former 'conscience clause'.²⁴⁷ These, however, were not the key issues. The fact that the Ordinance, in particular, preserved the link between elitism and education became the central argument for the abolishing of denominational schools²⁴⁸ and the declaration of Sinhala as the Official Language of an Independent Ceylon. Less than a year after the passage of the Ordinance of 1947, which was merely intended to amend the Education Ordinance of 1939, Ceylon became Independent.

VI. Social Stratification and Elite Formation:
A Product of the Colonial Education Policy

The success of the colonial policy on education must be measured with reference to the developmental goals pursued by succeeding Colonial Administrations, at least since the conquest of Kandy in 1815. The need to create a class of local representatives of the Colonial Government, with a commitment to upholding British traditions and a Judeo-Christian culture, was found to be a necessary element in the European approach to colonialism. The obvious result of this approach was the creation of an elite, which could be sufficiently powerful politically without being in any way representative of the native population, while at the same time having the ability to command the obedience of the masses by their very proximity to the centre of power. It was recognised that such an elite could expect little or no acceptance or respect from the masses and would be a vulnerable class if the proper legal desiderata for their survival was not left behind by a departing colonial regime. It is in this sense that the entrenched clauses²⁴⁹ of the Soulbury Constitution of 1948 become meaningful. While reserving an examination of those clauses for a later chapter, it is necessary to examine the formation of the elite in Ceylon at the point of Independence, in 1948. Elite formation in any society is related to a particular type of infra-structure which throws up a class which forms the elite at the level of its supra-structure. The relationship of the elite to the bulk of the society rests on the simple relationship of the elite and the bulk to some specific source, particularised by its availability to the elite and its denial to the bulk.

The social conflicts at the level of the infra-structure of the society results in the identification and the isolation of a group 'that comes out on top' with the rest being arranged along a graduated social scale in terms of their class relationship to the source of political power, at the supra-structure level.²⁵⁰ The particular social conflicts could be one of a series at the infra-structure level. It could be a conflict of economic interests - between the 'haves' and the 'have-nots'.²⁵¹ It could be a conflict of social, political and caste interests as it was under the Kandyan Kings²⁵² - between the Nobility and the 'others' arranged along a vertical stream of stratification dipping down to the Rodiyas.²⁵³ In some, it could be religious.²⁵⁴ But in Ceylon, at the time of Independence, it was principally education which caused the social conflicts at the 'infra-structure level'.

Other conflicts, such as 'economic', 'social' and 'religious', were pushed to the local levels creating a local or an 'intermediate elite'.²⁵⁵ 'Anglo-vernacular' vs. 'vernacular' education created a generalised conflict which involved the whole society at the infra-structural level of the nation, resulting in a small but powerful national elite at the supra-structure. Their source of power was 'political power' which was considered to be more potent than the 'economic power' which the intermediate elite wielded. The latter were subordinated to the former. It is the elite of the former category which inherited political power from the British government in 1948 and for eight years, thereafter, until 1956, remained protected by the laws and legal institutions which were left behind by the departing British Administration. It is against this back-drop that some of the changes associated with language become meaningful. While reserving the problems associated with the language

change until the next chapter the steps taken by the Government of Ceylon in 1960 to terminate the denominational system of education will be examined here. That would appear as a necessary prelude to language change, which was primarily conceived as a means towards negating the 'language conflicts' lingering in the infra-structure level of the Ceylonese society at the point of Independence, and from being continued thereafter. The Official Language Act of 1956²⁵⁶ merely ordained that the official language of the Island shall hereinafter be Sinhala,²⁵⁷ but left the implementation of that legislation to be worked out through Regulations,²⁵⁸ to be promulgated by the ministers, subject to parliamentary control. These matters require detailed treatment later, but it is important to mention here that the participation of the institutions engaged in educating the nation were regarded by the Government as an indispensable element for the success of the language change. Remembering the fact that English remained the key to power at Independence, one finds that while 4.1% of the total population were able to speak Sinhala and English, 2.2% of the population were able to speak Tamil and English.²⁵⁹ When these figures are superimposed against a population distribution of 70% Sinhalese to 11% Tamil,²⁶⁰ the higher rate of English literacy among the Tamil Community become evident. This factor had an impact on the contribution of each community to the resulting elite formation at the point of Independence. It is also significant to note that, while 8.1% of the people of Jaffna spoke Tamil and English, only 9.85%²⁶¹ of the Sinhalese in Colombo spoke English. The significance of these figures is that Jaffna with a population of about one quarter of that of Colombo and which was predominantly Tamil had nearly an equal percentage of

English educated persons among them, as Colombo had. No other city on the Island had that kind of advantage. When these figures are viewed against the national averages for English literacy of the two communities - namely 4.1% Sinhala and English proficiency and 2.2% Tamil and English proficiency²⁶² a clear picture of the extent to which the Tamil community had contributed, disproportionately, to the composition of the national elite at Independence, become clear. The figures further indicate the way the language conflict had become transferred into a communal conflict, between the Sinhala and the Tamil speaking people on the Island.

The success of the Missionary enterprise in using English education as an instrument for conversion may be gauged from other data provided by the 1946 census report. According to that report, there were 121,333 Ceylon Tamil Christians, as against 362,957 Sinhalese Christians.²⁶³ The Sinhalese Christians to the number of Tamil Christians was, therefore, of the ratio 3:1. The communal ratio, however, was 4,622,507 Sinhalese to 733,731 Ceylon Tamils; a ratio of 6:1. These figures seemed to indicate that the missionary educators since their first appearance on the Island during the first quarter of the nineteenth century have had twice as much success among the Tamil speaking people than among the Sinhalese. Directly proportionate to the success of the missionaries in their ministrations and conversion had been their success in educating the Tamil speaking people in the use of English as a second language. This knowledge of English was a key factor in the elite formation at the supra-structure of the Ceylonese society at Independence. Their disproportionate representation at the elitist level, therefore, became closely associated with the missionary

enterprise in educating the Tamil community. This made the argument in favour of abolishing denominational schools, which were considered as an impediment to the effective implementation of the language change from English to Sinhala increasingly attractive. The cudgel against the missionary schools and the English language was taken principally by the Sinhalese Buddhists, of whom the majority were rural based. It was found that 78.4% of the rural population were Buddhists as against 52.2% of the urban population who were Buddhists.²⁶⁴ The total percentage of Buddhists amounted to 66.7% of the population while 9.4% were Christians and 18.2% were Hindus.²⁶⁵ When these figures are considered against the fact that 58.9%²⁶⁶ of the total population spoke exclusively Sinhala, the rising tide of the 'Sinhala only' lobby seemed truly formidable. The result, therefore, was the forging of a Sinhala-Buddhist axis against a Tamil-Christian compact, initially, and later developing it into a direct communal confrontation between the Sinhalese and the Tamils in a wholistic manner. An important element in this discussion is the fact that the Christian interest in providing a sound English education to the rural Sinhalese appeared to be minimal. Therefore, by 1960, nearly four years after the passage of the Official Language Act, certain denominational schools in large towns, such as Colombo, Galle, Kandy and Jaffna were defying the avowed language policy of the Government and were in fact continuing to educate their pupils in the English medium.²⁶⁷ To a large measure this scheme of events was a result of an antagonistic posture taken by the denominational schools against the Official Language Act of 1956.²⁶⁸ This final confrontation

with the State, in a long series of confrontations of which mention has previously been made, gave rise to the passage of The Assisted Schools and Training Colleges (Special Provisions) Act of 1960,²⁶⁹ hereinafter referred to as the Act of 1960.

VII. Nationalisation of Schools.

By section 2 of the Act of 1960 its Provisions were made applicable to every Assisted School on the Island. In denominational terms it applied to all religious schools - Muslim, Hindu, Christian and Buddhist - which were within the grants-in-aid scheme. By section 3, the Minister of Education was empowered to declare the Director of Education as the Manager of any Assisted School. By a proviso to that section, the authorities in charge of any school were empowered to decide to opt out of the grant-in-aid system and remain as an unaided school. But when such a choice was made by section 11(b) of the Act,²⁷⁰ the school authorities must abide "by the Provisions of this Act and by Regulations and Orders made thereunder and abide by any ... written law applicable in the case of such school". A failure to observe section 11(b), enabled the Minister to acquire that school and vest it in the Director of Education as its new Manager. Several sections²⁷¹ of the Act provided for the holding of a poll to determine the views of the parents and of the teachers as to whether they wished to opt out of the grants-in-aid scheme and remain an unaided school. Elaborating extensively the responsibilities of a proprietor of an unaided school in section 6 of the Act, the Government clearly bound the unaided schools securely to its policy on education, and extended the same provisions to the aided schools after nationalisation, by installing the Director of Education as the new Manager of such schools. The Director, being a Government

functionary was responsible to the Minister of Education and finally to Parliament. By section 6(a) of the Act a proprietor of any unaided school was required to "educate and train the pupils in such school in accordance with the general educational policy of the Government". Recognising the fact that denominational education was at an end, the Catholic church took active steps to oppose the implementation of the Act.²⁷⁴ The Church expressed the fear that the Government might under section 6(a) make the teaching of Buddhism to all pupils compulsory, which in their minds would be totally unacceptable. They pointed out the danger they faced under sub-section (g) of section 6, where specific regulations aimed at specific schools could be made, requiring the proprietors of those schools to carry out such directives. Section 6(g) read:

"The proprietors of unaided schools shall comply with the provisions of any written law applicable to such school and matters relating to education.

Section 14 empowered the Minister to make Regulations:

"(i) in respect of any matter for which Regulations are authorized or required to be made by this Act, and (ii) for the purpose of carrying out or giving effect to the principles and provisions of this Act."

By section 15, the contravention of this Act or the failure to "comply with any provision of the Act or of any Order or Regulation made thereunder shall [constitute] an offence," punishable by imprisonment "of either description for a term of three months with or without a fine not exceeding five hundred rupees". The fact that imprisonment was made a fixed ingredient in the penalty shows the importance which the Government attached to, what came to be known as the "nationalisation of Schools" Act²⁷³ of 1960.

The opposition at the political level was conducted by persons professing the Catholic faith by seizing and occupying some of the Catholic schools on the Island. This was done for at least two reasons. First, it was thought that such a move could deter the Government from taking the schools over, by installing Government appointees as Managers to operate the schools on behalf of the Director of Education. Second, it was hoped that their extra-legal moves could focus national and international attention on their opposition to the Act. An ugly situation of a very definite danger to the harmony of the two leading communities on the Island was averted by the timely arrival of the late Valarian Cardinal Gracias at the behest of the late Pope, Paul VI. By being able to assure the Roman Catholic community that the Government intended merely to implement the language change and never to take over religious instructions, the late Cardinal Gracias successfully persuaded²⁷⁴ the Roman Catholic community to hand over the schools in question to the Government under section 3 of the Act. Although this eventual settlement helped to avoid a serious religious conflict on the Island, the Government passed, during the height of the school occupancy, The Assisted Schools and Training Colleges (Supplementary Provision) Act of 1961,²⁷⁵ hereinafter referred to as the Act of 1961. The two Acts became law within a period of four months.²⁷⁶ The Act of 1961 was intended to reinforce the provisions of the Act of 1960. During the school occupancy the Government investigated several methods to evict the occupants of the Catholic schools but as the buildings and the premises upon which they stood were church property, the Government was advised that they lacked the power to evict them. Therefore, by section 3 of the

1961 Act, the Minister was empowered to issue a notice declaring that certain property do vest in the Crown as being required "for the purpose of conducting and maintaining a school". Provided that the procedure enumerated under section 4 was carried out while making that declaration, the property was deemed to vest in the Crown without more. The Crown was absolved by section 11 from paying compensation for the loss of such property. Once a notice was issued to the owners of such property and such notice was published in the Gazette, the Director may authorise any person to go upon the property and it was declared by section 3(2):

"(a) if that property is movable property, enter any land or building in which such property is kept and examine and take an inventory of such property; or (b) if that property consists of any land, building, or other structure and demarcate and set out the boundaries thereof."

By section 26 of the Act of 1961, the Minister was empowered to formulate Regulations concerning a number of areas. Apart from implementing the Act and the principles there contained, the Minister was authorised by Regulations to amend the schedules to the Act and:

"for the determination of any question, or the resolution of any doubts, which may arise as to any right, title or interest, in or over any property which is the subject of a Divesting Order." 277

By section 27, contravention or breach of this Act and Regulations made thereunder was made punishable by a term of imprisonment of six months of either description with or without a fine not exceeding five hundred rupees. Realising the difficulty in bringing the Catholic church, among other missionary institutions within the definition 'of a person' who can be imprisoned, as distinct from

being punished by a fine, section 28 was drafted to threaten the individual members of the clergy with imprisonment. Fortunately, the need to enforce penalties under this Act never arose. Other Christian missions followed the line taken by the Catholic Church and peaceably permitted the Director of Education to assume control of their schools. The only significant change was that the Government required the denominational schools to abandon the English medium of instruction and adopt the Sinhala medium and, wherever necessary, the Tamil medium of instruction, under the Tamil Language (Special Provision) Act of 1958.²⁷⁸ The attempt to nationalise the Assisted Schools, and thereby to snuff out the denominational educational enterprise totally, did not pass without challenge. The two Acts²⁷⁹ together were intended to perform three separate functions. First, by section six²⁸⁰ of the Act of 1960, the unaided schools were required to follow policy laid down by the Government on education. This section was clearly central to the implementation of the language policy of the government. Second, a breach of section six enabled the Minister of Education to transform the status of an unaided school into one of Director-managed. This is tantamount to making it a Government Assisted School controlled and governed by the Minister of Education. This was under section 11²⁸¹ of the Act of 1960. In Vadamaradchy Hindu Educational Society Ltd. v. The Minister of Education²⁸² (hereinafter referred to as the Hindu School Case) the dispute centered around the relationship between the first and the second functions chartered by the Government. The third function was to ensure 'that the Minister could take physical possession of the schools' and this was stated in sections 3 and 4 of the Act of 1961.

Section 3 dealt with a procedural requirement to give notice that the Minister intended to take over certain property "for the purpose of conducting and maintaining a school". The notice that was required was in the form of a Gazette Notification. Distinct from section 3, and under section 4, of the Act of 1961 it was declared that:

"Where the Minister considers it desirable so to do, the Minister may, by order published in the Gazette (in this Act referred to as a Vesting Order) declare that, with effect from such date as shall be specified in the order (not being a date earlier than fourteen days after the date of such publication), all property of the description specified in the Order, being property liable to vesting, shall vest in the Crown."²⁸³

In The Board of Trustees of Maradana Mosque v. Minister of Education²⁸⁴ the inter-relationship between the two Acts was called into question. In each decision the Courts held against the Minister of Education, while pointing out a serious error in the way the two Acts were being used to achieve the three specific goals adumbrated above. As they were the only two disputes²⁸⁵ ever to reach the courts under the two Acts,²⁸⁶ they merit further examination.

In the Hindu School Case, the petitioner, an Educational Society, was informed by letter dated 11th January, 1961, that the Minister had reason to believe that section six of the Act of 1960 had been violated. The Minister enumerated five areas of contravention:

- (1) The school hostel had been closed down;
- (2) the post-primary school latrines had been demolished;
- (3) the school play ground had been converted into a timber depot and;
- (4) a section of the Primary School building which housed the Handicraft Laboratory had been fenced off.

All these matters constituted a

violation of section 6(b) of the Act of 1960; because all these facilities, the Minister pointed out, were available to the pupils at all times before 21st July, 1960.²⁸⁷ Under section 6(b) all proprietors of unaided schools were required:

" ... to continue to maintain all such facilities and services as were maintained by such schools on the day immediately preceeding the 21st day of July, 1960." ²⁸⁸

The Minister required the petitioner to show cause on or before the 25th January, 1961 as to why an Order under section 11(b)²⁸⁹ should not be issued. The petitioner by a letter dated 23rd January wrote, requesting an 'on the spot enquiry' if the Director was not satisfied with the explanations given in his letter. By way of an explanation the petitioner wrote, as the Court later observed:

"That the hostel had been closed in December, but had re-opened when the new term commenced in January, some latrines had been demolished by the owner of the land on which they had stood, but new latrines were being provided and would be ready very soon; the former playground on leased land had been taken back by its owner, but a new playground had been provided in anticipation some years before; the former handicraft laboratory was being put to a different purpose, but the laboratory was now housed in a new building." ²⁹⁰

Notwithstanding the foregoing explanation, by letter dated 26th January 1961, three days later, the Director of Education informed the Principal of the school that the Minister of Education had ordered that the school be taken over for Director-management with effect from 1st February, 1961, under section 11(b) of the Act. By the present proceedings, the petitioner sought a writ of Certiorari from the Supreme Court, to have the Minister's Order quashed. It is relevant to say that

these events were a result of a complaint addressed by some teachers who had been discontinued by the petitioner in December of the previous year. It appears that, a letter addressed to the Director of Education, by a group of teachers on the 30th December, 1960, had resulted in having their former school nationalised in less than six weeks. This was also the period during which the opposition to the schools take-over was at its zenith, moving the government steadily towards the enactment of Act No. 8 of 1961, during the month of March. that year. Without casting any doubts on the merits of the case submitted by the teachers in their letter, against the petitioner, it is important to state that the two Acts were open to considerable abuse. This particularly merited the closest scrutiny on the Minister's part, before being driven to exercise his powers under the Act.

The Supreme Court after an elaborate exposition of the nature of the Minister's power under section 11(b), ruled that a mere breach of section 6 did not per se enable him to exercise that power under section 11. The power granted by section 11, was found to be a 'quasi-judicial' power, and therefore the nexus between sections 6 and 11 was the holding of at least a 'quasi-judicial' enquiry to 'satisfy'²⁹¹ himself that there has been a breach of section 6 warranting the transformation of an unaided school into one of 'Director-administrated' under the Act. The fact that the petitioner had submitted an explanation for the complaint levelled against him required the holding of an enquiry, in such a way that the requirements of 'natural justice', as defined and applied by the Privy Council in The University of Ceylon v. Fernando,²⁹² were observed.²⁹³ The failure to do so made

the Order issued under section 11(b) null and void. While issuing the writ of Certiorari, Fernando, C.J., wrote:

"The society had in its letter of 23rd January twice requested the Director to hold an inquiry on the spot into the matters complained of.²⁹⁴ ... When the petitioner in the present case explained to the Director, as he virtually did, 'these buildings and facilities are in fact existing and available, come and see for yourself or send someone to see', would not an inspection on the spot have been the only just means of affording a 'fair opportunity' to the petitioner?"²⁹⁵

As it were²⁹⁶ to close this gap, the Legislature, in section 4 of the 1961 Act, set up a procedure which the Minister was to adopt while issuing an order to vest the school property in the Crown. But this procedure did not include the holding of an enquiry. The Act of 1961 was not intended only to alter the status of a school, but to alter the status²⁹⁷ and cause the vesting²⁹⁸ of the school's property in the Crown. In the Maradana Mosque Case,²⁹⁹ Zahira College was owned by the Board of Trustees of the Maradana Mosque. In the summer of 1961 the school, as distinct from the Board, ran into financial difficulties and a majority of the teaching staff remained unpaid with respect to their July salaries until after the 10th of August. That constituted a violation of section 6(i)³⁰⁰ of the Act of 1960. On the 11th August, 1961, the Minister received two letters from a group of teachers complaining of this fact. On the same day the Director of Education informed the appellants that there was a violation of 6(i) and required the appellants to show cause before 18th August, 1961, as to why Zahira College should not be taken over for Director-management "in terms of the Special Provisions Act No. 8 of 1961."³⁰¹

The Director's order avoided any mention of section 11(b)³⁰² of the Act No. 5 of 1960 under which the Hindu Schools Case was brought. The appellants replied on the 15th August that there had been a misunderstanding between the Board and the College and thereby the salaries of some of the teachers had not been paid before August 10th; but this had now been rectified and that the salaries would be paid before August 18th. In fact salaries were tendered before the 18th August but the teachers refused to accept payment at that time. The Privy Council nonetheless considered 'tender as payment' by that date.³⁰³ As for the ability to "satisfy the Director",³⁰⁴ the Board offered to show their books. Notwithstanding these guarantees, and notwithstanding a shared³⁰⁵ ethnic and religious identity between the Board and the Minister, by a letter dated 21st August, 1961, the Minister informed the President of the Executive Committee of the Board, and also the Manager of the school, that Zahira College would become Director-managed from that very day. As representations began to come in, the Minister in a Broadcast to the Nation explained his decision to 'take-over' Zahira College. A printed copy of that statement issued by the Ministry of Education was considered by the Privy Council³⁰⁶ as the basis for establishing that the Minister had mistakenly believed that he could without more 'take-over' the administration of a school under Act No. 8 of 1961 the moment any one of the twelve conditions³⁰⁷ laid down in section 6 of the Act of 1961 was broken by an unaided school. The 'Director-managed' status of Zahira College was challenged before the Supreme Court³⁰⁸ of Ceylon. The Board of Trustees sought a writ of Certiorari against

the Minister to have his decision quashed. The Supreme Court refused the application on the grounds that the Minister's decision under Act No. 8 of 1961 was not the exercise of a quasi-judicial power but of a ministerial or executive power, which cannot be the subject of judicial review. Herat, J., explained the distinction in the following way:

"The result of what I have read makes me come to the conclusion that the essence of a 'judicial act' is where the law predicates an enquiry by the judicial process before the reaching of the conclusion which results in the act. On the other hand, an 'executive act' is done by a process where the law predicates no prior judicial process before the arrival of a mental decision preceding the act. The exercise of judgment is not the test." 309

Taking a homely example, Herat, J., explained:

"For instance an Administrator has to decide on which of two plots of land, A or B, a housing scheme is to be erected. Before he decides to build in plot A rather than on plot B, he will consider many factors and undoubtedly exercise his powers of judgment - but his decision in favour of plot A and not in favour of plot B is not a judicial act. The law does not require him to go through the judicial process." 310

Herat, J., therefore, concluded that so long as the Minister was acting intra vires the Act, which he was undoubtedly doing, there could not be a review³¹¹ of his ministerial act. Herat, J., added:

"It is trite law that remedy by way of Certiorari only lies to question and quash a judicial act. It does not lie to question or quash a ministerial or executive act, even if done illegally. Such an act, even if illegal or ultra vires, must be canvassed by a different procedure." 312

The Board appealed against that decision to the Privy Council. Allowing the appeal,³¹³ the Privy Council expressly held that a decision to take over a school under section 11(b)³¹⁴ of the 1960 Act, and a decision to vest the school's property in the Crown under section 4³¹⁵ of the 1961 Act, were both functions requiring the due observance of Natural Justice.

Lord Pearce wrote:

"With all respect to the learned Judge, it is not correct to regard the Minister's act as purely ministerial. It was not contested below nor before their Lordships that the Minister was acting in a judicial or quasi judicial capacity in satisfying himself whether there had been a contravention. And until he was so satisfied he had no jurisdiction to make the order. He must, therefore, in satisfying himself on that point observe the rules of natural justice. He must give the appellants notice of what was charged against them and allow them to make representations in answer." 316

Relying on the report issued by the Minister of Information³¹⁷ on the Minister's view³¹⁸ of his rights under the two Acts, the Privy Council concluded that it was clear that the Minister had misconceived his rights and therefore directed the Supreme Court of Ceylon to issue the writ of Certiorari prayed for.

VIII. Conclusions

The Maradana Mosque decision³¹⁹ by itself raised no cause for comment. Lord Pearce's judgment was in line with what the Privy Council had said once before in Nakkuda Ali v. Jayartne.³²⁰ Where the dispute in question is characterised as one involving a judicial or a quasi-judicial activity, then the requirement to observe the maxim audi alteram partem becomes imperative. But where, as it was said in Nakkuda Ali's case, that the act was neither judicial nor quasi-judicial, then the dispute is not amenable to review by the courts. Lord Radcliffe made that distinction abundantly clear in the following passage:

"It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analagous to the judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he acts under this Regulation. If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of Certiorari."³²¹

The distinction made by the Privy Council in Nakkuda Ali's case became a useful method for successive administrations on the Island to protect governmental acts from judicial review by casting them outside the area of judicial and quasi-judicial acts. The Maradana Mosque decision was based on the supposition that there it was a judicial or a quasi-judicial act. The failure to comply with the requirements of natural justice, therefore, resulted in the issuance of the writ of Certiorari against the Minister of Education.

Several months after the Privy Council had delivered their opinion in The Maradana Mosque case, the Board had Durayappah v. Fernando,³²² yet another Appeal from Ceylon, before them. The Municipal Council of Jaffna had been dissolved by the Minister of Local Government. This was done under s. 277 of the Municipal Council Ordinance. Under that section, the Minister was empowered to dissolve a local government body if it appeared to him, "that a Municipal Council is not competent to perform, or persistently makes default in the performance of, any duty or duties imposed upon it ...". The Minister, before having the Municipal Council dissolved, did not provide the Council an opportunity to make representations in support of the view taken by the Council that it should not be dissolved. Durayappah, who was the Mayor at the time commenced these proceedings seeking Certiorari to quash the Minister's order and for an interim injunction restraining the new appointees from replacing the functions of the Municipality. The Privy Council held that the failure to provide an opportunity to make representations constituted a violation of natural justice - the maxim audi alteram partem had not been observed and therefore the ministerial order was 'voidable'. But the Board found that the failure of the Council to take steps to have that order rescinded while the Council was still a legal person, deprived the appellant from a right to seek Certiorari on its own behalf or on behalf of the non-existing Council.

The decision raises two issues of some significance. First, it suggests that in disputes where there has been a violation of natural justice, the act done or the Order issued by the authority in question becomes 'voidable' and not 'void'. This distinction had arisen out of the

speeches of their Lordships in the House of Lords in Ridge v. Baldwin.³²³ There, while Lords Evershed,³²⁴ Morris³²⁵ and Devlin³²⁶ had declared a power exercised in violation of natural justice to be 'voidable', Lords Reid³²⁷ and Hodson³²⁸ had considered such a power to be 'void'. As Van den Heever, J., had once said with reference to the distinction between 'void' and 'voidable' that an attempt to sort that distinction would be like an attempt by "blind men looking in a dark room for a black cat which wasn't there".³²⁹ The difficulties perceived by this kind of distinction has been noted by some commentators.³³⁰ Professor Wade who is one of them had concluded that:

"The Courts interfere with administrative action on two grounds only: that it is ultra vires (void); and that it shows error on the face of the record (voidable). Action which is quashed on grounds not appearing on the face of the record (such as mistake as a "jurisdictional" subject-matter or procedural error or abuse of discretion) must therefore be ultra vires and void."³³¹

This type of distinction helps the Courts in its choice of remedies. The view that the Act or the Order of the Minister is 'voidable' provides the Court with a basis inter alia for protecting the rights acquired during the interim period and to order the applicant to seek alternative relief.³³² This aspect of the judgment in Ridge v. Baldwin has been incorporated into the Law of Sri Lanka through the Durayappah decision

The second aspect of the Durayappah case concerns the dichotomy between judicial and quasi-judicial acts and Ministerial acts which determine whether or not Certiorari would lie. This was an inheritance from Nakkuda Ali's case. Some time before Durayappah was

decided by the Privy Council, the House of Lords had decided in Ridge v. Baldwin that the courts have an inherent power to strike down any act or order which had been done or issued in violation of 'natural justice'. This the House of Lords thought was available within the writ of Certiorari whether or not the act or order was ministerial or judicial or quasi-judicial. Lord Reid commenting on Nakkuda Ali's case wrote:

"This House is not bound by decisions of the Privy Council, and for my own part nothing short of a decision of this House directly in point would induce me to accept the position that, although an enactment expressly requires an official to have reasonable grounds for his decision, our Law is so defective that a subject cannot bring up such a decision for a review however seriously he may be affected and however obvious it may be that the official acted in breach of his statutory obligation." 333

During the course of his advice, in Durayappah v. Fernando, Lord UpJohn, in the Privy Council, alluded to this wider basis upon which judicial review was made available by Lord Reid in Ridge v. Baldwin. First, having rejected the idea that judicial review was limited to any particular category of acts or orders, Lord UpJohn said:

"These various formulae are introductory of the matter to be considered and are given little guidance upon the question of audi alteram partem. The statute can make itself clear upon this point and if it does cadit quaestio. If it does not then the principle stated by Byles J., in Cooper v. Wandsworth Board of Works³³⁴ must be applied. He said: 'a long course of decisions, beginning with Dr. Bentley's case,³³⁵ and ending with some very recent cases, establish, that, although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.'" 336

The thrust of the Privy Council decision, therefore, was to broaden the rule in Nakkuda Ali.³³⁷ To that extent the Durayappah decision brings the law of Sri Lanka into line with Ridge v. Baldwin. The effect on such decisions as The Maradana Mosque Case, now, is to make it unnecessary for the courts as Herat, J.³³⁸ did, to characterise the power as one which would in its exercise involve a judicial or a quasi-judicial act. It would now suffice if the courts would keep in mind three matters when considering whether there should be an observance of the maxim audi alteram partem so as to satisfy the requirements of 'natural justice'. These three matters are as follows:

"First, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of application of the principle can properly be determined."³³⁹

The Durayappah decision should to a large extent subject the activities of the state to the scrutiny of the Courts. In Sri Lanka, where Governments have, to a significant extent asserted powers which are by statute declared to be beyond scrutiny, by the Courts, it is somewhat reassuring that in areas where by a statute the State had failed to protect itself from the Courts' scrutiny, Courts can now enquire into both the Ministerial acts and judicial or quasi-judicial acts done or orders issued by the State. This power of review is determined principally under the three guidelines stated above leaving the types or categories of acts and orders which may become subject to this kind of scrutiny somewhat open-ended and undefined.³⁴⁰

The thrust of the Durayappah case was to limit the State's power to legitimise policy through the vehicle of the law. To the extent to which the State may use the law to blend policy with expediency, the Durayappah decision adds a much needed proviso; namely that this process of blending policy with expediency requires to be carried out in consultation with the people who comprises the society and who may have been the catalyst for that policy. In this curious way law in fact occupies "the interface between policy and implementation."³⁴¹ Implementation involves a process of blending policy with social change as an element in a strategy for development. This aspect of the study shall receive a deeper analysis at a later stage. It is necessary, however, to complete these conclusions by examining the second component of the equation - the social change - that had resulted out of the colonial education policy, the first component being the laws and legal institutions which were available to the State for the purposes of legitimising its policy. The progress of the various educational policies for Sri Lanka since the beginning of the 19th Century had resulted in the formation of a particular type of society which was best suited for a colonial type of Administration. With the advent of Independence the people's demand for increased popular participation in the creation of the new society which was promised, was found to be impeded principally with a language barrier resulting in a very definite gap between a small powerful elite at the centre of political power and a large powerless mass at the periphery. It is this factor which compelled the legislature to breakdown the language barrier, so that popular participation of the masses became possible. The language change³⁴² must, therefore, be viewed, as the commencement of a particular type of social movement, progressively moving towards the creation of a new society with new social dimensions; admittedly creating a new and a different type of elite in its own particular way. It is not difficult to assume that the change from

dependence to independence, must, if that is to be meaningful, bring about an attitudinal change internalising the political and legal changes which Independence brings about. This attitudinal change must necessarily alter the social dimensions from being manipulated from without to being controlled from within. It is this that calls for the need to facilitate popular participation after an era of 'agency rule'. Commencing from the colonial Governor right down to the most menial Government functionary, the role they play as an 'agent' of a source of unrepresentative power located outside, is a necessary hallmark of 'agency rule'. The de-stabilisation of this paradigm initially, and its replacement ultimately by a paradigm drawing in the masses from the periphery of the society and towards the centre of political power, may be considered as a meaningful element in the movement of any colonial society towards Independence. In some societies this process could commence at a point earlier in time than the actual date of legal Independence. The Dominion of Canada,³⁴³ New Zealand³⁴⁴ and Australia³⁴⁵ may be typical examples. For, by the time the Statute of Westminster³⁴⁶ re-defined and re-established their relationship with the Westminster Parliament, in 1931, these countries have had some considerable time to de-stabilise the initial 'agency-rule' model in favour of developing an internal system model of government. In Ceylon, however, the point of Independence, in 1948, marked the commencement of the process of de-stabilisation of the colonial model of 'agency-rule'. The principal road block which the Island experienced during the early years of Independence, was the language barrier, separating the masses on the periphery from a small but powerful elite at the centre of political power.

In this context the first eight years of Independence could be considered as wasted years for development and change; for by maintaining the barriers which separated the nation the resulting 'agency rule' of Government appears to have persisted. Like the colonial Administration, the Governments of Ceylon between 1948-1956 were compelled to carry out an 'agency-rule' model. By 1956, it was recognised that a break from this model was necessary and to do so it was necessary to change the language of administration from English to Sinhala. The choice of 'Sinhala' as the official language was determined by the fact that nearly 70 percent of the population spoke that language. It was believed that such a change would render the 'agency-model' redundant. It was also believed that the demotion of English to a tertiary if not secondary role could, by the passage of time, alter the social formations and elitism which had come down from colonial times. The General Elections of 1956 were fought on the language issue and the victory of the Sri Lanka Freedom Party which formed the Government as a result, had a firm commitment to change the Island's language of administration from English to Sinhala. The next chapter will deal with this event.

CHAPTER 4

Language and Development

I. An Introduction

Although views recently expressed¹ have traced the sources for the language problem into the 15th Century, the immediate causes for the problem could be found four centuries later, in the 19th Century.² Two distinct but inter-dependent sources of discontent could be readily identified as the principal reasons for the language problem; namely education and religion. Each of these have previously been discussed³ within the context of the British Colonial policy towards them. By abandoning education to the missionary enterprise⁴ and by their attitude towards Buddhism,⁵ the religion of a very significant majority of the native population on the Island, the British Administration in Ceylon had set in motion a process which inevitably resulted in the polarisation of the religious forces on the Island. The fact that the missionary enterprise had resulted in the formation of a small national elite, whose ideological and intellectual framework was carved out of Christianity, Western civilization and a pro-British political policy, eventually resulted in generating its own opposition. This opposition came from a massive pro-nationalist, Sinhala educated, Buddhist, group which in time became more and more determined to neutralise the strength of their adversaries. As a culmination of this process of interplay of opposing forces, the Government in 1956, enacted the Official Languages Act of that year. Various stages of this

conflict were marked by such temporary measures as the several Education⁶ and Buddhist Temporalities Acts⁷ which spanned the 19th and 20th Centuries leading ultimately to the declaration of Sinhala in 1956 as the only Official Language for the Island.

As an event that is central to the Language question in Ceylon was the grant of Independence, in 1948, as an end product of a process of de-colonisation. That event becomes important because the method employed for de-colonisation of Ceylon did not involve a change of the socio-political institutions on the Island. This unchanged nature of the socio-political organisations of the Ceylonese society required the retention of a legal system and a legal tradition which had evolved through over one and a half centuries of British rule. This was necessary because the laws and legal institutions in 1948 stood in complete harmony with the socio-political compact which the Island had inherited from British rule. Further, the Soulbury Constitution which served as a Grundnorm at Independence legitimised these laws and the legal institutions upon which the stability of the Ceylonese society at the time was based. To make this stability a lasting event, the Soulbury Constitution⁸ carried a certain number of entrenched clauses⁹ concerning certain vital areas of this socio-political compact. These entrenched clauses, as later events¹⁰ were to discover, were apparently meant to be unalterable under the Constitution. This apparent immutability by any future society was found by the Privy Council to have been necessary because they:

" ... represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and these are therefore unalterable under the Constitution."

11

The granting of Independence was not, therefore, meant to be considered as a point of departure from the social, economic, political or the legal organisations which had served to sustain colonial rule. By 1956, eight years after Independence, the Ceylonese society, however, had radically changed. An important basic assumption that appeared to have undergone a change by 1956 was the assumption that English should be considered as the Official Language of the Island. There was no preceding law that had declared the English language to be the Official Language of the Island. Particularly, after the Colebrooke-Cameron recommendations of 1833, where a knowledge of English was declared to be a pre-requisite for native employment in Government,¹² it was assumed that English would be the medium of Administration. In 1895, in Cornelius v. Uluwitike,¹³ the Supreme Court declared that English had always been the language of the courts, but gave no authority for that statement. Therefore, when enacting the Official Language Act, in 1956,¹⁴ the Government did not find it necessary to repeal a preceding enactment to declare 'Sinhala' the official language. The Act merely declared for the first time an Official Language for Ceylon; and that was to be 'Sinhala'. The 1956 Act was merely an instance where the Government had utilised the instruments of law to legitimise a particular change of policy within the framework of society. The later enactments, such as the Act passed to nationalise denominational schools,¹⁵ the reasonable use of Tamil Act¹⁶ and the Language of the Courts Act¹⁷ were several instances where the State considered it appropriate to regulate the ensuing social changes in the light of Government policy. This aspect of the role which the legal system plays, is vital to development.

II. Towards a Change in Ceylon's Official Language

(a) Language as an Instrument of Colonisation.

Inherent in every human society is an ability for change and growth. Its own social momentum may to a large extent determine the direction and the speed of its change. In that sense there will exist a particular relationship between the internalised forces for social change and the speed of that change. The former may be induced by external stimuli - such as colonisation or modernisation imposed from outside - or by the very processes for social change generated by the members of a given society. It is correct to say that the application of external stimuli of one sort or another could transform a given society suddenly and swiftly from one form into another. The transformation of the Ceylonese society through the missionary enterprise was limited to a narrow segment of the society and as such had left a large mass of non-English educated persons behind. This had resulted in absorbing only a small number of persons characterised by education in the English medium to constitute the political centre, while leaving a large mass of vernacular educated persons on the periphery. The former, therefore, remained trapped at the centre forming a new national elite. Embalmed by an over-layer of rules supported by the legal system, the new elite consequently formed the centre of both the legal and the political power of the society after Independence. The identification of such a national elite must now be pursued, using different criteria derived from the assumptions peculiar to the instrumentalities utilised to achieve that change. These criteria may be many and varied. Education, religious affiliations, caste affiliations, cultural adaptations, economic power and political affiliations may in one

form or another contribute to the many assumptions peculiar to the instruments of change. For Sri Lanka, English education, clearly, was one of the main criteria to which the formation of the new elite may be linked. Of the external stimuli, colonisation is not to be regarded as a normal or as a necessary stage in the development of human societies. But, as most of the present Third World countries have, at some stage in their social evolution, been subject to colonisation, the principal external stimulus considered as one being instrumental in modernising a Third World society is the de-colonisation process. Although social change is a continuing process, commencing from the very beginnings of social organisation, account must be taken of its effect at the point of a Nation's re-entry into Statehood, as an end product of colonialism. It is this that makes the de-colonisation process relevant to the nature and the character of the social change; namely the nature and the character of the society that results out of it. This must surely explain the differences between the modern societies of Vietnam, Mozambique, Guinea-Bissau and Angola; and those of Canada, Australia, New Zealand and of India. Similar to the broad anatomical regions of a human body - the Head, Chest, Abdomen and the Limbs - a human society is characterised principally by four regions of development. These are the cultural or ethnic level, the political level, the legal level of social organisation and the economic level. The de-colonising process entails changes, in varying degrees of sophistication, at those four levels of an emergent society. The de-colonisation process will, therefore, determine the extent to which the changes shall occur at these four levels of social organisations and that in turn should condition the nature of the post-colonial society which the country would inherit. Broadly, there appears to be two models for de-colonisation.

II (a)(i) The First Model of De-colonisation:¹⁸
A Recipe for Conservatism

In a very general sense, this model for de-colonisation represents a constitutional process leading to Independence. The end result would be the enactment of an Act of Independence, forming the Grundnorm for a newly Independent State. The Act of Independence which forms the new source of political and legal power for the now Independent former colony, will be recognised as the basis for the validity of the laws of that territory. Therefore, the Independent legal system must effectively conform to the Act of Independence. As for Sri Lanka, the Act of Independence embodied the ideological and the societal commitments of the elite which occupied the centre of political and legislative power of the land in 1948. The Constitution of 1948 merely provided the juridical framework for transforming policy into law. In this first model for de-colonisation, therefore, it is important to emphasise that the changes at each of the four levels of social organisation become minimal and, in this sense, Australia, Canada, India, Ceylon and a number of Third World countries illustrate this fact; namely, that the changes at the cultural, economic, political and legal levels of the newly Independent society remained much the same as they were during the colonial period. The changes brought about by Independence for them, were merely superficial and in no way could be characterised as being radical. In a transformation executed within a given constitutional framework, the Constitution itself could limit the extent to which that transformation was legally permissible. The limits placed by the legal system through carefully worded entrenched clauses may not coincide with political expediency or with social needs. Therefore, within the first model for de-colonisation any change becomes a part

of a controlled, predetermined and deliberate constitutional process. The constitutionality, both of the process and of the end result, becomes the principal determinant of social change. Experience predicates that it will be in the interest of the elite that assumes political and legislative power at the point of Independence to have some tangible legal guarantees: that most of the ideological underpinnings of the society to which they belonged shall be safeguarded, and indeed preserved despite the change of the territory from a Colony to Independence. It is in this sense that Lord Pearce's much quoted dictum in Ranasinghe v. Bribery Commissioner¹⁹ becomes meaningful. While commenting on the entrenched clauses of the Ceylon Constitution of 1948, the Learned Law Lord after referring to the voting and legislative powers contained in sections 18 and 29 said:

"There follows (b), (c) and (d), (of section 29), which set out further entrenched religious and racial matters, which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and these are therefore unalterable under the Constitution."²⁰

While the changes at the four levels of social organisation become slight and often obscure, the present model for de-colonisation maintains the pre-independence relationship between the national elite and the mass of the people forming a native proletariat. As for Ceylon, this relationship between the centre of power and the periphery, was largely dependent upon the question of literacy in the English language.

As suggested earlier, once the Anglo-vernacular educated elite were placed at the centre of political power it became important that the criteria which identified them for that position received legal protection. This criteria being English education, it was thought necessary to provide some tangible constitutional guarantees towards maintaining the English language as the Official Language of Ceylon even after Independence. The relationship between elitism and education is a common phenomena in former colonial territories. Commenting on this association of elitism to education in a Third World society in Africa, Miller²¹ wrote:

" ... Education remains the pathway to elite status, which in turn is usually followed by employment in government, the nature of the educational system of Africa will play a large role in determining whether the elite will solidify their position by becoming a ruling class. Education itself tends to set an individual apart, especially in a predominantly illiterate society. To acquire education is also to be re-socialised into a modern Western Orientation in which achievement, universal, rational criteria tend to displace ascriptive, particular and traditional norms." ²²

In the Ceylonese context, therefore, the key to social transformation was the language change. But section 29(2)(b) and (c), to which Lord Pearce makes reference,²³ raised an effective legal impediment to enforcing a language change by legislation. It is necessary to note that section 29 of the Constitution contains the aforementioned entrenched provisions. Sub-sections (b) and (c) of that section restrict the making of laws which would:

"(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or

(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions ..."²⁴

It could be argued that a language switch-over, making Sinhala the only official language, would constitute a breach of the foregoing sub-sections. At least it was so argued with success at first instance in Kodeswaran v. The Attorney-General.²⁵ These matters will be dealt with at a later point in this chapter. It is sufficient to state here that changes within the first model for de-colonisation must be constitutional, for such changes to be legal and therefore valid. When this limitation is associated with the fact that the Constitution itself happens to be a law conceived by a national elite at the centre of power; it becomes obvious that this model for de-colonisation affords a limited area for effective social change. In addition, the fact that the national elite in question was a product of the colonial heritage, having evolved through a period of nearly one and a half centuries, this must suggest that the aims and purposes of the new Constitution may have been to conserve the socio-economic and political infra-structure of the colonial past, rather than to provide the constitutional means for social change. The first model for de-colonisation, therefore, provides for the perpetuation of the post-colonial institutions which hinder change, rather than being catalysts for change and movement along new social pathways.

II.(a)(ii) The Second Model: Means for Radical Change²⁶

When considering the second model for de-colonisation one detects a clear distinction here from the first model, both in the method and in the result obtained. The basic difference here is that the de-colonisation process does not follow any defined juridical pathways. Independence as an end-result of colonialism is not obtained under the present model through a method within the contemplation of the law but by a process outside it. The legality of Independence thus achieved is not found on a preceding document but on a preceding fact, such as a victorious war of national liberation. Underlying the success of a war of national liberation is popular participation upon a mass scale. In stages, the progress towards victory becomes dependent upon mass support. The language of the masses becomes the language of the movement. The march is from the periphery towards the centre of power. The success of this process of de-colonisation is achieved when the centre of power of the colonial period collapses and becomes merged with the periphery, which comprises of the native proletariat during the post-liberation period. The total success of a national liberation movement is marked by the establishment of a new system of civil administration backed by a new system of laws. The policies, principles and goals of such a system of laws are formulated and derived from the ideological commitments of the national liberation movement. Coupled with the necessity to base such a movement upon the ideology of the masses for its own success, the ideological underpinnings of the resulting legal system become largely traceable to the popular views of the masses.

Thus a harmony is struck between the source of law, together with all its varying appurtenances and the masses who are called upon to observe it. Obedience to the law becomes a social commitment. In contrast, the policies, the principles and the goals of a legal system inherited from the colonial power under our first model, may be derived largely from colonial institutions. Therefore, the congruence required for its effective enforcement may well be lacking.

Besides re-structuring the legal system of the new social organisation along ideological lines shared with the masses, the changes at the cultural, political and economic levels of the new social unit too, will be differently conceived to what one finds under the first model. It is, however, important to distinguish a national liberation movement from a coup d'etat. A principal difference between the two lie in the fact that while a coup d'etat may lack popular participation national liberation movement as a rule thrives on mass support. A coup d'etat often changes the Head of State and the highest level of government, while in a national liberation movement the changes are directed towards a total integration of the masses at every level of social change. Describing a typical coup, one writer said:

"It is relatively easy to stage a coup in most African countries. The capture of the Radio Station, the occupation of the centre of the national communications network, and a few key arrests are usually sufficient to paralyse any counter-moves. Untrained in the use of weapons and lacking in arms anyway, the people are mere spectators who cannot intervene in any meaningful way. Hence a group of officers can simply decide with minimum preparations to seize the government as redress for whatever grievances they may harbour, without bothering their heads too much on how the people will react. If government leaders have had a rough night or have been careless and have slept with both eyes shut, the group succeeds. It has sometimes been that easy." 27

This second model for de-colonisation does not include a coup d'etat. It is limited to a change brought about by a national liberation movement as an manifestation of a mass movement.

Ceylon's Independence fell under the first model for de-colonisation. The initial difficulty perceived in any attempt to bring about radical social changes was the Independence Constitution of 1948, and the entrenched clauses therein. In a later chapter the political input in the enactment of the Constitution of 1972 will be explored. The validity of that Constitution was based upon a political fact rather than upon a preceding Act. As the Kodeswaran Case²⁸ will show, had the 1972 Constitution not been enacted, the possibility would have remained that the Official Language Act of 1956 might well have been declared unconstitutional. That would undoubtedly have led to socio-political problems of a considerable magnitude. The point must, therefore, be made, again, that section 29(2)(b) and (c)²⁹ of the Independence Constitution appear to have been designed to preserve the status quo ante of the national elite, intact. Considering the pluralist society which Ceylon is, and the political fragmentations kept together with shaky alliances, in 1946, in 1948 and thereafter, it would have been inconceivable that any government could have obtained the $\frac{2}{3}$ majority to make a constitutional amendment out of a language change. This is aside from the fact that, in the opinion of the Privy Council, section 29 as a whole was "unalterable under the Constitution". It is, therefore, important to view the Ceylonese path to social change as a possible alternative to both models for de-colonisation. Having first obtained Independence as an end result of de-colonisation through constitutional means, the people of

Ceylon proceeded to generate a new Constitution in 1972, resting its validity upon the well known doctrine of autochthony.³⁰ The making of the 1972 Constitution will be described in a later chapter. It must, however, be emphasised that autochthony in some respects resembles this second model for de-colonisation, namely it strives towards drawing in the masses from the periphery, into the whole process of constitution making.

II (b) The Language Legislation

The policy considerations which made the language change necessary, must be first explained by way of a statistical analysis. Such an explanation must take into consideration the racial composition of the population and its relevance to English education in Sri Lanka. This should provide a useful back drop to a discussion of the social consequences of the Language legislation

TABLE I³¹

The Proportion of Sinhalese and Tamils who were able to speak the English Language in 1953.

Total Population of the two races ³²	Persons who could speak English from each race ³³	Percentage of Persons who could speak English
Sinhalese: 5,616,705 Tamil: 884,703	307,570 146,549	5.5% 16.6%

- Note:
1. The communal proportion between the Sinhalese and the Tamils was 85% Sinhalese to 11% Tamil.
 2. It is noted that 233,567 persons³⁴ could speak all three languages; namely Sinhala, English and Tamil. Taking the extreme assumption that this group of persons could be divided into Sinhalese and Tamils according to their respective numbers in the population, 198,531, more Sinhalese and 35,036 more Tamils could be considered as being able to speak English. Adding these estimates to the figures in Table I, Table II is constructed.

TABLE II

Total Population of the two races	Persons who could speak English from each race	Percentage of Persons who could speak English
Sinhalese: 5,616,705 Tamil: 884,703	506,101 181,585	9.0% 20.5%

- Note:
1. The population of the Tamil speaking people in these figures is limited to the Ceylon Tamils, thus excluding the Indian Tamil speaking people from these calculations.
 2. Such an exclusion is justified upon the grounds that, the Indian Tamils being considered 'Stateless' at the time in question (in 1953) their participation in the Government and in the administration of Sri Lanka was denied to them. From their ranks, due to a clear lack of any formal education, no contribution was made to the formation of the national elite.
 3. However, if the 974,098³⁵ Indian Tamils were taken into consideration then the figures in Table III would become relevant.

TABLE III

Total Population of the two races	Persons who could speak English from each race	Percentage of Persons who could speak English
Sinhalese: 5,616,705 Tamil: 1,858,801 (Indian Tamils + Ceylon Tamils)	506,101 181,585	9.0% 9.7%

- Note: 1. The communal proportion between the Sinhalese and Tamils, taking the Indian Tamils into consideration, in 1953, was 66 $\frac{2}{3}$ % Sinhalese is to 33 $\frac{1}{3}$ % Tamil.
2. But the percentage of English education holds a 0.7% increase in favour of the Tamil population, notwithstanding the fact that they are, in numbers, $\frac{1}{3}$ that of the Sinhalese people.

The foregoing statistics merely indicate the complexity of the economic issues underlying the language problem. In simplistic terms while 506,101 Sinhalese speaking persons out of 5,616,705 were employable by the Government and in the professions, over 5 million Sinhalese remained on the periphery of the society in 1953. As for the Tamils there were 181,585 English speaking persons available for professional and other government employment out of a total Ceylon Tamil Population of 884,703. Although the Government had, for obvious political reasons, stopped reporting the ethnic composition in Government, para-government and professional employments, the above figures indicate the contribution made by each ethnic group to the elite formation at the supra-structure of the Ceylonese society by the time the 1956 General Elections were held.

At Independence, on 4th February 1948, the political skills of the first Prime Minister, Mr. D. S. Senanayake, succeeded in attracting the somewhat outspoken leader of the Tamil Congress Mr. G. G. Ponnambalam, Q.C., into the Cabinet. At the time, Mr. Ponnambalam was considered as one who could represent the whole of the Tamil masses in the country. Therefore, his acceptance of a ministerial appointment was regarded as a step towards bringing the two communities together. However, this apparent point of amity lasted for no more than a few months after Independence. On the 21st of September, 1948, Parliament of Ceylon enacted The Citizenship Act.³⁶ By section 2 of that Act, Ceylon citizenship was limited to two categories of persons. First, those by 'descent' and second by 'registration'. By section 4 of the Act.

" ... a person born in Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent if --

- (a) his father was born in Ceylon, or
- (b) his paternal grandfather and paternal great grandfather were born in Ceylon."³⁷

Regarding those who were born outside Ceylon, the Act required those who seek citizenship by descent to prove that:

- (a) his father and paternal grandfather were born in Ceylon, or
- (b) his paternal grandfather and paternal great grandfather were born in Ceylon."³⁸

The appointed day was the date of assent of the Act, which was 21st September 1948. The purpose of the Act seems clear. It was designed to dis-enfranchise nearly 780,589³⁹ Indian Tamils on the Island. By 1948, the employment of Indian indentured labour had taken place

for a period of nearly 70 years and some had actually been born in Ceylon. But few among them were able to establish, as required by the new Citizenship Act, that their fathers,⁴⁰ their paternal grandfathers⁴¹ or their paternal great-grandfathers⁴² had been born in Ceylon. As for acquiring citizenship by registration, the Act gave a limited discretion to the Minister of Home Affairs to nominate no more than 25 persons each year for citizenship by registration.⁴³ Such nominees were required to be persons who had rendered distinguished services in various spheres of public life⁴⁴ or had been "granted a Certificate of Naturalisation under the British Nationality Act" of 1914.⁴⁵ Into none of these categories would the Indian Tamil - the Estate Coolie - fall. The result, therefore, was, the isolation of the Indian coolie population from the main stream of Ceylonese society. Supportive of these policies was The Ceylon (Parliamentary Elections) Amendment Act⁴⁶ of 1949. By section 3 of that Act, no person who was not a citizen of Ceylon was qualified to have his name entered upon the register of voters and this effectively disenfranchised the Indian Tamil population of Ceylon. By 1953, therefore, the battle lines were drawn between 1,858,801 Tamil speaking persons comprising of both Indian Tamils and Ceylon Tamils and 5,616,705 Sinhalese. Of these figures 974,098 Indian Tamils had been rendered 'Stateless' by the Citizenship Act. The census report for 1953 indicated that while 506,101⁴⁷ Sinhalese were literate in English 181,585⁴⁸ Tamils were literate in English. When this nearly 2:1⁴⁹ ratio of English literacy was matched against a 6:1⁵⁰ ratio of the population distribution in favour of Sinhalese, the disproportionate representation by the Tamils at the centre of political and economic power became clearer to the mass of the Sinhalese people.

The period leading up to the 1956 General Election was charged with emotional appeals for a 'Sinhala only' policy, and therefore one of the earlier legislations which emerged from that Administration was The Official Language Act⁵¹ of 1956 (hereinafter referred to as the Act of 1956). Section 2 of that Act declared, that "the Sinhala language shall be the one official language of Ceylon". A proviso to that section nominated the 31st day of December, 1960, as the date up to which a minister may if he "considers it impracticable to commence the use of only the Sinhala language for any official purpose .

immediately on the coming into force of this Act, may continue the language or languages hitherto used for that purpose." By sub-section (1) of section 3 the minister was empowered to give "effect to the principles and provisions of this Act" through Regulations properly promulgated. Sub-section (2) of that section subjected the Regulations to parliamentary control by defining a valid regulation as one which had received the approval of both "the Senate and the House of Representatives", notification of such approval having been published in the Gazette. It was left to each ministry to implement "the principles and the provisions of this Act".

The thrust of the 1956 Act was to bring about a change of the official language, within a period of time, through Regulations approved by Parliament. The change of the official language, therefore, in Sri Lanka, was a controlled one. It was left to the Government of the day to determine the extent to which the official language change should occur. The Sinhalese community produced dissidents who thought that the Government of the day was proceeding too tenderly and was therefore showing an inadequate commitment to the language policy. The Tamil community saw in the language change the end to their

culture and to their language. For there was no real protection extended to them. These sharp political controversies and extensive social upheavals culminated in the race riots of 1958.⁵² The fears thrown up by the Tamil minority were largely attributed to their possible cultural demise. Such a view of the Official Language Act helped the Tamil minority to evolve along two lines. First, it brought into focus a strong cultural link with their comrades in Tamilnad, in South India. Politically, this strengthened the hand of the Federal Party, the political party which at the time represented the interests of the Tamil speaking people in Parliament. They were the principal and, at times, the only opponents of the Act of 1956, in Parliament and outside it. The Federal Party was not only modelled upon the Dravida Munnetra Kazhagam - (D.M.K.) - the party that was in power at the time in the State of Tamilnad, in India, but also preached the universality and the antiquity of the Tamil culture, thus forging a strong cultural link with India. In a sense the Federal Party drew a large measure of support and inspiration from the D.M.K.⁵³ Secondly, by pushing forward the cultural argument, the Federal Party successfully downgraded the economic argument which may have been to their clear disadvantage. For in no sense could they have sustained their argument "for parity of status" with the Sinhalese, when the population distribution of 6:1 in the favour of the Sinhalese in 1953 had produced an English literacy ratio of 1:2 against them. It was, therefore, assumed to be sound policy to push the cultural argument forwards while leaving the economic argument in the background. The key political argument, during the Parliamentary debate of the Act of 1956 was summed up by Dr. Colvin R. DeSilva, from the Tamil point of view, when he said:

"They do not want to feel that their language and through their language, themselves are locked down upon as an inferior section of the people of this country." 54

Replying at the cultural level of the debate, the Prime Minister said:

"Really this desire for making Sinhala alone the official language stems, believe me, from the fear that not merely would the Sinhalese, in fact, be reduced to a position of inferiority - the Sinhalese people - but their language and themselves be pressed back almost to a point of elimination." 55

In fact the official language change was not only a change effected at the economic level or the cultural level of Ceylonese social organisation but also at the legal and at the political levels of the society. It is on these two levels of change that the emphasis was largely placed during the period following 1956. That in fact was the period during which the Ceylonese society underwent a profound social change.

III. Use of Language in the Judicial Administration on the Island.

(a) The Consequences of the 1956 Act

During the period immediately succeeding the enactment of the Act of 1956, the judiciary found an unprecedented freedom to utilise their own understanding of the Sinhala language in judicial work, contributing significantly to the administration of Justice at that period of time. Until Panditha Watugedera Amaraseeha Thero v. Tittagalle Sasanatilleke Thero⁵⁶ came before the

Court of Appeal in 1958, the Ceylon judiciary considered themselves bound by a statement made by Bonser, C.J., in 1895, declaring that English was the language of the law and that Sinhala in Ceylon was an alien language. In Cornelius v. Uluwitike,⁵⁷ Bonser, C.J., delivering his judgment in 1895 wrote:

"I notice that there is put up in the paper-book what purports to be a warrant of arrest, in what seems to be the Sinhalese language. I do not understand under what authority process is issued in a foreign language, and the Solicitor-General who was in court at the argument professed himself unable to explain how this process came to be issued. The language of our Courts is the English language, and it appears to me that serious doubts might arise as to the legality of an arrest upon a warrant in such form."⁵⁸

This view of the Sinhala language had persisted well into the post-independence era, in its original stringent form. In as late as in 1951, the Court of Appeal in Francisco v. Swadeshi Industrial Works Ltd.,⁵⁹ when invited to examine the correctness of a translation of a deed from the Sinhala language into English, refused to do so, relying on the view that English was the language of the Courts, and Sinhala would be considered as a foreign language requiring the aid of expert witnesses. In that dispute, the deed creating a Fideicommissum was in the Sinhala language. The Courts were relying on a certified English translation of the original deed to determine whether the owner had intended to create a Fideicommissum. Central to the issue, therefore, was the correctness of the translation. Notwithstanding this fact, Basnayake, J., said:

"Learned Counsel invited us very earnestly to read the original Sinhalese deed which the learned judge appears to have examined. He submitted that the word "Pradanakota" therein had not been properly rendered in ... translation. We refused to accede to learned Counsel's invitation as we were of opinion that it was not our proper function to attempt to translate the Sinhalese document. English is the language of Courts (Cornelius v. Uluwitike (1895) 1 N.L.R. 248). Whether a document in a language other than English has been correctly rendered into English is a question of fact."⁶⁰

The learned judge, thereafter, advised the Counsel that the best way to proceed was to call in aid of expert witnesses to challenge the translation. Noticeable here is the sense of remoteness, which the use of a non-indigenous language as the language of the law, could create in the minds of the body politic of a nation. Documents such as receipts, memoranda, wills, deeds and a whole list of writings required by the procedural or by the substantive law of the land would, undoubtedly, to a very large extent, be couched in the language of the masses. That very language, at least until 1956, be it Sinhala or Tamil, was regarded as a foreign language, requiring the submission to Court of an accurate translation of the document in question into the English language. In such an event the persons engaged in producing the translation would be considered as expert witnesses, thus making them liable for cross-examination. This method was followed in every case until 1956, when a document was not in the English language. However, in the Amaraseeka Case,⁶¹ the Court of Appeal re-opened the two foregoing decisions in the light of the 1956 Act. In the present dispute, the 'Viharadhipathi' of Sangatissa-arama having died, his three pupils Aggawansa, Gnanawansa and the plaintiff were left behind as possible successors to the chief incumbency.

Succession was according to the Sisyanu-Sissya rule.⁵² In the meantime, the defendant Sasanatilleke too had ingratiated himself into the temple. Having arrived as a stranger, he had remained with the leave and licence of the deceased 'Viharadhipathi.' Subsequent to the latter's death a meeting of the Dayaka-Sabha⁶³ was held and at that meeting a 'Resolution' was proposed by Aggawansa and seconded by Gnanawansa, appointing the much junior Amaraseeha to succeed the deceased priest as the Viharadipathi. In these proceedings, concerning the plaintiffs' right of succession, a copy of the aforesaid 'Resolution', duly translated into English and certified by an official translator was submitted to court. During the hearing of the appeal, the judges found a serious error in the translation. Similar to the deed creating the Fideicommissum in Francisco's Case⁶⁴ the 'Resolution' here was central to the decision. In the course of his learned judgment De Silva, J., said:

"I have examined the original 'Resolution' very carefully and I find that its English translation submitted to Court is clearly wrong. In Francisco v. Swedeshi Industrial Works, which was decided in the year 1951 it was held that it was wrong for a judge, in the case of a document in a language other than English, to import his own knowledge of the language in construing the document ... the passing of the Official Language Act, No. 33 of 1956 has completely altered the position. Section 2 of that Act provides that the Sinhala language shall be the one Official Language of Ceylon. Therefore now it is quite open to a Judge to construe a document drawn up in Sinhalese."⁶⁵

This substantial change of the views of the judiciary is to be welcomed. Within the first decade of the application of the Act of 1956 the judiciary found some procedural problems in its implementation. In The Queen v. Hemapala,⁶⁶ the accused, Hemapala, was tried before an English-speaking jury and was convicted of murder in 1960. The mandatory sentence of death was passed upon him. At the commencement of the trial, the presiding judge had asked the foreman of the jury whether he and his colleagues understood Sinhala. The answer was that they did understand Sinhala. Then with the concurrence of the lawyers appearing both for the defence and for the prosecution, the trial was conducted in Sinhala; in that the addresses to the jury - by the two counsels - were delivered in Sinhala. The cross-examination was conducted in Sinhala, but an English translation was made for the purposes of the Court's record. The judges summing-up was, however, in English. In his appeal against his conviction, Hemapala, took the point that the aforementioned procedure adopted at the trial was so irregular that his conviction constituted a miscarriage of justice. A full bench of the Court of Criminal Appeal upheld that argument. Basnayake, C.J., observed:

"In regard to the argument of learned Counsel for appellant based on the Official Language Act 33 of 1956 it is sufficient to observe that it is common ground that at the time of the enactment of the Official Language Act No. 33 of 1956 English was the language of the Courts and at the relevant time - 15th to 20th December 1960 - it was lawful to use English as the language of the Courts by virtue of the notification published in Gazette No. 10,949 of 7th July 1956. The procedure adopted in the instant case gains no support from the Official Language Act. The Language of the Courts Act No. 3 of 1961, section 8 which proceeds on the assumption that after 1st January, 1961, English is not the language of the Courts, has no application to the instant case as it was enacted after the trial."⁶⁷

By a split decision⁶⁸ the Court, while recognising the irregularity of the procedure adopted at the trial concluded that, that irregularity had not caused a "substantial miscarriage of justice". The appeal, therefore, was dismissed⁶⁹ and the sentence of death was affirmed. Hemapala, appealed from that decision⁷⁰ to the Judicial Committee of the Privy Council. The Privy Council agreed with the Court of Criminal Appeal of Ceylon that there had been a grave procedural error in the way that the trial was conducted. But their Lordships disagreed with that court in its finding that there had not been "a substantial miscarriage of justice".

Sir Kenneth Gresson who tendered the advice of the Board wrote:

"The assurances given by the foreman of the Jury to which the other members of the Jury gave no more than a mute assent does not, in their Lordships opinion provide a sufficiently solid foundation on which to assume that all the members of the jury were in fact able to understand and appreciate evidence not given in English and the addresses of the defence counsel. Accordingly, their Lordships hold that, there having been a departure from the provisions of the code with no certainty that such a departure did not operate to the disadvantage of the appellant, the case must be regarded as one in which there has been a miscarriage of justice necessitating the quashing of the conviction."⁷¹

Hemapala's trial was held in December 1960. Therefore, whether or not his conviction should stand depended on the application of the Official Languages Act to the Criminal Procedure Code of Ceylon. As the Privy Council observed:

"The Criminal Procedure Code provides (S165B) that an accused person having elected, he 'shall be bound by and may be tried according to his election,⁷² subject however in all cases to the provisions of s. 224'. Section 224(1) enacts (2) that 'the jury shall be taken from the panel elected by the accused unless the Court otherwise directs.' There was no direction otherwise."⁷³

Both the Court of Criminal Appeal and the Privy Council were ad idem in their view that the Official Language Act had not altered the provisions of the Criminal Procedure Code. The Court in Ceylon founded that belief upon a Gazette notification. The Privy Council rested their decision on the seriousness of the procedural error as evidenced from the aforementioned passage from Sir Kenneth's judgment. Subsequently in 1964, at the hearing of The Queen v. Liyanage and Others,⁷⁴ three judges at a Trial-at-the-Bar were invited to rule on the validity of an Act of Parliament drafted in the English language and passed into law in 1961. Fernando, J., in the course of his judgment said:

"If then it is decided that laws must be enacted in Sinhala it may well be that a Constitutional amendment passed in accordance with section 29(4) will be necessary. ... And even if it can be said that section 2 of the Official Language Act manifests some intention that Acts of Parliament must be written in Sinhala, Parliament has the undoubted power to legislate inconsistently with the provisions of pre-existing legislation. We must hold therefore that at the very least in the case of all Acts enacted after 1st January 1961 in English, Parliament has merely exercised its right to override any such intention as to the language of the law which may have been entertained at the time of the passing of the Official Language Act."^{74a}

Not until 1972 did the legislations concerned with effecting a change in the Official Language become a Constitutional provision. That was under the Constitution of 1972.⁷⁵ However, until then, the Official Language Act required some further legislative buttressing. Soon after Hemapala's trial was concluded in 1960,⁷⁶ the legislature passed the Language of the Courts Act, of 1961.⁷⁷ By section 2 of the Act, the Minister of Justice was empowered to determine and declare the Courts in which Sinhala shall be used for the purposes of pleadings and of records. Section 3 required that such pleadings or records shall be translated into English; "where a judge of a court to which an Order under section 2 applies is unable to read and understand any pleadings in Sinhala which are filed on record."⁷⁸ Section 4 deals with certain changes in the procedure applicable in courts where a language change had occurred. Of particular significance is section 4(1)(a). By that sub-section, "every judgment, decree, order or direction of a Court shall be written in Sinhala or English, and, if written in English, shall be accompanied by a Sinhala translation thereof". The rest of section 4, together with sections 6 and 7, make certain functional changes in the Civil Procedure, in the Criminal Procedure and the Evidence Codes of the Island. Section 5 gives the Minister of Justice a power to make by order published in the Gazette such amendments or modifications of any written law as may be necessary for the implementation of the language change in the Courts. Under this Act,⁷⁹ once the Minister of Justice directs that a particular court shall, under section 2, conduct its pleadings and maintain its records in the Sinhala language, the amendments to the Criminal Procedure Code and the Evidence Code made by this Act,⁸⁰ shall enable such proceedings to be conducted in that language. By section 2, the Minister of Justice is

required to satisfy himself that: "the court is provided with the necessary staff and equipment for recording in Sinhala, the proceedings in that court and that it is practicable so to do", before he may designate a court as one in which the proceedings should be carried out in Sinhala. After 1961, an uncertain situation as the one that occurred in the Hemapala Case is unlikely to arise. However, in certain proceedings the court may adopt the Sinhala language, in others the court may still be compelled to carry on in English, which might create a situation somewhat analagous to that which occurred in the trial of Hemapala.

However, in 1963, Fawzia Begum v. The Officer in Charge of the Slave Island Police Station,⁸¹ the Supreme Court was invited to quash an order for the deportation of an Alien made under the Immigrants and Emmigrants Act, in the English language. Pronouncing his judgment a few days after⁸² the decision at the Trial-at-the-Bar in Liyanage,⁸³ Sri Skanda Rajah, J., expressed the view that:

"The Immigrants and Emmigrants Act is in the English language. It is an Act anterior in time to the Official Language Act. The latter Act does not purport to amend any of the provisions of the former. The problem is in reality one of interpreting an enactment which is in English. Therefore, I find it difficult to accept the proposition that an order under an Act in the English language would be invalid if made in that language. Besides, it cannot be said that the corpus has been prejudiced in any manner by an order made in English, a universal language, with which he is more likely to be acquainted than Sinhala. In my view, therefore, the last objection fails."⁸⁴

The fact that the Official Language Act⁸⁵ did not constitute a constitutional amendment left its validity in doubt. The Courts, therefore, were showing

a degree of reluctance to recognise the social and political significance of the enactment. The Courts were uncertain as to the constitutional validity of the enactment. Wherever possible the judges were attempting to avoid the implications of the Act and the foregoing case law appear to support that view. However, in Kodeswaran v. A-G⁸⁶ the constitutional validity of the Act of 1956 was raised, for the first time, in 1967.

Kodeswaran, was appointed an officer of the General Clerical Service on 1st November, 1952. He was promoted on 1st October, 1959 to the Executive clerical class according to the results obtained at a competitive examination. At that examination the choice of Sinhala or Tamil, as a subject for the language paper was made compulsory. Kodeswaran, being a Tamil, sat for the Tamil language examination paper and passed in it. On the 4th November, 1961, a new Treasury Circular No. 560 provided, that all officers of the Executive Clerical Class must pass a proficiency test in Sinhala. It was declared that failure to pass in such an examination would result in the suspension of all salary increments. Kodeswaran, failed to sit for the examination which fell due on 1st April, 1962. His salary increments were, therefore, suspended. Kodeswaran, sought in the present action a declaration that the Treasury Circular No. 560 of 4th November, 1961 was unreasonable and/or illegal and was not binding upon him. It was argued that the directives of the Treasury Circular were based upon the provisions of the Official Language Act of 1956. It was further argued that the Official Language Act was ultra vires section 29⁸⁷ of the Constitution and therefore the

Treasury Circular was in itself null and void and of no effect. The central issue therefore, was the Constitutional validity of the Official Language Act. The District Judge⁸⁸ of Colombo, at first instance gave judgment for Kodeswaran. He was clearly of opinion that the Official Language Act, not being in itself a Constitutional amendment was invalid. For, it was ultra vires the powers of the Ceylon Parliament under section 29 of the Constitution.⁸⁹ The Attorney General appealed against that decision. Being an Appeal from the District Court, the appeal was heard before two judges. Avoiding the issue of constitutionality of the Act of 1956,⁹⁰ the Court proceeded to give judgment against Kodeswaran on the grounds that, he being a servant of the Crown, had no locus standi in judicium in an action against his employer for his wages. Allowing the Crown's appeal, Fernando, C.J., said:

"I have already reached the conclusion that under our Law a public servant has no right to sue for his wages."⁹¹

It was evident that the Court had taken a deliberate decision to avoid deciding the question of constitutionality of the Act.⁹² Relying on American and Indian authorities, the learned Chief Justice declared that if it is at all possible to avoid making decisions on the constitutional validity of legislations, without breaching the official oath of a judge, judges must avoid making such decisions.⁹³ After restating the Court's reluctance to rule on the constitutionality of the Act, it declared that the learned District Judge's decision on that point,⁹⁴ at first instance, was not binding.⁹⁵ It is lamentable that the court should take such a negative position in this matter, particularly, in view of the socio-political implications of the legislation in question. The fact that the issue of constitutionality was argued fully⁹⁶

before the court should have been considered as a sufficient reason to require the court to make a decision on that ground. If the Bench felt inadequate to make such a decision as constituted, 'the fallibility of the human judgment' could well have been supplanted by inviting three of their learned Brothers to constitute a full Bench of the Supreme Court. It is tempting to suggest, with respect, that the Bench was equally threatened with the changes indicated, as a consequence of the Official Language Act of 1956 and therefore felt that the best decision in the circumstances was to make no decision, upon the constitutional validity of the change, thus leaving the matter by and large, unresolved.

Kodeswaran appealed to the Privy Council.⁹⁷ The Privy Council decided to hear the case on a preliminary point of law as to whether a servant of the Crown has a right of action against his employer, the Crown, for wages. Limiting the hearing to this issue, Lord Diplock wrote:

"The appellant's action, if it lies at all, thus raises issues of the highest Constitutional importance, all of which were argued before the District Judge. There is however a preliminary issue, viz. whether a civil servant has any right of action against the Crown for salary due in respect of services which he has rendered. If, as the Attorney-General contends, there is no such right of action, the broader constitutional issues as to the validity of the Official Language Act ... fails in limine".⁹⁸

Thus limiting the hearing to the point decided by the Divisional Court in Ceylon, the Privy Council allowed the appeal on the grounds that; in Ceylon there was the Roman-Dutch Common Law which - unlike the English Law - recognised a right in a servant of the Crown to sue for his wages. With reference to the Constitutional matter, Lord Diplock wrote:

"There are the other important constitutional issues to be decided upon which neither the Supreme Court nor their Lordships have heard argument. As already indicated, their Lordships would think it inappropriate to enter upon any of these matters without the benefits of the considered opinion of the Supreme Court of Ceylon thereon. They accordingly express no opinion upon any of the other issues as to the constitutionality of the Official Language Act ... The case should be remitted to the Supreme Court for further consideration of these other issues"99

It is incorrect to say that the constitutionality of the Act was not argued before the Supreme Court of Ceylon. The learned Chief Justice who gave the judgment of that Court made some reference to that aspect of the Counsel's argument.¹⁰⁰ However, it is correct that the Supreme Court did not express a view on that aspect of the case. The Privy Council rendered their advice to Her Majesty on the 11th December, 1969, and five months later, the Government,¹⁰¹ at the time of the decision was defeated at the General Elections of 1970. The new Government¹⁰² assumed office in June, 1970, with a mandate to change the 1948 Constitution. As early as in July, 1970, a Constituent Assembly was created for that purpose and a new Constitution emerged in 1972. These matters shall be considered in a later chapter.¹⁰³ The Supreme Court to which the Privy Council remitted the Kodeswaran dispute for further consideration, delayed their hearings until the new Constitution became effective, in May, 1972. Uncertain as to the provisions of the proposed Constitution the Supreme Court initially began postponing the hearing of the dispute. Later, when it became clearer that the new Constitution was likely to declare Sinhala as the Official Language, the interest in hearing the central issue in the dispute began to dissipate.

It is interesting to note that the very thoughts behind the framers of the Constitution of 1948 was to render a substantial constitutional protection to the minorities. The ambit of section 29 may be determined in that light. But the end result of Kodeswaran appears to have been such that the initial hopes and aspirations of the Soulbury Commissioners must now appear to have been frustrated, by overwhelming political and sociological considerations. The 1972 Constitution, by Article 7, declared, that:

"The Official Language of Sri Lanka shall be Sinhala as provided by the Official Language Act, No. 33 of 1956."

By Article 9(1) of the Constitution, all laws were required to be enacted in Sinhala. But by sub-section (2) of that Article, the Government was required to produce a Tamil translation of every law made under that Constitution. Article 10 made provisions to have laws and subordinate legislations existing immediately before the commencement of the 1972 Constitution translated into Sinhala. When such translations were laid before the National State Assembly and were gazetted, the Sinhala version of the law was deemed to have superceded the corresponding law in the English language.¹⁰⁴ Article 11(1) of the Constitution declared 'Sinhala' as the language of the Courts throughout the Island, thus requiring such Courts to keep: "their records, including pleadings, proceedings, judgments, orders and records of all judicial and ministerial Acts" in Sinhala. These provisions resolved the problems raised in Hemapala v. The Queen,¹⁰⁵ The Queen v. Liyanage¹⁰⁶ and Fawzia Begum v. The Officer in Charge of Slave Island Police Station¹⁰⁷ to which reference has previously been made. However, by a proviso to Article 11(1), the Constitution:

"Provided that the National State Assembly may, by or under its law, provide otherwise in the case of institutions exercising original jurisdiction in the Northern and Eastern Provinces"

It is for the provision of special rules particularly for the Courts in the Tamil speaking areas, that the Legislature passed The Language of the Courts (Special Provisions) Law of 1973¹⁰⁸ (hereinafter referred to as the 1973 Law). The application of the 1973 Law was limited to the Northern and Eastern administrative provinces.¹⁰⁹ By section 3, the Minister of Justice may "direct the Court, tribunal, institution or Board ... that their records including pleadings, proceedings, judgments, orders and records of all judicial and ministerial Acts shall be in Tamil". The Act, however, makes provisions to have such matters as those that are dealt with in Tamil translated and recorded in Sinhala.¹¹⁰ The Act does not prohibit or deny the right to "submit their pleadings, applications, motions and petitions in Sinhala and participate in the proceedings in Sinhala."¹¹¹ In such an event, however, a Tamil translation was required to be made and recorded in the Court.¹¹² Notwithstanding these concessions made to the Tamil language, the Act required a record to be prepared in Sinhala for the purposes of providing a basis for an Appeal to a higher Court.¹¹³ Under the Administration of Justice Law of 1973,¹¹⁴ appellate jurisdiction was left exclusively to the Supreme Court¹¹⁵ which was required to sit in the Capital City of Colombo, in the Western Province.¹¹⁶ The 1973 Law¹¹⁷ has no application to courts sitting in the Western Province and therefore, the absolute need to have a record of the trial court proceedings in Sinhala as the basis for the appeal became implicit. Again, under the 1973 Law, section 4, required that a translation of the proceedings

in a court to which the Law¹¹⁸ applies, should be made available 'in Sinhala' so that "every party, applicant judge, juryman or member of a tribunal not conversant with the language used in the Court", namely Tamil, could understand and follow the proceedings. This particular provision makes it possible to have 'Sinhala' speaking judges preside over cases in the North and Eastern provinces. However, the absence of similar provisions requiring that pleadings etc., which may be in Sinhala are translated into Tamil in Courts situated outside the Northern and Eastern Provinces, indicate that all judges must principally have a working knowledge of Sinhala. Courts situated outside the Northern and Eastern Provinces fall under the principal provisions of Article 11(1)¹¹⁹ and as such fall under the rule that 'Sinhala is the language of the Courts'. In such courts, as a practical measure, the Tamil judges rely largely on translations provided by the Official interpreters of the Courts. This unnecessarily slows down the proceedings causing great delays and considerable expense to the litigants. The practical difficulties which these complicated arrangements necessarily raised have been well documented.¹²⁰ The cost of litigation has accordingly increased. In addition, administrative delays, inconvenience to the litigants and many uncertainties have affected the administration of Justice. For decisions have often been rendered upon technical points of procedure; e.g., the absence of a proper translation or the fact that the pleadings are in the wrong language. Decisions on the questions of substance have thus been pushed aside.

Adopting the enabling provisions similar to those found in the Official Language Act of 1956, the Law of 1973 has empowered the Minister to give "effect to

the principles and provisions of the law" through Regulations.¹²¹ These Regulations are required to be approved by the National State Assembly and notification of such approval was required to be published in the Government Gazette before they became effective.¹²²

The Northern and the Eastern Provinces of Sri Lanka are inhabited by nearly 85 per cent of the total Tamil population on the Island. Being a fairly inhospitable terrain calling for hard and sustained work, a large percentage of Tamils have received no more than a vernacular education. The time and the opportunity required for the learning of a second language, such as Sinhala, with a distinctly different script to that of Tamil, was recognised as a very difficult task. The social upheaval and the gross injustice that the inhabitants may suffer was thought to exceed the importance of implementing the language policy of a government representing largely the interests of the majority ethnic group - the Sinhalese. Besides, some kind of palliation was thought necessary to bring about some quantum of harmony between the two races¹²³ that inhabited the Northern and Eastern Provinces of the Island. It must, however, be emphasised that throughout the British Colonial period and right up to 1956 (and even thereafter), the language of the courts across the Island was English. But neither the Colonial Administration nor the post-independent governments at any time recognise the difficulties that may have resulted in using the English language as the language of the Courts in the Northern and in the Eastern Provinces. The Tamil speaking people were content on having their legal disputes handled by the English speaking lawyering class, as their agents. However, the present problem appears to be, to a large measure, political. And the government, therefore, proposed to introduce a political solution. The Law of 1973¹²⁴ was thus conceived.

III (b) 'The Reasonable Use of Tamil' Legislation.

As a deliberate policy of government the Administration¹²⁵ committed itself at the time of passing the Official Language Act in 1956 to effectuate "the reasonable use of Tamil".¹²⁶ Sections 3 and 4 of the '1973 Law' was designed partly to achieve that end within the 'Sinhala only' framework, which represented the overall language policy for the nation. The policy concerning the reasonable use of Tamil was somewhat hastily conceived. Although the government had, at the time of passing the Official Language Act in 1956, given assurances that an Act providing for the reasonable use of Tamil would be enacted, very soon, nothing along these lines had been introduced even as late as the middle of 1958. After the prorogation of the second session of the third Parliament of independent Ceylon, on 15th May, 1958, the members of Parliament went back to their respective constituencies. Some time between that date and 2nd June, emotive reasons appear to have arisen sparking off a communal conflagration between the two ethnic communities - the Sinhalese and the Tamils. These language riots of June, 1958, were the first such communal conflicts on the Island that evolved into hostilities, ever since the Buddhist-Muslim riots of 1915.¹²⁷ That was almost a generation ago and the present amity between those two races¹²⁸ had helped to erase those unhappy memories from their collective minds. Therefore, the language riots of 1958 left the politicians and the people shocked, saddened and split. The rioting had reached such a level by 4th June, 1958, that the government was compelled to declare a State of Emergency and call out the Army to restore order. Nearly 2,000 lives¹²⁹ are reported to have been lost during that brief but sharp crisis. Historians, Journalists and political analysts have all pointed their finger¹³⁰

at the government's failure to carry out the assurances it had given to the Tamil people during the debate of The Official Language Bill, that provision would be made for the 'reasonable use of Tamil'. The failure to articulate these uses in legislative terms had fanned the fires of communal discord, in an atmosphere of deepening suspicion and a feeling of acute hopelessness among the Tamil-speaking people. It is against this background and with a feeling of guilt that the government proposed the Tamil language (Special Provisions) Bill of 1958.¹³¹ The government moved the second reading of this Bill on 5th August, 1958 (almost two months after the commencement of the communal riots). This was during the continuation of the State of Emergency under which the members of Parliament representing the Tamil speaking areas were in detention. Recognising these conditions under which the Bill was being introduced, the opposition made a decision to boycott the proceedings and take no part in the vote, by absenting themselves from Parliament. Speaking on behalf of the opposition, Mr. M. D. Banda¹³² of the United National Party declared, that:

"The United National Party protests against the Hon. Prime Minister's move to rush through Parliament the Bill for the reasonable use of Tamil in the existing State of Emergency, under which members of the public are detained in custody and important sections of Hon. Members of both Houses are prevented from attending Parliament and the public as well as political parties are precluded from expressing their views. Under these circumstances which would be tantamount to a travesty of democracy, the U.N.P. refuse to participate in this debate which involves issues so vital to the nation."¹³³

The leaders of the Lanka Samasamaja Party,¹³⁴ The Tamil Congress¹³⁵ and of the Janatha Samaji Peramuna,¹³⁶ each repeated their decision not to participate in the debate. The members of the Communist Party made no appearance during the debate. The Bill was passed on the 6th August, 1958 with 46 in favour and three against. The foregoing circumstances induced the government to do what it could to provide the best possible terms for the Tamils within the framework of a Sinhala only policy. In a sense, had the circumstances been different, the concessions, if any, made to the Tamils in 1958¹³⁷ would have had a more limited ambit. Principally, the 1958 Act, clarifies the position of Tamil, within the framework¹³⁸ of the 1956 legislation, in four specific areas.

First, Education. By sub-section (1) of section 2 of the Act, Tamil pupils in government schools or government assisted schools were given the right to be instructed in Tamil. This provision was restricted to government or government assisted schools. The provisions of this sub-section did not apply to unaided schools. But after 1961, as it was shown earlier,¹³⁹ the government acquired the necessary legal machinery¹⁴⁰ to introduce the intent and effect of the foregoing sub-section into those schools¹⁴¹ as well. Provision was made in the 1958 Act, for a limited form of University education in Tamil. By sub-section (2) of section 2 of the Act:

"When the Sinhala language is made a medium of instruction in the University of Ceylon; the Tamil Language shall ... be made a medium of instruction for those students who have, prior to their admission to the University, received their education, through the medium of the Tamil Language."

These provisions appeared to strike at the foundations of the language policy. For the 'Sinhala-only' policy was conceived as an answer to the Tamil representation in the elite-formation at the centre. By making it possible now for the Tamil-speaking people to compete in their own language, the government was in fact chartering a different route to the top. Further, it could be contended that, while the Tamils were formerly competing with the Sinhalese for a proficiency in English as a means towards achieving a position among the country's elite, now they were competing with none except themselves.

In a survey undertaken by the Sri Lanka Ministry of Foreign Affairs¹⁴² in 1976, the government¹⁴³ commented on the particular effect of its language policy after two decades. The government's White Paper first introduced the racial composition of the two major races in this way:

"In this connection it will be relevant to examine the statistics ..., keeping in mind that the Sinhalese constitute 71.9% of the population and the Tamils 20.5% (the Sri Lanka Tamils constitute 11.1% and the Indian Tamils 9.4%).¹⁴⁴

Having made that point, the White Paper proceeded to present some important statistical data.¹⁴⁵ It is important to realise that the ratio of Sinhalese to Tamils, in 1976 was one of 6.5:1. With this communal composition in mind, it is necessary to peruse the following statistics:

TABLE IV¹⁴⁶

Admissions to the University

1970/71

Faculty	Total Admission	Sinhala	Percentage	Tamil	Percentage
Engineering	152	85	55.9	62	40.7
Medicine	247	132	53.4	101	40.8
Sciences	556	362	65.3	174	31.1

1971/72

Faculty	Total Admission	Sinhala	Percentage	Tamil	Percentage
Engineering	274	171	61.7	95	31
Medicine	221	124	56	87	39.4
Sciences	604	385	63.9	207	34.2

1972/73

Faculty	Total Admission	Sinhala	Percentage	Tamil	Percentage
Engineering	275	201	76.7	67	33.3
Medicine	255	150	58.8	94	37.6
Sciences	647	442	68.3	186	28.7

1973/74

Faculty	Total Admission	Sinhala	Percentage	Tamil	Percentage
Engineering	283	223	78.7	46	16.1
Medicine	263	184	70	68	25.8
Sciences	857	651	75.5	180	21

1974/75

Faculty	Total Admission	Sinhala	Percentage	Tamil	Percentage
Engineering	289	241	83.4	47	14.1
Medicine	247	195	78.9	43	17.4
Sciences	882	665	75	184	21

From these statistics, it can be noticed that until the academic year 1973/74 the Tamil percentage intake into the University had far exceeded their communal representation of 20.5%. Since 1974/75 the intake appears to have begun to approach their communal composition. This is a result of a policy of 'Standardisation'¹⁴⁷ which the government introduced in 1974 to prevent the over-representation of the Tamil speaking people in the country's affairs. Since the change of government in 1977,¹⁴⁸ the 'Standardisation' principle has now been replaced by a direct entry method.¹⁴⁹ The figures for the academic year 1977/78 have not yet been made available. However, the government has detected some difficulties in the present system of admission due to over-marking of Tamil language papers by Tamil examiners.¹⁵⁰ Aside from these technical difficulties, it is conceivable that the admission pattern shown in the years leading up to and including 1973/74 may now have again begun to re-emerge. The government's White Paper further observed that:

"Prior to the granting of Independence in 1948, the Tamils had an advantage over the Sinhalese in securing admissions to the State Services, because educational facilities were more readily available to them, as a result of a number of missionary schools being set up in the Northern Province. With the granting of Independence and developing of educational facilities in the non-Tamil areas, it was to be expected that this advantageous position that they occupied would steadily erode. Over the years the intake of Sinhalese into the State sector has been comparatively increasing.

In spite of this reversal of trends the proportion of Tamils to Sinhalese in the State sector is still high. Statistics of the number of Sinhalese and Tamils in the larger Government departments will bear this out." 150a

The White Paper thereafter presented some further statistical data¹⁵¹ which concerned employment. It is necessary to comment that the reason for the disparity noted in the White Paper may rest upon the provisions of the 1958 Act.¹⁵² As it has been said earlier, the Tamil population can now compete with the Sinhalese in their own language, which necessarily provides a larger horizon for the development of the Tamil-speaking people than ever before. The White Paper produces the following figures, which must be read against the background that the Tamil, Sinhalese ratio is one of 1:6.5.

TABLE V¹⁵³

Employment Statistics

Employment	Sinhalese	Tamils	Ratio of Tamils to Sinhalese
Government Clerical Service	18,477	2,654	1:7
Sri Lanka Administrative Service	1,039	192	1:6
Posts and Telecommunications			
Staff Officers:	124	63	1:2
Clerical Grades:	1,051	173	1:6
Railway			
Staff Officers:	416	193	1:2
Clerical Grades:	858	173	1:4½
Labour			
Staff Officers:	61	31	1:2
Labour Officers:	165	32	1:5
Accountants Service	198	179	1:1
Corporation Sector	1,269	365	1:3½

A further analysis of the 1958 legislation¹⁵⁴ should support the view that the aims and purposes of the Official Language Act of 1956 have been thwarted by the provisions of the 1958 Act. The second aspect of the 1958 Act was to declare the Tamil Language as a medium of examination for admission to the Public Service.¹⁵⁵ Under this provision a person educated through the medium of the Tamil language became entitled to be examined in Tamil, provided that he possessed a sufficient knowledge in the Sinhala language at the time of the examination.¹⁵⁶ If he was unable to satisfy this latter requirement, then, as in Kodeswaran's Case, it would be sufficient if he could acquire a knowledge in Sinhala, within a reasonable time after his appointment.¹⁵⁷ By Regulations made under section 6 of the Act, Sinhala-speaking public servants were required to acquire a proficiency in Tamil, within a reasonable time after their appointment. In both cases, the Regulations empowered the Treasury Board to suspend salary increments, in the event where a public servant had failed to gain this proficiency.

These provisions again require the same comment as the one made under education. The statistical data¹⁵⁸ provide a graphic picture of the results achieved through the implementation of these provisions. A Tamil speaking person could now have his entire education - Primary, Secondary and University Education - in Tamil and finally enter the government service by passing the examination also in Tamil. The only effective point of contact he has with a Sinhalese is when the marks obtained are considered for selection. Recent recriminations and ministerial complaints have been voiced in the way the Tamil examination papers are marked.

The complaint is voiced that the Tamil candidates have, unfairly obtained, very high grades, thus subverting the opportunities of the Sinhalese student to achieve a competitive success.¹⁵⁹ This again appears to be the resultant of sections 2 and 3 of the Act of 1958.

Third, the Act of 1958, prescribed the use of The Tamil language for Correspondence. The wording of section four¹⁶⁰ originally resulted in considerable confusion. However, by Regulations subsequently promulgated, the government recognised the right of a citizen to correspond in Tamil both at the local level and at the level of the Central Government. The right to correspond at the local level was limited to the Northern and the Eastern Provinces of the Island where the majority of the population were Tamils. These Regulations clarifying the rather confused phraseology of section 4 has helped to lessen the adverse impact of the Official Language Act, considerably.

Fourth, the Act permits the use of the Tamil Language for prescribed administrative purposes in the Northern and in the Eastern Provinces.¹⁶¹ Again, by Regulations subsequently promulgated, Tamil became the language of the local government in the Northern and in the Eastern provinces of Ceylon.

The total effect of the 1958 Act was to provide a new basis for elite formation while keeping the two ethnic groups linguistically apart. This has considerably helped the minority Tamil community, as the figures now indicate;¹⁶² because the yard stick for development used by the system was no longer that of an alien language,¹⁶³ but that of the mother tongue of each community, in each case. The 1958 Act was intended to supplement the effective implementation of the 1956 Act. But in fact what it did was to

negate the social directions which were earmarked, as the goals to be achieved by the "Sinhala only" policy under that Act. As it has been mentioned earlier, the Act was debated in the total absence of an opposition and in great haste. The only point of controversy raised during the debate was by a Muslim member of Parliament.¹⁶⁴ His anxiety was based on the fear that Muslims, who traditionally stood between the two communities, some learning Tamil and others learning Sinhala - depending on their geographic location - would now be compelled to take a position in this language debate. The Prime Minister explained the position of the Muslims under the Act of 1958 in this way:

"This is a matter we can look into, if necessary, at the Committee stage. The real position is that we are dealing in this Bill with the Tamils. As far as the Muslims are concerned, they have the right now to be educated in any of the three media.¹⁶⁵ It is my sincere hope that the Muslims in future would mostly prefer to be educated in the language medium of the majority of the people, which is the official language ... although the position of the Muslims is not particularly dealt with by this Bill, they will not be prejudiced by this Bill."¹⁶⁶

The position of the Muslims was never determined with any precision. They continued to gain their education in the English medium as did those whose mother tongue was neither Sinhala nor Tamil.¹⁶⁷

III (c) The Consequences - Social, Political and Legal

The relevance of a change in the official language in a Third World country must be seen as a catalyst for massive social changes. The cultural underpinnings of a language together with its emotive embodiment subscribes in no small way to a modulated societal movement. In Ceylon, associated with the language change is the culture of a particular ethnic group - the Sinhalese - and therefore, the changes in the Island's social formations were controlled and directed towards achieving goals and aspirations peculiar to that ethnic group. The process of modulated change is an internalized fact and is independent of other recognised social stimuli. In Ceylon, the resulting changes in the existing social formations made it necessary to introduce changes at the institutional level of the legal system, so that out of the new language policy would evolve a new legal tradition. Towards this end, since 1970, a number of changes were introduced to legal institutions: the Language of the Courts Act,¹⁶⁸ the introduction of the new court structure,¹⁶⁹ the merger of the legal profession¹⁷⁰ and the introduction of a new system of criminal¹⁷¹ and civil procedures.¹⁷²

Particularly, relevant to language and its relationship with law is the problem of communication of rules. In every human society there is a centre and a periphery. The centre denotes the location of the source of legislative, executive and judicial power, while the periphery denotes those who are governed by the rules made at the centre. The relationship between the centre and the periphery prophesies the nature and the character of the government in any given human society.

Where the gap between the centre and the periphery is bridged, in a way that the periphery as a whole is drawn into the process of government, upon a participatory role, political scientists predict good government and therefore peace and tranquility for that territorial unit. But many territorial units adopt the view that links between the centre and the periphery should remain remote and restricted. A most effective way of maintaining the gap between the two is by having the language of the law and of administration different from the one used by those who languish at the periphery. As a corollary to that view the suggestion is made that the governed need know no more than that there are laws, that there are special groups of persons whose expertise is to interpret them for a fee and that they could be found in special places recognised by the State apparatus. However, in recent times, much has been written¹⁷³ on the need for communicating more extensively to the periphery, with a view to drawing them in, as participants in the whole process of government. According to this view, it is suggested, that the mobilisation of the periphery is a pre-requisite not only to the narrow vision of good government, but to the broader resultant of development. Emphasising this pre-requisite, Seidman wrote:

"Norms of development are, by definition, rules prescribing new way of doing things. They plainly do not match the myth that law merely embalms the customs of the people. If the norms of development did no more than that, law and the State could not affirmatively direct change. As a result, it is not enough for government to make the law cognoscible. Government must ensure that role-occupants know the Law and know what is expected of them. The rules received ... however, purport to do no more than make the law available to those who search for it."¹⁷⁴

Against the background that a legal language change was principally designed to bridge the centre with the periphery it may be suggested that the changes described in this chapter facilitated the evolution of a society with a commitment to upholding nationalist aspirations rather than emulating the culture and the traditions of a foreign race. The language change by itself did not alter the existing social formations, but it merely provided the momentum and the direction for that change. The relevance of the legal system to this process is that it provides the necessary institutional support to regulate and direct the momentum of the change. In other words, to modulate the change. The legal system could therefore be considered as supplying the State with the instruments necessary to modulate the change. This makes it possible for the State apparatus to relate change to policy, an element which is considered to be vital to Development. The Tamil language (Special Provisions) Act of 1958¹⁷⁵ and the Language of the Courts Act of 1961¹⁷⁶ are two instances of the State's use of Law to modulate and thus relate the social change resulting out of the implementation of the Official Language Act, to policy. The enactments¹⁷⁷ passed to nationalise the denominational schools was another instance of relating the social change to policy. In each such attempt the State presupposed that its use of the legal system in the way it does is legitimate. This means that the State must assume each time it uses the legal system as a means to relate policy to change, that there exists a particular constitutional provision to make this activity lawful. For the process of relating policy to change may involve a whole set of activities which may include the deprivation of property rights (as in the case of nationalisation of schools)¹⁷⁸ or the

derial of the right to be treated equally (as in the Kodeswaran Case).¹⁷⁹ Unless there is this assumption of constitutionality of the Laws passed in order to relate policy to change, the State would stand defenceless before its courts. The Kodeswaran Case¹⁸⁰ raised this kind of problem. Had the Privy Council decided against the Constitutionality of the Official Language Act of 1956, then the State's attempt in 1956 to relate social change to policy would have been frustrated. The Act itself was no more than an attempt to lend recognition to the fact that a bulk of the Ceylonese society had found that an official language change was necessary. This the people of Ceylon had expressed through their ballot by electing into power a particular political party committed to use the legal system to bring about that change. What the Act was intended to do was to recognise that the Ceylonese society had changed by 1956 and to relate that change to the policy of the State. Had the courts in Kodeswaran found that the then existing constitution would not legitimise the language change then the Government would be compelled to change the Constitution so as to seek that legitimacy. This would suggest that any attempt by the State to relate policy to social change should commence at the level of the Grundnorm. This kind of problem arose in Sri Lanka in 1978.

During the course of the 7th Parliament extending for an unusually lengthy period of time, from 1970 to 1977, the full thrust of the official language change was felt by every sector of the population. The Administration, headed by the Sri Lanka Freedom Party, was committed to the enforcement of the official language change. The only legislation which they enacted in this area was the language of the Courts (Special Provisions) Law of 1973.¹⁸¹ During the seven

years of their rule the society appeared to have moved towards realising the practical limits of the change. The Tamil minority in particular were adversely affected by the Official Language Act. A separatist movement had begun to gain momentum leading to the formation of the Tamil United Liberation Front as its main representative. The General Elections of 1977 showed these new dimensions of the Sri Lankan society. The Sri Lanka Freedom Party that headed the Government was defeated in an unprecedented manner. Its 91 seats in the seventh Parliament were reduced to 8 while the United National Party received a landslide victory, winning 140 seats out of a total membership in Parliament of 168 seats. The Tamil United Liberation Front won all the constituencies in the Tamil speaking areas totalling to 18 seats. They in fact formed the opposition for the first time in Sri Lanka's history. All other political parties including the Marxists were defeated. The United National Party which formed the Government sensed the mood of the society and decided as a matter of policy to introduce certain changes to the language legislations so that the society as a whole could move towards some kind of an accommodation between the two principal communities. The existing Constitution was the 1972 Constitution and the Government found that it would not legitimise a number of reforms to which it was committed. One of the areas in which the new Government had planned reforms was in the area of language. As a result of these limitations the Government which had more than a two-thirds majority thought that the enactment of a new Constitution must be a prelude to reform. Therefore, a new Constitution was enacted on the 16th August, 1978 and was promulgated on the 7th September of that year. The Constitution of 1978¹⁸² replaced the 1972 Constitution upon its promulgation.

Both the 1978 Constitution and the 1972 Constitution will receive close scrutiny later. For the present it will be sufficient to examine the extent to which the Language legislations dating from 1956-1973 have now been re-cast so as to embrace areas hitherto uncovered by the previous laws which had been legitimised by the Soulbury Constitution and by the Constitution of 1972.

The 1978 Constitution primarily declared Sinhala to be the Official Language of Sri Lanka¹⁸³ but at the same time recognised both Sinhala and Tamil to be the National Languages of the Island.¹⁸⁴ In the next six sections, the Constitution amplified various aspects in which the national character of the two languages become manifest. These are:

(i) Languages of Parliament and of Local Bodies

The 1978 Constitution declared that a Member of Parliament or of a local body has a constitutional right to speak in either language.¹⁸⁵ Under the 1972 Constitution the right to speak in Tamil in Parliament was given under the 'Standing Orders' which could be changed at any time by a simple majority. The right to speak in Sinhala, however, was a constitutional right under the 1972 Constitution. Now the right to speak in either language in Parliament or in any local body has become a fundamental right guaranteed by the Constitution.

(ii) Language of Legislation

The 1978 Constitution requires all legislations to be published in both languages.¹⁸⁶ Previously, the legislations were produced in Sinhala because that was the Official Language and in Tamil under a directive issued by the Treasury. The 1978 Constitution made it a constitutional requirement that:

"All laws and subordinate legislation shall be enacted or made, and published, in both National Languages together with a translation in the English language."¹⁸⁷

In addition, the 1978 Constitution made it a constitutional requirement to have:

" ... all Orders, Proclamations, Rules, by-laws, Regulations, Notifications, made or issued under any written law, the Gazette and all other official documents including circulars and forms issued or used by any public institution or local authority ...,"^{187a}

to be in both National Languages. The 1972 Constitution did not include these matters and had left them within the ambit of ministerial discretion to be exercised under authority derived from any one of the four language legislations^{187b} effective at the time. The creation of a constitutional guarantee in this respect appeared important in the stage in which the Sri Lankan society was in 1978, when the two communities seemed to be in a state of isolation poised for some form of inter-action. The need to draw the two communities closer to one another became a deliberate policy of the new Administration and towards this end the Government used the new fundamental law which it helped in establishing.

(iii) Education

The 1978 Constitution declared that every person is entitled to be educated through the medium of either Sinhala or Tamil.¹⁸⁸ It also declared that where one national language is the medium of instruction for any course in any University, then the other language too shall be made a medium of instruction for the other national language.¹⁸⁹ Previously, under both the

Soulbury Constitution and under the 1972 Constitution these two rights did not form constitutional guarantees but were declared in Regulations enacted under the 1958 Act.¹⁹⁰

(iv) Administration

The 1978 Constitution enacted that the Official Language, namely Sinhala, shall be the language of Administration throughout Sri Lanka.¹⁹¹ But this general rule has now been subjected to a constitutional proviso that the Tamil language shall now be used in the Northern and Eastern Provinces.¹⁹² The 1972 Constitution failed to make the use of Tamil Language in the Northern and Eastern Provinces a constitutional matter, but authorised its use by Regulations made under the 1958 Act.¹⁹³

In addition, the 1978 Constitution declared that all persons, irrespective of where they may reside have a constitutional right to communicate with and receive communications from any official of the State in either of the two National Languages.¹⁹⁴ Previously, these rights too were subject to Regulations made by the respective Ministers by virtue of their authority derived from the 1958 Act.¹⁹⁵

So as to avoid the problem raised in the Kodeswaran Case¹⁹⁶ the 1978 Constitution provided the applicants who propose to enter the Public Service a right to be examined through the medium of either language.¹⁹⁷ But they were required to acquire a sufficient knowledge of the official language within a specified period of time "where such knowledge is reasonably necessary for the discharge of his duties".¹⁹⁸ Commenting on this aspect, a Commentator¹⁹⁹ wrote:

"This section represents an attempt to achieve a pragmatic solution to the problem of public servants acquiring proficiency in the Official Language in the context of the circumstances that more than 70 percent of the people served by such public servants belong to the Sinhala community"

(v) Courts

The 1978 Constitution declared that the Official Language shall be the language of the courts.²⁰¹ However, by a proviso the Constitution declared that both Sinhala and Tamil will be the language of the Courts in the Northern and Eastern Provinces.²⁰² Despite this apparent limitation, the Constitution provided for the right of any party or any Attorney-at-Law to initiate proceedings and submit to any court proceedings in either language, even outside the Northern and Eastern Provinces.²⁰³ With this goes the right to have the proceedings in any Court situated anywhere on the Island translated into the other national language where a party or his Attorney, Judge or Juror finds it difficult to understand the national language in which the proceedings are conducted.²⁰⁴ All these matters now become fundamental rights guaranteed by the Constitution. Previously, these were regulated by Regulations made under the Language of the Courts Act of 1961²⁰⁵ and under the Law of 1973.²⁰⁶

(vi) The Duties of the State towards the two National Languages

By section 25, a constitutional obligation is placed upon the State "to provide adequate facilities for the use of the languages provided for in this chapter". This places a responsibility on the State to protect and

propagate the two national languages. This may require the State to allocate funds adequate to serve these two ends rather than in proportion to the population that consider the two national languages as their mother tongue. This is a unique basis for drawing the communities together as equal partners, a matter that had not been considered by those who drafted the 1972 Constitution.

It is essential to emphasise the extent to which the State had moved from the first enactment in 1956²⁰⁷ declaring 'Sinhala' to be the Official Language of the Island, to the extensive and detailed list of shared rights now found to be enshrined in the 1978 Constitution. What this signifies is what has been said earlier; that the State at various stages of social change has utilised the legal system to blend policy with change in a way that the State is able to control the direction of the social change. This line of thinking appears to be moving towards a realisation that an exposition of the nature and functions of a Constitution and the Courts established thereunder may be the starting point of an enquiry into the role of law as an instrument for controlling and directing social change. It seems to be evident that, unless the legal system is bottomed by a Constitution (or a Grundnorm) which legitimises the laws which the State may enact to implement its policy towards effecting social change, the State is liable to remain powerless. The momentum and the direction of the social change could thereby become uncontrollable, leaving the society as a whole in danger of slipping slowly into a condition of anarchy. It is this realisation that makes it necessary to examine constitutional and judicial development next, within a historical perspective. It is necessary to examine

both these aspects - Constitutionalism and Judicialism - historically, because Ceylon's social, political and economic development received different emphasis and different directions during different periods of time. The emphasis and the direction mentioned here being conveyed through the rules of law legitimised by the relevant Grundnorm or the Constitution operative during the particular historical period in question. The next five chapters will therefore be devoted to a study of both the institutions that made the enforcement of law possible and the Constitutions which in the nature of Grundnorms that made the whole enterprise legitimate. This study will be conducted from a historical standpoint spreading over a period beginning in 1796 and ending in 1978.

Part C

Constitutionalism and Judicial Evolution

- Chapter 5: Constitutionalism (1): The period of Restrictive Franchise. Pages 183-236.
- Chapter 6: Constitutionalism (2): The Donoughmore Reforms - The Beginnings of Universal Adult Suffrage in Ceylon. Pages 237-268.
- Chapter 7: Constitutionalism (3): Aspects of the Soulbury Constitution. Pages 269-308.
- Chapter 8: Autochthony and New Constitutions of 1972 and 1978. Pages 309-348.
- Chapter 9: Judicialism: The Survival of a Colonial Legal System. Pages 349-378.
- Chapter 10: From Adjudication to Conciliation. Pages 379-417.

CHAPTER 5

Constitutionalism (I): The Period of Restrictive Franchise

I. The Colebrooke Reforms (1833-1912).

I. (a) An Introduction

One part of the Colebrooke-Cameron Report provided a system for the administration of justice: that was the Cameron Report.¹ The other part of the same Report marked the commencement of a process for constitutional development which was ultimately to result in the gaining of Independence in 1948. That was the Colebrooke Report.² The model instituted for constitutional development as a result of the Colebrooke Report formed a continuum through the Crewe-McCallum Reforms of 1912, The Manning Reforms of 1922, The Donoughmore Reforms of 1926 and into Soulbury Reforms of 1945. The Donoughmore Reforms, however, did not fall within the model set by the Colebrooke Report. There was a definite incongruity in the Donoughmore model when compared strictly with the rest. In the next chapter an attempt will be made to show how the Donoughmore model proved an effective means for reversing the social consequences of the Manning Reforms, making the Soulbury Reforms a prelude to Independence. The Donoughmore model could, therefore, be explained as providing a necessary stage in the constitutional development of the Colony in its movement from dependence to Independence.

A number of scholars³ have provided a number of analyses and expositions of the aforementioned Reforms. These Reforms have been viewed from several standpoints. Their political implications⁴ and their constitutional effects⁵ have been well exposed. The approach here will be to combine these several viewpoints with a view to evaluating the socio-political implications of these Reforms; considered as a deliberate attempt by the British Government to translate colonial policy into colonial constitutional development.

The life-span of the Colebrooke Reforms was, undoubtedly, the longest in the colonial history of Ceylon. It lasted for three-quarters of a century and in that sense it spread over a whole period of transition from tradition to modernity. The fact that the Colonial Secretary of the time of the Colebrooke Reforms was able to obtain a reply from London, within hours, by cable, transformed the very basis of government, radically, from the pre-1833 days. In a sense, the Colebrooke Reforms introduced a modernized system of government, not only for Ceylon but also for the Cape Colony and Mauritius.⁶ The structure which resulted from the report provided a flexible framework in the form of a model for good government. Built into it, was a facility for change and growth of political institutions. As Sir Ivor Jennings had commented.

"If we ignore the dormant commissions, there were between 1833 and 1872, inclusive, ten 'Constitutions for the Island, namely, the Commissions and Instructions issued to Governors Horton (1835), Stuart MacKenzie (1837 and 1838), Campbell (1841), Torrington (1847), Anderson (1850), Ward (1855), McCarthy (1860), Robinson (1865) and Gregory (1872)."⁷

The point is that after its inaugurations by Instructions sent to Governor Horton on 20th March, 1833,⁸ the structures so introduced were used to support all the changes that were deemed necessary with the march of time. The necessary changes were communicated to the Governor and he was able to accommodate them within the existing constitutional framework. This in-built flexibility characterised its uniqueness in its ability to provide a constitutional foundation for Colonial Administration in Ceylon.

I. (b) The Model

Although at different times during the period between 1833 and 1912 the composite structure of the Colebrooke model for government changed, two basic structures - the Executive Council⁹ and the Legislative Council¹⁰ - were always retained as a part of the legislative process for the Colonial Administration of Ceylon. The Colebrooke model, therefore, was built on the Executive Council and the Legislative Council as two corner stones, the other two being provided by the Governor and the Secretary of State for the Colonies. Transposing this blue-print rather crudely upon the Soulbury Reforms, one finds that while the Executive Council took the place of the Cabinet the Legislative Council became a bicameral Parliament comprising a Senate and a House of Representatives. After Independence the position of the Secretary of State for the Colonies having become redundant - the Colonial Laws Validity Act¹¹ having ceased to apply¹² and the Colonial Governor having become the Governor-General, representing the King of Ceylon, the composite model presented by the Colebrooke Reforms underwent the necessary changes. The structural continuity between the Colebrooke Reforms and the Soulbury Reforms, although over a century apart, therefore, appears to be clear.

I. (b)(i): The Executive Council

The membership¹³ of the Executive Council established under the Colebrooke dispensation was limited to six: The Governor (as the Chairman), the Officer Commanding the Troops, the Colonial Secretary the Chief Justice, the Colonial Treasurer and the Government Agent for the Central Province. During the years this composition underwent several changes. By 1840 the Chief Justice was replaced by the Queen's Advocate¹⁴ and the Government Agent for the Central Province was replaced by the Auditor-General.¹⁵ By 1890, the Executive Council had evolved an Inner Council, comprised of: the Governor, the Colonial Secretary and the Attorney-General.¹⁶ One of the reasons advanced for this was that the advancement of the Colony required more and complex legislation. It was thought best that a small committee of the Executive Council should plan such legislation and present it to the whole Council in a way that it would be easily comprehended and discussed. Although the reason put forward for an Inner Council was one of a strategy for good government, it must be mentioned that legislation introduced by the Inner Council arrived before the Council with the initial backing of at least three members. The Governor, who had both the initiating vote and a casting vote,¹⁷ could, carry the legislation through, even when a solid block of the three remaining members of the Council may stand against it. Provided that the Governor could rely on the support of the Colonial Secretary and of the Attorney General, the government could hope with optimism to get the proposals passed in the Executive Council. That was the way in which the Executive Council was ultimately manipulated into service without altering its original constitutional structure. The Inner Council took the form of an ad hoc Committee within the Executive Council.

I. (b)(ii): The Legislative Council

The second corner-stone of the Colebrooke-Cameron Reforms was the Legislative Council.¹⁸ All six members of the Executive Council automatically became members of the Legislative Council. In addition, the Governor was empowered to incorporate four ex-officio members and in addition to appoint six unofficial members, making a total of sixteen. The four ex-officio members involved: the Government Agent for the Western Province, the Surveyor General, the Principal Collector of Customs; the fourth officer at the beginning was the Auditor-General but after 1890, the Auditor-General, having been elevated to membership of the Executive Council, was replaced as a member of the Legislative Council by the Government Agent for the Central Province.¹⁹ The Government Agent for the Central Province therefore, was brought down from the Executive Council and was made a member of the Legislative Council.²⁰ It is essential to point out that the six members of the Executive Council who became members of the Legislative Council, by virtue of that fact, may be considered as supporters of the British Administration in Ceylon. These were the Chief Justice, the officer commanding the troops, the Colonial Secretary, the Colonial Treasurer and the Auditor-General. To this solid block of support the Governor was able to add the four ex-officio members that the Colebrooke-Cameron Reforms authorised him to appoint. This necessarily gave the Governor the almost certain support of ten out of sixteen members within the Legislative Council.

The character of the unofficial members - who were initially appointed in 1840, for life, but later for a period of five years²¹ with a possibility of re-nomination - was as follows: Sinhalese (1), Tamil (1), Burgher (1),

General European Community (1), Planting Community (1), Mercantile Community (1).²² The General European Community, the Planting Community and the Mercantile Community were each represented by Europeans throughout the Colebrooke period. It is not always that the latter three members were found in opposition to the policies proposed by the government. To a large extent, their interests were centred around Health and Communications. Their particular concern was the health²³ of the Indian Coolies whom they had recruited to work on the plantations. Legislation concerning this aspect became their particular concern. Communication was another of their concerns. They asked for better roads and for an extensive railways system. Once these pressing needs were satisfied, the Governors found the three European Unofficial members willing to support the government's legislative programme. In a despatch²⁴ of Governor Sir Hercules Robinson, to which Wilson²⁵ refers, the European Unofficial member was described in this way:

"He is generally a merchant or planter with little or no knowledge of the Island beyond the capital and the coffee district. He is merely a temporary resident, whose sole aim and object is to acquire competency in the shortest possible time, so as to escape from the Island forever. He is a small but dominant class, whose interests often conflict with those of the majority of the inhabitants, who are life settlers. He has, in the appropriation of the revenue of the colony, objects to advance in which either he himself personally or his class are directly interested."²⁶

Although Wilson²⁷ doubts the accuracy of this description it is correct to say that this in effect was the attitude of the Governors towards the European Unofficial members.

I. (b)(iii): The Colonial Governor

The third corner-stone of the Colebrooke Reforms was the position of the Colonial Governor. When he presided over the Legislative Council he performed the functions of the modern Speaker. In that capacity he had the casting vote. When he initiated government business he functioned as the present day Prime Minister. Then he had the initiating vote. His position in the Executive Council was that of a Prime Minister, presiding over a Cabinet meeting. Unlike the modern Prime Minister the Governor was entitled to both a casting vote and to an initiating vote.²⁸ Unlike the Colonial Governors of the pre-1833 period, the 'Colebrooke-Governor' laboured under a number of limitations. Namely:

- (1) The Governor was instructed to refrain from proposing or assenting "to any Ordinance whatever respecting the Constitution, proceedings, numbers, or mode of appointing or electing any of the members of the Legislative Council."²⁹
- (2) The Governor was instructed to refrain from proposing or assenting "to any Ordinance whatever, whereby any person may be impeded or hindered from celebrating or attending the worship of Almighty God in a peaceable and orderly manner, although such worship may not be conducted according to the rites and ceremonies of the Church of England."³⁰
- (3) The Governor was instructed to refrain from proposing or assenting to bills which may alter the taxation system so as to diminish the revenues of the Crown.³¹

- (4) The Governor was instructed to refrain from proposing or assenting to laws that may change the established currency of the Island.³²
- (5) The Governor was instructed to refrain from proposing or assenting to laws which may cause "persons, not being of European birth or descent, - subjected or made liable to any disabilities or restrictions to which persons of European birth or descent would not be also subjected or made liable."³³
- (6) The Governor was instructed to refrain from proposing or assenting to laws which have once been refused by the Secretary of State for the Colonies, without his fresh instructions.³⁴

In addition to the above list of limitations of a substantive nature, the Governor was precluded from proposing or assenting to laws designed for the raising of funds by lotteries,³⁵ the naturalization of aliens, establishing titles, marrying those who are already married.³⁶ Further, the list of prohibitions extended to include laws for the taxing of transient traders,³⁷ the grant of money to the Governor or members of the Legislative Council³⁸ and laws affecting the ownership of private property.³⁹

The foregoing catalogue of limitations was aimed towards producing an integrated society within a racially harmonious and tranquil framework.⁴⁰ It is important to note that these measures were particularly helpful in preventing friction between the European

and the native population on the Island. The absence of laws discriminating within and thus dividing the society along racial and religious lines was a hallmark of the British Administration of Ceylon. Within the foregoing framework, the Governor was authorised, "to make, enact, ordain and establish laws", with the "advice and consent of the Legislative Council."⁴¹ By a separate paragraph in the Instructions it was declared that:

"... no law shall be made or enacted by the said Legislative Council, unless the same shall have been previously proposed by yourself i.e., the Governor, and no question shall be debated at the said Council, unless the same shall first have been proposed for that purpose by you."⁴²

It is important to note that the Governor had an absolute control of the proceedings of the Legislative Council. The Instructions provided for members of the Legislative Council to make suggestions to the Governor in writing regarding: "any law fit to be enacted by the said Council, or any question proper to be there debated."⁴³ But the ultimate decisions as to what should be the concern of the Legislative Council lay squarely within the inherent powers of the 'Colebrooke Governor'.

I. (b)(iv): The Secretary of State for the Colonies

The Secretary of State for the Colonies formed the fourth corner-stone of the Colebrooke Reforms. In him lay the ultimate political authority, exercised on behalf of the Sovereign; to whom the Governor remained responsible for his actions in the Colony. Previous to the Colebrooke Reforms this was a political fact. The Colebrooke Reforms founded this relationship upon a constitutional basis.

I. (c): The Socio-Political Implications of the Colebrooke Reforms

Fundamental to the Colebrooke Reforms was the introduction of the Legislative Council. In embryo it represented the future legislature of independent Ceylon - the Senate and the House of Representatives. Although the path to Independence took nearly twelve further decades, the model constructed by the Colebrooke report stood the test of times. But the model was not completely free from defects.

First, the absolute control left in the hands of the Governor to determine the role of the Legislative Council proved to be unsatisfactory and inhibitory of popular participation in the Government of the Colony. When this fact is considered in conjunction with the non-representative character of the membership of the Council, the efforts and the industry of the Commissioners appear to be counter-productive in effecting any real Reforms. The Legislative Council, in a total sense, was a forum for debate on topics selected by the Governor. It was not a forum to bring the natives and the Europeans into a partnership for development. In a despatch of the 17th July, 1848, to which Wilson⁴⁴ refers, Earl Grey, the then Colonial Secretary informed the Governor:

" ... In the present social condition of Ceylon with a large native population, but partially educated and imperfectly informed, unacquainted with any but a despotic form of civil policy and unfitted for self-government because unaccustomed to self-control, it would be obviously impracticable to introduce at present the principle of direct representation into the legislative body of the Colony. But as there exists, and probably continue to increase, a body of European proprietors, capitalists and merchants in the very centre of native population, as on their influence

and example, their industry and their wealth, the prosperity of the Colony must mainly depend, it must naturally be the desire of the British Government to recognise, in this class at least, the nucleus of a future population of freemen, around which native intelligence and education may cluster, and which may hereafter be the basis of a more extended representation." 45

The policy which forms the basis for the implementation of these reforms appear to be crystal clear. The British Government planned to create a small English-speaking elite emulating the ideals, manners and ways of life of the European community who may at some distant point in time be elected to represent the masses in the Legislative Council. Until that stage of Ceylonese social development is reached, the principle of 'appointment' or 'non-elected representation' appears to have been the chosen method for membership in the Legislative Council. This leads to the second observation.

Second, the social formations resulting out of this method of 'appointment' appears to have led to the creation of a ruling oligarchy at a 'family' or 'clan' level during the 'Colebrooke period'. A careful analysis of the membership of the Legislative Council over a period of nearly sixty years out of the total period of seventy five years appear to have been dominated by a single family unit.

TABLE VI⁴⁶

Sinhala Representation in Legislative Councils Established
Under The Colebrooke Reforms: 1833-1911

Name of Appointee	Relationship to the Previous Appointee(s)	Name of Family or Clan	Caste	Period of Membership
Hon. J. G. Phillipsz Panditharatne	1st Appointee	Bandaranaike Obeysekera	Goygama	15.12.1835 - 16.10.1841
Hon. J. G. Dias	Nephew of 1st Appointee	" " "	" "	10.08.1843 - 19.12.1859
Hon. Sir Harry Dias	Nephew of 1st Appointee	" " "	" "	17.07.1861 - 13.01.1864
Hon. E. J. Dehigama	Stranger	Stranger	" "	27.09.1865 - 01.07.1875
Hon. James de Alwis	Related to Sir Harry Dias by blood	Bandaranaike Obeysekera	" "	17.08.1864 - 21.10.1877
Hon. Sir J. P. Obeysekera	Related to Sir James de Alwis by blood	" " "	" "	11.09.1878 - 15.12.1880
Hon. Albert Louis de Alwis	" " "	" " "	" "	20.09.1882 - 18.01.1888
Hon. A. de A. Seneviratne	Stranger	Stranger	" "	31.10.1888 - 10.01.1900
Hon. Panabokke Tikiri Banda	Related to Sir J. P. Obeysekera by blood	Bandaranaike- Obeysekera	" "	29.10.1889 - 07.11.1894
Hon. S. C. Obeysekera	Related to Albert de Alwis by blood	" " "	" "	11.06.1897 - 15.11.1911

Name of Appointee	Relationship to the Previous Appointee(s)	Name of Family or Clan	Caste	Period of Membership
Hon. William Ellawala Ekanayake Rajapakse Basnayake Mudiyanse	Related to Sir J. P. Obeysekera by blood	Bandaranaike Obeysekera	Goygama	09.04.1895 - 21.02.1900
Hon. S. N. Wanninayake	Related to the Obeysekera's by affinity	" " "	" "	21.03.1900 - 25.07.1905
Hon. T.B.L. Moonemalle	Related to Sir J. P. Obeysekera by blood	" " "	" "	18.07.1906 - 15.11.1911

The appointment of a stranger to the clan - Hon. James Dehigama could be explained. In 1864, the Government proposed an increase of the military budget from £100,000 to £135,000. The unofficial members as a block opposed this increase. The Government however had this military expenditure passed by using the votes of: six members of the Executive Council and the four official members voting as a block of 10 to defeat the opposition mounted by the six unofficials. The latter, led by Sir Harry Dias resigned en block. The Governor's appointee to the Sinhalese seat was, therefore, drawn from outside the Bandaranaike group to which Sir Harry belonged.⁴⁷ That explains the appointment of Mr. Dehigama to succeed Sir Harry. The appointment of Mr. A. de A. Seneviratne, the second 'stranger' to the Bandaranaike - Obeysekera clan has a different explanation. This will be considered later.

TABLE VII⁴⁸

Tamil Representation in Legislative Councils Established
Under The Colebrooke Reforms: 1833-1911

Name of Appointee	Relationship to the Previous Appointee(s)	Name of Family or Clan	Caste	Period of Membership
Hon. A. Coomaraswamy [Pulle]	1st Appointee	Coomaraswamy	Vellala	14.12.1835 - 21.12.1835
Hon. Simon Casiechetty	Stranger	Stranger	*non-Vellala	14.08.1843 - 18.12.1844
Hon. S. Edirimana - Singham	1st Appointee's son-in-law	Coomaraswamy	Vellala	07.08.1845 - 19.06.1860
Sir Muttu Coomaraswamy	Son of 1st Appointee	" "	" "	17.07.1861 - 19.12.1878
Hon. Philip de Melho J. Ondaatjie	Stranger	Stranger	Vellala	02.06.1873 - 09.04.1875
Sir Ponnambalam Ramanathan	Grandson of 1st Appointee	Coomaraswamy	Vellala	27.08.1879 - 09.04.1895
Sir Ponnambalam Coomaraswamy	Grandson of 1st Appointee	Coomaraswamy	Vellala	13.09.1893 - 22.12.1897
Dr. W. G. Rockwood ₄₉	Stranger	Stranger**	Vellala	16.03.1898 - 25.07.1905
Sir A. Kanagasabai	Stranger	Stranger	Vellala	01.02.1906 - 15.11.1911

* (Colombo-Chetty)

** (But subsequently married into the Coomaraswamy family).

Hon. A. Coomaraswamy died within three months after his appointment. Sir Muttu, who was the obvious choice to succeed him was too young for appointment. Hon. Simon Cassie-Chetty, an urban newspaper editor from Colombo, was chosen to replace the late Coomaraswamy. Thereafter, the four successive appointments came from the Coomaraswamy family.⁵⁰

The Burgher appointment created a different type of social formation. It traditionally went to the lawyering class. But Sir Arthur Gordon's traditional dislike for the lawyers, particularly those at Hulftsdrop who criticised his legislative attempts, had their knuckles rapped when he chose a colonial surgeon, Dr. Anthonisz, to succeed James Van Langenberg, a lawyer of great eminence. After Sir Arthur's departure from the Island, the lawyers were returned to their former position. Dr. Anthonisz was succeeded by H. L. Wendt as the Burgher representative. Upon his elevation to the bench, F. C. Loos, a Proctor and Notary succeeded Wendt.⁵¹

TABLE VIII

Burgher Representation in Legislative Councils Established
Under The Colebrooke Reforms: 1833-1911

<u>Name of Appointee</u>	<u>Profession</u>	<u>Period of Membership</u>
Hon. R. F. Morgan	Lawyer	02.10.1851 - 24.09.1856
Hon. C. A. Lorensz	Lawyer	16.10.1856 - 30.12.1863
Hon. J. A. Martensz	Lawyer	27.09.1865 - 16.10.1872
Hon. C. A. Ferdinands	Lawyer	02.06.1873 - 29.11.1875
Hon. J. Van Langenberg	Lawyer	13.09.1876 - 13.01.1886
Hon. P. D. Anthonisz	Colonial Surgeon	05.10.1886 - 12.12.1894
Hon. H. L. Wendt	Lawyer	09.04.1895 - 31.10.1900
Hon. F. C. Loos	Lawyer	13.06.1900 - 07.06.1911
Hon. J. Van Langenberg	Lawyer	30.08.1911 - 15.11.1911

It is important to emphasise that the Colebrooke period gave rise to certain types of social formations which were to a large measure responsible for the creation of a centre-periphery schism in Ceylon. The concentration at the periphery of power of a large mass of the population, characterised by the absence of links with the ruling oligarchy progressively expanded the gap between the two groups. This provided a classic recipe for 'elite formation' on the Island.

The largeness of the periphery made it necessary that any kind of social movement in the future should commence there; and therefore it is important to realise that future policies originating from the periphery were destined to have the greatest impact on social change in Sri Lanka. Not until 1889 were the Kandyans and the Muslims given separate representation on the Legislative Council.⁵² These appointments did not, like those of the low-country Sinhalese and the Tamils, follow a pre-ordained family line.⁵³ The Governor chose the best persons to represent these communities and therefore the aforementioned social formations had no relevance to the way in which the Kandyan and the Muslim representatives were selected for appointment by the Governor.

Third, the period of governance of Sir Arthur Gordon records the only instance during the whole of the Colebrooke period during which an attempt was made by the British Government to alter the social formation at the centre of power. It is sociologically significant to note that the Governor, strongly motivated by reasons of dislike or distrust, did alter the family and professional lines of succession to the unofficial seats. By bowing to ecclesiastical pressure as to the corruptness of the system, Sir Arthur appointed Mr. A. de A. Seneviratne to succeed to the Sinhala unofficial seat vacated by Mr. Albert de Alwis.⁵⁴ Mr. Seneviratne was not a member of the Bandaranaike-Obeysekera clan. After Sir Arthur's departure, the seat returned to the established family clan by the appointment of Sir S. C. Obeysekera as the successor to Mr. Seneviratne. Similarly, Sir Arthur's appointment of Dr. Rockwood, to succeed Sir Ponnambalam Arunachalam, broke the line of succession of the Coomaraswamy family.⁵⁵

That departure from the traditional line of appointment appeared to have taken a permanent form for the rest of the Colebrooke period. The control of the lawyering class over the Burgher unofficial seat, too was broken by Sir Arthur by the appointment of a Colonial Surgeon, Dr. Anthonisz, to succeed Van Langenberg. As in the case of the Sinhalese seat, the departure of Sir Arthur heralded the return of the lawyering class to the Burgher seat. Mr. H. L. Wendt (later Mr. Justice Wendt) succeeded Dr. Anthonisz.⁵⁶

Despite these momentary digressions the social formations at the centre during the Colebrooke period took a regular and a consistent pattern. The eclipse of families - among the Sinhalese and the Tamils - over all others did not produce a healthy social atmosphere. Besides this, the members of these two significant communities chosen to represent their peers were drawn exclusively from two caste configurations, namely, the 'Vellala' (Tamils) and the 'Goygama' (Sinhalese) Castes. The unrepresentative character of the "representation", therefore, must appear to be compounding itself, leading to the emergence of considerable social tensions towards the end of the 19th Century.⁵⁷

Fourthly, the political grip of the Governor over both the Executive and the Legislative Councils proved to be self-defeating as an exercise in constitutional reform. Reforms should be evolutionary and progressive. What the Colebrooke era produced was an institutionalisation and regularisation of rule by the Governor. Particularly, the Governor's ability, commencing from the Inner Executive Council of three⁵⁸ to the Legislative Council of sixteen,⁵⁹ to come 'on top', each time; made participatory government a figment of one's imagination.

To enable the Governor to use his block vote of ten⁶⁰ against the six unofficials⁶¹ in the Legislative Council, the Secretary of State introduced, in 1841, the Melbournian principle of cabinet responsibility to the Executive Council.⁶² This bound the six members of the Executive Council, together with the Governor's casting vote, to form a block basically. Together with the support of the four official members of the Legislative Council, the Governor could thereafter rely upon a two-third⁶³ majority against a theoretically⁶⁴ united opposition of the six unofficials. By the end of the 19th century, a clamour for more power was being heard from the unofficial quarter of the Legislative Council. As a reply to these demands, Sir Henry MacCallum in 1907 created what was called 'a Finance Committee'.⁶⁵

The Finance Committee was composed of two groups of members. The first group consisted of: the Colonial Secretary, the Controller of Revenue and the Colonial Treasurer, as ex-officio members. The second group was formed by the six un-official members. The Colonial Secretary was made its Chairman and the latter, with three un-official members, formed the quorum for their meetings. The Committee met when the Legislative Council was not in session or when it had adjourned for a period exceeding twenty days and when it became necessary to vote funds out of the Colonial Treasury for emergencies or such other unforeseen circumstances. The Colonial Secretary, as the Chairman of the Committee, was required to present a report to the Legislative Council, at its next meeting. It was required that the Committee should seek a ratification of the report by the Legislative Council, approving the moneys voted during its recess. It was further required that the Chairman should inform the Council as to what moneys were refused by the Committee.

Although the six un-officials in the Finance Committee could out-vote the three ex-officio members, in the second round the Government could ensure its victory by having the money voted down at the committee stage before the Legislative Council by using the Government's block vote.⁶⁶ The Finance Committee was a strategy devised by the Administration to pacify the demands of the un-officials. But its weakness as an instrument of Budgetary control was apparent to the un-officials. For the next five years, until 1912, the Finance Committee functioned with declining interest.

Fifthly, it must be conceded that the Colebrooke Reforms provided a step towards open government. It is this that the Reforms must be noted for. Wilson,⁶⁷ in his general assessment of the Colebrooke Reforms, wrote:

"Hitherto laws could be hatched in secret by a Governor and put into operation with or without the advice of the Council of Government. Henceforth laws had to be enacted 'with the advice and consent of the Legislative Council'. This meant two things. First, before a measure reached the Statute book, it had to pass through the complicated sieve of two critical bodies, the Executive Council and the Legislative Council. Second, it was ensured that legislation will be enacted in the blaze of publicity and public opinion will be given an opportunity of expressing itself. In effect a legislative measure would from now onwards have to run the gauntlet of criticism before it could find its way into the Statute book. Needless to say, the benediction of the Secretary of State would be essential in all these matters. But it may be noticed that under the new dispensation the area of action allowed to the Governor was considerably circumscribed and he could now no longer be the Alexander Selkirk he might have been under the previous Constitution."⁶⁸

That passage presents a fair assessment of the total effect of the Colebrooke Reforms. It was the resulting social formations which made the next two steps necessary as a part of the overall colonial strategy for Constitutional reform in Ceylon. The next two steps were the Crewe-MacCallum Reforms (1912-1920) and the Manning Reforms (1924-1931). The gap between the two sets of Reforms was filled by what has come to be known as The Temporary Constitution of 1921.

II. The Crewe-MacCallum Reforms⁶⁹

(a) An Introduction

The Crewe-MacCallum Reforms were conceived within the framework of four principles. These principles were culled from the principal inadequacies highlighted by the Colebrooke model of government. It is against this backdrop that the Reforms become meaningful.

First, the Colebrooke model produced an overwhelming voting strength in the Government's favour in the Legislative Council. This was a matter of very real concern for the 'un-officials' and their respective lobbyists in the country. The new Reforms, therefore, while leaving the structure and the composition of the Executive Council intact, expanded the Legislative Council in such a way that the difference between the block vote available to the Governor and the un-official group put together was reduced to a minimum of two and a maximum of three votes. The new Legislative Council was comprised of eleven official members⁷⁰ and in addition had the Governor as its President.

In his capacity as the Governor he had an initiating vote and as the President of the Council he had a casting vote. As for the un-official numbers, there were ten. Excluding the Governor's Casting vote, the government was two votes ahead of the un-official group. As a matter of policy the government's need to be ahead of the

un-official group was conceded. Although the government had a block vote of twelve, of the twelve there were only ten ex-officio members, the other two being nominated by the Governor for appointment in pursuance of Instructions received from time to time from the Secretary of State for the Colonies. There was, therefore, the theoretical possibility of a parity of numbers between the un-official group and the official group under the new Reforms. This fact alone was profoundly conciliatory towards local demands.

Second, the Colebrooke Reforms were viewed as subscribing to social stratification at the centre. The membership of the Legislative Council was family-oriented with a caste bias. The Bandaranaike-Obeysekera family among the Sinhalese and the Coomaraswamy family among the Tamils had dominated the local representation in the Legislative Councils formed under the Colebrooke Reforms. The Vellala caste from the Tamils and the Goygama caste from the Sinhalese formed the Council's caste configuration. These two groupings appeared to produce the social formation at the centre. The argument was heard that this kind of social stratification should be destabilised.

In response to this demand the Crewe-MacCallum Reforms, while increasing the number of un-officials from eight under the Colebrooke arrangement to ten, reduced the number of European seats from three to two. The resulting configuration of three extra seats were allotted with one extra seat each to the Sinhala and to the Tamil communities, bringing their number of seats to two each; and relegating the third seat to a nebulous group of persons called the 'Educated Ceylonese'.

The latter group will be discussed later. Having created one extra seat for each of the two large communities,⁷¹ the Governor proceeded to appoint a member of the Goygama and of the Karawe castes to the Sinhalese seats while a Hindu Vellala and a Christian Tamil were nominated for the two Tamil seats. The rest of the six seats were occupied by a Kandyan (1), Muslim (1), Burgher (1), European (2), and an 'Educated Ceylonese' (1). Bringing in the Karawe caste pacified some of the demands of the low-country Sinhalese.

Third, the seventy-five years of government under the Colebrooke arrangements produced a group of persons whose tastes, manners and attributes were so clearly alien, because they were western-educated and oriented, that Governor MacCallum showed a distinct partiality towards them, identifying them as a class from which future rulers of Ceylon were fit to be extracted.⁷² Towards perpetuating their cause and adding a new dimension to the existing social formations at the centre, the Crewe-MacCallum Reforms created a new seat for them - the 'Educated Ceylonese seat'.

Fourth, a major complaint against the Colebrooke arrangement was the 'non-elective' but 'selective' nature of the representation at the Legislative Council level. The present Reforms recognised the need to introduce the 'elective' principle as a means for achieving representative government, but decided to delay that event for the present. However, as a sign of the government's commitment to the 'elective' principle, the Crewe-MacCallum Reforms isolated four of the ten unofficial seats for election. The two European seats, styled European (rural)⁷³ and European (urban),⁷⁴ were subjected to a European vote while the Burgher seat was left to a Burgher vote.⁷⁵ The identification of both these groups posed no practical problem. But in case of

doubt the government created an administrative machinery to decide and resolve any such problems.⁷⁶ As for those who were eligible to vote for the 'Educated Ceylonese's seat', special machinery was set up by legislation.⁷⁷ By making the qualifications for candidates for the 'Educated Ceylonese's seat', generally,⁷⁸ co-terminous with the qualifications of those who were eligible to be registered as voters for that seat, the government, by three sets of criteria isolated these privileged persons from the rest of their peers by legislation.⁷⁹ The first criteria was a professional criteria. Members of the legal and medical professions,⁸⁰ the engineers⁸¹ and members of the Armed Forces⁸² fell within this first category of privilege. The second criteria for selection was service to the government. Those who had served as members of a Municipal or Local Board,⁸³ those who were 'Government pensioners' in receipt at the time of retirement payments of an annual salary of not less than one thousand five hundred rupees,⁸⁴ and persons who were or who had been jurors.⁸⁵ The last criteria included those who were under-graduates or graduates of a British, Indian or Colonial university⁸⁶ and those who had passed either the Junior or the Senior Cambridge Local Examination.⁸⁷ As statistics for each of these categories, particularly those for the last two, are not available, and therefore making the extravagant assumption that all those who were able to read and write English would fall within the class of those who were qualified to vote, one sees a very narrow slice of the non-European and non-Burgher society benefiting from this limited franchise. The Europeans⁸⁸ and the Burghers⁸⁹ were relegated to their own special seats and they were expressly excluded⁹⁰ from the 'Educated Ceylonese' vote.

TABLE IX⁹¹

Table of those who were able to read and write English
in 1911 - excluding the European and Burgher population

Total	Males	Females	Buddhist		Muslims		Christians		Others	
			M	F	M	F	M	F	M	F
*37729	29353	8376	16708	2826	-	-	12633	5547	10	2
**3880	3320	560	2629	289	3	-	686	271	2	-
***14839	12195	2698	63	3	3	-	4900	1959	2	-
****2077	1948	93	--	-	1983	92	1	1	-	-

* Low-country Sinhalese

M=Males

** Kandyan Sinhalese

F=Females

*** Ceylon Tamils

**** Ceylon Moors

By disqualifying females⁹² and those who were not born in Ceylon⁹³ (unless their parents had been born in Ceylon)⁹⁴ and limiting the franchise to those who had attained the age of 25⁹⁵ a large number of females, Indian Tamils, Indian Moors and Malays were automatically excluded. The last three groups may be excluded upon grounds of birth, particularly when the age requirement was added to the birth requirement. Assuming the males represented in Table IX were all aged twenty-five, again an extravagant assumption, then 46,952 persons⁹⁶ out of a population of 4,106,350,⁹⁷ namely 1.1% of the total population, became eligible to vote. On the other hand, while limiting the percentage figures to the four communities⁹⁸ in question, with reference to Table X, then the percentage of voters under the 'Educated Ceylonese' category would be 2.5% of the society to which they belong. These figures should indicate the pattern of the resulting social formations at the level of the supra-structure. The decisive nature of the new Reform should therefore become clearly visible.

TABLE X⁹⁹

Population Figures for 1911: Sinhalese (Kandyan and Low Country), Ceylon Tamils and Ceylon Moors

	<u>TOTAL</u>	<u>MALE</u>	<u>FEMALE</u>
Low Country Sinhalese	1,716,859	894,078	822,781
Kandyan Sinhalese	998,561	525,483	473,078
Ceylon Tamils	528,024	268,649	259,375
Ceylon Moors	233,901	122,114	111,787
Total of all four Categories	3,477,305	1,810,324	1,667,021

During the succeeding years the new elite succeeded in grouping together, first under the banners of the 'Ceylon Reform League',¹⁰⁰ and the 'Ceylon National Association',¹⁰¹ and later by amalgamating to form the Ceylon National Congress¹⁰² by 1919. A fundamental basis upon which both the Sinhalese and the Tamil components of the 'New Elite' got together was to resist communal and class representation in the Legislative Council. It is, therefore, somewhat ironical that the Congress was to break apart, two years later, in 1921, upon the very grounds that had brought them together. This will be examined later. The socio-political consequences of the Crewe-MacCallum Reforms were to move the Colony towards further reform by 1921. In order to understand the next set of reforms it is necessary to expose the implications of these Crewe-MacCallum Reforms, which had acted as a catalyst for future constitutional development on the Island.

II. (b) The Socio-Political Implications of
the Crewe-MacCallum Reforms

Admittedly, the Crewe-MacCallum Reforms were a step towards representative government. The errors of the policy adopted were founded not so much in what it was intended to achieve but in what it was not designed to achieve. The Sinhalese lobby had by 1921 grown vociferous in its demands for proportional representation and universal adult franchise.¹⁰³ As was pointed out earlier, the creation of an 'Educated Ceylonese' seat proved a halter around the Colonial government's neck. It was construed as a slap on the face for the large majority of the native population and, therefore, the clamour for universal adult franchise became loud and clear. Among a number of demands, there were three emerging areas in which the government appeared to have erred.

First, the government's distribution of the communal seats received severe criticism. It was asked why a total Sinhalese population of 2,715,420¹⁰⁴ were given three seats while 528,024¹⁰⁵ Tamils were given two seats. The publication of the census figures for 1911 caused the Sinhalese population very real concern. They were able to recognise how badly they had fared under the Colebrooke Reforms.

TABLE XI¹⁰⁶

Occupation determined along Communal lines at the 1911 Census

Position Held	All Races	Sinhalese Low Country Kandyan	Ceylon Tamils	% Tamils	% Sinhalese
* ¹⁰⁷	5,375 ¹⁰⁸	2,862 ¹⁰⁹	960 ¹¹⁰	17.8	53.2
** **a	854 ¹¹¹	481 ¹¹²	205 ¹¹³	24.0	56.3
**b	1,370 ¹¹⁴	348 ¹¹⁵	625 ¹¹⁶	45.6	25.4
**c	6,959 ¹¹⁷	3,932 ¹¹⁸	1,868 ¹¹⁹	26.8	56.5

* Public Administration

** Professions & Liberal Arts:

**^a Lawyers

**^b Medical Practitioners

**^c School Teachers

TABLE XII¹²⁰

Occupation Determined Along Communal Lines 1921 Census

Position Held	All Races	Sinhalese Low Country Kandyan	Ceylon Tamils	% Tamils	% Sinhalese
Public Administration ¹²¹	7,851 ¹²⁵	4,481 ¹²⁹	1,827 ¹³³	23.2	57.
Professions & Liberal Arts:					
Lawyers ¹²²	1,099 ¹²⁶	620 ¹³⁰	521 ¹³⁴	47.4	56.4
Medical Practitioners ¹²³	968 ¹²⁷	363 ¹³¹	390 ¹³⁵	40.2	37.5
School Teachers ¹²⁴	11,122 ¹²⁸	7,317 ¹³²	2,399 ¹³⁶	21.0	65.7

TABLE XIII

Population Figures for the Year 1911 & 1921

	1911 ¹³⁷	1921 ¹³⁹
Total Population:	4,107,350	4,498,605
Sinhalese (Low Country & Kandyan):	2,715,420 ¹³⁸	3,016,154 ¹⁴⁰
Ceylon Tamils:	528,024	517,324
% Sinhalese to the whole population:	66.1%	67.02%
% Tamils to the whole population:	12.8%	11.5%

As the foregoing tables show, while the Tamil population had decreased from 12.8% to 11.4% during the period of the Crewe-MacCallum dispensations, their contribution in the fields of Public Administration and the various professions had significantly increased. Looking at the figure for 1911, the Sinhalese saw that the economic advancement of the Tamils during the Colebrooke period had outstripped their population ratio of 12.8%. The figures for 1921 showed an increase in their contribution, to the established professions leaving the Sinhalese behind and on the periphery of colonial development. In the light of these figures, the provision of two seats for the 12.8% of the population, leaving the 66.1% with three seats¹⁴¹ in the Legislative Council, became a cause for additional complaints. The fear among the Sinhalese was that economic advancement, coupled with political power of a disproportionate nature, could result in the emergence of a minority ethnic group in control of the centre of power. This, it was feared could lead to dangerous social conflicts of great magnitude. It was, therefore, time the Sinhalese argued, to reverse these trends.

This leads to the second area which the colonial government was accused of violating, namely, the franchise. The fact that the communal seats were still 'selective' and not 'elective' caused some concern, generally, to both communal groups. The Governor's choices were always suspected of patronage. Therefore, it was argued that membership of the Legislative Council lacked the political muscle and the will to represent the popular causes of the day. As a response to these developing fears, the Governor, Sir John Anderson, informed¹⁴² the Legislative Council in 1916 that

un-official members would not as a rule be re-nominated after the expiry of their period in office: i.e. nomination would rather be the exception than the rule. A nomination for a third period would be very unlikely unless the Governor was unable to find a suitable candidate who was also willing to shoulder the responsibilities of membership. This statement of policy proved a weak response to the growing fears among the Ceylonese that the Legislative Council was increasingly becoming a tool in the hands of the British Governors, merely to legalise an institutionalised form of unrepresentative government.

The third area which the Crewe-MacCallum Reforms violated was the isolation of a group of citizens as being 'educated', thereby bestowing upon them the privilege of having a special representative in the Legislative Council. The creation of a seat for the 'Educated Ceylonese' meant, at least, two things. First, it equated education with English literacy - an opportunity which was open to few in 1912. That willy-nilly reduced the importance of native languages (both Sinhala and Tamil) to nought. Second, by subjecting that privileged seat to a franchise of a limited nature,¹⁴³ the government appeared to have conceded that persons who were not educated in the English language were unsuitable or were deemed to be unable, to use the vote wisely and correctly. The unfortunate effect of being elected as 'An Educated Ceylonese' member in the Legislative Council was to subject that person to the ridicule of the large mass of the native population. Inevitably, this led to a polarisation of two social groups, characterised by literacy in English. The social formation at the centre of power was to bear that imprint, introducing a new dimension to the existing social stratification on the Island.

The three aforementioned principles which the Crewe-MacCallum Reforms violated led to the next stage of constitutional reforms on the Island. These were the Manning Reforms of 1924. Realising the dangers inherent in the Crewe-MacCallum model of government, the British Administration terminated this model and introduced the "Temporary Constitution" of 1921, until a comprehensive re-structuring of a proper model for colonial government could be undertaken for Ceylon. By an Order-in-Council of 1920,¹⁴⁴ the Crewe-MacCallum model was dissolved and a "Temporary Constitution" was introduced.

II. (c) Historical Antecedents Leading to the Temporary Constitution

Whatever else the Crewe-MacCallum Reforms failed to achieve it must be said that they succeeded in creating a new elite who seized their new position of political power to ask for extensive political reforms.

Commenting on this aspect, Mendis wrote:¹⁴⁵

"On the whole the Reforms helped to perpetuate the divisions in society, the special interests of which the British system of Administration for over a century had tended to obliterate. Though the educated Ceylonese electorate brought together the English educated classes among the Sinhalese, the Tamils and the Muslims, the grant of a special electorate to the Europeans and the Burghers helped these communities to consider themselves as separate rather than citizens of Ceylon."¹⁴⁶

Although the communal divisions and rivalries were latent and explosive, the new elite succeeded in creating a front for constitutional reform, incorporating the Sinhala, Tamil, Burgher, Muslim and European

elements of their own social level. As early as in 1917, under the leadership of Sir Ponnambalam Arunachalam, the Ceylon Reform League and its sister association, the Ceylon National Association was formed.¹⁴⁷ In his Presidential address to the Association, Sir Ponnambalam laid a foundation for future political demands.¹⁴⁸ By 1919 the activities of these two elitists groups had had such an impact upon the new elite and the government, that they formed a more permanent organisation - the Ceylon National Congress.¹⁴⁹ Although the ambit of their membership excluded the large majority of 'uneducated Ceylonese', its access to the centre of power spurred it into action, by telegraphing the Secretary of State for the Colonies, Lord Milner. The telegram succinctly stated their demands:

"Enlarge Legislative Council about fifty members, four fifths elected territorially, wide male franchise, restricted female franchise, remaining one fifth officials and unofficials representing important minorities; secondly elected speaker, Legislative Council; thirdly, continuance full control budget, no diarchy; fourthly, Executive Council at least half Ceylonese, chosen from elected members Legislative Council; fifthly, Governor should possess English Parliamentary experience; sixthly, complete popular control local self-government."¹⁵⁰

It is very important to note that the demands did not include communal representation. In fact the Ceylon National Congress was a non-communal body espousing an all-Ceylon cause. Notwithstanding the fact that it represented a small minority of the Ceylonese who had had an English education, it was determined to project a non-sectarian political stance in an emerging Ceylon.

Sir John Anderson having died¹⁵¹ in 1918, the new Governor, Sir William Manning, was only a few months at the head of the government when these demands were addressed to Lord Milner. Manning, however, had his own views on Constitutional reforms. Lord Milner, accepting Manning's views, issued an Order-in-Council in 1920 as a response to the aforementioned demands. By the same Order, the Crewe-MacCallum period was brought to an end. The Constitutional provisions chartered in the Order-in-Council caused a political uproar in Ceylon. The Ceylon National Congress rejected them and declared its intention to wreck the proposals. They made it clear that they planned to put forward candidates who would maintain a programme of passive resistance through non-cooperation, from within the Legislative Council. To avoid such a confrontation Manning bargained with the Ceylon National Congress for a respite. There was a negotiated settlement along the lines that while the Ceylon National Congress would co-operate in putting the proposals into effect, the Governor would give careful consideration to the suggestions made by the Congress in their telegram to Lord Milner. The present proposals were recognised as mere temporary provisions and by changes affected to them in due course the ultimate constitutional model for Ceylon was expected to emerge. Thus the constitutional proposals contained in the Order-in-Council of 1920 began their life as temporary provisions. Therefore, the Constitutional Provisions were referred to as the "Temporary Constitution of 1920", which became effective after the elections of 1921.

Before examining the provisions of the Temporary Constitution it must be clearly stated that the mass of the people, who lay outside the Ceylon National Congress, were not consulted. In reaching this arrangement the 'Educated Ceylonese', the new elite, and the Governor were the only participants. This is not to say that the native population were unconcerned about the matters which were being decided on their behalf, and without their participation. Their latent opposition was growing and was to erupt at some time after 1924, leading up to the Donoughmore Commission in 1927, on further constitutional reforms. It is now proper to examine the provisions of the Temporary Constitution from a socio-political standpoint.

III. The Temporary Constitution of 1921

The Ceylon Order-in-Council of 1920,¹⁵² which brought into being the Temporary Constitution of 1921, and the changes introduced in 1923,¹⁵³ in accordance with the agreement between the Governor and the Ceylon National Congress, have been subjected to a penetrating analysis by Wilson,¹⁵⁴ from the standpoint of a political scientist. It is, therefore, intended in this section of this chapter and the next to examine the two sets¹⁵⁵ of reforms from a socio-legal standpoint.

The Order-in-Council of August 13th, 1920¹⁵⁶ dealt exclusively with the structure of the Legislative Council, while the Instructions contained in Letters Patent issued on September 11th, 1920¹⁵⁷ dealt inter-alia with the Executive Council. The position of the Governor under the new Reforms was referred to in both these documents. The model thus emerging appeared similar to the Crewe-MacCallum Reforms of 1912¹⁵⁸ and the Colebrooke Reforms of 1833.¹⁵⁹

First, the Governor. He was regarded both as the political representative of the Secretary of State for the Colonies and as a member of the Legislative body created under the new Constitution. In his political capacity he had the advice of an Executive Council. By the aforementioned Instructions it was clearly laid down that:

"For the purpose of advising the Governor there shall be in and for the Island an Executive Council which shall be constituted in such manner and consist of such persons as may be directed by any Instructions under Our Sign Manual and Signet, and all such persons shall hold their places in the said Executive Council during our pleasure." 160

The demand of the Ceylon National Congress was that at least half the members of the Executive Council should be Ceylonese drawn from the Legislative Council. The Instructions, by leaving the composition of that body open, disappointed the Ceylon National Congress, initially. It certainly enraged the Congress when they subsequently discovered the Governor's choice. After the promulgation of the Constitution and the holding of the elections and the nomination of the un-official members, the Governor announced the appointment of the following members to the Executive Council:

III. (a) The Ex-Officio Members

These were, in order of precedence: the Colonial Secretary, the Attorney General and the Government Agent for the Western Province.

III. (b) The Appointed Members

These were, in order of precedence: the Colonial Treasurer and a so called representative éach from the three communities - the British, the Sinhalese and the Tamil. Had the Governor chosen three of the communal representatives from the Legislative Council, then, with a four to three representation, the Ceylon National Congress could have detected a conciliatory mood in the Governor. Instead, he chose the British¹⁶¹ and the Tamil¹⁶² from outside the Legislative Council and the Sinhalese¹⁶³ representative from within it but one who had been nominated¹⁶⁴ (and not elected) to that Council. That the Governor was deliberately set on a collision course appeared clear to many.¹⁶⁵ This then was the second structure of the new model. The third structure - the Legislative Council - included four types of representation.

1. The Ex-Officio Members¹⁶⁶

There were six members in this category: the Governor, the Officer Commanding H. M. Troops, the Colonial Secretary, the Attorney-General, the Controller of Revenue and the Colonial Treasurer.

The Governor performed the functions of a Presiding Officer¹⁶⁷ and was given both an originating vote and a casting vote.¹⁶⁸ This group of members, therefore, commanded seven votes in the new Council.

2. The Nominated Official Members

The Order-in-Council read:

"Such other persons holding Public Office under the Crown in the Island not exceeding nine in number (herein referred to as Nominated Official Members)¹⁶⁹ ... appointed according to the Instructions of His Majesty or by warrant or warrants under his Sign Manual and Signet or, provisionally, by the Governor in pursuance of the power hereby vested in him."¹⁷⁰

3. The Nominated Un-Official Members¹⁷¹

Persons not holding public office under the Crown on the Island were eligible for nomination by the Governor. The number of such members was limited to three.

4. A 'nebulous' group of Un-Official Members

The Governor was authorized either to nominate or to subject to the elective process, four seats representing: Muslims (1),¹⁷² Kandyan (2) and Indians (1).¹⁷³ Where the Governor in the Executive Council so decided, the Order-in-Council laid down the procedures to be adopted in preparing for such an election.¹⁷⁴

III. (c) The Elected Un-Official Members¹⁷⁵

Ceylon was divided into sixteen constituencies¹⁷⁶ each one returning one member. Of the sixteen there were two 'interest seats',¹⁷⁷ and three 'communal seats'.¹⁷⁸ Each category was subjected to separate voting registers compiled in such a way as to represent the respective category of voters those elected would represent in the Legislative Council.¹⁷⁹ The eleven remaining seats were distributed among the nine Provinces,¹⁸⁰ one seat for each Province except the Western Province, which was given two seats. The eleventh seat was given to the Town of Colombo¹⁸¹ - the capital city.

The immediate reaction to this composition of the Legislative Council was that the creation of communal seats diverged from the non-sectarian aspirations of the Ceylon National Congress. While reserving the discussion of the impact of this divergence upon the Ceylonese society for a later stage in this chapter,

it must be said at once that Sir William Manning, the Governor, harboured a cunning reason for this grand design. Relying on a secret communication from Manning to Lord Devonshire, the then Secretary of State for the Colonies, dated 14th August 1922, Fernando¹⁸² wrote:

"This package of reform was, to say the least, surprising. The principle of communal representation had been extended and a new communal principle - balance of power - introduced into the Constitution. Though the ostensible reason for the measures was safeguarding the minorities, they had actually been introduced unasked for; when no single recognised body of minority elites had requested them; and indeed, when the organization of the united elite groups - the Ceylon National Congress - had actually agitated for the abolition of such measures. The Governor himself, in a later secret despatch, provided a reason that must have been obvious to the elites: that communal representation and the balance of power were essential and territorial electorates intolerable, as otherwise the Sinhalese and the Tamils could unite against the Government, a situation which to the Governor would have been a 'very unsatisfactory state of affairs and one which would be greatly resented'."¹⁸³

The practicality of the well known principle of 'Divide et Impera' appears to have governed the articulation of these new Reforms. Wilson¹⁸⁴ has worked out four possible ways¹⁸⁵ by which a legislative measure could be carried out under the new arrangement. From a purely practical standpoint, considering Wilson's combinations, it seems somewhat difficult for the government to lose in the Legislative Council. However, in that unlikely event, the Order-in-Council provided the Governor, by paragraph 52, with a clear remedy; namely he could declare "a Bill, a clause, an amendment, a resolution or a vote to be of paramount importance."

If he does so, then such a provision:

" ... shall be deemed to have been passed by the Council if a majority of the votes of such ex-officio members and nominated official members are recorded in favour of any such Bill, clause, amendment, resolution or vote." ¹⁸⁶

The Governor now could give assent to such a provision, notwithstanding the fact that it was in fact adopted by no more than eight votes ¹⁸⁷ in a Council of thirty-eight. ¹⁸⁸ At a basic level of analysis the Reforms were to produce a veil of democracy hiding a monumental strategy for non-participatory rule. It was to create communal power blocks which, like the pawns upon a chess board, were to be utilised to play a game of moves and counter moves calculated in a way that 'the King' could never be 'checked'. Wilson ¹⁸⁹ has further indicated the communal composition of the Legislative Council:

- | | |
|----------------|----------------------------|
| (1) Indian | (3) Ceylon Tamils |
| (1) Muhammeden | (3) Europeans |
| (2) Burghers | (11) Low-country Sinhalese |
| (2) Kandyans | |

A total of 23.

These twenty-three members could be further divided into four categories:

1. The Nominated Un-Official Members

In this group were: Indian (1), Muslim (1), Burgher (1), Ceylon Tamil (1), Low-country Sinhalese (1), Kandyan Sinhalese (2). (A total of seven).

2. Those Elected to Represent Special Interests

In this group were: European (1), ¹⁹⁰ Low-country Sinhalese (1). ¹⁹¹ (A total of two).

3. Those Elected As Representatives of Communal Electorates

In this group belonged: Burgher (1); European (2).
(A total of three).

4. Those Elected Along Provincial Lines

In this group belonged: Low-country Sinhalese (9)¹⁹²
and Ceylon Tamils (2).¹⁹³ (A total of eleven).

This gives the break-down of the twenty-three un-official members of the Council. The complexities arising out of the various interests and groups they represented were sufficient to keep the un-official members constantly divided. In addition the power given to the Governor to re-nominate the seven un-officials, together with the power to remove them, affected their independence considerably. Paragraph 8 of the Order-in-Council read:

"The Nominated Members of the Council shall hold their seats until the next dissolution of the Council after their appointment, unless previously removed ... or suspended by the Governor under the power for that purpose hereby vested in him, but may be re-appointed."¹⁹⁴

It is unnecessary to emphasise the outcry which these new reforms generated, both inside and outside the Legislative Council. These have been well documented.¹⁹⁵ The demand was made of the Governor by 1923 asking him to carry out his promise to review these 'temporary provisions' at an early date. The Ceylon (Legislative Council) Order-in-Council of 1923,¹⁹⁶ which came into effect on February 16th, 1924 was the government's response to these demands.

IV. The Manning Reforms (1924-1931)

(a) The Reforms

Sir William Manning's tenure of office was an unusually long one. It lasted for seven years, 1918-1925. The major event of his period in office was constitutional reform. His 'Temporary Constitution' of 1921 had been calamitous. The changes which he recommended to the Secretary of State for the Colonies in 1923 also proved disastrous. The disaster was to cause a rift between the two communities - Sinhalese and the Tamils - to such an extent that it reversed and frustrated the efforts taken by the Ceylon National Congress to forge a unified nation with a cohesive society. As later events were to show, had the British Government acted in support of the position taken by the Ceylon National Congress, the next quarter century leading up to Independence could have brought the two communities to a position of amity. But the whole purpose of these Reforms, as secretly conceded¹⁹⁷ by Manning, was to divide the nation and rule thereby. The Order-in-Council of 1923, which introduced the 'Manning Reforms', succeeded in reforming the provisions of the Temporary Constitution to divide the nation further.

The 1923 provisions basically preserved the existing constitutional model with the Governor, the Executive Council and the Legislative Council. The Reforms merely enlarged the membership of the Legislative Council and in so doing shifted the balance of communal representation in a manner in which new social dimensions became added to the existing social formations. Until these could be considered later what is necessary at this stage is to state the nature of the Reforms introduced by Manning.

First: The new Legislative Council was enlarged to 50, from the previous 38 members. Of the fifty there were to be twelve official members, with the Governor making a total of thirteen. In addition there were to be thirty seven un-official members.

Second: As under the previous model, there were to be two categories of official members - the ex-officio members and the nominated official members. While the ex-officio members remained the same in number as those granted under the 1920 model, the number of nominated official members suffered a reduction of two, from nine, resulting in seven.

Third: The thirty seven un-official members, as before belonged to several categories. There were three persons whom the Governor could nominate as before, and under similar conditions from the Muslim faith. The Governor could either appoint them or have them elected from among the Muslim community. Further, there were two persons from the Indian Community, whom the Governor could either appoint or have elected to the Council. There were three European representations representing European Urban, Rural and Commercial interests. Further, there were three un-official members nominated by the Governor. There were two representatives from the Burgher community and one from the Ceylon Tamils in the Western Province. A total of fourteen representatives drawn from special interest groups. And lastly, there were the twenty-three persons to be elected from defined constituencies.

This third Reform suppressed the appointment of two Kandyan Sinhalese members as was recognised under the 1920 model. In its place the number of Muslim representations had been increased from one to three and the Indian representation from one to two. The elected membership had gone up from sixteen to twenty-nine.

Fourth: While enlarging the elected membership on the Council, the Manning Reforms increased the former Northern Provincial seat from one to five, thus enlarging the Tamil membership on the Council. In addition the Reforms created a reserved Tamil seat in the Western Province,

to represent those Tamil persons who may be "resident in that Province".²⁰⁹ Further the former Eastern Provincial seat which returned a Tamil member was split into two,²¹⁰ so that it could now return two Tamil members. These divisions became serious concerns for the Sinhalese majority during the years following the introduction of this new arrangement.

Fifth: The North Western Province,²¹¹ the Central Province²¹² and the Southern Province²¹³ were each divided into two. A seat each for the Negombo District,²¹⁴ Kalutara District,²¹⁵ Kegalle District,²¹⁶ and Ratnapura District²¹⁷ were added, thus increasing the Sinhalese representation, too. The Low Country Produce Association, however, lost their representation, a preserve of the Sinhalese majority. But the Colombo town seat was split into three seats.²¹⁸ There was no change in the European,²¹⁹ Burgher²²⁰ and commercial²²¹ representation. The commercial representation was drawn²²² from the Ceylon Chamber of Commerce, which was dominated by the European Mercantalist. Their representative accordingly came from the European population on the Island.

Sixth: The former clause²²³ concerning "questions of paramount importance" was widely drafted. In the present arrangement, paragraph LIV (1) read:

"If the Governor is of opinion that the passing of any Bill ... is of paramount importance he may declare such Bill ... to be of paramount importance ... either before or after the votes of the members are taken."²²⁴

Where such a declaration was made, then

"Any such Bill ... shall be deemed to have been passed by the Council if a majority of the votes of such ex-officio members and nominated official members are recorded in favour of any such Bill"²²⁵

The effect of this provision is clear. Whenever a measure proposed by the Governor is voted down by the Council, he could thereafter declare that measure to be 'a question of paramount importance'. Thereafter, no further vote is required, if it appears that a majority of the ex-officio members (six²²⁶ including the Governor) together with the nominated unofficial members (seven²²⁷) had supported the measure. Seven affirmative votes from these two quarters would, therefore, suffice to override a decision made by the rest of the membership of forty-three members. Under the Temporary Constitution the Government required eight,²²⁸ but now, under the Reforms, the Government required only seven. This, notwithstanding the fact that the total membership of the Legislative Council had been enlarged from 38 to 50 under the new Dispensations. The reduction of the number of nominated Unofficial Members from nine²²⁹ to seven²³⁰ was not in fact a concession to the demands of the Ceylon National Congress for more representative membership, but a further strengthening of the Government's position in getting legislative measures passed through the Council.

The basic criticism made about the previous model being a veil for non-participatory government appears to hold for these subsequent Reforms too. These Reforms remained in force until the promulgation of the Donoughmore Constitution in 1931, spanning a period of seven years. These seven years may be regarded as some of the more momentous years in the history of Ceylon, and have had a deep influence on the path taken towards Independence and beyond. The nature of the social formations during, and as a result of, the "Manning Reforms" requires a whole new programme of investigation. The attempt made in the

next section is merely to outline the social consequences of the Manning Reforms in so far as they could be regarded as having a bearing on later constitutional development. It is within that limited framework that the next section is approached.

IV. (b) The Social Consequences of the Manning Reforms

Historically, the 1920 Temporary Constitution of Manning and his 1923 Reforms could be treated as two distinct steps towards constitutional development. But in effect they were both an integral part of an overall strategy for colonial development through effective government. In that sense the social consequences arising out of both the 1920 and the 1923 Dispensations form a part of a continuous social movement towards increasing polarisation of the society along communal and linguistic lines. The fact that these kinds of divisions were to arise as early as in 1920, nearly three decades before Independence, and to continue unabated for the next 30 years bode ill for the nation. Concomitantly, this type of social formation should explain the post-Independence, thrust of the nationalist forces for fundamental social changes in Ceylon. There are a number of strategies which appear to be emerging from the two dispensations in the form of distant ripples but capable of turning, in time, into tidal waves. It is to these that the present section will be devoted.

The formation of the Ceylon National Congress²³¹ in 1919, by the amalgamation of the Ceylon Reform League and the Ceylon National Association may have appeared as a frightening spectacle for Manning, particularly with Sir Ponnambalam Arunachalam at its helm. As President of the Association, he had brought together the progressive

forces of the Jaffna Association and the Sinhalese Members of the 'new elite' into a common front. This necessarily meant a potential block of nearly 80% of the population lined up together against the Government. Manning, by creating two communal seats²³² for the Kandyan in the 1920 Dispensations, to be nominated by him, drove a wedge through the Sinhalese ranks. Between 1920 and 1923, by a series of swift but skilful moves, he succeeded in neutralising the Kandyan lobby. He thereby limited the scope of the National Congress to the Low-Country. Having succeeded by using the carrot - their two seats in the 1920 Legislative Council - in alienating Kandyans from their Low-Country brethren, he thereafter proceeded to abandon them in the 1923 Dispensations by suppressing these two communal seats. Therefore, by 1923, the Kandyans were compelled to seek an alliance with the Congress, whose members were unwilling to make any permanent arrangements with them.

At the ensuing elections in 1923, nearly half of the Kandyan seats were captured by the Low-country Sinhalese; despite a hastily-drawn agreement with the Congress that the seats in the Kandyan provinces should not be contested by their members.²³³ By 1924 Manning's skill had brought the Kandyans to the point of asking for separate representation and by 1927 to a claim for regional autonomy.²³⁴ This was Divide et Impera carried to the point of success.

As for the Tamils, Manning's approach was differently conceived. He pushed to the extreme two conflicting principles of constitutionalism. On the one hand he pushed for territorial electorates. This was fundamental to the Congress policy. On the other hand he subscribed to a policy of balancing power through specially created

communal seats, so that the majority could not dominate the minorities by the sheer weight of numbers. This not only attracted the Tamils both within and without the Congress but other minorities as well - the Muslims and the Indian Tamils. However, the latter policy was clearly against the policies of the National Congress. Pulled from the direction of the Jaffna Association, Sir Arunachalam and his Tamil colleagues within the Congress demanded that the Congress hierarchy supported the creation of a Tamil Communal Seat in the Western Province. This was a via media which could keep the Tamil members in the Congress together and without any loss of face with their brethren in Jaffna. As a question of principle, the majority of the Congress was unwilling to make this concession. Sir Arunachalam and his Tamil colleagues accusing their Sinhalese colleagues of a breach of faith²³⁵ left the Congress to form the Tamil Mahajana Sabhai in August 1921. Commenting on the gravity of this breach, Professor de Silva²³⁶ wrote:

"It is no exaggeration to state that Arunachalam's break with the Congress inflicted on it a blow from which it never recovered. The Ceylon National Congress had prided itself on the fact that the twin principles of communal harmony and national unity were the foundations on which it had been built. But within two years of its establishment the Congress was torn apart ... and was soon reduced to a hard core of low-country Sinhalese activists."²³⁷

To complete this polarisation of the two major communities on the Island, Manning gave the Tamils a communal seat in the Western Province in 1923.²³⁸ The resulting anger among the Sinhalese²³⁹ became self-perpetuating leading, as it has happened today, to regrettable ethnic conflicts. The question was asked how the government justified the creation of a special communal seat for the Tamils in the Western Province, when their population in that

Province was only 24,600, while ignoring the 51,900 Moors and the Indians who lived there.²⁴⁰ A special Sinhalese communal seat for the 27,000 Sinhalese living in the Eastern Province was not even considered.²⁴¹ The polarisation of the two communities and the policies of both Manning and his successor Sir Hugh Clifford helped to fan the fires of communal discord during the succeeding years. Sir Hugh, the historians²⁴² have found to be patent in his attitude of favour towards the Tamils. Fernando²⁴³ has quoted one of Sir Hugh's Despatches to the Secretary of State for the Colonies, in which he described the Tamils as:

"among the most thrifty, diligent, enterprising and intelligent of Oriental peoples. In their own country (Jaffna) they devote unremitting labour to the intensive cultivation of land that is none too fertile and of which Sinhalese peasants would be able to make very little."²⁴⁴

The National Congress being in disarray, the Sinhalese forces found a hard core of Sinhala-educated nationalists as their rallying point; particularly during the years leading up to the arrival of the Donoughmore Commission on the Island in 1927. The Sinhala Jatiya (the Sinhalese Race) newspaper, edited by Mr. Piyadasa Sirisena, a Sinhalese scholar, formed the centre for Sinhalese protests. Once the leadership of the protest group passed from the leaders of the Ceylon National Congress, communal battle lines began to take a different form. It became crude, direct and irreversible. There was thereafter nothing of the sophistication of the 'new elite'. The battles were less subtle, less discrete and less indirect. As a poignant example; Sirisena brought out his literary classic, the novel Maheswari.²⁴⁵

In it he devoted a whole chapter to a comparison between the racial characteristics of the Aryans and of the Dravidians - the Aryans always coming on top. In a telling conclusion, written in verse, Sirisena, moving swiftly from a condemnation of the Dravidians to a devastating attack on the Tamils, warned his readers:

පුරතන් දෙමට පහ විසයිය දෙමලි දි	හ
සිහියමෙ පෙණෙන දෙමලින් යන මෙකුන් දෙ	හ
විස වෙන මොව සිවින දෙමලෙකු කිසිම දි	හ
නොකරවි විශ්වාස යො රකි බසක් ව	හ

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(The ancient pundits have declared that no Tamil except the dead Tamil, the Tamil yet to be born and the Tamil on a mural should ever be trusted.)

It is important to note that the protest group was no longer using the medium of English, as the Congress did, but the vernacular. This necessarily helped in the succeeding years to draw in the mass of the people on the periphery into the mass nationalist movement. Once mobilised in the twenties, the movement, as a significant social consequence of the policies inaugurated by Governor Manning, was to steer the country through various stages of reform into a total transformation of Sri Lankan society in the seventies. Their success with the Donoughmore Commission was to strengthen their resolve and surely their ranks. The polarisation of the two communities, as years went by, became institutionalised, both by political policies and legislative enactments. This in fact is the core of the post-Independence portion of this writing. What has been said above forms the centre of the social problem created by Manning. But there were others too.

The property qualifications coupled with the literacy qualifications which Manning introduced in both the 1920²⁴⁷ and in the 1923²⁴⁸ Dispensations restricted the franchise to a very small portion of the population. Professor Mills²⁴⁹ fixed the number of those qualified to vote under the 1923 Dispensations at 204,997 out of a population of 4,498,605, a mere 4.5% of the population. Where, inter alia, the property qualification was satisfied, the potential voter needed merely the ability to read in one of the languages English, Sinhalese or Tamil, to have his name included in the voters list. Females and those under 21 were excluded. But a further qualification was required from those who aspired to represent the 204,997 persons in the Legislature. This was the ability to read and write English.²⁵⁰ This was justified upon the grounds that English was the official language. For practical purposes, such an additional requirement could clearly be justified. But it must be said that the result was to isolate a group of persons who could form a ruling elite for independent Ceylon. If the Order-in-Council had limited the membership in the Legislative Council to those with an ability to read and write English, purely as a practical measure, no real criticism could be made against this aspect of the Reforms. For it would have drawn in some from the country's economic periphery who through conversion or otherwise had obtained an Anglo-vernacular missionary education, and therefore, would be proficient in the English Language. But by linking literacy in English with a property qualification, the Government was making membership in the Legislative Council a very restrictive one. Not only was the Government, according to Professor Mills, restricting the franchise to 4.5% of the population, but was also restricting further the eligibility to stand for elections to a smaller group of elitists who were earmarked to become the future rulers of Ceylon.

It is to this aspect that the Donoughmore Commissioners paid particular attention. The combined effect of these two provisions was to leave at least 96% of the population frustrated and angry. It is from their ranks that the future collaborators for social change were in fact recruited.

As a strategy for colonial development the 1923 Reforms were effective. The communal representation in the new Legislative Council took the following form:

<u>Community</u>	<u>Number of Seats</u>
Sinhalese	(16) ²⁵¹
Tamil	(8) ²⁵²
Indians	(2) ²⁵³
Mohammadens	(3) ²⁵⁴
Europeans	(3) ²⁵⁵
Burgher	(1) ²⁵⁶

In addition there were six ex-officio members,²⁵⁷ seven nominated official members²⁵⁸ and three nominated un-official members.²⁵⁹ By Article X of the Dispensation the nominated member of either category held office until the 'next dissolution of the Legislative Council', resignation, death or suspension by the Governor. He could, however, be re-appointed without restriction, at the absolute discretion of the Governor. This necessarily meant that the Governor could rely on the votes of the ten nominated members to support him, for their re-appointment depended on the Governor's patronage.

According to the above configuration two interesting patterns emerge. Upon the "balance of power" principle, which was designed to protect minorities from majorities, the sheer weight of 67% of the Sinhalese was effectively checked by the 17 seats held by the five minority groups,

the Sinhalese in fact holding one less. This would be an effective means of drawing the Tamils away from the Sinhalese. For, if the Sinhalese and the Tamils had succeeded in forging a voting axis in the Legislative Council, then, together with their combined strength of 24, they could have drawn in the support of the three Mohammedans and the two Indians to swell their ranks to 29, giving the 'Native block' an overwhelming majority. It is this that Manning and his successors feared most. The Muslims, with the Buddhist-Muslim riots of 1915 fresh in their minds, considered the Tamils their allies and the Sinhalese their enemies. The Indians, with their cultural and linguistic affiliations, took the Tamils into their confidence. The Tamils, therefore, knew that they held the key to the hearts and the minds of the Governors. With the spectre of the Rebellions of 1818 and 1848 the Governors were reluctant to trust the Sinhalese. Moreover, the Sinhalese nationalists were clear as to what they wanted: they wanted Independence. The Tamils, however, remained aloof from the Independence struggle, for they felt secure under British rule. This indeed was a favourable trend, politically, from the British standpoint. Another is that, if, by some miracle, the 'native vote got crystallised into a single axis against the British', then Article LIV gave the Governor the means to push legislation through as "questions of paramount importance". The enlarged provisions of Article LIV, to which reference has been made before, would give the British government the ability to have measures passed into law, provided that a majority of the ex-officio members and the nominated official members had voted in favour of these measures - a total of seven votes in the Government's favour sufficed.

It is important to recall that in 1833, when the common Reforms of Judicial administration were introduced, the judicial powers hitherto exercised by the British Governors were suppressed and they were transferred totally to the judiciary headed by the Chief Justice. It appears now that as a not too insufficient quid-pro-quo the Governors' executive powers in fact enlarged and had steadily continued to enlarge, commencing from the Colebrooke Reforms of 1833. The Manning Reforms represented the highest point achieved in constitutional development in Ceylon within a restrictive franchise. The next logical step was the introduction of the principle of Universal adult suffrage which marked a new chapter in colonial constitutional development. This grand step was taken in 1931 by the introduction of what has become to be known as the Donoughmore Constitution.

CHAPTER 6

Constitutionalism (2): The Donoughmore Reforms - The Beginnings of Universal Adult Suffrage in Ceylon

I. Towards the Donoughmore Reforms

The Donoughmore Reforms became a necessary next step in Constitutional development, after Manning. The next step must be conceived within three broad categories of development. First, the social consequences resulting by 1927,¹ and certainly by 1931,² out of the creation of communal representation, had left an indelible impression on the inter-communal relations on the Island. The Donoughmore Reforms, therefore, were necessarily aimed towards reversing this trend. The abolition of communal seats and the introduction of a territorial principle of representation was their first step. Besides this, the Reforms inaugurated a form of government which required communal inter-dependence for its effective implementation. The system of Executive Committees was therefore introduced. Second, the social formations resulting out of the elitism generated by the Manning Reforms³ needed changing. The exclusion of females from voting was considered retrogressive. The Donoughmore Commission, therefore, recommended universal adult franchise, a privilege which was unknown to any other Third-World British dependency in 1931. Third, none of the Reforms between Colebrooke and Manning afforded the un-official members of legislature an opportunity to govern; they held no Executive positions. They were advisory, consultative

or legislative in their functions. It was thought that unless the un-official members, who were in 1931 territorially elected by a non-communal voting system were given Executive or Ministerial powers the reforms which the Commissioners recommended would stop short of reaching a fundamental point of constitutional development; namely advancing participation in the governmental process as a step towards Statehood. After all, universal adult suffrage which the Commissioners recommended, would have increased the electorate from 204,997 to 2,175,000, a more representative a figure.⁴ Therefore, every indicia for representative government was at hand. The Donoughmore Constitution passed through this gateway and in doing so resulted in leaving seven portfolios in the hands of the un-official members of the State Council, which in fact was the equivalent of the former Legislative Council. The portfolios of Finance, Justice and Foreign Affairs were left in the hands of the ex-officio members. To make the issue of inter-communal dependence more concrete the Donoughmore Commissioners introduced a form of secret balloting to select the members who would form the seven Executive Committees, leaving it to the members of each Committee to select their own Chairperson, who would be the Minister in charge of that portfolio. The Governor was kept entirely out of this process. Within these three broad parameters the Donoughmore Constitution was introduced in 1931.

II. The Donoughmore Constitution of 1931⁵

Basic to the recommendations made by the Donoughmore Commission was the atmosphere which the Commissioners found in Ceylon in 1927. Sir Charles Jeffries, the last Colonial Secretary of Ceylon, wrote:⁶

"The Donoughmore Commission testified with affecting sincerity to the warmth of the welcome which it received on all hands from the kindly people of Ceylon. But the political atmosphere in which its investigations were conducted was one of frustration and tension. Basic to all the rest was the tension between official government and representatives of the electorate. In an ideal world, populated by angels, the 1924 Constitution might have worked; but the people of Ceylon were, after all, human beings, and so indeed were the British Officials, even if they were sometimes described as "heaven born". Though this was far from the intention of the designers, the Constitution was in fact framed in such a way as to exacerbate rather than to alleviate differences of outlook and interest".⁷

By an Order-in-Council of the 20th March, 1931,⁸ which became effective on the 15th April, 1931, The Donoughmore Constitution replaced the Manning Reforms of 1923. The Constitution itself had been the subject of many comments by other writers.⁹ Therefore, it is not intended to discuss the Reforms in detail here, but to show their relevance to the social problems created by the previous Constitution.

One of the key elements in the previous Constitution was the number of ex-officio and nominated official members.¹⁰ The Donoughmore Commissioners recommended, and the British government accepted, that this government group should be to a large measure reduced. The Constitution of 1931 reduced that number to three,¹¹ allowing representation for the Colonial Secretary, the Legal Secretary and the Financial Secretary as the three official members in the new State Council. The change of name of the legislative body from 'Legislative Council' to the 'State Council'¹² was not merely a matter of nomenclature but of psychological significance. For one thing the 'Legislative Council', a term used from the

'Colebrooke' to the 'Manning' Dispensations, was associated with systems which had not proved conducive to social cohesion. For another, the framework within which the Reforms were conceived was meant to be the last step before 'Statehood', and therefore, this would be, as indeed it was, the body that would negotiate the next stage of Constitutional advance which would transform Ceylon from a dependent Colony to an Independent State. A point of some discontent over the previous Dispensations was the Governor's position in the Legislative Council as its President,¹³ having both an originating vote and a casting vote.¹⁴ The Donoughmore Commission recommended, and the government accepted, that the Governor should be removed from the legislative assembly. This separation was significant in at least two respects. It indicated his position as the representative of the Sovereign and it also indicated the proximity to Statehood, in which the legislature would include the Governor-General acting in the role of the Sovereign, constitutionally, with all powers, legislative and executive, left in substance to the elected representatives of the people. Therefore, it seemed necessary to remove the Governor from the forum of the elected representatives, leaving the government's representation to the three ex-officio members mentioned above, at this penultimate stage before Independence. This necessarily required two adjustments. First, by Article 30(1) of the 1931, Order-in-Council, it was required that a speaker be elected at the first meeting of the State Council, who would preside at its meetings. Provision was made by Article 30(2) to have a Deputy-Speaker, a Chairman of Committees and a Deputy Chairman elected. Article 30 further laid down that each of these offices could be held by elected members

of the Council only, thus excluding the ex-officio members from holding such offices. Second, by the Second Schedule to the Order-in-Council, all matters¹⁵ regarding the maintenance of the Colonial status of the country, for which the Governor was responsible, was distributed among the three ex-officio members. Schedule One, however, laid down matters which were of local content for which the elected representatives of the people, and ministers drawn from their ranks, were made responsible. By Article 33(2) the Governor, with the approval of the Secretary of State for the Colonies, was empowered to expand the ambit of the Second Schedule, provided that in doing so he does not alter the matters left to the elected representatives under Schedule One¹⁶ of the Order-in-Council. The latter powers were, in a sense, 'entrenched' in the Order.

The total effect of these provisions, clearly, was to reduce considerably the powers which the Governors had under the Manning Reforms. Under both the 1921 and the 1923 Dispensations the Governors could, by declaring a matter 'to be a question of Paramount Importance' have his measures passed into Law with a fictitious "majority".¹⁷ By denying the Governor a position in the State Council, that facility was taken away from him, under the new Reforms. The three ex-officio members might, without the support of the elected members, find it impossible to carry out the policies necessary to maintain the colonial status. The result, therefore, could be a dead-lock which could even lead to the suspension of the Constitution, thus reversing the progression towards Statehood. The Commissioners were clearly concerned about this difficulty. They said:

"The position of the Governor must be consistent with the type of constitution which we contemplate. If the new Constitution is effectively to transfer to the elected representatives a large measure of responsibility the retention unaltered of the Governor's powers would be inappropriate; if on the other hand the Constitution will not be equivalent to the grant of full responsible government it would be illogical to place the Governor in the position of the constitutional head of such a government. The change then in the position of the Governor must accord with the degree to which responsibility is to be transferred, and his executive powers must be diminished in direct ratio to the advance made towards responsible government. ... It follows then that the executive responsibility of the Governor must be pro tanto diminished. But here we are faced with a paradox. For with every transference of responsibility to representative organs the Governor must be given such additional reserve powers as will enable him to see that this responsibility is not wrongly exercised. These reserve powers will represent one form of safeguard, which will operate if and when the principles of the Constitution should be infringed"18

The government needed an alternative to suspension of the Constitution if and when the elected representatives overlooked the fact that the country was still a Colony. In case they were inclined to use their block vote to frustrate the Colonial Administration of the Island, then the Governor needed alternative means to pass essential legislations into Law. As an exception to the general provision laid down in Article 72 of the Order-in-Council, that "it shall be lawful for the Governor with the advice and consent of the Council, to make laws for the peace, order, and good government of the Island",¹⁹ the government introduced in Article 22 an alternative method for enacting Laws. It reads:

"If the Governor shall consider that it is of paramount importance to the public interest, or essential to give effect to any of the provisions of the Order, that any Bill, motion, resolution, or vote which the Council is empowered to pass, in the exercise of either its legislative or executive functions, should have effect, then in such case, notwithstanding any of the provisions of this Order or of any Standing Orders under this Order:

(a) it shall be lawful for any officer of State acting by the authority and under the instructions of the Governor, to propose any such Bill, motion, resolution, or vote to the Council and the same shall have priority over all other business of the Council;

(b) the Governor may declare that any such Bill or any such motion, resolution, or vote is of paramount importance or is essential to give effect to the provisions of this Order, and there upon such Bill, part of a Bill, motion, resolution, or vote shall have effect as if it had been passed by the Council. Such declaration may be made by the Governor by message addressed to the Speaker or by an Officer of State, acting by the authority and on the instructions of the Governor, either before or after the votes of the members have been taken." 20

The transcribing of this section in full is justified by its importance as a means for avoiding a deadlock between the elected representatives of the people and the Colonial Administration. While removing the Governor from the State Council under the new reforms, his lines of access to it were preserved in case of need. The three ex-officio members or the Speaker provided him with access to the new Council. Measures required to preserve the effectiveness of the Order-in-Council could now be assured of a clear and swift passage into Law, without even having to be put to a vote. This appears to have followed the Commission's recommendation that in the event of having:

"a council in which the elected element has been enlarged and the official element reduced to the three officers of State ... we consider that the power to enact essential legislation should rest absolutely in the Governor himself and that no voting on the Bill should be required."²¹

The elected members, however, had seven days after the Governor's declaration under Article 22, to make their opposition known.²² This was required to be in writing and was required to be lodged with the Governor.²³ The Governor was required to forward both the declaration and the submissions made in opposition, thereof, to the Secretary of State for the Colonies.²⁴ It is the latter who had the ultimate authority²⁵ to decide on this issue as on all other matters concerning legislation. Patently, this would be an ineffective means of opposing the policies of the government. The provisions appear to fall in line with the pragmatism shown by the Commissioners, who conceded that:

"As a country ascends the scale of self-government it is inevitable that the powers of the Governor should be gradually restricted" ²⁶

The Commissioners found that the Reforms would place Ceylon at an intermediate stage between a Colony in the full sense of the word and a fully Independent State and therefore "the assignment to him [the Governor] of an intermediate status is ... justifiable."²⁷

The importance of these constitutional changes regarding the position of the Governor is that they placed on record that the next stage of constitutional development for Ceylon must bring about Independence and Statehood.

It was this that provided both the need, and the framework of reference, for the Soulbury Commission of 1946. Communal representation and its social consequences were indeed the principal causes for discontent under the Manning Reforms too. Alluding to this issue the Commissioners wrote:

"It was generally admitted, even by many Communal representatives themselves that the communal form of appointment to the Legislative Council was a necessary evil and should only continue until conditions of friendliness and acknowledgement of common aims were developed among the different communities. It is our opinion, however, that the very existence of communal representation tends to prevent the development of these relations, and that only by its abolition will it be possible for the various diverse communities to develop together a true national unity."²⁸

Having thus structured a framework for their recommendations, the Commission set out a plan which could, in theory, have brought the varying communities on the Island together in a more effective way than by stopping at the mere refutation of the principle of Communal representation. In theory their plan, borrowed from the London County Council Constitution,²⁹ was a method of government through Executive Committees, which could have effectively erased the type of communal friction which was an inevitable consequence of the Manning Constitution. In practice, the influence exerted by various nationalist groups which had erupted during the Manning Reforms continued to function as powerful influences for the Sinhalese nationalist cause, thus keeping the communal fires burning until Independence and even beyond.³⁰ It is this single factor which to a large extent contributed towards frustrating the efforts made by the Donoughmore Commission towards a genuine reconciliation of communal conflicts.

III. Government by Executive Committees - The Donoughmore Model

The system of government through Executive Committees proposed by the Commission³¹ introduced a new model of constitutionalism for Ceylon. At no stage, from Colebrooke to Manning had such a system been practised on the Island. The later constitutional models of 1946, 1972 and 1978 had no reference to the Executive Committee system of government. In that sense what the Donoughmore Commissioners introduced was a short-lived instrument which fulfilled a need within the socio-political context prevailing at the time in question. The need was to break away from the past constitutional models, which had been associated with retrogression and regression. The purpose was to work out a modus operandi by which the varying communities could be brought together by a process of interdependence.

The method was this. Soon after the elections to the State Council were completed, at its first meeting, the members, (50 elected,³² 8 nominated³³ and 3 ex-officio members³⁴) sixty-one in all met to elect a speaker.³⁵ Having done that,

"the Council shall elect by secret ballot from among its members seven Executive Committees each of which shall be charged ... with the administration ... of such one of the seven groups of subjects and functions specified in the first schedule³⁶ hereto as the Council when electing the Committee shall determine."³⁷

The fact that "no member of the Council shall be elected to more than one"³⁸ Committee necessarily excluded the possibility of the Ex-Officio members becoming members of Committees other than in those that have been delegated to them by the Second Schedule³⁹ of the Order-in-Council. In any event their disqualifications from the seven Committees was expressed in

Article 34(2) of the Order.⁴⁰ It is also provided that if any of the members of the seven Committees under the first schedule became elected to the posts of Speaker (in succession to the first Speaker⁴¹ of each State Council), Deputy Speaker or Deputy Chairman of Committees, then he must vacate his membership in the Committee to which he belongs.⁴² The aforementioned offices were reserved for the elected members,⁴³ and, therefore, any elections to those offices would affect the composition only of the seven Committees carrying the responsibilities given to them under the First Schedule.⁴⁴ It is important to note that the election of "a Deputy Speaker and Chairman of Committees (herein called the Deputy Speaker) and the Deputy Chairman of Committees"⁴⁵ was to take place after the election of the Executive Committees. This made it possible for the largest number of State Council members to participate in this elective process. As the composition of the State Council was such that an equal distribution of members on each of the seven Committees was rendered impossible, Article 34(2) says:

"Each Committee shall contain as nearly as possible an equal number of members and every member of the Council, except the Speaker and the Officers of State, shall be elected to one of such Committees."⁴⁶

As soon as the Executive Committees were formed, each Committee, voting separately and by secret ballot, selected a Chairman from among its members.⁴⁷ The Chairman of each Committee was thereafter appointed a Minister in charge of the particular subjects and functions given to that Committee by the First Schedule. The appointment of Ministers from Chairman of Committees was a power left to the Governor in his capacity as the Sovereign's representative.⁴⁸ The Governor, in addition,

had a residual power to refuse such an appointment, in which case the Committee in question was required to select another Chairman for the Governor's approval.⁴⁹ In outline this was the model introduced by the Donoughmore Reforms.

It is important to recognise that from the moment the State Councillors met to elect their Speaker and until the dissolution of the Council, cooperation and inter-dependence became a basic necessity for the effective implementation of their individual legislative programmes. This cooperation and inter-dependence was not limited to the passage of legislation in the State Council but extended to keeping the Executive Committees together as functional organs of government. All these facets of the model necessarily nursed the hope that communal positions would become obliterated in time as an inevitable element in Ceylon politics. To that extent, the manipulative aspects of politics, based more upon foresight and judgment rather than on group affiliations and communalism, it was believed, would emerge as a result of the Donoughmore Dispensations.

IV. Universal Adult Suffrage: The Franchise under the Donoughmore Model

The Donoughmore Commission did not restrict their recommendations to the restructuring of the legislative and the executive arms of the government. They also looked down and away from the edifice and at its foundations. Their recommendations for the reform of the electorate were radical. They recommended universal adult suffrage with one real limitation.⁵⁰ They limited the franchise for males to those who were above the age of 21, and for females, to those above 30.⁵¹ Convicts, lunatics, non-British subjects and those who had resided on the

Island for a period of less than five years were recommended to be disqualified from voting. Besides the five year qualification, the Commission recommended a period of six months residence in any electoral district, during a period of eighteen months immediately preceding the commencement of the preparation of the voters' register, as a pre-requisite for registration as a voter of that electoral district.⁵² The Commission, despite the strong representations made by both the Ceylon National Congress and the Tamil Maha Sabhai, in support of the retention of a limited 'property, income and literacy' qualification, recommended the complete abolition of such tests.⁵³ This indeed became of great significance, for universal adult franchise in England, at the time, in 1925, was still a thoroughly contentious issue.⁵⁴ Membership in the State Council required an additional qualification. Because the English language was the official language of the country, the Commission recommended the retention of literacy in English - the ability to read and write that language - as a basic additional qualification for membership of the State Council.⁵⁵ The Donoughmore Report, dated 26th June, 1925 was published in July of the same year.

The Tamil reaction to the Report resulted in a massive eruption of passionate disapproval. These have been described by historians⁵⁶ and political scientists.⁵⁷ However, it is important to state that the abolition of communal representation and the approval of universal adult franchise were the twin elements which gave rise to the massive Tamil opposition to the Reforms. In a careful analysis of the franchise issue, De Silva⁵⁸ has drawn attention to the fact that the delegations from both the Ceylon National Congress⁵⁹ and the Tamil

Mahajana Sabhai⁶⁰ had opposed universal adult suffrage for two very different reasons. The Congress had opposed it on the grounds that a vote given to those below a particular economic level could lead to corruption. In their view, such a vote would be freely available for sale to the highest bidder. The Congress suggested an income of fifty rupees a month as a proper yard-stick for the vote. The Tamil delegation, led by Sir Ponnambalam Ramanathan,⁶¹ considered universal adult suffrage as a guarantee of a permanent position of Sinhalese domination in Ceylon politics. The Trade Union leader, Mr. A. E. Goonesinha was alone in asserting 'the need for universal adult suffrage now.' It is his persuasion and that of Dr. Drummond Sheils, the representative of the British Labour Party on the Commission, which persuaded the Commissioners to recommend the introduction of universal adult suffrage in unmistakable terms and without any pre-conditions.

The British electorate returned a Labour Administration in 1929, under Mr. Ramsay MacDonald. The liberal-minded Sidney Webb, as Lord Passfield, assumed control of the Colonial Office. Dr. Sheils became his Under-Secretary of State. There had been changes in the Colonial Administration in Ceylon too. Sir Hugh Clifford, during whose administration the hearings of the Donoughmore Commission were held, had been replaced by Sir Herbert Stanley, an experienced Colonial Administrator.⁶² Clifford's partiality towards the Tamils and his antipathy to the Sinhalese had become legendary.^{62a} His departure deprived the Tamil community of a friend at a time of need. After a considerable number of exchanges by way of secret communications^{62b} between the Colonial Office in London and Sir Herbert Stanley, a new constitution based upon the Donoughmore recommendations was promulgated by

Order-in-Council in 1931.⁶³ The structure of the Constitutional model has been previously discussed, except the question of the Franchise. The British Government accepted the recommendations on the franchise with some alterations. On the question of the enfranchisement of women, the Commissioners had suggested an age restriction, restricting the vote to females of thirty and over. On this issue the British Government decided to introduce parity between males and females, granting a right to vote to both sexes at the age of 21, a provision which the women in the United Kingdom had won, after a long and sustained struggle, no earlier than 1928.⁶⁴ In The Ceylon State Council Elections (Qualification of Voters)⁶⁵ Order-in-Council of 1931, by Section 6, it was declared that:

"(1) No person shall be qualified to have his name entered or retained in any register of voters in any year if such person -

- (a) is not a British subject; or
- (b) was less than 21 years of age on the first day of August in that year; or
- (c) has not for a continuous period of six months in the eighteen months immediately prior to the first day of August in that year resided in the electoral district to which the register relates; or
- (d)--(this sub-section excludes convicts)-
- (e)--(this sub-section excludes lunatics)-
- (f)--(this sub-section excludes those who have been convicted of a corrupt or illegal practice or by reason of the report of an election judge)-"⁶⁶

The British Government had made two significant departures from the Donoughmore recommendations. They had first widened the franchise by making both the men and the women eligible to vote at the age of 21. Second, the government had abandoned the recommendation of a basic residential requirement of five years generally for all. In its place the Order-in-Council introduced a general requirement of domicile:

"Any person not otherwise disqualified
[namely under section 6] shall be
qualified to have his name entered in
a register of voters if he is domiciled
in Ceylon." 67

While recognizing a domicile of origin in Ceylon, section 7 proceeded to define domicile in terms of a five-year residence.⁶⁸ In a sense this amounted to acquisition of a domicile of choice. For those who might fall outside either of these two requirements, the Order introduced two further alternative methods, under which the franchise could be sought. These were the special 'literacy property, income' qualifications borrowed from the Manning Reforms⁶⁹ and a special qualification to vote given by 'a certificate of permanent settlement'.⁷⁰ In the latter case, subject to certain procedures, a Government Agent and an Assistant Government Agent were authorized to grant a certificate of permanent settlement, entitling the holder of such a certificate to seek registration as a voter in the electorate in which he resided. By 1941, it was found that only 2% of the total number of Indian voters had sought the 'Certificate' avenue to the voter's register, while the rest had proceeded to have themselves enrolled by satisfying one or the other of the domicile requirements. The Soulbury Commission⁷¹ in 1945 after a careful scrutiny of the franchise under the Donoughmore Dispensations, recommended their retention. Therefore, the whole of the franchise qualifications of the Order-in-Council of 1931⁷² were re-enacted⁷³ as the franchise qualifications for the General Election of 1947. The Election of 1947 was a prelude to Independence under the Soulbury Constitution, in 1948.

The Donoughmore Constitution had a rough passage through the Legislative Council which was sitting under the Manning Reforms. As Sir Charles Jeffries remarks:

"It was touch and go; but, on December 12, 1929, the Legislative Council voted by nineteen to seventeen in favour of acceptance. The Secretary of State had not made any stipulation about the strength of the majority, and this vote was accepted as decisive. Some members who had opposed the scheme protested against it being introduced on so slender a margin of acceptance, but the die was cast."⁷⁴

V. The Socio-Political Significance of the Donoughmore Constitution

The abolition of communal seats and the introduction of universal adult suffrage were the two key elements in the new Constitution. Unfortunately, both these elements were rejected totally by the Tamil community. The introduction of universal adult suffrage was clearly a step in the right direction, increasing the electorate from 204,997⁷⁵ under the Manning Reforms to 1,200,539⁷⁶ under the Donoughmore Reforms. This five-fold expansion of the electorate must, however, be casted within a population increase from 4,498,605 in 1921 to 5,125,000 in 1931.⁷⁷ In the light of the population figures of 1931, 23.4% of the population formed the electorate at the General Election of that year; which was held to elect the members of the first State Council.

TABLE XIV⁷⁸

Communal Representation in the State Councils Elected Under the Donoughmore Constitution

The First State Council (1931-1936)	The Second State Council (1936-1939)	Community
28	31	Sinhalese (Low-country)
10	8	Sinhalese (Kandyans)
3	8	Tamils (Ceylon)
2	2	Tamils (Indians)
2	1	Europeans
1	0	Mohammadens
46	50	TOTAL

At the 1931 elections, the Tamil community staged an effective boycott of the electoral process. Four seats in the predominantly Tamil regions of the country, in the Jaffna Peninsular, had no contestants.⁷⁹ The first State Council, therefore, commenced with a total membership of 46. But, by 1936, the Tamil community had decided to abandon their passive resistance to the new Constitution and participate in the General Election for the second State Council of that year. At that election they increased their representation from three to eight members. The Europeans and the Mohammedans lost a seat each; the latter losing their only representative. The Sinhalese representation too, was increased by one, the Kandyan losing two of their seats to Low-Country contestants.

Universal adult franchise had the effect of steadily enlarging the electorate. In 1936, the electorate was nearly two and a half million. By 1940, there were 2,635,000 electors on the register.⁸⁰ Complaints began to mount, particularly from 1938 and from the Sinhalese quarter, that the registration of Indian voters was done without scrutiny.⁸¹ It was alleged, in a memorandum to Governor Caldecott, that the officials in charge of registration were accepting the word of the declarant without investigating the grounds upon which domicile was being claimed. Remembering the fact⁸² that 98% of the Indians had sought the domiciliary pathway to voter-rights, leaving a mere 2% to take the more arduous method of seeking a certificate of permanent settlement, the government, in 1940, directed that no applicant was to be registered as a voter upon grounds of domicile unless the basis upon which such domicile was claimed had been verified by an oral examination. In effect a viva-voce was made compulsory for every applicant. The following Table reveals the effect of the 1940 directive, which in turn should indicate the abuses to which the franchise under the Donoughmore Constitution had been subjected.

TABLE XV⁸³

The total number of Indians registered as voters, the number and percentage submitting for oral examination as required under the 1940 procedure and the number and percentage qualifying to vote

Year	Total Number of Indians provisionally registered as voters	Number who had submitted for an oral examination	% submitting for an oral examination	number recognised as of Ceylon domicile	% of registered voters who have been declared as being domiciled in Ceylon
1943	39,600	11,088	28%	7,000	17.6%
1942	34,782	8,000	23%	4,400	12.6%
1941	34,000	17,500	51.4%	12,000	35.2%
1941-1943	108,382	36,588	34.1%	23,400	21.8%

Proceeding from a registration procedure which involved little or no scrutiny, to one requiring a standard of proof required to be established through a viva-voce, the numbers of registrants for the 1941-43 period who actually passed the oral examination averaged only 21.8%. The more interesting result is that out of 108,382 Indians who had registered, a fraction over 1/3 reported for the oral examination. This is indicative of the fact that prior to 1940, during the preceding nine years, the expanded franchise had been open to some considerable abuse. Governor Caldecott's instructions in 1940 were prospective and therefore those who had already been registered as voters remained unaffected by these new procedures. The Sinhalese in particular were anxious

to reverse this process and the affirmation in its entirety of the franchise adopted by the Donoughmore Dispersations, by the Soulbury Commission,⁸⁴ and its later adoption by the British Government in The Ceylon (Parliamentary Elections) Order-in-Council, 1946⁸⁵ left the Sinhalese majority angry and frustrated. At the 1947 Elections, held under the 1946 Order-in-Council, the following success pattern of the parties emerged:

TABLE XVI⁸⁶

Party Positions at General Elections, 1947

Parties	No. of candidates put forward	No. of candidates elected	% success	% votes received of the total votes cast	% seats won by each party	Communal representation in political parties
The Ceylon Indian Congress	7	6	85.7	2.3	6.3	Indians
The Tamil Congress	9	7	77.7	2.7	7.3	(Ceylon Tamils)
The Bolshevik-Leninist Party of India	10	5	50.0	3.7	5.2	Mixed
The United National Party	98	42	42.8	24.6	44.2	(Sinhalese (Low country & Kandyan))
The Lanka Samasamaja Party	28	10	35.7	6.6	10.5	Mixed
The Communist Party	13	3	23.0	2.3	3.1	Mixed
Independents	181	21	21.6	17.9	22.1	Mixed
The Labour Party	9	1	11.0	1.2	1.0	Mixed

NOTE: 1. The total electorate was 3,052,814.
2. The total number of elected representatives were 95

The 85.7% success of The Ceylon Indian Congress could be explained by the fact that their members were drawn from the plantation areas on the Island. The indication was clear that the Indian Labour Community, created by the British Government as an adjunct to the plantation industry, appears now to have assumed control of parliamentary representation for these areas; so vital to the economy of an Independent Ceylon. There was also another matter of some concern. The communal nature of the politics of the Ceylon Indian Congress raised the spectre of a return to communal representation. This finger could be pointed at the Tamil Congress too. The United National Party, however, drew support from both Muslim and Tamil communities, although their majority support and representation was drawn from the Sinhala-speaking areas. The new Government was, indeed, powerless to punish the Tamil Congress for their communalism, but possessed both the power and the will to move against the Indians. Particularly, in view of their abuse of the franchise during 1931-1940, the Government considered most of the Indian electorate as interlopers whose rightful location was in India and not in Ceylon. It is in this light that the Citizenship Act of 1948⁸⁷ and The Ceylon (Parliamentary Elections) Amendment Act of 1949⁸⁸ must be considered. By Section 4 of the 1948 Act, the Status of citizenship by descent was limited to those whose 'fathers were born in Ceylon',⁸⁹ or 'whose paternal grandfathers and paternal great grandfathers were born in Ceylon'.⁹⁰ Viewed against the fact that Indian immigration had spanned no more than seventy years,⁹¹ Indians were hard put to establish that their fathers were born in Ceylon, let alone paternal grand-fathers and paternal great grand-fathers. The emphasis on the paternal as against the maternal side of

the lineage may be explained on the grounds that the Government was determined to prevent Indians claiming citizenship through inter-marriage with Ceylon Tamil women. By sub-section two of section four,⁹² persons who had been born outside Ceylon, were required to establish that their 'fathers and paternal grand-fathers',⁹³ or their 'paternal grand-fathers and paternal great grand-fathers',⁹⁴ were born in Ceylon before citizenship by descent was granted to them. There were provisions laid down for citizenship by Registration,⁹⁵ but this was left to the absolute discretion of the Minister "to disallow such application on grounds of public policy."^{95a} The Act carried a whole charter of citizenship rights, but the foregoing alone were effective in excluding the Indians from the ranks of Ceylon citizenship.

The 1949 Act⁹⁶ mentioned above, amended the 1946 Order-in-Council, principally by abandoning domicile as a test for voting and substituting citizenship in its place.⁹⁷ Having done that, the alternative qualifications of 'literacy-Property-Income formula' and the 'certificate of permanent settlement' were repealed.⁹⁸ The result, therefore, was effectively to exclude nearly a million Indians, almost 1/12 of the population, at the commencement of the 50's, from the ranks of citizens and thereby from being placed upon an electoral register in Ceylon. The Ceylon Indian Congress, which had polled 72,230 votes in 1947, representing 2.3% of the total electorate and attaining a 85.7% success,⁹⁹ was unable to contest the 1952 elections. The new citizenship laws dealt a devastating blow to the membership of the Ceylon Indian Congress. The 1949 Act excluded many of its members from the voters' register. Domicile henceforth had no relevance to the franchise, but only citizenship, as defined in the 1948 Act. Looking back at the philosophical

foundation of the Donoughmore Constitution, namely communal integration, the rules concerning the franchise appear to have had a damaging socio-political effect on a sizable community on the Island. The defect lies in the fact that neither the Donoughmore Commissioners nor the Soulbury Commissioners appear, from their reports, to have paid much attention to the concept of citizenship. Had they considered the principles upon which the concept of 'a Ceylon citizenship' could be formulated, and if they had tied that concept to the franchise, nearly a million of the Indians who were suddenly left on the way side, abandoned and therefore hostile, could have either been forewarned or could have negotiated some modus operandi, a via media, with both the Indian and the Ceylonese Administrations. In 1948, neither the British Government nor the Indian Government had any say in the manner in which the Independent Government of Ceylon was poised to act and therefore, the Indians were left to the tender mercies of a much prejudiced Sinhalese electorate.

VI. What the Donoughmore Reforms left behind for the Soulbury Commission

Although the second State Council should have come to an end in 1939, no elections were held, thereafter, until the 1947 elections, which were held under the Soulbury Constitution. There were at least two reasons for this prolongation of the life of the second State Council. First, there was the need for fresh reforms and secondly the need to fight a World War for the survival of the British Empire, of which Ceylon was considered to be an integral part. The importance of the latter compelled the British Government to postpone both Constitutional reforms and elections. The entry of Japan into the war in 1941 persuaded the Board of Ministers under the Donoughmore Constitution to form a War Council,¹⁰⁰ consisting of the Governor, The Commander-in-Chief,

all the Ministers, the Service Commanders and the Civil Defence Commissioner. The life span of the Donoughmore Dispensations, therefore, became extended until the introduction of the Soulbury Constitution in 1947, as a prelude to Independence in 1948.

The Donoughmore Commissioners made it clear from the outset that their recommendations were merely to introduce an interim Constitution as a pen-ultimate arrangement before Independence was granted.¹⁰¹ The necessity for this pen-ultimate arrangement, too, was clearly spelt out. The Commissioners wrote:

"Had the inhabitants of Ceylon presented greater appearance of unity and corporate spirit, one obstacle to the grant of full responsible government would have been removed. Not only is the population not homogeneous, but the diverse elements of which it is composed distrust and suspect each other. It is almost true to say that the conception of patriotism in Ceylon is as much racial as national, and that the best interests of the country are at times regarded as synonymous with the welfare of a particular section of its people. If the claim for full responsible government be subjected to examination from this standpoint it will be found that its advocates are always to be numbered among those who form the larger communities and who, if freed from external control, would be able to impose their will on all who dissented from them. Those on the other hand who form the minority communities, though united in no other respect, are solid in their opposition to the proposal. A condition precedent to the grant of full responsible government must be the growth of a public opinion which will make that grant acceptable, not only to one section, but to all sections of the people; such a development will only be possible if under a new constitution the members of the larger communities so conduct themselves in the reformed Council as to inspire universal confidence in their desire to harmonise conflicting interests, and to act justly, even at a sacrifice to themselves."¹⁰²

It has been emphasised earlier that the Executive Committee system of government was specifically introduced to create a sense of harmony among the communities through a process of enforced inter-dependence with one another, for the achievement of efficient government. The belief of the British Government was that over a period of time the conditions necessary for the grant of Independence, admittedly with the dominance of the majority Sinhalese community, would eventually become possible. The Soulbury Commission was, therefore, primarily called upon to work out a particular formula for Independence, in which the communal composition of the country as a whole could be conveniently accommodated.

VII. The Soulbury Constitution - Its Social Implications

The social consequences of several decades of government stretching as far back as to 1833, when the Colebrooke Dispensations founded the first Constitutional model for Ceylon, had by 1945, successfully, created a small but powerful Western-educated elite. Their ideological commitments and their philosophical attitudes were rooted in alien cultures. In a line, the social configuration in 1945 left a small elite at the centre and a large mass at the periphery with a widening gap between them. The concern of the Donoughmore Constitution was to bring about communal harmony. The harmony that was pursued was harmony among the elites of the two largest communities but not harmony between the elitist centre and the masses at the periphery. There were no constitutional desiderata in the Donoughmore Constitution which could have bridged this gap. On the contrary, the ability to read and write in English was made essential for membership in the State Council. The first step ever

to be taken towards bridging this gap was by the Soulbury Commissioners, who made the qualifications for the electors and for the elected, co-terminous.¹⁰³ Neither of these two groups¹⁰⁴ at the 1947 Election were required to pass a literary test in English; or for that matter in Sinhala or in Tamil. But this measure was found to have been introduced at a historical point of time which appeared to have been far too late in the day to reverse the elite formation at the centre and bridge the widening social gap between the centre and the periphery. The isolation of the mass at the periphery had created a danger to minority rights after Independence. The Soulbury Constitution has been the subject of a number of erudite dissertations.¹⁰⁵ The key issue of concern here is the examination of the social consequences of the Donoughmore Reforms and the way the Soulbury Commissioners had attempted to respond to them. The Soulbury Commission commenced their chapter¹⁰⁶ on 'The Minorities' with an apt quotation from Bryce:

"Institutions must represent or be suited to the particular phenomena they have to deal with in a particular Country. It is through history that these phenomena are known. History shows whether they are the result of tendencies still increasing or of tendencies already beginning to decline."¹⁰⁷

This passage from Bryce justifies the historical approach adopted here, as much as it had justified the Commissioners' resort to history in some of the chapters in their Report. The population distribution according to the 1946 Census¹⁰⁸ was as follows:

Sinhalese:	70.8%	{ Low Country: 42%
		{ Kandyan: 28.8%
Tamils:	21.6%	{ Ceylon Tamils: 11.0%
		{ Indian Tamils: 10.6%
Burghers & Eurasians:	0.5%	
Others:	6.1%	(includes Europeans, Malays ...)etc.

The disenfranchisement of the Indian vote when it occurred in 1949, to which reference was made earlier, effectively cut the Tamil vote by half.¹⁰⁹ This could have appeared to the Commissioners as a possible danger to the Indian minority in the hands of an overwhelming Sinhalese majority. Besides, the protections, if any that might be given to the Indian voters, the Commissioners may have assumed, could be important for the particular question of minority protection. For other minorities, together with the Ceylon Tamils, did form nearly a quarter of the total population.

The distribution of Religious Communities was along communal lines: the 1946 Census¹¹⁰ gave the following configuration:

TABLE XVII

The Percentage of those Persons who Professed the Four Leading Religions in Ceylon in 1946 Tabulated Along Communal Lines

Community	Buddhists	Hindus	Muslims	Christians
Sinhalese	91.9	0.1	0.1	7.9
Ceylon Tamils	2.6	80.6	0.2	16.5
Indian Tamils	2.3	89.3	0.3	8.1
Ceylon Moors	0.7	0.3	97.7	0.3

While nine out of ten Sinhalese were Buddhists nine out of ten Tamils were Hindus. With a Sinhalese population nearly three and a half times that of the Tamils, the Buddhists-Sinhalese would appear to hold the key to the freedoms

and the rights of the others. The attitude of the Sinhalese-Buddhists, therefore, became the main factor to reckon with, when constitutional reforms were being framed for an Independent Ceylon. Mindful of the centre-periphery conflict, it is necessary to examine the distribution of religions across three geographical areas on the Island, indicated by the following Table:¹¹¹

TABLE XVIII

The Percentage Representation of Religions in Urban, Rural and Plantation Districts of the Island in 1946

Religion	Urban Population	Rural Population	Plantation Population	Total
Buddhists	52.2	78.4	11.8	66.7
Hindus	17.7	10.3	80.7	18.2
Christians	19.2	7.3	6.4	9.4
Mohammadens	15.2	4.0	1.1	5.6
Others	--	--	--	0.1

The figures showed that 78.4% of the rural population were mainly Buddhists. Willing allies of the rural Buddhists are the Buddhists of the Kandyan region - the area of the plantation industry. This combination could set up a formidable political force against all minority religions. This assumption has historically proved correct. Another interesting feature is that while we have earlier found that nine out of ten Tamils were Hindus, over 80% of the Hindus are to be found among the plantation districts while not more than an average of 14% of the total Hindu population is to be found in the Northern, Eastern and in the Western regions, forming the urban and rural areas of the Island. The Northern and Eastern regions are the traditional homelands of the Tamils.

This indicates two separate factors. First, the Northern Tamil and the Eastern Tamil had been exposed to conversion. In the chapter on Education, the point was made as to the importance of missionary education in the Colonial educational strategy as a means for conversion. Secondly, the socio-economic advancement of the Tamil plantation population had remained static while the Tamils of the Northern and Eastern provinces have been dynamic. It is this that makes the almost equal distribution between the urban and the rural Hindu population, while the Tamils in the plantation areas had stagnated in one geographical area. The nature of the economic potential made available to the plantation workers is additional data for the conclusion that they have been static when compared with the overall development of the country. A factor which the Soulbury Commissioners had to consider was this complex socio-political amalgam related to an amorphous economic base.

The language distribution and its implications was another factor that forms the socio-economic compact. In 1946, the following communal¹¹² representation was found among four selected professions:

TABLE XIX

Communal Representation in Four Selected Professions in 1946

Community	Supreme Court	Judicial Service	Engineers: Civil Listed	Medical Profession
Sinhalese	5(41.66%)	21(46.66%)	35(52.23%)	205(61.19%)
Burghers	3(25.0%)	11(24.44%)	15(22.38%)	25(7.46%)
Tamils	1(8.33%)	13(28.80%)	17(25.37%)	115(43.32%)
Europeans	3(25.0%)			
Total*	12(100%)	45(100%)	67(100%)	335(100%)

*The numbers stated in this column represents 100% of the establishment for each of the four selected profession.

What is noticeable from the foregoing data is that, while the Tamil and the Burgher minorities were over-represented, the Sinhalese majority appears to be under-represented in the four professions therein considered.

The explanation must, therefore, be found in the literacy configuration among the communities. It was found that while the 4.2% of the population who spoke English were those who could also speak Sinhala, 2% of those who spoke English, likewise, spoke Tamil too. This necessarily indicated that while the Sinhalese:Tamil population ratio was one of 3.5:1, the English literacy ratio was 2:1, respectively.¹¹³ Therefore, the data suggest the presence of a higher proportion of the Tamils to their population who were literate in English than that of the Sinhalese to their population. That should explain to some extent the disparity shown in the communal representation in the four professions, selected, a year after the reforms were announced, in 1945. Against this background, the Commissioners recommended that:

"The Parliament of Ceylon shall not make any Law rendering persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable or confer upon persons of any community or religion any privileges or advantages which are not conferred on persons of other communities or religions."¹¹⁴

Section 29 of The Ceylon (Constitution) Order-in-Council of 1946,¹¹⁵ entrenched four areas in which the competence of the Ceylon Parliament was limited by the requirement to obtain the votes of "two-thirds of the whole number of members of the House (including those not present)".¹¹⁶ The four areas comprised in such laws as shall:

- "(a) prohibit or restrict the free exercise of any religion; or
- (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or
- (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities, or religions; or
- (d) alter the constitution of any religious body except with the consent of the governing authority of that body"117

It was the belief of the British Government that these provisions would be the correct answer to the problem "of the relations of the minorities - Ceylon Tamils, Indian Tamils, Muslims, Burghers and Europeans - with the Sinhalese majority."¹¹⁸ Yet again the British Government had been guilty of a serious error of judgment. As later events proved,¹¹⁹ the total unwillingness to deal with a sociological problem by sociological means, and by resorting to the instrumentalities of the law, has in later years proved to have been the source of a number of inter-communal conflicts. By placing conditions and limitations upon a parliament which was dominated by the majority and deemed to be Sovereign, the tendency gathered momentum to break loose from these constraints and thereafter assert that freedom, by legislating with particular emphasis in those areas which had hitherto been closed to them. It is this kind of mob-psychology which Section 29 generated. If constraints as those which were found in Section 29 were not placed upon Parliament, psychologically the minorities and the majority would have felt free to share a given area of land and come to terms with one another, thus finding a way of living together. The false security resulting from the entrenched clauses tempted the minorities, as the case

law¹²⁰ indicates, to litigate their rights rather than negotiate arrangements. It is this psychology which determined the progress of history in Ceylon, until the Soulbury Constitution and the principles within which it was spun were cast aside in 1972 by what was expressly claimed to be 'a political Revolution'. This will be the core of the next chapter.

CHAPTER 7

Constitutionalism (3) Aspects of the Soulbury Constitution: 1948-1972

I. An Introduction

The second State Council under the Donoughmore Constitution which was elected in 1936, continued to function as a legislative body beyond its mandated period of four years. The second World War which had by then begun was considered by the British Government as a compelling reason to postpone the political process under the Donoughmore Constitution. The formation of a National Government in the United Kingdom itself, with the postponement of National elections there, provided a healthy precedent. During the currency of the War Ceylon provided the British Government with a useful base for housing the headquarters of the Southeast Asia Command under the late Lord Mountbatten of Burma. The usefulness of Ceylon for the war effort became evident to both the British and the local politicians. As a 'pacifier' for the local politicians, the British Government on May 26th, 1943 promised the Island 'full internal self government' under a new Constitution. In that declaration Whitehall gave the Ceylonese Board of Ministers an undertaking that there will be a new Constitution which would be examined by "a suitable Commission or Conference" as soon as victory over the axis powers was achieved. In the light of this declaration, the Ceylonese Board of Ministers drew up a new Constitution under the supervision of the Leader of the State Council, Mr. D. S. Senanayake. This was a draft which the Ceylonese Board of Ministers intended to

present as a basis for 'full internal self-government' to the aforementioned Commission, or Conference, after the end of the war with the axis powers.¹ However, on July 5th, 1944, Col. Oliver Stanley, the Secretary of State for the Colonies announced in the House of Commons the appointment of the Soulbury Commission. In his announcement Stanley declared that the Commission shall be mandated not only to examine the draft Constitution prepared by the Ceylonese Board of Ministers but also to seek out the views of the Minority groups on the Island.² The Ministers took exception to that part of the Declaration which said that the Commission shall consult with 'various interests, including the minority communities, concerned with the subject of Constitutional Reform in Ceylon'. The Ministers argued that the Commission should be limited to the examination of the draft Constitution made by them, and the rights of the minority groups, according to the Board of Ministers, will be protected by the requirement that the passage of any Constitution that may eventually result shall require a vote of three-fourths of the total membership of the Council.³ The British Government, however, did not alter the mandate of the Commission, and therefore the Ceylon National Congress decided by August, 1944, to stage a boycott of the Soulbury Commission. However, the British Administration in Ceylon left the arrangements, regarding internal travel and the provision of the required physical facilities in the hands of the Civil Defence Commissioner, Sir Oliver Goonetilleke, - who was known to have been a close friend of the Ceylon National Congress and its members, on the Board of Ministers. Aside from informal briefings that the Commissioners received from Sir Oliver, and a copy of the draft Constitution produced by the Board of Ministers in 1944, the Commission was denied every access to the Board of Ministers in their official capacity and to the Ceylon National Congress.⁴

Col. Oliver Stanley, however, invited the leader of the State Council, D. S. Senanayake to London for talks and he was clearly anxious to be there at the time of the publication of the Commission's Report. As fate would have it, Senanayake left Ceylon in early July, 1945, and arrived in London, in time to see the electoral defeat of the Conservative Party, whose government was responsible both for the Declaration of 1943 and for the Soulbury Commission.⁵

Senanayake had an advance copy of the Commissioners' Report and to his amazement and satisfaction he found the basic principles contained in the original Ministerial draft of 1944 adopted with approval. There were few minor adjustments made to the original draft but these were not of any real substance. The only point of disagreement was that the Commissioners had not recommended⁶ the immediate grant of Dominion Status. They preferred to see how the Constitution worked within the framework of 'full internal self-government', first. The fact that the main pre-occupation of the new Labour administration at the time was not Ceylon but the Independence of the sub-continent of India (including Burma) and the Palestine question, reconciled Senanayake to the view that Ceylon's achievement of Dominion Status could wait a while. After all he had won a concession to have the question of citizenship kept out of the Constitution so that it could be left within the ambit of the first Independent Parliament of Ceylon. On the 9th November, 1945, after a two day debate, the State Council voted 51 to 3 to accept the 'White Paper on Constitutional Reform' based on the recommendations of the Soulbury Commission.⁷

The Soulbury Constitution fundamentally proposed 'a Westminster model' of government. Some of the more distinct features of this model have permeated through all Independence Acts of former British colonies and into their new Independent Legislatures. But few, if at all have retained them for any great length of time. The Westminster model have several noticeable features:

First, the model provided for a bi-cameral legislature, of which the 'Upper House' as it is called is characterized by the non-elective nature of its membership while the 'Lower House' is characterized by an elected membership by universal adult suffrage. The 'Upper House' is deemed to represent those 'interests' which are important to the achievement of a cohesive society but cannot or may not be able to successfully win a seat through the elective process. The parallels in Ceylon under the Soulbury Dispensations, to the British House of Lords and the House of Commons, were the Senate and the House of Representatives, respectively.

Second, though the 'Upper House' in the Westminster Model was expected to play a consultative role to a large measure, from a politically mature standpoint, free from a continuing responsibility to constituents; the House of Lords had a veto power over Legislations being an equal partner in the legislative process with the House of Commons. Although this power has recently been somewhat limited, the two Houses constitutionally are the two halves of the legislative process. The same idea was introduced into Ceylon by the Soulbury Dispensations.

Third, while recognising a distinction between the Head of State and the Head of Government, the Westminster Model subjected the Head of Government to the elective process while recognising the Head of State more as a symbolic figure; symbolising the nation rather than as a repository of executive power. The Soulbury Dispensation introduced this notion to Ceylon by recognising The Governor-General as the representative of The Head of State. The Head of State for Ceylon under the Soulbury Dispensation was recognised as the person who Heads the State of The United Kingdom.

Fourth, the Westminster Model provided for a clear separation of powers and as an obvious result of this it separated the judiciary in every way from the Legislative and the Executive branches of Government. Concomitant with the idea of the separation of powers is the idea of independence of the judiciary and therefore the independence of the Courts as ordinarily established. The Soulbury Dispensations introduced this idea into Ceylon.

Fifth, the Westminster Model recognised a tripartite legislative process in which the House of Lords, the House of Commons and The Monarch in his or her constitutional capacity shall participate. The Soulbury Dispensation found the legislative process in the Senate, the House of Representatives and in the Governor-General as the representative of Ceylon's Head of State.

Constitutional reform must to a large measure take into consideration the laws and legal institutions it must necessarily incorporate. The legal system as a whole, is a reflection, at the supra-structure of a given society, of its own peculiar economic underpinnings. It is important, therefore, to structure a constitution in the light of the economic base of a given society and therefore, it must be assumed that the Soulbury Constitution had taken into consideration the 'free-market' economic model. This in fact provided the foundation for the colonial economic programme, at least from the middle of the 19th Century. It is, therefore, necessary at this stage to postulate the broad assumptions upon which the laws and the legal institutions existing in Ceylon during the 40's of this century were based. For those assumptions did determine the types of laws and institutions which could promote development within the framework of a 'free-market' economy. The principal aim of the Soulbury Commission was to preserve the existing economic base. Therefore, the Commissioners intended to provide a constitutional framework within which

an Independent Ceylon could evolve its own economic growth utilising the 'free-market' economy as her guiding principle. As a model for development the Constitution was clearly conservative. Neither the British Government nor the Ceylonese Board of Ministers did plan any radical changes either to the economic base or to the legal system of a Ceylon emerging out of a colonial past.

Colonialism is generally considered to rest upon a capitalist base espousing, both a legal and an economic system rooted in a 'free-market economy'. At the core of this colonial arrangement were a number of assumptions which the Soulbury Commissioners adopted as fundamental to the laws and legal institutions of an Independent Ceylon. The new Constitution was not intended to disturb these sealed assumptions. First, there was the assumption that as a general rule the laws recognised the right to Private Ownership of both movables and immovables. The State may, however, acquire such property as an exception to the general rule, under defined conditions and only under particular laws passed to give that exceptional power. The chapters on the economy will deal with this type of power. Second, there was the assumption (arising out of the first), that an individual owner of property enjoyed a freedom to utilise the corpus, primarily, to his maximum economic advantage. Here too, the interest of the State in restricting this freedom in any given circumstance was strictly circumscribed. Third, the assumption that the rights arising out of ownership was a right superior in law to all other rights such as those arising out of the status of a 'cultivator or a tenant'. This assumption was considered to be basic. Any restriction of these rights, it was assumed, should not strike at the core

elements of the law which makes the concept of ownership meaningful. Fourth, the assumption that the utilisation of the Law of Contract must be free; and as an aspect of the notion of 'freedom of contract' the owner of the corpus should be free to enter into any type of contract limited only by the Common Law rules regarding Illegality. Fifth, the assumption that legislation was the exclusive source of new law and that any changes of such law should only take effect as a result of amending legislation. Sixth, the assumption that rights and duties between citizens inter se and their rights and duties visa vis the State were subject to the exclusive cognizance of the courts of law located within a hierarchical system of Courts. Seventh, the assumption that the Courts at all times shall remain independent and free from the political process and to that extent the judges shall enjoy every right that would establish their independence from the political system. Eighth, that at all times the assumption shall prevail that no rights of a person shall be taken away except by due process of law. Ninth, the assumption that at all times the Courts shall have the power to subject every law to Judicial Review so as to determine their validity. This catalogue of nine assumptions were considered to be basic to the colonial laws and legal institutions inherited from the British Colonial Administration at Independence, on the 4th February, 1948. They were in no way intended to be exhaustive. They supplied a framework for the 'free market economy' which in effect provided the base for the colonial economy. The Soulbury Constitution merely provided a new framework within which the legal, economic and the social elements of the new nation could be held together.

II. The Soulbury Constitution:

II. (a) An Introduction

The historical and political events which heralded the introduction of the Soulbury Constitution by an Order-in-Council in 1946⁸ and the Grant of Independence on 4th February, 1948, under an Order-in-Council of December 1947,⁹ have been well documented.¹⁰ The purpose of this section is to examine the constitutional model under which Ceylon gained her Independence, so as to expose the principal weaknesses which eventually led to radical constitutional reforms in 1972.

The Soulbury Constitution introduced a bi-cameral legislature with a House of Representatives and a Senate.¹¹ In the House of Representatives there were 101 seats, of which 95 were to be filled by elections on the basis of universal adult suffrage.¹² Six members were appointed by the Governor-General upon the advice of the Prime Minister after each election¹³ under Article 11(2) of the Constitution:

"Where after any election the Governor-General is satisfied that any important interest in the Island is not represented, he may appoint any persons not exceeding six in number, to be members of the House of Representatives."¹⁴

The House of Representatives had a life span of five years but could be dissolved earlier.¹⁵ The Parliamentary and constitutional conventions of the United Kingdom were introduced, together with their procedures, creating a "Westminster Model" of Government for Ceylon.¹⁶

The Upper House, the Senate, comprised of thirty members,¹⁷ fifteen of whom were elected by the House of Representatives, sitting as an electoral college, by proportional representation.¹⁸ The proportional representation of the political parties in the House of

Representatives influenced the party composition of the Senate. The other fifteen members were appointed by the Governor-General on the advice of the Prime Minister.¹⁹ This gave the Government an opportunity to strengthen its hand in the Senate and at the same time to provide positions in the legislature for minorities by race or caste. The Burghers, Europeans, Indians, Malays and other minorities could thus be given a vote in one or both of the Houses of Parliament. In addition, the minority castes, both of the Tamils and of the Sinhalese, were also represented in one or both of these two chambers. The life span of the Senate was independent of that of the House of Representatives.²⁰ "By lot",²¹ the Senators were required to divide themselves into three categories, of two, four and six year terms of office. One-third of the Senators, therefore, were returned every two years. The Senate was thus unaffected by a dissolution of Parliament. The Soulbury Constitution prescribed a detailed list of disqualifications for membership of the Senate,²² the most basic was the disqualifying of any member of the House of Representatives.²³

II. (b) The Soulbury Constitution: Legislative Powers

The Soulbury Constitution succinctly laid down the legislative powers in section 32, in this manner:

"(1) A Bill shall not be deemed to have been passed by both chambers unless it has been agreed to by both chambers, either without amendment or with such amendments only as are agreed to by both chambers."

"(2) A Bill which has been passed by the Senate with any amendment which is subsequently rejected by the House of Representatives shall be deemed not to have been passed by the Senate."²⁴

The Senate like²⁵ the British House of Lords, had the power to delay the passage of Money Bills for up to one month; thereafter such a Bill was deemed to have been passed notwithstanding the fact that it had not been passed by the Senate. In the case of the other Bills, section 3⁴ of the Constitution laid down:

"If a Bill, other than a Money Bill, is passed by the House of Representatives in two successive sessions, whether of the same parliament or not, and,

- (a) having been sent to the Senate in the first of those sessions at least one month before the end of that session, is not passed by the Senate in that session, and,
- (b) having been sent to the Senate in the second of those sessions, is not passed by the Senate within one month after it has been so sent, or within six months after the commencement of that session, whichever is the later, the Bill may, notwithstanding that it has not been passed by the Senate ... shall take effect as an Act of Parliament"26

These two provisions brought the Senate into line²⁷ with the British House of Lords and were considered to provide methods by which a recalcitrant or obstinate Upper House could be neutralised, thus avoiding legislative paralysis. This institutional means of bypassing the Upper House has no doubt contributed to the preservation of the House of Lords as an incident of English Constitutional History. However, its introduction to Ceylon, as events were later to prove, suffered the lack of a comparable sentimental or historical value and constituted a hinderance to the legislative process. The arguments against the retention of an Upper House were spun within a framework of expediency and the need for democratic representation.

The fact that the Senators were not directly elected by the citizens of Ceylon left them free of any local constituency pressures. They were, therefore, considered as a mature body which could rise above the localised perspectives of party politics to a generalised vision of the national good in their activities. By 1971, it had become clear that the gap between the perspectives of the peoples' representatives and the Senate had come to a dangerous and unbridgable divide. By an amendment²⁸ to the Soulbury Constitution, Parliament in 1971 abolished the Senate. The Senate Abolition Act merits particular emphasis as a socio-political consequence of the Soulbury model of Government.

The abolition of the Senate was a result of a political controversy concerning membership of the House of Representatives. One of the members of Parliament who belonged to The Sri Lanka Freedom Party - the party that was the principal partner of the coalition of three political parties which formed the Government in 1970, was unseated by the Supreme Court. The Court found that the member in question was disqualified for membership in the House of Representatives as a result of a previous conviction which had resulted in a sentence of imprisonment exceeding three months being passed upon him. The Soulbury Constitution disqualified such persons from membership of the House of Representatives for a period of seven years from the date of completion of such sentence of imprisonment.²⁹ In 1971, the House of Representatives passed an amendment to the aforementioned constitutional provision, so as to enable the member in question to continue as a member of Parliament; notwithstanding the constitutional disability. The Senate voted against that Bill and thereby precipitated its own demise. Although the abolition of the Senate did facilitate the unhindered

passage of the 1972 Constitution into Law, the motive behind its abolition was more of a general feeling in favour of ridding an unnecessary hinderance, a political anachronism, rather than a particular motive associated with the need to procure a swift passage into law of the 1972 Constitution, which was at the time in question nearing completion.

II. (c) The Soulbury Constitution: The Indian Question as an aspect of Citizenship

In most Constitutions in the Third World countries, the question of citizenship becomes a central issue for a detailed statement. The Soulbury Constitution was remarkable in that aspect, for it left that issue out of its ambit. In doing so the Soulbury Commission recognised that the issue of citizenship was a matter to be determined by an Independent Parliament of Ceylon. Therefore, the British Government decided to leave that question out of the Constitution, thus recognising the fact that it was a matter on which the departing colonial power ought not to shackle a future legislature of an Independent Ceylon. The question of citizenship, therefore, became, as far as the Constitution of Ceylon was concerned, a matter to be determined by a simple majority in parliament and not by the special procedure declared by the Constitution for its amendment.

Although the major constitutional amendment was brought about by the 'Senate Abolition Act', the twenty-four years³⁰ of the Soulbury Constitution were punctuated by several legislations of singular importance.³¹ These were concerned with what the political parties of a Marxist persuasion have maintained, as legislation designed to disenfranchise the Tamils of Indian origin, i.e. the plantation labourers brought in, from India, by the British Government. Associated with the Citizenship

Act of 1948³² and The Ceylon (Parliamentary Elections) Amendment Act of 1949³³ was The Ceylon (Constitution) Amendment Act of 1954.³⁴ The cumulative effect of the first two Acts, which have previously been discussed,³⁵ was to deny the Indian Tamil a vote. During a debate in the House of Representatives concerning the passage of the Citizenship Act, the Marxist opposition described the policy of the Government towards the Indian Tamils in this way:

"Dr. Perera"³⁶

I feel certain that the Prime Minister would gladly build a great Chinese Wall around this Island, if he could do it, to ensure that nobody from outside even peeped³⁷
Here in this Bill is embodied the principle of racialism and exclusiveness This Bill provides for no naturalization at all³⁸
The naturalization provision in Clause 12 ... is in fact a joke. It provides for the registration of not more than 25 people a year, and such registration is entirely at his discretion. The clause is very narrowly worded and it applies to a person who has rendered distinguished public service or is eminent in the professional, commercial, industrial or agricultural life of the country. The claims of the workers are left out - they are not eminent men. The Hon. D. S. Senanayake: Yes, they are not eminent men. They are only doing or have done useful service. Dr. Perera: That is what I am saying ... that they have rendered very useful service to the country This is not intended for them, although they have rendered useful service to the country. This is intended only for the elite, chosen by the Hon. Prime Minister, such as the Mamjees or Adamalys ... a mere handful of people and also perhaps the few Europeans" ³⁹

The foregoing comment in Parliament on the citizenship issue projected the socio-political dimensions of the problem. That the principal aim of the legislation was to disenfranchise, inter alia, the plantation workers of Indian origin was undisguised. This aspect was mentioned at a previous stage of this work.

The constitutionality of the Citizenship Act of 1948 and of the Parliamentary Elections (Amendment) Act of 1949 was litigated in 1951. In Mudanayake v. Sivagnanasunderam,⁴⁰ the respondent contended that the combined effect of the two Acts constituted a violation of Section 29(2) (b) and (c) of the Constitution, which declares that Parliament may not legislate in a manner which:

"(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or

(c) confer on persons of any community or religion any privilege or advantage, which is not conferred on persons of other communities or religions"41

The Court of Appeal thought that legislative limitations placed upon Sovereign states ought not to be construed too strictly, because that could without more, stifle good government, which indeed, they thought, was a paramount consideration. Basnayake, J., wrote:

"If the effects of a controversial piece of legislation are weighed in a fine balance not much ingenuity would be needed to demonstrate how, in its administration, one community may suffer more disadvantages than another. To embark on an enquiry, every time the validity of an enactment is in question, into the extent of its incidence, whether for evil or for good, would be mischievous in the extreme and throw the administration of Acts of the legislature into confusion."42

With reference to the limits of the discrimination envisaged by section 29, the court said:

"The Parliament of Ceylon has the power to alter the electoral law in any manner it pleases if it thinks it necessary to do so for the good government of the country subject to the narrow limitation in section 29. It has the power to widen or to narrow the franchise. If it widens the franchise the more advanced communities may feel that they are affected, on the other hand if it narrows the franchise the less advanced communities may also feel they are adversely affected. If it is open to a person to say that as a result of the alteration the voting strength of his community has been reduced ... then Parliament will only have the power to pass legislation as to what the polling hours or the polling colours should be."⁴³

The Court of Appeal found that the two Statutes were valid and were not in conflict with the constitutional provisions of section 29. The respondent appealed to the Privy Council.⁴⁴ Giving the opinion of their Lordships while rejecting the appeal, Lord Oaksey said:

"Standards of literacy, of property, of birth or of residence are as it seems to their Lordships, standards which a legislature may think it right to adopt in legislation on citizenship and it is clear that such standards, though they may operate to exclude the illiterate, the poor and the immigrant to a greater degree than they exclude other people, they do not create disabilities in a community as such since the community is not bound together as a community by its illiteracy, its poverty or its migratory character but by its race or its religion. The migratory habits of the Indian Tamils (see paragraphs 123 and 203 Soulbury Report) are facts which in their Lordships' opinion are directly relevant to the question of their suitability as citizens of Ceylon and have nothing to do with them as a community."⁴⁵

It may be recalled that a fundamental concern of the Soulbury Commission was to protect the rights acquired by the minorities under the Donoughmore Constitution.

Particularly, in their report, on the Franchise⁴⁶ they were satisfied with the progress enjoyed by the minorities under the Donoughmore Reforms and therefore recommended their retention.⁴⁷ In so far as the Sinhalese majority was concerned, the rights acquired by the minorities under the Donoughmore Dispensations were rights given to the minorities without the consent or concurrence of the majority. The position taken by the Privy Council and the Court of Appeal avoided a somewhat difficult crisis which the country might otherwise have faced. The claim of the Indian Community, now almost stranded in the Kandyan provinces, was transposed into a question of the status of 'Kandyan Tamils'; a term with clear historical undertones. For such a claim was only a stone's throw away from a distinct hereditary claim to Kandyan rights arising from the Tamil kings of Kandy and their Nayakar lineage. The following passage from a debate in the House of Representatives in 1950 is a clear exposition of their claim:

"Mr. S. Thondaman: But we of the Ceylon Indian Congress do not ask for any concessions. We do not want any mercies to be vouchsafed to us. We ask for it as a right and we will have it as a right, not as a concession. I might also add that when I say that I want to be here i.e., in Parliament as a matter of right, I demand that right not as an Indian but as a Kandyan Tamil. As a Kandyan Tamil I have the right to associate myself on an equal footing with the rest of the Ceylonese. The Hon. J. R. Jayawardene: Indian Tamil. Mr. Thondaman: That is the trouble."⁴⁸

The claim for recognition of a new status of 'Kandyan Tamils' had never before been raised. It was not argued before the Donoughmore Commission or before the Soulbury Commission. The Ceylon Indian Congress decided not to contest the 1952 Elections. The combined effect of the 1948 and 1949 Acts were to snuff the Congress out, as an effective political party.

Although the courts did overcome the Indian Tamil issue without denting the legislative limitations described in section 29, the rigidity of the section as construed by the Privy Council in 1964, seems to have provided the scenario, which compelled the coalition of three political parties led by the Sri Lanka Freedom Party to replace the Soulbury Constitution, in its totality, in 1972. The constitutional amendment of 1954⁴⁹ and other supportive legislation⁵⁰ followed the Mudanayake decision

II. (d) The Soulbury Constitution: The Entrenchment of Section 29(2)⁵¹

When the members of the Judicial Committee of Her Majesty's Privy Council wrote their opinion in The Bribery Commissioner v. Pedrick Ranasinghe,⁵² they may not have realised that they were in fact delivering the death warrant of the Soulbury Constitution. The central issue in the Ranasinghe case was a comparatively innocuous one. It merely questioned the right of the minister of Justice to appoint a Bribery Commissioner under the Bribery Amendment Act,⁵³ giving the appointee a status and rank similar to that of any member of the country's judiciary. Section 55 of the Soulbury Constitution left:

"(1) The appointment, transfer, dismissal and disciplinary control of judicial officers
...,"⁵⁴

in the hands of a Judicial Service Commission appointed by the Governor-General. To stress the political neutrality of this Commission, section 53 ordained that its members shall be:

"The Chief Justice, who shall be the Chairman, a judge of the Supreme Court, and one other person who shall be, or shall have been a judge of the Supreme Court."

The basic issue before the Privy Council was whether the Bribery Amendment Act - which was passed with a simple majority - was constitutional and was therefore valid, in the light of sections 53 and 55 of the Constitution. The Soulbury Constitution required a special procedure to be adopted where a proposed piece of legislation appeared to be in conflict with a Constitutional provision. All other legislation:

" ... proposed for decision by either chamber shall be determined by a majority of votes of the Senators or Members, as the case may be, present and voting. 55

The special procedure laid down for legislation which appear to conflict with any provision of the Constitution was stated in section 29(4). Under that provision all legislation found to be in conflict with the Constitution was regarded as a:

" ... Bill for the amendment or repeal of any of the provisions of this Order and shall be presented for the Royal Assent provided it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present)." 56

The aforementioned Bribery Amendment Act was passed with a simple majority. The question before the Privy Council was whether it was valid; notwithstanding the fact that it purported to give The Bribery Commissioner who was to be appointed by the Minister of Justice (and not by the Judicial Service Commission), the status and ranking of a member of the Island's Judiciary. To that question the Privy Council gave a negative answer. They found that the provisions of the Act were in conflict with sections 53 and 55 of the Constitution. Therefore, the failure

to follow the special provisions laid down in section 29(4)⁵⁷ of the Constitution was considered to be fatal to the question of constitutional validity of the Act. With reference to the special provisions, Lord Pearce said:

" ... in the case of amendment and repeal of the Constitution the Speaker's certificate is a necessary part of the Legislative process and any Bill which does not comply with the condition precedent of the proviso, is and remains, even though it receives the Royal Assent, invalid and ultra vires." ⁵⁸

Having said that, His Lordship, as it were to assure the Ceylon Parliament of its sovereignty, pointed out that:

"The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself, which can always, whenever it chooses, pass the amendment with the requisite majority." ⁵⁹

Thus far the reasoning of the learned Lord raises no cause for comment. His line of reasoning falls squarely within the lines drawn by previous authorities, both from the Privy Council ⁶⁰ and from other commonwealth courts. ⁶¹ But the area of his judgment which caused the greatest single difficulty, and, indeed later led to a general resentment of what was seen as a challenge to the sovereignty of the Ceylon Parliament, is contained in another passage from the judgment:

"The voting and legislative power of the Ceylon Parliament are dealt with in sections 18 and 29 of the Constitution.

18. Save as otherwise provided in subsection (4) of section 29, any question proposed for decision by either Chamber shall be determined by a majority of votes of the Senators or Members, as the case may be, present and voting"

29 (1) Subject to the provisions of this Order, Parliament shall have power to make Laws for the peace, order and good government of the Island.

(2) No such Law shall - (a) prohibit or restrict the free exercise of any religion; There follows (b), (c) and (d) which set out further entrenched religious and racial matters, which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and these are therefore unalterable under the Constitution." 62

The superior Courts in Ceylon have had no opportunity to examine the precise effect of those words. In so far as The Bribery Commissioner case was concerned, they were not regarded as necessary or in any way relevant to the issues there concerned. In that sense this was an obiter dictum. Notwithstanding that fact, the judgment itself raised a real concern among the legislators, for what it really spelt out was the inability of the Parliament of Ceylon to legislate in those areas concerning communal and religious matters, detailed in Article 29(2), even if the members were unanimous.

III. Was Lord Pearce correct in The Bribery Commissioner v. Ranasinghe?

It would be fruitless to argue at this stage that the Privy Council's view on the nature and the extent of the entrenchment in section 29(2) was misconceived. It must be conceded that, in their Lordships' view (as expressed by Lord Pearce), the special provisions laid down in section 29(4)⁶³ of the Constitution, requiring a two-thirds majority for constitutional amendment, were applicable to any legislation which came into conflict with any article in the Constitution, except section 29(2)⁶⁴ Where the conflict occurs with section 29 (2), no amount of affirmative votes could impress the stamp of validity upon an offending statute. This peculiar constitutional significance of

section 29(2) could be explained from a socio-political standpoint spun within a historical framework.

The British Government, by a declaration made on May 26th, 1943,⁶⁵ invited the Ministers functioning under the Donoughmore Constitution to make proposals for the drafting of a new constitutional arrangement. If such proposals were acceptable to His Majesty's Government, as being:

" ... in full compliance with the preceding portions of this statement and secondly, upon their subsequent approval by three-quarters of all members of the State Council of Ceylon, excluding the Officers-of-State and the speaker or other presiding officer,"⁶⁶

then the British Government would proceed to examine them, at a conference or by a commission, as the basis for a Constitution, "directed towards the grant to Ceylon by Order of His Majesty-in-Council of full responsible Government under the Crown in all matters of internal civil administration."⁶⁷ The British Government, however, cautioned the Ministers in Ceylon that no conference or commission could be organised or held before the end of hostilities in the war they were fighting, both in Europe and in Asia.⁶⁸ With remarkable speed the Ceylonese Ministers completed the structuring of the proposals, and presented them to the British Government by the beginning of 1944.⁶⁹ The Ceylon Minorities and the Indian Government made representations to the Secretary of State for the Colonies, upon the communal question.⁷⁰ They urged the Secretary of State to proceed with caution in accepting the Ceylonese draft. On July 5th, 1944, the Secretary of State for the Colonies⁷¹ announced to the House of Commons that a Commission would soon visit Ceylon to consult the views of the minorities and would also refer to the Ministers' draft and any other proposals for constitutional reform.

The Government was clearly of the view that it could not overlook the representations made by the minorities and, therefore, the proposal was tantamount to a fresh look at the process of constitutional development of Ceylon. As Sir Charles Jeffries⁷² says:

"The Ceylon Ministers took strong objection to these terms of reference, which in their view put the clock right back. They accused the British Government of breach of faith, withdrew their draft scheme, and refused to collaborate with the Commission. The British Government, while regretting this, were not going to be turned from their course. They went ahead with their plan, and the Commission, consisting of Lord Soulbury as Chairman, Sir Frédrick Rees and Sir Fredrick Burrows, with Mr. Tafford Smith of the Colonial Office, as Secretary arrived in the Island in December, 1944."⁷³

The Commission was provided with no formal opportunity to hear the views of the Ceylonese Board of Ministers, due to their decision to boycott the hearings.⁷⁴ There were, however, a number of informal opportunities afforded to the Commission, at several social gatherings, to seek out their views upon an individual basis. Aside from this voluntary absence from the hearings the Marxist political groupings (except the Communist party) were involuntarily absent. For they were, during the hearings, incarcerated under the Defence of the Realm Regulations. The British Government had made no attempt to provide them with an opportunity to present their views to the Commission. The Tamil Congress, therefore, became the only organised political party to present an articulated Brief. Their Brief was in support of the demands of the Tamil Community claiming what they called a "50-50" interest in the new arrangement. This included a right to equal representation in the new legislature.

The Commissioners left the Island on April 7th, 1945, and their Report was presented to the Secretary of State for the Colonies on the 11th July, 1945.⁷⁵ In their Report⁷⁶ the Commissioners recommended that Bills relating inter alia to defence, external affairs, immigration, franchise, the selective imposition of import duties, currency, British property, racial and communal matters and any changes to the Constitution itself should be reserved for "the signification of His Majesty's pleasure."⁷⁷ The thrust of these recommendations was to delay the grant of 'Dominion Status' or 'fully responsible government' until a future date.

By a White Paper⁷⁸ issued on the 31st October, 1945, the British Government accepted these recommendations. The White Paper made particular mention of the representations made to the Commission by the minorities and of the absence of any representation from the Ceylonese Board of Ministers. The British Government declared its sympathy for the desire of the Ceylonese Ministers to achieve Dominion Status. It further declared that the Soulbury Constitution could be considered as a basis for the future achievement of that Status and expressed the hope to have a new Constitution structured along the lines of the recommendations. The British Government concluded:

"It is therefore the hope of His Majesty's Government that the new Constitution will be accepted by the people of Ceylon with a determination so to work it that in a comparatively short space of time such Dominion Status will be evolved. The actual length of time occupied by this evolutionary process must depend upon the experience gained under the new Constitution by the people of Ceylon."⁷⁹

History has strange ways of plotting the destinies of man and his society. Just as the Donoughmore Constitution was drafted under a Labour Administration in England, so too the succeeding Soulbury Constitution was drafted

under a similar Administration. In both instances, the Commissioners were the creations of Conservative Administrations which suffered electoral defeats between the investigations and the Reports. The Leader of the State Council, the Hon. D. S. Senanayake was, in fact, in London to see the electoral defeat of the Conservatives in 1945. He had responded to an invitation by the Conservative Administration for talks regarding the impending Report. It is apparent from later events that certain assurances were exchanged by the Leader of the Ceylon State Council and the Colonial Secretary - Rt. Hon. Creech Jones - of the new Labour Administration. These assurances appear to have become transformed into basic commitments under which Section 29(2) of the Constitution was drafted. These commitments provided the basis upon which the Soulbury Dispositions were pushed towards full Independence by 1948. Senanayake came back reconciled to work under the new constitutional arrangements and the new Secretary of State for the Colonies had assured him of the Government's interest in pushing the constitutional position of Ceylon towards Dominion Status. After a two day debate⁸⁰ in the State Council, a conciliatory motion was passed with 51 for and 3 against. In an emotional speech Senanayake urged the Council "not to refuse bread merely because it is not cake."⁸¹

The foregoing historical sketch provides the background against which the Soulbury Constitution, containing section 29(2), was drafted. By 15th May, 1946, six and a half months after the White Paper was first published, The Ceylon (Constitution) Order-in-Council was proclaimed.⁸² It must be emphasised that, apart from a few insignificant changes, the whole of this constitution became the basis for Independence in 1948. At the time of drafting, as the preceding history suggests, the 1946 Order-in-Council

was to usher in a pen-ultimate stage of constitutional development before the actual grant of Dominion Status. Therefore, matters concerning communal and religious affairs of the nation were put in 'cast-iron' terms, which was not irreconcilable with the stage of constitutional development in which Ceylon was, in 1946; that is one of internal self government. It was still a Crown Colony, and therefore, a total prohibition placed in those areas that are contained in section 29(2), (a)-(c) was in harmony with that particular stage of constitutional development.

The British Government's decision to leave the structure of section 29(2) intact while taking the Colony into its next stage of constitutional development - namely that of Dominion Status - appears to have had at least the tacit agreement of the Ceylonese Board of Ministers. There are, in addition, clear indicators that the Board of Ministers may have assumed a tacit commitment to consider that the provisions of section 29(2) of the Soulbury Constitution, as Lord Pearce were to say in The Bribery Commissioner case: "unalterable under the Constitution." It is significant that, the Secretary of State for the Colonies, Mr. Creech Jones, during a debate on the Ceylon Independence Bill, in the House of Commons, on the 21st November, 1947 had said:

"I should perhaps also mention that the Government of Ceylon, while able in the future to amend their own Constitution, have felt that the provisions of the existing Constitution safeguarding minorities should be retained. They would obviously not wish to provoke any controversy on these issues in Ceylon. Thus the provision of an Upper House and the provision barring discriminatory legislation will be retained by the Ceylon Government." 83

The validity of the Senate Abolition Act of 1971 was never tested before the Courts. The Privy Council has historically departed from the view generally adopted by the British Courts, that they will not examine extraneous material which may have provided the basis for legislation. While applying a statute the British Courts prefer to sit with 'blinkers' and look exclusively to the legislation in question. The members of the Privy Council, however, have frequently abandoned⁸⁴ that posture and have roamed over a wide variety of preparatory, historical and legislative material which may appear to have a relevance to the provision that they have been called upon to interpret and apply. It is therefore, possible that Lord Pearce in The Bribery Commissioner case did examine a number of extraneous data so as to feel confident that section 29(2) was intended to be unalterable, although the rest of the Constitution may, by using the special procedure, be amended. Marshall, in his book on Parliamentary Sovereignty and the Commonwealth⁸⁵ observed that:

"In the case of Ceylon, it was suggested during the debates of 1947 that she was getting (a) more than Canada and (b) less than India or Pakistan."⁸⁶

During the course of the House of Commons debate,⁸⁷ reference was made that Canada had no power to amend the British North America Act of 1867, which was in the nature of a Constitution, while both India and Pakistan had possessed a power to change their Constitutions. Mr. Gammans at one stage of the debate pointed out that the Ceylon Independence Bill had "no strings attached",⁸⁸ for the Government of Ceylon could at any time revoke the Defence and External Affairs Agreements or even go outside the Empire. He added:

"Ceylon, as the right Hon. Gentleman, namely the Secretary of State for the Colonies has said, has the right to amend her own constitution - a right not even possessed by Canada." 89

The assertion that the Soulbury Constitution falls between the Canadian Constitution at one end and the Indian and Pakistani Constitutions at the other end does become clear from the view that the Dominion of Ceylon had only a limited power to amend its Constitution. That limitation is deemed to have been placed on the Ceylonese legislature by excluding section 29(2) from the ambit of the power to amend.

Besides these views, arising out of the House of Commons debate on the Independence Bill, there are other indicators too, to support Lord Pearce's contention. Sir Charles Jeffries, who had led⁹⁰ the British Government's negotiating team at the talks leading to the grant of Dominion Status, later referred to the problem of minorities which had troubled the British Government during these meetings. With reference to Sir Oliver Goonetilleke's contention, on behalf of the Ceylonese Ministers, that Ceylon was a rock of stability, Sir Charles Jeffries wrote:⁹¹

"While admitting the force of these arguments, British Ministers could not lightly set aside the claims of the minorities, which lay heavily on their consciences. After all, Ceylon was only now in the embryonic stage of forming political parties, and her people had not yet shown much sign of ability to sink their internal differences and live together as one nation. It was a difficult point, but Sir Oliver could reasonably contend that on a realistic view it did not affect the issue of Dominion Status. The Soulbury Constitution, which had been accepted, had entrenched in it all the protective provisions for minorities that the wit of man could devise. These provisions would remain in force after the grant of Dominion Status." 92

The granting of Dominion Status involved two short steps. By section 1(1) of The Ceylon Independence Act, 1947,⁹³ the British Parliament declared that:

"No Act of Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Ceylon as part of the Law."

The second step was the naming of the date for the grant of Dominion Status. The Ceylon Independence (commencement) Order-in-Council, of 1947,⁹⁴ named 4th February, 1948 as the day on which Ceylon shall acquire that status.

The thrust of Sir Charles' narration of what he calls 'The Decisive Negotiations'⁹⁵ is that the guarantees 'that the wit of man could devise' were intended to stay. It seems clear from the speech of the Secretary of State for the Colonies that the Ceylonese negotiators had, on behalf of the Government of Ceylon, agreed to accept a constitutional position more Independent than that of Canada, but less Independent than that of the sub-continent of India. Their acceptance of such a limited freedom to amend the Soulbury Constitution may have helped in removing a stumbling-block of some significance. That fact may have helped to calm the ruffled consciences of the members of the British Houses of Parliament.

Mr. Gammans expressed his concerns in this way:

"The second danger which Ceylon faces is one which the right Hon. Gentleman, The Secretary of State for the Colonies has not mentioned except very shortly today. It is that Ceylon is not a single racial unit. There are two races in Ceylon, the Sinhalese and the Jaffna Tamils, who are in the northern part of the Island, and number 1,500,000, out of a total of 6,500,000. They differ from the Sinhalese in race, language, religion, and, to a large extent, in background. They are extremely capable and intelligent people. I have had a lot to do with them because they played a very large part in the development of Malaya.

It was the Jaffna Tamils who came over in large numbers and started the railways and Government services. Where there is a racial minority in the country the danger is that it may become a permanent political minority, and if it does become a permanent political minority, Ceylon's evolution on democratic basis is bound to fail."96

Section 29(2) could, to a large measure, have prevented the Tamil speaking people from becoming a permanent minority. Therefore, it was evident that the British Government was interested in giving the provisions of that section a durability approaching permanency. All these indicators, forming a voluminous collection of extraneous materials, may have been available to the members of the Privy Council during the hearing of The Bribery Commissioner's case. Freed from the limitation placed on English Courts, tying them down to the terms of the legislation itself, the Privy Council could have roamed over a vast area of historical, political, sociological and legislative materials so as to lay down the view that the provisions of section 29(2):

"represents the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the constitution; and these are therefore unalterable under the Constitution."97

The obiter dictum could, therefore, be supported. The Soulbury Constitution was accepted by the House of Representatives by 59 votes to 11 and by The Senate by 21 votes to 5. Within the historical context in which the Constitution was conceived, Lord Pearce's gratuitous obiter dictum was, with respect, correct. However, it marked the commencement of a process towards replacing the Soulbury Constitutional model with an autochthonous model produced out of a unique constitutional exercise,⁹⁸ in 1972.

IV. Towards a New Constitution: (a) A Political Assessment of the Bribery Commissioner Decision.

The thrust of Lord Pearce's dictum was to bring into question the sovereignty of Ceylon's Parliament. During a debate in the House of Representatives, Dr. Colvin R. de Silva,⁹⁹ who subsequently became the Minister in charge of dismantling the Soulbury Constitution and structuring its substitute, the 1972 Constitution, arguing in 1969 from the opposition ranks, explained the position in this way:

"In respect of the powers of this House, from the point of view of section 29, our Constitution may be said to fall into three parts. There are those matters in which we have no power to legislate at all. Those are the matters referred to in section 29(2). There are the matters we can legislate upon only by a two-thirds majority of the actual membership of the House. Those are what are covered by section 29(4). Then there is the rest of that wide field of matters on which we can legislate by a simple majority. Those are the three divisions of the Constitution which are vital from this point of view."¹⁰⁰

The debate¹⁰¹ revealed a feeling of anxiety over the question of sovereignty from every quarter of the House. The Government of the day,¹⁰² however, appeared content to limit the word 'unalterable' to section 29(2) of the Constitution and not to the whole of the Constitution. They argued¹⁰³ that, in the words of Lord Pearce, the concern of section 29 being religious and racial matters, "they should not be the subject of legislation,"¹⁰⁴ and are "therefore unalterable under the Constitution."¹⁰⁵ The Constitution itself, the Government thought, was alterable in its entirety, and therefore the solution which they suggested was the introduction of a new Constitution.¹⁰⁶ In their view, the Privy Council was

not referring to the legislative competence of the Ceylon Parliament to enact a new Constitution, but its competence to change a particular section of the existing Constitution, and therefore in the Government's view, Parliament was competent to enact a new Constitution which would derive its validity from the present one. Its de jure validity thus assured, it would then be a successor to the present Constitution. The Government of the day was led by The United National Party (U.N.P.) which was responsible for negotiating the grant of Dominion Status in 1948.

The opposition,¹⁰⁷ at the time led by The Sri Lanka Freedom Party (S.L.F.P.), too, agreed that a new Constitution was the solution, but they were unwilling to accept the legislative competence of Parliament to enact one. Their interpretation¹⁰⁸ of Lord Pearce's dictum denied Parliament the competence, either to alter or to amend section 29 of the present Constitution, or to enact a new Constitution which did not carry the provisions of that section. This necessarily indicates a total inability to get rid of the present Constitution as a whole, and substituting for it a new one without having to carry into the new one the provisions contained in section 29. Viewed in that light, the opposition argued that, short of inviting the Westminster Parliament (which is the source of the legal validity of the Soulbury Constitution) to enact a new Constitution for Ceylon, a political revolution was the only alternative. The authority for such a revolution, the opposition thought, should be sought from the people. The mandate of the people should be sought to constitute a constituent assembly charged with the duty of drafting a new Constitution. Such a Constitution, the opposition pointed out, when enacted by Parliament, would derive its validity not from any narrow juridical source, such as a constitution, but from a broad popular source, the people.

It is important to appreciate the implication of the divergence in the respective views held by the two principal parties in Parliament. As for the opposition, The Bribery Commissioner case had conclusively shown that the Ceylon Parliament was not and had never been sovereign. The Government,¹⁰⁹ on the other hand, thought that Parliament was sovereign, and had the power to enact a whole new constitution, but was clearly powerless to alter or amend section 29 under the present one.¹¹⁰

The absence of a clear statement from the courts as to the true import of Lord Pearce's view, together with the irreconcilable positions taken by the Government and the opposition in Parliament, left the whole issue of Parliamentary sovereignty in a state of suspended animation. The Privy Council, however, only five months previously,¹¹¹ had in an appeal from Ceylon, expressed a view which appeared to strengthen the view taken by Lord Pearce in The Bribery Commissioner case. With reference to section 29, Viscount Radcliffe had said on that occasion:

"Apart from the fundamental reservations specified in section 29, the Order contained only two qualifications on the full legislative authority of Parliament."¹¹²

The opposition derived further strength in support of their position from this view of Viscount Radcliffe.¹¹³ After quoting the above passage, Dr. Colvin R. de Silva¹¹⁴ during a debate in the House of Representatives, proceeded to say this:

"Then they speak¹¹⁵ of the qualifications - of the two-thirds majority and the Speaker's certificate. Apart from the fundamental reservations specified in section 29 - that is fundamental. That cannot be touched. That is entrenched.

That is why I said to you, sir,¹¹⁶ in answer to your question, that I agree with the decision.¹¹⁷ I do not agree with every observation in the judgment, but I agree with the decision because it is a correct interpretation of the Law, whether we like it or not.

And, sir, please remember, as things are, any effort to act otherwise is subject to decision by the same authority, and it is only a set of fools who will think that the Privy Council will adopt another interpretation on the matter of the meaning of the Constitution under this Constitution.

Therefore, if we try to legislate in the face of, or in defiance of, this decision under the Constitution, then any citizen can take the matter to the Privy Council. In fact he need not go all the way to the Privy Council. The local courts are under an obligation to apply this decision. That is the position."

Although The Bribery Commissioner case was decided in 1964, its effect did not come up for evaluation until 1969. The S.L.F.P. was defeated at the 1965 General Elections and the U.N.P. that took office in that year at the head of a seven party political coalition¹¹⁸ had other pressing political problems to resolve. The maintenance of communal harmony, the propagation of the 'National Food Drive' and the sheer effort of keeping a seven party political coalition together, consumed a large measure of parliamentary time. However, by 1969, both the Government and the opposition were on the look out for new and attractive election issues for their respective manifestos, and it is then that The Bribery Commissioner case became a boiling political issue. With anxieties about parliamentary sovereignty heading the list of other controversial issues, the sixth Parliament after Independence was dissolved in April, and elections were called for May 27, 1970.

IV. (b) The Creation of a Constituent Assembly

The divergent views held over The Bribery Commissioner case by the two political groups in the sixth Parliament were clearly reflected in their respective pre-election manifestos. The political groups that comprised the Government of the previous Parliament pledged, if returned to power, to implement constitutional reforms through Parliament. That was in line with the stand that they had taken on The Bribery Commissioner case. The opposition, however, sought a mandate from the people for the next Parliament, to sit as a constituent assembly "to draft, adopt and operate a new Constitution which will declare Ceylon to be a free sovereign and Independent Republic" ¹¹⁹ Poised in that manner, The Bribery Commissioner case went up, as it were on a further appeal, to the electorate.

On May 27, 1970, the opposition of the last Parliament, the Sri Lanka Freedom Party with their two Marxist partners, was swept into power, and His Excellency the Governor-General called upon Mrs. Bandaranaike to form the next Government. On June 14, the first session of the Seventh Parliament was declared open by the Governor-General on behalf of the Queen, and included the following paragraph in his speech from the throne. It read:

"By their vote democratically cast the people have given you a clear mandate to function as a Constituent Assembly to draft, adopt, and operate a new Constitution which will declare Ceylon to be a free sovereign and Independent Republic" ¹²⁰

The procedures thereafter set forth by the Government towards creating a Constituent Assembly laid emphasis on two factors. First, the Government made it clear that the authority to create a Constituent Assembly was

derived neither from the British Crown and Parliament of the United Kingdom nor from the present Constitution of the country, but exclusively from the mandate given by the people at the General Election. Emphasis on both these matters appeared to the Government as important, for one of the options which were open to Parliament in the light of Lord Pearce's dictum was to invite the Westminster Parliament to legislate for a new constitution, ostensibly, to make the Ceylon Parliament a supreme legislative body, by deleting the restrictions which Lord Pearce found in the present Constitution. This was viewed by both sides of the House as an admission of dependence, and therefore to adopt such a course was thought to be humiliating and fraught with a great many political and legal difficulties. The second option was the one suggested by the United National Party, which was the principal partner of the Government between 1965-1970. That was to legislate for a new constitution, relying on the legislative competence of the Ceylon Parliament to do so. That would necessarily have founded the juridical validity for the new constitution on the one it was designed to replace.

The Government of Mrs. Bandaranaike, therefore, felt it important that it made clear from the very outset, in the procedures which were set in motion, that the basis for the validity of the new constitution would ultimately rest exclusively on the will of the people. The Constituent Assembly was deemed to be a creation of the House of Representatives under a mandate given to that body by the people of Ceylon. The legality of the Constituent Assembly together with the legality of the Constitution which it was mandated to form was founded, ultimately, on the will of the people expressed through the electoral process of May 27th, 1970. It was, therefore, thought that the resolution creating the Constituent Assembly should reflect all these legal and political factors.

The resolution read:

"We the members of the House of Representatives, in pursuance of the mandate given by the people of Sri Lanka (i.e., Ceylon)¹²¹ at the General Election held on the 27th day of May, 1970, do hereby resolve to constitute, declare and proclaim ourselves the Constituent Assembly of the People of Sri Lanka for the purpose of adopting, enacting and establishing a Constitution for Sri Lanka which will declare Sri Lanka to be a free, sovereign and Independent Republic pledged to realise the objectives of a socialist democracy including the fundamental rights and freedoms of all citizens and which will become the fundamental law of Sri Lanka deriving its authority from the people of Sri Lanka and not from the power and authority assumed and exercised by the British Crown and the Parliament of the United Kingdom in the grant of the present Constitution of Ceylon nor from the said Constitution and do accordingly constitute declare and proclaim ourselves the Constituent Assembly of the people of Sri Lanka
... •" 122

The second factor upon which the Government laid emphasis when creating the Constituent Assembly was this: although it was the members of the Seventh Parliament that received the mandate to draft a new Constitution, the Government, in the procedures it adopted, laid emphasis on the distinction between members sitting as Parliament, and members sitting as a Constituent Assembly. To make this distinction clear, the first meeting of members sitting not as a Parliament, but as a body of citizens bent on creating a Constituent Assembly was held in a premises several miles away from the House of Representatives. That was held in response to a personal invitation¹²³ sent out by the Prime Minister, and addressed to each member by name, requesting his or her presence at a meeting to consider and adopt a resolution to create a Constituent Assembly.¹²⁴ The meeting was held on July 19, 1970. Having symbolised the separateness of the two bodies - the Parliament and the Constituent Assembly - the members who were members of both bodies

resolved that henceforth they should sit, when sitting as a Constituent Assembly - in the Chamber of the House of Representatives.¹²⁵ The Resolution, which was moved by the Prime Minister, Hon. Sirimavo Bandaranaike and seconded by Dr. N. M. Perera¹²⁶ on July 19th, was adopted, unanimously, on the 21st of that month.¹²⁷ That marked the creation of the Constituent Assembly. When giving the opinion of the Privy Council in The Bribery Commissioner case, Lord Pearce's view of the Ceylon Constitution may have had the appearance of a distant ripple. But as events have revealed, it turned into an enormous tidal wave.

IV. (c) The Drafting of a New Constitution: How The Constituent Assembly Worked.¹²⁸

The resolution to establish the Constituent Assembly and to authorize it to adopt, enact and establish a Constitution for Sri Lanka was unanimously approved on the 21st July, 1970,¹²⁹ by the elected representatives of the Seventh Parliament sitting as an assembly of persons who had been mandated to do that. Their mandate sprang from the votes cast in their favour by a majority of the voters at the General Elections held on May 27th, 1970. Eight days later, on the 29th of July, The Minister in charge of Constitutional Affairs, Dr. Colvin R. de Silva outlined the procedure¹³⁰ the Assembly should adopt in its work towards producing a new Constitution. The procedure was designed in a way that a series of Basic Resolutions would be drafted first, embodying the principles upon which the new Constitution would rest. The Minister laid down two sources from which these Resolutions would emerge. He said:

"These Resolutions will come from two sources:
(a) the Steering and Subjects Committee acting through the Minister of Constitutional Affairs;
(b) Members of the Assembly who have obtained either the concurrence of the Steering and Subjects Committee or of the Assembly to bring any specific Resolution of basic principle before the Assembly."¹³¹

The first source provided the Government - namely the Cabinet of Ministers - the means of transforming Government's own views into 'Basic Resolutions'. The second source provided the Members of the Constituent Assembly, in their individual capacities to move basic principles which they may desire to have the Constituent Assembly adopt as 'Basic Resolutions'. Both streams of ideas, views and suggestions of the basic principles would, according to this procedure, ultimately germinate within the Steering and Subjects Committee. The latter in fact was a Committee of experts chosen to function as a drafting body, directly under the Minister of Constitutional Affairs. They sat as a group of experts under the chairmanship of the Minister and carried the collective responsibility of transforming lengthy memoranda containing views, suggestions and opinions at various stages of maturity. These memoranda contained the suggested 'basic principles'. Each 'Basic Resolution' was in the form of a constitutional provision. Upon a decision being made by the Steering and Subjects Committee that any particular 'basic principle' proposed by a member of the Assembly merits adoption, the Committee would then draft a 'Basic Resolution' out of that 'principle'. If on the other hand the Committee were to reject such a 'principle' the member or members concerned could move its adoption by way of a simple resolution before the Assembly.¹³² If such a resolution were to receive a simple majority, the Steering and Subjects Committee should thereby be required to adopt such 'principle' and re-state it in the form of a 'Basic Resolution' which would have the potential of being incorporated as a provision of the new Constitution. In addition, the Assembly was empowered to reject or amend any 'Basic Resolution' that the Minister of Constitutional Affairs may himself move under the first of the two aforesaid sources.¹³³ The supremacy of the

Assembly is thus established at every stage of the drafting procedure. Aside from the two aforementioned sources, there was a third source too from which a 'basic principle' may arise. The 'public' in the widest sense of the word may individually or by groups suggest 'basic principles' that they wish the Constitution to incorporate. Within this category fell both citizens, non-citizens, residents and non-residents who may have an interest in submitting memoranda to the Committee.¹³⁴ If the Committee were to decide that their memoranda should be adopted, the resulting 'Basic Resolution' should have the status of a Resolution put forward by the Committee acting through the Minister of Constitutional Affairs. The first stage of the procedure was therefore, the collection of memoranda from these three sources containing an elaboration of the 'basic principles' that should go into the 'Basic Resolutions'.

The second stage involved the adoption of the several 'Basic Resolutions' by the Constituent Assembly.¹³⁵ Each 'Basic Resolution' was separately debated and was individually voted. At that stage the Constituent Assembly had the power to reject or amend any of the 'Resolutions', if the members had so wished. Once the Assembly had adopted all the relevant 'Resolutions', which in fact by now were potential constitutional provisions, the Minister of Constitutional Affairs was required to move:

"That the draft Constitution is in accordance with the basic principles adopted by the Constituent Assembly."¹³⁶

The adoption of that resolution by a simple majority commenced the third stage of Constitution making. During this stage the Assembly was required to divide:

" ... into a suitable number of Committees to each of which an appropriate portion of the draft Constitution will be referred for amendment if necessary. Each Committee will be empowered to receive memoranda from the public and, if the Committee considers it necessary, to receive evidence on such memoranda. The Committee shall report to the Steering and Subjects Committee on any amendments proposed together with a summary of their reasons for proposing the amendments." 137

At the end of this stage the Steering and Subjects Committee should have before it several reports from the mini-committees of the whole Assembly. The Steering and Subjects Committee was then required to consider those reports and produce what should be the second draft of the Constitution. 138

The fourth stage of the process was to place before the Assembly the second draft of the Constitution. At that stage the Assembly as a whole sitting as a committee embarked upon a detailed consideration of the revised second draft. 139 During that process the Assembly, now in the guise of a Committee was empowered:

" ... to amend the draft in accordance with the Standing Orders". 140

This eventually produced the third or the final draft of the Constitution. The fifth or the final stage of this process was a relatively short one. It was the adoption of the final draft by a simple majority by the members of the Constituent Assembly. 141 That step culminated in the promulgation of the draft Constitution on the 22nd May, 1972. By 'Schedule A' of the 1972 Constitution, the Ceylon (Constitution and Independence) Orders-in-Council of 1946¹⁴² and 1947¹⁴³ were repealed. This effectively replaced the Soulbury Constitution with the 1972 Constitution.

CHAPTER 8

Autochthony and New Constitutions: Of 1972 and 1978

1. An Introduction

The legal aspects of the 1972 Constitution have been the subject of an authoritative study¹ by Dr. Cooray. No useful purpose could be achieved by adding to his most valuable exposition. But, considering the 1972 Constitutional model as the commencement of a process of breaking away from the colonial model - the Soulbury Constitution, - the 1972 model could be usefully examined by indicating the additional changes which have been brought about by the 1978 model. The 1978 Constitution represents a new stage in the continuing process of modernization of the Constitutional structure in Sri Lanka. The 1972 Constitution, inaugurated on the 22nd May, 1972, formed the basis² for the 1978 Constitution introduced on the 7th September, 1978. Just as the 1972 Constitution was formed under an electoral mandate³ given to the United Left Front Government led by Mrs. Bandaranaike in 1970, the 1978 Constitution was a result of a mandate⁴ given by the electorate to the United National Party in 1977. The two Constitutions can be conveniently examined under a series of headings.

II. Sovereignty and the Separation of Powers

The central issue debated in The House of Representatives in 1969 over Lord Pearce's obiter dictum was the question of Parliamentary Sovereignty under the Soulbury Constitution. The first basic resolution moved before the Constituent Assembly on the 14th March, 1971 was that:

"Sri Lanka shall be free, sovereign and independent Republic." ⁵

The second basic resolution ⁶ which was moved two days later was that the Constitutional structure of Sri Lanka shall be that of a Unitary State, thus rejecting the idea of Federalism. Surrounding these two broad propositions, the 1972 Constitution contained five articles in the first chapter which established the principle of a Sovereign Unitary State. Three of these five articles merit comment:

"Article 3: In the Republic of Sri Lanka, sovereignty is in the people and is inalienable.
Article 4: The sovereignty of the people is exercised through a National State Assembly"
Article 5: The National State Assembly is the supreme instrument of State power of the Republic. The National State Assembly exercises - (a) the legislative power of the people; (b) the executive power of the people, including the defence of Sri Lanka, through the President and the Cabinet of Ministers. (c) the judicial power of the people through the Courts" ⁷

What Article 4 indicated was that the National State Assembly was the agency through which the people exercised their sovereignty. Article 3 declared that the sovereignty of Sri Lanka lay in its people. The Agent, the National State Assembly, exercised legislative power, while the executive and judicial powers were sub-delegated, not by the people, but by the National State Assembly, to the Cabinet and to the Judiciary, respectively. Phrased in that way, the Judiciary, like the cabinet became agents of state power, the National State Assembly being its supreme instrument. The Constitution did not bring about separation of powers but the subordination of all agencies of state power to the National State Assembly. In this way the Judiciary became in Law subordinated to the National State Assembly. Accompanying this change was

the abandonment of the principle of separating the judiciary from the legislature and the executive, as found in section 55(1) of the Soulbury Constitution; which formed the basis for the dispute in The Bribery Commissioner case.⁸ Section 55(1) of the Soulbury Constitution provided:

"The appointment, transfer, dismissal and disciplinary control of judicial officers is hereby vested in the Judicial Service Commission."

Section 53 of the Soulbury Constitution made the Judicial Service Commission an independent entity and entrusted to them the task of appointing the Island's Judiciary. The 1972 Constitution, however, left that task to the Cabinet of Ministers emphasising the subordination of the Judiciary to the National State Assembly. By these means Judicial appointments became subject to Parliamentary control, thus establishing the ultimate link with the people as a whole. Adopting the provisions of the Soulbury Constitution the 1972 Constitution, however, retained the stringent requirement of an address and a vote in the National State Assembly for the removal of a Judicial Officer.⁹ But, unlike the Soulbury Constitution, the ultimate responsibility for the transfer of a judicial officer was left in the hands of "the Minister in charge of the subject of Justice".¹⁰ The thrust of these provisions was to make the judiciary subordinate to the National State Assembly - which was considered the supreme instrument of State power.

The 1978 Constitution,¹¹ retained this paradigm. It reads:

"Article 3: In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise."

Having thus located the sovereignty the next three sub-articles of the Constitution proceeded to explain the way the people exercised their sovereignty.

"Article 4: The sovereignty of the people shall be exercised and enjoyed in the following manner:-

(a) the legislative power of the people shall be exercised by Parliament ... and by the people at a referendum;

(b) the executive power of the people, including the defence of Sri Lanka shall be exercised by the President of the Republic elected by the people;

(c) the judicial power of the people shall be exercised by Parliament through Courts,"12

To make the ascendancy of the peoples' sovereign power over the judiciary unmistakably clear, the 1978 Constitution empowered The President, who is also the head of the Executive, to appoint the judges at all levels, at his absolute discretion.¹³ As for the removal of judges, the traditional procedure of an address from Parliament was retained.¹⁴ Although it was the Cabinet which held the collective responsibility for the appointment of judges under the 1972 Constitution, Article 126 (1) required the Cabinet to consult the Judicial Service Advisory Board¹⁵ before a judicial appointment was made. Article 107(1) of the 1978 Constitution, however, carried no such pre-condition for the exercise of the President's power to appoint judges. In this context the President's power to appoint the judiciary was unconditional. There is, of course, an important constitutional issue that comes to light, in that the President is not a member of Parliament. The President is elected by the people but is outside Parliament. This may create a conflict between what is said in Article 4 (c) of the Constitution, that "the judicial power of the people shall be exercised by Parliament through Courts" and the fact that the ultimate power of appointing judicial officers is held by the President, who is not responsible to Parliament.

The provision of the 1972 Constitution is more in harmony with the location of the Sovereign power in the people of Sri Lanka, than is the parallel provision in the 1978 Constitution. For the Cabinet, which is responsible for judicial appointments under the 1972 Constitution, is responsible to Parliament, which is the repository of the Sovereign power of the people. This makes the claim that the judicial power of the people (an attribute of their Sovereignty), is exercised primarily by Parliament, but through the agencies of the Courts, a constitutional fact. However, the broad principle of political policy which, in both constitutions, was translated into Law - namely, that the Sovereignty of the country lies in its people - must help in establishing the Sovereignty of the Sri Lanka parliament for all times. This was meant to be a suitable answer to the problems raised, by implication, in Lord Pearce's obiter dictum in The Bribery Commissioner case.¹⁶

III. Executive Government

The principle element in the Westminster model is the separation of the Head of State from the Head of Government. The Head of State becomes constitutionally identified with powers, rights and privileges demarcated by law. The Head of Government, on the other hand, as the Chief Executive, presides over a ministry which he has selected for himself, and sits as a member with voting rights in the legislature. The 1972 Constitution, while adopting the Westminster model, took a further step towards isolating the Head of State from Parliament by declaring that a Bill, when passed by the requisite majority in Parliament, becomes law upon its certification by the Speaker that:

"This law (here include the short title of the law) has been duly passed by the National State Assembly."¹⁷

This position has been retained in the 1978 Constitution.¹⁸ This dispenses with the need for the President's assent before a Bill becomes law and thereby internalises the law making power totally, in the hands of the People's representatives in Parliament. This again is a manifestation of the absolute view of Sovereignty pursued by the makers of the two Constitutions.

Under the 1972 Constitution, "a Cabinet of Ministers charged with the direction and control of government"¹⁹ was made "collectively responsible to the National State Assembly and answerable to the National State Assembly on all matters for which they are responsible."²⁰ The 1972 Constitution thereafter declared that:

"of the Ministers, one who shall be the Head of the Cabinet of Ministers shall be the Prime Minister. The President shall appoint as Prime Minister the Member of the National State Assembly who, in the President's opinion, is most likely to command the confidence of the National State Assembly."²¹

The Prime Minister was given the task of determining the number of ministers and the assignment of subjects and functions to them.²² The President was thereafter required to appoint them to the portfolios designated by the Prime Minister.²³ The model pursued under the 1972 Constitution maintains a strict separation between the Head of State and the Head of Government. The President under the 1972 Constitution was no different from the Governor-General under the Soulbury Constitution. Under both Constitutions, the President and the Governor-General merely functioned as Heads of State not as Heads of Government. This was clearly the essentials of the Westminster model, retained in the 1972 Constitution.

The United National Party which formed the Government in 1977, proposed to the electorate a departure from the 'Westminster Model', at the General Elections of that year. Having obtained a mandate to change the system of government to what was then called a 'Presidential Model', Parliament designed some of the principal provisions of the 1978 Constitution in order to break away from the 'Westminster Model', which had persisted in both the Soulbury Constitution and in the 1972 Constitution. Article 19 of the 1972 Constitution²⁴ declared the President of the Republic of Sri Lanka to be her Head of State while Article 30 of the 1978 Constitution²⁵ expanded the role of the President to be:

" ... the Head of State, the Head of the Executive and of the Government, and the Commander-in-Chief of the armed forces."

Further, in Article 43, the 1978 Constitution declared that:

"(1) There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament.

(2) The President shall be a member of the Cabinet of Ministers, and shall be the Head of the Cabinet of Ministers:

provided that notwithstanding the dissolution the Cabinet of Ministers under the provisions of the Constitution, the President shall continue in office."²⁶

In addition, the 1978 Constitution gave the President the responsibility of appointing a Prime Minister,²⁷ and determining the number of Ministers, their Ministeries,²⁸ and the assignment of subjects and functions to them. In the latter, the President was not required to consult the Prime Minister if he wished to act without his advice. The cumulative effect of these provisions was

to merge the position of the Head of State and that of the Head of Government in one person. Although the President had a right to address Parliament at any time, by virtue of his office,²⁹ he could neither be a member of Parliament nor be answerable to it.³⁰ The President could if he so wished, "assign to himself any subject or function" and thus assume responsibility for any particular ministry in the Government.³¹ However, the 1978 Constitution makes no provision for the President's answerability to Parliament in his capacity as a Minister of State.³² The danger lies in the fact that the President could, by not assigning any functions to any Ministers,³³ assume responsibility under Article 44(2) for all functions of Government, and thereby deny Parliament the right to control the nation's business. Such a point would, however, make the Constitutional position³⁴ of the government of the United States of America appear in many ways similar to that of Sri Lanka under the 1978 Constitution. In practice the Deputy-Minister responsible for the portfolio in question would answer to Parliament - as the mouthpiece of the President; but only in his ministerial capacity.

The Presidential system of Government contained in the 1978 Constitution effectively ended the 'Westminster Model' of Government for Sri Lanka. The 1972 Model, while changing the role of the Governor-General from one of being a mere representative of The Queen, to that of a President, as a Head of State for Sri Lanka, retained in other respects the 'Westminster Model' of Government. In that sense the 1978 Constitution, in the area of Executive Government, presents a higher synthesis in this dialectical process³⁵ of Constitutional development, than the model presented by the 1972 Constitution.

IV. Legislative Powers

Earlier³⁶ it was pointed out that the limits placed on the legislative powers of the Parliament of Ceylon after Independence provoked considerable concern among political leaders, particularly after The Bribery Commissioner³⁷ decision. The 1972 Constitution, therefore, paid particular attention to the question of the legislative powers of the National State Assembly which replaced Parliament. The 1972 Constitution³⁸ required the publication of a proposed Bill in the Gazette for a period of at least seven days, in both Sinhala and Tamil, before it was placed on the Agenda of the National State Assembly.³⁹ During the proceedings of the Constituent Assembly, the Minister in Charge of Constitutional Affairs explained⁴⁰ that this procedure would help to give the Bill wide publicity and time to stimulate discussion on the provisions contained in it. Thereafter, the Bill would be placed on the Order Paper and there is yet another week before⁴¹ the expiry of the period allowed to challenge it upon Constitutional grounds. According to normal practice, however, several weeks do elapse between the first publication of the Bill in the Gazette and its appearance on the Order Paper.⁴² During the first week after its appearance on the Order Paper, any member of the National State Assembly, through his political party,⁴³ any twenty members of the Assembly,⁴⁴ the Speaker or his deputy⁴⁵ or any citizen⁴⁶ may raise the question of its Constitutionality with the Speaker, in writing. The Speaker is then required⁴⁷ to refer the question of Constitutional validity to the Constitutional Court established under Article 54(1) of the Constitution. The Constitutional Court must, except in the case of Bills which the Cabinet of Ministers had certified as being 'urgent in the National interest'; deliver their opinion within two weeks of the Bill being referred to such Court.

In the case of 'Urgent Bills', the period was limited to twenty-four hours.⁴⁸ What is required within the prescribed period is the view of the Constitutional Court as to whether the Bill offends the Constitution. Their reasons, however, could be delivered later.⁴⁹

If the Court concludes that:

" ... this Bill or any provision therein is inconsistent with the Constitution or that the Constitutional Court entertains a doubt whether the Bill or any provision therein is consistent with the Constitution such Bill may not pass into Law except with the special majority required for the amendment of the Constitution."⁵⁰

The special majority required for Constitutional amendments was two-thirds at least of the whole house (including those absent) voting affirmatively in favour of passing the provision.⁵¹ While Article 54(4) makes the decision of the Constitutional Court binding on the Speaker and conclusive for all purposes, no challenge of the Bill could ever be made after the lapse of a period of one week reckoned from the day of its publication upon the Order Paper. Explaining the policy behind these provisions, the Hon. Dr. Colvin R. de Silva told the Constituent Assembly:

"So, I do not think it is possible for anyone to go further within the principle that laws cannot be challenged after they are passed in the interests of certainty of the Law and the security of the citizen."⁵²

Explaining the important role which the Constitutional Court would play under the new scheme for delineating the legislative powers of the National State Assembly, Dr. de Silva said:

"If, however, the Constitutional Court or the Speaker or both, the Constitutional Court in particular, think that there is a question of repugnance, then the Government must take its choice. Either it must forget its hurry and go through it in the ordinary way, or, the Government being of the opinion that it is a matter of urgency in the national interest, it can decide on one of two courses of action. It can either remove that provision and present the Bill without it, and then there would be no problem, or it can decide that that provision is necessary and proceed with the Bill with that provision, but in that case the Speaker will insist on a two-thirds majority. In other words, it will have to reach that status. So every precaution is being taken. What I want to stress is that I am seeking to build into the Constitution various precautions which will prevent any laws being passed that ought not to be passed except by a special majority. Those are precautions which the British Parliament do not have, they are precautions they do not observe, because even by a snap majority they may pass a law and that law would be good law. I am seeking to build into the Constitution these precautions." 53

The United National Party, which was leading the opposition at the time, agreed to these Constitutional provisions, but its leader, Mr. J. R. Jayawardene (as he then was),⁵⁴ expressed serious doubts as to the competence of a special Constitutional Court to hear the Constitutional challenge raised against a Bill.⁵⁵ The Court, as constituted under Article 54 of the 1972 Constitution was not expected to be drawn from career judges of the Supreme Court. Dr. de Silva on behalf of the government explained that:

"In the matter of this question of the Constitutional Court it must be realised that expertise in legalism alone is not enough. For instance, supposing we had an equivalent to Sir Ivor Jennings here, would we not consider him a suitable member of the Constitutional Court? We have professors of Constitutional Law ... we have men of goodly position and expertise; and what has to be brought in is not only the legal expertise but proper attitudes. I may say it is a consideration of all these matters

that caused me also to limit the life of the Constitutional Court to the period of a given Parliament."⁵⁶

The Government's position was that the Constitutional Court was required not only to decide a legal issue but to do so within a political framework. For, whether a Bill was in conflict with the Constitution was not only a legal matter but also a political matter. What a Bill was primarily intended to do was to act as the vehicle for the transformation of political policy into legal rules. What is found embalmed in Constitutions are the fundamental political philosophies of the framers. It was this line of argument which the Government adopted before the Constituent Assembly in 1971. As an element of the superiority of the National State Assembly, the Constitution required that no member of the Constitutional Court could refrain from voting⁵⁷ and the decision of the Court should be by a majority vote.⁵⁸ The President was required to appoint five members to the Court and at each sitting three of them would be required to sit as a fully constituted Court.⁵⁹ In practice, the majority of the Court, always including the Chairman, were career judges drawn from the Supreme Court. Dr. Cooray,⁶⁰ the Constitutional lawyer and law teacher, was the only non-judicial member of the Court.

The United National Party took office in 1977 and retained the fundamental structure of the 1972 Constitution, in this area. But two minor changes, and one substantial were introduced. The substantial change was made by substituting the Supreme Court,⁶¹ the highest Court of the land⁶² under the 1978 Constitution, for the Constitutional Court under the 1972 Constitution. Being the highest Court of the land, its ruling bound every Court on the Island, as established under the 1978 Constitution. This change of the forum was in line with

the views expressed by the leader of the United National Party, from the opposition, in 1971.⁶³ The two minor changes were that the Supreme Court now, under the 1978 Constitution, was given an extra week - namely three weeks - to make a determination on the Constitutional validity of an Ordinary Bill⁶⁴ and three days (instead of the twenty-four hours granted under the 1972 Constitution) to make a similar determination over an 'Urgent' Bill.⁶⁵

Under both, the 1972 Constitution and the 1978 Constitution, all Bills which expressly or by implication attempted to alter the Constitution were required to be passed by a majority of two-thirds of the total membership of Parliament (including those who may be absent). This under the Constitution ensured their Constitutional validity. Those Bills which did not conflict with the Constitution could however be passed into law by a simple majority. While recognising these two categories of legislative provisions, the 1978 Constitution carved out a third category of Bills which, in addition to obtaining a two-thirds majority in Parliament as required for any Constitutional amendment, carried a further requirement that they be submitted to a vote by the People at a Referendum.^{65a} Article 83 of the 1978 Constitution laid down six areas of the Constitution which fell under this third category.

(1) Where the Sovereignty of the State^{65b} and its people⁶⁶ are concerned or the unitary nature⁶⁷ of the State is in question;

(2) Where the National flag,⁶⁸ the National Anthem⁶⁹ or the National Day⁷⁰ is in question;

(3) Where the position of Buddhism in Article 9 is in question;

(4) Where the guarantees of such fundamental rights as freedom of thought, conscience, religion⁷¹ and freedom from torture or cruel, inhuman or degrading treatment or punishment⁷² is in question.

(5) Where the maximum life of the Parliament, normally ordained as six years, is in question.⁷³

(6) Where the repeal of Article 83, itself, is in question.⁷⁴

Besides these six areas where the Constitution requires the holding of a Referendum, Article 86 of the Constitution declared that:

"The President may ... submit to the people by Referendum any matter which in the opinion of the President is of national importance."⁷⁵

In addition:

"The President may in his discretion submit to the people by Referendum any Bill (not being a Bill for the repeal or amendment of any provision of the Constitution, or for the addition of any provision to the Constitution, or for the repeal and replacement of the Constitution, or which is inconsistent with any provision of the Constitution), which has been rejected by Parliament."⁷⁶

The Constitution further declared that a matter submitted for Referendum is deemed to have been approved by the people if it receives an absolute majority of the votes cast at such Referendum. However, where the total number of votes cast at a Referendum does not exceed two-thirds of the whole number of electors eligible to vote then atleast one-third of the whole number of such electors must vote in favour of the question referred to them of its approval.⁷⁷

Although the areas required to be subjected to a Referendum do not expressly include changes to the territorial extent of the Republic, presumably any such changes would raise questions of sovereignty and would, therefore, be required to be subjected to a Referendum.

In any event, any matter concerning the territorial integrity of the nation would raise an issue of such national importance that the President would be obliged to submit the issue to the people, through a Referendum under Article 86 of the Constitution. The Tamil demands for separation or federalism raise such an issue which must by necessity be an issue concerning the whole nation and not only their elected representatives in Parliament.

In conclusion, the 1978 Constitution maintains the framework of the 1972 Constitution regarding legislative powers subject to the two aforementioned changes. The substitution of the Supreme Court for the Constitutional Court is one and the introduction of the Referendum as a part of the legislative process is the other. The Referendum is a very new idea in the constitutional models thus far applied to Ceylon⁷⁸ or Sri Lanka.⁷⁹ Its significance is that it signifies the ultimate location for Sri Lanka's sovereignty; namely, in the people, a principle acknowledged by both constitutional models.

V. Religion and Language

In Chapters II and III of the 1972 Constitution the position of Buddhism and of the Sinhala language was stated, in that order. Buddhism was declared as being accorded "the foremost place and accordingly it shall be the duty of the State to protect and foster Buddhism while assuring to all religions the rights" granted under the provisions contained in the chapter on Fundamental Rights and Freedoms.⁸⁰ The 1978 Constitution in Chapter II adopted and affirmed these provisions.⁸¹

In Chapter III of the 1972 Constitution the validity of the Official Language Act⁸² and the Tamil Language (Special Provisions) Act⁸³ were confirmed.⁸⁴ Besides re-establishing the validity of these Acts, Chapter III adopted⁸⁵ the provisions of the Language of the Courts Act of 1961.⁸⁶ The 1978 Constitution,⁸⁷ in Chapter IV, adopted and affirmed the provisions of Chapter III of the 1972 Constitution,⁸⁸ but with one change. It is this. After confirming in Article 18, that the Official Language of Sri Lanka is Sinhala, in Article 19, it provided:

"The National Languages of Sri Lanka shall be Sinhala and Tamil."⁸⁹

The significance of Article 19 lies in the fact that the Tamil language, together with Sinhala, has now become recognised as one of the languages of a national group within Sri Lanka. Arabic, Malayalam, Malay or English cannot claim to have a national status as a recognised language of a particular ethnic group of Sri Lankans. Not even the Welsh language in the United Kingdom may claim such a recognition; for Welsh is only a regional language which may not be used for any purpose outside the Principality of Wales. Arising out of Article 19, is the assurance that the Tamil-speaking people of Sri Lanka may now, as a right, use their language, in all matters concerning them, in any part of the Island. In Articles 22, 23 and 24 reference is made to three particular areas in which particular rules regarding language may apply: these are the areas of public administration,⁹⁰ the Language of legislation⁹¹ and the language of the Courts.⁹² These areas are governed by earlier legislation which has come down to the 1978 Constitution by way of the 1972 Constitution. Article 23 of the 1978 Constitution projects the basic relationship between the Official Language and the two National Languages:

"All Laws and subordinate legislation shall be enacted or made, and published, in both National Languages together with a translation in the English Language. In the event of any inconsistency between any two texts, the text in the Official Language shall prevail." 93

The position of the English is expressly mentioned as a language into which a law ^{should} be translated, presumably for international use.

The Official Language comes into operation when there is a conflict between the Sinhala version and the Tamil version, but until then, both Sinhala and Tamil texts have equal force as law properly constituted in any region of the Island. The inclusion of Article 19 in the 1978 Constitution may well have a psychological effect of some magnitude for the minority Tamil community.

VI. The position of the Servants of the State under the Post-Soulbury Constitutions.

One of the key issues before the Soulbury Commission was the question of guarantees for a non-politicized public service.⁹⁴ By placing the public service under an independent body, the Public Service Commission,⁹⁵ the Soulbury Constitution sought to guarantee its independence. During the post-independence period, and particularly under the Bandaranaike Governments, the complaint was often heard of the non-cooperative posture of the public services to political changes and demands. This was said to be most pronounced at the more elitist levels of the public services. Several attempts were made during these periods to re-structure the services. However, in the 1972 Constitution it was provided that the public services should remain directly under the cabinet.⁹⁶ The 1972 Constitution renamed "public officers" as "state officers". Having done that, by Article 105 of the Constitution, a "state officer" was defined as:

"any person who holds a paid office as a servant of the Republic, but does not include -

- (a) the President;
 - (b) a Minister or a Deputy Minister; and
 - (c) a Member of the National State Assembly
- by reason 'only of the fact that he receives any remuneration or allowance as a member."

That definition of a 'state officer' was in line with the definition of a 'public officer' found in the Soulbury Constitution.⁹⁷ The 1972 Constitution created a State Services Advisory Board⁹⁸ to advise the Cabinet on appointments and a State Services Disciplinary Board⁹⁹ to advise the Cabinet on disciplinary matters. The transfer of state officers was left to the Cabinet of Ministers,¹⁰⁰ which could delegate that power to other persons or bodies.¹⁰¹ The 1978 Constitution, however, left the appointment of public officers (as they are now called) in the hands of the President,¹⁰² By Article 55(1) of the Constitution¹⁰³ the powers of appointment, dismissal or transfer of all public officers were delegated to the Cabinet, with a further power of delegation to a body called the Public Service Commission created under the 1978 Constitution.¹⁰⁴ The sub-delegation to the Commission was limited to all Public Officers who were not departmental heads. The matters concerning the appointment, dismissal and transfer of Heads of Departments were non-delegatable and therefore were required to be carried out by the Minister himself.¹⁰⁵

VII. Finance

The provisions contained in the Soulbury Constitution concerning public finance,¹⁰⁶ have survived in both the 1972 and the 1978 Constitutions. The creation of the Consolidated Fund,¹⁰⁷ into which all revenue flows,

and of the Contingency Fund,¹⁰⁸ as a part of the Consolidated Fund, received constitutional protection in all three Constitutions. These funds fell under the control of the Finance Minister, who was himself subject to Parliamentary Control.¹⁰⁹ The Finance Minister is prohibited from dealing with monies in either fund without Parliamentary approval. All three Constitutions recognise the position of the Auditor-General as an independent officer,¹¹⁰ whose tenure of office and salary is protected by the Constitution. The present Auditor-General,¹¹¹ has served under all three Constitutions in that capacity. Thus Chapter XVII of the 1978 Constitution follows Chapter XII of 1972 Constitution which was based on Chapter VIII of the Soulbury Constitution. Every administration in Ceylon (and in Sri Lanka) has taken the question of the control of Finance with due seriousness.

VIII. Public Security

The area of public security was subjected by the Soulbury Constitution to the provisions of the Public Security Ordinance of 1947.¹¹² This Ordinance was amended once in 1954.¹¹³ The 1972 Constitution in Chapter XVI adopted the provisions of the aforesaid Public Security Ordinance, subject to the limitation that:

"The President shall act on the advice of the Prime Minister in all matters legally required or authorised to be done by the President in relation to a state of Emergency."¹¹⁴

The reliance on the advice tendered by the Prime Minister as a prelude to a declaration of emergency was a borrowing from the days of the Soulbury Constitution. Both under that Constitution and under the 1972 Constitution the Prime Minister was the Head of the Executive. The Governor-General under the Soulbury Constitution¹¹⁵ and

the President under the 1972 Constitution¹¹⁶ were Commanders-in-Chief of the armed forces. By subjecting a declaration of emergency to the advice of the Prime Minister the two Constitutions upheld the supremacy of Parliament, subjecting both the Head-of-State and the Commander-in-Chief to the will of Parliament. The 1978 Constitution, however, was differently conceived. Under that Constitution, the Head-of-State is both the Head-of-the Executive and the Commander-in-Chief of the armed forces. The 1978 Constitution declared:

"The Public Security Ordinance as amended and in force immediately prior to the commencement of the Constitution shall be deemed to be a law enacted by Parliament."¹¹⁷

All matters connected with the effective implementation of a 'State of Emergency' were left in the hands of the Head of State, in his capacity as the Commander-in-Chief of the armed forces. However, the Constitution required the declaration of a State of Emergency and the rules and regulations proclaimed by the President during a State of Emergency, to be approved by Parliament, within ten days.¹¹⁸ Although these provisions were contained in the Public Security Ordinance as amended, the adoption of the requirement of Parliamentary approval, by the 1978 Constitution, provides a Constitutional safeguard for these parliamentary checks and controls during a period of Emergency. This in effect is the difference between the 1972 Constitution and the 1978 Constitution in this respect.

IX. The Principles of State Policy

While introducing Basic Resolution 4 containing the principles of State Policy to the Constituent Assembly, the Minister for Constitutional Affairs,¹¹⁹ speaking in Sinhala, explained the aims and purposes of that Resolution in this way:

විම යෝජනාවෙහි අප ආරභයන ඇත්තෙන්
අපට නියම වී ඇත්තෙන් සමාජවාදී පුරාතනත්වවාදිය
කරා ගෙනින්නාවූ, වෛස ගෙනින්නීමට ඇප බැර වූ
රක්ෂකයන් ඇති කිරීමටයි.¹²⁰

(translation "What we have accepted from that Resolution and what has indeed become our responsibility is to establish a Republican form of Government which is both dedicated and is able to work towards achieving a socialist democracy.")

The structure adopted by the draftsmen of the 1972 Constitution in the Chapter¹²¹ on 'The Principles of State Policy' appears to have been borrowed from the Irish and Indian Constitutions.¹²² But it was revealed during the lengthy debate on the principles of State Policy, that Constitutions around the world had previously followed this pattern.¹²³ There were, therefore, precedents for this structure. The basic aim of including such a section is merely to draw attention of future parliaments to some fundamental notions which the framers of the Constitution had adopted as guides to legislation. The belief is espoused that by following such principles of State Policy, Parliament functioning under that Constitution could move the country as a whole towards creating the conditions necessary for the growth and development of a new society.

The view held by the framers of the 1972 Constitution was that those principles would move the nation towards creating a social democracy in Sri Lanka. From the stand point of development, a closer analysis of these "Directive Principles of State Policy" should help in assessing the degree of social change that was projected. The degree to which that projection had become a reality could only be assessed from the type of legislations that had emerged and its affect on the socio-economic structure of the country. It is because of this need to make a fundamental assessment of these principles, that their further scrutiny is postponed until the concluding chapter is reached. For the present there are two less important matters to state. First, the 1978 Constitution, too, has followed the structure of the chapter on "The Principles of State Policy" of the 1972 Constitution,¹²⁴ The difference between the two Constitutions, in this respect, is that the 1978 Constitution appears to state these principles in less general and in more concrete terms. Chapter VI, containing the principles, is headed: "Directive Principles of State Policy and Fundamental Duties", while the heading in Chapter V of the 1972 Constitution is "Principles of State Policy". Secondly, the 1978 Constitution, having laid down the principles behind the policies of the State, proceeded to enumerate a set of fundamental duties expected of the citizen. In Article 29 the 1978 Constitution declares:

"The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka -

(a) to uphold and defend the Constitution and the law;

- (b) to further the national interest and to foster national unity;
- (c) to work conscientiously in his chosen occupation;
- (d) to preserve and protect public property, and to combat misuse and waste of public property;
- (e) to respect the rights and freedoms of others; and
- (f) to protect nature and conserve its riches.¹²⁵

In both the 1972 and 1978 Constitutions, these directive principles of State Policy and the Fundamental Duties in Article 28 of the 1978 Constitution, were declared not to impose legal rights or obligations and were declared not to be enforceable in a Court of Law.¹²⁶

X. Fundamental Rights and Freedoms

The Basic Resolution No. 5 put forward the provisions of Chapter VI of the 1972 Constitution concerning Fundamental Rights and Freedoms. This Chapter, containing Article 18, was the counterpart of Article 29 of the Soulbury Constitution,¹²⁷ where some of the protections remained unalterable¹²⁸ while others required a two-thirds majority for amendment.¹²⁹ The protections contained in Article 18(1) were subject to the provisions of Article 18(2):

" The exercise and operation of the Fundamental Rights and Freedoms provided in this Chapter shall be subject to such restrictions as the law prescribes in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others or giving effect to the principles of State Policy set out in Section 16." ¹³⁰

It is important to note that the implementation of a "Principle of State Policy" takes precedence over the "Fundamental Rights and Freedoms" mentioned here. The 1978 Constitution has spread the "Fundamental Rights", Chapter, over eight Articles.¹³¹ In doing so, the Constitution has enacted varying limitations applicable to certain types of rights while other limitations may apply to other types of rights. The Chapter does not submit all rights to a single list of limitations as in the 1972 Constitution.¹³² The 1978 Constitution, however, takes a step further than the 1972 Constitution by providing, in Article 17, for recourse to the Supreme Court where a person claims that there has been an infringement or there is a possibility that an infringement is imminent:

"by executive or administrative action of a fundamental right to which such person is entitled under the provisions of this chapter."¹³³

It is important to notice that this remedy is available provided that the particular infringement is not authorised by any one of the limitations placed on the fundamental right in question. However, unlike the 1972 Constitution, the 1978 Constitution does not subject the fundamental rights to the supremacy of the Principles of State Policy. Looking at both the 1972 Constitution and the 1978 Constitution from the standpoint of the protections entrenched in Article 29 of the Soulbury Constitution,¹³⁴ one sees a clear absence of any kind of protection to any class of people in any matter which could in any way be considered as effective. At the end of the last chapter the view was expressed that the introduction of the entrenched provisions may have been unfortunate as a misguided effort of the Soulbury Commissioners to protect the minorities. By placing these social problems squarely within legal bounds,

and confining them to a fixed position taken by a Constitution (as section 29(2) of the Soulbury Constitution did in declaring those provisions to be unalterable and therefore fixed for all times), the resulting social pressures could have by now found no legitimate escape route. For instance, had a re-hearing of the Kodeswaran Case¹³⁵ as directed by the Privy Council been held, and had that resulted in the Official Languages Act being declared null and void on the grounds that its implementation violated sections 29(2) (b) and (c), of the Soulbury Constitution, the only other¹³⁶ legal choice that the Government would have had at the time was to seek an amending power from Westminster. That would clearly have created a complex socio-political problem for the country. It was, perhaps the good sense of the officials¹³⁷ during the 1970-72 period which helped to avoid the enormous social and political problems that could have rocked the Island, had the Language Act become invalid as a result of a legal action commenced on behalf of Tamil rights. By delaying the re-hearing of the Kodeswaran Case until the Official Languages Act became embalmed within the 1972 Constitution, the Island was spared of a highly volatile situation both in social and political terms.

XI. Transitional Provisions

Each new Constitution must take into consideration the existing institutions recognised by the one it is meant to replace. Of these institutions there may be some which the new Constitution had declared to be valid and those that it may have excluded expressly or by implication. There may have been many institutions which may have been changed or amended before being adopted by the new Constitution. The front-line casualties of any constitutional change are the Members

of Parliament, the Head of State, the Head of the Executive and the members of Judiciary. These have had the most intimate relationship with the replaced Constitution, for they would have been either elected or appointed under it. The Courts, the Parliament and the Office of the Head of State are institutions whose validity is derived from a Constitution. Therefore, the replacement of one Constitution by another must necessarily affect these institutions. The transitional provisions are, therefore, meant to regulate and govern the impact of a constitutional change on these and a number of other institutions. The Public Service and the Armed Forces including the Naval and Air Force establishments are clearly affected by changes of the Fundamental Law - the Constitution.

The 1972 Constitution, by Article 19, created for the first time, the position of a President as the Head of State. This creation suppressed the Office of the Governor-General, which had existed under the previous Soulbury Constitution. By Chapter VIII of the Constitution the House of Representatives under the Soulbury Constitution was replaced by a National State Assembly. By Article 42(1) of the 1972 Constitution the members that comprised the Constituent Assembly were appointed as the first members of the first National State Assembly. As mentioned earlier, the Sri Lanka Freedom Party Government had maintained a clear distinction between the House of Representatives sitting as Parliament, a legislative body, and the Constituent Assembly sitting as a Constitution making body. It is to the latter that Article 42(1) applied and it was as members of the Constituent Assembly that the former elected representatives of the people became members of the first National State Assembly.

By Article 42(5) the life span of the National State Assembly was thus established:

"Unless sooner dissolved, the first National State Assembly shall continue for a period of five years, commencing on the date of the adoption of the Constitution by the Constituent Assembly."

By Article 43 the Constitution declared that:

"The holder of the Office of Prime Minister immediately before the commencement of the Constitution, shall be the first Prime Minister under the Constitution"

By Article 13, it was declared that:

" ... every person who immediately prior to the commencement of the Constitution -

- (a) held judicial office in any Court;--
- (b) was in the service of the Government of Ceylon, any local authority or any public corporation; or
- (c) held any office in any local authority or public corporation; or
- (d) held any appointment under any written law, shall continue in such service or hold such office or appointment under the same terms and conditions".

Aside from the suppression of the post of Governor-General and the House of Representatives, the 1972 Constitution preserved the rest of the governmental infra-structure inherited from the Soulbury Dispensations.

The 1978 Constitution too included a Chapter on 'Transitional Provisions'.¹³⁸ In Article 160, the 1978 Constitution declared that the President in office at the commencement of the Constitution, "shall be deemed for all purposes to have been elected as the President of the Republic, and shall hold office for a period of six years from February 4th, 1978." The 1978 Constitution was promulgated on Thursday, September 7th, 1978. The President who was holding that office immediately

prior to the commencement of the 1978 Constitution had assumed that position under the 1972 Constitution on the February, 1978. By Article 161(a) the Constitution declared that all persons who were members of the National State Assembly immediately before the commencement of the 1978 Constitution, 'shall be deemed to have been elected as Members of Parliament under the new Constitution'. By Article 161(e) the new Constitution established the life span of the first Parliament at six years from August 4th, 1977, unless dissolved any earlier. That was the day on which persons who subsequently became members of the first Parliament under the 1978 Constitution, took office, as members of the last National State Assembly under the 1972 Constitution.

The difference in attitude to the dates of commencement of the relevant periods of the First Heads of Government and the First Parliaments under the two Constitutions is significant. It highlights the fact that the 1972 Constitution was intended to make a complete break with the past. Therefore, the Constitution was regarded as marking a new beginning and membership of the new National Assembly was made to run from the date of commencement of the new Constitution. It is also significant that membership of the new National State Assembly under the 1972 Constitution was linked, legally, to the Constituent Assembly and not to the House of Representatives established under the Soulbury Dispensations. The 1978 Constitution, on the other hand, adopted a continuation of the 1972 Constitution into the 1978 Constitution in a basic way, making changes only where the new political directions dictated them. For instance, the framers of the 1978 Constitution made a political decision to reorganise the Supreme Court and the High Courts: Article 163 declared that:

"All judges of the Supreme Court and the High Courts ... holding office on the day immediately before the commencement of the Constitution shall, on the commencement of the Constitution, cease to hold office."

As for other officers of State, Article 164 declared that:

"Subject to the provisions of Article 163 every person who immediately before the commencement of the Constitution - (a) held office in any Court or Tribunal deemed, ..., to be a Court or Tribunal created and established by Parliament, (b) was in the service of the Republic, any local authority or any public corporation, (c) held office in any local authority or public corporation, or (d) held any appointment under any existing written law, shall continue in such service or hold such office or appointment under the same terms and conditions."

An argument against the provisions contained in Article 163 is that they reduce to nought the guarantees given by the 1972 Constitution to judges concerning their security of judicial tenure.¹³⁹ It is argued that the judges would be exposed to the constant threat of possible constitutional changes, which might affect their judgments concerning the State. A counter argument would be that the need to make a new Constitution carries with it the responsibility to examine every institution within the nation, together with the power to change any institution if the aims and purposes of Constitution-making so require.

XII. The Electoral System

The electoral system under the Soulbury Constitution was adopted by the framers of the 1972 Constitution without change. Elections to the House of Representatives were by a direct vote cast under Universal Adult Franchise.

Any vacancies that might arise subsequent to a General Election were filled by by-elections. An argument that was often heard against the latter was that the composition of Parliament could change radically during its life span due to by-elections. This may even lead to a change of government, which should normally result from a General Election. The 1972 Constitution, notwithstanding these arguments, adopted the electoral system which the country had inherited from colonial times. The 1978 Constitution is significant in that it changed the electoral system radically, principally in two ways.

(i) The By-Elections

The 1978 Constitution declared that where a vacancy arises, either after or before the promulgation of the Constitution, and in the case of a vacancy which had arisen before the promulgation of the present Constitution and, under the 1972 Constitution, had continued under the present Constitution, such vacancies shall be filled not by holding a by-election but by nomination:

" ... [by] the Secretary of the Political Party to which such Member belonged Upon the receipt of such nomination the Commissioner of Elections shall declare such person to be the Member for the electoral district in respect of which the vacancy occurred." ¹⁴⁰

The only exception to this method of filling a vacant seat is when the vacancy occurs as a result of the member being unseated by an election petition. In that event, the 1978 Constitution directed the holding of a by-election. ¹⁴¹ The effect of these provisions is that the electorate is denied an opportunity to express its reactions to the political party in power until the whole of the life span of a Parliament is spent. The counter-argument is that this gives the government a degree of political stability, throughout the life of a

single parliament, enabling governments with slender majorities to govern effectively without the fear of defeat at mid-term.

One of the gaps left by these provisions is that, where a member whose election is being challenged before the courts decides to have himself unseated by absenting himself from the sittings of Parliament during a continuous period of three months,¹⁴² the resulting vacancy would then appear to be of a category which must be filled by a nomination from the Secretary of the Party to which the member belonged. There is nothing in the Constitution which prevents the same person being nominated to fill the vacancy he had himself created.¹⁴³ Needless to say, such a step would attract political condemnation but not legal redress.

(ii) The Distribution of Seats

The 1978 Constitution introduces a novel system for the distribution of seats among electoral districts. The Delimitation Commission, an institution coming down from the Colonial times, was required by Article 96 to divide Sri Lanka into at least 20 but no more than 24 electoral districts. The total number of members required to be elected from the total number of electoral districts which the Commission may create was declared to be 196.¹⁴⁴ The composition of the 196 members was made up of two groups. In the first group there were 36 members.^{144a} These members were found from each group of electoral districts from the 9 provinces on the Island. Each such group was required by the Constitution to elect four members.¹⁴⁵ The 9 provinces would thus elect 36 members. This would leave the rest of the 160 seats to be shared among all the electoral districts.

In a fairly complex manner the Constitution¹⁴⁶ laid down the method by which the rest of the 160 seats may be filled. The first step that the Constitution takes is to determine what is referred to as the 'qualifying number' of electors.¹⁴⁷ This number is found by dividing the total number of electors of all the Electoral Districts on the Island by the figure 160. The total number of electors of all the Electoral Districts shall be the total number of voters on the Island. The resulting number is designed to be the 'qualifying number.'¹⁴⁸ The method merely predicates the number of electors that must share the number of members available to the electoral districts of the country.

Having determined the 'qualifying number', the total number of voters in each electoral district is then divided by that number. The resulting figure taking its whole number by omitting the fractions or the decimal figures resulting out of that division, would establish the number of seats which each electoral district would have.¹⁴⁹ As the Constitution requires the adoption of the whole number and not the fractions or the decimal points resulting from the above division, the total number of seats given to each electoral district on the Island will not add up to 160. The Constitution, therefore, prescribes a complex arrangement to distribute the remaining seats equitably. In the latter exercise, the Constitution requires that demographic considerations and considerations of under representation should guide the distribution of the remaining seats, so that the total number of seats would then add up to 160.¹⁵⁰

(iii) Voting at Parliamentary Elections

The first step which the Constitution¹⁵¹ takes is to declare that any recognised political party or an identifiable group of independent candidates may submit

one nomination paper. In that single nomination paper, each party or group is required to set out a list of candidates:

" ... in order of priority, of such number of candidates as is equivalent to the number of members to be elected for that electoral district, increased by one-third." ¹⁵²

The increase by one-third is to the nearest whole number and these presumably may be called in aid of the extra seats that may be allotted so as to bring the total number of seats to 160. ¹⁵³ Reference was made to this aspect at the end of the last section. At the elections each elector was entitled to one vote for each electoral district, which he may cast in favour of a recognised political party or in favour of a group of independent candidates contesting the seats allotted to that electoral district. ¹⁵⁴ A vote cast during the elections held under the 1978 Constitution was declared as a vote cast in favour of a particular 'political group' rather than in favour of an individual candidate. ¹⁵⁵ Therefore, the candidate named first by the political party, or the group of Independents, which polls the highest number of votes in any particular electoral district, will be declared elected. Where any political party or any group of independents fail to obtain one-eighth of the total votes polled in any electoral district, that party or group would be declared by the Constitution to be disqualified. ¹⁵⁶ At that stage of the counting process, the votes polled by such a party are deducted from the total number of votes cast in that electoral district. The resulting figure is referred to as the "relevant number of votes." ¹⁵⁷

The "relevant number of votes" is used as a means of determining as to which political party or group in what proportion should represent the particular electoral district. Towards this end, the 'relevant number of votes' is divided by the number of members to be elected for that electoral district, reduced by one. ¹⁵⁸

The one in question is the candidate who heads the list of:

"The recognised political party or independent group which polls the highest number of votes in any electoral district."¹⁵⁹

He will be declared elected first before the process of dividing the 'relevant number of votes' is set in motion.¹⁶⁰ Having declared him elected, the 'relevant number of votes' is divided by the number of seats allocated to that electoral district, less one. The arithmetical result of such a division is referred to by the Constitution as the 'resulting number'.¹⁶¹

The 'resulting number' is thereafter used as a means by which the proportion of the seats to be allocated to each political party or group may be determined.¹⁶² This is done by dividing the total number of votes polled by each of the 'political groups', (not thus far eliminated by failing to obtain the minimum number of votes mentioned earlier),¹⁶³ by the 'resulting number'. The arithmetical result obtained by dividing the total number of votes cast in favour of each 'political group' by the aforementioned 'resulting number' determines the number of seats which each political group in any particular electoral district shall have.¹⁶⁴ The Constitution further provides for the possibility that by selecting whole numbers in every arithmetical process and omitting fractions and decimals, the number of seats allocated by the aforementioned process may add up to a total less than the number of seats given to any particular electoral district. In two sub-articles¹⁶⁵ the Constitution provided for a complex process of equitable distribution of the remaining number of seats among the 'political groups' remaining qualified.

It is difficult to evaluate the effectiveness of this novel method of electing members to Parliament without some considerable practical experience of the process in operation. It is a unique system, for in no other country has such an elaborate exercise been prescribed. It must, however, be said that the process involves both a method of proportional representation and a method of re-distribution of votes. The first and the only experience the country has thus far had of this new method of election was during the local government elections of 1979. If the municipalities, which are smaller in extent than the electoral districts, are to be considered as electoral districts, the following table emerges from four select municipalities on the Island.

TABLE: XX

Electoral Process in Sri Lanka Under The 1978 Constitution applied
to Municipal Elections of 17th May, 1979.

<u>Municipality</u>	<u>Party</u>	<u>No. of Votes</u>		<u>% of Polled</u>	<u>No. of Seats</u>		<u>% Seats</u>	<u>Where 12½% rule is omitted</u>
		<u>Polled</u>	<u>Polled</u>		<u>Seats</u>	<u>Seats</u>		
Colombo (Total Registered 294,812 Total Polled 192,788 % Polled 65.4%)	UNP	119,782	62	35	74	29	UNP	
	SLFP	42,734	22	12	26	10	SLFP	
	JVP	14,503	8	-	-	4	JVP	
	ULF	13,861	7	-	-	3	ULF	
	MEP	1,908	1	-	-	(1)	MEP	(0.47)
		<u>192,788</u>	<u>100</u>	<u>47</u>	<u>100</u>	<u>47</u>		
Kandy (Total Registered 48,213 Total Polled 35,535 % Polled 74%)	UNP	18,667	53	14	61	12	UNP	
	SLFP	13,398	38	9	39	9	SLFP	
	IND	2,319	6	-	-	1	IND	
	ULF	1,151	3	-	-	(1)	ULF	(0.69)
			<u>35,535</u>	<u>100</u>	<u>23</u>	<u>100</u>	<u>23</u>	
Jaffna (Total Registered 60,012 Total Polled 44,717 % Polled 75%)	TULF	29,322	66	18	78	15	TULF	
	TC	9,385	21	5	22	5	TC	
	UNP	5,066	11	-	-	3	UNP	
	CP	944	2	-	-	(1)	CP	(0.46)
			<u>44,717</u>	<u>100</u>	<u>23</u>	<u>100</u>	<u>24</u>	
Galle (Total Registered 42,620 Total Polled 31,472 % Polled 74%)	UNP	14,513	46	10	67	7	UNP	
	IND	9,908	32	5	33	5	IND	
	SLFP	3,841	12	-	-	2	SLFP	
	ULF	3,210	10	-	-	1	ULF	
			<u>31,472</u>	<u>100</u>	<u>15</u>	<u>100</u>	<u>15</u>	

A comment may be made regarding the results obtained. First, there is no correspondence of the percentage of votes obtained and the percentage of seats won in so far as it applies to the party which polls the highest percentage of votes. In each of the four municipalities:

(i) Colombo

U.N.P. polled 62 percent and won 74 percent of the seats.

(ii) Kandy

U.N.P. polled 53 percent and won 61 percent of the seats.

(iii) Jaffna

T.U.L.F. polled 66 percent and won 78 percent of the seats.

(iv) Galle

U.N.P. polled 46 percent and won 67 percent of the seats.

The party which polls the highest number of votes appears to receive a number of seats well in excess of the percentage of votes polled. The party (or parties) which obtain the second (or the third) highest number of votes appear to receive a number of seats which corresponds with the percentage of votes received by them. This naturally helps a party which may poll less than half or less than two-thirds majority (as the case may be) in the legislature provided that it has received the highest percentage of votes among all other political parties. The average difference of the percentage of seats received and the percentage of votes obtained at the elections in question for the four selected municipalities is fourteen.¹⁶⁷ The results indicate¹⁶⁸ a 12% difference for Colombo, Kandy and Galle and a 20.1% difference for Jaffna, averaging to a 14% difference across the board. The conclusion is that the party which comes out on top would reap a bonus of 12 to 14 percent of the votes they had actually received. This could to a large extent be

related to the elimination of those parties which had failed to obtain $12\frac{1}{2}$ percent of the total votes polled, without making a corresponding reduction of the number of seats allocated to the particular electoral district. The elimination of the parties which have failed to obtain $12\frac{1}{2}$ percent of the total vote appears to serve an important purpose. In circumstances in which the party obtaining the highest number of votes may find itself in a minority, the $12\frac{1}{2}\%$ rule helps that party to find a majority in the legislature. This fact becomes evident from the figures set out in the last column of the table.¹⁶⁹

The electoral process adopted under both the Soulbury Constitution and the 1972 Constitution, produced an imbalanced result.¹⁷⁰ This process was based on what has become to be known as: The First past the post system.¹⁷¹ Commenting on this system MacKenzie wrote:

"So far as concerns elections, the simplest and perhaps most naive answer is to say that the candidate who gets the most votes is to win. This at least was the traditional English practice from the thirteenth century onwards ...¹⁷² First, the 'first past the post' system may have very bad results. .:

A	(Conservative)	12,000
B	(Labour)	11,000
C	(Liberal)	9,000
D	(Communist)	2,500
E	(Welsh Nationalist)	2,000
F	(Independent)	500
		<u>37,000</u>

A was elected Member of Parliament

Such a result would at once raise questions about the 'reality' or representation; does the winner 'really' represent the seat? Or has he merely been lucky?¹⁷³))

(iv) The Presidential Elections

The 1978 Constitution provided for the election of the President by an Island-wide electorate.¹⁷⁴ In these elections the electoral districts have no relevance to the electoral process leading up to the election of a President. The Constitution, however, makes differences in the voting procedure depending on the number of candidates that have been nominated for the Presidential election. The Constitution declares that:

Where there are two candidates, voters will choose one; where there are three candidates voters will indicate their second preference;¹⁷⁵ where there are more than three candidates, the voters will indicate their first three preferences.¹⁷⁶

The candidate who obtains more than half of the votes cast will be elected as President.¹⁷⁷ Where no such candidate emerges, all candidates, except the two receiving the highest and the second highest number of votes, will be eliminated. Thereafter:

"the second preference of each voter whose vote had been for a candidate eliminated from the contest, shall if it is for one or the other of the remaining two candidates, be counted as a vote for such candidate and be added to the votes counted in his favour" ^{177a}

But where there has been more than three candidates then the third preference of each voter who had voted for one of the candidates eliminated would come into focus. Provided that his second preference had not been taken into account his third preference will be added to the totals thus far secured by the two remaining candidates; provided that his third preference had been for one or the other of them.¹⁷⁸ The totals thus obtained will determine the winning candidates for the presidency.

Thus the ultimate result may depend on second and third preferences rather than on first preferences. This may weaken the political standing of the ensuing presidency. Although the system devised for parliamentary elections should attract a great deal of political support, by returning Parliaments which are fairly representative of the voting patterns, the presidency may become the centre of some discontent. In a system of Presidential Government it may be thought that the Presidency should be a matter totally free from any controversy. The French system of Presidential election involving a second, 'run-off' election is expensive, but psychologically satisfying both to the electorate and to the President elected by it. However, it must be emphasised that the method requiring the counting of the second and the third preferences, theoretically, represents 'a run-off' operation. For there is the assumption that at the 'run-off' election the persons who preferred a particular candidate as his second or third choice would vote for that candidate, if his first or second choices were not available. Aside from the psychological aspect the method laid down in the 1978 Constitution saves the country from the expense of conducting a second presidential election.

CHAPTER 9

Judicialism: The Survival of a Colonial Legal System

I. The Administration of Ceylon by The British East India Company: The Early Period - 1796-1802

In order fully to understand the assumptions upon which the constitutional development of Ceylon was based by the British Administration, it must first be realised that the conquest of Ceylon in 1796 was an economic venture of the British East India Company and was not initially considered as a military adventure of the British Government.¹ At the time in question,² the British East India Company remained uncertain as to whether the Maritime Provinces would after all, be returned to the Dutch as part of an overall settlement worked out in Europe, for the achievement of peace among the European powers.³ With that as a very real possibility, the Company, as from the first day of its operation in Ceylon, proceeded to set up an elaborate administrative structure for revenue-gathering, with little else in contemplation.⁴ At least between 1796 and 1798, when the first British Governor⁵ made his appearance in Ceylon, the interim administration headed by Colonel Stuart⁶ concerned itself very little in governing the country by providing the basic needs such as education, health and public welfare services or the Administration of Justice, but concerned itself as instructed by the Directors of the Company, with the gathering of revenue to recoup the expenses incurred in the military activities against the Dutch.⁷ It is interesting to note that the British East India Company had instructed its representatives in

Colombo to deal with its criminal matters not in the courts of law but at the various revenue offices so that they could be treated as matters concerning fines, and therefore revenue to the Company, rather than as occasions for imprisonment.⁸ But for heinous offences involving felonies, murders and others carrying capital punishment, the instructions were that Colonel Stuart (the military governor) should be contacted so that Courts-Martial could be set up to try such offenders.⁹ If one were to search for a system of civil administration for Ceylon at this period of time, one would find that it consisted mainly of an elaborate revenue-collecting system and the rest, if it existed at all, would be found in a rudimentary form. The system of civil administration began from the Superintendent of Revenue and wound its way through the Assistant Superintendents of Revenue - called Collectors - whose functions were to supervise the collection of revenue. Emphasising the British East India Company's policy towards Ceylon as one of undisguised mercantalism one commentator¹⁰ wrote:

"These Collectors also exercised judicial powers both in Civil and Criminal matters but the judicial power was mainly confined to cases relating to revenue.¹¹ ... Below the Collectors were minor officials called Aumildars. They were under the direction of the Collector and helped in the collection of revenue. They were the officials who replaced the Mudaliyars (the native chiefs) who were responsible for the Native system of revenue collection. There were other minor officials too who were in some way or other involved in the collection of revenue. They had strange names - Peschcars who had to execute orders respecting revenue; Sumpreadies who were responsible for keeping accounts; Cuttwals who were charged with the duty of keeping the peace; and Maniagars who had to carry out the orders of the government."¹²

As a result of the Company's interest in the revenues of Ceylon, the Administration of the Maritime Provinces was initially placed under the Government of the Presidency of Madras.¹³ The same commentator wrote:

"Faced with the hostility of the Dutch and the truculence of the natives, [the Company] introduced the Madras revenue system, and substituted Aumildars from Madras for the Native Mudliyors. [The Company] summarily abolished the ancient form of land holding."¹⁴

The latter was found to be not very conducive to tax-gathering, for it was difficult to identify the persons upon whom the duty to pay land-tax should lie. The total confusion in which the administration was at the beginning had often been blamed for a number of difficulties which resulted in the revolt of 1797.¹⁵ Lack of foresight and the absence of personnel may be the reasons why the Company was compelled at this stage of colonial development to leave the organisation of the public administration in the hands of those who were trained to fight as soldiers, rather than those with the expertise in economic planning and in administration. The resulting chaos made it necessary for the Madras Government to appoint a Committee of Investigation. The Committee recommended that for the time being the Dutch system of government should be continued as far as possible.¹⁶

Colonel Stuart, who had acted as the Military-Governor on behalf of the Company, had done his best to maintain a system of law and judicial administration. However the political limitations within which he was compelled to function left him with very little scope to work out an efficient system of colonial administration for the new settlement. In terms of early judicial

development, the period between the capitulation of Colombo in 1796 and the Charter of Justice (1833) could be regarded as providing the foundation for the colonial judicial system for Ceylon, which in varying degrees had influenced the legal developments of that country until the present day. The methodology to be adopted here is to examine the political basis for, and the inter-action of, policy decisions which by a dialectical process moved the Colonial Administration, in stages, towards the Charter of 1833. This exposition will be in seven stages.

The Treaty of Capitulation,¹⁷ signed between the Dutch Administration¹⁸ and the officers of the British East India Company¹⁹ on the 15th of February, 1796 was subsequently proclaimed²⁰ on the 9th March, 1796, giving it the force of law. The Treaty, in the form of 'requests' and 'acquiescences' gave the distinct impression of being a document drawn up in an ad-hoc manner, without any legal assistance. Article 23 of the Treaty read:

"All civil suits [de]pending in the Council of Justice shall be decided by the same Council according to their laws.

Answer: Granted, but they must be decided in twelve months from this date."²¹

The fact that the Treaty made no provisions for the hearing of civil disputes arising after the 15th February, 1796, was a major concern to Stuart. Serious criminal offences were heard by military tribunals under martial law and other offences meriting fines, as mentioned earlier, were heard by Revenue Officers. The total absence of a forum for settling civil disputes compelled Stuart to make representations to his superiors in Madras. The Madras Residency authorised Stuart to re-establish the administration of both civil and criminal justice.²²

Recognising the absence of lawyers trained in English law, the company instructed Stuart to utilise the Dutch legal infra-structure for the purpose of administering justice. This necessarily involved the re-employment of Dutch lawyers and the application of the Dutch Law in settling disputes. Accordingly, Stuart promulgated an 'Act of Authorisation' on the 1st June, 1796.²³ Under that Act, the Dutch Courts of Justice at Colombo, Galle and Jaffna were re-established and given jurisdiction to try causes of both civil and criminal nature in accordance with the Dutch Law that existed at the date of Capitulation.²⁴ Certain aspects of the Dutch Criminal Law, involving capital punishment, the mutilation of limb or organ and other types of torture were made subject to review by Stuart himself.²⁵ There was an initial problem which Stuart was unable to overcome. The Dutch lawyers were unwilling to go beyond the twelve month period mentioned in the Treaty of Capitulation. Their stubborn refusal to co-operate with the British Administration, by sticking closely to Article 23 of the Treaty of Capitulation left Stuart's endeavour in jeopardy. After more than a year, the British Administration succeeded in persuading the court at Galle to resume their work, but the obstinacy of the Courts in Colombo and Jaffna persisted.²⁶ However, Stuart managed to collect three Dutch lawyers who were willing to preside over a court in Colombo, which he established as the Court of Equity. This court was empowered to try petty causes in a summary manner according to the Dutch law.²⁷ The Court at Galle sat from September, 1797 and the Court of Equity sat from October, 1797. Both these courts continued to function for the next twelve months. North having received his commission as the Governor of the Colony on the 19th April, 1798, requested the three judges on the

Court of Equity to take an oath of allegiance to the British Sovereign.²⁸ Their refusal to take that oath resulted in the dissolution of the Court of Equity which was later followed by the suppression of all other courts of both civil and criminal jurisdiction on the Island.

Faced with this dilemma, North began to examine the problem. He noticed that the Dutch procedure was totally unsuitable to the conditions prevailing in the new Settlement. For the Dutch procedure required a seven-judge bench for criminal matters and a five-judge bench for civil matters. It had no jury system. The difficulty in finding judges trained in the Dutch Law, willing to take the oath of allegiance, at the time, seemed a real one. For the future of the Maritime Province was still in doubt²⁹ and no Dutch national was willing to risk his life by taking such an oath, in case the Settlement reverted to the Dutch as a part of an overall settlement made in Europe. Recognising these immediate difficulties, North decided to make a complete break from the Dutch legal institutions of the past. He, therefore, established a new model for legal development, relying solely on the limited British talent then available on the Island. It is within these considerations that North's administration conceived the provisions of the Proclamation of October, 14th, 1797.³⁰ This Proclamation may be regarded as the earliest attempt by the British Administration to introduce a hierarchical court structure to the 'Settlement of Ceylon'. The Proclamation established the following Courts:

First: it introduced two Courts of Appeal and called them The Greater and the Lesser Courts of Appeal.³¹ The Greater Court of Appeal was consisted of the Governor, the Chief Secretary and the Commander-in-Chief of His Majesty's Troops.³² The Lesser Court of Appeal was to consist of those members who belonged to the Supreme Court of Criminal Jurisdiction.³³

The Jurisdiction of the Greater Court of Appeal was limited to civil disputes, exceeding £200.³⁴ It also had jurisdiction to direct courts below to hold further enquiries and to gather additional materials for the consideration of the Greater Court of Appeal.³⁵ The jurisdiction of the Lesser Court of Appeal in civil disputes was limited to disputes less than £200.³⁶ Its criminal jurisdiction was limited to fines of £100. All other sentences were appealable directly to the Privy Council.³⁷

Second: The Proclamation created The Supreme Court of Criminal Jurisdiction.³⁸ This Court consisted of the Governor, the Commander-in-Chief, the Chief Secretary, the Commandant of the Garrison at Trincomalee and a gentleman of the Irish Bar - James Dunking Esq.³⁹ This Court replaced the Dutch Hoff von Justitie at Colombo, Galle and Jaffna.⁴⁰ Its jurisdiction covered all serious criminal matters, leaving lesser offences to be tried by the Fiscal.⁴¹ The Supreme Court of Criminal jurisdiction went on circuit with the Governor.

The Town Courts, which had functioned to hear petty civil matters and matrimonial matters during the governance of Stuart, continued even after the Proclamation of 1799. Appeals from these Courts were heard by the Greater or Lesser Courts of Appeal, depending on the value of the dispute.⁴² The promulgation of this Proclamation effectively annulled the Dutch Courts. By a second Proclamation⁴³ promulgated on the same day the British government recognised the right of appellants, whose appeals were pending before the Dutch Courts, to have such appeals transferred to the newly constituted Courts of Appeal:

"Provided always that such Petitions, in the nature of Petitions of Appeals, be preferred to us within three months after this our Proclamation shall have been promulgated" ⁴⁴

These appeals too were limited by reference to a particular value.⁴⁵ The pith of this Proclamation was to introduce a legal system for the administration of justice in a way that it would not in future be affected by the obstinacy and the recalcitrance of the Dutch lawyers left on the Island. Out of a conflict between the legal profession of the time and the Executive, there has emerged a new model for legal development which provided a starting point for a British-oriented system for the administration of justice in Ceylon. That was in 1799.

II. The Beginnings of British Colonial Rule: 1799-1810

The structure for the administration of justice established by the Proclamation of 1799 was affirmed and substantially strengthened by a Royal Charter of Justice, in 1801.⁴⁶ By Article VI of that Charter, the name of the Court of Record was fixed as 'The Supreme Court of Judicature', and it was to be presided over by two judges: - one being "the Chief Justice of the Supreme Court of Judicature and the other to be called the Puisne Justice of the Supreme Court of Judicature in the Island of Ceylon; which the said Chief Justice and Puisne Justice shall be Barristers, in England or Ireland, of not less than five years standing, to be appointed, by us ..."⁴⁷ It appears to be clear that the British Government had decided to move the system of judicial administration away from the Dutch system. By resorting to the appointment of British Barristers, the intention became clear that the English Law to a measureable extent was intended to be introduced into the substance of the Ceylonese legal system. The administration effected this introduction through Ordinances.⁴⁸ By ignoring the existence of legal expertise of the Dutch lawyers, the British government in a sense had taken certain retaliatory steps to punish the obstinacy of the Dutch nationals left on the Island.

They were now required to fall into line with the new arrangements to ensure their place within the new judicial system. The system no longer needed their participation for its effective application. There is a second implication too, to be gathered from the foregoing Articles. The decision to have the members of the Supreme Court of Judicature appointed by the British Crown, and not by the British East India Company, foreshadowed the colonial plan to wrest the Maritime Provinces from the Company and have them annexed to the Crown as a Crown Colony.

On January 1st, 1802 the Maritime Provinces became a Crown Colony under the Colonial Office, thereby resting the ultimate legislative and executive authority in the British Crown. No more was there a doubt regarding the future of the Maritime Provinces. It was not to be returned to the Dutch as a part of a European settlement.⁴⁹ The Dutch inhabitants felt a little melancholy for they felt abandoned: in effect they were left to deal as best as they could with the British. As statistics show,⁵⁰ their role in the strategy for colonial development was clearly a significant one, due largely to their unmistakable advantage. For they were able to claim a cultural identity with the British to their distinct benefit.

The Charter of Justice of 1801 was wide-ranging in its effects. It concerned itself with the Admission of Advocates and Proctors,⁵¹ the localisation of the jurisdiction in civil matters,⁵² the native laws relating to inheritance and succession,⁵³ the equity jurisdiction of the courts,⁵⁴ the jurisdiction concerning testamentary and matrimonial causes,⁵⁵ the superintendence of the Supreme Court in Criminal matters⁵⁶ and the appellate jurisdictions.⁵⁷ The Charter in fact created a whole system of judicial administration for the Island. The Proclamation of 25th June, 1802⁵⁸ introduced some minor changes to the

Charter of Justice. It introduced a new Court - the Vice-Admiral's Court with both ecclesiastical and Admiralty jurisdiction. The Proclamation abolished the Greater and Lesser Courts of Appeal first proclaimed in 1799. In its place a single Court of Appeal was established, consisting of the Governor, the Chief Secretary, the Chief Justice and a Puisne Justice or any two of them. The position of the British Governor in a colony was a confusing one. He was free from any direct control by the Houses of Parliament at Westminster. He was merely subject to the authority of the Secretary of State for the Colonies, who in turn remained answerable to the legislature at Westminster. Within the colony he had an Advisory Council comprising of his own nominees. Their membership on the Council was determined by the Governor. This type of agreement presented the most conducive environment for the British Governor to grow into an autocrat within the colony, while being considered as a technocrat by his superiors at the Colonial Office. These predispositions of autocracy placed the British Governor upon a collision course with the Judiciary, particularly, during the early days of Colonial rule in Ceylon. Two instances of such a conflict merit particular mention. For they in some way appear to have influenced the introduction of the next Charter of Justice: that of 1810.

First,⁵⁹ during the 1803-1804 Kandyan invasion under the governorship of North, his Commander-in-Chief, General Wemyss had the occasion to address a letter to North about the Judiciary. He, particularly, had unkind words to say about Lushington, the then Chief Justice. The letter was in fact the climax to a developing disagreement between the Army and the Judiciary. Due to the exigencies prevailing with the Kandyan invasion, Governor North was compelled to side with the army in this dispute. Although the

beginnings are somewhat convoluted rather than being complex, it appeared that one Flower, the then Magistrate in Pettah, had two soldiers who were found drunk within his jurisdiction, subjected to corporal punishment. It was alleged by the army Commandant of Colombo that they were not in fact in breach of the peace, but merely drunk and merry. That was in early September 1804. But by October 3rd, a little more than a month later, matters had reached such a pitch that Lushington, C.J., had General Wemyss, the Commander-in-Chief upon a contempt charge for writing to the Governor in contempt of the judiciary. Wemyss having pleaded guilty was released after entering into a recognizance of 100,000 Rix-Dollars (£50,000) to keep the peace for a year. It is important to mention that Wemyss had asked the court by letter for a delay of the hearing until October 14th on the grounds that he was in fact in the battle zone conducting operations against the Kandyans. Lushington, C.J., refused that request in an attempt more to impress the superiority of the judiciary over all other establishments than on grounds of urgency or convenience.

The Kandyan invasion ended in an unmitigated disaster for the British. North was replaced by Sir Thoman Maitland as Governor in 1805, but Lushington continued as the Chief Justice. Royal instructions were that all public instruments should be signed by the Chief Secretary by order of the Governor-in-Council. But customarily the Deputy Chief-Secretary signed them in the Chief Secretary's absence. Maitland, exercising his prerogative powers of mercy, pardoned a convict. With the consent of the Governor-in-Council and in the absence of the Chief Secretary, his Deputy signed the commutation order. Lushington's refusal to recognise the pardon constituted the second⁶⁰ conflict between the judiciary and the executive. Although Maitland took the immediate step of legislating in favour of authorising the Deputy-Chief Secretary to sign, the fact that

the legislation was against the Royal instructions remained an obstacle in the Governor's path. The decision to exclude the Chief Justice from the Governor's Council in 1808 merely exacerbated these difficulties. In 1809, Maitland threatened to suspend Lushington as the Chief Justice if he still maintained his refusal to recognise the Governor's pardon. At that point, Lushington resigned. By 1809, Maitland had compiled a dossier of considerable proportions in support of judicial reform. When Maitland was appointed Governor, in 1805, he was specifically directed to put the country's finances and the administration into order. His predecessor's extravagance and inefficient administration was crowned with his disastrous invasion of the Kandyan Kingdom⁶¹ in 1803. Maitland had in less than five years corrected the economy and introduced a viable system of civil administration.⁶² His standing with the Colonial Office in London was, therefore, high. Taking these matters into consideration, Maitland dispatched Alexander Johnstone to the United Kingdom with a request for a new Charter.⁶³ He emphasised his problems with the judiciary, and Johnstone who was one of the Puisne judges at the time of Lushington's tenure of office, was able to stress the difficulties that the colony could meet under the present arrangements if there was the necessity to deal with an uncompromising judiciary. The result was the Charter of 9th August, 1810.⁶⁴

III. The Charter of 1810

The Charter of 1810 may be examined as an attempt to avoid a repetition of the past collisions between the judiciary and the executive. Considered within its historical framework four points emerge.

First: The Charter made a clear distinction between the executive powers and the judicial powers in the colony. In this sense, the judiciary was given civil and criminal jurisdiction over the Maritime Provinces and over every inhabitant - native and European.⁶⁵ The Supreme Court was directed to sit in two circuits which effectively covered the whole of the Maritime Province.⁶⁶ In criminal matters it was ordained that there would be a jury of 13 men drawn from the community to which the dispute belonged.⁶⁷ The Chief Justice was placed solely in charge of the Judicial Department.⁶⁸ The extension of the civil jurisdiction made the provincial courts redundant. These were accordingly abolished.⁶⁹ The Burgher community, which had faithfully served and supported the administrative infra-structure, was rewarded by creating a special court, presided over by one of their peers, for matters concerning their domestic and interpersonal disputes.⁷⁰

Second: The Charter characterised the areas to be shared between the two arms of the administration. It provided that the Chief Justice may suggest to the Governor, areas in which the Charter is lacking and is in need of completion. Upon a request made by the Chief Justice, the Governor was empowered to legislate in such areas.⁷¹ The appointments of Registrars, clerks and other Ministerial Officers too were to be made by the Governor in accordance with the advice of the Chief Justice.⁷²

Third: The Governor's contribution to the administration of justice was limited to the 'sitting magistracies'.⁷³ By reducing the powers of the Headmen, the new arrangements extended the powers of the 'sitting magistrates'.⁷⁴ By Instructions⁷⁵ accompanying the Charter, the British Government left the system of sitting magistrates solely in the hands of the Governor.⁷⁶ Although there has been a fairly comprehensive statement disassociating the executive from the judiciary, the Charter permitted the intrusion of the executive into the area generally considered as the preserve of the judiciary through the 'sitting magistracies'. The Instructions justified this intrusion on the grounds that the sitting magistrates functioned best by being 'closer to the ground' utilising their 'local knowledge'⁷⁷ and, therefore, was best suited to be handled through the agencies of the executive government rather than through the judiciary.

Fourth: The Instructions accompanying the Charter re-organised the Governor's Council in such a way that it followed the Sovereign's Council in the United Kingdom. In adopting this British Model, the Colonial Office appeared to have failed to comprehend a cardinal difference between the two political entities. The British Sovereign, being a constitutional monarch, was here being paralleled to a British Governor who had the powers of a potential autocrat. The failure to appreciate this vital difference, as later events will show, frustrated the model chartered in the Instructions. The model was as follows:

The Governor was considered as the representative of the Crown.⁷⁸ The Chief Justice, like the Lord Chancellor in the United Kingdom, was considered as the President of the Council.⁷⁹ The Chief Secretary, the Commissioner for Revenue, the Vice-Treasurer and a person to be nominated by the Governor, subject to the Sovereign's consent, were to constitute the membership of the Council.⁸⁰ Except for the last mentioned the rest occupied their seats ex-officio.⁸¹ The keeper of the Great Seal, namely the Chief Justice was the President of the Council.⁸² All grants of land⁸³ and all legislative Acts were to be validated by affixing the Great Seal.⁸⁴

The Charter and the Instructions accompanying it succeeded in delineating with clarity the roles required to be played by the Executive and by the Judiciary. This is not to say that the participants in this model, particularly the Governor, were content with the ensuing part they were each expected to play. For the complete exclusion of the Governor from his Council was to cramp his style as a potential autocrat. By the time the Charter of Justice issued in London on the 6th August 1810, and the accompanying Instructions issued in London on the 30th September, 1810 reached Ceylon, Maitland had left the Island, relinquishing his duties as Governor.⁸⁵ Although the new arrangements did not directly affect Maitland, he was concerned with the possible consequences of separating

the Governor from the Council. Besides, the Chief Justice, in his capacity as the President of the Council, would, while initiating legislation be conscious of his role as a judge who may in due course be called upon to enforce them. His role of an initiator of legislation may sometimes become confused with his role of an interpreter of legislation in his judicial capacity. After arriving in the United Kingdom, Maitland wrote to Robert Peel, the Prime Minister saying that:

"The Governor ought to be President of the Council and hold the Great Seal. He ought also to legislate in Council: the phrase 'Governor and Council' was misleading and ought to be avoided - nor was the signature of the Chief Justice necessary for grants of land."⁸⁶

Maitland in his letter warned the government that the Constitution of the Council "could perpetuate quarrels in the Council", which he himself had attempted to avoid.⁸⁷ Maitland's views attracted the greatest respect. Lord Liverpool, the then Secretary of State for the Colonies, wrote⁸⁸ to Sir Robert Brownrigg, who had by then succeeded Maitland, revoking the composition of the Council. This was followed by a new Charter of Justice, of 1811.⁸⁹

IV. The Charter of Justice of 1811

The Charter of 1811 was basically designed to achieve two goals: First, to limit the powers of the judiciary and second, to extend the powers of the Governor. The Charter achieved these two objectives with ease. But it also succeeded in planting the seeds of discord between the judiciary and the executive which in a sense was to lead the Colony towards effecting further changes to its legal system.

Turning to the provisions of the Charter of 1811, it was clear that by limiting⁹⁰ the jurisdiction of the Supreme Court to its pre-1810 position, its powers to hear civil causes was thereby revoked. It was, therefore, left only with its former criminal jurisdiction to be exercised before a jury. Less serious criminal offences, however, were left in the hands of 'sitting magistrates', who fell under the direct control of the Governor.⁹¹ That position was left unchanged. As a result of the denial of civil jurisdiction to the Supreme Court, the Secretary of State for the Colonies was compelled to re-activate the Provincial Courts. This the 1811 Charter did and in so doing subjected the Provincial Courts to the powers of the Governor.⁹² The total package regarding the re-allocation of judicial duties and powers was such that the area of the Governor's authority was increased while decreasing the area left to the Supreme Court by the Charter of 1810. By Instructions⁹³ accompanying the Charter, Liverpool instructed⁹⁴ Governor Brownrigg to reconstitute 'the Council'. The Great Seal was returned to the Governor who was made the President of Council. The Governor was empowered to initiate legislation unfettered by any restraints placed by the Charter of 1810. By revoking⁹⁵ paragraph 17⁹⁶ of the Instructions accompanying the Charter of 1810, the Chief Justice was effectively removed from the Council. This necessarily meant that the Supreme Court was confirmed in its position as the interpreter of legislation rather than its initiator. The Instructions categorically stated that the powers created in 1810 regarding the:

" ... formation and functions of the Council; the custody, and application of the Great Seal; the framing of legislative Acts; and the passing of grants of land; are also to be considered void and of no effect; ... " ⁹⁷

The Governor was returned to his former position of absolute power on the Island. The events had come a full circle. The failure to take notice of the position of the British Governor as an autocrat had proved unwise.

V. Towards Colebrooke-Cameron Reforms: 1811-1833

The next two decades were packed with tension, erupting occasionally in dramatic exchanges between the judiciary and the executive.⁹⁸ Commenting on this period De Silva wrote:

"If the Charter of 1810 was unfortunate in its political effects, the restoration of the pre-1810 position left the judiciary open to the earlier criticisms, so much so that in 1822, and again in 1827, judicial reforms were considered. In the latter year the judges even submitted draft charters embodying the alterations they regarded as⁹⁹ necessary. But as a Commission of Enquiry was about to visit Ceylon, the question was deferred till after their report."¹⁰⁰

The Commission of Enquiry to which De Silva refers was the Colebrooke-Cameron Commission.¹⁰¹ Its Report,¹⁰² in 1832, resulted in the Charter of 1833, which finally gave Ceylon a system for the administration of Justice which was to survive, in its original form, until 1974.¹⁰³ The Commission and the Charter were made necessary by the frequent difficulties experienced by the Judiciary and the Governor, representing the two arms of the British Administration in Ceylon. It is in the light of these continuing conflicts that the final set of law reforms introduced in 1833 become meaningful.

In 1815, Governor Brownrigg, gained control over the Kandyan Kingdom on behalf of King George III. By virtue of Article 8 of the Kandyan Convention,¹⁰⁴ under which the British Administration of the Maritime Provinces assumed

control of the Kandyan Provinces, it bound itself to administer Kandy in accordance with the laws of the Kandyan Kingdom. By Article 6, the British government declared that: "Every species of bodily torture, and all mutilation of limb, member or organ, are prohibited and abolished." By Article 7, "no sentence of death can be carried into execution against any inhabitant except" with the written permission of the Governor or Lieut-Governor. By Article 9, special procedures for the trial of persons - military and civil - who were not the inhabitants of the Kandyan Provinces, were enacted. These special procedures naturally applied to the British and the inhabitants of the Maritime Provinces who might be found within the Kandyan Provinces. By Articles 6 and 7 the British Administration excluded the more horrendous aspects of the Kandyan Criminal Law. Having made these arrangements, the Administration accepted the obligation to enforce the Law of Kandy under Article 8. That Article read:

"Subject to these conditions,¹⁰⁵ the administration of Civil and Criminal Justice, and Police over the Kandyan inhabitants of the said Provinces is to be exercised according to established Forms and by the Ordinary authorities, saving always the inherent Right of Government to redress grievances and reform abuses in all instances whatever, whether particular or general, where such imposition shall become necessary."¹⁰⁶

Relying on the foregoing provisions, Brownrigg excluded the jurisdiction of the Supreme Court from the Kandyan Provinces. The judiciary claimed that despite what the body of Article 8 may say, the British government could under the proviso extend the jury system and trials before the Supreme Court to those provinces as an exercise of the "inherent right of government to redress grievances and reform abuses ... " in the Kandyan law. Just as persons in the Maritime Provinces had a right to a jury

trial before the Supreme Court, so too must those who live in the Kandyan provinces. The challenge of the judiciary became so severe that the Governor referred the matter to the Colonial Office in London. The latter advised the Governor that the view held by the Crown lawyers was that the Kandyan provinces were not yet annexed to the British Crown and until it was so annexed by an Act of the British Parliament, the laws applicable to the Maritime Provinces do not supercede the obligations assumed under the Treaty.¹⁰⁷ This response was patently defective, as the judges were not attempting to put the Treaty to a test but the proviso under Article 8 into effect. The judges remained dissatisfied with the way Brownrigg was administering the Kandyan Provinces. The critical moment arrived in 1818 - during the first Kandyan Rebellion against the British Crown. In aid of the war effort, Brownrigg pressed local inhabitants into forced labour. The Judges declared this illegal. Considering the urgency and the prevailing state of emergency in the Kandyan Provinces, Brownrigg passed a regulation declaring:

"the legality of pressing for the service of government persons bound to such service by caste, Tenure of Land or Custom, and of the mode enforcing the same as heretofore practised."¹⁰⁸

The recognition of a duty to render services based on caste and other forms of social disabilities naturally enraged the judiciary. The battle lines now began to be clearly drawn between the two branches of the British Administration. Brownrigg was succeeded by Sir Edward Barnes and during the latter's tenure of office an extraordinary case¹⁰⁹ came before the Collector of Jaffna in 1820. A person of the Covia Caste, to which all liberated slaves belonged, was accused of having been carried in a palanquin. By the customary law prevailing

among the Tamils in Jaffna a ride in a palanquin was reserved for those of a higher caste. The Collector of Jaffna, Mr. Hooper, sentenced the miscreant to be flogged. The Collector found that the Dutch law prohibited such an act by a person of a low caste and the British law required a licence to do what he did. As he had no such licence, he was clearly in breach of every law applicable to his case. The convict appealed to the Supreme Court which was in fact on circuit at the time in question, in Jaffna. That Court quashed the conviction. Mr. Hooper, who was, as the Collector of Jaffna, responsible exclusively to the Governor, submitted his report to Barnes. In his report Hooper wrote that:

" ... this infraction of the customs and usages of the district was calculated to create a serious ferment,"¹¹⁰

and proceeded to cite instances where his predecessors had recognised these caste commitments by punishing persons who breached them. Fears were expressed by other Government officers, such as the Revenue Commissioner, about the possible social consequences of the Supreme Court's decision. Barnes, enacting a Regulation confirming the Dutch law, reversed the decision of the Supreme Court. The Dutch law decreed flogging for such social infractions. The mood of the Supreme Court in 1820 defied description. A classic dichotomy appeared to have arisen¹¹¹ between the Supreme Court and the rest of the Courts. The latter were those which fell directly within the control of the Governor the Charters of 1810 and of 1811. In an apparent act of defiance the Supreme Court refused to recognise 'the minutes and the advertisements' of the Council. They gave recognition only to the Regulations and to the Ordinances. The 'minutes' were the records of dialogues and debates that were kept by the Council. They represented the government's policy and these to a large extent were

indicative as to the way the British Administration wished the judges and the civil service to act. 'Advertisements' on the other hand were directives of an administrative nature which the Council periodically issued. These were as a rule published in the government Gazette. In the classical sense none of these could be regarded as law. The Sitting Magistrates, the Provincial Courts and all other Courts which fell under the Governor's exclusive control recognised and thereby gave the force of law to all four documents - namely, Minutes, Advertisements, Ordinances and Regulations. The laws applicable in the two sets of Courts were, therefore, different. Problems arose when appeals were heard. A very different system to the aforementioned prevailed in the Kandyan Provinces. The whole system of judicial administration was now approaching a state of chaos. The Supreme Court was doing its utmost to create a state of judicial anarchy hoping that the whole system would be overhauled after a careful review of both the substantive and the procedural laws on the Island.

In 1824 the Supreme Court had the case¹¹² of J. D. Rossier before them. A Sitting Magistrate had Rossier arrested upon suspicion that he was a deserter from the British East India Company. He was in custody pending removal to India. The Supreme Court, hearing this event, issued a mandate ordering Rossier to be produced before them. The fact that the Supreme Court was planning to have his corpus released became obvious to the Administration. Barnes issued a Regulation under which a detention of any person under a warrant issued by the Governor, the Chief Secretary or by his deputy was a complete answer to any mandate issued by any court - civil or military. The correspondence which passed between

Sir Hardinge Giffard, the Chief Justice, Sir Richard Ottley, the Puisne Judge, and Sir Edward Barnes, the Governor, as a result of this Regulation, was mostly abusive. Giffard characterised the Governor's Regulation as 'objectionable in the highest degree', for it was not only retrospective in that it applied to Rossier's case but also in clear negation of the sacred principles concerning the freedom of the individual. The matter reached the British House of Commons and Bathurst, the then Secretary of State for the Colonies sent orders to Barnes directing him to repeal that Regulation. More with cunning than with skill, Barnes managed to keep the original Regulation alive until 1830. By an Order-in-Council¹¹³ passed on the 1st November, 1830, the offensive Regulation of 1824 was repealed. But the Governor was left with a residual power to detain persons without recourse to Courts for a period not exceeding eighteen months. By the same Order-in-Council, the Supreme Court was given the right to issue the writ of Habeas Corpus similar to that of in England.

The struggle for power between the Supreme Court and the Governor resembled an amateur game of chess. New strategies became necessary after each move. The Governor controlled all the courts on the Island except the Supreme Court. Through the Board of Judicial Commissioners he controlled the Administration of Justice in the Kandyan Provinces too. The Advocate-Fiscal was the Governor's agent, through whom these Courts had access to the Governor. Unlike the chastity of Ceasor's wife, the Governor was not beyond reproach. Patronage appeared largely to govern appointments to these Courts. Relying on a view expressed in the Charter of 1810, that the Sitting Magistrates should be possessed with knowledge of the locality in which they sit,^{113a} the Governor maintained that his Courts must have a thorough knowledge of the locality.¹¹⁴ Unlike the judges of the Supreme Court, his

appointees should not stand aloof from the social environment. This politicisation of a large part of the judicial administration of the country was viewed with horror by the Supreme Court,¹¹⁵ the judges of which court made yet another move. They proposed that all laws should be registered in the Supreme Court.¹¹⁶ This proposal was made so as to subject the validity of laws passed by the Council to judicial scrutiny. By such means the judges were in effect proposing a veto power over legislation. As De Silva remarks:

"[The] Council, as constituted, was a very unreal check. Officials dependent on the Governor's patronage could hardly be in a position to display much independence, if they did, it could not be with much effect."¹¹⁷

Although the relationship between the judges of the Supreme Court and the Governor was one of open hostility, the British government was determined to engage no more in piece-meal reforms. They were determined to await the outcome of a Royal Commission¹¹⁸ they had appointed as far back as the 18th January of 1823. Due to a number of unrelated events,¹¹⁹ one of the Commissioners, Colebrooke, did not arrive on the Island until April, in 1829. He was joined by another, Cameron, in March, 1830. While Colebrooke was made responsible for the administrative reforms,¹²⁰ Cameron undertook to enquire into the judicial reforms. Together they produced a joint report in 1832, which has come to be known as the Colebrooke-Cameron Report of that year. Although the final Report appeared as a part of a single enquiry, there were many sub-reports dealing with particular aspects of the Colonial Administration of Ceylon.¹²¹ Of these, the Report by Cameron on the 'Judicial Establishments and Procedure in Ceylon' will be considered here.

VI. The Cameron Report

Although the final report appeared under Cameron's name, most of the evidence was collected by Colebrooke some time before the arrival of Cameron on the Island.¹²² The evidence of Mr. Justice Marshall was particularly damaging to the Governor's role in the administration of justice on the Island.¹²³ The recommendations contained in the Report aptly indicated the apprehensions created in Cameron's mind by the evidence given by the judiciary.¹²⁴

The Commission recommended that the Island as a whole, including the Kandyan Provinces, should have a single, uniform legal system.¹²⁵ The obligation to maintain a separate system in Kandy by virtue of Article 8 of the Convention, a principle submitted by the Governors since Brownrigg, was brushed aside. The Report mentioned that

"The argument I allude to is founded upon the attachment which mankind in general, and the Oriental races in particular, feel for systems which have been long established among them, and which are commonly connected with their religious opinions. This argument, I say, has no application to the case of Ceylon; A fairer field than the Island of Ceylon can never be presented to a legislator for the establishment of a system of judicature and procedure, of which the sole end is the attainment of cheap and expeditious justice."¹²⁶

Contrary to the views of the Colonial Administration in Ceylon, the Report recommended the extension of the civil jurisdiction of the Supreme Court.¹²⁷ The Commissioner saw no reason why a special jurisdiction in civil matters concerning the European population should be isolated from the rest.¹²⁸ It was recommended that Governor's control over the local courts should be revoked and that control over all courts should be vested in the Supreme Court.¹²⁹ The Report recommended the retention of the

jury system in criminal trials.¹³⁰ It was further recommended that Ceylonese Assessors should be associated with the judges as had been done in the Kandyan provinces since 1815.¹³¹ The Commissioner recommended the extension of the jury system to the Kandyan Provinces, a matter of deep concern to the Supreme Court, particularly under Brownrigg.¹³² To a large measure the foregoing settled the issues that were muddying the waters between the Governor and the Supreme Court. Several other recommendations were made to strengthen the Appellate system¹³³ and for the efficient administration of justice throughout the Island.¹³⁴ Some of these will surface in the next section of this Chapter. The British government, having accepted the recommendations, issued a new Charter of Justice on the 18th February, 1833.

VII. The Charter of Justice 1833:¹³⁵ A Basis for Colonial Legal Development

It is necessary to view the Charter of 1833 as the climax of a dialectical process of change and development which had progressed within a historical framework dating back to the Treaty of Capitulation in 1796.¹³⁶ It is also necessary to consider the Charter as the end product of a long and sustained struggle between the judges of the Supreme Court and the British Governors for the control of the source of power within the Colony. The Charter itself appears to have settled the administration of the Colony in that it provided the legal infrastructure for colonial development for the next 115 years, until Independence in 1948, and even continued to support the post-independent strategies for social change and development until 1974.¹³⁷

Initially, the Charter provided the Colony with a system for administering justice similar to the one pursued by the Imperial government during the Victorian era for England.¹³⁸ In subsequent years, planners and plotters for colonial development took due regard of the legal infra-structure provided by the Charter as a foundation for colonial expansion. Moreover, in the years that immediately followed the introduction of the Charter, concern of the colonial administration in Ceylon was not of legal reform but of economic expansion through the creation of a plantation economy. Such a concern had not arisen in the Colony during the years preceeding 1833, for the preceeding 37 years were years of territorial expansion¹³⁹ and administrative consolidation. A combination of these reasons, however, appears to have held together the structure for judicial administration provided by the Charter for the next fourteen decades.¹⁴⁰ The Charter may therefore, be assessed as a basis for colonial legal development.

It is fundamental to the strategies for colonial development that a single land mass should be considered in every respect as a single territorial unit. The need to administer the Indian sub-continent as one whole territorial unit was a result of this line of thought. The Charter fundamentally recognised the unitary nature of the Island of Ceylon by removing the distinction, maintained by successive British Governors since 1815, that the Kandyan provinces required separate treatment. The Charter abolished inter alia the Board of the Judicial Commissioner for Kandy and expressly extended the jurisdiction of the Supreme Court to those provinces.¹⁴¹

A congeries of courts under two different arms of the Administration, following different and distinct procedures, was not conducive to legal development.

The British have had their experiences in judicial administration moulded out of the conflicts between the Common Law Courts and the Courts of Equity. By 1833 thinking in England was moving towards some accommodation between these two judicial structures.^{141a} The year 1873¹⁴² was not far away and Lord Mansfield had already departed for another world.¹⁴³ The Charter with one clean sweep abolished:

"The Provincial Courts, the Courts of the Sitting Magistrates, the Court of the Judicial Commissioner, the Court of the Judicial Agent, the Courts of the Agents of Government, the Revenue Courts, and the Court of the Sitting Magistrate of the Mahabadde."¹⁴⁴

These were all the creations of the British Governors in their struggle for power with the Supreme Court. These institutions, in a sense, were the supporters of the British Governors, which were presided over by his appointees. The Charter mentioned that these courts:

"... differ among themselves in respect of their constitution, of their rules of procedure, and of the kinds and degrees of the jurisdictions which they exercise within the limits of their respective districts or provinces."¹⁴⁵

The Charter further abolished¹⁴⁶ all existing appellate tribunals; namely,

"... the Court of the Judicial Commissioner exercising ... appellate jurisdiction ... in the Kandyan Provinces ... certain Courts called the Minor Courts of Appeal, and certain Courts called the Minor Courts of Appeal for Revenue cases"¹⁴⁷

Again it must be mentioned that these appellate tribunals were the creations of the British Governors and, like those that were mentioned earlier, were not under the control or supervision of the Supreme Court. The Charter gave the following reason for abolishing the appellate tribunals:

" ... the existence of several independent appellate judicatures in the said Island tends to introduce uncertainty into the administration of justice" ¹⁴⁸

Having done away with every Court on the Island except the Supreme Court, the Charter proceeded to lay down a rule in absolute terms prohibiting the Governor from creating Courts other than those which the Charter recognised. ¹⁴⁹ As to those Courts which the Charter recognised, it was declared:

" ... that the entire administration of justice civil and criminal therein; shall be vested exclusively in the Courts erected and constituted by this our Charter." ¹⁵⁰

As a proviso ¹⁵¹ to the prohibition placed upon the Governor, the Charter recognised in the Governor a power to appoint "certain assemblies of the inhabitants of villages known ... by the name of Gamsabaves" ¹⁵² in response to a request made by persons wanting to submit "their differences to ... arbitration".

The British Government was accustomed to a four-tier system of judicial administration in the United Kingdom and therefore was happy to introduce such a system to her colonies. The Charter of 1833 produced a four-tier system, its base rooted at the district level. The Island was divided into four circuits ¹⁵³ - Colombo, Northern, Southern and Eastern - each divided into districts. ¹⁵⁴ At the first tier of judicial administration

each district was given a District Court,¹⁵⁵ with both Civil¹⁵⁶ and Criminal¹⁵⁷ jurisdiction. Its Civil jurisdiction was quite extensively and exhaustively described in various¹⁵⁸ Articles of the Charter. The basic principle was that the District Courts:

" ... shall have cognizance of and full power to hear and determine all pleas, suits, and actions in which the party or parties defendant shall be resident within the district in which any such suit or action shall be brought, or in which the act, matter, or thing in respect of which any such suit or action shall be brought, shall have been done or performed within such district."¹⁵⁹

Thus the local character of the jurisdiction of the District Courts was emphasised: they resemble the County Courts and the Courts located below the High Court system in the United Kingdom.

The second tier was indeed the Supreme Court.¹⁶⁰ It was to have a Chief Justice and two Puisne Judges, initially.¹⁶¹ In a separate Article¹⁶² the Charter clearly stated the ranking of the Chief Justice and the Puisne Judges within the Colony: while the Chief Justice ranked second, immediately below the Governor,¹⁶³ the Puisne Judges ranked fourth, after the officer commanding the forces in the Colony.¹⁶⁴ The appointment of the judges of the Supreme Court and those of the District Courts were to be "by letters patent to be issued under the public seal of the ... Island, in pursuance of warrants to be from time to time issued by us i.e. the Sovereign."¹⁶⁵ The Governor was to play no part hereafter in the appointment of judges of any Court on the Island except upon a temporary basis during: resignation, incapacity, death, absence or suspension of the holder of such office.¹⁶⁶ Such appointments were regarded as

acting appointments, which could only be confirmed by a warrant issued by the Sovereign. The Supreme Court was given original civil¹⁶⁷ and criminal¹⁶⁸ jurisdiction and in that aspect resembled the High Court of Judicature in England.

The third-tier of judicial administration was concerned with the appellate jurisdiction,¹⁶⁹ in its penultimate stage. In that sense it resembled the appellate division of the various branches of the High Court of Judicature, as it existed at the time in question in England. In this penultimate stage it was made the responsibility¹⁷⁰ of the Supreme Court to constitute itself into a suitable appellate tribunal and, until 1852,¹⁷¹ this third-tier of judicial administration had individual assessors forming a part of the appellate Court.

The fourth-tier¹⁷² was an appeal to His Majesty in Council, i.e., to the Judicial Committee of the Privy Council.^{172a} This ultimate Court of Appeal corresponded with the House of Lords in its judicial capacity.

The respective jurisdiction and procedures associated with each of the four tiers were carefully laid down.¹⁷³ The similarity this arrangement bore to the English legal system, not only in 1833 when it was first introduced but also in 1974, when it was finally replaced,¹⁷⁴ may have been a further reason for its longevity. The Charter having laid down a viable infra-structure to support the implementation of a legal system left, to the Executive, the responsibility to plan the strategies for colonial development in other areas of concern. Expansion and the perpetuation of a colonial economy were in fact the principal concerns of the administration during the years following the promulgation of the Charter. This has been examined at various stages of this dissertation.¹⁷⁵ Although this colonial model was to some extent disturbed by the Administration of Justice Law in 1974, to which reference has previously been made, the model was, however, re-established in its original form in 1978.¹⁷⁶

Chapter 10

From Adjudication to Conciliation

I. An Introduction

The Cameron recommendations, which formed the basis for The Charter of Justice of 1833, were discussed in an earlier chapter.¹ It was argued there that the model for the administration of justice which was provided by the Charter of Justice in 1833 stood the test of time until the early part of the seventies of this century.² The abolition of appeals to the Privy Council in 1971,³ followed by the re-organisation of the Court system and the changes introduced at the procedural level of adjudication in 1973,⁴ did not in any way alter the adjudicatory framework within which the system of dispute settlement was conceived.

To ensure the continuation of the adjudicatory system, the plan for Legal Education introduced by The Courts Ordinance of 1889,⁵ despite the twenty-four amendments it had thus far undergone, retained to this day the adjudicatory role for which the students-at-law were trained.⁶ Although the method of conciliation, as distinct from adjudication, had had a very ancient history in Ceylon dating back to 425 B.C., the colonial system of justice did not readily accept the ideas of conciliation and the method of extra-legal settlement of disputes as alternative methods to the judicial process.

The ancient forum for conciliation was the Gamsabhava. The Colebrooke recommendations made particular reference to the Gamsabhavas as an institution meriting retention.⁷ The Gamsabhavas, therefore, survived British rule; but they were recast in a style different from their ancestors and within an adjudicatory framework. The Gamsabhavas underwent several changes during the colonial period and, in 1945, assumed the character of Rural Courts.⁸ The only significant character which the early Gamsabhavas and the later Rural Courts preserved was the fact that their jurisdiction was locally based. Aside from that one small feature, the Gamsabhavas were still adjudicatory. The movement towards conciliation as a method for dispute settlement went hand-in-hand with the setting

up of quasi-judicial or administrative bodies.⁹ But there was no deliberate movement, until 1958, towards recognising conciliation as an alternative method to adjudication for the settlement of disputes generally. It is in this light that The Conciliation Boards Act of 1958¹⁰ is considered to have made a significant break with the past.

II. The History of Conciliation¹¹

According to the Mahavamsa,¹² the conciliation procedure for dispute settlement was known to Sri Lanka from as early as 425 B.C.¹³ The Conciliation Boards were called Gamsabhavas or Village Councils. Commenting on the functions of the Gamsabhavas, Dr. Tambiah,¹⁴ quoting from D'Oyly,¹⁵ wrote:

"Pandukabhaya, the ruler of Lanka,¹⁶ established the village boundaries over the whole island of Lanka. Ever since the existence of these villages the Gamsabhavas must have existed. The court was held both in the dissawanes (villages under the rule of the dissawas) and the upper districts, and consisted of an assembly of the principled men of the village. The court met at an ambalama (resting place), or under a shady tree, or in some other central place, upon the occurrence of any civil or criminal matter, and heard cases involving debts, petty thefts, quarrels, etc. After an inquiry into the case they settled it amicably."¹⁷

The Gamsabhavas survived British rule. But their constitution and purposes underwent several changes. On the other hand its structure as a forum for settling disputes, within a local setting was, strictly preserved. The movement towards the creation of Conciliation Boards was a slow one. One of the earliest quasi-judicial or administrative bodies for dispute settlement was set up under the Workman's Compensation Ordinance.¹⁸ Besides this there were a series of such bodies established under varying statutes. To mention some: The Patents and Trade Marks Ordinance,¹⁹ The Rent Restriction Act,²⁰ The Industrial Disputes Act,²¹ The Land Acquisition Act,²² the Inland Revenue Act,²³ The Licensing of Traders Act,²⁴ The Muslim Marriage and Divorce Act,²⁵ and The Paddy Lands Act.²⁶ In addition, the professional bodies such as The Ceylon Medical Council,²⁷ The Ceylon Law Society²⁸ and

the various institutions for higher learning²⁹ were each authorised to appoint panels for dispute hearings and dispute settlements. The foregoing catalogue spanned several decades, extending from colonial times to the present day. In each creation the government's main concern was that certain types of disputes were best suited for a non-adjudicatory process of settlement. The best settlement, the legislators believed, was a settlement worked out by the peers of the disputants.

On April 10th 1956 the first Bandaranaike government was elected into office. Its electoral victory was hailed as a victory for the common man; it was considered the very political anti-thesis of the United National Party which it had successfully defeated. On the 12th March 1958, the Bandaranaike government passed into law, The Conciliation Boards Act,³⁰ which forms the subject of this chapter. Certain sections of the Act were amended³¹ on the 24th December, 1963 but these amendments were merely cosmetic in nature. The Conciliation Boards Act was the creation of the then Minister of Justice, Senator M.W.H. deSilva. Senator deSilva was an experienced Queen's Counsel who had won his silks from the British Administration. He had practiced as an advocate both in the trial Courts and in the Appeal Courts. He had occupied the posts of Solicitor-General and Attorney-General and had also functioned as the Legal Secretary at a time when the Island was still a Crown Colony. His career became eventually crowned by being appointed to the Bench of the Supreme Court of Ceylon. His judicial career brought him to preside over a number of important and now famous criminal trials of Ceylon. As he were to recall³² while presenting the Conciliation Boards Bill to the Senate, these experiences made him only too aware of the unsatisfactory conditions of litigation on the Island. He admitted to the Senate that he had examined the pre-trial conciliation procedures of other countries, but made it clear that the ideas contained in the Act was an essential response to wholly local needs. Senator deSilva's speech to the Senate did not suggest in any way that the Bill was intended to establish Courts in the nature of People's Courts similar to those that may be found in the communist world. After a careful reading of the Senator's speech Goonesekera and Metzger concluded that:

"In the Minister of Justice's remarks introducing the scheme to the Senate, he made particular reference to the voluntary Conciliation Boards functioning in Moratuwa and Panadura. Experience there and the history of the Gamsabhava seem to have had significant influence on the new Act, particularly in its choice of a lay body of leading citizens serving part-time and without remuneration as the mechanism through which conciliation was to be encouraged." ³³

The fact that the Conciliation Boards Act was intended to provide the Island with a unique model for settlement of disputes, very different from similar institutions in the Communist world and equally different from conciliation through Arbitration processes known in the United Kingdom becomes clear, from the pith and substance of the Senator's Speech. ³⁴ The political significance of the Conciliation Boards Act may be found in the political directions of the new Sri Lanka Freedom Party (S.L.F.P.) Government which was responsible for piloting the Bill through Parliament in 1958. The S.L.F.P. in taking office had declared its intention to create the necessary socio-political conditions in Ceylon which could provide the framework within which a new society with a new orientation geared towards the re-establishment of a lost national heritage could be achieved. One of the principal changes which the new Administration was eager to bring about was in the realm of dispute settlement. As it had been made clear during the debate in the Senate, the ancient Gamsabhavas and the voluntary experiments by residents in two sea-side towns - Moratuwa and Panadura, some 12 and 17 miles distance, respectively from the capital city of Colombo - appeared to have provided the necessary inspiration to the Minister of Justice.

During the debate on the Bill, in the House of Representatives, Dr. Colvin R. deSilva explained the aims of the Bill in this way:

"---let the Conciliation Board, whose task is not to find a person guilty or find a person in the wrong, search all matters that are troubling the parties and arrive at a conciliation. It is a little like the--- procedure---used in psychotherapeutics, in a sense. You try to find out what is troubling the two parties so that you may reconcile them and make them live in harmony together." ³⁵

Popular acceptance of the settlement hammered out through conciliation was an important corner-stone in this process. Much criticism was made during the debate about the lack of power in the Board to reject a repudiation of a settlement arrived at within the 30 day period which was allowed by the Act. The Act permitted the parties to repudiate the settlement with or without reason within that period. The Government argued that the practices of the ancient Gamsabhava were such that the disputants had a reasonable time within which they were able to repudiate their settlements. The importance of this escape route was put in graphic terms by Dr. Colvin R. deSilva in the House of Representatives in the following passage from his speech.

"---here you catch them by the ear, you bring them before the Board, you bang their heads together hoping that a settlement will arise, and since they only see stars by reason of the banging of their heads, they say, "Very well, (since you say so, then I accept)." Then one of them goes home and says, "what did I do?" He writes back and says "Well, you knocked our heads together; I did not like it." Then you are back where you are. It is, if anything worse than before, in that more enmity will be created, for the other man who says, "you are a funny fellow. The two of us went before the Board, and I agreed to all sorts of concessions in order to arrive at some kind of settlement, but now you want to go back on it." Thus you will see that there will be no conciliation, no settlement, but murder." 36

The Conciliation Boards in essence were to provide the people with the ways and means of settling their disputes extra-judicially, if they so wished, while always leaving their route to adjudication free and open to them. The Act itself remains inoperative unless, by Gazette notification, the Minister of Justice proclaims ³⁷ the application of the Act to a given "village area". By section 2(3) of the Act, "the expression 'village area' has the same meaning as in the Village Councils Ordinance." The basic local unit of administration is the Village Council. The next unit is the Town Council. The Urban Council represents a higher stage of local Government than the Town Council and the principal cities are administered by the Municipal Councils. The Municipal Councils are considered as occupying the most advanced form of local Government. The Conciliation Boards are therefore fitted into the geographical area governed by the

basic local government-unit; namely the Village Council. Although the Conciliation Boards Act had been in existence for nearly two decades, its operation has never reached the areas administered by the Municipal Councils. Not all the Urban Councils and the Town Councils in the Island have Conciliation Boards. In many of those which have been designated by the Minister, Conciliation Boards have periodically remained defunct due to the expiry of their mandates. Members of the Conciliation Boards approved by the Minister of Justice ³⁸ serve for a period of three years, ³⁹ but may be removed by ministerial order, "without assigning any reason." ⁴⁰ The Minister of Justice has an additional power to appoint ⁴¹ the Chairman of the panel of conciliators and also to remove him "without assigning any reason." ⁴² Certain local associations engaged in social work are empowered to submit a list of potential candidates to the Minister of Justice for selection for appointment to the Board. ⁴³ The Act lays down the powers available to the Conciliation Boards:

They are:

- "(a) to procure and receive all such written or oral evidence, and to examine all such witnesses, as the Board may think it necessary or desirable to procure or examine;
- (b) to summon any person residing in Ceylon to attend any meeting of the Board to give evidence or produce any document or other thing in his possession, and to examine him as a witness or require him to produce any document or other thing in his possession;
- (c) notwithstanding any of the provisions of the Evidence Ordinance, to admit any written or oral evidence which might be inadmissible in civil or criminal proceedings." ⁴⁴

One of the critical points that needs emphasis is contained in subsection (c) of the foregoing section. The freedom to admit any evidence, insofar as it seems relevant to the enquiry, is a necessary element in the conciliation process. Further, this renders the analytical exercises which goes with the art of advocacy of the legal profession redundant. Accordingly, legal representation is not permitted before Conciliation Boards. By Section 12 of the Act

the duties of a Conciliation Board are laid down. Insofar as the dispute is non-criminal, the Board has a duty to summon the parties before it and "after inquiring into such dispute make every effort to induce such parties to settle such dispute, and, where such parties agree to a settlement, record such settlement and issue a copy thereof." ⁴⁵ Where the matter in question constitutes a criminal offence then the Board is required to make every attempt to compound such offence. ⁴⁶ Depending on whether the offence is a Schedule I offence or a Schedule II offence, the consent of the Attorney-General may be necessary to effectuate an agreement to compound. The word "compound" in the Statute is used in a non-technical sense: it means the settlement, condoning a liability for an offence committed upon the payment of money, forbearing prosecution upon a private motive or coming to terms with a person for foregoing his claim for an offence committed against him. These shades of meanings are culled from the dictionaries of the English language. Webster's English Dictionary, defines the word 'compound' in this way:

"---to settle amicably; to adjust by agreement (a controversy); to fail to prosecute (an offence) for a consideration; to discharge (a debt) by paying a part - viz; to agree upon concession; to come to terms of agreement; to arrange or make a settlement by compromise; especially, to settle with creditors by agreement, and discharge a debt by paying a part of its amount; or to make an agreement to pay a debt by means or in a manner different from that stipulated or required by law (to compound with a person, and for a debt)." ⁴⁷

Under Section 13(1) the parties to a civil dispute, having settled their dispute before the Conciliation Board, may thereafter repudiate that settlement within 30 days. There are no provisions in the Act for repudiating the agreement to compound a criminal offence. This may be explained upon the grounds that criminal offences being of a species of offences in which the State has an interest, any agreement to compound a criminal offence involves the State. In such a situation it may be argued that repudiation of any agreement to compound, too, would involve the consent of the State: therefore to allow an individual a power to repudiate such an agreement would by implication be an erosion of State power. It will clearly be against the principles of constitutional law to bind

the State (or the Crown) to such an eventuality unless the legislation has expressly mentioned the State as a party to such an individual power.

By Section 14 of the Statute it is required that all disputes falling under Section 6 of the enactment be first heard by a Conciliation Board before "proceedings [are] instituted in, or [are] entertained by a civil court."⁴⁸ 49 The production of a certificate from the Chairman of a panel of conciliators, stating that "such disputes have been inquired into by a Conciliation Board, or that a settlement of such dispute made by a Conciliation Board has been repudiated by all or any of the parties to such settlement", is a necessary pre-requisite for the commencement of proceedings before a civil or a criminal court. The question has often been asked whether the parties have an option to proceed directly to the courts, if it is evident to them that a settlement before a Conciliation Board appears to be an impossibility.

In Wickremaratchi v. The Inspector of Police,⁵⁰ the Supreme Court, sitting as a single bench, thought that:

"Section 6 reads as follows: -

"The Chairman of the Panel of Conciliators constituted for any village area may, and shall upon application made to him in that behalf, refer for inquiry to Conciliation Boards constituted out of that Panel the following disputes and offences.

There is thereafter an enumeration of the disputes and offences that can be inquired into by a Conciliation Board. Section 6, therefore, in my view, contemplates that the only disputes and offences which can be referred for inquiry to a Conciliation Board, are such disputes and offences of the kind enumerated in section 6(a) to (b) which the Chairman may of his own motion refer to the Board of such disputes and offences which the parties desire should be referred to the Board. Disputes and offences of the kind enumerated in section 6(a) to (d) which are not referred to a Board by either one or other of the two methods mentioned above would ordinarily be justiciable by the established Courts, even without the required certificate. The

proposition therefore that every dispute or offence of the kind enumerated in section 6 must in the first instance be referred to a Conciliation Board and a certificate obtained from the Chairman, before proceedings can be instituted or entertained in an established court of law, is a proposition not warranted under the provisions of the law and one which I am unable to accept." 51

This decision was reviewed by the Court of Appeal in Nonahamy v. Halgrat Silva. 52 Overruling the Wickremaratchi case, the Court 53 held that reference to a Conciliation Board of matters falling within section 6 was a pre-requisite to the commencement of civil or criminal proceedings before courts ordinarily constituted. There was no option open to the plaintiff. It is an imperative requirement and must always be followed. The judgment fails to state the reasons for the decision, which leads one to suspect that it could well be a policy decision of that Court.

The powers of the Conciliation Boards are enhanced by two important sections of the Act. Section 16 declares that the members of a Conciliation Board are deemed to be public servants and proceedings before them are deemed to be judicial proceedings. That empowers the Board to cite parties for perjury and for contempt of the Board. A theoretical, but indeed a fascinating, aspect of this power is that, while proceedings for perjury are possible, the elicitation of the facts and the determination of the degree of falsity are not required to be determined by a process of cross-examination but as a result of a dialogue between the panel and the witnesses. The absence of legal representation is a relevant factor in this respect. Criticisms have often been made that the proceedings before the Board have sometimes taken the form of an interrogation reminiscent more of an inquisitorial system rather than of a conciliation process.

Locked into the judicial nature of the Board's activities is the provision in section 8 that failure to appear upon being summoned by a Conciliation Board is a criminal offence, subject to a summary trial before a Magistrate. A similar fate awaits a person who, without cause, fails "to produce and show to the Board any document or other thing which is in his possession or power and which is in the opinion of the Board necessary for arriving at the truth of the matters that are being inquired into by the Board." 54

During the Bandaranaike administration the Parliament of Sri Lanka adopted the theme of 'facilitative law' for public policy legislation. Under that theme the Statutes merely authorised the Ministers of State to implement particular government policies. Section 17(1) of the Statute states:

"The Minister of Justice may make regulations to give effect to the principles and provisions of this Act."

By sub-section (2) of section 17, regulations formulated under sub-section (1) require to be approved by Parliament and thereafter to be gazetted before they become effective. Utilising this method of legislation, successive Ministers of Justice expanded and contracted the conciliation process for settlement of disputes on the Island. Each regulation made under Section 17 was dictated by the prevailing policy of the party in power towards Conciliation as an alternative to adjudication. By Section 18, the provisions of the Conciliation Board Act were declared to be effective notwithstanding "anything to the contrary in any other written law."

The purpose of the Boards, as the foregoing description should show, was merely to create an institutional means to bypass the adjudicatory process that had gained control of the institutions of judicial administration in the country for nearly one and a half centuries. It must, therefore, be emphasised that the Conciliation Boards form a part of the total socio-economic reform programme which the Sri Lanka government proposed for the whole nation.

III. The Ambit of Conciliation

Unlike the role relegated to conciliation of disputes in such countries as The People's Republic of China,^{54a} in the Sri Lankan experience, conciliation of disputes is limited to certain categories of disputes. These categories are detailed in section 6 of the Conciliation Boards Act.⁵⁵

- "(a) any dispute in respect of any movable property that is kept, or any immovable property that is wholly or partly situate, in that Conciliation Board area;
- (b) any dispute in respect of any matter that may be a cause of action arising in that Conciliation Board area for the purpose of the institution of an action in a civil court;

- (c) any dispute in respect of a contract made in that Conciliation Board area;
- (d) such offences specified in the Schedule to this Act as are alleged to have been committed in that Conciliation Board area."⁵⁶

Despite the apparent width of the formulation contained in the foregoing subsections, academic discourses⁵⁷ and judicial comments⁵⁸ have indicated certain types of disputes which have, to a large measure, been regarded as unsuitable for conciliation. It has been argued⁵⁹ that they are best suited for adjudication. It has been suggested that the use of Conciliation in such cases would lead to injustices and inconveniences.

While compiling a list of eighteen case-types, Goonesekera and Metzger⁶⁰ have submitted them⁶¹ as those which should be expressly excluded from the Conciliation Boards jurisdiction or made subject to special treatment.⁶² The list has been divided into four parts.⁶³ Dealing with a list of ten case-types⁶⁴ under the broad heading of 'non-contentious proceedings', the authors argue that the list consists of certain case-types over which there are 'special State interests' and, therefore, it is in the interest of the State to extend its supervisory jurisdiction over them. By such means, the authors argue that stability in the community could be maintained. In their words:

"The special state interest upon which the courts' supervisory jurisdiction is founded may stem from the significance of the relationship to stability in the community (e.g., marriage or title to land), a need to provide special protection to certain individuals (e.g., children or lunatics) or the need to protect third parties in complex, multi-party litigation (e.g., partition or trusts). So viewed a section 14 certificate⁶⁵ is not a condition precedent to going to court with these actions: they do not involve disputes within the jurisdiction of the Boards as defined in section 6, and they cannot be the subjects of Conciliation Board settlements with the force of a court decree."⁶⁶

Dealing⁶⁷ with 'applications for injunctions, arrest or sequestration before judgment, or restraint of waste', under the broad rubric of 'interim relief', the authors argue, that:

"It must be recognised, however, that certain interim remedies created for the sole purpose of providing expeditious relief pending a full decision on the merits by a court, will be made meaningless protections if the delays inherent in the conciliation process permit damage to be done where earlier it might have been avoided. There are two conflicting interests here: one party's need for expeditious temporary relief, and the State's interest in avoiding frivolous and disruptive litigation." 68

Regarding 'actions entrusted by law or by agreement to administrative or quasi-judicial tribunals or to arbitration', 69 the authors make the point 70 that in cases where legislation grants jurisdiction to entertain certain disputes to administrative or quasi-judicial tribunals, such as the labour tribunals, the Conciliation Boards play no useful role. It is correct to say that the Industrial Disputes Act of 1950 71 and the several amending Acts 72 have all maintained the principle of reserving disputes for labour tribunals, rather than for an adjudicatory process within the framework of the hierarchical system of courts. Since 1950, successive administrations have introduced a series of administrative or quasi-judicial bodies to settle disputes in a number of other areas. Under the Rent Restriction Ordinance, 73 rent conciliation boards have been created. Further, a number of administrative or quasi-judicial bodies have, of late, been created under a variety of statutes. 74 In each case, the authors argue that no useful purpose would be served by submitting the disputes therein to a Conciliation Board: this would lead to a duplication of efforts, but might not necessarily lead to settlement of the disputes.

Lastly, the authors cite six categories 75 of disputes which they argue, should be excluded from the jurisdiction of conciliation tribunals under the heading of "Inappropriate Parties and Subjects". In support of this contention they submit a variety of reasons why Conciliation is inappropriate for them. As for their first category, persons under legal disability, the author's argue that the State has an interest in these matters and that therefore they should be subjected to the supervisory jurisdiction of the courts. As for their second category, Admiralty matters, the magnitude of the claims and the complexity of the disputes should predicate the unsuitability of such issues to go before a Conciliation Board. As for their third category, election petitions, the socio-political nature of the dispute,

together with its emotional underpinnings, render it totally unsuitable for a Conciliation Board hearing. Further, they argue, the power to unseat an elected member of Parliament is given to a special court called the Election Court, presided over by a Judge with a particular jurisdiction, derived from The Ceylon (Parliamentary Elections) Order in Council of 1946 and its later amendments.⁷⁶ With reference to their fourth category for exclusion, namely those disputes in which the Government becomes a party, the authors argue that the Boards may as a rule be biased in favour of the citizen who may well be their neighbour, as against a remote government agency. They also mention the cost in terms of money, for the taxpayer, that may be spent in sending government officers to represent the agency at the hearing. Fifthly, in a dispute involving the clergy, the authors argue that it:

"---tends to place the conciliation process on its head: rather than common men appearing before a body of prestigious community leaders, one has clergymen appearing before a group of lower social standing which assumes a posture of deference to the clergy. This is not an atmosphere conducive to conciliation."⁷⁷

And lastly, the authors suggest, the enforcement of foreign or municipal judgments should be kept out of the jurisdiction of conciliation boards. For, these entail matters which have already been settled and therefore are ripe not for a process of conciliation but for a process of enforcement.

These views of Goonesekera and Metzger have been restated here, because they present the only extensive analysis of the jurisdictional question regarding Conciliation Boards. Indeed, they were the only writers who responded to the need to publish on the Conciliation Boards of Sri Lanka

Before leaving this area of case-types excluded from the Conciliation Boards, it is necessary to submit one or two comments on the views of the aforementioned authors. While agreeing that some of the disputes they have mentioned are clearly unsuitable to go before Conciliation Boards, there are some within the categories they have listed which are suitable for conciliation rather than adjudication.

The goal of conciliation is the achievement of social harmony. The special State interest case-types which the authors mention,⁷⁸ where supervisory jurisdiction, rather than conciliation, is recommended

by them, are in a sense disputes, where the interest in the preservation of social harmony and the special State interests involved in such disputes become co-terminous. Disputes ⁷⁹ falling under Matrimonial proceedings, custody of a minor, adoption proceedings, actions in lunacy, actions in regard to guardians, curators (not receivers) and even to an extent some of the testamentary disputes, are intimately concerned with the social paradigms of a group. They are, therefore, most suited for conciliation by a group of elders or by a group of respected citizens drawn from within that society. The disputants do have the right to resort to a court of law if the settlement worked out is not to their liking. This ultimate recourse, which is always made available to the parties, is an important consideration which should allay some of the fears expressed by the authors. This is particularly relevant when considering the question of bias.

Concerning 'actions to which the State, State enterprises, another governmental body, or its authorized agent is a party', the authors argue that because the panel members of a Conciliation Board may be biased against the "remote government agency which people believe should be their servant and a local villager who has suffered injury, the pressure brought to bear by the conciliators to effect a settlement can be expected heavily to favour their neighbour." ⁸⁰ Depending on the popularity of the government agency or even the particular political party in power, it is possible that the panels may take a view in favour of the citizen. But the critical issue is that the citizens have in such cases grasped an opportunity to judge their government. Some of the views expressed by the panels would serve as a useful indicator for the government as to the way in which public opinion may appear to move. Critical views of a particular policy aspect could be valuable indicators for the local elected officers to utilise in debates both in local legislative bodies and in Parliament. This kind of feedback would be cut off the moment the Conciliation Boards were robbed of their jurisdiction to hear disputes between the citizen and the government. To this extent, it must surely be in the interest of the political party in power to utilise the Conciliation Boards to their fullest so as to facilitate the submission of government policy to critical appraisal by the people.

Subject to the foregoing comments, it is correct to say that some case-types must clearly be excluded from the jurisdiction of the

Conciliation Boards.

IV The Settlement of Debts Law

By 1975 the Government was anxious to extend the facilities of the system of Conciliation Boards to the area of settlement of debts. By a statute enacted in that year⁸¹ all creditors who were not banking corporations or companies were required to apply to the Conciliation Boards of their respective areas for the settlement of any debts⁸² except those exceeding 5000 rupees. The Conciliation Board which settles the dispute was required⁸³ to consider a number of circumstances in arriving at the settlement: the original debt,⁸⁴ the period during which the debtor had fallen into arrear,⁸⁵ the reasonableness of the rate of interest charged,⁸⁶ the amount of money that had already been paid by way of interest or other charges⁸⁷ and the capacity of the debtor to pay the amount presently due from him.⁸⁸ The latter could include any change of circumstances and other personal matters. The Conciliation Board was further required to consider the financial position of the creditor⁸⁹ and the extent to which a delay in completing the payments might affect him. The Statute left a large measure of discretion to the Board, by requiring it to consider such other matters as the Board might think desirable.⁹⁰ The settlement arrived at was incorporated in the certificate which the Board must issue;⁹¹ where the debtor fails to carry out the arrangement settled for the repayment of the debt, the creditor was required to do no more than to apply to a Court for the execution of that agreement.⁹² The Law required such a court to order an execution without a further hearing. The certificate handed down by the Board was considered "as a decree", the execution of which formed the basis for the order of the Court.⁹³ The submission of debt claims within open-ended guidelines⁹⁴ to Conciliation Boards, had to a large measure removed an important area of personalised disputes from the adjudicatory processes of the Courts. By doing so, the legislature had recognised the importance of taking into account matters which may not be strictly legal and may well be social. Aside from habitual drunkenness and such other self-imposed disabilities, economic calamities arising out of droughts, floods and pestilence coupled with retrenchment and loss or lack of employment, could all be

relevant factors in the settlement process. Moreover, since the process was conducted within the debtor's locality, the Board might be conscious of a number of local factors which could be relevant to the repayment of the debt. The submission to conciliation, therefore, could produce a very different result from that which the creditor might have obtained by way of adjudication.

V. The Overall Place of Conciliation within the Legal System

It is important at the outset to conceive the Sri Lankan legal system within the broad framework of Western Jurisprudence. The institutions of the law, the substantive rules of law, the procedures providing the access to law, the techniques of deduction, the analysis of the principles of law, and the modalities for dispute settlement through legal instrumentalities, have all been spun from within a western legal tradition. The English legal system and the Roman Dutch Law have, to varying degrees, provided the basic materials for the Sri Lankan legal system. Despite the fact that these elements have come from two different sources, it is abundantly clear that the skills of British colonial legal creativity have blended these disparate strands into a single common principle to anchor the colonial legal system of Ceylon to the bedrock of colonial legal institutions which were handed down to independent Ceylon in 1948. It is this institutional edifice that the Bandaranaike Government confronted when it enacted the Conciliation Boards Act of 1958.

The overall position of the Conciliation Boards in the legal system may be assessed at two levels. First, the procedural level. This is covered by Section 14 of the Act to which reference has already been made. The substance of the section suggests the creation of an institutional by-pass by which access to the courts is made conditional upon a prior submission for conciliation. The established nature of the legal institutions which Ceylon and Sri Lanka had inherited from the colonial administration made it difficult for the Government, at this late stage, to introduce fundamental changes into the existing colonial legal structures. Conciliation methods for settling disputes, it was found, could not be accommodated that easily within a system geared towards maintaining an adjudicatory process. Consequently, as a kind of a via

media between the complete elimination of the colonial institutions and the integration of the conciliation process into those institutions, Section 14 of the Act succeeded in creating an institutional by-pass. At the time the Boards were created, the Government hoped that the force of this change in the direction hitherto taken in settlement of disputes on the Island, would carry to fruition a fundamental change in the attitudes of the citizens towards the whole process of dispute settlement. It is to this that we will turn next.

The second level of our assessment is the substantive level. Here the analysis shows that the decision to do away with strict rules of evidence ⁹⁵ and the lawyers' right of audience have been dictated by a desire to introduce popular participation into the process of settling disputes. The elimination of legal technicalities has to a large measure paved the way for popular representation at the panel level. Thus in a village, ⁹⁶ 35 miles from the capital city of Colombo in the North Western coast of the Island was a Conciliation Board which was studied in the course of this research. The Chairman of the Board was the Headmaster of a local central school. He was a graduate in the Sinhala medium and was related to the village community by marriage. He was also an active member of the local branch of the political party then in power. The rest of the Board was composed of the following four members. First, there was a person of no more than third grade education in the vernacular. By profession he was a coconut husker. His earning power was geared to what he could acquire by his own labours. He did not own land in the village except his own dwelling. He had no accumulated capital to rely upon. Second, there was an individual who had a basic vernacular education. By profession he was a coconut toddy tapper. Third, there was a village farmer with no significant vernacular education. The fourth too was a farmer, again with little or no education. Each of these members possessed common characteristics. They were neither wealthy nor had powerful political or economic connections. They were each respected members of the community. They had no criminal records. They were regarded as honest and incorruptible. They were the very epitome of the common man. Their participation as members of the Board was made possible by the removal of some of the

technical rules of procedure, of evidence and of law. The object of the conciliation procedure was not to produce an outcome desired by law but rather to reconcile the dispute to the satisfaction of the disputants. The tools for conciliation were not rules of law but the standing of the Board in the eyes of the community. Conciliation pressed into service not the rules of the law, but compromise and persuasion. The institutional framework within which the Boards functioned was very different from what the nation had inherited from the colonial era. To that extent it may be said that the creation of Conciliation Boards constituted an institutional bypass to the Sri Lankan legal system. The fall of the Bandaranaike Government on the 21st July, 1977 brought the system of conciliation to a halt by removing members of all Conciliation Boards without appointing their successors. Thus the whole process of Conciliation was made defunct.

VI. The Effectiveness of Conciliation as a Process

(a) Comparison with adjudication

Although conciliation and adjudication have similar goals in view, namely the settlement of disputes, yet the routes chartered for the two processes remain fundamentally different and distinct. The adjudicatory process is usually locked into a concretized hierarchical court structure. The belief is clear that the adjudicatory process could lead to inconsistencies and errors and, therefore, a system of appeals for their correction and clarification is thought to be a necessary element that should be built into that system. In the common law tradition, particularly among the nations that once were British dependencies, there are at least two, and sometimes three levels of appeal: firstly, to the Divisional Court or the Supreme Court of Judicature. The latter constitutes a single bench hearing while the former may constitute a hearing before a two member bench or a three member bench. The second level of appeal is to a Court of Appeal, consisting of a three or five member bench and the final appeal is usually to the House of Lords or to the Judicial Committee of the Privy Council in London. In some instances the final hearing may be held in a court within the country in question. It is only in a very few instances that appeals now lie to the Privy Council in the United Kingdom. ⁹⁷

Conciliation logically excludes the need for an appellate procedure. For, once the parties have voluntarily decided upon a course of action as a settlement of their dispute, it is wrong in principle to re-open the door leading to further disputation. Therefore, one of the classical differences between adjudication and conciliation is the need to establish an appeals procedure for the former while recognising the need to prevent appeals against the decision arrived at through conciliation in the latter.

The adjudicatory procedure must be viewed as a narrow construct. It utilises rules which may be traced to the sources which the system recognises as those capable of generating valid law. Legislation, judicial decisions subject to the doctrine of stare decisis and custom would, for the common law tradition, be regarded as legal sources. In contrast, the conciliation process would recognise a broader vista of operation, taking into consideration the totality of elements which characterize a given society. These may include the norms for social organization, the criteria for economic decision making, the criteria for determining a value system within a society, and a whole catalogue of such socio-economic, cultural and political factors. It is important to grasp this flexibility upon which the conciliation process rests. The adjudicatory process rests upon the belief that legal norms must apply uniformly to all within a given legal category. In criminal law, the differences pertaining to the circumstances of the offence are noticed by means of mitigation with reference to sentencing. The adjudicatory process does not take personal differences, differences in status and such other non-legal elements into consideration, while the conciliatory process does take into consideration all manner of facts which are relevant to the dispute. It is this that renders technical rules of evidence inappropriate to the conciliatory process.

The adjudicatory process relies upon the availability of an identifiable and consistent source for the creation of law. This reliance is a result of the need to use 'law' as the criteria for dispute settlement. The conciliation process as a matter of principle avoids the utilisation of norms. The essential element of this process is to utilise facts, circumstances, social consequences, economic pointers, political advantages, community interests and

a host of such factors which do not strictly fall within the perimeter of law, as instruments for dispute settlement.

The adjudicatory process disassociates the organs which create the law from the organs which apply the law. In a relative sense, the adjudicatory process espouses a doctrine of separation of powers. This is both a necessary and a crucial part of the adjudicatory process. The idea is alive that those who make the laws are not their best judges. Carved out of Montesquieu's doctrine of separation of powers is the fundamental rule that the law-making organ must not supply to those who judge those laws anything other than the law itself.⁹⁸ Where Conciliation Boards constitute the primary organs for settlement of disputes, the association of the fori for formulating normative orders and guidelines with the fori which settles disputes has been regarded as a necessary element in the conciliation process. The Conciliation Boards in Zanzibar,⁹⁹ Cuba¹⁰⁰ and The People's Republic of China¹⁰¹ are classical examples. The success of their conciliation process is linked to the fact that the persons who are involved in the law-creating process are the same persons who are called upon to participate in the process of settling disputes.¹⁰² Under the banner of 'popular participation in the dispensation of popular justice', the aforementioned countries encourage the fusion of the norm creating organs with the organs responsible for the settlement of disputes. The argument is often made that such a system could support internal consistency in settling disputes rather than cause the dissensions associated with an adjudicatory process conducted within a framework of separation of powers.

The adjudicatory process rests largely on the efficacy of the legal profession. The need to unravel the law, the need to argue its logical consistency, the need to identify the facts and the need to relate the law to the facts are all considered as pointing towards the need to perpetuate a strong legal profession. The fact that norms do not form the basis for the conciliation process, by implication, calls for the total elimination of the role played by the legal profession.

This leads to the total absence of specialized techniques of thought and particular types of analyses and arguments which do not consider the common social and political trends prevailing during the proceedings before a Conciliation Board.

It needs no particular mention that the foregoing could have frustrated the workings of the Conciliation Boards in the absence of legal expertise among the members of such Boards.

The dispute resolution process within an adjudicatory framework is often shrouded in mystery and is grossly ritualistic. This is intended to provide the 'psychological punch' to those who are called upon to observe the law. Within the adjudicatory process the complex of fear is preponderant. The conciliation process functions best within an atmosphere of informality. The absence of ritual and mystique is characteristic of the informality which pervades the whole process of conciliation. This encourages a free dialogue among the disputants and the members of the Conciliation Board. The two processes differ fundamentally in two further aspects. In the area of remedies, the adjudicatory system is geared towards the ordering of human conduct -- towards compensation, right-recognition or punishment. In contrast the conciliatory process arrives at a settlement. The settlement may embody all the elements that may be contained in a judgment reached as an end-product of the adjudicatory process. But these would appear in a different guise; namely, as a result of a compromise mutually agreed upon, and having the sanctity of an agreement freely arrived at between the parties, not as a result of an exercise of a legal right by one over another, but as a result of a voluntary assumption of rights in the belief that such is beneficial for their common well-being. If the settlement arrived at and agreed upon before the Conciliation Board is repudiated within the 30 days allowed for that purpose, the slate is wiped clean, and the parties may thereafter proceed to litigation before a Court of Law. The proceedings before that Court, is a hearing de novo and not to be considered as any kind of appeal from the Conciliation Board. Therefore, the decision to accept the settlement and thereafter to remain bound by it must ultimately rest on the free choice of the disputants. In no way does the coercive arm of the executive intrude into the process of conciliation before the Boards.

Lastly, it must be emphasised that while in the adjudicatory process there is a party who succeeds and a party who loses, in the conciliation process there is neither a victor nor a vanquished.

Parties are required to give a little and take a little. The resulting agreement is a voluntary conclusion that the disputants have reached with the advice and persuasion of the Board. The conciliation process has its sights set on achieving greater social cohesion and stability. Its goals are to produce a compromise solution rather than a condemnation of one in the favour of the other.

The foregoing catalogue of differences is meant to support the view that has been previously espoused. Namely, that the two systems are different and distinct in a fundamental way.

VI(b) Description of the manner in which the process is employed

One of the key questions about which clarification appears to be wanting is this. Who under the Conciliation Boards Act has the power to initiate the conciliation process? Section 6 of the Act is the only available guide in this matter. The preamble to that section indicates that upon application made to the Chairman of the panel of conciliators, he may thereafter refer the matter in dispute to the Conciliation Board for inquiry. The section is unclear as to whether the application should come from one of the disputants or from some other interested party or from the police in criminal matters. There have been no regulations promulgated under section 17 of the Act clarifying this problem. However, the tendency among the Chairmen and the panels, according to Goonesekera and Metzger, is to admit complaints made by anyone who has an interest in the matter, which necessarily includes the police in criminal cases. Once the complaint is made, or the claim is communicated, the Chairman, under section 8 of the Act, summons the parties to appear at a hearing on an appointed date. A refusal to appear or a failure to appear, upon being summoned, will, under section 8(4)(b), constitute an offence. The party in default will, at that point, become liable to a summary trial before a Magistrate and, upon conviction to a fine not exceeding one hundred rupees.

When the parties appear before the Board in response to the summons, the conciliation process commences. This process involves both the hearing of oral testimony and the admission of documentary evidence. The parties may call witnesses in support of their claims and these witnesses may be questioned either by the members of the

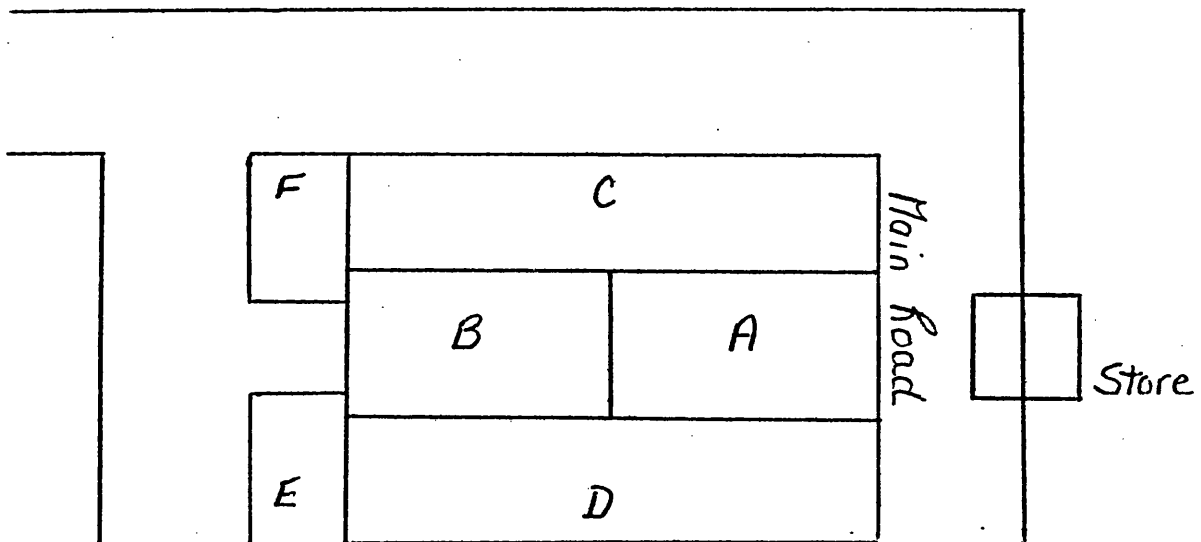
panel or by the parties to the dispute, with a view to eliciting the true facts pertaining to the dispute. By section 11 of the Act:

"Every person who gives evidence before a Conciliation Board shall, in respect of such evidence, be entitled to all the privileges to which a witness giving evidence before a court of law is entitled in respect of evidence given by him before such court."

By section 16, the proceedings before the Conciliation Board have been characterized as 'judicial proceedings.' This, by implication, makes the evidence given before the Board judicial evidence and therefore subject to the law relating to perjury. The witnesses are subject to a judicial oath, which is administered by the Chairman of the panel.

The proceedings before the Board take the form at times of a dialogue. The members of the Board may sometimes engage themselves in an admonition, in a friendly persuasion, in an explanation, or in tendering advice to the disputants.

To quote an example from a Conciliation Board, from the North Western Province: ¹⁰³ there was before that Board a dispute concerning a right of way.



Lots A.B.C.D.E and F were owned and occupied by members of the same family. The owner-occupant of lot B for decades had a right of access to the main road and the store across A's land. A's children, having secured government employment, moved to the capital city of Colombo. They subsequently sold lot A for the highest offer.

That offer was made by an outsider. (Neither B, nor the other neighbours to lot A were able to find the necessary money to match the outsider's offer.) The outsider Z went into occupation of lot A. While preparing to build on lot A, he, Z, set up a gate at the point at which B had, for decades, crossed on to lot A to gain access to the main road. B became apprehensive and sought a declaration of an easement over Z's land, namely lot A. The Conciliation Board engaged in the following dialogue:

Chairman: (addressing B)

For this long you have not taken steps to regularise this claim. What makes you bring this up now?

B: Now we have an outsider owning and controlling our ancestral property. He has no reason to consider my right.

Chairman: But he has not prevented you from walking across that land. He has in fact erected a gate and has made access easy. Formerly you had to jump over two strands of barbed wire. Now there is a gate.

B: Yes, but who has the key to the padlock. He could shut me out any time.

Chairman: (addressing Z)

Why did you put a gate there?

Z: Cattle have been jumping over the barbed wire bent and tied together previously to facilitate ingress and egress to my land. I plan to build a house and farm. I need to keep the cattle out. So there is a gate which B should close each time he opens it. There is also a gate, now, at the entrance to the main road.

Chairman: Do you envisage any situation in which you intend to keep B out?

Z: Surely it must be clear to B that I am an outsider in this village. I have no kith and kin here. If I were to survive in this village I have to do everything in my power to be a good neighbour to B and his other relatives. It is I who has to travel that extra distance (extra mile) to keep within the friendship of the village. So do you think I am such a fool (so insensitive) as to act against my own interests?

That set the tone for the conciliation process. The panel convinced B that it was in Z's interest to keep the access to the main road open for him. B accepted that position and the parties departed without having had to enter into a binding agreement. It may be pointed out that B, in my view, could not have claimed, on the available evidence, an easement in his favour before a court of law. Had there been no conciliation process available to them, B would have unsuccessfully litigated the matter before the civil courts. The result would inevitably have been to create an almost permanent state of enmity in the relationship between B and Z. The right of way could, for all practical purposes, have been lost by such an attempt to assert it.

It must be said that the Conciliation Boards do not always extract binding agreements from the parties. In many cases the parties agree to a particular course of action and in most cases these have been faithfully followed. ¹⁰⁴

VI(c) The Extent to which disputes before Conciliation Boards are eventually taken before the Courts.

Unlike the method of conciliation through arbitration adopted in the United Kingdom, Sri Lanka does not recognise the right of appeal from Conciliation Boards to Courts ordinarily constituted. In the jurisprudence of Sri Lanka, the Conciliation Boards occupy a distinct and separate system for dispute settlement, resting on principles which are peculiar to them. To that extent, a dispute before a Conciliation Board constitutes a very different thing to that before a Court ordinarily constituted. The latter while being an adjudicatory process where the voluntary consent of the parties to the processes leading to the settlement becomes irrelevant and inconsequential, the volens and the acquiescence of the parties to the dispute to go before the Board was considered as the corner stones for conciliation. The results obtained by the Board to a very large measure depended on the willingness of the parties to settle their disputes irrespective of their legal rights. The recognition of these basic differences led the Minister of Justice, ¹⁰⁵ in 1958, to separate the two systems.

The Act recognises the right to bring a dispute which had been heard by a Conciliation Board before the ordinary courts in two

situations. First, where the parties have failed to reach an agreed settlement before the Conciliation Board. And second, where, a settlement having been agreed upon, at least one of the parties to the dispute had subsequently exercised the power recognised under Section 13 of the Act, to repudiate¹⁰⁶ it. In either event the matter could go before the ordinary courts. It must be emphasised that where the parties have agreed to a settlement and have not exercised the power given to them under Section 13 of the Act to repudiate that settlement, within the statutory period of thirty days,¹⁰⁷ the matter cannot thereafter be raised before the ordinary Courts. Here again a difference may be detected. Where a judgment has been handed down by the ordinary Courts an appeal against that judgment is a right recognised generally by all countries. But in conciliation, where acquiescence and volens play a predominant role, revocation within 30 days of a settlement once agreed upon, leads not to an appeal process, but to a first hearing within a new process of dispute settlement, namely Adjudication.

Once the proposition is made that the jurisdiction of ordinary courts is limited to matters in which no settlement has been obtained by conciliation, then it becomes axiomatic that the hearing before the ordinary courts is not an appeal from a judgment but a hearing de novo. For there is nothing from which an appeal could be launched. The matter comes up for hearing as a new matter, which thereafter leads to a judgment, binding upon the parties, not as a consequence of an agreement but as a result of the Court's jurisdiction to hear and determine the matter in accordance with the Law. This, therefore, should explain that in the way the Conciliation Boards are set up and in the way their functions are described,¹⁰⁸ their hearings do not in any event give rise to an appeal to the ordinary Courts. They merely constitute the terminal point of a particular process for the settlement of disputes in Sri Lanka, namely, the extra-judicial process, which forms an alternative to the Courts as a means of dispute-settlement.

VII. Attitude towards the use of Conciliation

(a) The Advocates

The exclusion of legal representation from Conciliation Boards, coupled with the need to proceed to conciliation as a condition pre-

cedent to commencing legal proceedings before ordinary Courts, was viewed by the legal profession more as an attack on their economic interests than as a challenge to their profession. The threat to their economic interests was felt mostly by the rural members of the legal profession. It was right that their opposition to the Conciliation Boards Act was the most vociferous, for the Boards were constituted soon after the passage of the Act, in the rural rather than in the urban areas. Certain towns like Colombo, Galle, Kandy and Jaffna have never had Conciliation Boards. This apparently was a result of a policy decision in which the Governments of the day had decided not to appoint any members to a Conciliation Board in these municipalities. Despite this decision all four municipalities were given Rent Control Boards which were partly Conciliation Boards and partly quasi-judicial tribunals. The urbanity and sophistication of the society in these municipalities may have made the Conciliation Boards a necessary evil that had to be endured before the parties could go into a Court of Law. The Society may not have received the Conciliation Boards with the kind of respect and faith with which they were received by the rural society in the rest of the Island. That may well have been a consideration that may have influenced the Administrations at the time.

The legal profession criticised the Boards for several reasons.¹⁰⁹ The legal profession sought from the Government the judicialisation of conciliation proceedings so that, in their view, the proceedings would be more systematic and less arbitrary. They asked for the appointment of lawyers as chairmen, a reduction of the Boards' ambit of jurisdiction and the strict application of the Evidence Ordinance. The profession further sought the exclusion of Section 14 so that the effect of the rule in Nonahamy v. Halgrat Silva¹¹⁰ could be avoided. (It may be recalled that under the Nonahamy rule, conciliation in matters mentioned under Section 6 of the Act is a condition precedent to instituting proceedings before the ordinary Courts, both in civil and criminal matters. The legal profession desired the removal of this condition.) Finally, the profession asked for the right to be given to their members to appear and represent parties before Conciliation Boards, as legal representatives of the disputants. It seems to be clear that insofar as the

foregoing comments are concerned the lawyers were in fact seeking to have their position before the Conciliation Boards established so that, in purely economic terms, there would be open to them an additional judicial forum before which they could appear for a fee. The Government was clearly opposed to providing an additional forum to serve the economic well-being of the legal profession. The government considered comments from the legal profession about Conciliation Boards with scepticism. Goonesekera and Metzger¹¹¹ have said:

"Lawyers' distrust of the Conciliation Boards scheme has taken concrete form in some local law societies by gentlemen's agreements that lack of a section 14 certificate will not be pleaded as a defence in certain types of cases. Judges have been aware of such practices, but have allowed such collusion to take place in their courts."

Aside from the foregoing catalogue of defects raised by the legal profession, Goonesekera & Metzger¹¹² suggest a number of other reasons why the legal profession should be particularly critical of the conciliation process. "The unavailability of extraordinary reliefs like injunction or arrest and sequestration before judgment -- without first going before a Conciliation Board has been viewed as a source of delay which negates the very purpose of these remedies."¹¹³ Before Conciliation Boards, the rules of law had no relevance. The Board is merely charged with the duty to work towards an agreed settlement. Therefore, the settlement, once in esse, could compensate for the loss sustained by delay or for the unavailability of the aforementioned extra-ordinary reliefs. However, where an agreement cannot be obtained and the parties do decide to seek the aid of the Courts, then the loss by delays caused or by the unavailability of the extra-ordinary reliefs could become substantial because such reliefs may by that time have become useless. In such cases, the parties may have to seek other methods of relief such as a resort to damages.

The authors¹¹⁴ have raised another danger in the conciliation process. They say:

"Concern has also been expressed that settlements are entered which bear no relation to the parties' legal rights. The concern is that the parties are negotiating a settlement in an environment much different from the one which would

prevail if they were aware of their rights and of the probable view of their case which would be taken by a Court of Law. It is also felt that the protective provisions of certain social welfare legislation are being negated by settlements entered in ignorance of their existence."

This again is an obvious comment. But it must be remembered that when a person goes to conciliation, he does so not with the idea of scoring a right or an advantage over his adversary but intending to arrive at a settlement which is in consonance with social harmony. The aim must be to settle the dispute while at the same time maintaining a harmonious relationship among the disputants. If the latter is not the goal, then the disputants could determine their legal rights by refusing to accept the settlement. Or they could, even after accepting a settlement, consult lawyers as to whether their rights according to the law could be any better, and then decide to invoke Section 13 to repudiate their agreement. That would necessarily pave the way to litigation before the ordinary Courts. Therefore, the comment made by the authors fails to take into consideration the goals set by the political party in Government which piloted the Conciliation Board's Bill through Parliament into Law.

The authors ¹¹⁵ make a further point that the Boards often exert a degree of psychological pressure which helps towards arriving at a settlement. They say:

"The coercion is in the accumulated social standing and authority of the conciliator, which to a simple villager may seem quite formidable. Even if parties and conciliators sit round a table and the atmosphere is informal, there is a physical and psychological distance separating them. Conciliators in the bona fide belief that any settlement is better than allowing parties to go to Court recurringly use the same arguments on parties -- chiefly the justness of the proposed settlement, the folly of going to Court and wasting both time and money, and the need to act decently. In this atmosphere it may be difficult for the parties to reject a proposed settlement."

Again, the authors ignore the fact that the party who has been psychologically coerced into accepting the settlement would be the first to seek legal advice and proceed to repudiate the settlement under Section 13. Therefore, the fact of acceptance under psycho-

logical coercion, ought not to affect the justice of the agreement. For there is always a way out for those who feel that the settlement is not in their best interest.

Thus although members of the legal profession reacted adversely to the Conciliation Boards, their opposition was largely based on their own economic interests rather than the substantial issues characteristic of the conciliation process. Many of the larger issues mentioned here may be viewed within the broader context of the principles underpinning conciliation, such as social cohesion. Viewed in that light, the criticisms made by the authors, Goonesekera & Metzger, lose their initial validity. The availability of the power to repudiate a settlement within 30 days is crucial to the justice of the whole conciliation process. The authors have failed to emphasise that fact in their paper.

But according to the statistics which the two authors have quoted ¹¹⁶ from data made available to them by the Minister of Justice, the percentage of disputes settled by the Conciliation Boards on the Island was as high as an average of 58%, over a period of five years between 1964-1969. According to the statistics: In 1964-65 the settlement rate was as high as 82%. In 1965-66 the settlement rate was 78%. In 1966-67 the settlement rate was 43%. In 1967-68 the settlement rate was 37% and lastly in 1968-69 the rate went up to 47%. This gives an average settlement rate of 58% over the five year period. A comment that could be made is that during the period between 1965-69 the Island was governed by the United National Party, which had opposed the Conciliation Boards Bill from the opposition. It is also important to mention that during their tenure of office they showed little interest in appointing members to Boards which had suffered vacancies - either through death or expiry of their mandates. According to the figures available at least four districts - Moneragala, Mannar, Jaffna and Amparai - had no panels functioning during this lean period.

VII(b) The Judges

During the course of his judgment in the Nonahamy Case, ¹¹⁷ the then Chief Justice wrote:

"The function of the Board is beneficial and quite unobjectionable, because it is

a function which is often performed by mutual friends or disputants or, by administrative officials. If the Boards effort at making peace fails, and, if recourse to the judicial power is not avoidable, it is the Courts alone that can exercise the power. I am therefore unable to agree that insistence upon a production of the certificate referred to in s.14 of the Act in any way constitutes an erosion of the jurisdiction of the Courts. There is no ousting or erosion of judicial power, unless such a power is taken away from the Courts and conferred on some other authority." 118

The judges have consistently taken the view that the Conciliation Boards have not threatened their jurisdiction and that "the provision does not bear -- any semblance of a control of the Judiciary; if control is at all involved, it is only a somewhat loose control of the litigant's right to institute an action, by (at the worst) delaying the institution." 119 Although this has been the clear line of approach, some members of the judiciary have taken a less open view of their opposition to the Conciliation Boards.

In Wickramaratchi v. The Inspector of Police 120 Alles J., took the view that the requirement to seek conciliation was not a prerequisite to instituting legal proceedings but was an optional procedure open to the disputants. The Court in Nonahamy disagreed with that view. 121 In the Nonahamy case, 122 Alles J. in his dissenting judgment made the point that:

"It has not been established since the decision of the Privy Council in The Queen v. Liyanage 123 that the judicial power of the state has been unaffected by the Constitution and rests on the provisions of law under which the Court's function (the Charter of Justice of 1833 and other laws including the Court's Ordinance). Therefore, if the Legislature required the subject to obtain a certificate from an officer appointed by the Executive it would appear that it authorised a procedure which did not secure to the judiciary, in the words of Lord Pearce, "a freedom from political, legislative and executive control". To this extent, therefore, a law which requires recourse to a Conciliation Board before an application is made under Sections 86 or 87 124 is one which is likely to affect the jurisdiction of the District Court in preventing the

subject from obtaining an effective remedy, for the practical effect of such a course would be to make the law laid down in sections 86 and 87 almost a dead letter. Such a deprivation would be tantamount to an interference with judicial power. When the relief available under Sections 86 and 87 is circumscribed in this manner, being dependent on a certificate issued by the Chairman of a Board of Conciliators, there is, in my view, an ouster of the jurisdiction of the District Court and a conference of such power however limited it may be, on a Conciliation Board (where a proceeding is deemed to be a judicial proceeding) in the sense that the subject is denied an effective remedy." ¹²⁵

It is this reasoning of Alles J which the learned Chief Justice and Wijayatilake J. rejected in the Nonahamy Case. Despite the unequivocal statement of the law by the majority in subsequent decisions, the Sri Lanka judiciary had made some successful inroads into the rule requiring a submission to conciliation before resorting to adjudication. In several decisions ¹²⁶ after The Nonahamy Case, the Sri Lanka Courts have held that a failure to raise the issue of non-submission to conciliation at the commencement of the judicial hearing would bind the parties to the resulting judgment. In Kurera v. Fernando, ¹²⁷ the defendant petitioner sought to have a consent decree directing him to pay Rupees 7000 set aside on the grounds that the action and the proceedings were null and void. The reason being that the parties had not been to conciliation before proceeding to litigate. The Divisional Court held that it was too late to raise the issue of failure to go before the Conciliation Board. In Fernando v. Fernando, ¹²⁸ the defendant raised the issue regarding non-submission to conciliation at a point after the commencement of the hearing. The Divisional Court held that that was too late a stage to make such an application. The Courts have taken the view that the issue is one of jurisdiction. In Kurera v. Fernando, ¹²⁹ Samarawickrame J. wrote:

"It will be seen that the objection that the Court lacked jurisdiction was taken and the want of jurisdiction was apparent at a very early stage. Where want of jurisdiction appears from the pleadings or on the face of the proceedings there is a

patent want of jurisdiction and it is the duty of the Court to stay its hand. In such cases the objection to jurisdiction may be taken at any stage. The position appears to be different where the want of jurisdiction depends on the existence of facts which are not brought to the notice of Court. If a defendant fails to plead or prove such facts upon which the want of jurisdiction depends and permits the Courts to proceed to hear the action then he may be precluded by his conduct from seeking to rely on those facts at a later stage." 130

This line of reasoning helped the legal profession, though unwittingly to generate their own responses for the diminution of the total effect of Conciliation Boards. The legal profession, particularly in the rural areas, proceeded to propagate the idea that gentlemen's agreements between opposing counsel not to raise the issue of non-submission to Conciliation should, as a matter of expediency, permit of the Conciliation process to be by-passed and directly to litigation before the Courts. Provided that this gentlemen's agreement is kept, at least during the initial stages of the trial, the disputants (or their counsels) may not at a later stage raise this issue in order to defeat the effect of the resulting decree. The judges are aware of these gentlemen's agreements and have taken the view that they would not allow this question to affect the remedy they may hand down.

In Jayawickrema v. Nagasinghe,¹³¹ De Kretser J. wrote:

"I do not think that a plaintiff, if it is found that he should in fact have filed a Section 14 Certificate with his plaint, could complain of prejudice even legally when his effort to mislead the Court into entertaining his plaint is found out. The fact that a defendant who takes the objection late is perhaps resiling from what is called a "gentlemen's agreement" between plaintiff and defendant or more likely their respective lawyers, is no reason for penalising the defendant, when the plaintiff is as much to blame in what alone the court should resent, Viz the effort to mislead it into thinking that it has jurisdiction, for the Court acts on the facts as pleaded before it and not as they actually exist." 132

Looking at the policy behind the Conciliation Boards, the legislature should have changed the procedural law of the Island to make it a positive requirement that a certificate from a chairman of a Conciliation Board should be a pre-requisite to the proper filing of a plaint, in order to commence a judicial proceeding. By tying their requirement to the law of procedure, rather than leaving it as a matter of jurisdiction, this large loop hole could have been conveniently plugged. It is regrettable that neither Goonesekera and Metzger¹³³ nor the Ministry of Justice had considered this approach to remedy the situation. Goonesekera and Metzger had, however, detected¹³⁴ this defect and its concomitant ill effects. Regrettably, they do not seem to have condemned the gentlemen's agreements which appear to subvert the purpose of the conciliation process - namely, to provide an effective alternative to litigation.

In the context of the legal tradition espoused by the Sri Lanka judiciary, the judges do not openly debate questions of government policy. Where government policy appears to be unacceptable, the path chosen by the judiciary is to test it against settled legal principles. In doing so, if the policy appears to be in harmony with such principles, the judges implement such policy within the total conceptual framework of the legal system. Where policy conflicts with settled legal principles, the judges stop short of condemning them by refusing to implement them, because they are not law. The requirement to submit to conciliation before proceeding to litigation falls under the former category. It is known to English jurisprudence, which forms a large area of the jurisprudence of Sri Lanka, that parties could contract to submit their dispute to arbitration before proceeding to law.¹³⁵ It is equally known that such issues are involved with questions of jurisdiction which require to be raised as preliminary issues at the commencement of any trial. Therefore, it is correct to say that, without more, the Nonahamy decision merely raises a question of jurisdiction and therefore a failure to raise that issue at the commencement of the trial makes it a lost issue. By implication, these matters did collectively defeat the very purpose of the Act.

VIII. The Future of Conciliation

(a) The Perceived Role for Conciliation Present and Future

The change of Government on July 23rd, 1977 makes it somewhat

difficult to assess the future of the conciliation process for Sri Lanka. The Conciliation Boards Act remains on the statute books, but the whole process of conciliation could be thwarted by failure to appoint Board members. No sooner had the new Government assumed office, at the end of July 1977, the then Ministry of Justice issued an order, under the power vested in him by Section 3, sub-section (7) and Section 4, sub-section (3) of the Act, removing members and chairmen of all Conciliation Boards. That put the entire conciliation process into a state of suspended animation. Until such time as new members of the Board and new Chairmen are appointed, parties may proceed directly to litigation without first going to conciliation. An area without a panel of conciliators was regarded as an area in which there were no Conciliation Boards. This permitted the disputants of that area to proceed directly to adjudication. In Chandra de Silva v. Ambawatta ¹³⁶ the Divisional Court held that where only one of the disputants is within a Conciliation Board area and the other is not, there is no requirement to seek Conciliation before proceeding to courts. However, where both disputants are within an area without Conciliation Boards then there is less reason to seek Conciliation before proceeding to courts.

The possibility that the conciliation process may be re-started is a remote one. The present Government, while in opposition, opposed the Conciliation Boards. Their argument was that the whole process of Conciliation through Conciliation Boards bred untold political corruption. The appointments of Board members under Section 3 of the Act and chairmen under Section 4 of the Act, it was said, were motivated by political considerations. Besides these arguments, the present Government while in the opposition continuously charged the previous regime with the violation of legal norms and the creation of para-legal or non-legal bodies to compete with the established legal institutions of the Island. The Criminal Justice Commission was one of their targets. Soon after the new Government had taken office, it abolished the Criminal Justice Commission and released those who had been incarcerated under sentences imposed by that Commission. The trend, therefore, is clear that the present Government will not be a party to the re-establishment of para-legal or non-legal bodies to provide an institutional by-pass to the courts ordinarily constituted. This appears to provide

one of the basic political principles upon which the present administration is based. Therefore, the indications are clear that the future may not see Conciliation Boards in the shape and form in which they were previously constituted; as for the present, they appear to be in a state of abeyance.

VIII(b) A Review of the Societal Perspective on Conciliation as an Effective Legal Process.

It must be said at once that Conciliation processes for settling disputes presents three types of models. Each model appears to cater for certain types of societal perspectives. Each of the models shares certain common characteristics but their differences are both distinct and fundamental.

The First Model:

Within this model one may find two parallel systems of conflict resolution. Firstly, there is a formal system of conflict resolution by an hierarchical court system. Secondly, operating side by side with this formal system, is to be found an informal system for conflict resolution. The two systems remain associated, with a built in appeal structure, whereby appeals originating from a decision arising out of the informal system go to the formal system. Each system may formulate the nature and the form of the appeal procedure, but the link between the two systems remain formal. Examples of these could be found, particularly, in Cuba, the Soviet Union and in Mainland Tanzania. The Soviet and the Cuban Comrades Courts and the Tanzanian Peoples Courts are associated with their respective formal systems by an appeal procedure.

The Second Model:

The second model closely resembles the first model in that it has a formal hierarchical Court system functioning side by side with the informal system. But, unlike the first model, there is no inter-connecting association between the two systems which could make one supplementary or complementary to the other. The Conciliation Boards of Sri Lanka supply what is perhaps the only example of this model.

The Third Model:

The third model resembles the other two models in a very small way, namely that it has an informal system for the settlement of disputes. It differs from the other models in that the principal means for settling disputes are all basically informal. Notwithstanding the fact that it has several different fori for settling disputes, with an inbuilt appeal system, each fori espouses an informal, conciliatory method for dispute settlement rather than a system which relies unduly on the correct application of rules and established procedures. Perhaps the only available example of this model is the Peoples Republic of China between 1966 and 1977. ¹³⁷

These three models of conciliation, to varying degrees of sophistication, have served the task of social engineering. The central theme for the Conciliation process was to draw in people as a whole from the periphery of the socio-political unit and towards the centre of a new society. Popular participation was extended to the institutions that administered justice. There was also a transference of the broad categories of state functions from governmental organs to "social" agencies. The countries that have adopted the three aforementioned models portray a classical Marxist bias.

They have viewed "law" and its institutions as instruments of coercion and domination particularly when they rest in the hands of a dominant social class. The conciliation process was viewed as a means towards annulling that undesirable association and as a distant signal indicating a movement towards a gradual 'withering away of the law', and therefore of the State. This is a significant guideline along which the countries concerned with the three models have proceeded in developing their own conciliation process.

The formal systems of dispute settlement do not concern themselves with the educational role of the process. Punishment, the Marxist jurists believe, does not result in remaking the collective conscience of a society. Both the Organic Law, creating the comrades Courts of the Soviet Union, and Khrushchev's speech at the 21st Party Congress, laid down the theme that the Comrades' Courts were responsible at carrying out the all important task of re-

making the conscience of the people. ¹³⁸ Dr. Neelan Tiruchelvam, while calling this the paternalistic elements in the legal system added:

"The relative absence of status differentiation between tribunal and disputants, the informality and the flexibility of their procedures, the social and physical proximity of the proceedings to the location of the dispute or the violation, enhance the effectiveness of the popular courts in re-shaping the attitudes and behavioral patterns of workers and residence." ¹³⁹

The educative process helps both in the enforcement of the laws and in the effective settlement of disputes under the laws. This necessarily involves the diminution of the quantity of the laws and the simplicity of the terminology in which they are couched. In a system like in Sri Lanka, where the laws are many and where all the laws are expressed in legal terminology borrowed from the colonial era, the Conciliation process had no choice but to abandon all normative propositions and resort to broad principles of basic social justice between two citizens administered within a broad socio-economic framework. This draws into the centre of the conciliation process non-legal considerations which in turn raise the need for mass mobilization as a key to the success of the process.

One of the all pervading social consequences of the Conciliation process was the re-establishment of the channels for an urban-rural dialogue. The re-activation of the old Gamsabhava system (to which reference had been made at a very early stage of this chapter) in the form of Conciliation Boards has brought into the forefront of social thinking a return to the roots of Sri Lankan society. A return to the roots necessarily indicates a return to a responsive attitude to rural demands; for it is the rural, and not the urban communities that have remained the repository, if not the guardians, of ancient Sri Lankan heritage. This move away from the urban to the rural has introduced into Sri Lankan Society new social and political dimensions, by diluting the political power of the elitist bourgeoisie and thereby strengthening the power of the rural proletariat. As the composition of the Conciliation Boards indicate, the Conciliation process gave birth to a new era, the era of the common man, vernacular educated, and untouched by

alien sophistry. The Boards form one of the several pieces of this whole jig-saw puzzle. Associated with the Conciliation Boards were a number of new social reforms: - for example, the People's Committees, the language switch-over from English to Sinhala, the Land Reform Movement, the ceiling on incomes policy, the Educational Reforms and a whole set of other and somewhat minor reforms. Taken as a whole the Conciliation Boards demarcate a particular stage in the development of Sri Lanka. The creation of the Boards indicate the important role which the society as a whole could play in settling disputes, so that the system of adjudication inherited from the colonial period appears more as an alternative dispute settling method, rather than the only effective means for maintaining social harmony as an important contribution towards progress and development.

Part D

Law, Economy and Development

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- Chapter 12: The Legal Framework for Financing Development. Pages 474-515.
- Chapter 13: Institutional Supports for Development. Pages 516-557.

Chapter 11

Land Policies and Development

I. An Introduction

It is important to commence this chapter with a brief summary of the Law relating to Land holdings in Ceylon. The position of the English Law in Ceylon was in the nature of 'imposed law' introduced through Statutes, while the common law of the Island was the Roman Dutch Law, evolved over one and a half centuries of Dutch rule. These distinct and separate sources to which the two systems may be traced, have determined the nature and the character of the law applicable to land in Ceylon. The position of the English Law with reference to rights over land was largely procedural introduced through Ordinances and limited to such areas as Registration of Title and rules of conveyancing. But the substantive law applicable to ownership of land was the Roman Dutch Common Law of Ceylon. Therefore one must begin to understand the nature of land tenure in Ceylon by understanding the classifications of land ownership recognised under the Dutch law which has come down to the present times. The four types of land holdings recognised in the Dutch Civil Law have survived the passage of time and close parallels can be drawn with the concepts found in English Land Law. One clear exception is that the title to land in the Roman Dutch Law was absolute, thus espousing the concept of Dominium. The absolute nature of the title in the Roman Dutch Law was achieved by the curative effect introduced in a defective title by the methods of Usucapio and by Longi Temporis Praescriptio. This absolute nature of the title to land was long established in the maritime provinces. As to the land holdings in the Kandyan Provinces the divisions were clear. All land was held by the King. But some lands were gifted to individuals and Temples. These were the Nindagam Land, and the Dewala and Viharagam Land, respectively. The Crown's claim to the Royal lands of the Kandyan Kings was by a process of State succession. This principle of State succession formed a continuum, conveying the original titles to the independent Governments of Ceylon.

The four divisions of land tenure under the Roman Dutch Law are as follows:

- (i) Res Communes: These were held in common but not owned by any one person. These were incapable of being appropriated into private ownership. The classical examples were: the air one breathes, the water that runs along public streams, the sea and the sea-shore.

Reform of the common ownership of the Res Communes had been brought about by various statutes. The Seashore Protection Ordinance of 1911¹ introduced certain prohibitions upon the right to remove sand. The Crown Lands Ordinance of 1947² by section 58 vested the power to administer and control³ the foreshore in the Crown. The Fisheries Ordinance of 1940⁴ introduced certain controls on the fishermen who used the foreshore of the sea. A number of other statutes reduced the extent of the right to common ownership of the Res Communes.

- (ii) Res Publicae: These were things which were actually owned by the public. While the res communes remained unpossessed by the public or by a private individual, remaining free to be used by all, the Res Publicae were things that had fallen into possession of the State but were destined to be used only for public purposes. Into this category fell: the harbours, public roads and highways, public footpaths, public rivers and lakes and public canals and water channels.

Various statutes have reformed the public rights over these by limiting public access to them for very obvious reasons. The Port of Colombo (Administration) Act of 1950⁵ controlled the public access to the harbour, among other matters, thus making the harbour area secure for its normal use. The Irrigation Ordinance of 1946⁶ prohibited the drawing out of water from certain lakes, rivers and water channels. The Forests Ordinance of 1907⁷ controlled the right of the public to cut down trees from public forests. The Thoroughfares Ordinance of 1861⁸ introduced laws concerning the use of public roads. In these and in other ways the public's rights over the Res Publicae were limited.

- (iii) Res Nullius: These were property not owned by anyone. They become owned by the first person who takes possession of them with an intention to own them. The process is described as occupatio in the Roman Dutch Law. Res Nullius fell into three broad categories- res sacrae (property consecrated by the state for religious purposes, such as churches), res religiosae (property devoted to the burial of the dead such as burial grounds) and res sanctae (these are hallowed things such as walls and gates of cities) - which were also referred to as res divini juris.

This category of property since the earliest days of British rule had been subjected to legal controls. Churches have been subjected to varying Ordinances applicable to each of the Christian denominations, while the burial grounds have fallen under the Cemeteries and Burial Grounds Ordinance of 1899.⁹ Res Sanctae are now governed by the Antiquities Ordinance of 1940.¹⁰ The only remaining Res Nullius was Treasure Trove which Maasdorp defined as: "Akin to lost property is treasure trove, which is a deposit of money, bullion, precious stones, etc., hidden in the earth, or elsewhere, at a period beyond the memory of man, and the ownership of which had therefore become lost in obscurity, and the treasure itself therefore becomes res nullius once more."¹¹

Although the Treasure Trove was not land, its close association with land probably merits mention here. However, in Ceylon as early as in 1887¹² Treasure Trove was declared as being vested in the Crown.¹³

- (iv) Res Singulorum: Things which are owned by individuals or Res Universitatis those owned by companies. This category contains all property (both movables and immovables) which are privately owned.

Since early times, little or no reform was attended to the private right of ownership of property either by the Dutch or by the British. The only pieces of legislation that could be found in any way interfering with the concept of ownership, until the early seventies of this century were the Land Acquisition Act of 1950¹⁴ and the Requisitioning of Land Act¹⁵ of the same year. The size of the problem of land reform require little emphasis. For it is true to say that Ceylon has had no historical precedents of any interference with the concept of private ownership of property for many

centuries. A new dimension was the position of the Nindagam Lands gifted by the Sinhalese Kings. An aspect of ownership of such lands was the services required to be rendered by the tenants to the landlords of such land. Reform of Nindagam Lands was therefore undertaken as a matter of re-routing the ownership derived by the landlords from the Kings, to their tenants. In other words, the Nindagam Lands Act of 1968, ¹⁶ while abolishing the requirement to perform services to the landlords ^{16a} declared that 'every tenant or holder of any Nindagam Land was the owner thereof.' ¹⁷ But the problem was that the law abolishing Nindagam Lands and vesting their ownership in the tenants, was not a part of any overall plan for the reform of land in Ceylon. However well-intended the legislature was, in passing the Nindagam Lands Act into Law, in 1968, it must be said at once that the measure cannot be regarded as a part of the land reform movement in Sri Lanka. A more complex dimension to the land reform movement was introduced by the problem of ownership of housing. The reform of land and the reform of the ownership of housing must be considered as the two faces of the same problem. One of the sub-divisions of land was Paddy Land. The dichotomy was therefore forged between Paddy Land and Dry Land. These were subjected to two very different approaches because the reform of Paddy Lands involved the conflicting interests between the owner and the Tenant-Farmer. Land reform in Ceylon therefore require four separate expositions.

- (i) The Colonial strategy for the Acquisition and Distribution of Land.
- (ii) The post-colonial plan for the reform of Paddy Land.
- (iii) The post-colonial plan for the reform of land other than Paddy Land.
- (iv) The post-colonial plan for the reform of housing property.

II. The Colonial Strategy for the Acquisition and Distribution of Land.

(a) Acquisition of Land

From the outset the British administration in Ceylon appeared to have considered it wise to base the economy of the country on a plantation industry; with this in mind it set in motion a number of

strategies to find the land necessary to create such an industry. A factor which the British Administration was compelled to take into account was that land which was most suited for the plantation industry was land owned by the Buddhist Temples and by the Kandyan Chiefs. The Maritime Provinces had a settled system of land holdings dating back to the Dutch period and was supported by the notion that title to land was 'absolute'. The Thombus, the Dutch records, which recorded the land holdings, left the British in a weak position to interfere with existing property rights to immovable property, in the Maritime Provinces. Besides, it was found by 1873¹⁸ that Ceylon had an exceptional climate for the growth of tea in the Highlands. Particularly, in the wake of the destruction of coffee as a result of a Blight, this presented the colonial Government with an attractive prospect. In a previous chapter¹⁹ the legal methods employed towards reducing the Temple Land holdings²⁰ and the land holdings of the Kandyan chiefs²¹ have been exposed.

In the chapter on Buddhism, where these matters were discussed, the central role played by a Commission mandated to determine the ownership of lands claimed by the Temples was mentioned. It was there pointed out that the Commissioners appointed under the Registration of Temple Lands Ordinance²² was empowered to reject claims to ownership which could not be established before them. The fact of the matter was that most of the land grants made by the Kandyan Kings were either oral or under Sannas written on Ola leaves which may well have been lost or decayed. Besides, unlike in the Maritime Provinces there was no system by which grants could be registered and therefore the question of proof before a commission was a very difficult one. However, the British administration in Ceylon took the view²³ that the Temple Lands to a large extent were once privately owned by individuals who had received land grants from the Kings, but had fraudulently transferred these lands to the Temples, so as to avoid performing Rajakariya or services to the King. Having made the transfers, it was alleged, they had fraudulently shared the profits with the Temples, thus swelling, notionally, the land holdings of the Temples for which no tithes were payable. The Commission therefore was a means of determining the extent to which the Temples were entitled to tax

exemption and nothing more. Continuing this allegation, Sir Henry Ward²⁴ wrote in a despatch to Secretary of State for the colonies, in 1859:

"The Consequence was, that the claims to exemption from Tithe, have been constantly increasing and that, as the possession of low or muddy lands carried with it a claim to a certain, or rather to a more uncertain, portion of high or chena lands without which it is impossible to carry on paddy cultivation, a very large amount of land in the central province could neither be alienated, nor improved, without the certainty of interminable litigation."²⁵

Appended to the despatch²⁶ the Governor attached a printed copy of a Report on the progress of the Commission up to the end of 1858, namely during the preceding two years. The report carried the following chart of success.

The Work of the Temple Land's Commission. Table: 27 XXI

Fields		High Lands		
Registered	Rejected	Registered	Rejected	
		Both Chena and Forests	Chena	Forests
A.R.P.*	A.R.P.	A.R.P.	A.R.P.	A.R.P.
1051.0.4	1258.3.3	1704.2.5	1503.1.7	6668.1.1

*Acres, Roods and Perches

Although the Commission did not end its activities until 1860,²⁸ the foregoing table indicates the proportion of the claims registered to those rejected. It is important to recognise that the rejections are almost five times²⁹ as high for Highlands, than those that have been registered. The ratio appears to be much less,³⁰ in the case of fields. This is significant because it was the highlands that provided the earth upon which the coffee plant initially and the tea plant after 1873 was destined to grow. Considering the lands of one temple Lankatilaka in Kandy - Dr. Hans-Dieter Evers presented in his work³¹ the following table. This too was culled from the information provided by Sir Henry Ward in the report on

the Temple Lands Commission to which reference has previously been made. ³²

Table ³³ XXII

LANKATILAKA Temple Lands Registered - 1857-58

	FIELDS		HIGHLANDS		TOTAL CLAIMED
	Registered A-R-P	Rejected * A-R-P	Registered A-R-P	Rejected A-R-P	A-R-P
Viharagam	49-3-9	29-0-1	185-3-1	92-0-9	357-0-0
Dewalagama	24-3-0	13-2-2	0-0-0	105-1-1	143-2-2
Total	74-2-9	42-2-3	185-3-1	197-2-0	500-2-3

*Reject claims in Udunuwara only.

Although there may not be direct evidence to establish the work of the Commission as a factor contributing to the establishment of the plantation industry, there is abundant evidence that the motive behind its creation was at least indirectly to support that cause.

In a despatch from Sir Henry Ward, the Governor of Ceylon, in 1860, to the Secretary of State for the colonies, it was recorded that:

"So few people, in this colony, appreciate the delicacy and importance of this enquiry, or the large results, that will be obtained by bringing it to a successful conclusion, that there is a considerable disposition to grudge the expenditure incurred, and to underrate its necessity. For myself, I can only repeat that I cannot conceive a more dangerous and irritating question to leave open, or one more certain to bring the Government, the priesthood, and the planters into Collision."³⁴

Whatever was the motive for the establishment of the Commission of 1856, one thing remains clear. It was the work of the Commission that resulted in the accumulation of a large acreage of Highland declared to be without an owner, which was therefore available for sale to prospective entrepreneurs who became the founding fathers of the plantation industry of Ceylon.

A curious parallel may be drawn between this method of Land Acquisition and a similar approach taken in Rhodesia.³⁵ There the

British Government, by refusing to recognise the Tribal Law concept of the collective ownership of tribal lands by particular tribes as 'ownership', had them declared as vacant land. Thereafter they were declared as 'ownerless', thereby placing them under the ownership of the Crown. The Crown in return proceeded to sell the land to prospective entrepreneurs who acquired the land free from any encumbrances. The starting points in the two modalities for the acquisition of land may be different, but the end result appears clearly to be much the same. Once the Crown had assumed the ownership of the immovable property by a process of occupation, it becomes the owner, free from all encumbrances. That point is vital to the whole enterprise, for it gives the Crown an opportunity to convey a clear title to the investor. This undoubtedly helped to dispel any doubts as to the title that may possibly cloud the minds of potential investors. The Commission, therefore, played an important role by finding ownerless land for the Crown which provided the foundation for the new economic ventures in Ceylon.

As early as 1840, by an Ordinance ³⁶ passed "to provide more effectively for the prevention of frauds and prejudices," the British Administration in Ceylon required inter-alia that all interests in land created by deed must be executed before a Notary. ³⁷ However, it was not until 1863 that comprehensive legislation requiring the registration of titles to land and all interests created over land was enacted. ³⁸ This was a few years after the conclusion of the work of the Temple Lands Commission of 1856. Recommending the approval of the ordinance, the Governor, Sir Charles McCarthy, in a despatch of 1863 to the Secretary of State for the colonies wrote:

"The question of the introduction of a measure of this kind has been for some time under the consideration of this Government. Its want has been long felt, the absence of a proper system of registration of deeds affecting lands having been found to be productive of serious injury to private interests." ³⁹

The requirement that land sales be registered was an important stage in the colonial development of Ceylon. Although the Crown grants of the Highlands in the Kandyan provinces raised no doubts as to title, the new arrivals who were interested in planting coconuts in the Maritime Provinces appear to have had some anxious moments. Despite the requirement that interests over land must

be created by deeds notarially executed, some planters venturing into the coconut industry appear to have experienced a few problems. The case of one Mr. Thomas Clarke received particular mention in a despatch from Lord Torrington, the Governor, to Earl Grey, the Secretary of State for the colonies in 1847. Mr. Clarke's problem was this:

In 1843 one Mr. Edwin Whitehouse bought 179 acres of land situated at Waddatalpolle in the province of Jaffna. In 1845 he sold that land to Mr. Thomas Clarke. Both sales were made after certification from the headman after examination of the 'Thombo' or the register of lands maintained by the Dutch administration in the district of Jaffna. Eighteen months later the Crown made a claim to that land as Crown land-enroached by the first native seller to Mr. Whitehouse. Mr. Clarke had cleared the land and had planted 60 acres with coconut. ⁴⁰

Lord Torrington while asking the Secretary of State for the colonies for direction as to how Mr. Clarke's problem should be resolved, requested the Secretary of State for the colonies to take note of the fact that there was a great need for a system of land survey and registration. In a subsequent despatch ⁴¹ to Earl Grey, Lord Torrington suggested the imposition of a land tax which would in part reimburse the expenses incurred in an extensive land survey which is a necessary prerequisite to the registration of titles to land. Quoting from a letter addressed to his predecessor, Governor MacKenzie, by the then Chief Justice of Ceylon, Sir Anthony Oliphant, Torrington referred to a case heard by Sir Anthony where the dispute was over a 1/2200th interest of a coconut tree which had been sold in execution of a debt. This kind of problem is said:

"to arise from the practice on the part of owners of land, of permitting other parties to plant it with coconuts or other trees, allowing the planter to receive a third of the produce as his share, and frequently leasing to him also his own, or the proprietor's share. Hence it follows that one man is owner of the land, another the absolute proprietor of a portion of the trees, and also the renter of another portion of the produce." ⁴²

In a personal note ⁴³ to Lord Torrington, The Secretary of State for the colonies suggested a modified strategy. He suggested that a land tax be imposed for several years to come. Those who were doubtful of their rights to any particular property would refrain from paying that tax. After several years, the Secretary of State for the Colonies suggested, that those who have not paid

the tax would be deemed to have surrendered their land to the Crown and at that stage a method of registration of titles to land could very easily be introduced. The letter began by reminding Torrington of:

"The immense difficulty which Napoleon with all his power experienced in getting 'Cadashe' (?) accurately settled in France is a (illegible) proof of the extreme difficulty not to say impossibility of getting a satisfactory survey of an extensive territory of any description of the cultivation and value of the different properties---". 44

The result therefore was that proper registration of title to land was delayed until 1863 and the survey of lands did not commence until 1866. This may to an extent have been responsible for delaying the active participation in the coconut industry by foreign entrepreneurs until sometime after 1863. This must explain why a large acreage of coconut plantations remained in the hands of the natives up to and after Independence, while the Highlands to a very large extent became the preserve of the settler community. The Land Survey Ordinance ⁴⁵ of 1866 opened the way for the ascertainment of boundaries and titles to land. Under that Ordinance the Surveyor General was authorised to demand the production of deeds and other indicia of title. ⁴⁶ Failure to supply proof of title resulted in the loss of land to the claimant. However, if proof was provided a survey plan authenticated by the Surveyor General's department was provided, which could be:

"---offered in evidence in any suit," ⁴⁷ concerning that land. On the same day ⁴⁸ that the Land Survey Ordinance became Law, an Ordinance "to compel the registration of Sannases, old deeds and other instruments of Title" was enacted. ⁴⁹ The latter together with The Land Registration Ordinances of 1863, ⁵⁰ formed the trilogy of statutes designed to bring clarity and certainty to land titles in Ceylon. The 1863 Ordinance requiring registration of title to land declared that unregistered titles were inadmissible as evidence in any Court of Law. ⁵¹

The 1866 Ordinance ⁵² requiring the registration of Sannases and old deeds laid down in Section 2:

"All persons holding or claiming title under deeds Sanasses, olas, or other instruments on which title to land or other immovable property is founded,

which bear date on or before the 1st day of February, 1840, are hereby required to produce the same before the Registrar of Lands -- on or before the 31st December, 1967." ⁵³

By Section 7 of the Ordinance, no deed, Sannas, ola or other instrument executed before the 1st February, 1840 was admissable as evidence before any Court of Law, unless it had previously been registered under Section 2 of the Ordinance. February 1st, of 1840 was regarded as the relevant day for both the 1863 Ordinance ⁵⁴ and the Sannas and old deed Ordinance of 1866, because as from that date all interests in land had to be created by deed.

The thrust of these provisions was to introduce into the legal system of Ceylon machinery by which title to immovable property could be made more secure and clear. This in turn was intended to help attract potential investors not only through Crown grants, but also by private sales. The latter were deemed to be an important element in the colonial development of the Maritime Provinces. For the Temple Lands Commission of 1856 was limited geographically to the Kandyan provinces.

(b) Allocation of Land:

Although the programme for acquiring land for sale to settlers was not commenced until the creation of the Temple Lands Commission of 1856, plans for the sale of land appears to have got under way in as early as 1839; a copy was enclosed of an advertisement ready for publication regarding sales in Ceylon in a despatch of 1839.

Two articles of that advertisement ⁵⁵ merit particular mention:

"Article 1: All lands in the colony not hitherto granted, and not appropriated or required for public purposes, will be put up to sale by public auction. The price will of course depend upon the quality of the land and its local situation, but no land will be sold below the rate of five shillings per acre."

Article 5: On payment of the purchase money the purchaser will be let into possession, and a grant under the public seal of the Island will be made, in fee simple, to the purchaser at the nominal quitrent of a pepper-corn." ⁵⁶

Article 1 of the advertisement suggests that all land which have not been the subject of Land Grants and are not required for public purposes will be subject to sale by public auction. The Temple Lands

Commission of 1856 may be regarded as a means by which the British Administration was able to determine whether a particular grant of land, by a Kandyan Monarch, was in fact a valid grant. Article 5 makes a purchase valid, and capable of creating an interest in land, without registration. However, at the request of Governor MacKenzie, the Secretary of State for the Colonies ⁵⁷ agreed that the advertisement should be amended to require that all grants be registered in the District Court of the District in which the land in question was situated.

The attitude towards the giving of credit for land sales appears to have undergone a change after the Temple Land Commission. In 1839 the attitude of the Government of Ceylon was to give extended credit for periods not exceeding 12 months. In reply to a request addressed by Governor MacKenzie for the grant of credit facilities, the Secretary of State for the Colonies asked for further details before allowing that request, so as to satisfy himself that:

"---the real interests of Ceylon are promoted by the sale of Government land in very small parcels and by encouraging the purchase of such land by persons entirely destitute of capital for their cultivation and improvement." ⁵⁸

Again, in 1841 Governor Colin Campbell sought permission from the Secretary of State for the Colonies to extend the period of credit given on land sales from one month to 12 months. ⁵⁹ In a Minute appended to the despatch Rt. Hon. Lord John Russell allowed that request. However, by 1863 the British Administration in Ceylon had taken a different attitude to credit sales. This was a period of increased land sales and the coffee boom was at its peak. Native entrepreneurs were anxious to buy land and, having limited resources they were compelled to ask the Governor's permission to pay the purchase price in four equal instalments. Against the Governor's refusal they appealed directly to the Secretary of State for the Colonies. Advising the Secretary of State for the Colonies to refuse their Memorial, the Governor, Sir Charles MacCarthy wrote:

"And there would be considerable difficulty in many cases in recovering the purchase money from native purchases, after they have been once let into possession." ⁶⁰

The Secretary of State for the Colonies accepted the Governor's advice and disallowed the Memorial. But the Secretary of State did

make an important point in a Minute appended to the Governor's despatch. In that Minute the Noble Duke wrote:

"I conclude against a compliance with the prayer of the Memorials-though I shall say it was a case where the larger coffee planters might be anxious to keep out a class of small powers." 61

It would have been more appropriate to say that the decision would keep the native population out of the coffee industry. For they could quite easily be outbid at a public auction unless credit facilities in the nature of delayed or instalment payments were given to them. The attitude of the British Administration in Ceylon was designed to restrict the plantation industry to British nationals. This appears to have been the avowed policy of the British Government even before the property boon of the years succeeding the Temple Lands Commission of 1856. As early as in 1844, one Captain Arabin sought permission to purchase land in Ceylon. The Governor, Sir Colin Campbell sought an opinion from the Colonial Office in London. In his reply, denying Captain Arabin's request to hold land, on the grounds that he was a foreigner, the Colonial Office explained that:

"---the common law of England must in this case be considered as extending to the colonial possessions of Great Britain. In that opinion I concur and I have therefore, to state that if any alien should desire to hold lands in Ceylon it will be necessary that he should first obtain 'Letter of Denigration'^{61a} in the form of an Act or Ordinance of the local legislature. But you will understand that you are not at liberty to introduce any such Ordinance into the legislative council of Ceylon without having previously obtained Her Majesty's express sanction to the measure." 62

The sum total of these provisions was to attempt at limiting land holdings to British nationals and to restrict native participation considerably. As for the latter, the denial of credit facilities may well have resulted in excluding them from the plantation industry of the Highlands. The unsettled nature of title to immovable property until 1866 may have been a saving grace which may well have enabled the native population to enter the plantation industry in the Maritime Provinces well ahead of the rush by the settler population from the British Isles. As suggested earlier, this may explain the greater native participation in the coconut industry in the Maritime Provinces, when

compared with marginal impact in the Highlands.

(c) Regulatory legislation relating to Land.

In the preceding section the methods adopted for the distribution of land were examined. In order to give a guarantee of title to potential investors, the British Administration had passed Laws which would ensure that the title to land would first vest in the Crown before the land was sold to the Planting Community. This was considered in the previous section. Besides this step, the British administration in Ceylon did enact a number of important pieces of regulatory legislation regulating the use and enjoyment of Crown land. These legislations were vital for the protection and preservation of such land. It is these types of legislation that will receive attention in the present section.

(i) The Resumption of Lands Ordinance of 1887 ⁶³

One of the problems associated with land grants was that the grantee might, due to supervening circumstances, find it difficult or impossible to utilise the land to its full potential, thus frustrating the purposes for which it was granted by the Crown. The result then might be that the land may lie under a 'dead hand' inaugurating a process for underdevelopment. To avoid such a result, the Government enacted the Resumption of Lands Ordinance of 1887. Under this Ordinance:

"When any land in Ceylon which has been or which may hereafter be alienated by or on behalf of the Crown shall appear to the Government Agent to have been abandoned by the owner thereof for eight years or upwards and such owner or any person lawfully claiming under him cannot be ascertained, notwithstanding all reasonably diligent inquiry made by such Government Agent, it shall be lawful for such Government Agent, with the sanction of the Land Commissioner, to declare by a notice to be published and to be posted on such land in the manner provided by this Ordinance, that if no claim to such land is made to him by or on behalf of any person able to establish a title within the period (not being less than twelve months) specified in such notice, such land shall be resumed by the Crown." ⁶⁴

The Ordinance merely determines the issue of title. And once that is determined the next step, logically, would be to re-consider the Crown grant as a whole. This step is left to be taken under the Forest, Chena, ⁶⁵ Waste, and Unoccupied Lands Ordinance (hereinafter referred to as the Waste Lands Ordinance) of 1897. ⁶⁶

(ii) Forest, Chena, Waste, and Unoccupied Land Ordinance of 1897.

Historically, the Waste Lands Ordinance represents the period following the creation of the plantation industry in the Highlands. It represents the period which followed the sale of Temple property obtained out of the industry of the Temple Lands Commission. In that sense it succeeds the historical period commencing after the establishment of the Tea plantations in the Highlands. This necessarily meant that the Ordinance was principally aimed at acquiring the land situated outside the former Kandyan provinces. For such land had by 1898 become fully absorbed into the Tea planting industry. It is significant to note that forests and chenas were not to be found in the Kandyan provinces. Their principal location was in the North Central and Eastern provinces of the Island. The provisions of this Ordinance are also relevant to the Resumption of Lands Ordinance of 1887, insofar as it supplements that Ordinance. This is done by assuming the possession of lands the titles to which had been vested in the Crown under 1887 Ordinance. The Waste Lands Ordinance, therefore, was assigned to achieve two purposes: firstly to acquire land for the Crown from outside the Kandyan provinces, (for the Temple Lands Commission had already achieved the acquisition of land from the Kandyan provinces); secondly to supplement the Resumption of Lands Ordinance of 1887 by acquiring for the Crown the land which, under that Ordinance, had been declared as Crown Land. These two aspects of the Waste Lands Ordinance require separate treatment.

(a) The Acquisition of Forest, Chena and waste and unoccupied Land.

The Ordinance ⁶⁷ by section 1 empowers the Government Agent or the Assistant Government Agent of a district to publish in the Government Gazette a notice requiring persons to make a claim to land which in the Government Agents' or his Assistants' view is forest, chena or wate land. The Gazette notification would, under the Ordinance require any claim to be made within a period of three months. The Gazette notification was further required to state that if no claim was made to the aforesaid land, within that period, the land in question "shall be deemed to be the property of the Crown and may be dealt with on account of the Crown."

Where a claim was made to the land in question within the specified period, the Ordinance required the Government Agent or his Assistant to hold an enquiry into the claim.⁶⁸ The Ordinance lays down the procedure to be adopted at the enquiry in some detail.⁶⁹ The decision of the Government Agent or his Assistant could be challenged by an Appeal to a Commissioner or to a District Court,⁷⁰ with a further appeal to the Supreme Court⁷¹ of the Island.

In order to facilitate the acquisition of land, the Ordinance lays down a presumption of fact in the favour of the Crown. Section 24 read:

"For the purpose of this Ordinance:

(a) All Forest, waste, unoccupied or uncultivated land and all chenas and other lands which can be only cultivated after intervals of several years, shall be presumed to be the property of the Crown, until the contrary thereof be proved.

(b) The occupation of any person of one or more portions or parcels of land shall not be taken as creating a presumption of ownership against the Crown in his favour for any greater extent of land than that actually occupied by him.

(c) The term "unoccupied land" includes uncultivated land and all land which at the time of the passing of this Ordinance was not in the actual occupation of any person or persons, and also all lands shall not have been in the uninterrupted occupation of some person or persons of a period exceeding five years next before notice given by the Government Agent or Assistant Government Agent under section 1 in respect of the same."⁷²

The presumption of fact in this section makes the task of the Crown much easier. The Waste Lands Ordinance proved to be a powerful instrument in the hands of the British Administration in Ceylon for the acquisition of land for the purposes of the Crown. Although the Land Settlement Ordinance of 1931⁷³ did repeal the Waste Land Ordinance, the important elements of the Waste Lands Ordinance were chosen for re-enactment in the 1931 Ordinance.⁷⁴

The 1931 Ordinance was passed at a time when all the land which was required for the plantation industry had been provided to the planting community. The Ordinance, therefore, was able to deal with the surplus land, as it were, which was in the custody of the Crown. While preserving the instrumentalities necessary for acquiring land for the purposes of the Crown, the Ordinance of 1931 in addition dealt with the procedure for the distribution of the acquired land for public

purposes other than to the planting community. In the proviso to section 4(c), the Ordinance declared that:

"Provided also that it shall be lawful for the settlement officer, with the written consent of the claimant which shall not be revocable, to make a declaration in writing, which shall be deemed for the purposes of this Ordinance to be a settlement in favour of the Crown, that any land to which such claimant would otherwise have been declared to be entitled is Crown property set apart for the purpose of a communal chena reserve for the use of the inhabitants of such village as the settlement officer shall specify in such declaration." 75

Considering the fact that the extent of land that became available to the Crown by the beginning of the 30's of this century, by far exceeded the demands made by the planting community the British Administration decided to distribute the remaining Crown lands inter-alia among the Ceylonese native middle class for development purposes. The Government, therefore, enacted the Land Development Ordinance of 1935. 76

One of the purposes of the Land Development Ordinance was to include the Ceylonese native middle class as members of that prestigious body of persons who have been the recipients of Crown lands. The Ordinance while defining "Ceylonese" as:

"persons of either sex domiciled in Ceylon and possessing a Ceylon domicile of origin", 77

defined the "middle class" in terms of the taxable income. 78

Besides authorizing grants of land to native Ceylonese persons of the middle class, the Ordinance further authorised the Land Commissioner to set, Crown land, apart for any one or more of the following purposes. Section 8 79 read:

"(a) village expansion; (b) village forest; (c) village pasture; (d) Chena cultivation (e) village purposes not herein specified; (f) colonisation; (g) protection of the sources of courses of streams; (h) prevention of the erosion of the soil; (i) forest reserves; (j) government purposes, including government buildings, roads and works; (k) preservation of objects of archaeological or historical interest; (l) the requirements of local authorities; (m) the development of towns; (n) alienation to middle-class Ceylonese; (o) alienation to any persons whom so ever irrespective of the class or race to which they belong; (p) any other purpose that may be prescribed." 80

An important difference between the Land Development Ordinance of 1935 and the Waste Lands Ordinance of 1897 was that the

objects of the Crown's bounty under the later Act ⁸¹ included a wide range of public purposes. With reference to the particular historical period within which both the Land Settlement Ordinance of 1931 and the Land Development Ordinance of 1935 were spun it is necessary to point out that this period coincides with the emergence of a new constitutional structure for the Island under Governor Sir William Manning. This period of the "Manning Reforms" appeared in the country during a period of divide et Impera ⁸² and therefore it was in the best interest of the British Administration in Ceylon that certain sections of the more influential members of the Sinhalese community were drawn to the side of the Colonial Administration on the Island. The inclusion of the 'Ceylonese middle-class' as a group may be explained more as a political decision than as any independent change of colonial policy towards land holdings on the Island. The Ordinance made a further enumeration of persons entitled to receive land grants in section 8(o), namely:

"alienation to any persons whomsoever irrespective of the class or race to which they belong." ⁸³

This declaration which makes class or race irrelevant to a land grant recognises by implication that all sectors of the Ceylonese middle-class were for the first time made candidates for land grants. The criterion after 1935 was merely an economic one. ⁸⁴

(b) The Waste Lands Ordinance as supplementing the Resumption of Lands Ordinance of 1887.

The point was made before, that the thrust of the Resumption of Lands Ordinance of 1887 was to set aside the title to certain Crown lands which the grantee had forfeited due to a breach of the conditions attached to the grant. The Ordinance itself did not provide for the re-sale or re-granting of the same land by the Crown in such a way that the new grantees' or the purchasers' title to the land as against the first grantee, would not become a matter of controversy. The 1887 Ordinance had failed to introduce a provision that would make resumption of the land by the Crown under the Ordinance co-terminous with the cancellation of the original grant. That left a lingering doubt as to the purity of the title which the second grant or sale could convey to the second grantee or to the purchaser of the land. The problem which the

government faced was the doubt that might linger in the mind of a potential investor in the colony over the title to land which fell under the 1887 Ordinance. Unlike Roman-Dutch law, English land law provided no cure for a defective title. The Concept of dominium in the English land law provided no cure for a defective title. The concept of dominium in the English land law went no further than recognising the idea of 'the best title', as distinct from 'the only title'. The Roman-Dutch law on the other hand recognised the doctrine of Usucapio and thereby provided the means for curing a defective title. The introduction of English rules of conveyancing as early as in 1863,⁸⁵ effectively shut the door in the face of Roman-Dutch Law in this area. Therefore, it became a matter of immediate importance to provide a means by which the Government could, even subsequent to making a grant or a sale of Crown land, re-establish its title over land claimed to be Crown land. It is to this aspect of the problem pertaining to Crown land that the Government addressed itself in section 29 of the Waste Lands Ordinance⁸⁶ of 1897. Section 29 read:

"Nothing in this Ordinance contained shall preclude or prevent the Crown in any way in which no notice has been issued under section 1 in respect of any land from selling, leasing, reserving, or otherwise dealing with the same, or from instituting in any court an action to recover such land."⁸⁷

The necessity for section 29 was recognised by the Government of Ceylon after the experience of a steady line of disputes. The decision in Saibo v. Andris⁸⁸ in 1898 was the last of a line of decisions which may well have weakened the image of the Crown as a vendor of real property. There, the Kankanagedera family owned land at the bottom of which was a swamp. One of the members of the family developed the swamp into a fertile paddy field of nearly 50 acres. The Government Agent of the Southern Province by a Gazette notification published in three languages advertised the sale of the 50 acres as Crown land. The Crown argued that the swamp was unoccupied land and therefore was crown land. Its transformation into a paddy field constituted an encroachment upon Crown Lands contrary to the Crown Lands Encroachment Ordinance of 1840.⁸⁹ The argument was based on the grounds that the swamp was in fact a 'waste land' under the 1840 Ordinance.⁹⁰ Therefore, it was submitted that the swamp could be considered under the Ordinance to be in the ownership of the Crown. The plaintiff, therefore, claimed a good

title to the swamp as the purchaser from the Crown. But the defendants, members of the 'K' family prevented the plaintiff from entering upon it. The defendant denied the Crown of its title to the swamp. At first instance the District Judge dismissed the plaintiff's case. Against that order, the plaintiff unsuccessfully appealed to the Supreme Court. The Supreme Court pointed out that private individuals often sold land not caring too much about its title to the land, leaving the buyer to sort that issue out with the claimants. While pointing out this unsatisfactory situation prevailing in the colony, Lawrie, J. wrote:

"There is no presumption that the land belonged to the Crown. Apart from the presumption arising from the character of the land, I am of opinion that there is no presumption that land conveyed by a Crown grant is land over which the Crown had disposing power. No Ordinance has ever given the privilege to a Crown grant, and this Government has never held that there is a presumption. It is strange that a grant in the name of Her Majesty, under seal of the colony, signed by the Governor and by the colonial secretary, should have no intrinsic weight, but such I think is the law, and the reason is not far to seek. Sales by Government are often instigated by private applicants. Lands are surveyed and advertised to which Government has no real claim, of which it never was in possession. A reference to any Gazette shows that Government advertises and sells paddy fields and lands planted with coconuts. Government takes up the position that it does not warrant its title, that it leaves to the purchaser the chance whether he gets possession or not. Knowing this we must look into the evidence in each case and decide whether the land granted did or did not belong to the Crown." 91

Section 29 of the Waste Lands Act did not have the effect of curing the Crown's title to the land. But it had the effect of giving the Crown a right of sale of land to which it had acquired a title under the Lands Resumption Ordinance, without having the means of cancelling an existing crown grant. Recognising this gap in the Lands Resumption Ordinance, the British Government took care to set out an elaborate procedure for cancellation of Crown grants in 31 sections in Chapter VIII of the Land Development Ordinance of 1935.

In a number of ways, the Government's thirst for land appeared to have made the servants of the Crown less than honest in their dealings with the people whom they had as their wards. The industry and the care taken by the courts in protecting the individual's

rights to property against the sharp dealings by the servants of the Crown, merit particular mention. In Silva v. Kindersley⁹² it was found that the Crown had claimed property belonging to the Dalada Maligawa in Kandy which in fact had been registered as Temple property by the Temple Lands Commissioners acting under Temple Lands Registration Ordinance of 1856.⁹³ Subsequent to the registration, it was found that the surveyors of the Crown had drawn several plans and these had effectively excluded the disputed land from the survey plan that had been recognised and registered by the Commissioners under the Ordinance of 1856. The Crown further contended that the land in question was chena land and unless these were the subject of grants by the Kandyan Kings by Sannases, it was argued that the Crown's claim became, in law, impossible to answer. The Trustees for the Dalada Maligawa were unsuccessful at first instance. Against that decision the Trustees appealed successfully to the Divisional Court. Allowing the appeal Pereira J. wrote:

"So far as the presumption concerns chena lands in the Kandyan Provinces, I do not think it can apply to such lands in respect of which as a matter of custom or practice Sannases and grants were never issued, and no taxes, dues, or services were ever paid or rendered. It is in evidence that for lands granted by the old Kandyan Kings to the Dalada Maligawa no Sannases were ever issued, and, of course, in respect of such lands, as in respect of Temple lands generally, there was no liability on the part of anybody to render any services, nor were any taxes or dues payable. As regards chena lands in the Kandyan Provinces, the only means provided in the Ordinance to save them from the operation of the presumption is the proof of a Sannas or grant or of the payment of taxes, etc., and it would be absurd to suppose that the presumption was intended to apply to lands in respect of which proof of the only means provided for its rebuttal was an impossibility. The Ordinance was not intended to vest absolutely in the Crown all chena lands in the Kandyan Provinces belonging to temples." ⁹⁴

Both Saibo v. Andris⁹⁵ and Silva v. Kindersley⁹⁶ exhibit an embarrassing aspect of the land policy of the British administration. They also present two litigants who had the means to take their disputes to courts at two levels of adjudication. The number that must have accepted the encroachments by the Crown without any redress have yet to be recorded. The Courts, however, were aware of these

activities of the servants of the Crown. In Saibo v. Adnris,⁹⁷ Lawrie, J. subscribed a paragraph to reveal such misdeeds. He wrote:

"Certainly the Crown is not presumed to be the owner of every bit of swamp or every bit of waste land in the Island. This swamp was not claimed by the Crown as an appurtenance of any other Crown land, it was surveyed and sold as a separate subject, although it is clear that it is a part of a land -- Karambadelahena ---. It is proved that the defendants -- were in possession of Karambadelahena, and that they claimed this 'swamp' or 'wala' as part of their land. On every estate there must be some waste, some uncultivated land, some clumps of trees, some land for firewood or, as here, a hollow where the water lies, which waits for the man of energy and capital to improve. The Crown surely cannot be presumed the owner of scraps of uncultivated land adjacent to the cultivated land belonging to its subjects.--- I hope the plaintiff will get repayment of the money paid by him to the Crown ---." ⁹⁸

The plaintiff under the law of Ceylon at the time had no right of action against the Crown for return of his money, without first obtaining the consent of the Attorney-General. Aside from that, the plaintiff was mulcted with costs both at first instance and on appeal. If the vendor in Saibo v. Adnris was a subject of the Crown, then Saibo could have proceeded against him for deceit using the actio injuriarum. There may in addition have been a matter for the application of the Criminal Law too. However, the Crown and its servants stood protected from any visitations of the law. The Waste Lands Ordinance was regarded by the people of Ceylon as a thoroughly pernicious piece of legislation. Given the industry and the acquisitive intent of the servants of the Crown, a waste land or an occupied land could very conveniently be found. The equal industry and the good intentions of the Judiciary, to a large measure, appear to have protected the subjects of the Crown in Ceylon from the encroachment of the Crown upon their immovables. But, as we have seen, there was no law to prevent the Crown's encroachment upon the property of its subjects. But there was indeed a law to prevent the encroachment of the subjects upon the property of the Crown. It is to the latter we must turn at this point.

(iii) Encroachment upon Crown Lands Ordinance ⁹⁹

The Ordinance which was first enacted in 1840 allowed any person to lay an information in the District Court against any other person

supported by an affidavit, charging him or her with having:

"without the permission of the Government, entered upon or taken possession of any land which belongs to, or which immediately prior to such entry is Crown Land". 100

The District Court was empowered to order a delivery of possession, which placed the defendant in a position of contempt, a criminal offence, if he failed to obey that order. The Ordinance had a much wider significance than being a mere regulatory law. It expressly declared that:

"All forest, waste, unoccupied or uncultivated lands shall be presumed to be the property of the Crown until the contrary thereof be proved, and all chenas and other lands which can be only cultivated after intervals of several years shall, if the same be situate within the districts formerly comprised in the Kandyan provinces (wherein no thombo registers have been heretofore established), be deemed to belong to the Crown and not the property of any private person claiming the same against the Crown except upon proof only by such persons, (a) of a Sannas or grant for the same together, with satisfactory evidence as to the limits and boundaries thereof; or (b) of such customary taxes, dues, or servies rendered to the Crown or other person---; or (c) of his or his predecessors in title having made and maintained a permanent plantation in and upon the same for a period of not less than thirty years, or of his having otherwise improved the same and maintained it in such improved state for such period, and in either case of his having held uninterrupted possession of the same during the whole of the said period." 101

In all other districts in Ceylon, chena and other lands which can only be cultivated after intervals of several years shall be deemed to be forest or waste lands within the meaning of this section. 102

Section 7 clearly had an acquisitive function, but it was hidden away in among sections performing a prohibitive function, such as prohibiting the encroachment upon crown lands. Several Memorials on this hidden aspect were presented to the Governor, Sir Henry Ward, in 1859, when its full impact came into prominence. These were transmitted to the Secretary of State for the Colonies but with no real success. 103 It is, however, interesting to note that the Secretary of State for the Colonies was far from being equivocal in his decision to deny the Memorials. In his reply denying the prayer that the provisions in Section 7 be repealed,

the Duke of Newcastle wrote to Governor Ward:

"It will be for you to consider whether it will be possibly by the instrumentality of a Commission of inquiry or by any other means, to devise some satisfactory measure for removing the difficulties which this subject is embarrassed. The question is dependent so much more upon local circumstances than upon any doubtful points of law---." 104

The provisions enacted in 1840 appear to have survived the passing decades. It has come down in its original form and remains a part of the Law of Independent Sri Lanka. 105

(d) Some Concluding Remarks Regarding Land.

The Whole saga relating to land in this context could be narrated under three headings: The acquisition, distribution and control of land respectively. At each stage there appeared to have been an interplay of law and policy. Law appeared to play a prominent part at the stage of land acquisition and land control, while policy became an uppermost consideration at the stage of land distribution. Naturally, unless the acquisitive procedures were legal, doubts as to title could well have be-devilled the whole plan for the economic development of Ceylon. For no investor would have invested in land subject to a doubtful title. The process of acquisition of land was therefore subjected, principally, to two enactments. Namely, section seven of the encroachments upon Crown Lands Ordinance of 1840 106 and the Registration of Temple Lands Ordinance of 1856. 107

The work of the Temple Lands Commission under the 1856 Ordinance and the effect of Section 7 of the 1840 Ordinance produced the same result. Namely, a fund of ownerless property which by the rules of the Common Law 108 (namely Roman-Dutch) or English 109 Law passed to the Crown, automatically and without more. The control of these lands too was subjected to the Laws of the country. This was necessary so as to bring into effect the instrumentalities of the Courts to protect the Crown lands. The crucial factor which determined the direction which the new economic pathway would take, was the policy towards the distribution of land which formed the economic infra-structure of the new colony, which would effectively control the economic base of the Colony. Who should control the economic base of the Colony was a political question and it was by a political decision, as earlier indicated, that that question was determined. Within the political framework in which the world was cast in the mid-nineteenth century the economic base was destined to be held by the agents of the

colonial power and not by those who were subject to that power, namely the natives of Ceylon. Ideas of popular participation in the economic construct had no place in the Colony at the time in question. It is this utilisation of the 'agents of the colonial power' that require consideration as a backdrop not only to this chapter but also to the next. Much the same type of approach appears to have been taken by the British Government concerning land in other colonies. In Kenya, the British administration there had chartered a plan which had led what Meek¹¹⁰ described as the 'European Highlands', to be retained by the white settler population. Under the Crown Lands Ordinance of 1915, the Kenyan administration prohibited the alienation of land to persons of a different race without the prior written consent of the British Governor or his authorized agent. The 'uplands' which comprised of the 'European Highlands' had by 1915 become completely colonised by the European planting community. The 1915 Ordinance was a result of the Elgin Report on land tenure which recommended that as a matter of administrative convenience grants of land in the uplands should not be made to Asiatics. The concern for the Asiatics over the natives in this respect was due to the fact that it was found to be conceivable that the Asiatics may have been the only persons in 1915 with the sufficient economic means of buying land in the 'European Highlands', from a competitive market.¹¹¹

III. The Post-Colonial Plan for the Reform of Paddy Land

Problems and issues concerning paddy lands have a complicated background. The growing of paddy, unlike any other agricultural crop, required the help not only of the initiated but also of the experienced. The several stages of preparation that a Paddy Land must undergo before sowing the paddy seed needs a great deal of experience and skill. The several stages that paddy cultivation involved, both in the art of irrigation and 'bundings', between sowing the seed and harvesting, required a great deal of dedication, attention and skill. Equally 'the harvesting', 'the thrashing' and 'chaffing' involved experience and hard labour. Out of these energies and exercises had arisen a determinable group of persons called the paddy farmers or Govias. The latter is a recognised profession

and a committed Govia by necessity must abandon all other means of livelihood. As much as the un-skilled owner of a motor car may engage a chauffer to drive him about; an un-skilled owner of a paddy field must by necessity engage a Govia. For in Ceylon, as a result of family interests in land and private ownership of property, many Paddy Land owners had little or no skill in farming paddy. The position of the Govia was therefore a vital element in the paddy planting industry in Sri Lanka. The Govias were engaged upon an Ande basis, which meant, at least in the Northwestern Provinces, the supplying of three-quarters of the crop to the Govia if the land owner provided the seed paddy, manure and had paid for all the labour connected with the whole enterprise. In the latter arrangement the work of the Govia was limited to providing his skills as the head of a 'gang of labourers' when engaged in preparing the earth for the sowing. The land owner in this case provided the labour. The Govia monitored the progress of the plant, sprayed it with insecticide, prepared the bund, supplied the water and then again would act as the head of a 'gang of hired labourers' during the harvesting, reaping, and thrashing periods. Whether it was the three-quarter Ande arrangement or the one-quarter Ande arrangement, the importance of a Govia's position in the whole enterprise is undeniable.

Until 1953 there was no law governing the relationship between the Govia and the owner. The Paddy Lands Act of 1953¹¹² was the first attempt ever to be made towards regulating the historic relationship between the Govia and the owner. By this Act, Parliament gave a statutory basis to the Ande, which meant that Govias were entitled by law to a particular portion of the yield subject to performing particular types of duties. These were spelt out by regulations made under the Act.¹¹³ The Act prohibited any adjustment of the stated proportions.¹¹⁴ The Act in addition gave the Govia a security of tenure. The Act forbade the owner from engaging a Govia for a period less than 5 years.¹¹⁵ The Act however, prescribed several grounds upon which a sitting Govia may be dispossessed.¹¹⁶ The Act introduced a legalised system of rights and duties between the Govia and the owner. In addition it provided a limited security of tenure up to five years. That was all. The thrust of the Paddy Lands Act of 1958¹¹⁷ was to provide a greater security to the Govia, whom the Act described as a Tenant-Cultivator.

Section 4 of the Act detailed the extent of his interest.

"(3) The rights of the Tenant-Cultivator of any extent of paddy land shall not be affected in any manner by the sale (whether voluntary or in execution of the decree of a court), the transfer by gift, testamentary disposition or otherwise, the assignment or disposal or otherwise, or the devolution under the law of inheritance of the right, title and interest of the landlord of such extent.

(4) The rights of a Tenant-Cultivator over any extent of Paddy land shall not be sequestrated, seized or sold in execution of the decree or process of any court."

In addition a Tenant-Cultivator may nominate any citizen of Ceylon to succeed him,¹¹⁸ which nomination he may cancel during his lifetime and make a fresh or further nomination.¹¹⁹ The Act prescribed the way in which such nominations, cancellations and re-nominations may be made.¹²⁰ In the absence of a nomination of a person who would succeed to his rights as a Tenant-Cultivator, his rights devolve upon his spouse.¹²¹ If there was no spouse then they would become subjected to, (with the elder taking precedence over the younger) to the following order of precedence:

Sons, Daughters, Grandsons, Grand-daughters, father, mother, brothers, sisters, uncles, aunts, nephews and nieces.

Where all these persons fail to accept the rights and the duties of a Tenant-Cultivator the Act nominates the Cultivation Committee of the area, as a temporary successor only.¹²² Where the Cultivation Committee of the area assumes the position of the Tenant-Cultivator the landlord may if he so wishes, give notice to the Cultivation Committee that he would like to become an Owner-Cultivator of that Paddy Land. If no such notice is given within 30 days, the owner will lose an opportunity of breaking the grip held by the Act over his Paddy Land. In such an event, the Cultivation Committee is required to select a suitable person from the locality who would assume the position of the Tenant-Cultivator.¹²³ During the hiatus, the Cultivation Committee will remain responsible to perform the duties which may have been performed by the deceased Tenant-Cultivator.¹²⁴ The Act of 1958 provided that the owners of Paddy Lands may within the first five years of its operation apply to the Cultivation Committee of the area to have him/her declared as the Owner-Cultivator.¹²⁵

Where a person has been an infant owner, in 1963, he or she has six months after gaining majority, to make such an application. ¹²⁶

The thrust of the Act was clear. Aside from conditions which may give the owner a cause to have the Tenant-Cultivator removed, the Tenant-Cultivator was not only secure throughout his own lifetime but would, in addition, acquire a proprietary interest which he could devise by will or other instrument to his heirs. The proprietary nature of a Tenant-Cultivator's interest was further enhanced by the Act, by giving him the power to transfer his interests to anyone, other than a non-citizen, by way of gift or sale. This is subject to the condition that notice be given to the owner of the Paddy Land in question. ¹²⁷

The primary effect of the Act was to secure the position of the Tenant-Cultivator by creating a parallel interest in the Paddy Land in his favour. The proprietary nature of his interest secures to him, rights which are similar in character to those enjoyed by the owner - namely, such interests as those that could be alienated by the Tenant-Cultivator. ¹²⁸ The Agricultural Lands Law of 1973 ¹²⁹ closely followed the provisions of the Act of 1958 ¹³⁰ which it replaced. However, it made one basic change. Under the 1973 Law the Tenant-Cultivator was limited in his power to transfer his interests to persons mentioned in the Schedule to that Law, which in fact were the same as the list of those who would succeed at his death, if he were to die intestate. ¹³¹ Unlike the 1958 Act, the 1973 Law permitted the Tenant-Cultivator to transfer his rights to the owner with the written consent of an Agricultural Tribunal. ¹³² The 1973 Law created an Agricultural Tribunal to which inter alia all defects in the system could be referred. ¹³³ The Cultivation Committees under both the Act of 1958 and under the Law of 1973 had identical tasks. These were to provide the administrative base for the running of the system which the Act and the Law had created so as to facilitate State intervention in Agriculture. Aside from securing the position of the Tenant-Cultivator vis-a-vis the owner, which indeed was a new step in the agricultural enterprises on the Island, the Law of 1973 (and before that the Act of 1958) introduced a basic administrative infrastructure which merits some comment.

The Law of 1973 required the Minister to create a Cultivation Committee for Agricultural Lands situated in each such area as to be determined by him.¹³⁴ The Minister was empowered to appoint to it not less than ten persons who were engaged in agriculture, or such other persons as the Minister may deem suitable.¹³⁵ The role of the Cultivation Committee is one of an agent of the Agricultural Productivity Committee.¹³⁶ The latter is a creation of the Agricultural Productivity Law of 1972.¹³⁷ The Agricultural Productivity Committee was created to supervise the utilisation of agricultural land for its maximum productivity. It was meant to be a watch-dog committee which was required to report back to the Minister, when ever a particular land owner appeared to act in breach of his duty to make the maximum use of his land. In such an event the Minister may, under the Agricultural Productivity Law,¹³⁸ issue 'a supervision order' which would require such owner to cause a satisfactory improvement of his land within the space of one year.¹³⁹ Failure to do so would result in his land been taken out of his possession and been vested in some other person or body under the condition that its productivity be increased. Towards this end the Minister was empowered to issue an 'order of dis-possession' against the owner.¹⁴⁰ The Agricultural Productivity Committee, created under the 1972 Law,¹⁴¹ performed a watch-dog function towards helping its implementation. Returning to the Cultivation Committees established under the Agricultural Lands Law of 1973,¹⁴² these Committees were required by section 39 of the 1973 Law to assist the Agricultural Productivity Committee, inter alia,¹⁴³ in the preparation and in the maintenance of a register of the agricultural lands, recording the names of the landlords, Owner-Cultivators, Tenant-Cultivators and collective farmers, as the case may be.¹⁴⁴ In addition, section 40 of the 1973 Law left the Cultivation Committee with some specific fiscal matters. Further, section 41 provided the Minister with the power to determine, confer or impose additional powers and duties by regulations made under this law. The multiplicity of committees and authorities tended to confuse the duties left to each of these bodies, which may sometimes cause difficulties of some magnitude to the citizen. To solve such problems, the 1973 Law created an Agricultural Tribunal with wide powers.¹⁴⁵ The Tribunal, was empowered to settle disputes and give consent to the transfer of

the rights of a Tenant-Cultivator to the owner.¹⁴⁶ It was further empowered to award damages against the landlord and in favour of a Tenant-Cultivator whenever the latter had been unlawfully evicted. The Agricultural Productivity Committees,¹⁴⁷ The Cultivation Committees and the Agricultural Tribunals provided the infrastructure for the workings of an integrated policy towards paddy cultivation on the Island. One thing which the Acts of 1953, 1958 and the Law of 1973 failed to do was to provide for the distribution of Paddy Lands to the landless in such a way as to loosen the grip held on the cultivation of Paddy on the Island, by a few. This was left to be achieved by the Land Reform Laws of 1972 and of 1975.¹⁴⁸ It is to these that we must next turn.

(iv) The Post-Colonial Plan for the Reform of Dry Land.

As a matter of history the passage of the Land Reform Law of 1972¹⁴⁹ marked the first step ever to be taken by any administration on the Island to introduce a system which could lead towards an equalisation of land holdings among the population of Ceylon. The aims of the Law was succinctly stated in Section 2 of the Law of 1972 in this way:

"The purpose of this Law shall be to establish a land Reform Commission with the following objects: (a) to ensure that no person shall own agricultural land in excess of the ceiling; and (b) to take over agricultural land owned by any person in excess of the ceiling and to utilize such land in a manner which will result in an increase in its productivity and in the employment generated from such land."¹⁵⁰

The achievement of these purposes required four interrelated sets of activities. First, the appropriation of the land held in excess of the ceiling. Second, the distribution of the land so appropriated. Third, the provision of an institutional infra-structure to organise and effectuate the related activities in an integrated fashion. And fourth, the payment of compensation to those from whom the land was appropriated. It is in this sequence that the Land Reform Law of 1972 will be examined.

(a) The Appropriation of the Land

The Law ordained that the maximum extent of agricultural land that could be owned by any one person was twenty-five acres of

Paddy Land, if his land holdings were exclusively Paddy Lands, or fifty acres of agricultural land of which no more than twenty acres should be Paddy. ¹⁵¹ Any agricultural land a person may hold in excess of that ceiling was: "deemed to vest in the Land Reform Commission" ¹⁵² and "be deemed to be held by such person under a statutory lease from the Commission." ¹⁵³ The appropriation by the Commission was automatic upon a person becoming the owner of land in excess of the ceiling. His ownership immediately and without more was transformed into one of a lessee of the Land Reform Commission. The statutory lease may be determined at any time, and in any event shall not be in excess of one year. ¹⁵⁴ This necessarily meant that within a time span of one year the Land Reform Commission will take actual possession of the land which was held under the statutory lease. During that year or part of the year, the statutory lessee (the former owner) was required to pay the Land Reform Commission a rent-charge. The rent charge for non-paddy land was one-fifteenth of the compensation which the Land Reform Commission shall pay to the statutory lessee. This one-fifteenth was calculated pro-tanto if the lease had lasted less than a period of one full year. For Paddy Land it was fixed at one-tenth of the compensation payable, again the amount was reckoned as an annual rent-charge. ¹⁵⁵

One of the large gaps that was found in the Land Reform Law of 1972 was its application to the plantation industry comprising of companies owning large estates. The Law was designed towards imposing a ceiling on small, private land holdings. The imposition of a fifty acre ceiling on a tea or rubber plantation could be disastrous, as fragmentation was always counter-productive to the plantations. As for 'company estates' any reform appeared to be one of total nationalisation and it was towards this end that the Government was moving between 1972 and 1975. A new dimension to the complex nature of the plantation industry were the "Agency Houses" which supervised them. The role played by the 'Agency Houses' was a vital element in the Tea, Rubber and Coconut plantation industries owned by multi-national companies. The 'Agency Houses' managed these estates for the foreign based companies as their agents. They, therefore, was an element to be considered in any plan to nationalise the company estates on the Island. The

Government drafted an amendment to the Land Reform Law of 1972 which took into consideration the position of the Agency Houses in the formula for land reform. This became the Land Reform (Amendment) Law of 1975.¹⁵⁶ It declared that every estate land owned by public companies shall:

"(a) be deemed to vest in and be possessed by the Land Reform Commission---; and (b) be deemed to be managed under a statutory trust for and on behalf of the Commission by the agency house or organization which, or the person who, on the day immediately prior to the date of such vesting, was responsible for, and in charge of the management of such estate land, for and on behalf of such company, and such agency house, organisation or person shall, subject to the provisions of this part of this law, be deemed to be the statutory trustee of such estate land." 157

The Law clearly laid down the duties of the statutory trustee and the way he was required to manage the vested lands. The government appeared to have had some concern as to the reaction of the Agency Houses in Sri Lanka to these radical and unprecedented steps. After all, the amendment was effectively dismantling a vast financial empire which the sterling companies had created for the 'metropolis' since the earliest days of British rule in Ceylon. Fearing the possible counter moves the directorates in the 'metropolis' may take through their agents, the Agency Houses in Sri Lanka, the amending Law¹⁵⁸ enacted the following section:

"Where the Minister in consultation with the Minister in charge of the subject of trade, the Minister in charge of planning and economic affairs and the Minister in charge of Finance, is of the opinion that it is necessary for the purpose of giving effect to this part of this law, to vest in the government, the business undertaking of any Agency House or organisation which, under this part of this law, is the statutory trustee of any estate land vested in the Commission, the Minister may request the Minister of Finance to vest such business undertaking in the government under the provisions of the Business Undertaking (Acquisition) Act, Act No. 35 of 1971, and accordingly, the Minister of Finance may by order made under section 2 of that Act vest such business undertaking in the government." 159

Besides the power to vest any Agency House in the Government, the amendment empowered the Minister to replace any Director or other Executive Officer of any Agency House established on the

Island. This effectively gave the government the power to control the activities of the Agency Houses, without actually nationalising them. This in turn facilitated the Land Reform Commission to determine and to direct the way in which Estate Land vested in the Commission was administered. The amendment declared that the government may replace existing Directors and other persons if it appeared that such a replacement was necessary "for the good and proper management of any Estate Land vested in the Commission." ¹⁶⁰ This provided the government with the means to act without actually having to acquire a particular Agency House under the Business Undertakings (Acquisition) Act of 1971. ¹⁶¹

The combined effect of the Principal Law and its amendment was to reform the Land tenure system on the Island in a way that the ownership of land shall not hereinafter be a means to capital accumulation by a few, but would to a large measure be a means towards achieving a greater participation in the nation's economy by many. It was believed at the time that this would lead to the progressive economic development of the Island for the common good of its citizens. This end was naturally linked to the method of distribution and utilisation of the land acquired from the effective implementation of the Laws of 1972 and of 1975. The Island at this point appeared to have come a full-circle. The theme of the mid-nineteenth century was the extraction of land by legal means, so that land could be available to provide the underpinning for a successful process of capital accumulation for the 'metropolis'. The theme, almost a 125 years later, was the return of that land back to the nation, again within the parameters drawn by the laws of the land for national development. It is this method for the return of capital by a process of land distribution and land utilisation that must be the next topic for investigation.

(b) Distribution and Utilisation of the Land

The distribution and utilisation of estate land ¹⁶² followed a different route and pattern from that of non-estate land. ¹⁶³ The two therefore must be considered separately.

As to Estate Land, the large Tea, Rubber and Coconut estates were preserved, unfragmented and were transferred mainly to corporations established or to be established under the State Agricultural Corporations Act of 1972 ¹⁶⁴ or to the Ceylon State Plantations Corpora-

tion established under the Ceylon State Plantations Corporations Act of 1958.¹⁶⁵ By this method the unity of the representative estates was preserved while the profits were returned to the nation through the Treasury. However, those that could be utilised without loss by fragmentation were used for village expansion and other public purposes¹⁶⁶ and by alienations to individuals for the construction of residences for personal use.¹⁶⁷ The rest of the land was utilised by:

"---alienation by way of sale, exchange, rent, purchase or lease to persons for agricultural development or animal husbandry, or for a cooperative or collective form or enterprise,¹⁶⁸ or for a farm or plantation managed by the Commission directly or by its agents." ¹⁶⁹

It must be emphasized that estate land was largely used for national development projects.. The building of residential premises was perhaps the only non-productive enterprise for which the land was used. Land given to private persons "for agricultural development or animal husbandry" may be considered as having at least a peripheral benefit for the nation as a whole.

In contrast, the non-estate land acquired under the ceiling on land holdings provisions of the Land Reform Law,¹⁷⁰ had a different distribution route and a different utilisation pattern. Such land was distributed mainly to persons who did not have sufficient land to achieve the 50 acre limit. The landless, and those with less than 50 acres, received the benefit of this category of land. The law provided that the land acquired by the Land Reform Commission should be utilised, inter alia for:

"---agricultural development or animal husbandry by way of sale, exchange, rent purchase or lease to persons who do not own agricultural land or who own agricultural land below the ceiling." ¹⁷¹ Alienation by way of sale to persons who were minors at the time of the imposition of the ceiling on agricultural land and whose parents were dispossessed of such land in excess of the ceiling by reason of such excess land having vested in the Commission." ¹⁷²

These two categories of persons (which includes the totally landless) were considered as being at the top of the list of potential grantees of these lands. In addition the lands were made available for all the other purposes enumerated under the (Amendment) Law

of 1975.¹⁷³ It was natural, and indeed was expected, that the implementation of this programme for land reform could entail a complex bureaucratic network. To supply an infra-structure that could provide the bureaucracy that was required to function within a particular political framework, the Land Reform Law of 1972, established the Land Reform Commission, headed by a Commissioner responsible to the Minister of Agriculture and Land. The success or the failure of the Land Reform Programme ultimately lay in the hands of the Commission and it is to the Commission that one must next turn.

(c) The Land Reform Commission

The Land Reform Commission was established under the Land Reform Law of 1972¹⁷⁴ and was utilised both under this principal law and under its amendment of 1975. In other words, the Land Reform Commission was put in charge of the reform of all land, both non-estate (under the 1972 Law) and Estate (under the 1975 Law) Land. The Minister of Lands was empowered¹⁷⁵ to appoint a chairman for the Commission.¹⁷⁶ Of the five members, the Minister was required to appoint two members with experience in the administration of lands, land tenure, surveying or law. The other three were to be appointed after being nominated by the Ministers of Finance, Plantation Industry and Planning and Employment. These three nominations were required to be drawn from the pool of state officers in the service of these three ministries.¹⁷⁷ In addition to the five appointed members and the chairman, there were three ex officio members, namely the Land Commissioner, the Commissioner of Agrarian Services and the Director of Agriculture.¹⁷⁸ Besides the two persons experienced in the administration of Lands etc., a wide cross-section of the Departments of State connected with land, land development and agriculture were represented in the Land Reform Commission.

The Law¹⁷⁹ detailed the powers and the functions of the Land Reform Commission in extenso. These were:

1. "To acquire, hold, take or give on lease or hire, exchange, mortgage, pledge, sell or otherwise dispose of any movable or immovable property;"¹⁸⁰
2. "To carry out investigations, surveys and record data concerning and relating to any agricultural land and call for returns

in the prescribed form concerning and relating
to agriculture land; ¹⁸¹

(This was a prelude to tracking down owners of land who had failed
to declare the extent of their individual land holdings.)

3. "To conduct, assist and encourage research into
all aspects of land tenure and reform;" ¹⁸²
4. "To make charges for any services rendered by
the Commission in carrying out its business;" ¹⁸³
5. "To establish and maintain branch offices for
the purpose of the Commission;" ¹⁸⁴
6. "To call for and receive such documents relating
to title, valuation, surveys and plans for
agricultural land as may be necessary for
carrying out such objects;" ¹⁸⁵

(These steps were necessary for the computation of reasonable
compensation to be paid to the owners.)

7. "To delegate to any member, officer or employee
of the Commission or any State officer, or
any employee of a state corporation or local
authority or to a District Land Reform Authority
or to any Agricultural Productivity Committee
established under any law any of its powers
and functions other than the power to make
rules [under s.57 ¹⁸⁶] ¹⁸⁷
8. "To enter upon and inspect any agricultural
land;" ¹⁸⁸
9. "To direct and decide all matters connected
with the administration of its affairs." ¹⁸⁹
10. "To enter into and perform, either directly
or indirectly through any officer or agent
of the Commission, all such contracts or
agreements as may be necessary for enabling
it to achieve the objects of this law and
to exercise its powers under this law." ¹⁹⁰
11. "To borrow money for the purposes of its
business;" ¹⁹¹
12. "To establish a provident fund and provide
welfare and recreational facilities, houses,
hostels and other accommodation for persons
employed by the Commission." ¹⁹²
13. "To do anything for the purpose of advancing
the skill of persons employed by the Commission
and the assistance or the provision by others
of facilities for training persons required
to carry out the work of the Commission." ¹⁹³

This catalogue of powers and functions have been included here in full to show the extent to which the success or the failure of the Land Reform Programme depended on the effectiveness of the Commission.

(d) Janawasa:

There was one important area in which the Land Reform Commission had no power to interfere. That was in any social organisations that may arise as a result of the distribution of large estates to a number of individuals or individual families. There were instances where persons banding themselves as private cooperatives applied for land to set up a social unit akin to the Chinese Commune or the Jewish Kibbutz. There was no infra-structure that could integrate and hold such social units together as a cohesive and effective means for development. To fill this vacuum the Government passed the Janawasa Law of 1976.¹⁹⁴ The Law created a Janawasa Commission in Part V of the Law, to which all individual social arrangements forming Janawasa could be affiliated. Under the Law any group of citizens of Ceylon, who are not less than 18 years of age may form a Janawasa and have their own social unit so recognised by the Janawasa Commission, provided that the objects of their association fall within the following framework.¹⁹⁵ Namely, that the objects of their Janawasa shall be:

- "(a) (i) To foster the collective management and development of agricultural land, and the collective development of animal husbandry and agro-based and cottage, industries;
 - (ii) To ensure maximum productivity and maximum utilisation of agricultural land for maximum employment and profit sharing in proportion to the quality and quantity of the work output;
 - (iii) To promote the social and cultural development of the members;
 - (iv) To promote and foster group farming among owners or cultivators of neighbouring agricultural land; or
- (b) To provide agricultural machinery, implements and inputs and other such services to members."¹⁹⁶

Provided that the objects are as detailed as above and the membership is of citizens over the age of 18, the Janawasa may apply for registration with the Janawasa Commission.¹⁹⁷ The issuance of a

certificate of registration by the Janawasa Commission is conclusive proof of its registration ¹⁹⁸ and thereafter the Janawasa assumes the personality of a body corporate. ¹⁹⁹ Once registered the Janawasa may acquire land in one of three ways:

- (a) By leasing land from the Law Reform Commission.
- (b) By leasing land from any State Institution.
- (c) By any other means. ²⁰⁰

The most likely source of land for the Janawasa has been the Law Reform Commission. Land leased by them may be purchased from the Commission at some point prior to the expiry of the lease. ²⁰¹

The Janawasa is forbidden by Law to use its land for the benefit of any individual member of the Janawasa. The idea of collectivisation is therefore pushed to its limit. ²⁰² However, the Janawasa may permit individuals to build a house for residential purposes "on such terms and conditions as may be determined by the Janawasa." By a blanket provision, the Janawasa Law conferred upon every Janawasa on the Island additional powers.

Section 12 reads:

"A Janawasa may in addition to the powers and functions conferred or assigned to it by the law, exercise and discharge all such powers and functions as are necessary or conducive to the attainment of its objects or as ²⁰³ may be conferred on or assigned to it by, by-laws."

Part III of the Janawasa Law laid down its constitutional structure, regarding the holding of meetings, the structure of its council of management (a kind of a Committee of management), the Rights, Powers and Privileges of members and the conditions under which membership may be lost. The law also prescribed that the shares held by its members may be sold or inherited only by those who are members of the Janawasa. ²⁰⁴ The law further created a Federation of Janawasa by associating other Janawasas with it. ²⁰⁵ The idea of the Federation was to expand the participation of Janawasas in the march towards increasing agricultural productivity, by the inter change of ideas and experiences. It was also a method by which the marketing of products may be greatly facilitated. ²⁰⁶ The overseeing effect of the Janawasa Commission keeps the Janawasa management council of each Janawasa active and correct in their functions. The Janawasa Commission, therefore, carried the power to punish any miscreants among the family of Janawasas by compelling dissolution. ²⁰⁷ Each Janawasa was required to have its accounts audited and profits

distributed among its members.²⁰⁸ The powers and the functions of the Janawasa Commission²⁰⁹ appeared to be co-terminous with those of the Land Reform Commission, to which reference has already been made.²¹⁰ The Janawasas appeared as a direct social consequence of the land reform movement of Sri Lanka. What is important is to emphasize that the Janawasas were an obvious and anticipated result of the land reform movement and the legal desiderata introduced through the Janawasa Law of 1976 seemed adequate to supply this new social dimension with an effective institutional base. The last item that needs discussion is the question of compensation for lost land.

(e) Compensating the landowners.

A basic problem concerning compensation was the identification of the land owner. In the previous chapter it was pointed out that the land tenure system among the Ceylonese was a most complex one. Particularly complex was the inter-play of relationships created under the Roman Dutch Law by various institutions such as Hypothecs, Fiduciaes and Fidei Commissum. In addition there had been land grants under the Land Development and Land Settlement ordinances to which reference had previously been made. To solve a few of these problems, the Land Reform Law of 1972 declared, that:

"where land is held subject to 'a mortgage, a lease, a usufruct or a life interest, the mortgagor, the lessor or the person in whom the title to the land subject to the usufruct or life interest is; and where any land is held on a permit or a grant issued under the Land Development Ordinance the permit-holder or the alienee of such grant,²¹¹

was considered as the owner of such agricultural land. Such a statement, not only helped to locate the owner for the payment of compensation, but it also helped towards determining the ownership of land for the purposes of ascertaining whether or not the ceiling had been exceeded by any particular individual. The section in effect prevented a person from claiming to hold less land on the grounds that some of the land he holds was not in his absolute ownership. As for property under, Fidei Commissa and, entailed property under trust settlements, the abolition of Fidei commissa and Entails Act of 1972²¹² was sufficient to provide the solution. Under that Act, all land under Fidei Commissa and all entailed land were declared to be free from such encum-

brances and was declared to be held absolutely by the person in lawful possession as the Fiduciary or as the beneficiary, as the case may be. In the case of successive interests created by a trust or by a Fidei Commisum, the interest of the present beneficiary shall be absolutely free from any encumbrances, so that he could for the purposes of the Land Reform Law be deemed to be its absolute owner.²¹³ As for future creations of Fidei Commissa or Entails, the Act declared that all such creations shall be void and of no effect.²¹⁴ Having thus cleared some of the difficulties connected with ownership, the Land Reform Law of 1972 and its amendment of 1975, concerning estate land, were able to introduce a comprehensive method for compensating the owners of the land who had lost their land holdings under these two laws.

The Land Reform Laws of 1972 and of 1975 introduced three methods of compensation. First, the law of 1972 laid down a thumb rule of payment, of a sum not exceeding fifteen times the average annual profit as assessed by the Commissioner of Inland Revenue, for non-paddy land and a sum not exceeding ten times the annual average profit similarly assessed for Paddy Land.²¹⁵ Second, the value assessed by the Commissioner of Inland Revenue for the year ending March 31st, 1971 for the purposes of wealth tax.²¹⁶ The compensation payable shall be the greater of these two amounts. Where the land had neither been assessed for Income Tax nor for Wealth Tax then, the government's chief valuer shall make his own valuation for the purposes of Income Tax and for the purposes of Wealth Tax, so that the methods laid down above could be put into effect.²¹⁷ Thirdly, none of these two methods was applicable to estate land: the Land Law Reform (Amendment) Law of 1975 subjected the determination of compensation for estate land to the assessment of the government's chief valuer. In both instances, the quantum of compensation offered by the Land Reform Commission for estate land and for non-estate land, could be challenged before a Board of Review.²¹⁸ A decision by that Board, was declared to be final and therefore may not be called into question before a court of law.²¹⁹ The payment of compensation for both types of land, estate and non-estate, is partly in money and partly in bonds²²⁰ called Land Reform Bonds.²²¹ The Bonds were normally payable at its maturity in 25 years, with an annual interest rate of 7%.²²² But they could be surrendered earlier

and their value obtained earlier, if the moneys thus obtained were required to be used for one of three purposes,²²³ Namely, (i) "for agricultural, industrial or other development purposes approved by the Minister of Lands."²²⁴ (ii) "For the construction of residential buildings with the approval of the Minister."²²⁵ (iii) "For any other purpose as may be approved by the Minister."²²⁶ Besides these, the bonds may be used at its par value for the payment of taxes, Capital Levy, Estate Duty and Income Tax at any time.²²⁷ The underlying policy here is that the land acquired by the Land Reform Commission and money paid by the government, on behalf of the nation, must as far as possible be utilised for national development purposes. It is this thinking that appeared to have driven the government to limit the maturing date of the bonds to 25 years subject to the earlier release of its value for specific development purposes which must first be approved by the Minister.

(V) The Post-Colonial Plan for the Reform of Housing Property.

(a) An Introduction.

The Land Reform Movement did not affect the ownership of houses. The value of land in the towns was many times more than its value in the rural areas. Therefore, owners of land in towns were not planters but renters of houses. They owned very small extents of land but the profits they derived through renting of houses were immeasurably more than what a similar plot of land could bring from the plantations in the rural areas. One important fact was that the urban land owners owned much less than the ceiling of 50 acres. One important mistake in the Land Reform Law was that it did not distinguish urban land from rural land. Therefore, the need to reform urban land by some other means became a matter of great controversy. The Ceiling on Housing Property Law of 1973²²⁸ was designed to plug that gap. Under that Law, what was controlled was ownership of houses and not the ownership of land. The persons who held no more than an acre of land with more than one house standing on that fell within the ambit of the Ceiling on Housing Property Law, where ever the land was situated. The Ceiling on Housing Property Law could therefore be considered as an adjunct to the Land Reform Law of 1972. It is to this that we now turn.

The Law which was passed for the reform of Housing Property holdings was the Ceiling on Housing Property Law of 1973.²²⁹ It is important to state that the reform of housing property, similar to the reform of land was not based on value but on quantity. The number of acres of land under the Land Reform Law and the number of houses under the 1973 Law formed the central issue. The failure to link both Land Reform and Housing Reform to value as distinct from numbers appear to have been a serious error in the two enactments. If the basic premise is one of equalisation of wealth through central directives, then the person who owns three modest houses in a little village in the North Central Province should not be treated equally with someone owning the same number of houses in the Western Province. Even less justifiable should be a comparison between a house owner in rural Dambulla and a house owner in the capital city of Colombo. This fundamental error of failing to tie reform with value rather than with numbers left some of the house holders in prestigious areas of Colombo unaffected because they were within the specified number of houses (namely owning two). But the middle class native of Dambulla with three houses, which may well be less than 1% the value of one of the houses in a prestigious suburb of Colombo such as 'Cinnamon Gardens' would fall outside the ceiling on housing property under the Law. The result will be that the citizen from Dambulla would be required to surrender his one extra house to the National Housing Commission. The value of that surrendered house to the income of the citizen from Dambulla could be most significant. But the value of that house when compared with any one of the houses from 'Cinnamon Gardens' would be infinitesimal. The reform therefore did not effectively harmonise the national wealth but provided an extra house for the home less in Dambulla. The houses left to be privately owned in Colombo had now become real sources of wealth with exorbitant rentals; for the Rent Restriction Laws did not control the rents beyond a basic level at which Colombo housing property was not normally available. The result therefore was that housing in Colombo became such a source of wealth that nationals of the Island found it difficult, if not impossible, to find accommodation in Colombo within their economic limits.

The tenants in Colombo, therefore, became the very rich friendly aliens with access to convertible currencies tied to foreign earnings. This result must be related to the error of judgment seen in the Law of 1973. As most of the houses beyond the ceiling have now been allotted to the homeless, it is difficult to see how this Law could now be changed in a way that wealth and not the numbers would become the key to its application.

The Law could be examined under the same four categories chosen for the analysis of the Land Reform Law. Namely, the appropriation of the houses for distribution, the distribution of the houses after they are acquired, the infra-structure for the integration and effective implementation of these activities chartered by the Law and lastly the problem of compensation.

(b) The Appropriation of the Houses

The Law of 1973, in section 2, states:

- (1) The maximum number of houses which may be owned by an individual who is a member of a family shall be such number of houses which together with the number of houses owned by the other members of that family is equivalent to the number of dependent children, if any, in that family, increased by two.
- (2) The maximum number of houses which may be owned by an individual who is not a member of a family shall be two.
- (3) The maximum number of houses which may be owned by any body of persons, corporate or unincorporate, shall be such number of houses as is determined by the Commissioner to be necessary for the purpose of providing residence to the employees and functionaries of such body or of carrying out the objects (other than any object for the letting of houses on rent) of such body.
- (4) An individual shall for the purposes of this Law be deemed to be a member of a family if such individual has a spouse or a dependent child or is a dependent child of any individual." ²³⁰

Despite the complexity of the wording in the foregoing section, the law limits an individual to two houses, Any number of houses owned by a person in excess of two are vested in the Commissioner for National Housing. In computing this number, the Law requires that a person who constructs houses for sale shall not be considered as a person who owns them ²³¹ provided that the house is not occupied

by any person before it is sold and provided that it is in fact sold within a period of 12 months after its completion.²³² But a person who has taken steps to demolish existing houses so that the number shall become two, will be deemed to be the owner of the demolished houses, provided he had demolished them at a time on or after November 9, 1971.²³³ Amalgamation of two or more houses is permitted, if it appears to the Commissioner of Housing that the requirements of any particular family demands such an amalgamation.²³⁴ Houses built on land leased by the government to an individual or by an individual to another individual will be considered as a house owned by the lessee.²³⁵ This provision catches the Chena owner who farms the Chena land granted or leased by the Government in some remote part of the Island, who may have constructed more than two modest houses. The value of this kind of housing bears no real significance to the overall purposes of this law, namely for the control of wealth. The only part of the law which appeared to relate to the question of wealth was Part II. Under that part, no person was permitted to construct a house in excess of a floor space of 2,000 square feet including the thickness of the external walls.²³⁶ The law further placed a limit on the space on which such a property was built. In municipal areas the maximum extent of the land permitted to be utilised is 20 perches while in the urban areas it is 40 perches. No control of any sort was placed for rural areas.²³⁷ Further, the cost of construction of a house was limited to a sum fixed by the Minister of Housing, as per square foot of construction. A violation of this provision was made a criminal offence, punishable by a fine of not less than three times the amount spent in excess of the fixed amount.²³⁸ It is a curious fact that the government, while attempting to tie houses-to-be-built to a value indicator, failed to use the same indicator as a basis for housing reforms. By an amendment²³⁹ to the Principal Law, the government added in 1976 four additional grounds on which housing property may vest in the National Housing Commission. These four new grounds were; where the owner of a house:

- (i) had left Sri Lanka and has obtained a foreign citizenship;

- (ii) had been residing abroad for a continuous period of 10 years;
- (iii) had left Sri Lanka for the purposes of settling abroad;
- (iv) is not in existence, is not known, or cannot be traced.

In each of these instances, the tenants of such houses may purchase the house from the Commissioner of National Housing. This naturally affected absentee landlordism which had recently become prevalent in Sri Lanka, due to the increase of immigration by Sri Lankans to foreign countries. A principal lacuna in the Law was that it did not define as to what constituted a house. That left the court with a discretion to determine the applicability of this Law as a preliminary issue in any litigation. Grey areas such as the corner boutique attached to a residence could raise nice questions of Law and Fact. However, there are no reported cases as yet on this question.

(c) The distribution and utilisation of the appropriated houses.

Within 12 months of this law ²⁴⁰ coming into effect, all houses in excess of the ceiling were deemed to have vested in the National Housing Commission, per force the Law. ²⁴¹ The Commissioner was authorised to transfer the houses vested in him to any local authority, government department or public corporation, subject to such terms and conditions as the minister may determine. ²⁴² The local authorities usually rented those premises to persons in their localities at a nominal rent. As for government departments and public corporations, the houses transferred to them were used exclusively for the benefit of such institutions. One of the recurring problems arising out of these arrangements were the unauthorized transfer of houses to other persons by the individuals to whom the local authorities or public corporations had rented or leased them.

To prevent this kind of misuse of the facilities provided, the government enacted the Housing (Special Provisions) Law of 1974. ²⁴³ Under the provisions of that law, all persons who had a right of occupancy to premises owned and provided by: (i) the Commissioner of National Housing; (ii) Local Authority; (iii) The Commissioner of Local Government, and (iv) any public corporation ²⁴⁴

were prohibited from transferring that right of occupancy to some other person without the prior authorisation of the "appropriate authority."²⁴⁵ The Law defined the "appropriate authority" in each case as being:

- (i) The Commissioner-in the case of the National Housing Board. ²⁴⁶
- (ii) The Municipal Commissioner, the chairman of a village committee, a town council or an urban council-in the case of local authorities. ²⁴⁷
- (iii) The Commissioner of Local Government. ²⁴⁸
- (iv) The head of a public corporation. ²⁴⁹

A breach of these provisions was made a criminal offence, punishable upon a summary conviction by a fine of 500/rupees or with imprisonment for six weeks or both. However, the Commissioner was authorised to offer houses for sale, first to the tenant-in-occupancy and thereafter to others who own less than two houses. ²⁵⁰ It is this that became the high point in the implementation of this law. For the tenants and the homeless were benefited by being given the opportunity to acquire houses of their own at a very nominal price. By an amendment to the Principal Law, the Ceiling on Housing Property (Amendment) Law of 1977 ²⁵¹ the Commissioner was empowered to transfer the ownership to the tenant of a house where the rent is not more than 25 rupees and which had become vested in the Commission under the Principal Law. It was further declared that there shall be no stamp duty on any payment of a purchase price regarding that transfer. ²⁵² In addition to the vesting of the house, the law declared that certain appurtenances connected with the house, vest with it. ²⁵³ These are: a reasonable extent of land necessary for the proper use of the house ²⁵⁴ and in the case of flats, "land and other rights as are appurtenant to the flat." ²⁵⁵

The law relating to condominium properties ²⁵⁶ was reformed subsequent to the Ceiling of Housing Property Law, in the same year. Under the Apartment Ownership Law of 1973 ²⁵⁷ apartment dwellers were empowered to organise themselves into Associations ²⁵⁸ so as to regulate among themselves the use of common amenities pertaining to the apartment block. Servitudes, ²⁵⁹ the surrounding land and other common elements such as staircases and approach-passages were deemed to be held in common ²⁶⁰ for the use and enjoy-

ment of apartment dwellers. ²⁶¹ All these rights and privileges were subject to the overriding requirement to register the 'Condominium Plan' with the Registrar of Lands. ²⁶² While empowering the Registrar of Lands to register the Condominium Plan ²⁶³ the Law laid down the matters that must be included in the plan that was submitted for registration in an explicit way. ²⁶⁴ The purpose of the Apartment Ownership Law of 1973, appeared to be to integrate the community that had been established by virtue of apartments being transferred from one of tenant-occupancy into one of owner occupancy as a result of the application of the Ceiling on Housing Property Law of 1973. Among tenants the inter-personal rights and duties became regulated by the owner of the apartment block. But now, when each of them had become the absolute owner of the apartment they occupy, the inter-personal relationships became differently conceived requiring different modalities for their enforcement. The Commissioner for National Housing was in no way considered to be in the position of the original owner and it was this that required the passage of the Apartment Ownership Law of 1973. Related to this aspect of apartment ownership and dwelling was the establishment of a Common Amenities Board in 1973. ²⁶⁵ The Common Amenities Board Law, ²⁶⁶ which created a Common Amenities Board, a Public Authority, just prior to the passage of the Apartment Ownership Law, required the Board to "control, manage, maintain and administer the Common Amenities and the common elements of units of accommodation" in apartment blocks. ²⁶⁷ The link between the two pieces of legislation was struck by empowering not less than 75% of the owners of an apartment block to apply to the Common Amenities Board, a public authority to have the provisions of the Common Amenities Board law apply to their property. ²⁶⁸ By these means the legislature had attempted to provide a viable infra-structure to support the changes that an apartment dweller would surely undergo in being transformed from a tenant-occupier status to that of an owner-occupier status.

(d) The National Housing Commission

In 1954, the United National Party administration introduced the National Housing Act. ²⁶⁹ The Act merely provided the infra-structure, together with financial backing, to inaugurate a programme of building houses for rent and rent-purchases. The Act

created a National Housing Fund, which derived its financial support mainly from the Treasury. ²⁷⁰

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Loans from this fund were made available to Building Societies, Housing Bodies ²⁷² and Building Companies. ²⁷³ The Act provided for the appointment of a commissioner for National Housing ²⁷⁴ and a staff ²⁷⁵ capable of putting the objects of this Act into effect. The objects which the commissioner and his staff were required to achieve were described widely in section 2 of the Act.

These were:

- (a) the construction of buildings for residential purposes---;
- (b) the manufacture, importation of supply of materials required for the construction of such buildings;
- (c) the provision of roads, water, electricity, gas and sewage;
- (d) the administration, management or control of buildings and building schemes;
- (e) the provision of amenities for the inhabitants of any area in which any housing scheme has been carried out including transport and other services;
- (f) any other prescribed objects;
- (g) any object reasonably connected with or ancillary to any of the objects specified in paragraphs (a)-(f);
- (h) the development of land for the carrying out of any of the objects herein before specified; ²⁷⁶

Supporting these objects, the Act authorised the Commissioner of National Housing to lend money ²⁷⁷ to prospective house builders who were building societies, housing bodies and building companies. ²⁷⁸ The government under the Act ²⁷⁹ guaranteed the re-payment of the loans, by charging them on the Consolidated Fund. ²⁸⁰ The Act empowered the Commissioner to acquire land for house building purposes under the Land Acquisition Act ²⁸¹ and left Crown Land required for the purposes of carrying out the objects of this Act, at the Commissioner's disposal. ²⁸² Houses subject to this scheme were given a special position by the Act. Section 90 (1) read:

"The income accruing to any person from any new house shall be exempt from income tax under the Income Tax Ordinance in respect of the year of assessment commencing on the 1st day of April, 1955, and each of the seven years of assessment immediately succeeding."

These provisions indicate that the aims and objects of the Act were to put more houses in the hands of private individuals who may rent and acquire an income which would be free from Income Tax for at least seven years. The expression 'Income' for the purposes

of s. 90 (1) was defined in this way:

"If the house is let, the income accruing to that person by way of rent; or if the house is not let but is occupied by that person, the income that would accrue to that person by way of rent if it were let." ²⁸³

The National Housing Commission, until 1973 provided that institutional base for financing the building of houses for rent. It was an element in the free market economy within which the ownership of houses was conceived since Independence. It is ironical that the same commission was utilised by the 1973 Law to reverse this economic policy by introducing a centrally directed ceiling on housing property ownership.

The National Housing Commission which was established under Part II of the National Housing Act of 1954, ²⁸⁴ provided the administrative infra-structure for the implementation of the Ceiling on Housing Property Law of 1973. Aside from the community arrangements introduced under the Apartment Ownership Law of 1973, the reform of housing did not require the establishment of social arrangements similar to the Janawasas. However, by an amendment to the present law in 1974, this principal law was excluded from applying to cases where members of Janawasa were permitted to construct their own houses for their own occupation for so long as they do remain members of such Janawasas. The Ceiling on Housing Property (Amendment) Law of 1974, ²⁸⁵ declared in section 2 that:

"a house owned by a body of persons which is let by such body to a person other than an employee or functionary of such body shall not be taken into account in determining the number of houses necessary for the purpose of providing residence to the employees and functionaries of such body. ²⁸⁶

Besides this amendment the government did not find it necessary to provide any additional support to the Commissioner of National Housing. The powers he had, arising out of the National Housing Act of 1954 ~~were~~ deemed sufficient for the implementation of the Housing Property reforms entrusted to him by the 1973 Law.

(e) Compensating the owners of houses acquired under the Law.

Although the method of computation and the quantum of compensation fundamentally differed from that which was used under the Land Reform Law, the method of payment and the conditions of payment appear to be a carbon copy of what was introduced in the Land Reform Law of 1972. Compensation for houses acquired by the Commission was payable partly in cash and partly in bonds.²⁸⁷ But unlike the higher interest rate of 7% under the Land Reform Law, here the bonds under the Law which would mature in 25 years, carried an interest rate of 5%.²⁸⁸ The bonds under this Law were capable of being transferred as a gift inter-vivos or by will, to one's spouse or children²⁸⁹ and they could be cashed in at anytime, for the same kind of purposes for which the 'Land Reform Bonds' were considered for instant payment.²⁹⁰ These similarities cease at this point at which the method for the computation of compensation comes into play. Of these the lesser amount becomes payable. Under the Land Reform Law too there were two methods for the computation of compensation for non-estate Land. Of the two, there, the highest value became payable. Returning to the two methods of computation of compensation for the loss of Houses: First, the market value of the house at the time of appropriation was determined.²⁹¹ Second, the market value of the house on April 1st, 1957 is determined. Then, that value is increased by a figure of 6% for each year thereafter until the point at which the house became vested under this law is reached. The amount payable as compensation is the lesser of these two sums.

The higher rate of interest and the higher value of payment under the Land Reform Law and the lower rate of interest and the lesser value of payment, between two determinate values under the Ceiling on Housing Property Law cannot be adequately explained as a matter of serious policy. However, it is important to say that while the Land Reform Law was the creation of the Minister of Lands, a Kandyan Land owner,²⁹² the Housing Property Law was the creation of the then Secretary General of the Communist Party (Moscow Wing).²⁹³ Whether that explains adequately these two different approaches to the two Laws, is not a matter meriting

serious thought.

(VI) Reflections on the Reform of Immovable Property

In the lesser developed countries comprising the former colonial territories, the ownership of immovable property became the key to economic power. Often the control of economic power became the key to political power. And thereby political power became co-axial with the ownership of land. The underlining reason for this fact was that the colonial economic foundations were not built on industries but on land. The emphasis was on the production of the primary elements and not of manufactured items. Therefore, the reform of land was considered as a key element in the formula worked out for the reform of the socio-economic structure of a lesser developed country. These cursory observations apply, with full force, to the conditions found in Ceylon at the dawn of Independence in 1948. It is safe to assume that the land reform programme introduced in the present decade was primarily aimed towards altering the social formations that were found at the time of Independence. These formations were maintained by successive Administrations without any noticeable change. It must be said at once that the land reform movement by itself could not have brought about a detectable change in the original social formations inherited from colonial times. The land reform movement was one important catalyst for change. Changes in the education programme which had come down from the colonial times and changes in the emphasis placed on indigenous languages were some of the other catalysts for social change. These have been considered in previous chapters of this work. Despite the association of these catalysts, in a grand design for change, Land Reform must be considered as an instrument of considerable strength forged towards dismantling the socio-economic power of a large slice of the population that had contributed to the particular social formations inherited from the colonial days.

To achieve this end it becomes both important and necessary to link any programme for land reform to the 'value factor' rather than to the 'quantity factor'. This distinction seems fundamental to the planning of a Land Reform Programme for any lesser developed country. A basic error in the programme structured for Sri Lanka was that the programme was linked to the 'quantity factor' and not to the 'value factor'. For an acre

of land in Colombo or a house in Colombo was worth several times more than a house in rural Walahapitiya or 50 acres of land in the North Central Province. Besides, in the computation of the 50 acres, the owner was free to keep the best land in the best location and deliver to the Land Reform Commission land of little value and often of little utility. This kind of tactic could effectively frustrate the principal aims of the Land Reform Movement. For the transference of land with a low fertility content in the soil could substantially affect the fortunes of the landless peasants to whom the Land Reform Commission invariably transferred land for agricultural purposes. All these problems could have been avoided, had the Government proceeded along a 'value factor' basis rather than upon a 'quantity factor' basis. This underlying error of judgment appears to have adversely affected the whole programme for land reform in Sri Lanka. Both the Ceiling on Housing Property Law of 1973 and the Land Reform Law of 1972 had only been marginally effective, if at all, in cutting any decisive inroads into the existing social-formations of Sri Lanka. The resulting system of rights, to land and housing property distributed as a result of the reforming laws, made the introduction of any changes to the original programme for reform, at this stage, likely to cause a great deal of inconvenience. Any change to a 'value factor' oriented system of land reform now could cause very considerable injustice. The choice of the quantity factor should explain, at least partly, why the land reform programme in Sri Lanka had failed to achieve the desired results.

The Land Reform (Amendment) Law of 1975, which concerned estate land, was better conceived. This was so, because it was directed to a particular category of land and therefore to a particular economic unit. The estate lands to which it applied formed the sum total of the infra-structure of the colonial economy. The nationalisation of the estate lands was tantamount to the absorption of that infra-structure into the economy of the whole nation. That largely was the effect of vesting estate land in the Land Reform Commission and subsequently in the Ministry for the Plantation Industry. The 1975 Act was conceived within the framework of a 'value factor' rather than a 'quantity factor', for it did not bring into effect the 50 acre limit imposed by the Principal Act. The three pieces of legislation

central to this area have attempted to avoid the possibility of conflicts arising out of their implementations. They had carefully defined the concept of 'owner' in a way that 'the lessee' and the 'grantee' of Crown Lands, inter alia fell into the category of 'owner'. The abolition of Fidei Commissa and Entailed Property Law of 1972 had been introduced so as to help in avoiding any disputes concerning the rights of a 'fiduciary' or a 'beneficiary'. Further, by subjecting the assessment of compensation to the sphere of administrative and bureaucratic action, without any resort to the courts, the government had effectively restricted the operation of the land reform programme to that nebulous area of Government, called political policy. This approach effectively increased the power of the bureaucracy and any ills of the system must therefore be related to that quarter normally referred to as the Civil Service. This indeed was the state bureaucracy.

It had previously been mentioned with reference to Education and Language that the role of law in development was to blend Government policy with social policy so that social changes could to a large measure be controlled and directed so as to conform with policy. The legislations concerning Land Reform did perform such a function. They merely related the policy of the Government at the time, to social needs.

The reform of non-paddy land and housing property was an answer to the concentration of land and housing property in the hands of a few, thus creating an acute state of landlessness and homelessness on the Island. But the reform of Paddy Land was an answer to several complex social and economic problems. The main problem was an economic problem where the Paddy Lands had fallen into disuse and neglect under a 'dead hand'. Paddy Lands had become vested in family interests and persons who should rightly be concerned in developing the potential of such land had taken up other employment leaving the tasks of a Govia, to paid labour. The Minister of Agriculture ²⁹⁵ while proposing the Paddy Lands Bill alluded to this in the following passage in his speech:

"It is only right to provide opportunities for a man to become a carpenter because paddy cultivation is for people who are interested in paddy cultivation. It is not for people who are interested in clerical work---. Paddy cultivation should be undertaken by people who are interested in Cultivation,

who understand cultivation, who know the problems of agriculture and it is for that purpose that the various clauses are in the Bill to see that a certain standard of cultivation is maintained." 296

Connected with the economic problem was the non-availability of land for paddy cultivation. As an end result of the concentration of Paddy Lands in the hands of a few, less and less of such land had been "Asweddumized" - a term used for preparing the soil for planting paddy. This had progressively decreased the extent of land available for cultivation while the extent of cultivable land lying fallow had increased during each year. The Land Reform Laws and the Paddy Lands Acts had all attacked this basic problem by both ferreting out land with a potential for paddy cultivation and by distributing them among those who were most suited to cultivate them. As early as in 1951, when one of the earliest Bills on the reform of Paddy Lands were being debated, the then Leader of the Opposition, Mr. Bandaranaike remarked:

"An interesting fact was brought to my notice the other day that in about 1930 or 1931, according to the figures in the Government reports, there were 850,000 acres under Paddy Cultivation in the country. For last year, in spite of the fact that over a period of 15 to 20 years about 100,000 to 150,000 new acres have been asweddumized in the dry zone, the total number of acres that were cultivated for the Maha season was only 650,000 in this country." 297

Another factor for underdevelopment was the problem of ownership. Unlike in the Land Law in England where there was a recognition of primogeniture, the Roman Dutch Law which was applicable in Ceylon gave rise to a position of co-ownership. During the 1951 debate, the then Minister of Finance, Hon. J. R. Jayawardene explained this problem:

"In Ceylon, once a parent dies or an owner of a land dies, unless he has passed over the ownership by a will on a written document, the land belongs to the entire family, --- our families are not small. So, co-ownership has become the rule rather than the exception throughout the maritime provinces. In the Kandyan areas the vast areas of land owned under nindagamas of land tenure create difficult problems and the nindagama landowners and nilakarayas cannot be ousted from their possession." 298

These two aspects of land holdings had evolved a system called:

"---Thattumar possession of property that is held under co-ownership without recourse to partition, whereby one owner may cultivate the land for a period of years and the other for the next period of years, and so on - has created a unique system of land tenure in this country." 299

The system of Thattumar which was in effect a result of the peculiar system of land tenure had an adverse effect on the potential for paddy cultivation. Unlike the coconut plantation industry, the paddy plantation industry requires a great deal of attention, particularly regarding manuring and spraying. It has been found that paddy lands held under the Thattumar system had been neglected by the respective co-owners who do not remain psychologically attached to such land as they would be if the ownership in them was not a shared one. The Paddy Lands Act of 1958 avoided the adverse effects of this system by introducing the Tenant-cultivator, who principally remained fixed and in charge of the cultivation programme, while the share that is due to the owner under the Thattumar system could go to the particular co-owner who is entitled to that share at that time in question. As for the concern and the interest that the cultivation of paddy requires, the 1958 Act makes that the responsibility of the Tenant-Cultivator, with a fixed tenure, and independent of the Thattumar system. The Paddy Lands Act was a good example of the role that law plays in development. The Act clearly blended the social dimensions with Government policy as an element in its strategy for development.

Chapter 12

The Legal Frame Work for Financing Development

1. An Introduction

A major road block in the way of Third World development is the lack of money. The mere availability of cheap labour and basic raw materials, together with the potential for irrigation and fertile land had been proved insufficient as a basis for development due to the paucity of the available financial resources. Many Third World Countries have been compelled to rely on International Funding Agencies such as the International Monetary Fund and regional development agencies such as the Asia Development Bank as their principal sources of funding. The aim in this chapter is to examine the legal framework within which Ceylon's development had been financed, both from internal sources and from external sources.

II. Financing from Internal Sources

II. (a) The Role of Commercial Banks in Development

The first Commercial Bank was established in Ceylon in 1841¹ and there are now twelve such Banks on the Island. Of the twelve, four² are of Sri Lanka nationality while the other eight are of foreign nationality. Of these eight, four³ are British Banks, three are Indian⁴ Banks and one Pakistani.⁵ Most of these Banking Corporations have a number of branches spread across the Island. Until the creation of the People's Bank in 1961, as one of the Ceylonese Banks, none of the existing Banks, both foreign based and local based had the power to finance national development projects. Such projects were generally regarded as uncertain financial ventures for investments. Development financing in Ceylon may, therefore, be broadly divided into two periods. First, the era of free enterprise banking, and secondly, the period of controlled banking. The end of free enterprise banking came in 1961. Through

the Finance Act of ⁶ that year, the government introduced legislation to regulate the business of banking in Ceylon in such a way that the capacity to acquire profits out of a Banking business in Ceylon thereafter became somewhat limited.

II(a)(i) The Era of Free Enterprise Banking and Development
Financing: The Period Before 1961.

Despite the fact that the establishment of the Central Bank under the Monetary Law which was enacted in 1949 ⁷ introduced a 'super bank' with supervisory and regulatory powers over all commercial banks on the Island, the Central Bank has no power to alter the policy regarding lending of money and the provision of credit facilities to the people of Ceylon. Both these items were left in the hands of the Board of Directors of each commercial bank whose decisions were guided by a well established principle among Bankers that their main endeavour should be to: minimise the risks of lending while maximising the margin of profit through investments. The commercial banks, except the People's Bank, displayed an attitude of varying degrees of caution towards financing. The Bank of Ceylon, although privately owned until 1963, displayed the greatest interest in structuring a liberal policy towards credit financing. The Hatton Bank Limited and the Commercial Bank Limited, two recent additions to the banking circles on the Island, were equally liberal in their lending policies. The readiness to take financial risks was a key to development financing and it is this tendency that was understandably absent in most of the commercial banking companies on the Island.

To augment this lack of development aid, governments at various times introduced institutions, underwritten by the Treasury against financial losses. These institutions were specifically created to support development financing, encouraging them by Government guarantees of financial support to undertake a certain degree of risks for the sake of development financing. The Ceylon Savings Bank which was first created in 1859 ⁸ was subject to strict government control. Despite the interest shown by the government no active steps towards making its money available for national development were taken until 1955. By an amendment to the Ceylon Savings Bank Ordinance, ⁹ Parliament took a limited step and empowered the Bank to lend money on first mortgages of

immovable property.¹⁰ However, the British Administration in 1931 had established the State Mortgage Bank basically to lend money, largely provided by the government, on mortgages of immovable property. The State Mortgage Bank¹¹ may be considered as the first step taken by an administration in Ceylon to finance national development. Describing the purpose for which the Bank may grant loans, the statute read:

"The Bank may make loans for any of the following purposes and such purposes only: (a) the purchase or lease of agricultural land, its development, and improvement and the incurring of capital expenditures necessary for the preparation of its produce for the market; (b) any purpose incidental, accessory, or ancillary to any of the above purposes; (c) the liquidation of debts already incurred for any of the above purposes."--- 12

Since independence, the ambit of the lending powers of the State Mortgage Bank was steadily enlarged, so as to bring in more of the goals of national development into it. The Ceylon State Mortgage Bank and Finance (Amendment) Act of 1968,¹³ by an amendment to section 51 of the ordinance of 1931,¹⁴ introduced a much expanded area in which the bank may invest its money by granting loans. The purposes for which the Bank may now lend money under the 1968 amendment indicates the extent to which the goals of national development had changed since 1931. The amendment authorizes the Bank to finance national development in a number of areas which were considered to involve a far too great a risk for Commercial banks. Seven principal areas require particular mention:

1. Agriculture

The Bank was authorized to grant loans for the "purchase, lease, cultivation, improvement or development."¹⁵ of land used or to be used for agriculture. This extension appeared important in the light of the Paddy Lands Act of 1958. Under the Act, as it was mentioned in the previous Chapter, the Govia acquired the status of a Tenant-Cultivator together with the responsibility to prove himself to be a good farmer. Where the Tenant-Cultivator was on a three-quarter Ande arrangement which entitles the owner to receive a mere one-quarter of the produce, the Tenant-Cultivator must then pay both for labour and manure. The amendment to the State Mortgage Bank enabled him to obtain a loan to finance

'the development of improvement' of his Paddy Land, which in fact was land used for agriculture. The amendment in this aspect supported the implementation of the Paddy Lands Act.

In addition, the amendment authorized the granting of loans for "the purchase, or lease, or the construction, repair or renewal, of any building, factory, mill, mine, machinery or equipment used, or to be used, in connection with any agricultural --- undertaking ---." ¹⁶ This too helped the Tenant-Cultivator under the Paddy Lands Act of 1958. Under this sub-section a Tenant-Cultivator may obtain a loan to purchase farm implements, Tractors, Hulling machines and a variety of other machinery. In addition, the repair of out-houses, such as barns could be accomplished through a loan obtained under this sub-section.

2. Dwellings

The amendment provided the Bank with an opportunity to loan money for the purchase of land for building dwellings, ¹⁷ the construction, repair, renovation or extension of dwelling houses ¹⁸ and for the purchase or lease of dwelling houses. ¹⁹

The amendment provided an opportunity for Ceylonese to own more than two houses and five years later, in 1973, a different administration to the one that enacted this amendment was compelled to take the excess houses away under the Ceiling on Housing Property Law, ²⁰ to which reference was made in the previous chapter.

3. Market Produce

The amendment empowered the Bank to finance "the manufacture or preparation of any agricultural or other prescribed product or commodity for sale in the market," ²¹ and "for all other incidental, accessory or ancillary purposes." ²²

This provision had a much wider implication than the mere financing of the preparation of agricultural products for sale. Under the alternatives: 'or other prescribed products', the Bank was able to finance a number of cottage industries. This helped the rural folk to commence such enterprises on the sidelines as weaving cloth, making handicrafts for sale in Tourist shops, creating batik patterns on cloth and a whole catalogue of small industries. In addition this provided the industrious and skilled unemployed to use their talents for national development.

4. Supportive Services

Under four sub-sections ²³ the amendment authorized the granting of loans for a number of projects which would support the plan for increasing agriculture on the Island. Under one of the sub-sections ²⁴ the Bank was authorized to lend financial support for businesses concerned with providing farm implements business on a hire-purchase basis. The Bank was authorized to participate directly in Corporations concerned with supporting agriculture. ²⁵ In this respect the Bank was required to buy shares in such Corporations. This would necessarily involve the Bank in becoming a shareholder in such Corporations. The Bank was also authorized to grant loans; "To any person for the purpose of conducting any agricultural business." ²⁶ This provision provided opportunities to persons interested in engaging in business as wholesale merchants in Agricultural produce. The wholesalers play an important part in providing the distribution of Agricultural products through locally based retail outlets.

5. Advisory or Managerial Work

The Bank was authorized to engage in managerial, advisory or supervisory activities in any enterprise in which the Bank, directly or as a result of a loan granted to a client engaged in such enterprise, has an interest in its success. Under the sub-sections ²⁷ in question, the Bank was authorized to undertake these activities with or without remuneration. This provision allowed the Bank to protect its own financial interest by ensuring that the enterprise in question was operated in a way that it would be able, in time, to pay back the money lent. This provision was clearly of great importance to the Bank in light of the risks the Bank was required to take in development financing.

6. The Marketing of Agricultural Produce

In two sub-sections the Bank was empowered to set up "the necessary organization for selling or marketing any product of any agricultural or other prescribed undertaking", ²⁸ and to act as an agent of any client of the bank. ²⁹ In each such activity the Bank would be supporting agricultural development, a role which Commercial Banks were unwilling or incapable of playing.

7. To Provide Support Services for Development

In a broad list of activities enumerated in three sub-sections the Bank was authorized to provide particular supporting services for development. This included the provision of technical, financial and management services.³⁰ In this aspect the State Mortgage Bank has periodically engaged foreign experts provided through one of the International Organizations. The World Bank in particular and the Asia Development Bank in general had periodically provided the much needed foreign experts. The State Mortgage Bank had been further authorized to conduct 'economic surveys, studies and seminars.'³¹ It had also been empowered to train selected personnel of the bank and other persons in accountancy, banking and valuation, project and credit appraisal, and engineering and scientific skills.³²

Although these amendments were enacted in 1968, almost seven years after the end of the free enterprise era for Banking, the need to expand the powers of the State Mortgage Bank was felt as a result of a situation created by the free enterprise system of banking dating from 1841. The need was to re-create a local source for development financing as an alternative to foreign aid - an alternative which the Commercial Banks on the Island were either unable or unwilling to provide. The amendments in a sense mirror the changes in political attitudes to development financing. The need to re-create a locally based foundation for the wealth of the nation and the need to finance rural advancement was an important consideration behind the 1968 amendments. Similar thoughts and aspirations appear to have guided the policies of the British Administration in Ceylon during the last days of World War II. The British Administration found that the Commercial Banks on the Island cannot be persuaded to indulge in development financing. At the same time, the Administration found that the State Mortgage Bank as constituted under the Ordinance of 1931³³ did not have the power to engage in the kind of speculative financing which development financing called for. The British Administration, therefore, enacted the Agricultural and Industrial Corporation Ordinance of 1943.³⁴ Under that Ordinance the British Administration established an Agricultural and Industrial Corporation. It left at the disposal of the Corporation a sum of thirty million rupees voted out of the Consolidated Fund of Ceylon. The Ordinance spelt out a number

functions which the Corporation was authorized to undertake. These functions fell into the seven categories that have been enumerated under the 1968 amendment ³⁵ to the State Mortgage Ordinance of 1931 above. What the 1968 amendment did was to marry the functions of the Agricultural and Industrial Corporation with the functions declared by the Ordinance of 1931 ³⁶ in light of the consequences of the Paddy Lands Act with particular reference to the Tenant-Cultivators. The State Mortgage Bank ³⁷ and the Agricultural and Industrial Credit Corporation ³⁸ represented two of the most significant interventions of the colonial administration in the national development of Sri Lanka. While monies voted out of the Consolidated Fund were made available to the Credit Corporation, the State Mortgage Bank was authorized to raise money through the sale of debentures. ³⁹ The repayment of these debentures with interest was initially made from the funds of the Bank and failing that it was to be paid out of the Consolidated Fund. ⁴⁰ This government guarantee proved vital to the activities of the Bank. Neither of these two financial sources were available to the co-operative movement of Ceylon. And therefore, on the eve of Independence, the British Government created the Co-operative Federal Bank of Ceylon Ltd. (Financial Aid), by an ordinance passed in 1947. ⁴¹ The sole purpose of that bank was to produce a central source of credit for the co-operative movement in Ceylon. Upon registration of the Bank by the Registrar of Co-operative Societies, the government authorized the payment of 2 million Rupees towards its capital and thereafter agreed to supply further sums of money from the Consolidated Fund whenever a resolution was passed by parliament. The creation of the co-operative Federal Bank proved of great assistance to the Co-operative Movement. This enabled individual Co-operative Societies, such as the Multi-purpose Co-operatives, to raise necessary loans to expand their own activities. The Co-operative Movement had been an active movement during the British Administration of Ceylon, particularly, during the war years. Out of those trying and difficult days the Movement had emerged in a matured and an expanded role. This naturally created a need for extended credit facilities to widen their scope of business, particularly at that critical juncture of the nations history; namely, at the dawn of Independence. Aside from the expanded objects provided for the State Mortgage Bank by an amending Act in 1968, ⁴¹ to which reference has been previously made,

the post Independence administration provided yet another credit financing agency in 1955. This was the Development Finance Corporation.⁴² The purpose of the corporation was to attract capital investment both from external and internal sources including the government. The authorized capital of the corporation was 8 million Rupees and each share was to be sold at 100 Rupees.⁴³ The declared purposes of the corporation were contained in section 4. These were:

- "(a) to assist in the establishment, expansion and modernization of private industrial and agricultural enterprises in Ceylon, and
- (b) to encourage and promote the participation of private capital, both internal and external, in such enterprise."

These three legal entities⁴⁴ which were essentially credit financing agencies, from 1931, provided an alternative source for financing the Island's development. These agencies were in no way the competitors of the commercial banking enterprises on the Island. For the debtors who borrowed from these agencies were often not the ones who could have secured a loan from the Commercial Banks. The period of entreperunial banking continued until 1961, when, by the Finance Act of that year, the government nationalized, not the Banks but the business of banking on the Island.

II(a)(ii) The Era of Controlled Banking and Development Financing: 1961 and after.

The year 1961 was an important year for banking. On May 30th of that year, the government enacted the People's Bank Act.⁴⁵ Under the Act, a new commercial banking establishment was created. The Board of Directors were drawn from five distinct and separate sources. These were:

- "(a) The Commissioner of co-operative development who shall be the exofficio director;
- (b) two directors appointed by the Minister;
- (c) one director appointed by the Minister for the time being in charge of the subject of rural development;
- (d) one director appointed by the Minister of Finance; and
- (e) three directors appointed or elected as provided in sub-section (2)."⁴⁶

By sub-section two of section 8 and sub-section one of section 9, the last category of directors was initially appointed by the Minister and was thereafter elected:

"by a general body of the Bank consisting of the Secretary to the Treasury, the members of the Board and the persons elected by co-operative societies which are shareholders of the Bank to represent such societies in that body." 47

The government's control of the directorate of the bank was made clear. While providing the nation with normal banking services of a commercial bank, the government specifically provided the following services through the People's Bank:

"In carrying out its purposes, the Bank may exercise all or any of the following powers:

(a) to grant---:

- (i) short-term, medium-term and long-term loans and other accommodation to co-operative societies, approved societies and Cultivation Committees
- (ii) short-term, medium term and long-term loans to co-operative societies, approved societies, Cultivation Committees and individuals for constructing, repairing or renovating buildings;
- (iii) short-term, medium-term and long-term loans and other accommodation to any person who intends to carry on or is carrying on any agricultural, industrial or business undertaking which, in the opinion of the Board of Directors of the Bank, is a small-scale undertaking; and
- (iv) short-term loans to persons resident in rural areas for the purchase of articles necessary for their personal or domestic requirements; 48

The inclusion of Cultivation Committees as potential recipients of loans granted by the People's Bank raises an important stage in development financing. The Cultivation Committees, it may be recalled, were a creation of the Paddy Lands Act of 1958. These committees principally possessed a supervisory power over the Tenant-Cultivators. They also had the power to assume control over Paddy Lands in certain defined circumstances.

One such instance was when the Tenant-Cultivator had neglected in his duties towards the Paddy Land. Another is when the Tenant-cultivator dies without leaving a heir who is both willing and able to assume the responsibilities of a Tenant-Cultivator. In such a situation the Cultivation Committees could have found themselves without adequate financial support to help farm the Paddy Land under its care. ⁴⁹ The Minister who was the architect of the Paddy Lands Act was also the architect of the People's Bank Act. It was a strange coincidence that the People's Bank Act was not a creation of the Ministry of Finance but of the Ministry of Food and Agriculture. The inclusion of Cultivation Committees in the People's Bank Act was, therefore, a recognition by the Government that its creation, the Cultivation Committees, may be found wanting in financial assistance while assuming and discharging the responsibilities placed upon them by the Paddy Lands Act.

Since commercial banking was first introduced into Ceylon in 1841, the People's Bank was the first Commercial Bank that was empowered to finance particular aspects of national development carrying some high financial risks. Besides, the Co-operative Societies, the Cultivation Committees, and Small-scale undertakings were within the ambit of its credit financing powers. The Act ⁵⁰ declared the purposes of the Bank in this way:

"The purposes of the Bank shall be to develop the co-operative movement of Ceylon, rural banking and agricultural credit, by furnishing financial and other assistance to co-operative societies, approved societies, Cultivation Committees and other persons." ⁵¹

The People's Bank Act introduced a new perspective to banking in Ceylon and this new attitude became even further manifested in the Finance Act of that year ⁵² which became law on the 12th October, 1961. In Part I of the Act, Parliament declared that;

"All the ordinary shares of the Bank of Ceylon--- shall be deemed to have vested in the government--- and accordingly the government shall be deemed--- to have been, and to be, the holder of such shares." ⁵³

This short section brought to an end the status of the Bank of Ceylon as a private enterprise. The Act laid down provisions ⁵⁴ for compensation and provisions for replacing the existing Board

of Directors at the time of nationalisation, by a Board appointed by the Minister. ⁵⁵ In Part III of the Act the government placed a prohibition upon opening new accounts in foreign owned banks in Ceylon. Section 22(1) read:

- "(a) no persons who is a citizen of Ceylon,
- (b) no body corporate of which any director is a citizen of Ceylon,
- (c) no firm of which any partner is a citizen of Ceylon, or
- (d) no other body of persons, by whatever name called, the affairs of which are managed by one or more persons who is a citizen of Ceylon or who are citizens of Ceylon,

shall open any account whatsoever in any bank other than in the People's Bank, the Bank of Ceylon, the Ceylon Savings Bank, the Ceylon Post Office Savings Bank or any bank registered as a society under the Co-operative Societies Ordinance.---" ⁵⁶

The effect of these provisions was to limit the foreign-based Banking Businesses progressively, by leaving the foreign-owned banks to expand in the area of the non-citizen sector, while leaving the citizens solely to the government controlled and nationalised local banks on the Island. The provisions did not in any way result in the nationalisation of foreign owned banks. What it merely did was to exclude them from the local sector. Any citizens who had accounts in the foreign-owned banks opened before the promulgation of the law of 1961, were permitted to maintain them even after the promulgation of this law.

The Monetary Law Act of 1949, ⁵⁷ which created the Central Bank of Ceylon, did declare that one of the objects of the Bank was:

- "(d) the encouragement and promotion of the full development of the productive resources of Ceylon." ⁵⁸

The problem facing the co-operative societies, the Cultivation Committees and such other institutions was that, until the People's Bank was created in 1961, their sources of credit were limited. After 1961, although the Bank of Ceylon and the People's Bank were subject to government policy, the limited availability of liquid assets in the nature of cash reserves for credit financing appeared to limit the extent to which these two institutions were able to lend money for development. The government, therefore, in

1963 amended the Monetary Law Act of 1949, by empowering the Central Bank to grant medium or long-term credit:

"with the object of granting financial accommodation to any credit institution in respect of lending operations carried out by such institution for any productive purpose, the Central Bank may, from time to time, grant out of the fund, and loan or advance to such institution against a promissory note given by such institution.---" 59

The simplicity of the loan granting procedure, namely against a promissory note ⁶⁰ and the period for which such loans were granted—namely for a maximum of fifteen years, ⁶¹ proved to be most helpful to productive groups and institutions in their work towards national development.

The banking reforms of 1961 proved sufficient to support the pace of national development by providing credit primarily to various productive institutions. With the amendment to the State Mortgage Bank introduced in 1968, ⁶² the character of the State Mortgage Bank was changed. ⁶³ During the next seven years the governments noticed a significant change in the potentiality of the Bank as an instrument for development financing. The growth of the Bank within the rôle expanded by the 1968 Act ⁶⁴ was such that it had begun clearly to overlap the powers and functions of the Agricultural and Industrial Credit Corporation ⁶⁵ which was first established in 1943. Therefore, with a view to streamlining the powers and functions of these two important agencies, the government in 1975 enacted the State Mortgage and Investment Bank Law. ⁶⁶ The primary purpose of this law was to amalgamate the objects of the two agencies and in doing so amalgamate the two into one grant giving agency for development financing called The Ceylon State Mortgage and Investment Bank. ⁶⁷ The new bank was given a Board of five directors, appointed by the Minister. ⁶⁸ The Board of Directors was made responsible for 'the supervision, control and administration' of the new legal entity, ⁶⁹ subject to directions that may be issued from time to time by the Minister. ⁷⁰ The authorized capital of the new Bank was 200 million Rupees ⁷¹ and the Bank was empowered to create and issue debentures, stocks, shares and securities towards obtaining the authorized capital. ⁷² Should the funds of the Bank prove insufficient to pay for the 'debentures and stocks--', the Law guaranteed its payment from the Consolidated Fund. ⁷³ The Law further provided that the Minister may

make regulations under the Act, ⁷⁴ thus subjecting the Bank to the policies of the government of the day. The powers and the objects of the new entity were widely described.

By section 31 of the Law, ⁷⁵ the seven kinds of functions the Bank was able to perform under the 1968 amendment were preserved. By the same section the 1975 Law adopted a number of powers which the Credit Corporation had, in order to protect its interest in the loans it had given for Agricultural purposes. In this aspect section 31(y) of the 1975 law declared that the Bank possessed the power:

"generally to take or concur in taking, all such steps and proceedings as the Bank may deem to be best calculated to uphold and support the credit of the Bank---."

The fact that the objects and the powers enumerated in section 31 of the 1975 law differed very little from such classes as those that were found in the Agricultural and Industrial Credit Corporation Ordinance of 1943 ⁷⁶ and the State Mortgage Bank and Finance (Amendment) Act of 1968 ⁷⁷, indicated the folly in not having repealed the 1943 Ordinance at the time of enacting the 1968 Amendment. The Law of 1975, therefore, did what the 1968 amendment should have done; namely, repeal the Agricultural and Industrial Credit Corporation Ordinance of 1943 and revamp the 1968 amendment relating to the State Mortgage Bank.

II(a)(iii) Reflections

The nature and the form of banking enterprises -- their goals and their purposes - are a product of the political and economic milieu in which they arise. The importance of banking to the economic well-being of a nation needed little emphasis. Spun within the framework of private enterprise and of private ownership of property, the principal hallmarks of a free market colonial economy, the Commercial Banks in Ceylon as from 1841 were deemed to be a part of a world system of colonial mercantilism. The Ceylon Savings Bank, which was founded in 1859, ⁷⁸ was merely an attempt by the established political order to extend the services of the world banking fraternity to a native population. For the Savings Bank had a very much lower minimum deposit and charged no specific bank charges for the services provided. Besides it had a fairly simple procedure for banking, adopting the use of bank-

deposit books in place of the more complex system of cheques. The establishment of the Bank of Ceylon in 1938⁷⁹ was again a step taken by local entrepreneurs to enter into the system of world mercantilism. The banking world, curiously, attracted the kind of people who were, conservative in outlook, in thinking and in action, cautious with the money entrusted to them, concerned exclusively with its secure protection and its growth. Above all, being a party to the system of world capitalism, the bankers' instinct as mercantilists was naturally to avoid taking obvious financial risks. It was merely to provide an alternative to this type of attitude that the British Government in Ceylon created the State Mortgage Bank in 1931⁸⁰ and the Agricultural and Industrial Credit Corporation in 1943.⁸¹ Cast in the particular milieu to which they belonged, these two suffered from the singularity of the goals of mercantilism of the time; namely the dedication 'to growth and security.' As indicated earlier, even the locally - based Bank of Ceylon became a victim to this syndrome. In Part II of the First Schedule to the specific legislation which created it, limitation upon its lending powers were thus stated:

- "(c) the amount of the advances and loans made by the bank and outstanding at any time shall not in the aggregate exceed fifty per centum of the total of the amounts lying at the time to the credit of depositors, in current, deposit or other account, in the bank.
- (d) No advance loan or accommodation shall be granted for more than fifty thousand rupees without security."⁸²

It is important to note that this type of limitation persisted throughout the colonial period and even after the nationalisation of the Bank of Ceylon in 1961. These two limitations were, however, removed by the Bank of Ceylon (Amendment) Act of 1968.⁸³ Their removal freed the Bank of Ceylon from a very real limitation. The point is that bank nationalization and the lapse of a further seven years became necessary before such an important step was considered by the legislature.

The changes introduced to the banking world of Ceylon in 1961 effectively detached the banking institutions in Ceylon from a scheme of world mercantilism, thus making the banks in Ceylon follow a different line of mercantilism, to the one thus far followed by commercial banks on the Island. This was clearly a necessary change of direction to meet the new role created for them as agencies

for development financing. The foreign-based and foreign-owned banks were, however, penalised for the fact that they were not totally amenable to local policy shifts. It is in this light that the limitation placed on their powers to open new accounts for Ceylonese nationals after 1961, may be viewed.⁸⁴ However, in 1968, the Minister of Finance was empowered to remove this prohibition, acting upon the recommendations of the Monetary Board. By orders published in the Government Gazette, the Minister of Finance permitted all foreign banks to open accounts with Ceylonese nationals. The only exception was The Habib Bank (Overseas) Ltd.⁸⁵

The period after 1961 saw a number of changes in the socio-economic base of the Island. The changes inaugurated in 1961 commenced a fairly rapid progression towards transferring the principal sources of production, namely agriculture, from the control of a few to the hands of many of the inhabitants on the Island. In keeping with this diffusion of development, the need to provide greater financing for agriculture, cooperatives and rural development compelled the administrations to broaden further the base for development financing on the Island. It was to meet this demand that such legislations as the Ceylon State Mortgage Bank (Amendment) Act of 1968⁸⁶ and later The State Mortgage and Investment Bank Law of 1975⁸⁷ were passed.

II(b) Taxation and Development

II(b) i. An Introduction

The second internal source of development financing was Taxation. Taxation is the type of instrument which provides the outside world with an indication of the economic strengths and weaknesses of any given country. Where the economy is weak and development is slow, taxation becomes both gross and confounded. New types of taxes often descend upon the nation indicating the degree to which the nation is fearfully facing its inevitable bankruptcy. However, taxation could equally be used as an aid to national development, in which event the particular tax could be explained with reference to a particular goal. There are therefore these two categories of taxes. There is, however, a third category. These are facilitative types of taxes which are basically meant to enable the State to achieve certain social goals. These three categories do not take into consideration

the more direct type of taxation, namely the taxation of individual incomes. This category is excluded from this work for at least three reasons. First, the policies and purposes behind income taxes is more an analysis in the nature of economics than of Law. Second, an exposition of the Income Tax structure of Sri Lanka would require a separate treatise rather than being a segment of a section of this chapter. Thirdly, the annual surveys published by the Central Bank presents the best possible commentary on the taxation of income on the Island and no particular improvement on that could be made within the scope of this work. It is, therefore, intended to examine a selection of tax laws from the three areas enumerated above.

II (b)(ii) Those tax laws that signal economic dangers.

Three statutes passed in 1961 give the clear indication that the Government was in urgent need of 'spending money.' These are the Rubber Export Duties (Special Provisions) Act of 1961,⁸⁸ The Land Tax Act of 1961⁸⁹ and the Companies Tax Act of 1961.⁹⁰ In all these Acts, the Government intended either to increase the present level of tax as in the Rubber Export Duties Act⁹¹ or to introduce new taxes where there were none as in the other two cases. The Land Tax Act introduced a new tax⁹² upon those who owned land and the Companies Tax Act imposed a new tax⁹³ on the share capital of companies. All three taxing provisions were clearly counter-productive in so far as development was concerned. For these restricted growth and investment. The only result was that the Government by these means acquired some extra spending money, which was indicative of the state of the national coffers at the time.

The Revenue Protection Act of 1962⁹⁴ was perhaps more indicative of the difficult times. Under that Law the Minister (of Finance) was authorized to make an order subject to the measure being passed by the Cabinet of Ministers:

"(a) to impose a new customs duty upon an article, being not subject to such duty; or (b) increasing or reducing the rate of such duty on any article for the time being subject to such duty; or (c) abolishing such duty on any article for the time being subject to such duty,

the Minister may make an order with a view to giving immediate legal effect to such decision pending that Bill becoming an Act of Parliament, or that resolution being passed by the House of Representatives, as the case may be." ⁹⁵

The need to manipulate the Government's fiscal arrangements with this kind of urgency indicated the difficulties that the Government was facing monetarily upon a day to day basis. The danger signals appear to have continued into 1963 when by a second Finance Act of that year ⁹⁶ the Government imposed a surcharge of 20% upon Income Tax payable for the year of assessment commencing on April 1st, 1962. ⁹⁷ Besides this measure Parliament authorized the Minister of Finance to increase (or reduce) the Excise Tax by an order "with a view of giving immediate legal effect to such decision pending that resolution being passed by the House." Governments are normally in no unusual hurry to reduce taxes. The need here was the urgency to increase the Excise Tax. The clearest indication of the weakness of the Rupee at this particular time was given by the Finance Act of 1963. ⁹⁸ In Part II of that Act, the Government introduced a special tax, known as the 'Exchange Tax'. It declared that any sale of Foreign Currency by any competent authority, would be subject to a tax called the 'Exchange Tax'. ⁹⁹ It was declared that this tax would vary and would be subject to ministerial orders issued out of the Ministry of Finance. This clearly was an indirect devaluation of the Rupee. A direct devaluation was indeed avoided so that the imports shall not require a high level of payment using an officially devalued Rupee. Such a step could have further depressed the value of the Rupee which could possibly have had dire consequences for the nation's economy. It is to avoid this possibility that the Government being fearful of the situation, introduced this indirect method of devaluation. The administration that was responsible for these enactments was defeated at the General Elections, which were held in 1965. The new government repealed the 'Exchange Tax' in the Financial (Special Provisions) Act of 1965. ¹⁰⁰

These taxing provisions were chosen merely to indicate how certain types of taxes (other than Income Taxes) could be reflective more of corrective policies, correcting the national economy, rather than in aid of development. The next group of laws have been chosen to highlight the use of taxing provisions as aids to development.

II(b)(iii) Tax as an aid to Development

Numerous examples may be cited in support of this type of tax laws. One of the earliest examples of this category was found in the Tax Reserve Certificates Act of 1957.¹⁰¹ Under that Act, the Central Bank was authorized to issue on demand Tax Reserve Certificates to any applicant who makes an application to The Superintendent of Public Debt.¹⁰² The certificates acquire an interest of 1% per month¹⁰³ and may be used in order to pay Income Tax or Profit Tax of the holder of such certificates.¹⁰⁴ This was an incentive to those who had over paid their taxes to opt for Tax Reserve Certificates in place of claiming tax refunds. Further, by declaring that:

"The sum represented by the denominational value of every unexpired certificate held by any certificate holder carrying on any business to which Profits Tax Act, No. 5 of 1948, applies, shall be treated for the purposes of that Act as capital employed in that business,¹⁰⁵

the Government created a tax revenue advantage to itself. At the same time the Taxpayer derives the advantage of receiving a 12% interest per annum computed every month which clearly was about 100% more than the legal interest he would otherwise have received with his tax refund. This 'shared-interests' policy was an important aspect of this law.

The Food Subsidies Temporary Taxes Act of 1952¹⁰⁶ and the Rice Subsidy Tax Act of 1967¹⁰⁷ were two further examples of developmental aids through taxation. In both instances the Government provided certain subsidies and in both instances the Government received a contribution towards the subsidies only from those who were most able to make that contribution. In the first instance the Government levied an additional tax of 10% of the Income Tax payable from all Income Tax payers.¹⁰⁸ In 1952 the

Income Tax base was high enough to exclude a large segment of the population from the burden of taxes on Incomes. In the second instance, in 1967, a tax to be determined by the Minister of Finance was imposed on those earning above 12,000 Rupees a year, at a time when a judge of the Supreme Court was on a pay scale between 1,800 and 2,200 rupees a month. These provisions were designed to maintain the two subsidies evenly across the nation, thus cutting down the costs incurred in organizing the subsidies upon a selective basis and requiring those who are able to do without the subsidies to make a fair contribution towards the scheme. Here too the principle of a 'shared-interests' policy appeared to surface.

A more recent example of a 'shared-interests' policy oriented statute was the Land Betterment Charges Law of 1976.¹⁰⁹ The preamble to that Law represented clearly its main and only purpose. The Preamble read:

"A Law to provide for the levy of Betterment Charges on Lands within the areas where the value of land has increased as a result of the construction within those areas of certain development projects, financed in whole or in part by the State---." 110

Here again the approach was clear. The Government had improved the area where a particular land was situated; directly resulting from this improvement was an increase in the value of the land in question. The two parties shared their interests in the project by making a contribution to its overall expenditure.

Similarly, in the Foreign Exchange Entitlement Certificates Act of 1968¹¹¹ the Government was interested in attracting foreign currency from abroad to support its dwindling foreign exchange reserves. Under this Act the Government extended the privilege to certain categories of persons to bring in foreign currencies into the country by giving them a premium of about 65% of the official rate of exchange. This privilege was given to all remittances from abroad excluding those that were sent for the payment of exports, exported under export licences issued by the Ministry of Trade and Commerce.

This arrangement helped the Government in two further matters. It helped to eliminate the illegal trafficking of foreign currencies, at least to some small extent. Secondly, by subjecting the premium system to authorized remittances of local currency to foreign lands,

more rupees were collected by the Treasury from foreign exchange remittances of local currency to foreign lands, from Ceylon. The 'FEEC' Act, as it was called, attracted foreign capital into the country, by giving, at least during the 1970-71 period, a premium of 65% over and above the official rate of exchange. This, among other matters made Ceylon a financially attractive place for foreign investments setting the Island, upon a competitive course with India. The shared-interests policy, the policy that benefited both the Government and the Foreign Currency holders, underpinned the application of this Law.

The Bank Debits Tax Act of 1970¹¹² was another piece of legislation espousing a 'shared-interests' policy. The Principal thrust of the Act was that account holders were required to pay by way of a tax, 1/10 of one percent on "total amount of debits made during each calendar month against each current account." The purpose of this provision was to encourage the depositors to retain the maximum amount of money within the Commercial Banks on the Island, so as to maintain the stability of the economy, by minimizing the danger "of a run on the banks". At the same time the banks will be paying a certain level of interest (which in 1980 was in the region of 22%) on fixed deposit accounts. Aside from this the majority of the native accounts were in Government owned Banks, particularly after the Banking Reforms of 1961.

The importance of this Act to the Administration could be assessed by a glance at its history. It was first enacted in 1957 and was repealed in 1965.¹¹³ It was later re-enacted in 1970 and was slightly amended in 1975.¹¹⁴ The indirect effect on the account holders is that it stimulates savings for which a very significant interest was paid by the Banks. For Government, the availability of money in the Banks allowed it a considerable financial leverage in its day to day dealings.

The point that must be made is this. In all these enactments at the base there lay the policy of 'shared-interests'. In some, these were evenly balanced. In others, the interests of one party may overwhelm the interests of the other. In either case the policy was not the imposition of a direct tax, which is often characterized by its preponderant benefit to the Government.

The next group of taxes are 'facilitative.' These are meant to facilitate the State to achieve certain ends. The Motor Vehicle taxes, the Road Taxes on all forms of vehicles including bicycles, and such other taxes are clear in their goals and purposes. But the two types of taxes that will be discussed in the next section, are some of the less obvious facilitative taxes, which have always been at the Government's disposal.

II(b)(iv) Facilitative Taxes

Of the extensive membership in this category the Temporary Residence Tax Act of 1961¹¹⁵ and the tax on the transfer of property to non-nationals,¹¹⁶ shall receive comment. The Temporary Residence Tax (of 500 rupees) was charged from all non-citizens who had remained on the Island after the expiry of the initial period allowed to them upon their first entry into the Island. Once the initial period of stay expires, a non-citizen may have an extended period of stay on what is known as "A Temporary Residence Permit." It is the 'TRP' as it is commonly known, that costs the foreigner a sum of 500 rupees by way of a tax. Weerasooriya (W)¹¹⁷ in his commentary on the Temporary Residence Tax wrote:

"The Temporary Residence Tax, which was introduced in 1961 and later repealed, has been reintroduced. The rationale for the imposition of this tax is two fold. First, there is the need for every non-citizen profitably employed or having a business in Ceylon to pay a tax for the social benefit that he receives from the Government. Secondly, it is an incentive for as many visa holders as possible to leave Ceylon of their own accord. The levy under the new provisions will be rupees 500 per annum." 118

The facilitative nature of this law is clear. The Government could on the one hand receive a certain amount of revenue by facilitating some of the non-citizens to remain in the country, engage in business and enjoy what Weerasooriya refers to as 'the social benefit.' The foreigners would no longer feel themselves unwanted. For they too make a contribution for being allowed to remain on the Island beyond the period allowed to them by their visa. Second, the levy may encourage others, particularly of the 'beatnik and such other exotic fraternities' to leave the Island upon the expiry of the initial period of stay allowed to them at their point of entry into the country.

Another example of this type of taxation is the tax on the transfer of property to non-nationals. This was first introduced in the Finance Act of 1963.¹¹⁹ Section 58(1) of the Act provided that:

"Where there is a transfer of ownership of any property in Ceylon to a person who is not a citizen of Ceylon, there shall be charged from the Transferee of such property a tax of such amount as is equivalent to the value of that property."¹²⁰

This introduced a 100% tax on foreign buyers of local real property. The Government obviously had the option of placing a total ban on foreign ownership of local real property, as many Third World countries have done. But the Government was interested as a matter of policy to encourage investment on the Island. However, the Government recognized the low cost of living and the low price of property when compared with western industrialized nations. And therefore, to both facilitate foreign investment and facilitate the collection of some reasonable amount of revenue, the tax on transfer of property to foreign nationals was introduced. Aside from these two provisions there are a large number of laws that could be categorized under this heading. The Embarkation Tax,¹²¹ which facilitates the Government of a Third World country to maintain the standards necessary for International Airports or Sea Ports, certain types of licensing fees, stamp duties for the issue of certificates (of marriages-deaths and births) and for the attestation of deeds are all examples of this third category of taxes.

II(b)(v) Reflections

Taxation has been a multi-faceted instrument in the Third World. It has also been a much maligned agent of Third World administrations. It has sometimes been regarded as a ruthless instrument of Government. Whatever the emotional reaction a citizen experiences to taxation, few countries have used tax as a stimulant for development. The two of the more popular roles prescribed for tax is that of acquiring a fund of money for the purposes of meeting Government expenditure and the other is to move an existing free market economy towards the creation of a public welfare state. Although these two roles are to a degree inter-linked, the establishment of a public welfare state may be regarded as a step in the direction of stimulating some

fundamental social changes in the society. Aside from these two roles, Taxation has a third and a more important role to play. And that is to stimulate development. It is this role that the Third World Countries should utilize to its fullest. The Laws which were discussed under the broad heading of "shared-interest-laws" fall into this third role which stimulates development. The difficulty, however, is to ascertain with some degree of certainty the point at which taxation becomes counter-productive and the "shared-interest" policy begin to crumble. Commenting on the point beyond which taxation may result in an "economy of backwardness," Dr. Baran wrote: 122

"Even if measures like progressive taxation, capital levies and foreign exchange controls could be enforced—such enforcement would to a large extent defeat its original purpose. Where businessmen do not invest, unless in expectation of lavish profits, a taxation system succeeding in confiscating large parts of these profits is bound to kill private investment. Where doing business or operating landed estates are attractive mainly because they permit luxurious living; foreign exchange controls preventing the importation of luxurious goods are bound to blight enterprise. Where the only stimulus to hard work on the part of intellectuals, technicians, and civil servants is the chance of partaking in the privileges of the ruling class, a policy aiming at the reduction of inequality of social status and income is bound to smother effort." 123

The difficulties that have been foreseen by Third World economists is that taxation is a dangerous instrument and unless it is used with care, there is a danger that it could result in the development of under development. The period dealt with in this section was principally the 1960's, which indeed was a difficult period for the economic development of Sri Lanka. That would explain the need shown by the Government to use Taxation largely in the first two roles and relegating the 'shared-interest-role to a peripheral stance. The lesson to be learned is that taxation as a stimulant for development must be carefully conceived. For it carries the potential danger of creating 'backwardness' in place of 'development.'

III Financing Development from External Sources

(a) Development Financing from International Aid

The Government's increasing interest in extensive development

projects dates back to 1949, barely a year after Independence. That was the Galoya Development Project. The massiveness of that project permitted no individual participation. The Government, therefore, handled the entire development programme through a Statutory Board; namely, the Galoya Development Board, created under the Galoya Development Board Act of 1949.¹²⁴ In 1970 the then Government inaugurated a second massive development project; namely, the Mahaveli Development. This again involved such a large financial and a technological commitment that the Government decided to remain in charge of the entire project through the Mahaveli Development Board,¹²⁵ another Statutory Board.

The functions of The Galoya Development Board were:

- "(a) to develop the undeveloped area;
- (b) to promote and operate schemes of --
 - (i) irrigation; (ii) water supply;
 - (iii) drainage; (iv) generation, transmission and supply of electrical energy and (v) food control.
- (c) to promote and control irrigation and fisheries;
- (d) to promote afforestation;
- (e) to control soil erosion;
- (f) to control public health;
- (g) to prevent and control plant and animal diseases; and
- (h) generally to promote agriculture and industrial development and economic and cultural progress in the area of authority."¹²⁶

To make these functions possible the Government constructed an extensive irrigation scheme, cleared large areas of forests, constructed dwellings and encouraged persons to move into these new settlements. This altered the demography of the Eastern Province and created new societies in new agricultural zones. In turn the programme helped to increase food production which was of significant help to a developing economy. The large amount of money mostly in foreign exchange had to be externally sought by way of development aids.

The Mahaveli Project was equally expansive and indeed expensive. It involved the linking of two waterways and thereafter its wholesale movement away from its original course, through massive underground tunnels into the North Central Province which is a part of the Dry Zone. The view behind this large undertaking was to open up for rice cultivation the proverbial 'rice Bowl of Asia', known

in Sinhala as "Rajarata." Ancient mythology had identified that area as the source from which rice was exported to other parts of the Orient during pre-colonial times.

The Government felt compelled to undertake this scheme to provide the only element that was missing to re-succitate this forgotten land. This was water for irrigation. The Mahaveli Board which acted as the counter part to the Galoya Development Board was given the following functions:

- "(a) to provide and operate schemes of irrigation water supply, drainage, flood control and the control of soil erosion;
- (b) to promote agricultural and economic development;
- (c) to ensure the necessary co-ordination between the government and local bodies in the development of such areas."¹²⁷

During the thirty-three years of Independence, Ceylon had seen just these two State controlled development projects. Besides the economic advantages, the two schemes have altered the cultural and sociological components of the nation.

First, the schemes drew out from the rest of the Island, large groups of the native population from every caste on the Island. Although, due to the largeness of certain castes like the Goiygama and the Batgama,¹²⁸ larger representations of these must invariably occur among the new colonists, the strict caste configurations maintained at the rural level were dismantled and a new inter-caste marriages could become the beacon light that may propagate a new non-caste society in Sri Lanka.

Second, the development scheme drew in the native population from the lower middle class proletariat rather than the petty-bourgeoisie or the upper middle class. A very important qualification for receiving grants of land in these new development zones was that the applicant must either be land less or must own land which clearly is insufficient for his needs and the needs of his family. The climatic conditions in the Eastern Province and in the North Central Province are such that hardened rural farmers have been the largest number of colonists to receive land in these new development zones. Therefore, among the colonists there is a clear homogeneity of class, which has invariably helped in the organized development of these new zones.

Third, the participants in these new ventures have been drawn from both the Christian and Buddhist communities. This inter-faith representation in the new society has been of remarkable success. The Muslims, due to their religious cultural and linguistic peculiarities have been bad mixers. And the only social eruptions that have gone on record have been between the Muslims and the Sinhalese. In the case of the Sinhalese, both the Christian and the Buddhist Sinhalese had taken part in skirmishes with the Muslims.

Fourth, inter-racial representation in this new venture had been almost non-existent. The principal complaint of some of the Tamil speaking people had been the colonisation of Padavia by the Sinhalese a part of the Island which runs a common boundary with the Tamil speaking areas of the Northern Province. More for political reasons than for reasons of security successive administrations have avoided mixing the races in the new development zones. This has largely left the nation with no point of racial contact. The facilitation of inter-religious and inter-caste contacts through colonisation schemes of this sort merit recognition and praise.

Fifth, the three decades of colonisation of these new development zones have yet again, made the country self-sufficient in rice. A recent export shipment of rice was hailed by the Minister of Trade as an event of historical significance. For the last shipment that went out from the harbours of the Island was some seven centuries before.

The two development projects have been, on the whole, successful. The Mahaweli scheme is now almost complete. But re-settlement, irrigation and agricultural production commenced several years ago. In around 1975.

The massive aid programme which helped the country to launch such a project for national development merit some comment. The basic law regarding the ability to raise loans from foreign sources is found in the Foreign Loans Act of 1957. ¹²⁹ Section 2 of that Act read:

"The Governor-General or any person specifically authorized by him in that behalf may, in the name and on behalf of the Government of Ceylon, sign ---
(a) a loan agreement relating to a foreign loan to the Government of Ceylon, and

(b) any bond, promissory note or other document required by such loan agreement to be executed by the Government of Ceylon."

All sums payable by the Government of Ceylon under a loan agreement relating to a foreign loan is charged on the Consolidated Fund. ¹³⁰ The Act empowers the Minister of Finance by order published in the Gazette to make:

"such provision as may be necessary to give effect to a loan agreement relating to a foreign loan to the Government of Ceylon ¹³¹ and every order made and published under sub-section (1) shall have the force of law." ¹³²

The latter provision has the effect of by-passing Parliament, which has the inherent power to make law. However, the explanation for such a step could be founded on the vague principle of 'prospective legislation' and may be justified on the grounds of national importance to receive foreign aid. The Act applies exclusively to foreign loans. Section 5 of the Act defines a 'foreign loan' as:

"a loan in any currency granted by a foreign Government or the agency of a foreign government or by any international organization." ¹³³

The fact that it is the source rather than the currency that identifies a foreign loan is important. This facilitates such grants as loans from the 'US PL 480' scheme. Under that scheme Ceylon was at one time the recipient of United States wheat flour, for which the Government was permitted to pay in Ceylon Rupees into a special fund at the Central Bank, called the 'PL 480' fund. Money from that source was available for aid. And when aid was given from that particular source it was given in the form of Ceylon Rupees. This too will be within the definition of 'a foreign loan'.

Sri Lanka's membership in a number of international aid giving organizations qualifies her for loans from those international bodies. The Foreign Loans Act, governs loan agreements from such organizations too. In 1956 Ceylon became a member of the International Finance Corporation. ¹³⁴ In 1966, she became a member of the Asian Development Bank. ¹³⁵ In 1950 Ceylon became a member of the International Monetary Fund and of the International Bank for Reconstruction and Development. ¹³⁶ Except for her membership in the Asian Development Bank, her association with the other two international bodies pre-dates the passage of the Foreign Loans Act of 1957. However, the

Foreign Loans Act does no more than supply a legal basis for negotiation and execution of foreign loans. The Act does not indicate the method of negotiation, execution or the terms to be accepted. It merely supplies an open ended validity to the loan, once it is negotiated and executed. The comments that have been made by some economists and by some political scientists have often been critical of these agreements between International agencies and Third World Countries. It is not the intention here to make any judgments regarding such loan arrangements. For that falls outside the scope of this work. In addition to the 'foreign loans' which the Government may raise for national development, the National Development Loan Act of 1950¹³⁷ and the Ceylon Development Loans Act of 1954¹³⁸ authorize the Government to raise loans up to a total of 1000 million rupees for National Development. The Act of 1950 authorized the Minister of Finance to raise 400 million rupees and the Act of 1954 gave the same Minister the power to raise a further sum of 600 million rupees for National Development. The 1954 Act gave somewhat wider powers in that the Minister may under that Act raise moneys both from United Kingdom sources and from International Bodies. It could be said with confidence that the Republic of Sri Lanka has a number of options open to her for financing her present programme for national development. Whether she has chosen the right options at the right time has been the subject of some controversy. However, the two development projects, the Galoya scheme and the Mahaweli scheme have been of significant success. Whether the Island should have had three or four such schemes instead of two, during these three decades of nationhood is not a matter which has sparked off any great controversy. But it is a point of some concern as to what extent the Galoya and Mahaweli schemes have helped the Northern end of the Island where most of the Tamil speaking people live. Their oft heard complaint is that development stops at the 'Elephant Pass', the gateway to the North. If it does, then it is a matter of some concern.

III(b) The Free Trade Zone

The idea of the Free Trade Zone was modelled on a similar programme introduced by the Governments of South Korea, Taiwan and Singapore for attracting foreign investments into those countries. The programme involved the carving out of certain

geographical areas on the Island and relegating them into zones in which foreign investors may under licence produce articles of manufacture for export from Sri Lanka and sale in foreign markets. What the host countries to this programme earn is the foreign capital investments that enter the country thus contributing to a strengthening of the local economy. In addition, the host country attempts to solve her own unemployment problem by providing cheap labour, in contrast to the cost of labour in the countries from which the investment originates. As an example, the Government issued the following information on wages for foreign investors:

TABLE XXIII: Average wages in Sri Lanka 139

	*Wages per day in Sri Lanka-rupees	Wages per hour in Sri Lanka - rupees	Wages per day at the equivalent in U.S.D. Currency	Wages per hour at the equivalent in U.S.D. Currency	Minimum wages in each category in the U.S.A. per hr per day	
skilled	18.50Rs.	2.13Rs.	\$1.25	\$.15	\$9.00	\$72.00
semi-skilled	16.00Rs.	1.85Rs.	1.05	.12	5.50	44.00
unskilled	13.00Rs.	1.38Rs.	.80	.09	3.10	24.30

* Per day in each case is of an 8 hour period.

In addition to the effect this programme may have on the unemployment problem, it could stimulate the local economy by the demands it may make on local supporting services necessary for the success of this programme. This may include such enterprises as road transportation, the hotel industry, the food industry, and a whole range of such necessary supports. Particular effect has been felt by the real property market in Sri Lanka. The value of land and housing has increased since the inauguration of the Free Trade Zone investment programme. The absence of rent control has made house rents rise and the need for more houses has become a very real need in and around the Free Trade Zone.

The legal framework for the Free Trade Zone was provided by the Greater Colombo Economic Commission Law of 1978.¹⁴⁰ The purpose of this law was declared in its preamble. It read:

"A law to establish the Greater Colombo Economic Commission to vest the said Commission with powers

necessary for the development and resurgence of the economy of the Republic; and to provide for matters connected therewith or incidental thereto."

In a schedule to the Act, the Government provided a map of 415 square kilometers (160 sq. miles) of the Western Province of the Island and declared that area as the Free Trade Zone of the Island within which the foreign capital investments on the Island may be made. ¹⁴¹ Among the several objects declared by the Law; five such objects merit particular mention, for they provide the base for attracting and utilising foreign capital for Sri Lanka's development. These are:

- (a) to foster and generate the economic development of the Republic;
- (b) to widen and strengthen the base of the economy of the Republic;
- (c) to encourage and promote foreign investment within the Republic;
- (d) to diversify the sources of foreign exchange earnings and to increase the export earnings;
- (e) to encourage and foster the establishment and development of industrial and commercial enterprises within the Republic---." ¹⁴²

The Law ¹⁴³ created a Commission with a corporate personality with the ability to sue and with a liability to be sued. The Commission was empowered to enter into agreements with any enterprises, that would further the objects declared by the Law, and cause the issuance of a licence to such enterprises to establish commercial undertakings within the zone. ¹⁴⁴ The Law restricts the Commission's authority in two ways. First, it is limited to the geographical area covered by the zone ¹⁴⁵ and second to such enterprises as are licensed by the Commission. ¹⁴⁶

There are three aspects to the programme which require particular mention. First, article 157 of the 1978 Constitution expressly declared that any Treaty of Agreement signed between the Government of Sri Lanka and any foreign State:

"for the promotion and protection of the investments in Sri Lanka of such foreign state, its nationals, or of corporations, companies and other associations incorporated or constituted under its Laws; such Treaty or Agreement shall have the force of law in Sri Lanka, and otherwise than in the interests of national security no written law shall be enacted or made, and no executive or administrative

action shall be taken, in contravention of the provisions of such Treaty or Agreement,¹⁴⁷

provided that not less than two-thirds of the whole number of Members of Parliament (including those not present) have voted in favour of a resolution approving such an Agreement or Treaty. By the end of November, 1979, the Government of Sri Lanka had approved such Agreements or Treaties with 25 foreign Governments¹⁴⁸ and 83 projects¹⁴⁹ financed by investors drawn from those countries have been licensed by The Commission.¹⁵⁰ The wording of article 157 of the Constitution¹⁵¹ appears to remove that provision from the normal powers that Parliament has for constitutional amendment. The Article in question appears to be unalterable except "in the interests of national security". This type of entrenchment was believed to provide the kind of security and guarantee against future expropriation which was vital for attracting foreign investments into the country. As for Taiwan, South Korea and Singapore, the character of the political system, with a virtually one-party system of government of a dictatorial nature had provided, those much needed guarantees. However, in Sri Lanka with political fortunes likely to change at each General Election, a constitutional guarantee of this sort was considered necessary. Nevertheless, it must be mentioned that the change of the Island's electoral system introduced by the 1978 Constitution¹⁵² from one of 'first at the winning post' to a more complex system of elections combining both proportional representation and the redistribution of votes, appears to provide a particular political scenario which could make it difficult for any political party at any future General Election to win sufficient number of seats to change the Constitution through Parliament. It may be argued that the form in which Article 157 was couched appears to be such that it is unalterable even with a two-thirds majority, unless there is a demonstrable question of national security involved. Such an assumption appears to run counter to a well established rule in Constitutional Law that 'one parliament cannot bind its successors'. In any event, as Sri Lanka's history may show, a Constitution believed to be partly unalterable even with an absolute majority was totally replaced through what may be referred to as a political revolution, in 1972.¹⁵³ Similarly, it may be that future Governments may decide to overlook the rigid wording of Article 157¹⁵⁴ and

attempt to repeat the history of 1972 at some future date. These are all imponderables regarding which the wit of man cannot adequately devise any absolute safeguards. However, the greatest security for foreign investment must be its effect on the national economy which could be felt by all the inhabitants on the Island. If the investments produce what it is generally expected to produce; namely, a reduction in unemployment, and an increase in the standard of living on the Island, then that by itself could provide the surest guarantee against future expropriation of foreign investments.

The character of the investments were such that they were made under a Treaty obligation entered into between two sovereign countries. The second aspect of the programme has a bearing on this character of the investment. By section 26 of the Law of 1978 it was declared that disputes relating to the interpretation of any provisions of an agreement made between any enterprise and the Commission would be referred for settlement to "the International Centre for Settlement of Investment Disputes established under the Convention on the Settlement of Investment Disputes between States and Nationals of other states of 1965." It is also declared that any award made upon such a reference shall be final and binding on the parties and shall be enforced:

"in Sri Lanka in the District Court of Colombo as a decree of that Court and the provisions of the law relating to the execution of a decree of that court shall apply." 155

The law further declared that these provisions shall apply even to enterprises which become domiciled in Sri Lanka by registration, subsequent to its establishment in the Free Trade Zone as a foreign enterprise. 156 The statutory obligation to refer disputes to the 'Centre for the Settlement of Investment Disputes' was in line with the view that each investment in the Free Trade Zone should be considered as falling within the Treaty or the Agreement with the particular foreign country from which the investment was derived. This must necessarily mean that the capital utilized by the investors must be drawn from foreign sources so that the Free Trade Zone investments must have a foreign component. By Regulation 7, made under Section 24 of the Law of 1978, the Minister of planning who was responsible for the Greater Colombo Economic Commission declared:

"that all working capital of the enterprise shall be met by convertible foreign currency remittances to Sri Lanka---." ¹⁵⁷

This means that the investments must be derived from foreign sources so that the Commission may succeed in achieving one of the key objectives laid down by Law of 1978; namely: 'to encourage and promote foreign investment within the Republic'. ¹⁵⁸ As the commission's report ¹⁵⁹ indicates, as of the end of 1979, 83 projects to the investment value of 150 million United States Dollars had come from 25 foreign countries. ¹⁶⁰ By the powers vested in the Commission under Section 17: "to enter into agreements with any enterprise", the Commission appears to be successfully using such powers, guided by the provisions contained in the aforementioned Regulation, to attract foreign capital into the Island. It must be emphasized that investments in the Free Trade Zone are drawn from investors from countries with which Sri Lanka has obligations arising out of Treaties or Agreements ratified under the aforementioned Article 157 of the 1978 Constitution.

The Third aspect of this development programme is that neither the Business Undertakings (Acquisition) Act, ¹⁶¹ nor the Companies (Special Provisions) Law ¹⁶² shall apply to them. ¹⁶³ This is meant to assure the investors that their investments shall not be acquired by the Government. Section 39 of the 1978 Law which makes this declaration could, however, be repealed by a simple majority in Parliament and therefore the protection provided by these provisions is more illusory than substantive. The protection that investors must ultimately look to is not the Law of 1978 but the Treaty or the Agreement between the Governments of their own nationality and the Government of Sri Lanka.

The Law of 1978 gave the Commission a split legal personality. By section 2(2) of that Law, Parliament had declared the Commission to be:

"a body corporate having perpetual succession and a common seal and may sue and be sued in its corporate name, and may perform such other acts as bodies corporate may by law perform." ¹⁶⁴

This character of its corporate personality must indeed be restricted to all 'rights and duties' arising other than out of the investment agreements made with foreign investors under Section 17 of the Law. In such matters, as do fall under Section 17, the Law of 1978 declared that the:

"Commission shall be an Agency of the Republic of Sri Lanka for the purposes of conferring jurisdiction for the settlement of such disputes by the said centre." 165

This duality of the legal personality of the Commission was clearly in line with the development objectives conceived by the Government relating to the Free Trade Zone. For all such matters as connected with the supply of services and the provision of physical and institutional infra-structures for the Zone, the Commission may act as an independent legal entity. But when matters falling under the Treaties or Agreements assumed by the Government of Sri Lanka vis-a-vis other States are concerned, then the Commission in that limited capacity assumes the role of a department of the Government. Aside from this attribute in its role as an Agent of the Government of Sri Lanka, section 32 of the Law of 1978, exempted the Commission from the payment of:

"any tax, levy, charge or duty under the provisions of the Inland Revenue Act, No. 4 of 1963 and Customs Ordinance (chap. 235) and the Imports and Exports (Control) Act, No. 1 of 1969." 166

The dual legal personality of the Commission could raise an intricate question as to the legal status of its employees. Questions may be raised as to whether they should be regarded as public servants or as employees of a Public Corporation who are not, under the law of Sri Lanka, considered to be Public Servants. One of the indications in support of the latter conclusion is that employees of Public Corporations are both employed, and are subject to have their employments terminated by the Corporation without reference to the Ministry in Charge of the Corporation. These matters shall be considered in detail in the course of the next chapter. 167 However, it might be mentioned that the Law of 1978 declared that the Commission was responsible for both, engaging and dis-engaging personnel. 168 This provides strong indication that the Commission's employees may be considered as

non-public servants. In any event, in order to clarify any doubts, the Law of 1978 declared in section 34 that:

"Any member, officer or servant of the Commission shall be deemed to be a state officer---." 169

It seems to be clear that in those areas where the corporate personality of the Commission was recognised the Commission was subject to the jurisdiction of the local courts. But in those instances ¹⁷⁰ in which the Commission was required to act as an agent of the Government of Sri Lanka, the local courts have no jurisdiction except when invited to enforce an award obtained from the International Centre for the Settlement of Investment Disputes. ¹⁷¹ The attraction of foreign capital through an investment programme structured around the creation of a Free Trade Zone in Sri Lanka, was central to the economic package presented to the electorate by the United National Party at the 1977 elections. The clear victory of that party at the ensuing election naturally fortified the Free Trade Zone plan for economic progress as one of the key policy concerns of the new Administration. The Government, therefore, considers the Greater Colombo Economic Commission as an important agency for the implementation of its economic policies. The Law of 1978 which transformed the policy into Law, as expected, declared in clear and unambiguous terms that the Commission:

"In the exercise of its powers and the carrying out of its objects under this Law---shall comply with the general policy of the Government." 172

Thereafter, the Law reposed a wide power in the Minister in charge of the Commission, to issue special and general directions to the Commission ¹⁷³ and in addition a power to make regulations ¹⁷⁴ regarding the work of the Commission. These arrangements, quite clearly, make the Commission an agency of the Government, which is in line with the purposes for which the whole idea was conceived, namely, as a part of a plan for the economic development of Sri Lanka.

(IV) Conclusions

The strongest feelings about international aid may correctly be characterised as negative ones. The criticism mounted against international aid consortia is basically one of continuing under-development. Frank ¹⁷⁵ questions why the aid receiving Third World

Countries (his focus is on Latin America) suffer recurring trade deficits and balance of payment problems. Frank proceeds to show that the receipt of International Aid places a heavy burden on the recipients to pay in foreign exchange for related services such as "transport and insurance, profits transferred abroad, servicing of debt, travel, other services, donations, funds transferred abroad and errors and omissions." ¹⁷⁶ As for the whole of Latin America (excluding Cuba, which receives no aid at all), 61% of the total Foreign Exchange earnings had been spent for services attendant upon receiving of International Aid. ¹⁷⁷ The hypothesis is therefore advanced that International Aid is counter productive and must therefore be refused. Dr. Mahbub-Ul-Haq ¹⁷⁸ one of the former Advisors on foreign aid to the Bangladesh Government had expressed some constructive views on International Aid. He considers that International Aid could be used effectively for the development of a nation provided that the national planners, do not commit, what he calls, 'the seven deadly sins.' ¹⁷⁹ The first deadly sin is what Dr. Ul-Haq refers to as the "numbers game". Under this he warns the aid receiving countries to stop relying too much on the percentage increase of the Gross National Product and thus overlook the intangible benefits acquired by the utilisation of such aid. In light of Sri Lanka's economic development programme embracing the Free Trade Zone, the increase in the demand for the supply of supportive facilities for its success, must be considered as an advantage in addition to the effect foreign investments have upon the Gross National Product.

The second is excessive controls. International aid is given for the improvement of productivity in the public sector or for public welfare purposes. The recipients, therefore, take the view that development planning with reference to the Aid received should be such that it must stimulate and encourage the public sector and impose bureaucratic and administrative controls to regulate the economic activities of the private sector. The fallacy of this approach becomes apparent if the development planners were to consider that Aid is given for the total uplift of a nation and therefore it becomes necessary to use the Aid to develop not at the sacrifice of the private sector but in spite of the private sector. The policies pursued by the Administrations in Sri Lanka have taken this warning, to a large measure, into consideration, while providing financial Aid to the private sector for development. The

reform of the banking enterprises in Ceylon, particularly after 1961, was seen as a giant step towards financing the development projects of the private sector. The creation of the People's Bank in 1961 could, in this light, be considered as a manifestation of the Government's commitment to help the private sector.

The third aspect is what Dr. Ul-Haq refers to as 'investment illusion'. In his view the utilisation of Aid exclusively as an investment has created a myopic approach to development. The attitude taken by development planners was that the use of Aid for commodity assistance is deemed to increase consumption and therefore considered to be non-productive while its utilisation for project assistance was considered an investment. The result, therefore, was that in place of aiding the cultivation of garden and market products such as chillies, potatoes and onions, the Aid was sometimes used to build hospitals, roads, schools and community halls. The result therefore was to increase the need to utilise some of the foreign exchange obtained through Aid to import basic foods while inheriting shining white buildings without doctors, school teachers, road engineers (or vehicles) or community development officers to man the 'investments.' It is therefore important for development planners to appreciate the relationship between 'commodity assistance' and 'project assistance.' Here too the Sri Lankan planners have attempted to strike a balance between 'commodity development' and 'project development'. The expansion¹⁸⁰ of the objects of the Ceylon State Mortgage Bank in 1968 was a clear indication of the Government's intention to assist in commodity development. The 1968 amendment to which reference was made at an earlier stage in this chapter, enabled the Bank to lend money to those involved in agriculture,¹⁸¹ in housing,¹⁸² in 'the manufacture or preparation of any agricultural or other prescribed product or commodity for sale in the market'¹⁸³ and a whole catalogue of other commodity development projects.¹⁸⁴

The fourth aspect of Dr. Ul-Haq's thesis refers to Development fashions. He says that development planners have often been influenced by current development fashions. In each period, International Aid giving agencies through conferences and symposia disseminate development models. These models are a result of the work of development planners working for these agencies who structure theoretical models working out of a 'Think-Tank' unit. During each

'time-frame' these models are pushed out to float across the globe and local development planners are required or even tempted to adopt them for the utilisation of Aid received from these funding agencies. Sometimes it is felt that an application for Aid incorporating the current development plan would help secure the loan. The danger here, is, that the local development planners may lose sight of national or local variations or peculiarities to which the general model may not in any event apply. Thus the Aid may, at the end of the day, prove to have been misapplied giving rise to certain economic difficulties in the Aid receiving country.

As early as in 1949, the Sri Lanka planners had worked out a programme for national development within a localised framework for its implementation. The Galoya Development Board¹⁸⁵ and The Mahaveli Development Board¹⁸⁶ are two such glaring examples. This independence asserted by the Government in its approach to development has enabled successive Administrations to obtain Aid from a wide cross section of the world community. While the 'Kirindi Oya scheme' is being financed by the Asia Development Bank; the 'Ingimmitiya Reservoir Project' is financed by Japan, The 'Muthukandiya project' is being financed by Australia and the 'Mahadivulwewa project' by the European Economic Community.¹⁸⁷ In addition; there is an entirely locally financed project which commenced in 1978: the 'Tank Modernisation project' aimed at modernizing the several hundred ancient water reservoirs on the Island dating back to 200 B.C.¹⁸⁸ This project, which is expected to end in 1982 at a total expenditure of nearly 15 million United States Dollars¹⁸⁹ is considered by the Government as a key to the creation of a viable irrigation system across the Island. In none of these projects has the Government adopted the development models produced and recommended by the World Bank Organisation. It certainly has not relied on aid coming exclusively from that quarter, either.

Fifth, a divorce between planning and plan implementation has been said to be wrong. However, a dichotomy does exist in the Third World Countries between planning and plan implementation. Planning is left in the hands of the developmentalists-the Government experts-while implementation is considered as the responsibility of the political system of Government. This absence of co-ordination at the economic integration level of Government, between planning

and plan implementation has been bad for Aid utilization. In Sri Lanka, after 1970, a separate Ministry under the Prime Minister (and after 1978 under The President of the Republic) was established for planning and plan implementation. This arrangement too could evolve further, to link hands with the Ministry of Finance, so that a more effective integration of the several economic strategies of the nation could be achieved. In some countries, such as in West Germany, the Ministry of Finance is designated the Ministry of Economic Affairs giving the portfolio a much wider ambit. At the very least, an integration of planning and plan implementation in one body is essential for the ultimate utilization of Aid.

A key agency for the utilization of International Aid today (1980) in Sri Lanka is the Greater Colombo Economic Commission. That Commission was empowered to plan and to implement its plans in a way that the objects of the Commission may be achieved. However, in order to integrate these responsibilities with the economic policies of the Government, the Commission, as it has been shown earlier, was made responsible under the Law of 1978 to 'comply with the general policy of the Government.'¹⁹⁰ So as to further integrate planning and plan implementation, the Commission was placed in charge of the Ministry for planning and Economic Affairs which indeed was the chief architect of the economic development programme for the Island.

The sixth aspect of Dr. Ul-Haq's thesis prescribes a concern for the improvement of human resources. In many Third World countries, International Aid was not used with the thought that development of human resources was an important adjunct to the proper utilisation of development aid. The purposive advancement of education within the framework of local susceptibilities was essential for Third World Development. Dr. Ul-Haq, commenting on the conditions in Pakistan wrote:

"It was often a tragic sight to watch a village child reciting some nursery rhymes with great pride while he did not know how to interpret the labels on a bag of fertilizer or to help his aging father decide which fertilizer would be more useful for what crop and at what time. Little was lost, therefore, when the parents withdrew their children from school after two or three years of schooling, making Pakistan's drop-out ratio of 85% one of the highest in the world."¹⁹¹

The failure in Sri Lanka to utilise some of the aid to produce 'bare-foot doctors' has left hospitals under staffed. For those doctors who graduate from the Faculty of Medicine of the University of Sri Lanka sought foreign appointments while abandoning their responsibilities to serve a nation which had provided them with the training at the tax-payers expense. No scheme had been worked out to provide a back-up system for essential services on the Island, particularly in the Medical, Dental and Pharmacists's professions. Apart from this adverse comment, indicators from the areas of education, health and welfare seems encouraging.

TABLE XXIV: Selected Social Indicators of Sri Lanka ¹⁹²

	1946	1953	1963	1975
Adult literacy (%)	58	65	72	78
Life expectancy (years)	43	56	63	68
Infant mortality (per thousand)	141	71	56	46
Death rate (per thousand)	20.5	10.9	8.5	7.7
Birth rate (per thousand)	37.4	38.7	34.3	27
Natural population	1.7	2.8	2.6	1.9

The increase in the social indications of all six indicators supplies cogent evidence in support of Governments' care in utilising International Aid for the development of human resources. Sri Lanka has an extensive and well organised system of education. Education is compulsory at the primary level and free up to University level. As a result the country has a high level of literacy. It was estimated in 1974 that over 80% of children between the ages of 5 and 13 attended school and a substantive number of these continued their education up to pre-University level. ¹⁹³

TABLE XXV: Number of Schools and Pupils 194

	1973	1974	1975	1976	1977
Schools (1)	9,660	9,625	9,675	9,649	9,689
Pupils (2)	2,596,970	2,534,071	2,431,626	2,461,503	2,462,147

Notes: (1) The number of schools had remained more or less constant as junior and senior sections of schools which were previously counted individually are now treated as one school.

(2) The number of pupils had declined as the age of admission was raised from five to six years.

The seventh deadly sin according to Dr. Ul-Haq was economic growth without justice. In many instances, economic growth had taken place in the absence of any advancement of social justice. Often economic growth had resulted in mounting unemployment, worsening of social services and the increase of the gap between the rich and the poor. The result of this kind of development had been to increase the social tensions and thereby create the necessary conditions for the under utilisation of aid for development. The energies and moneys of the state apparatus thereby became pinned down to the laborious task of maintaining the socio-political infra-structure of the society without which development could become clearly impossible. The utilisation of International Aid, therefore, should be carefully monitored so that economic growth should not be achieved at the expense of social justice. It was this belief in a formula for economic growth with justice that the Government of Sri Lanka introduced a property reform programme during the seventies. This aspect of Sri Lanka's economic development was considered at an earlier stage of this work. That was concerned with a programme for the distribution of dwellings to the homeless and land to the landless. Besides these, the administrations in the past had introduced such taxes as the capital levy tax and the compulsory savings scheme so that excess earnings of those at a high income level could be taken off them and utilised by the Government for the upliftment of others. 195

In this sense the current social welfare benefits in Sri Lanka include an unemployment benefit of Rupees 50 per month to a head of family and the availability of subsidised rice and sugar supplies to those earning less than Rs. 300 per month. 196 This had also helped to keep down the rate of urbanisation. In addition, medical

care is largely free and widely available. This has resulted in life expectancy rising to 68 years, a level comparable with many western countries, and an adult literacy rate of 78% in 1974. ¹⁹⁷

In Dr. Ul-Haq's view International Aid used within the seven aforesaid principles could avoid the several pit falls which many have been described as the uncharitable face of International Aid.

Frank's ¹⁹⁸ total condemnation of International Aid is poignant in the Latin American Context. For they have committed more than one of the seven deadly sins. Sri Lanka's record is more impressive. Admittedly, her Administrations have committed some of the seven sins only when they became unavoidable. Unlike Brazil, Sri Lanka has taken great care towards acting within the parameters chartered by Dr. Ul-Haq. The present chapter and some of the other chapters in this work may testify to that view.

Chapter 13

Institutional Supports for Development

1. An Introduction

Some of the earliest achievements of the British Administration in Ceylon were the introduction of a selection of English Laws through Ordinances, the establishment of a court system together with English legal traditions, and a system of courts and procedure modelled upon the English legal system. The result was to introduce a viable infra-structure upon which some of the more specialised areas of the English law could be rested. Since the English legal institutions provided through the Charter of Justice of 1833¹, laid down the infra-structure for the application of the Roman Dutch Common Law of Ceylon, the British Administration felt free to chose from a wide variety of laws from the English legal system, laws, which were both suitable and necessary, for introduction into the Island. One of the earliest laws that were introduced into Ceylon from the English legal system was The Insolvent Estates Ordinance of 1853.² By that time the Ceylon Savings Bank had been established³ and as from 1833 it had become the centre for banking, particularly for the native population on the Island. The Regulation⁴ under which the Ceylon Savings Bank was established was subjected to a number of amendments between 1833 and 1859; when the first comprehensive legislation on this subject was enacted.⁵ The 1859 Ordinance transformed the Savings Bank into a viable financing institution, both from the depositors' standpoint and from the borrowers' standpoint. The Bank appeared from that point of time ready to receive money for investments and for lending money for development. Section 29 of the 1859 Ordinance, as amended by Section 17 of Ordinance No. 12 of 1892, introduced a commitment, undertaken by the British Administration in Ceylon to development financing in the role of an underwriter for the Bank's activities. This was of particular interest to the financial community, who acquired considerable confidence as a result, for investing money in Ceylon. Section 29 read:

"All moneys, goods, chattels, and effects whatsoever and all securities for money or other obligatory instruments and evidences or muniments of title, and all other effects whatsoever, and all rights and claims belonging to or held, by the said bank, shall vest in the Government of this colony for the use and benefit of the said bank and the respective depositors therein, their heirs, executors, administrators, or assigns respectively, according to their respective claims and interests, and also shall, for all purposes of action or suit, as well criminal as civil, in any wise touching or concerning the same, be deemed and taken to be, and shall in every such proceeding (where necessary) be stated to be the property of the "Crown", without further description." ⁶

The Joint Stock Companies Ordinance of 1861 ⁷ opened the way for participation in the financial affairs of Ceylon. The Ordinance was a re-enactment, with necessary changes of the 1856 Joint Stock Companies Act ⁸ of England. This adoption of the English Law on the subject attracted the participation of British Companies in the development of the Colony of Ceylon. The purpose of the Joint Stock Companies Ordinance of 1861 was to facilitate the introduction of the British economic infra-structure into Ceylon. But not until 1897 ⁹ was the concept of the Joint Stock Company extended to embrace banking enterprises on the Island. Between the original enactment of 1861 and the 1897 Ordinance a number of amending statutes ¹⁰ were passed in Ceylon, on matters more of a peripheral nature. In the meantime the British Government had passed two comprehensive statutes ¹¹ improving the Company Law in response to the modern needs of the mercantile community in England.

The mercantile lobbyists in England were anxious to have the laws relating to companies in Ceylon brought into line with those of England. With reference to this matter the Secretary of State for the Colonies wrote to Governor Sir Hugh Robinson in a despatch of 1868 in these words:

"I should wish you to consider whether it would not be well to consolidate and amend the colonial law on this subject by adopting, in a comprehensive Ordinance, the provisions of the English Companies Act, 1862 and Companies Act 1867 or such of them as may be applicable to the circumstances of the colony so as to bring the legislation in respect of Joint Stock Companies into accordance with that of England." ¹²

Although no comprehensive legislation on companies emerged until 1938,¹³ a combination of the 1861 Ordinance¹⁴ and its amendments and the 1897 Ordinance sufficed to satisfy the mercantile community of Ceylon. In support of the mercantile community and their varying enterprises, the British Administration in Ceylon passed a series of statutes in a number of important areas. The Merchant Shipping Ordinance of 1863¹⁵ and The Merchant Shipping Carriage by Boat Ordinance of 1900¹⁶ were two of the more important¹⁷ Ordinances in the area of shipping.

However, the British Administration had, as early as in 1852, enacted an enabling statute¹⁸ which in a general way had introduced the English Law into the colony in particular areas including commercial law. That Ordinance declared the law applicable to all matters concerning ships and property therein, stoppage-in-transit, freight, demurrage, insurance salvage, average, collision between ships, Bills of Lading and generally all maritime matters¹⁹ and in respect of all contracts and questions arising (out of) Bills of Exchange, Promissory Notes and Cheques:²⁰ the law applicable in Ceylon:

"shall be the same in respect of the said matters as would be administered in England in the like case at the corresponding period, if the contract has been entered into or if the act in respect of which any such question shall have arisen had been done in England, unless in any case other provision is or shall be made by any Ordinance now in force in this colony or hereafter to be enacted."²¹

As English commercial laws became codified at the end of the nineteenth century by the industry of Sir MacKenzie Chalmers, the English statutes were introduced into Ceylon one after another. The Partnership Ordinance in 1866,²² the Sale of Goods Ordinance in 1896²³ and The Bills of Exchange Ordinance in 1927²⁴ were the three most important importations from the English Law. As Professor Nadaraja had said:²⁵

"The Charter of Justice of 1833, which introduced a uniform system of judicature throughout the country, has been described as a 'purely judicial charter'; and it made no changes in the law that was to be applied by the courts. Subsequent changes in the law consisted mainly in the definition of the spheres of application of the bodies of the "Special

Laws", in the abrogation of some of the rules of the residuary general law and in the introduction of more rules of the English system." 26

What is suggested here is that the foregoing catalogue of laws that were borrowed from England had served to create a system of laws which were a carbon copy of those that were in force in England. This, it is suggested, was instrumental in creating a sense of commercial security for the potential investor so that their understanding of a familiar system of laws, legal institutions and procedures would encourage investment, which, indeed, was a necessary prelude to colonial economic development. Laws and legal institutions were in a sense a reflection of the political and philosophical foundations of a given society. The English Laws and legal institutions of the mid-nineteenth century could be regarded as a reflection of a free market economy containing little or no social elements espousing the creation of a welfare society. These, however, could be regarded as axiomatic. The type of society which the British Government was attempting to create for Ceylon during this period was one of a close parallel to the one existing in Britain. The socio-economic structure which Ceylon acquired at this period of time seemed, therefore, to be one that was designed towards creating the type of social divisions and class configurations that had existed in Britain during the latter half of the nineteenth century. While the laws and legal institutions borrowed from England were designed towards perpetuating these socio-economic divisions, the concomitant tensions within the Ceylonese society at the time may well have been a mirror image of those that were present in Britain at the same historical period. It has been mentioned at an earlier stage of this work that the Dominion of Ceylon inherited the colonial socio-economic institutions at Independence in 1948. The period between 1948 and 1956 had been generally regarded as a period of conservatism, when these institutions were conserved and applied within the framework of an Independent Ceylon. The period commencing from 1956 inaugurated a plan for radical change of the socio-economic base of Ceylon. Included in this plan were changes to the institutions that supported the socio-economic base which Ceylon had once inherited from the British Administration. The present chapter shall consider these institutional changes at two levels. First, at the macro level, the public corporation as an institution for development shall receive comment. Second, at the

micro level, the development boards created under particular statutes, designed to achieve particular types of economic goals, shall be considered.

II. The Public Corporation

II(a) An Introduction

The orthodox view of government espoused the theory that a government had three basic duties or responsibilities to discharge. These were in the areas of (i) legislative duties, exercised through Parliament (ii) executive duties, exercised through a cabinet of Ministers responsible to Parliament and (iii) the responsibility to maintain an infra-structure for the administration of Law and the dispensation of justice. The 1972 and the 1978 Constitutions of Sri Lanka altered the third obligation by declaring that, it was centrally the responsibility of Parliament to administer justice through the agencies of the courts, which were presumed to be responsible to Parliament. Despite these variations of emphasis, the three basic responsibilities of government were conceived in terms of legislation, executive action and of the judicial functions.

Since the beginning of the process of de-colonisation, a new dimension to these attributes of government had been added in the form of State participation in the economic development of the territory over which it governs. This additional aspect of governmental functions received international recognition for the first time in the declaration of the rule of law formulated in Delhi at the International Congress of Jurists in 1959. In its declaration,²⁷ the Congress declared that it:

"Recognises that the rule of law is a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized." ²⁸

The recognition lent by the Congress to the legitimate right of governments to intervene through the instrumentalities of the law to create inter alia the necessary socio-economic conditions in which its citizens could achieve their legitimate aspirations and

dignity was a welcome departure from the Athens declaration of 1955, by the same body. The Athens declaration laid heavy emphasis on 'fundamental freedoms' and on 'equal protections to all'.²⁹

Conceived within these two benchmarks was the belief that acquisition of property, of businesses and governmental interference with a free market economy were all against the notion of 'the rule of law'.

The intervention of a government in the economic development of a country may arise in two ways. Describing these two methods, Ghai³⁰ wrote:

"One can draw two models of control of an economy. The first is where the state does not itself take over any sectors of the economy, but seeks through a variety of regulatory and other mechanism to influence the conduct of the economic factors, who are private parties. The other model is where the State actually enters into production, and moves from control to the management of the economy. These models do not exist in isolation, one from the other, and indeed given the mixed economy of most developing countries, they exist side by side, sometimes reinforcing each other, and sometimes in some degree of confusion, if not actually in antagonism." ³¹

The controlling and regulatory influences of the government on the private sector in Sri Lanka had principally been through the tax structure.³² In addition, the application of regulatory laws of a centrally directed economy³³ had served to reinforce the control of the private sector. These have been considered at several stages in this work.

The creation of the public corporations however, afforded a direct intervention in the economic development of the Island. Using these economic arrangements the administrations in Sri Lanka have functioned at two specific levels. First, it had acted to provide a whole range of alternative institutions for development. The varying public corporations which Parliament specifically created were primarily meant to provide a competitor in the field so that an alternative was provided to the citizen in his role as the consumer. The alternative provided was such that between it and the private sector, an uneven scheme for competition was created. In every competition, it is axiomatic, that the public sector by virtue of its relationship to parliament could always win. Parliament, therefore, held the key as to how the competition went between its own creation - the public corporation - and the private sector. By

holding this balance, Parliament was able to rectify the defects of existing consumer services while providing the best possible service to the consumer in that particular area. This then was the first implication for development, arising out of the public corporation. The second aspect was the nationalisation of key areas which had provided the necessary support for economic development. Into this category fell the Ceylon Transport Board (a creature of the Motor Transport Act of 1957), the Ceylon Petroleum Corporation, the Insurance Corporation and the Ceylon State Plantations Corporation. These public corporations operate some of the key areas of economic development while holding a complete monopoly in each of these areas. The petroleum, insurance and the plantation industries were largely in the hands of multi-national corporations and their nationalisation and investment in public corporations was a major step towards freeing the Island's economy from foreign domination. The nationalisation of the Island's Motor Transport Companies and vesting their assets in the Ceylon Transport Board, centralised the transport services of the country in such a way that it became amenable to central control and central direction.

These two aspects of the effect of public enterprises must be related to the political ideology of the time. The effective implementation of that ideology when translated into policy depended largely on the attitudinal makeup of a bureaucracy that must occupy a central position in each of these public corporations. The increasing number of public corporations had generally resulted in an increasing number of bureaucrats upon whom the State must ultimately rely for the efficient functioning of the public corporations. A common criticism heard very often from other Third World countries, about the era of public corporations was its resulting bureaucracy.³⁴ Shivji³⁵, referred to the way the new class, arising out of the bureaucracy of public corporations, had functioned more as an instrument to eliminate the Asian and foreign businesses in Tanzania, than to implement any effective programme for national development. The result Shivji argued, was the creation of a new petty bourgeoisie with entrenched social, political and economic interests of their own rather than of the nation. The public corporations in Sri Lanka, fortunately, have failed to create a distinct class with a particular

class interest. This may be a result of the fact that the miscreants in the Sri Lankan political economy were considered to be business conglomerates, whether locally or foreign based. Parliament had itself seen to the elimination of these interests, by nationalising key enterprises through regulatory laws geared towards creating a centrally directed economy. What the bureaucrats themselves had attempted to do in the Tanzanian system, it must be pointed out, was done by the several Administrations in Sri Lanka by actively promoting a competitive spirit among public corporations it had helped in creating. The problem for Sri Lanka, however, was a different one. For Sri Lanka the problem was one of creating a bureaucracy with an understanding of the by-ways and highways of development, so that they may not lose their way when travelling through this vast jungle, unable to arrive at their right destination.

II(b) The Emergence of the Era of Public Corporations

The earliest legislation facilitating government participation in the development programme of Ceylon was enacted in 1955. This was the Government-sponsored Corporations Act of 1955.³⁶ The Act of 1955 empowered the Government to take over and carry out the activities of 'manufactories' already established and in existence on the Island. The basic limitation imposed by this Act is significant. It does not empower the government to commence a new venture, either monopolistically or competitively in any particular area. It merely enabled the government to acquire the 'manufactory' by publishing an 'Incorporation Order' in the Gazette,³⁷ specifying the manufactory and declaring that:

"a corporation shall be established to take over and carry out the purposes of the specified manufactory."³⁸

The 'Incorporation Order' may specify the objects of the Corporation,³⁹ determine its initial capital⁴⁰ and declare a number of other matters⁴¹ connected with the provision of an infrastructure to the new corporation. The Act provides for three types of take-overs. Namely; 'where the government holds the entire capital of the corporation,'⁴² where the government holds only a part but in excess of 20% of the capital of the corporation⁴³

and where the government holds less than 20% of the capital of the corporation.⁴⁴ The basic differences in these various levels of government participation were manifested in the differing extents to which a government desired, as a matter of policy, to control the activities of these corporations through their Boards of Directors. A very significant step taken by the Government was to exclude the application of the Companies Ordinance, as a general rule,⁴⁵ while leaving the discretion open to the Minister of Industries to introduce specific sections of the Companies Ordinance if and when the need did arise,⁴⁶ by Regulations made under the Act.⁴⁷ These provisions effectively limited the governance of any new types of corporations (The Government-Sponsored Corporations) to the provisions of the Act of 1955.

The Corporations formed under the 1955 Act provided a commencing point for government participation in development. That was all. The first comprehensive legislation enabling the government not only to commence totally new industries, but also to take over existing industries under the 1955 Act and run them in a monopolistic and competitive manner was enacted some two years later in 1957.⁴⁸ This was the State Industrial Corporations Act of 1957. That was a product of the first S.L.F.P.^{48a} Government of Mr. Bandaranaike. The 1957 Act declared that:

"Where the Government considers it necessary that a corporation should be established for the purpose of
(a) setting up and carrying on any industrial undertaking, or
(b) taking over and carrying on any industrial undertaking previously carried on by any corporation which was established under the Government sponsored Corporations Act, No. 19 of 1955, and was subsequently dissolved,⁴⁹

the Minister may by Order published in the Gazette:

"declare that a corporation shall be established for the purpose of setting up and carrying on, or taking over and carrying on, as the case may be, the specified Industrial undertaking.⁵⁰

Many of the key provisions of the 1955 Act were found in the present Act, including the provisions governing the incorporation order which determines the type of infra-structure that corporations created and established under this Act shall possess. Following the pattern adopted by the 1955 Act, the present State Industrial Corporations Act excluded, as a general rule, the application of

the Companies Ordinance. ⁵¹ The Minister, however, was left free to introduce by Regulations ⁵² any provisions of the company law of the Island if he had so wished. ⁵³ Under both acts, the corporations thus formed were empowered to acquire private land under the Land Acquisition Act of 1950, ⁵⁴ if such an acquisition was deemed necessary for any purpose of the Corporation. The State Industrial Corporations Act of 1957, ⁵⁵ like the Government-Sponsored Corporations Act of 1955, ⁵⁶ provided 'umbrella provisions', under which the Government acquired a facility to enter into commercial and industrial ventures either alone or in partnership with the private sector. The 1957 Act, however, went a step further by providing the means to commence new ventures either in competition with others or by holding a monopoly in that specific area of activity. In either case the Government by acquiring a controlling majority could compel the corporation to adopt the socio-economic policy of the Government. Alluding to this aspect of the enactment, the Minister for Industries, ⁵⁷ who piloted the Bill through Parliament, said:

"The powers of the Minister are for two purposes. Firstly, general powers are necessary - because these are entirely State-owned enterprises - to transmit Government policy to the Board of Directors of the Corporation. I do not think any Hon. Member would say that that is interference. We could not have enterprises owned and controlled by the State going counter to Government policy. Government policy may be with regard to the price factor and various other questions. These powers are found in respect of all the nationalised industries in Great Britain." ⁵⁸

It is important to realise that public corporations were useful channels through which the Governments were able to implement their policies. Although the two Acts - The Government-Sponsored Corporations Act of 1955 and The State Industrial Corporations Act of 1957 - did provide a generalised legal basis for government participation in the Island's industry or commerce, in later years the creation of new entities in the nature of public corporations was largely done by the legislature through specific Acts of parliament. The pattern established by the State Industrial Corporations Act of 1957 had been adopted and been pressed into service in the twin areas of State Commercial and State Agricultural undertakings. The

Sri Lanka State Trading Corporation Act of 1970⁵⁹ provided the "umbrella" legislation under which the Government could establish 'satellite' Corporations for the importation, exportation, distribution, supply, promotion and expansion of any article⁶⁰ which the Minister may from time to time determine by order published in the Gazette.⁶¹ The Act⁶² declared that the Minister may specify the objects of the corporation in the incorporation order.⁶³ By a different section the Act gave the 'satellite' corporation the "power to do anything necessary for or conducive or incidental to the carrying out of its objects".⁶⁴ A similar 'umbrella' legislation was introduced in 1972 for the furtherance of state participation in agricultural undertakings. This was the State Agricultural Corporation Act of 1972⁶⁵. The Act declared that:

"where the minister considers it necessary that a corporation should be established for the purposes of the planning, promotion, co-ordination on development of any agricultural undertaking, the minister may, with the concurrence of the Ministry of Planning and the Minister of Finance, by order (hereinafter referred to as the "Incorporation Order") published in the Gazette,"⁶⁶

establish a corporation under this Act. Following closely, the State Trading Corporations Act of 1970, this 1972 legislation declared that the objects of the Corporation shall be specified in the Order of Incorporation⁶⁷ and that the Corporation shall have a general power to do what is deemed to be necessary for carrying out the objects of incorporation.

The three 'umbrella Acts'⁶⁸ cover a wide area of State activity in the development of Sri Lanka. In industry, commerce and agriculture, these laws empower the government to establish satellite corporations whenever it considers necessary to do so. The political policy of the government determines the objects and the extent to which powers are given to the new 'legal creatures' to act towards achieving them. The flexibility, free from parliamentary controls, that the government of the day enjoys in these three key areas of⁶⁹ development could be considered as vital to those 'Third World' countries with a parliamentary form of two or more party governments.

II(c) The Legal Characteristics of the Public Corporations in Sri Lanka.

In Sri Lanka today, there are about 22 public corporations.⁷⁰ Of these, the majority have been created under the State Industrial Corporations Act of 1957.⁷¹ A few specialised public corporations, such as the Ceylon State Plantations Corporation,⁷² The State Insurance Corporation,⁷³ The Ceylon Motor-Transport Board⁷⁴ and other corporations have been created through statutory enactments. Irrespective of the sources of their creation, some common legal threads may be found in their structure and in their composition.

First: The statute which creates the particular legal entity determines and charters the sum total of its objects and powers, by providing a clause similar to an 'objects clause' of a company memorandum. This necessarily means that whenever Parliament desires to expand, contract or amend the objects and powers of the Corporation, it could do so, guided principally, by political policy.

Secondly, aside from the Parliamentary control exercised over the objects and powers of the public corporation, the minister in charge of the particular enterprise has a power to appoint members to the Board of Directors and also to remove them, at his absolute discretion. He holds a further power to appoint and indeed to remove the chairman of the Board without reference to Parliament. Every change of Government has resulted in a change of personnel at the level of directors and chairmen of all public corporations. When viewed against the number of changes of Government that Sri Lanka has witnessed since 1948, the radical changes that the public corporations have undergone, every few years, have not been good for development. Sri Lanka has had eight General Elections since 1948⁷⁵ and except in one case, in 1952, in every election the Government in power had suffered defeat thus altering the political directions of the Island in a radical manner. After each such change of government, the composition and the political directions of public corporations also change.

Thirdly, the statutes establishing the public corporations have empowered the Minister to issue special or general directions in writing to the Board of Directors, directing them as to the way they should exercise the powers given to them under the relevant statute. This enables the government in power to subject, the Board of Directors to seasonal changes of policy without having to bring in

amending legislations. In addition, a power is given to the Minister to issue orders, by Regulations issued under the relevant statute and published in the government Gazette. The combination of these two powers is akin to a power to alter the memorandum and the articles of a company, without reference either to courts or to its share holders.

Fourthly, the capital of every public corporation, is determined and controlled by Parliament. To that extent, the government in power could determine the particular role the entity can play in the development strategies of the nation. Unlike private enterprises, the great majority of public corporations have no private share holders. Those that were established under the Government-Sponsored Corporations Act of 1955, were perhaps the only corporations with a private share holding. In all others, and more particularly in specialised corporations created by special legislative enactments, no room was left for private investments. The total control of capital exercised by Parliament, subject to changes of political emphasis, was a particular hallmark of the public corporation.

Fifthly, unlike private enterprises, every public corporation has a statutory power to acquire privately owned land under the Land Acquisition Act of 1950.^{75a} In each case if any immovable property appeared to be necessary for the purpose of the particular enterprise, the Minister in charge may at his absolute discretion cause such property to be acquired under the 1950 Act. The procedure for such an acquisition was the procedure which the legislature had laid down in the 1950 Act itself.

Although the five aforementioned elements have been identified as providing the peculiar legal and economic characteristics of the new legal entity called the public corporation, there were a few other elements of equal value.

The foregoing highlights the principal legal aspects of public corporations in Sri Lanka. The absence of case law on these matters leaves one, with the enactments concerned with the creation of each such corporation as the sole guide to the law on this subject. Fortunately, as Amerasinghe has shown in his exhaustive work on public corporations in Ceylon, ⁷⁶ disputes involving public corporations have largely been in the area of policy rather than of law. Similar to problems regarding private corporations, the question of vires could be a matter for the Courts. As Amerasinghe has indicated:

"---a Court should remember that the administrative process is not and ought not to be a succession of justiciable controversies, for economic progress and development would be impeded and brought to a standstill if the Acts of Public Corporations are to be too frequently reviewed. They should be reviewable but only on the restricted grounds of excess of power or objectionable motives. The permission to interfere on such grounds as want of reasonableness when there is no express requirement would precipitate a dangerous conflict between the Judiciary and those responsible for policy." ⁷⁷

As Amerasinghe's work indicates the Courts in Ceylon had not concerned itself with laying down a body of laws regarding public corporations. Therefore, apart from the legal characteristics that may be discerned from the enactments creating them little else could be found by way of guidance from the Courts.

This leads to the next important question: How then are public corporations controlled? It appears that they are controlled by the institutions that control and determine state policy. As for Sri Lanka two such institutions could be located. These are Parliament and the Government.

II (d) Extra-legal controls on Public Corporations

II (d)(i) Control by Parliament

With reference to Parliamentary control of Public Corporations, Amerasinghe wrote:

"Ideally, from the corporations' point of view, Parliament should be a sort of shareholders' meeting reviewing annual accounts and reports and holding special general meetings when necessary." ⁷⁸

It is important to recognise that public corporations being creatures of Parliament, Parliament and not the Courts have the power to enlarge, contract or amend the objects and the powers of such a corporation. In the case of private corporations the Courts, under the Companies Ordinance, hold a residual power, in some instances, to sanction proposed alterations to the company's memorandum of Association or to the Articles of Association. This power in the case of a public corporation is held by Parliament and to that extent Parliament is more than a mere meeting of shareholders. For this reason it is important to examine whether Parliament has the necessary accoutrements to impose an effective control over public corporations.

Parliamentary debates raising criticisms of public corporations is an important method of raising issues that concern the public regarding the way in which a particular public corporation may function. But Parliament needs an institutional structure that could monitor, regulate and direct the workings of public corporations if there were to be an effective Parliamentary control of these legal entities. In this aspect, in Sri Lanka, the Public Accounts Committee appears to provide this institutional structure.⁷⁹ The Auditor-General, who is required to audit the accounts of public corporations is also required to submit a report to the Public Accounts Committee. That Committee being an organ of ~~the~~ *Parliament* ~~the~~ makes the report together with its own observations and recommendations available to the Treasury. The Treasury as a matter of course brings to the notice of the Ministry in charge of the corporation the observations and the recommendations of the Committee and the report made by the Auditor-General. In addition to these matters the Treasury may submit its own guidelines for consideration by the Minister in charge of the corporation. Under the Finance Act of 1971,⁸⁰ the Minister in charge of the particular public corporation is required to bring to the notice of the Board of Directors of the public corporation in question, the views expressed by the three institutions that had examined its overall record of activity during the previous fiscal year.⁸¹ The three institutions being: the Auditor-General, the Public Accounts Committee and the Treasury. Prior to 1971, however, the Ministers were not required to bring these observations to the notice of the Board of Directors of the public corporations in question. The Ministers did, however, inform the Boards merely to protect themselves from criticisms levelled against them in

Parliament. The report of the Public Accounts Committee - which is a Committee of Parliament - is ultimately made available to Parliament and therefore could be the basis for a number of sharp questions.

Although parliamentary controls of public corporations is a necessity so that their Boards of Directors and the Government of the day do not follow policies which are diametrically opposite to each other; too rigid a control exercised by Parliament could prove to be counter productive of the development aims that the corporations are required to pursue. If the Boards of Directors were subject to controls of a strict nature, then the power to make decisions quickly which may be necessary for the business efficacy of the corporation may become somewhat restricted. This may lead to delays in the workings of the corporation, because the Board may for its own protection refer a large number of matters for Ministerial direction rather than making decisions on its own and thus risking the censure of the Minister or of the Board or both.

(ii) Control by Government

Amerasinghe,⁸² commenting on the power which the Government has, to control public corporations, pointed out that this type of control was exercised through the directions issued by the Ministers responsible for particular public corporations.

Amerasinghe⁸³ concluded that:

"The directive influence of a Government on a particular Corporation would vary with such circumstances as the personality of the Minister, the status of the corporation and the strength calibre of its permanent personnel."⁸⁴

The Ministerial power to issue special or general directions is the key to development. It plays a role similar to that played by law in development; Ministerial directions to Boards of public corporations blend Government policy with the social and economic policies pursued by the corporation. In previous chapters, particularly in those on Education and Language, the point was made that the laws enacted at the relevant times in question were merely instances where the legal institutions were utilised by the Governments to control and direct the changes to the socio-economic base of the society, so that those changes fall into line with the declared policies of the Governments in power. In that sense Law

was seen to lie at the interface of policy and its implementation. Similarly, it may be suggested, that the residual power left in the hands of the Ministers responsible for public corporations, to issue Ministerial directions, is no more than an effective method of blending Government policy with the policies declared by the Board. By this method the Government could, as in Education and Language, control and direct the changes at the social and economic levels of the society in a way that the Government's declared development goals could be achieved. Ministerial directions in this sense must be recognised as essential tools for development.

Another aspect of Government control of public corporations may be seen in the contents of Treasury Circular No. 1052 of 31st August, 1969.⁸⁵ The circular was meant to lay down certain guidelines for Ministers who are in charge of public corporations. One of the guidelines there contained required each such Minister to submit all new proposals and plans for public corporations, first, to the Ministry of Planning and Economic Affairs for its approval. This requirement was to ensure that the corporations' policies and the overall economic policies of the Government were co-terminous. The guideline in effect would result in having the policy framework of each public corporation fall into place with the general framework for the Island's development worked out by the Ministry of Planning and Economic Affairs. Apart from the guidelines laid down in the Treasury Circular, the Treasury does, in a much more direct way, control the activities of public corporations, in that it: examines the annual budget, reviews the annual accounts, determines the amounts from profits of the corporation which should go into the Consolidated Fund, advises and suggests measures to improve its finances, assists in formulating business procedures, supervises and directs corporation investments so as to obtain the best returns and a variety of similar activities.⁸⁶ In each of these activities the Treasury plays a vital role in guiding the corporation along a path determined by the policy of the Government for the day. So as to institutionalise these roles, the Treasury created in 1964, a special Division called the 'Public Corporations Unit'.⁸⁷

The foregoing description both of Ministerial control and Treasury control presents a confused and complex picture for the public corporations. A Cabinet sub-committee that looked into a whole range of matters regarding public corporations reported that:

"various agencies such as the Ministry in charge, the planning Ministry, Treasury and Central Bank call for different types of information from public corporations to examine and review their operations. This unco-ordinated attempt to review, only results is a heavy burden of clerical work on the Corporations. The figures submitted cannot be considered to be reliable. Therefore, while there has been the good intention of the Government to oversee and review the work of corporations, in practice the operation has been a failure." ⁸⁸

Apart from the foregoing recommendations of the sub-Committee at least one Finance Minister ⁸⁹ had openly declared the unsatisfactory nature of Government control through the Treasury. The answer may be the creation of a single Ministry to remain in charge of public corporations and nationalised industries, so that the two aspects of national development could be co-ordinated under a single Minister. The position today is that, while nationalised industries fall under the Ministry in charge of Industries, public corporations are spread right across the Ministries in the Government.

(e) What is the Legal Status of a Public Corporation?

The answer to the question whether a public corporation is a department of the Government raises a number of interesting issues. First, if the Corporation is an agency of Government then its employees will deem to have the status of public servants. Second, where the employees have the status of public servants then they will be regarded as being under a special liability under the Penal Code ⁹⁰, The Public Servants (Liabilities) Ordinance ⁹¹, and under the Post Office Ordinance ⁹². Third, if employees of Public Corporations were Public Servants, then they would be entitled to special privileges concerning travel, holidays, security of employment and retirement benefits. This very question, came before the Supreme Court on at least three occasions and on each such occasion the Courts held that a servant of a public corporation was not a public servant in the employment of the Crown (before 1972) or of the State (after 1972).

In The Ceylon Bank Employees Union v. Yatawara⁹³ The Supreme Court was asked to rule as to whether employees of a nationalised bank had the power to seek redress from the Industrial Tribunal, under the Industrial Disputes Act. If the employees in question were Public Servants, it was conceded that they could not seek any redress from such a Tribunal. Adopting a passage from a judgment⁹⁴ of the Supreme Court of Madras, Sansoni J. found that notwithstanding the nationalisation of the Bank of Ceylon in 1961, its employees were not servants of the Crown (as determined under the Soulbury Constitution). Sansoni, J. laid down the following tests which he had adopted from the decision of the Supreme Court of Madras:

"The tests for determining the constitutional position of such a Corporation laid down by the learned Judge are:

(1) the incorporation of the body, though not determinative, is of some significance as an indication by Parliament of its intention to create a legal entity with a personality of its own distinct from the State.

(2) The degree of control exercised by the Minister over the functioning of the Corporation is a very relevant factor, a complete dependence on him marking it as really a government body, while comparative freedom to pursue its administration is treated as an element negating an intention to constitute it a Government agent.

(3) The degree of dependence of the Corporation on the Government for its financial needs."⁹⁵

The Courts thereafter examined the Statute which nationalised the Bank of Ceylon and concluded that:

"Guided by these authorities and applying them to the provisions of the Finance Act, No. 65 of 1961---,"⁹⁶

the employees of the Bank of Ceylon are not Public Servants. The decision does not lay down a general rule that all public corporations are non-governmental organisations. But it does lay down a test under which the courts could determine the legal status of a public corporation.

In Air Ceylon Ltd. v. Rasanayagam⁹⁷ the same question came before the Divisional Court. There it was argued that under the Air Ceylon Act,⁹⁸ the Government's responsibilities towards the Air Ceylon Corporation was such that the corporation became more a branch of Government rather than an independent body. Three

areas were identified ⁹⁹ as crucial to this submission. First, it was submitted that under the Air Ceylon Act the Government remained liable to make contributions to the Air Ceylon Corporation's Capital when ever such a contribution was called for. Second, it was submitted that members of the corporation's Board were appointed and their appointments terminated by the Government acting through the Minister in charge of the corporation. Third, certain portions of the net receipts of the corporation were required under the Act to be paid into the Consolidated Fund. Therefore, the submission was made that Air Ceylon Corporation was in fact a department of the Government and was in no sense an independent entity.

In spite of these weighty submissions on behalf of Air Ceylon, Fernando, C. J. held that Air Ceylon Corporation was not a department of the Government but was a separate entity. The learned Chief Justice said:

"I am unable to agree that the provisions of Air Ceylon Act which are mentioned above, and other provisions thereof, have the effect that in law the Crown or the Government is the employer of persons, employed on the staff of Air Ceylon. The Act establishes a Corporation to be known as "Air Ceylon Limited" and section 14 empowers the Corporation to appoint and dismiss its staff and to determine the remuneration and other conditions of service to the staff. As the President of the Tribunal has pointed out in his order, the Corporation has under the Act (s.3) the duty to secure the fullest development of efficient Air transport services to be operated by it, and has all necessary powers to facilitate the performance of that duty. There are of course certain powers vested in the Minister to supervise and in some instances to direct the policy of the corporation but the existence of these powers does not, in my opinion, have the consequence that the Crown or the Government is the employer. The staff of the Corporation is in fact employed by and under the Corporation itself, and it is clear beyond doubt that the relationship of employer and employee does exist between the corporation on the one hand, and on the other hand, the members of its staff." ¹⁰⁰

The corporations ability to take decisions regarding the implementation of its objects; namely, the provision of 'efficient Air Transport Services' appears to be the key to the determination that the corporation was independent of the Government.

In the third case, The Coconut Research Board v. Subramaniam, ¹⁰¹ the Divisional Court was required to determine the status of the Coconut Research Board. Mr. Justice Weeramantry, finding the

Board in exactly the same position as Air Ceylon was, in the previous decision, concluded that the Coconut Research Board was not a department of Government but an independent and separate entity. While reaching that decision His Lordship reiterated the position taken by previous decisions that dependence on the Government for funds and Government's control of the corporation would not "necessarily render a corporation a servant or agent of the Crown." 102 Having said that Weeramantry, J. observed that:

"Though dependent on Government funds, the Board has full power and authority generally to govern, direct and decide on all matters connected with the appointment of its officers and servants, the administration of its affairs and the accomplishment of its objects and purposes. There is also express provision in the Ordinance that any such officers or servants when appointed shall for the purposes of discipline and otherwise be subject to the control and supervision of the Chairman of the Board." 103

The three decisions 104 discussed above lay down some valuable ground rules for the determination of the legal status of a public corporation under the Law of Ceylon. It seems to be clear that the obligation of the Government to make a financial contribution to public corporations out of the Consolidated Fund or the obligation of the corporations to pay back moneys to the Consolidated Fund from their annual profits is not to be regarded as a relevant fact to this determination. But the power of the public corporations both to employ and to terminate employment of its personnel appears to be a vital factor. Where a corporation was left free to make decisions on engagement and on disengagement of personnel, the courts 105 have held that the public corporation has a personality distinct from the Government. The cases surface another point of distinction too. This is the question of control. Particularly, in the Air Ceylon Case, Fernando, C. J. spoke of the power given to the corporation to achieve the purposes for which it was created, free from Government interference, as a criterion for recognising the corporation as a separate entity. This point of distinction cannot be too greatly relied upon. As it was succinctly stated at a conference 106 on public enterprises held in Colombo:

"---although the public corporation and the Government department are different in certain respects, it is dangerous to exaggerate this difference in form, for

no public corporation is completely autonomous and no government department administering a service of some magnitude can be managed without a considerable degree of independence." ¹⁰⁷

The fact of the matter is that while there is a degree of control exercised by the Government over the affairs of public corporations, this control is, as a general rule, limited to matters of Government policy while the method or the manner of execution of that policy is left in the hands of the Board that runs the corporation. Although the corporation is free to adopt the most efficient method of achieving the ends identified by policy, the corporation at all times remains answerable to the Ministry in charge of its activities. The Ministry in its turn through its Minister is answerable to Parliament, which leads the line of command ultimately to the people. This arrangement as a rule does not make a public corporation a department of Government. But it would, if the responsibility for the execution of the policy and the choice of the means by which such policy was executed had ultimately been left, not in the hands of the corporation, but in the hands of the Ministry in charge of it. This in my view seems to be the point at which a public corporation could in law be considered a department of the Government. Connected with the issue of the legal status of a public corporation was the question as to whether the public corporation had a corporate personality, which made it liable to be sued and able to sue in its own rights. All public corporations are creatures of Parliament. The statutes that create them sometimes declare expressly that they shall have a corporate personality. The State Industrial Corporations Act, ¹⁰⁸ which created the public corporation of that name, declared by section 2(2), that:

"Upon the publication of the Incorporation Order in the Gazette, a Corporation--- with the corporate name specified in such Order, and with perpetual succession shall be deemed to have been established.

Section 2(3):

"The Corporation may sue and be sued in its corporate name".

In The Ceylon Tea Propaganda Board v. The Commissioner of Inland Revenue, ¹⁰⁹ the respondent claimed Income Tax payments on money received from the principal collector of customs as proceeds from

a special export duty paid on the exportation of Tea from the Island. These duties were levied under the Tea Propaganda Ordinance.¹¹⁰ The Board created under that Ordinance was declared to be entitled to receive the aforesaid export duties. The Tea Propaganda Board was a public corporation created for the purposes of propagating the production and sale of Tea grown on the Island.

The Divisional Court held that The Tea Propaganda Board being a separate entity from the Government was liable to pay tax, on profits as would any other corporation. However, the Court declared that the money from export duties did not fall into the category of 'profits' or 'income' and therefore, did not fall within the taxing provisions of the Income Tax Ordinance. However, in the course of his judgment, Fernadno, J. said:

"The functions of the Tea Propoganda Board are not carried out by Government officers and although some officials are members of the Board, they receive no remuneration on that account from the Government. The fact that in a sense the Government may be regarded as making a contribution towards the expenses of the Board by appropriating to it the proceeds of the special export duty does not render the Board's undertaking a Government undertaking. There are many undertakings, non-governmental in nature, which receive financial assistance from the Government."¹¹¹

This passage supports the conclusion made earlier that the point at which a public corporation ceases to remain an independent and separate entity and becomes in law, a Government Department, is when the execution of the Government policy formulated with reference to the corporation is carried out by the Ministry in charge rather than by the officers of the Corporation. The fact that the functions of the Tea Propaganda Board were being carried out by its own officers appeared from the foregoing passage to be the key to the recognition that the Board had an independent corporate personality liable to be sued and able to sue in its own right.

(f) The Public Corporation as an Economic Unit

In recent times, much literature on public corporations has emerged, high-lighting particularly the importance of the concept of public corporations for development.¹¹² The Attlee Government which was returned to power in the United Kingdom after

the 2nd World War was responsible for the refinement and the increase of public corporations there, which naturally set the pattern for her colonies in the present Third World. Describing the legal characteristics of one of the most powerful public corporations at the time, the British Transport Commission, ¹¹³ Denning, L.J. (as he then was) wrote in his judgment in the Court of Appeal in Tamlin v. Hannaford: ¹¹⁴

"The protection of the interests of all these-taxpayer, user and beneficiary-is entrusted by parliament to the Minister of Transport. He is given powers over this corporation which are as great as those possessed by a man who holds all the shares in a private company, subject, however, as such a man is not, to a duty to account to parliament for this stewardship. It is the Minister who appoints the directors-the members of the Commission - and fixes their remuneration. They must give him any information he wants; and, lest they should not prove amenable to his suggestions as to the policy they should adopt, he is given power to give them directions of a general nature, in matters which appear to him to affect the national interest, as to which he is the sole judge, and they are then bound to obey. These are great powers but still we cannot regard the corporation as being his agent, any more than a company is the agent of the share holders, or even of a sole shareholder. In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not crown property. It is as much bound by Acts of parliament as any other subject of the King. It is, of course, a public authority and its purpose, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of Government." ¹¹⁵

This legal analysis of the public corporation appears to fit squarely the type of public corporations to be found in Sri Lanka. It appears that the mould for the Sri Lanka creation was borrowed from the United Kingdom. The point made by Denning, L.J., that the public corporation was ultimately in the control of the Minister who could, by specific directions on policy matters, have the corporation implement the policies of Parliament, is of very real significance to development. This necessarily means that the government in power may use the public corporation as an

instrument for socio-economic change. By shifting the levers of policy the directions of the public enterprise too could be changed as political parties change, together with political ideologies at general elections. It is to this 'revolutionary' but precarious and uncertain nature that Ghai referred when he said:

"Ultimately, the functions of public enterprise must depend on the nature of the state. This helps to explain the apparent paradox that---countries with socialist as well as capitalist aspirations employ the device so extensively." 116

This creates a precarious situation for the economy, for radical changes in the Administration could result in radical changes to the system of public enterprises in the country. It creates an uncertainty for the economy because, as the Sri Lankan experience has shown, at every General Election a new administration with a political ideology different from the one from which it takes over, has resulted. The introduction of a new system of voting by the 1978 Constitution to which reference was previously made, was considered necessary to prevent the radical changes that were taking place in the political and ideological directions of the Island every five (now six) years; namely, at each General Election.

The success or the failure of a private corporation was determined in terms of its profits and its losses. The difficulties with public corporations was that their success or failure was not related directly to its profits or to its losses. The public corporation was considered as a means for regulating the price of commodities rather than as a means for making profits. The idea was conceived, within the overall plan for controlling both inflation and deflation. It was suggested that public corporations could contribute to both inflation and deflation if they were to incur either a loss or a gain of profit, respectively. If they were to be operated at a loss it could place a strain on the Island's Treasury which could result in inflation. If they, on the other hand, were to gather a profit, then it was said that it would result in deflation. Either economic posture was believed to be harmful to development. 117

A counter view had been put forward by a different school of thought. Propagating the counterview, Oskar Lange¹¹⁸ suggested:

"As a rule public corporations should make profits. Part of the profits may remain at the disposal of the corporation, but the major portion of the profits should revert to the budget to be used for purposes of new industrial investment.---In any case it is important that the major part of the profits of public corporations go into general reserve and serve to finance public investment policy according to the national plan of economic development." 119

Of these two views, the latter appears to be eminently suitable for Third World countries, where lack of financial resources appears to be a major roadblock to development. Adopting the view that the public corporation should be considered as a vehical for economic growth, it follows that the Governments should be interested in undertaking profitable ventures rather than attempting to make unprofitable ventures work by the infusion of capital. In this sense the Business Undertakings (Acquisition) Act of 1971 ¹²⁰, becomes a useful instrument in the hands of the Government. Under that Act, the Minister of Finance on his own initiative or at the request of any other Minister may acquire any business undertaking on the Island. This could be done ¹²¹ either by negotiation leading to an agreed acquisition or by compulsory acquisition of the property. Where the acquisition was compulsory it was effected by a primary vesting order published in the Gazette. The Act required that the 'vesting order' be placed before Parliament for its approval within six days of its publication in the Gazette, when Parliament was sitting and within fifty days of the commencement of the next session when Parliament was not sitting at the time of such publication. The Act required the approval of the 'vesting order' to be moved in the form of a motion that 'such order be approved.' If Parliament were to disapprove the vesting order then that business undertaking was deemed never to have vested in the Government. If it was approved, then the 'vesting order' became final and conclusive and cannot thereafter be questioned in a Court of Law whether by writ or by other means. Utilising this Act, the Government transformed a number of profitable private corporations into public corporations. The Bogola Graphite Company Limited, ¹²² the British Ceylon Corporation Limited, ¹²³ The Ceylon Extraction Company Limited, ¹²⁴ the Orient Company (Ceylon) Limited, ¹²⁵ the Anwil Distilleries Limited ¹²⁶

and the United Motors Limited ¹²⁷ were acquired by the Government within the first three months after the promulgation of the Business Undertakings (Acquisition) Act of 1971.

In a number of statutes creating public corporations financial provisions were laid down, indicating the way the Corporation should handle its finances. In each of those provisions, a statutory obligation was placed upon the Board to make a new profit. However, until 1971, a general financial provision applicable to all Public Corporations on the Island, in the form of a Charter for general economic progress had not emerged and the public corporations were merely responding to ad-hoc directives issued by the Treasury regarding the financial management of such corporations. By the Finance Act of 1971 ¹²⁸, the Government laid down a charter for general economic progress. Section 7 of the Finance Act, laid down:

"It shall be the duty of the governing body of a Public Corporation to conduct the business of the Corporation so that the ultimate surpluses on revenue account shall at least be sufficient to cover the ultimate deficits on such account over a period of five years or such other period as may be determined by the Minister of Finance."

In two other sections ¹²⁹ the Finance Act carried a detailed statement as to the way the public corporations should regulate their financial matters. First, the Act defined ¹³⁰ what the Corporations should consider as 'Income'. This was indicated as earnings arising from three specific sources; namely, proceeds from the sale of products or supply of services, subsidies received from Government sources and income including profit accruing from the sale of capital assets. Second, the Finance Act laid down a list of recognised expenditures which the Public Corporations may 'set off' against its 'income'. What results after this 'set-off' would be considered as 'profits' for the corporation. The recognised expenditures fell into six categories. ¹³¹ These were: the working expenses of the corporations, allocations to cover the depreciation of the value of movable and immovable property, the payment of interests on any loans obtained by the Corporation, loss incurred by the sale of capital assets, payment of income tax or any other tax which the corporation is required

to pay under any written law, and payments made into the Consolidated Fund for whatever reason. The difference between the 'income' and the foregoing payments shall be considered as 'profits'.

The Finance Act laid down in another section the way the profits of a Public Corporation ought to be utilised. Section 10(2) of the Act laid down five areas in which the profits may be used.

These were:

- "(a) writing off the whole or any part of any accumulated losses brought forward;
- (b) writing off the whole or any part of the preliminary expenses incurred in the formation of the Corporation;
- (c) writing off the whole or any part of any unproductive expenditure or loss not properly chargeable to revenue account;
- (d) transfer to a loan redemption reserve which the Corporation is hereby authorized to establish and maintain; and
- (e) transfer to other reserves." 132

The Act further laid down that in every case where the profits were used for any one of the foregoing purposes, the approval of both the Minister in charge of the corporation and, if he is not the Minister of Finance, then in addition, the consent of the Minister of Finance must be obtained prior to any transfer of the corporation's profits. ¹³³ However, when payments are made specifically under headings (d) and (e), in addition to the approvals required generally from the Minister in charge and from the Minister of Finance where the two are not the same, the Boards of each Corporation were required to obtain the approval of the Minister of Planning in addition, before any payments were made from the corporations' profits. ¹³⁴ This kind of ministerial controls may be an answer to the fears expressed by Sir Arthur Lewis that profit making public corporations may, in a sense, contribute to deflation while loss incurring corporations may create inflation. ¹³⁵ By centralising the regulation of the destinations of 'profits', in this way the Governments could to a large measure strike a balance between 'inflation creating' corporations and 'deflation creating' corporations. The Finance Act at the end declared that what money was left after the utilisation of the net profits in the way described above, shall be credited to the Consolidated Fund. ¹³⁶ These somewhat elaborate financial arrangements appear

to have paid rich dividends. ¹³⁷ Out of the vast number of public corporations some considerable number of public corporations may, at the end of each fiscal year, be called upon to contribute through the Consolidated Fund for the subsidisation of other public corporations which may have incurred a deficit. What has to be examined upon an yearly basis was the overall contribution the public corporations make towards the national economy. As this section was limited to the economic aspects, such public corporations as those concerned with cultural and educational objectives of the State cannot be evaluated against the same criteria as used here. Their utility was more suited for an analysis at a social level than at an economic level.

III. Development Boards

State participation in the economic development of a nation may take several forms. First, there could be a direct participation in the Nation's economic development. This could be achieved by the State assuming control over the sources of production. The Business Undertakings (Acquisition) Act ¹³⁸ and the Companies (Special Provisions) Law ¹³⁹ may be regarded as two examples where the Sri Lankan Legal System had provided its Governments with the necessary instrumentalities for such direct participation. The State's participation under this heading could involve its assumption of the ownership and possession of existing enterprises under the two aforementioned enactments. Reference had been made to them at an earlier stage of this work.

Second, the State may set up institutions in competition with existing enterprises or may create institutions to commence new enterprises in new areas of activity. The State Industrial Corporations Act of 1957 ¹⁴⁰ and the Sri Lanka State Trading Corporation Act of 1970 ¹⁴¹ may be regarded as two examples where the legal system had provided the Sri Lankan Administrations with the legal instrumentalities required to intervene in the economic development of the country under this second heading.

Third, the State may set up institutions to aid the sources of production by administrative directions. Friedmann, ¹⁴² referred to these as "auxiliary organs of administration." ¹⁴³ The first two methods of state participation had been the core of this chapter.

But this section is devoted to the third aspect of state participation. In all three methods of participation the State utilises the juridical concept of the public corporation. But the 'auxiliary organs of administration' differs fundamentally from the other two in that these do not indulge in commerce but only as aids to development. In that sense, the 'auxiliary organs of administration' function as "Social Service Corporations," ¹⁴⁴ and not as commercial corporations. The former type of corporation appear in Sri Lanka as 'Statutory Boards', and are generally under close ministerial supervision, unlike the commercial corporations. The Statutory Boards as a rule are financed as part of a departmental budget of the Government and therefore, are subject to a closer public accounting procedure than in the case of the commercial corporations. Friedmann finds the 'Statutory Boards' which he refers to as 'Social Service Corporations': "In a far more direct sense, prolonged arm of the Executive." ^{144a}

In Sri Lanka, the 'Statutory Boards' (or 'Social Service Corporations' or 'Auxiliary organs of Administration') are formed, mainly, to aid, direct, control and advise the various sources of production, so that they may produce the best result and create 'a community of producers' in their own spheres of activity. In other words, these 'Statutory Boards' provide an institutional framework within which the sources of production could enhance their capacity to develop. The laws that have created these types of Boards have displayed the five following characteristics:

FIRST: The law creates an Authority or Board to supervise, superintend and administer the production of the particular commodity. The Board thus created falls squarely within the area of responsibility of a particular Ministry, thus establishing the ultimate power of control by Parliament.

SECOND: Agriculturalists or productionists in the particular area of activity becomes linked to the Authority or Board requiring them to follow the direction set out by that Authority or Board for the better management of the particular source of production and for better results.

THIRD: The law provides the Authority or the Board with instruments of coercion so as to maximise obedience to their directives. The powers of coercion are such that they in their nature are convenient and simple to enforce.

FOURTH: The Law constitutes the failure to observe these directives as constituting a criminal offence; but the greater emphasis is placed on administrative sanctions rather than in the imposition of criminal penalties. Administrative sanctions, such as forfeiture of the corpus of production subject to an extra-legal review by a Board of Reveiw was considered to be an effective instrument of coercion.

FIFTH: Subject to the Board or Authority, in every instance there is a decentralised body, elected by persons in the locality and by persons engaged in that type of production. This body becomes the Agent of the Central Authority or Board, thus establishing a direct line of command stretching from parliament to the grass-roots level of production.

These five elements may be considered as common to every such Board or Authority.¹⁴⁵ They differ from public corporations in that they do not engage in any commercial or productive venture, but merely act as supervisory or superintending organs. The Agricultural Productivity Law of 1972 provides a good example.

The Law of 1972^{145a} primarily introduced the idea of state control of agricultural production. The Law centred chiefly on quality control and on the maximum utilisation of the available land. Towards this end the Law laid down a set of principles underlying the concept of "good management".^{145b} The Law required that:

"---every owner or occupier of any agricultural land--- manage it in accordance with the rules of 'good management--- with a view to improving the productivity and maintaining efficient standards of production both as to quantity and quality of the produce." ¹⁴⁶

The failure to conform to the standards of "good management" was made a criminal offence,¹⁴⁷ attracting a penalty of an imprisonment for a period not exceeding six months or to a fine of one thousand Rupees or to both.¹⁴⁸ Besides the availability of this criminal sanction, the government had additional coercive powers. The failure to observe the standards of 'good management' gave the Minister the power to place the owner of such land under supervision by issuing him with a 'Supervision Order',¹⁴⁹ for a period of twelve months. If after the expiry of that period, it was found that the owner had failed to comply with the 'Supervision Order' the Minister may at that point issue 'Orders of Dispossession'¹⁵⁰

followed by an application before a magistrate for the owner's eviction.¹⁵¹ The order for eviction results from the failure of the owner to quit the land subsequent to an 'Order for Dispossession'.¹⁵² The dispossession of Agricultural Land under these proceedings was subject to the payment of compensation by the State.¹⁵³ The Law provided for the assessment of compensation by the government's chief valuer¹⁵⁴ and appeals against that determination laid to the Compensation Review Board established under the Land Acquisition Act,¹⁵⁵ and disputes regarding the 'Dispossession Orders' lay to the Agricultural Tribunal¹⁵⁶ established under this law in the geographical area in question.¹⁵⁷ Aside from a power to make an application to the Supreme Court, upon a question of law^{157a} decisions of the Agricultural Tribunal were deemed to be final.¹⁵⁸ Equally, a decision on the question of compensation by the Compensation Review Board was final and in that case it was also "conclusive and shall not be called in question in any court" of law.¹⁵⁹ This was the machinery provided by the Law¹⁶⁰ for the effective implementation of the policy prescribing state participation in Agricultural production, both as to the qualitative measure and as to the quantitative measure of production. Associated with this programme were a number of local bodies which the law had established, in order to ensure local participation at the grass roots level in the Government's development programme. It is to these that we must next turn. The Law created four sets of institutions. These were: (a) The Agricultural Productivity Committees,¹⁶¹ (b) The Agricultural Co-operative Societies,¹⁶² (c) The Agricultural Co-operative Leasehold Societies,¹⁶³ and (d) The Small-Holders Service Co-operatives.¹⁶⁴

III(a) Agricultural Productivity Committees

In every 'Agricultural Area', as determined and declared by the Minister in charge of Agriculture, the Law declared that there shall be an Agricultural Productivity Committee,¹⁶⁵ which shall be a body corporate with perpetual succession.¹⁶⁶ The Law declared that the Agricultural Productivity Committees:

"so established shall be charged within the area of its authority with the duty of promotion, co-ordination and development of agriculture, of assisting in the formulation and implementation of programmes and targets for the production of crops and livestock and of exercising such powers as the Minister may entrust

to such Committees under this Law or by any regulations made thereunder." 167

The Law spelt out in several sub-sections, the specific aspects of the aforementioned overriding obligations of the Committees. One of the key elements of the Law was to involve the Agricultural Productivity Committees (A.P.Cs) in the 'Supervision Order.' 168 The membership of these committees was determined by the Minister. The law declared that:

"The members of each such Committee shall be appointed by the Minister and shall consist of not more than ten persons as the Minister may think necessary should be appointed." 169

The extent to which the State had retained the power to control the membership and the duties of the Agricultural Productivity Committees should provide an indication as to the extent to which the Government had intended to participate in the agricultural production on the Island. By subjecting the Agricultural Productivity Committees to ministerial regulations, the Committees became subject to the changing patterns of Government policy. The Law confirmed in the Minister a power to make Regulations, 170 for this purpose.

III (b) Agricultural Co-operative Societies:

The Law provided for the establishment of Agricultural Co-operative Societies in each of the geographical areas within which an Agricultural Productivity Committee may be found. Such societies were formed out of cultivators of the agricultural lands in that area. The choice of membership and the decision to create such societies were both left to the discretion of the Minister of Agriculture. But he was, in this matter, required to act in consultation with the Minister in charge of Co-operative Development. 171

The Agricultural Co-operative Societies were required to perform a number of functions, 172 such as:

- "(i) obtain agricultural advances in proportion to the area of lands owned by its members;
- (ii) supply farmers with working capital, including the necessary seeds, fertilizers, insecticides, cattle, pumps, agricultural machinery and provide facilities for storage and transportation of crops;
- (iii) organize the farming of the land and its utilisation in the best possible manner including the selection of seeds, the classification of crops, the combating

of agricultural pests and weeds and the construction of canals and drains;

(iv) sell the produce of the members subject to such conditions as may be agreed upon; and

(v) take all such measures for the welfare of its members." 173

All these activities of the Societies were required to be carried out under the supervision of an officer appointed by the Minister of Agriculture with the advice of the Minister of Co-operative Development. 174

Again, what is manifested here is the complete control of the government over the work done by these societies.

III(c) Agricultural Co-operative Leasehold Societies

Where an Agricultural Co-operative Society¹⁷⁵ decides to obtain a lease of land subject to private ownership and decides to farm such land under a joint management with its owner, the Agriculture Co-operative Society became transformed into Agricultural Co-operative Leasehold Society. 176 The Law provided for the method of fixing the rent for the leasehold¹⁷⁷ and a number of other matters. The Law did not, however, specify with any clarity as to the specific duties of this new creature. One could, therefore, assume that this new creature carried the same type of duties as did the Agricultural Co-operative Society, because both statutory creatures remain inter-linked. The utility of this new creation was to facilitate joint agricultural productive activities with land owners of the locality. By entering into such ventures, land, which was privately owned, came under the influence of Government policy. By this method the Government was able to bring land, without requisitioning or acquiring privately owned land, under the influence of its distinctive agricultural policies.

III(d) Small-holders Service Co-operatives

The Law¹⁷⁸ declared, in Section 39 that:

"The Minister may, in consultation with the Minister in charge of the subject of cooperative development, make regulations to establish in any area serviced by an agricultural productivity committee a system of small-holders service co-operatives as an initial step towards the transition of development of agricultural land from the present system of individual and independent holdings to co-operative or collective system of production."

The creation of small-holders service co-operatives marked an intermediary stage in the march towards the establishment of Janawasas. Collectivisation was the ultimate goal of the government, and the creation of small-holders service co-operatives was considered as a mere starting point for a new social configuration. The importance of a schematic social formation was perhaps borrowed from the Chinese experience. At the beginning, soon after the land reforms were first commenced in 1950, the peasants worked in 'Mutual-Aid-Teams', which slowly evolved into co-operatives. These, by a steady dialectical process of evolution gave rise to "Advanced Agricultural Producers' Co-operatives." By 1958, 'the Advanced Agricultural Producers Co-operatives had reached the gateway to communisation. The next step required no more than a structural change to achieve the stage of an 'Advanced Co-operative.' The changing concepts of ownership and possession in the Chinese Law were linked to these structural and organizational developments in the Chinese society. Together with such changes as were necessary to move the 'Mutual-Aid-Teams' into co-operatives and then into Advanced Co-operatives in their march towards the creation of rural Communes, the society too had undergone organizational changes of some considerable importance. These organizational changes were found necessary not only to accommodate the Commune concept of social organisation but also to lend institutional support to the type of socio-legal system which they were evolving.

The Sri Lankan approach was to a large extent underpinned by similar assumptions. It appeared to be the belief of the Government that out of the Land Reform Movement must evolve a new society with the elements of collectivisation. The march towards that ultimate stage was chartered in measured steps and with Janawasas as the ultimate goal, the point of commencement was fixed with the creation of small-holders service co-operatives. As mentioned earlier, the Janawasas were ultimately established in 1975 and the subsequent change of administration, in 1977, ended its short span of life.

AN ANALYSIS OF THE STATUTES PROVIDING THE INSTITUTIONAL
INFRA-STRUCTURE FOR DEVELOPMENT BY CREATING STATUTORY BOARDS

The Title of the Statute	The Reference to the Statute	The manner in which the Boards and the Authorities exercise their powers under their respective statutes.	The manner in which the statutes construct a chain of command between the grass-roots level of production and Parliament passing through the Authorities and the Boards as an intermediary point.	Instruments of Coercion	Extra-legal Institutions for the Settlement of Disputes--no access to courts	De-Centralisation of the Powers of the Boards and Authorities through Grass root representation on local bodies
Agricultural Productivity Law.	Law No. 2 of 1972	Part II	Part I	ss. 6 and 7	Part III	Part IV
The Ceylon Tea Board Act.	Act No. 15 of 1970	s. 2	s. 4	ss. 13 & 32	-	-
Coconut Development Act.	Act No. 46 of 1971	Parts I & III	Part II	Part V	s. 60	-
Co-operative Societies Law.	Law No. 5 of 1972	s. 2(1)	ss. 4-6	Chapters VIII-X	Chapter XI	s. 3
Industrial Development Act	Act No. 36 of 1969	Parts I & II	s. 15	s. 33	s. 46	s. 43
Industrial Products Act.	Act No. 18 of 1949	s. 3	s. 7	s. 10	-	-
Silk & Allied Prod. Development Law	Law No. 30 of 1975	s. 2	s. 17	s. 18(2)	s. 28	-
Sri Lanka Fruit Board Law	Law No. 30 of 1973	s. 2	s. 16(2)	s. 23(2)-(4)	ss. 32 & 33	s. 21

Sri Lanka Tea Board Law	Law No. 14 of 1975	s. 2	s. 4(2)	s. 13	s. 19	-
Tea & Rubber Estates (Control) of Fragmentation Act.	Act No. 2 of 1958	s. 10	s. 3(1)	s. 11	s. 15	-
Tea Small Holdings Development Law	Law No. 35 of 1975	s. 2	s. 14	s. 15(2)	ss. 26 & 31	-
Urban Development Authority Law	Law No. 41 of 1978	s. 2	s. 8	s. 23	s. 26	s. 7

IV. Conclusions

Many have pointed out the curious nature of public corporations in that they possess the capability to provide a means, both to 'Free Market' economies and to 'Command' economies, for achieving their respective political and economic goals. However, throughout the history of Colonialism persons grouped together as corporations, had been used as agencies for European powers situated at the metropolis, for the implementation of a 'Free Market' economy in the colony, constituting its satellite. The use of private corporations in this process of creating a colonial economy has received much comment.

While synthesising his ¹⁷⁹ work in Latin America, Dr. Frank projected what he called the 'metropolis-satellite relation' as an explanation of the 'development of underdevelopment in Latin America'. ¹⁸⁰ In his view the European capitals forming the metropolis based their economic growth upon the exploitation of their colonies forming the satellite through private corporations. The principal satellite in the colony was its capital city. Frank commences his exposition by first explaining the politico-economic significance of capital cities in this way:

"The privileged position of the city has its origin in the colonial period. It was founded by the conqueror to serve the same ends that it still serves today; to incorporate the indigenous population into the economy brought and developed by that conqueror and his descendants. The regional city was an instrument of conquest and is still today an instrument of domination." ¹⁸¹

The capital city as the first economic out-post of colonialism functioned as an integrating point for the economies of the metropolis and of the satellite. This integration of the two economies was implemented by the Government at the metropolis, largely through the instrumentalities of the corporations. The fact that the nationality of the corporations taking part in the integrative process happened to be the same as for the Metropolitan State in question, helps both, in the enforcement of strict controls over the corporate policies of the corporation, and in directing their respective activities. By this way the colonial powers in Europe were able to implement their colonial economic policies through a willing agent - the corporation. But thereafter, Frank points out, that the capital city of the colony became the

national metropolis while the provincial towns become the satellite of an internalised economic exploitative order. The national metropolis at this stage constituted an agency of the international metropolis in Europe. The inevitable result therefore was to facilitate the control and thereby perpetuate the economic dependence of the farthest point on the globe upon the metropolis in Europe. This must necessarily mean that both the price of a commodity like Lactogen manufactured in the metropolis and sold to a mother in rural Walahapitiya¹⁸² and the price of coconut from rural Gorakana,¹⁸³ or the price of a pound of tea in Ratnapura,¹⁸⁴ were all determined not by the satellites but by the economy of the metropolis through several institutional arrangements made through the participation of corporate bodies, like in the fixing of Tea prices by 'Mincing Lane'. Irrespective of the fact that the consumer who buys a coconut in the Western province of Ceylon or a pound of tea from a boutique in Uva¹⁸⁵ or Sabaragamuwa¹⁸⁶ was paying for a local product, its price at the point of sale is not a matter for the satellite economy to determine but for the corporations at the metropolis. For the local product sold locally must ultimately derive its price from the fluctuation of world commodity prices.¹⁸⁷ This, notwithstanding the fact that tea, unlike Lactogen, was a locally produced product. This ultimate economic control held by the metropolis was explained by Frank in the following passage:

"Thus these metropolis-satellite relations are not limited to the imperial or international level but penetrate and structure the very economic, political, and social life of the Latin American colonies and countries. Just as the colonial and national capital and its export sector become the satellite of the Iberian (and later of other) metropolises of the world economic system, this satellite immediately becomes a colonial and then a national metropolis with respect to the productive sector and population of the interior. Furthermore, the provincial capitals, which thus are themselves satellites of the national metropolis-and through the latter of the world metropolis-are in turn provincial centers around which their own local satellites orbit. Thus, a whole chain of constellations of metropolises and satellites relates to all parts of the whole system from its metropolitan centre in Europe or the United States to the farthest outpost in the Latin American countryside." ¹⁸⁸

The formation of a national metropolis commences the process by which the exploitative economic tentacles of the international metropolis spreads into the countryside of the colony. It is to this particular characteristic that Frank referred when he said that the satellite (which now is the national metropolis): "serves as an instrument to suck capital or economic surplus out of its own satellites and to channel a part of this surplus to the world metropolis of which all are satellites." 189

The economic structure of a given society is primarily a product of a commitment by a political order to a given ideological or a philosophical standpoint. In that sense it rests upon a particular political ideology or upon a given political philosophy. The British Administration in Ceylon espoused the twin principles of private ownership of property and a Free Market economy. Within these two principles the whole of the economic policies of the British Administration were spun.

The legal institutions and laws that were introduced from England merely provided the institutional underpinnings for the colonial economic venture. Besides laws, the British Administration provided the functional accoutrements such as roads, railways, a banking system, a system facilitating mercantile investments, communication-postal, telephonic, telegraphic-and a host of other institutional supports. In addition the British Administration provided the necessary manpower by organising the importation of labour from India. These were all a part of a deliberate compact worked out for the effective implementation of a free market economy based on private ownership of property and channeled through corporations of British nationality.

The social formations resulting out of the obvious needs of the system namely to create an agency and a sub-agency group at the satellite, principally recruited from among the natives, resulted in a particular type of socio-political configuration which had frequently attracted the opposition of those who believed in a command economy with a plan for the distribution of property, underpinned by a programme for the State control of the sources of production. The latter had found that the members of both the agency and the sub-agency groups, which kept the corporate system of the metropolis functioning effectively, had supported

the perpetuation of a system of private enterprise largely for their own financial gains. Their support for the Free Market economy and the principle of private enterprise had been a strong focal point to rally the opposition to public corporations at every general election since 1948. The opposition of the Agency and Sub-agency groups to the 'progressive' forces was found to spring, to a large measure, from their own self-seeking motives for the accumulation of wealth through the corporate structure, rather than for the economic development of the Island.

The realisation that this national bourgeoisie were contributing very little, if at all, towards the development of an independent economic system out of the colonial economic system which the Island had inherited in 1948, became the rallying point at the general elections of 1956. The perpetuation of the colonial economic system during the first eight years of Independence came up for comment in a big way during that election campaign.

Commenting on this type of problem, Frank¹⁹⁰ wrote:

"The colonial structure had created a high profitability of production for export and an unequal distribution of income at home, and the consequent class structure deprived the majority--of adequate purchasing power and rendered production for the domestic market relatively unprofitable. Therefore, the domestic bourgeoisie used the remaining capital surplus for reinvestment to expand the export productive apparatus, or to import capital goods for the same purpose and some luxury goods for the bourgeoisie's own consumption. Thus, unlike the metropolitan bourgeoisie, the satellite bourgeoisie did not construct or invest in a productive apparatus or create a social organization capable of generating self-sustained economic development. Instead, the satellite bourgeoisie made the development of underdevelopment into a self-reinforcing part of the historical process of world capitalist development for as long as its metropolitan capitalist senior partner was willing and able to maintain the fundamental colonial relationship. The colonial relationship--has persisted until today." 191

Frank's exposition is of the Latin American countries. In 1956, it was recognised that the Independent Dominion of Ceylon had not even commenced a programme for altering the colonial economic system inherited from the British Administration. It was the declared commitment to change the system, by changing the twin principles of a Free Market economy and of private ownership

of property - that swept the Sri Lanka Freedom Party of Mr. S.W.R.D. Bandaranaike into power. That marked the commencement of a new era for Ceylon: the emergence of the public corporation as an instrument for the creation of a command economy in Ceylon. The introduction of the public corporation into the Sri Lankan economy may, therefore, be considered as an instrument for change from a Free Market economy to a Command economy. As much as the colonial power at the metropolis was able to use the corporate structure to implement its policies towards creating a Free Market economy at the satellite, the sovereign power of an independent former colony could use the same type of infra-structure to transform the economy into something different from colonial times. This use of the corporate infra-structure by a Government was the public corporation: "Clothed with the power of Governments but possessed of the flexibility and initiative of a private enterprise." ¹⁹²

Part E

Conclusions

Chapter 14: Towards a Theory of Law and Development: Some Concluding Remarks. Pages 558-592.

CHAPTER 14

Towards a Theory of Law and Development: Some Concluding Remarks

I. An Introduction

This chapter presents the conclusions of the enquiry conducted in the preceding chapters into the role of law in Sri Lanka's development from colonial times to the present day Republic. This historical period stretches across eighteen decades. During the past two decades a marked interest in the study of law as an aid for development, under the somewhat pedestrian rubric, 'law and development' had become prominent, particularly, among academics ¹ in the United States of America. As a starting point to their work, they made the initial assumption that none of the traditional theories of law ² did in any way explain the role of law in development. As a matter of fact it was their assumption that the framework within which those traditional theories were formulated had no relevance to the problems encountered in development. ³ The traditional theories have been generally found to be concerned not so much with the need to modernize society or cause some radical changes in it, but to explain and provide a justification for the existence of a system of laws in a given society. ⁴ To this extent the position taken by American academics, ⁵ that the traditional theories of law are irrelevant to development may well be justified. However, the traditional theories of law should not be totally discounted as having no importance to a theory of law in development. During the course of this dissertation some reference to Maine and Kelsen have been made. To a large extent some of the ideas of the Historical and Anthropological schools of Jurisprudence could have some relevance to development. ⁶ The Marxist school or the Economic theory of Law have been utilised by a number of scholars as a basis for re-structuring societies of the Third World. ⁷ Therefore, to varying degrees of emphasis and importance, certain aspects of the traditional theories of law could be utilised in the search for a theory of Law in Development.

The earliest proponent of these studies was Professor Seidman ⁸

who has now published a compendium of his own writings in: The State, Law and Development.⁹ Seidman's theory rests largely upon the belief that rules of law are the key to social change, to modernization of social institutions and to what he conceives as 'Development'. In Seidman's view law is a useful instrument for achieving development, because law implies the existence of established rules of conduct which are meant to be observed. Seidman wrote:¹⁰

"The legal order is the tool most easily available to politically organized society to bring about purposive social change. Law does this by re-defining norms so that, if the new rules in fact induce the behaviour which they prescribe, new patterns of social interaction will ensue. Society will be to that extent changed."¹¹

An important feature of Seidman's model is the extreme reliance which he places on law as a means by which development, modernization or social change may be achieved. Seidman is, however, willing to admit that social change may be induced by non-legal stimulants that are in a sense intractable and often impervious to empirical research. As a result of this extreme dependence on law, Seidman, calls upon the development minded lawyer to examine the legal system together with its rules of law with an eye to improving the system both qualitatively and quantitatively so that it could bring about the desired end result, in the most efficient manner.

Any reliance on law as a tool for development must necessarily be preceded by a study of the ideal types of laws and administration that would facilitate development. Reviewing Seidman's thesis, Martin wrote:¹²

"Law also connotes a system of administration which seeks to inhibit discretion and the exercise of arbitrary power. It would seem, then, that Seidman's entire theses stands or falls on the likelihood of the development-oriented legal system which he advocates becoming normative. Legality is thus the implicit major premise in his argument."¹³

In a recent writing¹⁴ Seidman made the point that law lies at the interface between policy and implementation. Expanding his original thesis described earlier, Seidman laid heavy emphasis on the need to use the legal system to normalise the policies regarding development.

He appears to believe that once the policies are normatised their implementation shall proceed to completion per force the law. Seidman, however, admits,¹⁵ while agreeing with Myrdal,¹⁶ that policies of development to a large extent remain on paper and fail to achieve the stage of implementation. Myrdal's principal argument is that: "Without much more social discipline, development will meet great difficulties and, in any case, will be delayed".¹⁷ Myrdal, in his work: Asian Drama, An Inquiry into the Poverty of Nations,¹⁸ stigmatised development programmes of the Third World as those in a 'soft state'. Myrdal explained¹⁹ what he meant by that term in the following passage:

"By that term I mean to characterize a general lack of social discipline in underdeveloped countries, signified by many weaknesses: deficiencies in their legislation and, in particular, in law observance and enforcement; lack of obedience to rules and directives handed down to public officials on various levels; frequent collusion of these officials with powerful persons or groups of persons whose conduct they should regulate; and at bottom, a general inclination of people in all strata to resist public controls and their implementation. Also within the concept of the soft state is conception, phenomenas which seems to be generally on the increase in underdeveloped countries."²⁰

It appears from Myrdal's analysis that a reliance on law alone will not effectively implement the policies of development. For the equation of development contains a heavy social element for which law does not provide a complete answer. This appears to be a glaring weakness in Seidman's theory of law in development. Aside from Seidman, American scholarship has produced what has become to be known as the theory of 'Liberal Legalism'.²¹ The principal proponents of this theory are Professors Trubek and Galanter of the University of Wisconsin. Their theory was based on the fundamental assumption that development in any form was difficult to achieve, unless the legal system of a nation adopts the values and the principles of a Western legal system. While denying the validity of Seidman's theory, the two academics put forward a definition of development which led to the conclusion that: "the Third World is thus assumed to be doomed to underdevelopment until it adopts a modern Western legal system."²² After pursuing this theory for a number of years, the two scholars, Trubek and Galanter have now

recanted²³ and have admitted the falacy of their beliefs.²⁴ They have admitted that the motive for formulating the 'liberal legalist' theory, originally, was merely to attract the attention of funding agencies to their research.²⁵ In their new view of development, which they characterise as 'eclectic critique',²⁶ they promise not to be persuaded by needs for funding.²⁷ In a joint writing,²⁸ the two scholars postulate:

"Eclectic critique transforms the central assumptions underlying the law and development enterprise into critical standards. They always were this in part, but the belief that they were also factually descriptive involved the scholar in premature and uncritical commitment to particular institutions and policies. In 'eclectic critique', the assumptions are purified of the admixture of descriptive assertion; they are completely and self-consciously normatized."²⁹

Beneath this verbiage there appears to lie a re-statement of their original theory of 'liberal legalism'. All that is missing is a commitment to the goals of aid giving organisations. They re-affirm this and conclude that:

"This lack of institutional loyalty frees the practitioner of eclectic critique to assemble his critical armory from diverse and disparate sources."³⁰

After a penetrating analysis of this new twist to their original theory, Seidman concluded³¹ that the new label was nothing more than the promise to pursue their former theory of 'liberal legalism' without responding to the demands of funding agencies. There are poignant references in some passages of the joint work³² of Trubek and Galanter, that could support Seidman's complaint. A fundamental disagreement with both the original view and the amended view of Trubek and Galanter is that, it is wrong to presuppose that development is possible only within the framework of a Western legal system. Such an assumption is both against the available evidence gathered from empirical research³³ and is contrary to theory.³⁴

Aside from Seidman, Trubek and Galanter, studies in law and development in the United States stand devoid of any prominent advocate of a theory to explain the role of law in development. However, in a less exhaustive treatment of the subject, Merryman,³⁵ recently

suggested a study of Comparative Law and social change. In his view development was merely a synonym for 'progressive social change.'³⁶ Merryman justified the use of 'Comparative Law' as a means to remind the scholars that they were dealing with other legal systems. The combination of Comparative Law and Development, Merryman argues, gives a wide scope to the studies of law and development.³⁷ He believes that the scope of the study will extend from law to Comparative Law, with a study of society shared between them. Merryman admits that his proposals are merely tentative and are essentially put forward as an opportunity for the,

"depressed, isolated and forlorn in the law
and development movement, --- to come in from
the cold."³⁸

Viewing this landscape from an objective standpoint, these theories in essence fall far short of a comprehensive explanation of the role of law in development. It is, therefore, necessary to examine the data and the conclusions contained in the body of this dissertation and thereafter attempt to formulate an explanation as to the role of law in development.

II. What are the elements that are essential for development?

One of the roles thus far perceived for law in the field of development is that of an integrator of ecological, cultural, social, economic, institutional and political dimensions of a given society, so that the diverse trends and human aspirations in each of these fields could be synthesised in a way that the society as a whole could evolve into a cohesive social unit. The role of law in this sense is to integrate the various elements that comprise the society so that conditions of social stability could be achieved; in the absence of which efforts taken to change conditions of underdevelopment could prove to be wasteful and even counter-productive. The conditions of underdevelopment could be found in a number of related fields but the four basic areas that have been recently identified by a research group at the Dag Hammarskjold Foundation³⁹ are: Food, Habitat or Shelter, Health and Education.⁴⁰ These four areas were selected as the principal elements that should provide the framework for any

definition of 'underdevelopment'. The satisfaction of these needs provide the gateway to ecological, cultural, social, economic, institutional and political development and provide a stable foundation upon which the dignity of a group of people could be enhanced and used as a catalyst for social integration. This, it is believed would achieve the social cohesiveness which must be an essential element in any programme for development.

The Brandt Commission, ⁴¹ recognising the limitations of any attempt to define development, explained the notion of development in the following way:

"It refers, broadly speaking to desirable social and economic progress, and people will always have different views about what is desirable. Certainly development must mean improvement in living conditions ---. But if there is no attention to the quality of growth and to social change, one cannot speak of development." ⁴²

The areas which the Brandt Commission identified ⁴³ as those that should be relevant to a definition of development, appear to be co-terminous with the four elements suggested by the Dag Hammarskjold Foundation, particularly by Ghai, ⁴⁴ as early as in 1978. These four elements are: Food, Habitat or Shelter, Health and Education.

II(a) Food

The importance of food as a basic element in development requires little emphasis. Underdevelopment in this area may be attributed to a multiplicity of factors: lack of planning, delay in planting, soil erosion, lack of agricultural equipment to meet particular demands, Acts of God resulting in a bad harvest and such other difficulties. Development in the production of food in Sri Lanka, required the introduction of reforms at two principal levels. First, the reform of the methods of Agriculture. Second, the reform of the institutions intimately connected with agriculture.

The Paddy Lands Act of 1958 ⁴⁵ provided a good example of institutional and methodological reform in the production of rice, the staple food of the Islanders. Although the Paddy Lands Act of 1958 is regarded as the starting point for sweeping reforms into Paddy

cultivation, the Paddy Lands Act of 1953⁴⁶ may be remembered as the first step taken towards the recognition of the position of the Govia.^{46a} For the first time in history, the Govia was given a particular status in 1953, in the eyes of the law, which continued to be so recognised in the 1958 Act⁴⁷ and later in the 1973 Law.⁴⁸ Once the law began to recognise the position of a Govia or a tenant-cultivator as a question of status then it was logical for the legal system to recognise in him a list of rights^{48a} and duties^{48b} attaching to his position. In addition to the duties enumerated in the 1973 Law, the Agricultural Productivity Law of 1972^{48c} prescribed 'standards of good management'⁴⁹ which the tenant-cultivator was called upon to observe. This provided a juridical basis for development of the Paddy plantations on the Island. The 'standards of good management' provided a change to the somewhat disinterested, uncontrolled and often careless methods of paddy cultivation which was devoid of any real development goals. The 'standards of good management' enumerated in the Act required the Govia to observe such a standard of conduct as:

- "(a) the proper timing of agricultural operations;
- (b) the efficient management of irrigation water;
- (c) joint measures for conservation of soil;
- (d) water conservation and drainage;
- (e) protection of pests and diseases;
- (f) any other collective responsibilities which may be prescribed by regulations under the law for efficient land use and the improvement of agricultural productivity; and
- (g) ensure that the prescribed period between the harvesting of any agricultural produce and the marketing thereof---." ⁵⁰

The 1972 Law, created a social organisation at the village level called the Agricultural Productivity Committee,⁵¹ inter alia to monitor the observance of the required 'standards of good management'. Further, the 1972 Law vested a power in each of the Agricultural Productivity Committees at the village-level, to determine the standard of good management⁵² with reference to local factors. To this extent the development strategies became locally based. The Agricultural Productivity Law,⁵³ which legitimised the programme for development of Paddy Cultivation laid down^{53a} in broad detail the 'functions and powers' of the Committee. Aside from monitoring the 'standard of good management', and a whole list⁵⁴ of other functions, these Committees were empowered:

"to prepare and submit to the Minister for implementation by regulations made under this Law, schemes for ensuring the efficient farming of agricultural lands and their management, maintenance and improvement. 55

This provided the Government with village-level advice for its development programmes. The Committee on the whole was made responsible for the implementation of the programme. The Law declared that:

"Notwithstanding anything to the contrary in any other Law an Agricultural Productivity Committee so established shall be charged within the area of its authority with the duty of promotion, co-ordination and development of agriculture, of assisting in the formulation of implementation programmes and targets for the production of crops and livestock and of exercising such powers as the Minister may entrust to such Committees under this Law or by any regulations made thereunder." 56

It is, therefore, important to recognise the importance of these Committees for the village-level implementation of the development programmes of the Government. The implementation of the programme is considered to be lawful so long as the Agricultural Productivity Committees are acting within the powers given to them while implementing the programme. Any activity which is deemed to be ultra vires those powers are considered to be illegal notwithstanding the result obtained. The Law requires the Minister to appoint ten members to the Committee out of those who could adequately:

"represent the interests of persons engaged in agriculture." 57

In practice the Member of Parliament acting through local organisations (both social ^{57a} and political ^{57b}) recommends the names of 10 persons to the Minister for appointment. In some areas an election is held among those who are engaged in agriculture for the purposes of choosing the ten persons ⁵⁸ required by the Law. From my fieldwork I learnt that the method for choosing the 10 members is largely a matter of elections rather than by some kind of ad hoc procedure for selection. The Law does not provide a procedure for selecting the 10 names to be recommended to the Minister for appointment. The Law, therefore, appears to leave the determination of the selection procedure in the hands of the agriculturalists at the village-level. In practice the election of the 10 members is conducted by the village headmen, or the Gramasevaka, about whom reference will be made later.

The creation of the Agricultural Productivity Committees provides a new village-level organisation relevant to the advancement of Paddy cultivation through popular participation. A similar village-level social organisation for the advancement of dry land development was provided by the Janawasas under the Janawasa Law of 1976.⁵⁹ Very similar creations are the Agricultural Co-operative Societies,⁶⁰ Agricultural Co-operative Leasehold Societies⁶¹ and the Small-holders Service Co-operatives.⁶² In each of these the legislation which legitimises the development programme has been responsible for the creation of these village-level social organisations. The key to the success of these village-level social organisations was popular participation. These village-level social organisations to a large measure carry the responsibility of satisfying the local needs. These organisations have the ability to monitor the implementation of the development plan with reference to the availability of local resources. This would raise the need to blend the programme for development with the capacity for self-reliant development at the local level. The whole purpose of linking the 'standard of good management' to the Agricultural Productivity Committees was to submit that standard to an appraisal, against local conditions. The failure to observe the standards, subject to a number of intermediate steps like the administration of a caution^{62a} could end in the dispossession of the land and as a consequence to a loss of ownership.⁶³

The village in which my research was conducted, namely, Walahapitiya, was bi-sected into two parts using the ancient Dutch Canal as the baseline. West of the Canal were about 100 families which had their own Agricultural Productivity Committee. This area was designated Pahala (or lower Walahapitiya). East of the Canal was designated Ihala (or upper Walahapitiya). Each section of the village had its own Productivity Committee. The significance of this type of micro-division was to make popular participation in the activities of the new social organisation possible. Although each half of the village of Walahapitiya had approximately 100 families. Less than 100 persons as a rule participated in the activities of the Productivity Committee on both sides of the Canal. The way that these Committees work fits Ghai's⁶⁴ suggestion that development needs to stem:

"---from the heart of each society, which defines independently its values and the

vision of its future. It must also be self-reliant, so that each society relies primarily on its own strengths and resources in terms of its members' energies and its natural and cultural environment. It is recognized that self-reliance needs to be exercised at national and international levels, but that it acquires its full meaning only if rooted at local level, in the praxis of each community." ⁶⁵

Associated with the development strategies in the provision of food is the question of development financing and aid utilization. This involves much more than the provision of agricultural credit to the tenant-cultivator to buy his implements - a new hoe or a rake - or the periodic use of insecticides and manure. It includes the effective mobilisation of the masses at the village-level of participation for the efficient implementation of the programme for development. It is the latter kind of activity of the Productivity Committees that becomes crucial for the implementation of a plan for development based upon self-reliance. The Agricultural Productivity Committees qualify for Government loans and credit facilities and this enables the Committees to provide the tenant-cultivators with easy access to financial assistance whenever a legitimate need does arise. The State Mortgage and Investment Bank, ^{65a} the Peoples' Bank ^{65b} and the Agricultural and Industrial Credit Corporation ^{65c} are the principal sources from which the Productivity Committees receive financial assistance. In addition, direct grants to these Committees from the Ministry of Food and Agriculture are a common feature. Aside from these types of village-level aid, International Aid for the construction, reconstruction, repair and maintenance of bunds of rivers, of reservoirs and such other projects as the Mahaveli and the Galoya schemes are common place. The Agricultural Productivity Committees which are the beneficiaries of the latter projects are made responsible to monitor 'the efficient management of irrigation water' ⁶⁶ and ensure that there is 'water conservation and drainage'. ⁶⁷

In conclusion, it is important to stress the evolving pattern for the utilisation of law in development. There appear to be emerging from the foregoing description a two-tier structure. At the first level of legislation is the legitimisation of the broad development

programme and the creation of village-level social organisations. At this level the rules of law have been used to create a new status in the Govia or the tenant-cultivator and declare the legal incidents that inhere to that status. In addition the legitimising statute establishes the village-level social organisations and provides a legal framework of 'functions and powers' they may legitimately perform.

At the second level of legislation the statute provides the means by which, the activities of the village-level social organisations - when implementing the development programme - could be supervised, corrected, challenged or terminated, at the suit of the people at the village-level or by the State.^{67a} At this second level of legislation, the legitimising statute provide for the settlement of disputes arising out of the implementation of the development programme.^{67b} The procedure made available for settling disputes in these cases is by conciliation and not by adjudication. This paradigm of a two-tier system has been rigorously followed not only in the case of Agricultural Productivity Committees,⁶⁸ but also in the Janawasas,⁶⁹ the Agricultural Co-operative Societies,⁷⁰ the Agricultural Co-operative Leasehold Societies⁷¹ and the Small-holders Service Co-operatives.⁷² This two-tier plan for the utilisation of law in development appears to be a common feature particularly, in the areas of economic development in Sri Lanka.

One of the practical difficulties one faces with village-level organisations is one of linkage with the centre of power. The latter could be with the legislature linked through the relevant Minister of State or with the central bureaucracy linked through the various ministries. This line of communication from the village-level to the legislature has been maintained by a rigorous process of decentralisation of the administrative apparatus in Sri Lanka. The principal unit of local government administration is the Province, which is headed by a Government Agent. His immediate sub-ordinate, the Assistant Government Agent, was placed in charge of district and sub-district levels of administration. Each Assistant Government Agent has under his governance a number of Gramasevakas or Village Headmen. Each village has a Gramasevaka. The latter forms a vital point of contact between the 'Government' in the collective

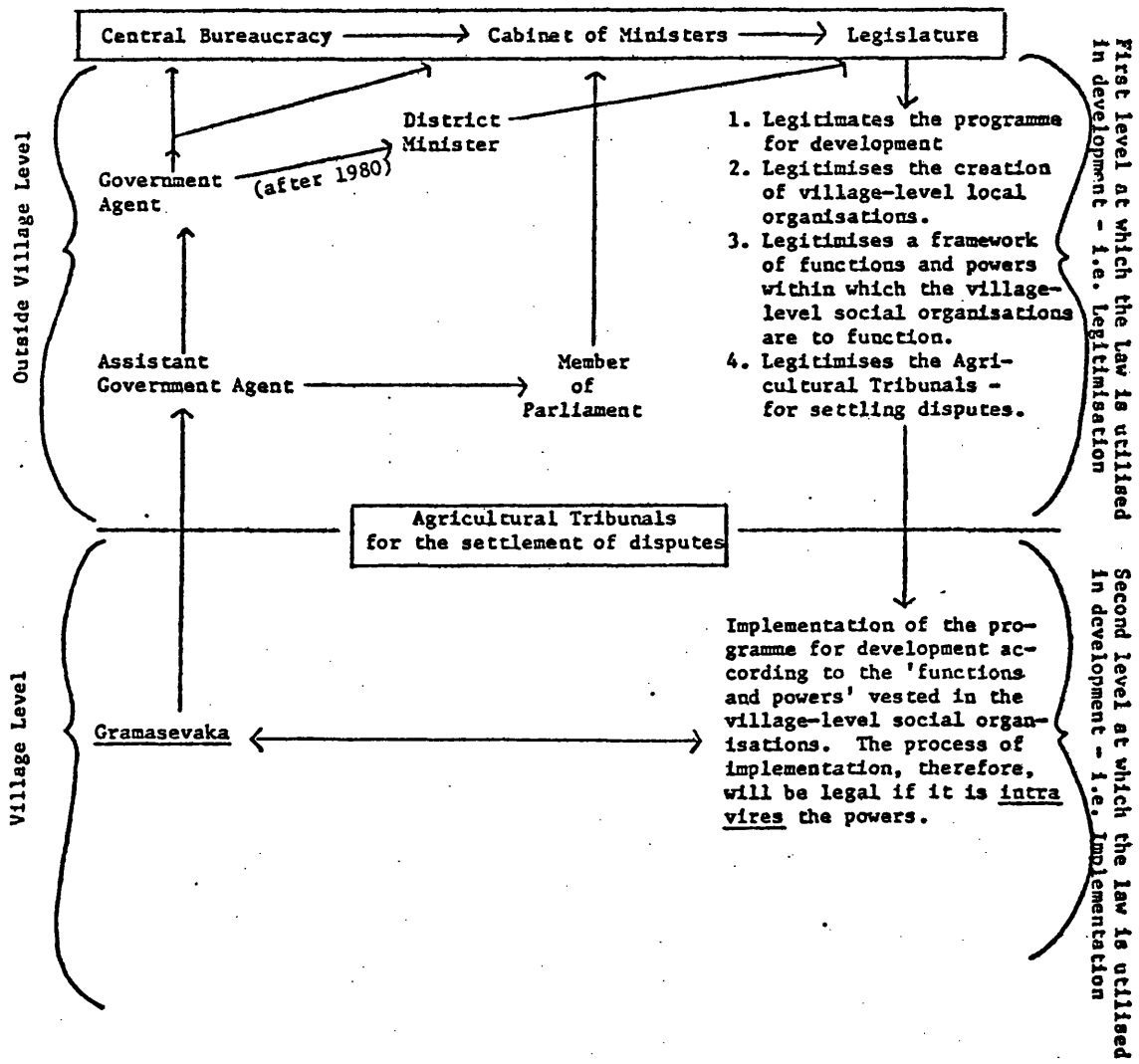
sense of that term, at the centre and all village-level social organisations scattered around the Island. The village, therefore, provides a single local unit within which all the village-level social organisations remain directly in contact with the Gramasevakas - the village-level administrative unit with a direct access to the 'Government' occupying a central position of administration. The continuing dialogues and interactions between the Gramasevakas and the several village-level social organisations (of which the Agricultural Productivity Committees are one) provide an important element in the structuring and the implementing of a development programme for Sri Lanka. In addition, the Gramasevakas, perform the functions of useful listening posts for the Cabinet of Ministers. In an ideal condition any programme for development should first seek a general acceptance by the people at the village level prior to its legitimisation by Parliament. The Gramasevakas have often been used to determine what views the 'targeted people' ⁷³ have, of the proposed programme.

The Gramasevaka's immediate superior to whom he reports is the Assistant Government Agent. The Assistant Government Agent remains directly in contact with the local Member of Parliament. Where such Member of Parliament is a member of the opposition group of Members in Parliament the Assistant Government Agent's report to that Member could be of marginal value. Where the Member of Parliament in question is a member of the Government group of Members, he may be able to take effective action where ever it seems necessary through one of the Ministers under whom the particular village-level social organisation falls for review. This facility may not be available for a Member who belongs to one of the political parties outside the ranks of the Government. In such a case, the Gramasevaka's report will travel to the next stage up the ladder, namely to the Government Agent at the provincial level. Prior to 1980, the Government Agent would report directly to the particular Minister who has been designated by the 'legitimising statute' as the Minister who shall remain responsible for the proper execution of the 'functions and the powers' of the village-level social organisation. However, after 1980, I have learnt from a recent unpublished communication ^{73a} that the Government Agent report directly to one of the District Ministers ⁷⁴ in whose district, the particular village-level social organisation was located. In either event, the report originating

at the Gramasevaka level has access to the 'Government' at the centre of Administration.

This arrangement leaves room for disputes that may arise between the village-level social organisations and the aforementioned officers or the institutions of Government. There may also be disputes between the people at the village-level and the social organisation. In either case a need to settle these disputes quickly and with careful reference to the local conditions do arise. The settlement of these disputes, therefore, have, as a rule been subjected to conciliation as distinct from adjudication before a Court of law. Excluding points of law, which the varying conciliating tribunals may state by way of a reference to a Court of Law, all matters of fact in the dispute are subjected, exclusively, to a conciliation process. Limiting this exposé to the Agricultural Productivity Law of 1972,⁷⁵ all disputes arising under that law have been subjected to conciliation before the Agricultural Tribunals⁷⁶ established under it. The following diagram represents this emerging structure:

The utilisation of the legal system by the
Agricultural Productivity Law, Law No. 2 of 1972



The three remaining areas: habitat or shelter, health and education - which both the Dag Hammarskjold Foundation and the Brandt Commission Report ^{76a} identified as areas which are relevant to a definition of development may not fit this evolving pattern for the role of law in development. This could be explained on the grounds that habitat, health and education form an area which largely incorporates elements which are relevant to social and not to economic development and, therefore, has been the concern of the Government as a part of a centralised plan for implementation. However, the laws passed for the reform of land (both private land and estate land) may appear to fall within the two-tier paradigm which has been suggested here. This aspect will receive attention in the discussion of 'habitat or shelter'. The reform of land was partly for social development and partly for economic development at the village-level. Where the reform programme became involved in village-level development, it may be noticed that the two-tier approach to explain the role of law in development was adopted, by separating the process of legitimising the programme from its implementation. Against this framework it would be useful to examine the remaining areas of: habitat or shelter, health and education.

II(b) Habitat or Shelter

Improvements in the conditions of habitat or shelter is as basic as food in the progressive movement away from underdevelopment. Habitat embraces a wide variety of human conditions. It includes the space and environmental conditions necessary to achieve a minimum standard of material, spiritual and economic standards associated with the quality of life. This aspect of improving one's habitat remains dependent upon the availability of economic resources to support a uniform population spread. This raises the need to include regional development, land use planning, the provision of an effective system of public transport, the distribution of water and the general improvement of community amenities. The provision of sanitation and protection against natural disasters such as floods and droughts become essential components of the habitat. The ecology and the protection of the environment too

are crucial elements for an improvement of the habitat. Ghai⁷⁷ commented:

"Development must also be ecologically sound, utilizing rationally the resources of the biosphere in full awareness of the potential of local ecosystems as well as the global and local outer limits imposed on present and future generations, which in turn means equitable access to resources by all as well as careful, socially relevant technologies."⁷⁸

Although these and perhaps many other items are clearly essential for the development of the habitat, Sri Lanka has placed even heavier emphasis upon housing. The provision for suitable housing assumed such a high priority in Sri Lanka's development, that environmental needs have been reduced to a secondary role.

The two principal attempts made in Sri Lanka concerning the development of the habitat and shelter were the reforms of land⁷⁹ and housing property.⁸⁰ This legislation restricts the maximum extent of land holdings to 50 acres per person⁸¹ and the maximum number of houses owned by persons to two⁸² and transferred the rest of the land and the rest of the houses to two Government institutions - the Land Reform Commission⁸³ and the National Housing Corporation.⁸⁴ In addition to the reform of individual land holdings, through legislation enacted in 1975⁸⁵ the State transferred all 'Estate Land' owned or possessed by public companies into the Land Reform Commission.⁸⁶ In so far as the houses that vested in the National Housing Commission were concerned, the Commissioner was authorized to sell them to those who were homeless on such terms as the Commissioner deemed it reasonable to do so.⁸⁷ Extensive credit facilities were made available through the Commission or through other government financing agencies to finance their purchase. The end result of the enterprise was to make housing available to those who needed them at a price they could afford.

The goals regarding land acquired within the ambit of the two aforementioned legislation, were differently conceived. The Government was primarily concerned with the utilisation of the excess of private land collected under the 1972 Law, for the eradication of landlessness. The 'Estate Land' collected under the 1975 Law was primarily destined for the State Plantation Corporation. This was

thought to be necessary so as to maintain the economic and productive strength of the land un-interrupted. 'Estate Land' being of large extents of Tea, Rubber and in some cases Coconut, it was thought, that fragmentation would result in underdevelopment. Tea and Rubber being the backbone of the Island's economy, any act which could disturb its economic potentiality presented a fearful spectacle to the development planners of the Government. Therefore, to a very large extent, 'Estate Land' acquired under the 1975 Law was given to the State Plantation Corporation by the Land Reform Commission. This applied in the main to Tea and Rubber estates. However, a considerable acreage of coconut land was used by the Government to provide for the landless through village-level social organisations.

According to the figures ⁸⁸ made available by the Land Reform Commission, the Commission appears to have acquired a total of 563,411 acres under the 1972 Law and 417,957 acres under the Law of 1975. A total of 981,368 acres in all under both pieces of legislation. This total of nearly a million acres had been distributed according to the following Table:

TABLE: XXVI

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Distribution of Land acquired under the 1972 and 1975 Land Reform Laws.

Institution or Management Methods	Land Reform Law of 1972 (Acres)	Land Reform Amendment Law of 1975 (Acres)	Total (Acres)	Percentage of total area alienated
Janavasama (J.E.D.B.) State Plantation Corporation	73,795	232,147	305,942	31.18
Electorate level Co-operative Societies	107,397	167,465	274,862	28.01
Individual villagers	71,446	4,641	76,087	7.75
Co-operative Janawasas	70,154		70,154	7.15
Land Commissioner's Department	61,635	835	62,470	6.37
District Land Reform Authority	39,675		39,675	4.04
Under G.A., A.G.A, D.R.O, Grama-Sevaka	38,585		38,585	3.93
Livestock Development Board	17,777		17,777	1.81
District Development Projects and Special Projects	7,020	2,870	9,890	1.00
Rubber Research Institute	8,939		8,939	0.91
Productivity Committees	1,725	5,309	7,034	0.72
Conservation of Forests	4,295		4,295	0.44
Tea Research Institute	4,128		4,128	0.42
Sri Lanka Sugar Corporation	---	3,990	3,990	0.41
Multi-purpose Co-operative Societies	2,831		2,831	0.29
Coconut Cultivation Board	2,841		2,841	0.29
Special Co-operative organizations	2,262		2,262	0.23
Sri Lanka Cadju Corporation	1,966		1,966	0.20
Coconut Research Institute	883		883	0.09
Rehabilitation Department	381		381	0.04
Others	351	700	46,025	0.03
	45,325			4.69
Total	563,411	417,957	981,368	100.00

It is important to note that lands alienated to the: Janawasama (31.18%), Electoral level co-operative societies (7.15%), co-operative Janawasas (6.37%), District Land Reform Authority (3.93%), District Development projects and special projects (0.19%), Productivity Committees (0.44%), Multi-purpose co-operative societies (0.29%) and special co-operative organizations (0.22%), a total of 58.2%⁹⁰ - were alienated to village-level social organisations. In these cases the utilisation of such land would become the subject of the popular will of the members of those several village-level social organisations. In other words over one-half of the land acquired by the state for development purposes were left with social organisations espousing village-level popular participation. The emerging pattern is a two-tier arrangement, where the legal system both legitimises the programme for development and creates village-level social organisations for its implementation. The village-level social organisations must therefore act to implement the plan, but in doing so, they must act within the specific powers that the legitimising statute delegates to them. That makes their actions intra vires and therefore legal.

II(c) Health

Commenting on health as an element of development, the Report from The Dag Hammarskjold Foundation contained the following passage:

"If it is accepted that health depends first on food, habitat and preventive measures, all the practical implications of this assertion have not yet been drawn. The satisfaction of health needs call for, in particular: a reallocation, directed towards prevention, of available resources; the integration of health services into development services as a whole; the adaptation of health services to specific circumstances, using local resources, to the maximum, instead of imitating models from countries in which conditions, notably the epidemiology are different." 91

This approach to the development of Health services raises a number of important points. First, it calls for the increasing utilisation of indigenous forms of medicine. In the Sri Lanka experience the availability of an ancient form of medicine - The Ayurvedic system

- requires to be developed and utilised. The Auyurvedic doctors have a limited expertise. Their training and skills in major surgery is very rudimentary, their skills in minor surgery and medicine appears to be extensive and pronounced. Their training does not involve the scale of expenditure that is normally associated with a training in Western medicine, and accordingly, Auyurvedic medical treatment is less costly. In Sri Lanka the native medical halls primarily found in the villages have an intimate relationship with the society they serve and to that extent the Auyurvedic medical system in addition provides the type of psychological satisfaction which enhances the curative effect of its treatment. The Auyurvedic doctor plays an important part in the community which he serves. This pattern of village-level health care is still largely followed. Particularly, since Independence, some Auyurvedic doctors have even attained national renown. Nonetheless, they represent less than 1% of the total number of such doctors on the Island.

The State has institutionalised this type of medicine by creating a School for Indigenous Medicine. Although this school initially was established to introduce such modern equipment such as the stethoscope and instruments for the measuring of blood pressure, the Auyurvedic doctors continue to rely on their traditional diagnostic tools such as observation of symptoms and the feel of the patient's pulse.

Second, the Brandt Commission's Report calls for a re-examination of the wisdom of placing a too great an emphasis on Western models of medicine. The Western model of medicine which is both expensive as to its cost of delivery to the needy and remote from the traditional setting from which the patients are drawn, is generally regarded by the Third World countries as a luxury rather than a necessity. The Peoples' Republic of China has to a large extent grasped this fact and has effectively blended the Chinese traditional system with that of the Western model, so as to provide the Acupuncture method of cure backed by herbal drugs. There is no such movement towards a blended medical facility in Sri Lanka today. This does not distract from the fact that for certain types of ailments the most effective method of cure could well be the Western medicinal system.

Third, the Report calls for a re-structuring of a number of areas of health-needs with reference to the immediate and long-term requirements of a society. The creation of a system of 'Base Hospitals' in Sri Lanka merit particular mention. Within every 30 miles radius the Government has established a 'Base Hospital' ^{91a} and for every 10 to 15 miles radius the Government has created 'Ordinary Hospitals' ^{91b} so as to provide the Island with health facilities within affordable distances of travel. The 'Base Hospitals' and the 'Ordinary Hospitals' form the nucleus for a number of related services such as immunization and preventive medicine, the provision of pre-natal and post-natal care and related facilities.

Fourth, the Report recommends the provision of health services to the rural poor. The Government of Sri Lanka has to a large measure failed to address this problem. The rural poor are left to the Government dispensaries run by Government Apothecaries in the rural areas. These Apothecaries are in no way to be considered as doctors as they have had no more than a basic training in Medicine and in Surgery. The answer to the need to provide health services to the rural poor may be the training of para-medics comparable to the 'barefoot' doctors of the Peoples' Republic of China.

In the area of health the role of law is more regulatory than facilitative. Health forms an area of development which requires the achievement of a certain stage of improvement in the provision of Food and of Habitat as a part of the development struggles of a nation. Such forms are necessary pre-requisites to the effective implementation of a programme of health services. It is, therefore, very important to recognise that development in the provision of food and of habitat are inter-related and are closely associated with the improvement in the condition of health in the Third World.

Development in the area of health falls into the broad category of human development at the social level, and therefore this has, in many Third World countries, been the concern of the Government. To that extent health programmes have always been implemented centrally, through a Ministry and a department of Health. Notwithstanding this fact, any real improvement in the health care of the people could be achieved by adopting the two-tier principle enunciated above. What the Government of Sri Lanka ought to do is

to recognise by a process of licensing the various Auyurvedic doctors at the village-level and place them within a legal framework to provide health services to the people at the village-level. This could be done through a legitimising statute legitimising the health services provided by them. The absence of any such legislation has left the entire profession of Auyurvedic doctors unrecognised and in the periphery of the society. The consequences of this non-recognition is to deny them the capacity to issue medical certificates, death certificates, birth certificates or give expert evidence in courts of law. This has reduced the Auyurvedic doctors to the position of non-professionals.

II(d) Education

It must be recognised that upward social mobility in the Third World as a rule was not achieved through material acquisitions alone but through birth and caste or tribal affiliations. However, as a result of colonial conquests during the 18th and 19th centuries, a new pathway was added to the upward movement of Third World societies. This was education. The colonial powers as a rule utilised education in the medium of the colonial language, as a pre-requisite to Government employment and as a gateway to professional education. The prestige attached to both these goals in a given colony made education a primary concern of every person in that society. The recognition of this fact became an important element in development. During the colonial period in Sri Lanka, education was used as an instrument, both for religious conversion and for elite formation.

Throughout the colonial period the struggle of the native population was to achieve proficiency in English education. In 1956 the Government introduced legislation ^{91c} which made Sinhala the only official language of the Island. These two approaches stood in opposition to one another.

The policy of the Administrations regarding education during both the colonial period and the post-colonial period has been a centralist one. The Administrations considered itself the guardians of the nation's education and, therefore, thought it best that there was a centrally worked out plan for education. This centrist approach

to education has continued unabated. However, the Administrations have on a number of occasions ^{91d} attempted to leave the implementation of the policies on Education with the societies intimately concerned with the day to day governance of the schools. But when this arrangement appeared to break down under religious pressure, ⁹² the Government in 1960, felt compelled to enact the Assisted Schools and Training Colleges (Special Provisions) Act. ⁹³ The principal effect of this legislation was to provide the Government with the necessary legal powers to appoint the Director of Education as the Manager of any school, if it appeared to the Government that the Board of Management of any particular school was not carrying out the declared policies of the Administration. ⁹⁴ In essence, this was a means by which the Government was able to take away the implementation of a given educational policy, whenever it appeared necessary, from those at the village-level. Here too, it could be suggested, that while the legitimisation of a developmental policy on education was left to the legal system, the primary responsibility to implement it was left in the hands of those at the village-level of administration, acting within the powers chartered by the legitimising statute; the Education Ordinance at any given point of time.

III. Reflections

This enquiry has encompassed a number of relevant areas of study. It has encompassed education, ⁹⁵ religion, ⁹⁶ language, ⁹⁷ constitutional reform, ⁹⁸ land reform ⁹⁹ and investment problems. ¹⁰⁰ In each of the chapters specific conclusions were drawn with respect to the relationship between political policy and developmental goals. There has been an attempt to show how the legal system has been utilised to legitimise the development programme, create village-level social organisations to implement them, ensure popular participation in their implementation and allocate or control the distribution of essential national resources (both human and material) through village-level organisations such as The Cultivation Committees formed under the Paddy Lands Act of 1958, ¹⁰¹ the Janawasas formed under the Janawasa Law of 1976 ¹⁰² and the Agricultural Productivity Committees created by the Agricultural Productivity Law of 1972. ¹⁰³

In addition an attempt has been made to show that village-level social organisations were created for the implementation of the development programmes legitimised by the legal system. The creation of these village-level social organisations was considered as basic to the propagation of popular participation and the inculcation of self-reliance among the people at the village-level. Despite the fact that development is generally viewed as a process engulfing the whole nation, the emphasis placed by the Sri Lanka Governments, particularly since Independence, was to bring about the progressive development of the nation, commencing at the village-level of participation.

There is evidence that one could find in the history of human societies that particular types of social organisations have been utilised for the organised propagation of enhanced production, control, distribution, regulation and allocation of property and other vital resources and in the form of other types of supports for human development. The utilisation of the traditional village councils or the Gamsabhavas, the Agricultural co-operative societies and the Small Holders Service Co-operatives, together with others previously mentioned, formed such village-level social organisations which, indeed, became some of the vital elements in the programme for development in Sri Lanka. These social organisations carry the basic responsibility to act within a framework of norms, within which popular participation in the implementation of the programme is made possible. Acting within a framework of norms is an essential pre-requisite to ensure that the implementation of the programme for development shall be lawful. This would in addition exclude ad hoc behaviour verging on anarchism, nepotism or corruption at the village-level of implementation. These social organisations must, therefore, as their primary responsibility introduce into the implementation process some kind of specific, regular and organized behaviour. Several sections of the Statute which legitimises the programme for development and legalises these social organisations, lay down patterns of conduct that such organisation should follow under the broad heading of 'Functions and Powers'.¹⁰⁴ These have been described in the relevant areas of this dissertation. These 'Functions and Powers' to a large measure indicate what actions are legitimate and what actions of the organisation are ultra vires.

The legitimising statute lays down the processes by which the social organisation may take decisions. Those include rules to be observed at the meetings, ^{104a} the method available for consultation ^{104b} and participation ^{104c} and the way in which disputes may be settled. ^{104d} In these cases disputes are not generally brought before the Courts, as ordinarily constituted, but may be heard and adjudicated before extra-judicial bodies such as the Conciliation Boards ^{104e} or Agricultural Tribunals. ^{104f}

This kind of development arrangement calls for what the proponents of Another Development ^{104g} have characterised as Development Administration. This branch of study appears to specialise in the examination of the way officials of the Government work in harmony with the planned implementation of development programmes by the village-level social organisations. The legitimising statutes in Sri Lanka do not indicate how the process of implementation could be monitored, supervised, altered, amended or terminated by the State acting through its officers. Taking the Agricultural Co-operative Society ¹⁰⁵ as a random example, the legitimising statute declares that:

"An Agricultural co-operative society shall conduct its activities under the supervision of an officer appointed by the Minister on the advice of the Commissioner of Co-operative Development. Such officer may be in charge of more than one Agricultural Co-operative Society." ¹⁰⁶

The supervisory functions of the official may appear, according to the statute, as the only controlling effect which the State may exercise over the activities performed by the Agricultural Co-operative Society. However, the Minister in charge of each of these organisations, does hold a residual power to dismiss the members of any of these Committees if it appears to him that they are 'unsuited to continue to discharge such duties'. ^{106a} In all these matters good development administration would assume a need to explore certain fundamental interests between the organs of the State and the people. Professor Paul declared: ¹⁰⁷

"good administration is characterized by good officials working in collaboration, rather than in conflict with intended beneficiaries (or targeted people) of programmes." ¹⁰⁸

The legislation which legitimises the overall development programme

must identify its goals, the method for achieving them and the designation of village-level social organisations for carrying them out. As it was mentioned earlier, the legitimising law must provide all the ingredients for popular participation. It must prescribe the organizational form, allocate powers and designate roles to persons within it and prescribe particular obligations. The legislation should indicate the line which divides lawful developmental activities from unlawful activities and the legitimate actions of the village-level social organisations from ultra vires activities. The need to adopt and adhere to the lawful and legitimate actions would be seen as an essential element for ensuring that there will be popular support for the programme of development, without which its implementation could end in failure.

Although the legitimising laws are often in written form, much of the plan for implementating them could be derived from local custom. The Cultivation Committees formed under the Paddy Lands Act of 1958, developed their cultivation programme according to the prevailing customs of the geographical areas in which they were established. In some rural areas, the cultivation pattern was tied to two seasonal harvests for each year, the Yala season and the Maha season. The type of paddy used in these areas were totally different from those areas in which there was only one harvest - the Maha harvest - in each year. Participation in the Agricultural programme in each of these areas were differently conceived. Both the Paddy Lands Act of 1958¹⁰⁹ and the Agricultural Productivity Law of 1972¹¹⁰ stated in broad terms a notion of 'good management'¹¹¹ to which a marginal reference has already been made.¹¹² The Agricultural Productivity Law by Section 2(1) stated that:

"it shall be the duty of every owner or occupier of any agricultural land to farm such land with such crops or breeds of livestock as are best suited for the land, having regard to the extent and the situation and the natural resources of land.---" 113

Failure to observe these standards of 'good management' resulted in the owner being deprived of the land and having it vested in the possession of some other person for its 'good management'. However, the legislation laid down an elaborate procedure to be adopted before

the original owner could be dispossessed. The decision as to whether the owner had failed in these standards is primarily for the Agricultural Productivity Committee of that area to make.¹¹⁴ In this regard one of the key factors that the Committee may take into consideration is whether the owner had observed "the proper timing of agricultural operations".¹¹⁵ Returning to the two types of seasonal harvests mentioned above - the Yala and Maha - it is essentially for the Agricultural Productivity Committee to determine whether it was reasonable to cultivate in two seasons for the year or only during a single season. That determination could be the key to determining whether the owner of the land had observed the proper timing for agricultural operations as required under the Law. Aside from the timing of agricultural operations, the legitimising law establishes other criteria by which the Agricultural Productivity Committees can measure standard of 'good management'.¹¹⁶ These have been enumerated earlier.¹¹⁷

In all these matters the Agricultural Committees in each area would be free to determine the standard of good management with reference to local factors. To this extent the development strategies become locally based and will therefore facilitate village-level participation in the implementation of the overall plan for development. The village-level social organisations to a large measure shall carry the responsibility of satisfying the local needs. The decisions taken towards these ends would invariably be taken with little or no reference to the centre, but in accordance with the powers given to these organisations by the legitimising statute.

In this respect the village-level organisations should monitor the implementation of the development plan with reference to the availability of local resources. This would require the blending of the development programme with the capacity for self-reliant development at the local level. It may be pointed out that this paradigm for development is radically different from the one used during the colonial period. During the period of British Administration and, indeed, until as late as the first Bandaranaike Administration of 1956, the strategies for development were centralised. There was a single-tier approach where the Government of the day legislated provisions for development which were effectively

carried out by the various Ministries concerned through the instrumentalities of their officers and sub-ordinate functionaries. There were no locally based social organisations which were designated as authorities charged with the duty of implementing the overall development programme. The major agricultural schemes at the time were executed by labour engaged by the Departments of Agriculture, of Labour and of Irrigation. There was no opportunity for local participation in any of these ventures at the village-level of social organisations.

The creation of new village-level social organisations calls for 'the transformation of social, economic and political structures' in Sri Lanka. The introduction of the Public Corporation ^{117a} and Statutory Boards ^{117b} as vehicles for economic development and for the integration of economic policies paralleled the creation of village-based social organisations. Both the Corporations and the Boards provided useful functional supports for the social organisations. The Paddy harvests of the members of the Agricultural Productivity Committees were purchased at a fixed price by the Paddy Marketing Board for distribution while the Fats and Oils Corporation purchased the Coconuts from the Janawasas and private land owners alike. The Marketing Board purchased the fruits, the Milk Board the milk and the Tea Board the Tea. The Coconut Board supplied the coconut seedlings and advice for good husbandry. The Irrigation Board ensured that the 'Water Tanks' were kept in good repair and that the irrigation channels were not silted. These Boards and the Corporations played a very significant supportive role in the programme for Sri Lanka's development. The new social organisations were such that they created the local conditions which made popular participation in their work possible. This made it necessary for the Government in 1958 to move the dispute resolution process away from Adjudication and towards Conciliation. The establishment of Conciliation Boards under the 1958 Act ¹¹⁸ marked the beginnings of an alternative system for dispute settlement by the utilisation of informal procedures. The Conciliation Boards inaugurated an era of popular participation in the settlement of disputes. In addition, the Nationalisation of Schools, ¹¹⁹ the imposition of an official language ¹²⁰ for the Island became necessary aids to promote popular participation at all levels

of Government. In the light of the language change from English to Sinhala, the reorganisation of the Judicial system,¹²¹ educational system¹²² and of the administrative system¹²³ became vital for the social transformations commenced on the Island. As the discussions in the previous chapters have shown, these re-organisations were carried out in several stages commencing from the Tamil Language (Special Provisions) Act of 1958¹²⁴ and ending with the Language of the Courts Law of 1973.¹²⁵ These fundamental changes which were brought about by legislative enactments needed to be founded upon constitutional provisions which could lend constitutional validity to these changes. Unless the legitimising statute was valid, it cannot legally create the social organisations required for the implementation of the programme for development. In addition, the powers that the legitimising statute delegates and vests in the village-level social organisations will be of no effect. This would necessarily mean that every act that the village-level organisation performs while implementing the programme will be considered as unlawful. In short, the constitutionality of the legitimising statute becomes an essential pre-requisite to the legality of the process of implementing the development programme. As witnessed in the Maradana Mosque Case¹²⁶ and in Kodeswaran v. A-G,¹²⁷ the Constitutional validity of the Schools Nationalisation Act¹²⁸ and the Official Language Act¹²⁹ became a matter of vital importance. Had the two Acts been declared unconstitutional, the entire programme for the reform of Education and of Language could have been placed in serious jeopardy. The importance to Sri Lanka's development, of the promulgation of the 1972 Constitution¹³⁰ which made the statutes legitimising the reform of Land, of housing property and a whole catalogue of other reforms constitutional, should not be underestimated. The constitutional provisions contained in the Soulbury Constitution¹³¹ would have declared a number of key provisions in several reforming legislations unconstitutional. One of the more important provisions enacted in the 1972 Constitution which set the development goals of Sri Lanka within a constitutional framework was Article 16. Among a number of different objectives described under the broad title of "Principles of State Policy,"¹³² the Article declared that the objectives of The Republic shall be:

"the distribution of the social product equitably among citizens;---. ¹³³

the development of collective forms of property such as State property or co-operative property, in the means of production, distribution and exchange as a means of ending exploitation of man by man---. ¹³⁴

the State shall strengthen and broaden the democratic structure of Government and democratic rights of the people by affording all possible opportunities to the people to participate at every level in national life and in Government including the civil administration and the administration of justice---." ¹³⁵

These three items selected at random would provide the constitutional validity to the Property Reform Legislation, ¹³⁶ Ceiling on Incomes Legislation, ¹³⁷ legislation concerned with Conciliation as a method of dispute settlement ¹³⁸ and a whole list of other statutes. The Constitutionality provided by the 1972 Constitution to the legitimising statutes at the first-tier, made the activities of the village-level social organisations lawful at the second-tier of development implementation.

Developmental programmes must essentially concentrate on the needs of the society taken as a small but cohesive social unit. In that regard the village-level development in the Third World has proved to be a very desirable one. Borrowing a term from von Savigny, the Volksgeist ¹³⁹ principle should be closely monitored and effectively used when planning a development project. The village as a basic sociological unit has been recognised in history as a complete and cohesive social unit. As early as in 1872, Maine ¹⁴⁰ described a village community in this way:

The village communities which are still found in the Eastern world, exhibit, at first sight, a much simpler structure than appears on close examination. At the outset they seem to be associations of kinsmen, united by the assumption (doubtless, very vaguely conceived) of a common lineage. Sometimes the community is unconnected with any exterior body, save by the shadowy bond of caste. Sometimes it acknowledges itself to belong to a larger group or clan. But in all cases the community is so organised

as to be complete in itself. The end for which it exists is the tillage of the soil, and it contains within itself the means of following its occupation without help from outside. The brotherhood, besides the cultivating families who form the major part of the group, comprises families hereditarily engaged in the humble arts which furnish the little society with articles of use and comfort. It includes a village watch and a village police, and there are organised authorities for the settlement of disputes and the maintenance of civil order. ¹⁴¹

It has been shown during the course of this dissertation that in Sri Lanka various village-level social organisations have been charged with the responsibility of implementing the varying policy oriented legislation for development. It has also been shown that disputes arising out of such implementation were primarily determined and settled through the Conciliation Boards, also at the village-level of organisation. This emphasis on the village-level approach to development raises two separate issues. First, it calls for a thorough going decentralisation of the programme for development. The implementation of the programme in village No. 1 could be very different from that of village No. 26. A pig farm, in village No. 1 may be substituted by a poultry farm in village No. 26 to respond to the religious beliefs of a large Muslim community. ¹⁴² These decisions are essentially made at the village-level, with considerations of religious and racial harmony in view.

Second, it calls for the development process to take principles of local customs and customary laws into consideration. The need to conduct extensive research at the village-level could be the key to the success of any development programme. As it has been mentioned in some of the preceding chapters, Sri Lanka presents a classic cultural, ethnic, religious and a linguistic mosaic. To further complicate and, indeed, to confuse this picture the country provides a homeland for as many as 43 castes ¹⁴³ with deep and clear social divisions. Any development programme which intends to ensure popular participation must without a doubt respond to these many and varied divisions. This necessarily means that no single programme for development could totally succeed unless the competing and diverse interests of a village community were taken into consideration at the time of its implementation. This is yet another reason why the Government should rely heavily on village-

level social organisations for the implementation of the development programme.

The central thesis submitted here is that development must principally proceed within parameters chartered by the national legal system. The norms must not only legitimise the programme at the first level of analysis but must also prescribe the limits within which the village-level organisations created by the legitimising statute should act when implementing the programme. The method of implementation forms the second level of analysis. The two levels are linked to each other as mentioned above¹⁴⁴ by a variety of intermediate institutions, stretching between Government Agents at the provincial level and the Gramasevakas at the village-level. The relationship between these intermediate institutions, the Government (represented by the various Ministers in charge of development) and the village-level social organisations raises what might be referred to as 'development administration.' This provides a new area for study as Administrative Law did, particularly, after the Second World War.

Even as late as in 1935, the then Lord Chief Justice of England, Lord Hewart, was seen to dismiss the use of the term 'Administrative Law' as "nothing but continental jargon".¹⁴⁵ In more recent judicial pronouncement,¹⁴⁶ Scarman L.J., declared that 'there is no droit administratif in England.'¹⁴⁷ However, Griffiths and Street in their joint work on Administrative Law,¹⁴⁸ wrote:

"Administrative Law poses that most important problems of our time: the relationship between public powers and private rights. We are concerned, then, not merely with the powers and processes of the administration, but with the controls of the administration, legal and political, without which that essential balance between individual liberty and public good is impossible."¹⁴⁹

Similarly, the purpose of development administration is to regulate the individual liberties in the broadest sense with the advancement of public good through development. Development could involve, as the preceding chapters of this dissertation show, the loss of property rights, limitations on the rights to compete in the field of economy, loss of privileges based on language rights and a re-structuring of

class interests and regional interests in a way that certain acquired rights (such as social or economic) may be lost. It is, therefore, necessary to place these matters squarely within the framework of law, thus controlling, regulating and directing the functions of the many village-level social organisations which effectively implement these as a part of the overall development programme. The International Centre for Law in Development ¹⁵⁰ has put forward a proposal ¹⁵¹ for the study of the way the people at the village-level protect their own rights and enforce the performance of certain duties undertaken by the village-level social organisations. This study, according to the centre, should embrace the methods available for the social organisations to protect themselves and exercise their rights against the State institutions as well. This kind of specialised study which has many of the appearances of 'Administrative Law', has been labelled 'development administration'.

A postulation of the role of law in development strategies along the two-tier arrangement elaborated earlier makes a study of 'development administration' important. The Centre appears to have recognised the importance of village-level studies as a prelude to formulating plans for development. ¹⁵² This must necessarily mean that a separation between the organs that legitimise a development plan and the organs that implement it should be the subject of separate treatment. The emphasis which the Centre is now placing upon research into village-level organisations and into 'development administration' could to a large extent support the two-tier analysis of the role of law in development. For, the two-tier analysis pre-supposes an administrative relationship between the first-tier and the second-tier. And a similar relationship between the people at the village-level of participation and the social organisations or qua the social organisations, the State Institutions. In a recent (1981) seminar ¹⁵³ paper presented by the Centre for Law in Development, its team of researchers ¹⁵⁴ argued that their's was a new approach to development structured along the lines set out by the Dag Hammarskjold Foundation Report in 1975. They called it the 'Alternative Approach' ¹⁵⁵ to development, which:

"emphasizes quite different, interdependent ends and means for rural development. The rural poor are not simply the objects of "development", they,

themselves, provide the source of-and force behind-effective efforts to change the conditions and relations which produce impoverishment. Much of that strength can be found through mobilization, organization and collective efforts; the poor can:

- 1) Secure more equitable allocation of resources from state agencies---
- 2) Secure changes in state structures-as when an organization secures changes in the rules governing procedures or eligibility of credit,
- 3) Create alternatives to state allocational agencies-as when a community organization creates its own health clinic or credit dispensing structures,
- 4) Create new forms of group-managed economic enterprises-as when a group becomes a communal structure for production of marketing, and for resolution of disputes arising from these activities". 156

Some of the features of the two-tier approach to the role of law in development suggested here do not appear to be in conflict with the theory of 'Another Development'.¹⁵⁷ In fact they appear to supplement each other. The core-concept of the two-tier approach is based upon six basic assumptions. First, that the process of legitimisation of a development programme is centralised and is, therefore, left with the 'central level of Government'. Second, that its implementation is decentralised and is executed through village-level social organisations. Third, that the two levels are related to each other by administrative procedures while they each function within a framework of rules or laws enacted by the legitimising statute. Fourth, that there are means available to the people at the village-level of participation to protect their own rights and enforce the performance of duties undertaken by the village-level organisations and the State. Fifth, the conditions created by the legitimising statute are such that the village-level social organisations are able to maximise popular participation as the key to development implementation. Sixth, the process of development is basically spun within a legal framework and a study of development becomes a study both of the types of laws and the types of programmes that are acceptable to people at the village-level of organisation. Such a study would in essence involve a careful assessment of such diverse factors as Education, Language, Religion, Traditional Myths, Customary Beliefs, Superstition, the availability of economic resources, the ecology, the conditions of

health in the community, demographic data and such other relevant factors that have been the areas of concern in this study. These do not appear to be in conflict or in any way inconsistent with the central thesis of 'Another Development'. Sri Lanka, therefore, may have commenced, as early as in 1956, under the first Bandaranaike Administration, a novel approach to Third World development.

FOOTNOTES

FOOTNOTES FOR CHAPTER 1

1. The Mahavamsa, translated by Geiger, (W.), The Ceylon Government Information Department, Colombo, 1953.
2. 483 B.C. - 445 B.C.
3. Fn. 1.
4. The Revolt in the Temple, Sinha Publications, Colombo, 1953, p. 3.
5. Ibid.
6. There are a number of Bibliographies prepared in this area. However, the Bibliography provided by Malalgoda, (K.), Buddhism in Sinhalese Society (1750-1900), University of California Press, 1976, pp. 269-284, is of great value.
7. The Mahavamsa, fn. 1, gives some idea as to how the Kings of Ancient Lanka dispensed justice. But a comprehensive work on this area is truly lacking.
8. D'Oyly, (J), A Sketch of the Constitution of the Kandyan Kingdom, Tisara Publishers, Colombo, 1975 (reprint).
9. Sawers, (S.), Digest of Kandyan Law, Edt., by Modder, 1826.
10. Armour, (J.), Notes on Kandyan Law, Ceylon Miscellany, Colombo, 1842.
11. Niti-Nighanduwa, (The vocabulary of Law as it existed in the days of the Kandyan Kingdom), translated by Le Mesurier, (C.J.R.) and Panabokke, (T.B.), 1880.
12. Tambiah, (H.W.), Principles of Ceylon Law, Cave & Co., 1972, p.1.
13. Ibid.
14. Ibid.
15. Ibid.
16. Mendis, (G.C.), The Colebrooke-Cameron Papers, Vol. 11, Oxford University Press, 1956, pp. 28-30.
17. Act No. 10 of 1958. See Marasinghe, (M.L.), [1980] 29 International and Comparative Law Quarterly, pp. 389-414.
18. Fn. 1.
19. Fn. 12.
20. Fns. 8-10.
21. Pieris, (Sir Paul E.), The Dutch Power in Ceylon, (1602-1670), C.A.C. Press, Colombo, 1929 and particularly, Ceylon and the Hollanders 3rd Edn., The Colombo Apothecaries Ltd., Colombo, (date of publication unknown).
22. Palm, (J.D.), "The Educational Establishments of the Dutch in Ceylon", Journal of the Ceylon Branch of the Royal Asiatic Society, Vol. 1, 1846, pp. 106-107.
23. C.O.55.1, dated 20/9/1796.
24. Legislative Enactments of Ceylon, Vol. 1, (1707-1879), Government Printer, Colombo, Ceylon, and re-enacted, Cap. 9 of 1938.
25. Ibid., p. 32.
26. Ordinance No. 5, of 1852.
27. Williams v. Robertson (1886) 8 S.C.C. 36.
28. Legislative Enactments of Ceylon, Vol. 1, (1707-1888), Government Printer, Colombo, Ceylon, 1923, pp. 59-60.

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29. Temple Lands Registration Ordinance, Ordinance No. 10 of 1856.
30. Fn. 28.
31. Mendis, Fn. 16, Vols. i & ii.
32. The Legislative Enactments of Ceylon, Vol. 1, (1707-1808), The Government Printer, Colombo, 1923.
33. The Administration of Justice Law, Law No. 44 of 1973.
34. Fn. 16.
35. Ordinance No. 13 of 1910.
36. The Service Tenures Ordinance, Ordinance No. 4 of 1870.
37. Statutory Rules & Orders, 1920, Vol. 11, H.M.S.O., London, p. 1572.
38. Statutory Rules & Orders, 1931, H.M.S.O., London, p. 1448.
39. 11 Geo. 6, ch. 7.
40. Act No. 18 of 1948 and Act No. 48 of 1949.
41. Act No. 33 of 1956.
42. Act No. 28 of 1958.
43. Act No. 5 of 1960.
44. [1964] 2 M.L.R. 1301 (P.C.).
45. The Compulsory Savings Act, Act No. 6 of 1971.
46. Law No. 25 of 1976.
47. Act No. 10 of 1958.
48. Act No. 1 of 1958.
49. Law No. 2 of 1972.
50. Fn. 42.
51. Law No. 1 of 1973.
52. Law No. 39 of 1975.
53. The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.
54. Ibid., Articles 95-99.

FOOTNOTES FOR CHAPTER 2

1. Wickramasinghe, (M.), Sinhala Language and Culture, Tisara Prakasakayo, Ltd., Colombo, 1975.
2. Mahavamsa, Translated by Geiger, (W.), Luzacs, 1954, p.XXXI. Devanampiyatissa became king in 395 B.C. or 236 years after the passing away of Buddha.
3. Hayley, (F.A.), A Treatise on the Laws and Customs of The Sinhalese, Cave & Co., Colombo, 1923, p. 533.
4. Ibid.
5. Ibid.
6. "The religion of Boodho, professed by the Chiefs and inhabitants of these provinces, is declared inviolable and its rites, ministers, and places of worship are to be maintained and protected." (Article 5).
7. Circa 1815-1846.
8. Hayley, (F.A.), fn. 3, p. 534.
9. Hayley, (F.A.), fn. 3, p. 534.
10. After the depletion of the Buddhist clergy of 'senior ranking' (upasampada), in the 18th Century, Priests of 'senior ranking' were brought from Siam to re-establish the clergy. This gave rise to the Siamese sect of the Buddhist clergy in Ceylon. The year 1750 has been noted as the period during which the Siamese sect was introduced into Ceylon.
See: Tambiah, (H.W.), Sinhala Laws and Customs, Lake House Investments Ltd., Colombo, 1968, p. 20.
11. Subsequent to the introduction of priests from Siam, priests of 'senior ranking' were brought from two places in Burma. One was Amarapura the other was Ramanna. Both these sects have their followers in Sri Lanka today. With the Siamese sect, they form three sects of the Buddhist clergy today.
12. D.C. Kandy, Case No. 8950, 1838, reported in Austin's Appeal Reports, 40.
13. Minutes of the Board of Ministers for Kandyan Provinces, May 12th, 1820.
14. Legislative Enactments of Ceylon, Vol. 1 (1707-1888), Government Printer, Colombo, pp. 60-64.
15. Of 2nd March, 1815, ibid., pp. 59-60.
16. C.O.54/55, dated 15th March, 1815.
17. The Nayakkar Dynasty was established in 1782, at the death of the last Sinhalese King of Kandy, Kirtisri Rajasinghe (1747-1782). The latter's brother-in-law, Sri Vijaya Rajasinghe commenced the Nayakkar Dynasty in Ceylon. Sri Vijaya was succeeded by his brother Rajadhi Rajasinghe (1782-1798). On the 26th July, 1798, Rajadhi died and Kannasamy a relative of Rajadhi was made King in that year, under the name of Sri Wickrama Rajasinghe. In 1815, March 2nd, he was deposed and the Kingdom passed into the sovereignty of Britain under the Kandyan Convention.
18. See fn. 3.
19. Fernando, (C.N.V.), "Christian Missionary Enterprise in the Early British Period", (1949) 11 University of Ceylon Review, p. 203.

20. Fernando, (C.N.V.), Ibid.
21. The Basnayake Nilame of the Dalada Maligawa instituted an action against the British government requiring it to observe Article 5 of the Kandyan Convention and hold the annual procession of the 'Temple of the Tooth'. Dr. Paul E. Pieris, the then District Judge of Kandy allowed the Basnayake Nilama's action, in January, 1915. The Attorney-General appealed against that decision. On 2nd February, 1915, Shaw & De Sampayo, J.J., of the Divisional Court reversed that decision.
22. DeSilva, (K.M.), History of Ceylon, Vol. 3, University of Ceylon Press Board, Colombo, 1972.
- 22a. i.e. Buddhist Priests.
23. Ibid., p. 27.
24. Schwarzenberger, (G.) and Brown, (E.D.), A Manual of International Law, 6th Edn., Professional Books Ltd., London, 1976, pp. 121-140. Pp. 121-122 the learned authors write:

"Every treaty has four constituent elements:
(1) It presupposes capacity of the parties to conclude treaties under international law or in other words, their international personality. (2) The parties must have intended to act under international law. In relations between subjects of international law, this may be presumed. This excludes from the category of international treaties contracts which subjects of international law have concluded with one another or with objects of international law under any system of municipal law. (3) There must be a meeting of wills between the parties: consensus ad idem. This distinguishes treaties from unilateral acts, which become effective upon communication to the addressee. (4) The parties must have the intention to create legal obligations. This distinguishes treaties from declarations of policy, such as the Atlantic Charter, or so-called gentlemen's agreements by which it is intended to create purely moral obligations."
- 24a. Morris and Read, Indirect Rule and the Search for Justice, Clarendon Press, Oxford, 1972, pp. 49-68 and Andrews, (J.A.), (1978), Law Quarterly Review, 408.
- 24b. Ol le Njogo & Others v. A.-G. (1913), 5 E.A.L.R. 70; Sadulaka Serwanga v. Edward Suleman Khaya (1938), 6 U.L.R. 40. See also Morris & Read, fn. 24a, pp. 55-57, fn. 46.
- 24c. Sobhuza II v. Miller [1926] A.C. 618.
- 24d. (1916) 18 N.L.R. 193.
- 24e. Ordinance No. 16 of 1865. Section 69 reads:

"Officers of police not below the grade of sub-inspector may, as occasion requires, direct the conduct of all assemblies and processions in the public roads, streets, or thoroughfares, prescribe the routes by which and the times at which such processions may pass They may also regulate the music in the streets, when

the same shall be allowed. Every person opposing or not obeying the orders so given as aforesaid, or violating the conditions of any licence granted . . . shall be liable to a fine."

- 24f. Ordinance No. 13 of 1898 Section 69 of that Ordinance reads:
"It shall be lawful for the Board [of Health and Improvement] to grant permission for any religious or public procession or the performance of any music in the streets of the town, and to regulate and restrict such processions and music in such manner as the board shall think fit, regard being had to the comfort and convenience of the inhabitants."
- 24g. Namely, the judgment of Sir Paul E. Pieris.
24h. (1916) 18 N.L.R. 193.
24i. Ibid., p. 196.
24j. See fn. 24h.
24k. Ibid., pp. 212-213.
24l. (1793) 30 E.R. 521 (Ch.D.).
24m. The Secretary of State for India v. Sahaba (1859) 15 E.R. 9 (P.C.); The Ex-Rajah of Coorg v. The East India Company (1860) 54 E.R. 642 (Ch.D.).
24n. See fn. 24e.
24o. See fn. 24f.
24p. (1916) 18 N.L.R., p. 200.
24q. Riots and Martial Law in Ceylon, 1915.
24r. The Revolt in the Temple, Sinha publications, Colombo, 1953, p. 120, where the quote may be found in full.
25. Hayley, (F.), fn. 3, p. 226.
26. Ibid., p. 225.
27. Pandukhabaya in 437 B.C., See Mahawansa, fn. 2, X.103; Wattagamini Abhaya in 104 B.C., See Mahawansa, fn. 2, XXXIII 50.
28. By way of Excheat.
29. Kandyan Law and Buddhist Ecclesiastical Law, Dharmasamaya Press, Colombo, 1963.
30. Ibid., p. 248.
31. The Resumption of Lands Ordinance, Ordinance No. 4 of 1887 and Forest, chena, waste, and unoccupied Lands Ordinance, Ordinance No. 1 of 1897.
32. Roberts, (M.) "land problems and policies circa 1832-circa 1900", History of Ceylon, Vol. III, (Ceylon from beginning of 19th century to 1948), ed. by de Silva, (K.M.), University of Ceylon Press Board, 1973, pp. 119-145.
33. Ordinance No. 8 of 1905.
34. Ibid., Interpretation Clause, in Section 2.
35. See fn. 33.
36. The Minutes of Board of Judicial Commissioners for Kandyan Provinces, April 14th, 1820.
37. Ibid.
38. Treason appears to be the only reason upon which the Korale-Lords lost their Koralegams.
39. Legislative Enactments, Ceylon, Vol. 1, 1707-1888, fn. 14, p. 63.

40. Legislative Enactments, Ceylon, Vol. 11, (1889-1909), Government Printer, Colombo, p. 644.
41. Ibid., pp. 644-645.
42. Ibid., pp. 645-646.
43. See fn. 40.
44. Ibid.
45. Ordinance No. 2 of 1846.
46. Fn. 29.
47. Ibid., p. 246.
48. Hayley, (F.A.), fn. 3, p. 535.
49. Queen Victoria.
50. Namely Ordinance No. 21 of 1846.
51. Fn. 29, p. 246.
52. Addresses delivered to the Legislative Council of Ceylon by Governors of the Colony, Published by Government Printer, Ceylon, 1876, Vol. 1.
53. The Members of Her Majesty's Government.
54. Fn. 52, p. 205.
55. Ibid., p. 204.
56. Ibid., pp. 204-205.
57. Ibid., p. 205.
58. Fn. 29, p. 248. 58a. C.O.54.217 dated 8th May, 1845.
59. Ibid.
60. Viscount Torrington informed the Legislative Council on 2nd October, 1848, that: "It is satisfactory to me to be able to announce to you, that the individual who on this occasion was set up as the pretended King, has now been captured, and that not only have many of his partisans and followers been already brought to punishment, but important disclosures have been made, which will, I hope, suffice completely to establish the guilt of the originators of the late conspiracy". Fn. 52, pp. 216-217.
61. Ordinance No. 10 of 1856 - commenced on January 1st, 1857.
62. Ordinance No. 4 of 1870 - commenced on February 1st, 1870.
63. Fn. 61, s. 3.
64. Ibid., s.8.
65. Ibid., ss. 8-11.
66. Ibid., s.12.
67. Ibid.
68. Fn. 61, ss. 15-18.
69. The office of the agent of the government in every district was referred to as the Kachcheri. The term comes down from the Dutch period and its precise origins are a matter of some controversy.
70. Fn. 61, s. 21.
71. Ibid., s. 22.
72. See fns. 40 and 41.
73. Hayley, (F.A.), fn. 3, pp. 547-557. See also Gunananda Unnanse v. Dewarakkita Unnanse (1925) 26 N.L.R. 257 for an exposition of pupillary succession.
74. Hayley, (F.A.), fn. 3, pp. 546-547.
75. Ibid., p. 547.
76. (1919) 20 N.L.R. 385.

77. After the higher ordination (upasampada) the priests are required to spend 10 years in a state of dependence and obedience to a priest of seniority. This period could be spent in one's own temple, namely in the one in which the ordination originally had taken place or at some other temple. Where that period is spent at some other temple, the priest stands as a Nissayantevasika to that other temple. See Betram, C.J.'s judgment at Ibid., pp. 390-391 for the authorities.
78. Betram, C.J. Ibid., p. 391 explains this relationship as one which a priest would have to an institution of learning which he joins for his education.
- "I understand that there is nothing to prevent a priest choosing for his instructor a priest other than those who have robed or ordained him, or given him a nissaya" (p.391).
79. The Courts have transliterated the term Sishyanu Sishya Pramparawa as 'pupillary succession'.
80. Fn. 76, pp. 390-391.
81. Hayley, (F.A.), fn. 3, p. 547, footnote c.
82. The opinions of the chief priests of the Asgiriya chapter and of the Kandyan Chiefs, Ibid.
83. Fn. 3.
84. Fn. 3, p. 546.
85. (1903) 6 N.L.R. 313.
86. See fns. 40 and 41.
87. On the 27th September, 1865.
88. Addresses delivered in the Legislative Council of Ceylon by Governors of the Colony together with the replies of Council, Vol. 1 published by the Government Printer, Ceylon, 1876.
89. Under Section 25 of the Ordinance No. 10 of 1865, the Commissioners were authorised to charge the temples half the cost of surveying while the other half was to be paid by the Public Treasury.
90. Fn. 88, p. 70.
91. The Governor.
92. 25th September, 1872.
93. Addresses delivered in the Legislative Council of Ceylon by Governors of the Colony, Vol. 11, 1860-1877, published by the Government Printer, Colombo, Ceylon, 1876, p. 273.
94. Ibid., pp. 366-367.
95. Ordinance No. 4 of 1870.
96. Ibid.
97. See fn. 61.
98. Fn. 95, s. 4.
99. Fn. 95, s. 8.
100. These are the obligors of the service tenure. It is they, as Paraveni Pangu-Karayo or Maruveni Pangu-Karayo, who must perform the services to the proprietor. See also fn. 34.
101. 'Pangu' means share. 'Pangu Karayo' means share-holders.

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102. See fn. 34.
103. Ibid.
104. Fn. 95, s. 10.
105. Fn. 95, s. 10(4). See also Yatawara Disawa v. Lekamalage (1914) 16 N.L.R. 14.
106. Ibid.
107. See fns. 105 and 106. See also Martin v. Hatana (1914) 16 N.L.R. 92.
108. 22nd September, 1869.
109. Fn. 93.
110. Ibid., pp. 177-178.
111. When the An Ordinance to amend the law regulating the Entail and Settlement of Immovable Property, became law as Ordinance No. 11 of 1876.
This Ordinance introduced the law of Mortmain of England.
112. Fn. 93, p. 273.
113. Ibid.
114. Ibid.
115. Fn. 93, pp. 468-470.
116. Fn. 93, pp. 366-367.
117. Ordinance No. 10 of 1856.
118. Ordinance No. 4 of 1870.
119. Means trusts for Accumulation. See Keeton, (G.W.), "Modern Developments in the Law of Trusts", Northern Ireland Law Quarterly, 1971, pp. 215-275.
120. Thellusson v. Woodford (1805) 11 Vos. 112.
121. Keeton, (G.W.), fn. 119, pp. 229-230 and footnotes 44-46 thereat.
122. Nadaraja, (T.), The Roman Dutch Law of Fideicomissa as applied in Ceylon and South Africa, Associated Newspapers of Ceylon, Ltd. 1949.
123. Land Settlement Ordinance, Ordinance No. 20 of 1931.
124. 3rd February, 1873.
125. Fn. 93.
126. Ibid., p. 303.
127. Ibid.
128. Fn. 93, p. 304.
129. Fn. 93, p. 302.
130. Act No. 20 of 1972 amended by Law No. 13 of 1972.
131. Fn. 93, pp. 432-433.
132. Fn. 93, p. 433.
133. On 13th September, 1876.
134. An Ordinance to amend the Law regulating the Entail and Settlement of Immovable Property, Ordinance No. 11 of 1876. The Ordinance became Law on the 15th June, 1877.
135. Fn. 93, p. 433.
136. Dissanayake and DeSoysa, fn. 29, p. 247. See also Viscount Torrington's address to the Legislative Council - on 30th August, 1847 - fn. 55, pp. 204-205.
137. See fn. 73.
138. See fn. 74.
139. (1882) 5 S.C.C. 61.
140. (1917) 19 N.L.R. 242.
141. Udanwita Loku Banda v. Giragame Ratemahatmaya (1875) Beven & Siebel's Appeal Reports 33 or Ramanathan (1872-1876) 185; D.C. Kandy 67167 (1877) Ram, 325; Giragama Dewa Nilame v. Henaya (1891)

141. cont'd
- 2 C.L.R. 42; Appuhami Wedarala v. Punchi Menika (1893) 3 S.C.R. 68.
142. Fn. 3.
143. Ibid., p. 558.
144. Fn. 93, pp. 432-433 and fn. 131.
145. The address of Sir William Gregory, Governor to the Legislative Council on the 13th September, 1876. Fn. 93, pp. 441-442.
146. Ibid., p. 441.
147. Addresses delivered in the Legislative Council of Ceylon by the Governors of the Colony, Vol. III (1877-1890), published by, The Government Printer, Colombo, 1896.
148. On 15th September, 1880.
149. Fn. 147, p. 69.
- 149a. Fn. 150, pp. 487-491, particularly, p. 490.
150. Addresses delivered to the Legislative Council of Ceylon by the Governors of the Colony, Vol. I, 1833-1860, Published by the Government Printer, Colombo, 1876, pp. 194-211.
151. Viscount Torrington's address to the Legislative Council, on 30th August, 1847. See fn. 88, pp. 203-205.
152. Hayley, (F.A.), fn. 3, pp. 535-536 and Dissanayake & Soysa, fn. 29, pp. 246-249.
153. Ibid.
154. See fn. 162.
155. See fn. 162 and fn. 52.
156. The Supreme Court decisions directly on this point has escaped reporting. But there are decisions, see: fn. 141, where the Court did say that the priests were the absolute owners of temple property. Sir Henry Gordon mentions the Supreme Court rulings on the matter between the Buddhist community and the priests. But, he too gives no references to the reports. See fn. 161.
157. Fn. 55, pp. 534-535.
158. Ibid., p. 534.
159. See fn. 149.
160. 31st October, 1888.
161. Fn. 147, pp. 288-295.
162. Fn. 147, pp. 288-289.
163. An Ordinance relating to Buddhist Temporalities in this Island, Ordinance, No. 3 of 1889.
164. Ibid., section 4.
165. Ibid.
166. Ibid.
167. Ibid., ss. 6, 9, 10, 11.
168. Ibid., s.7: "Every Buddhist Priest who shall have been resident within such Sub-District for a period of six months or upwards and every male householder above the age of twenty-one years, and professing the Buddhist religion within such sub-district, shall be entitled to vote."
169. Ibid., s.8: "In order to be qualified to be elected or to serve as a member of the district committee, a person must--

169. cont'd

- (a) be a Buddhist layman;
- (b) have been the occupier of a house within the district either as an owner or tenant for one year previously to the date of his election;
- (c) have completed his twenty-fifth year;
- (d) not have been convicted of any infamous crime.

170. Ibid., ss. 12-14.

171. Ibid., ss. 15-16.

172. 'Pangus' are shares. These could be Maruveni or Paraveni. These terms have been defined by Ordinance No. 3 of 1889, in Section 2.

173. Ibid., see s.14.

174. See fn. 169 and Ibid., s. 17.

175. There are three principal sects in Ceylon. These are - Siamese, Amarapura and Ramanna.

176. Ibid., s. 17.

177. Ibid., s. 16.

178. Ibid., ss. 31-36 to be mentioned later. See fn. 186.

179. Ibid., ss. 41 and 43.

180. Ibid., s. 17.

181. Namely, s. 20(a) - (g).

182. Ibid., s. 22.

183. Ibid., ss. 22-25.

184. Ibid., s. 20(g).

185. Ibid., s. 29.

186. Ibid., s. 34.

187. Ibid., s. 32.

188. Ibid.

189. Ibid., ss. 33-35.

190. Ibid., ss. 37-48.

191. Ibid., s. 49.

192. Ordinance No. 8 of 1905.

193. Ibid., s. 17.

194. Ordinance No. 19 of 1931.

195. Ibid., s. 10(1).

196. Ibid.

197. Ibid., s. 5.

198. Cap. 318 of 1956 - merely re-enacts Ordinance No. 19 of 1931.

199. Attadasi v. Piyadassi Unnanse (1900) 1 Browne's Report 164; Dewa Siri Terunanse v. Radanapola Terunanse et al (1902) 3 Browne's Report 146; Wimalatissa v. Perera (1900) 1 Appeal Court Reports 83; Somittare v. Jasin (1907) 1 Appeal Court Reports 167; Andris Appu v. Daniel (1919) 21 N.L.R. 255; Jayawardene v. Terannanse (1920) 22 N.L.R. 113; Indrasumana Thero v. Kalapugama Upali (1968) 70 N.L.R. 358; Hanwelle Piyaratana Thera v. Jinananda Thera (1966) 68 N.L.R. 178.

200. Ibid.

201. Cap. 318 of 1956 Section 23:
"All Pudgalika property that is acquired by any individual bhikku for his exclusive personal use, shall, if not alienated by such bhikku during his lifetime, be deemed to be the property of the temple to which such bhikku belonged unless such property had been inherited by such bhikku."
202. Frank, (A.G.), Latin America: Underdevelopment or Revolution, Monthly Review Press, N.Y., 1970, p. 3.
203. Ordinance No. 12 of 1846; Ordinance No. 30 of 1890; Ordinance No. 7 of 1916; Ordinance No. 6 of 1885; Ordinance No. 24 of 1892; Ordinance No. 11 of 1842; Ordinance No. 22 of 1865; Ordinance No. 31 of 1890; Ordinance No. 5 of 1893; Ordinance No. 6 of 1911; Ordinance No. 5 of 1864; Ordinance No. 13 of 1845; Ordinance No. 12 of 1896; Ordinance No. 18 of 1906; Ordinance No. 16 of 1916; Ordinance No. 13 of 1913; Ordinance No. 19 of 1906; Ordinance No. 2 of 1908; Ordinance No. 4 of 1908; Ordinance No. 3 of 1911;
In each of these enactments the government either gave financial aid from the treasury (see s.1 of Ordinance No. 11 of 1842) or provided the various denominations of Christianity with a strengthened infra-structure to carry out their missionary work effectively.
204. Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960, amended by Act No. 8 of 1961.
See: Maradana Mosque (Board of Trustees) v. Badi-ud-Din Mahmud and Others [1966] 1 All E.R. 545 and 68 N.L.R. 217 in the Privy Council.
205. The Business Undertakings (Acquisition) Act, Act No. 35 of 1971 and The Companies (Special Provisions) Law, Law No. 19 of 1974.
206. Land Reform (Amendment Law), Law No. 39 of 1975.
207. 'Gathas' are the equivalent of the Christian prayer.
208. See Chapter 4.

FOOTNOTES FOR CHAPTER 3

1. The first British Governor of Ceylon, 1799-1805.
2. Turner, (L.J.B.), Collected Papers on The History of The Maritime Provinces of Ceylon, 1795-1805, published by the Times of Ceylon Company Ltd., Colombo, 1923, pp. 161-176.
3. The Missionaries and the younger civilian employees of the British East India Company held the view that western influence should be spread in India through the propagation of the English language. In the early 1834's MacCauley came to India, as an educationist, and assumed the leadership of this group. His minute on education dated 2nd February, 1835 set down in bold terms their philosophy towards English education. See Nurullah and Naik, fn. 4, pp. 51, 58 and 62.
4. Nurullah, (S.) and Naik, (J.P.), in their book, Students' History of Education in India, McMillan & Co. Ltd., 1955 uses the MacCauley's minute in a number of places. Jayaweera, (C.V.S.), in his thesis for London has collected the portion of the minute which deals with English colonial policy, p. 12 of his thesis. It is this collection to which reference is gratefully made. Jayaweera, (C.S.V.), The Control of Education in Ceylon-The Last Fifty Years of British Rule and After (1900-1962), M.A. thesis, London, 1966.
5. In his Preface to Frantz Fanon's, The Wretched of the Earth, Penguin Books, 1976, Sartre wrote:

"The European elite undertook to manufacture a native elite. They picked out promising adolescents; they branded them, as with a red hot iron, with the principles of Western culture; they stuffed their mouths full with high sounding phrases, grand glutinous words that stuck to the teeth. After a short stay in the mother country they were sent whitewashed. Those walking lies had nothing left to say to their brothers; they only echoed. From Paris, from London, from Amsterdam we would utter the words 'parthenon'! Brotherhood! and somewhere in Africa and Asia lips would open (...thenon! ...therhood! ' It was the golden age."
6. 'Comprador' has been defined as: "---the name of the principal native servant, employed in European establishments, both as head of the staff of native employees and as intermediary between the house and its native customers". The Oxford English Dictionary, Vol. II, Clarendon Press, 1961, p. 741.
7. Tse-Tung, (M.), Selected Works, Vol. IV, Foreign Languages Press, Peking, 1975.
8. Professor of English, University of Ceylon, at the time of Independence.
9. See "The English Language in Ceylon", (1943) 1 University of Ceylon Review, pp. 50-65 and "The Importance of English in Ceylon" (1949) 7 University of Ceylon Review, pp. 162-170.

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10. "The Importance of English in Ceylon" (1949) 7 University of Ceylon Review, pp. 162-170.
11. Ibid., p. 163.
12. Ibid., p. 164.
13. Ibid., pp. 163-164.
14. Ibid., p. 169.
15. Ibid., p. 168.
16. Ibid., pp. 169-170.
17. Ibid.
18. Ibid., pp. 166-167.
19. Act No. 33 of 1956.
20. The Tamil Language (Special Provisions) Act, Act No. 28 of 1958; The Language of the Courts Act, Act No. 3 of 1961; The Language of the Courts (Special Provisions) Law, Law No. 14 of 1973.
21. In six articles written for the University of Ceylon Review (U.C.R.) Father Fernando exposed the missionary enterprise of Ceylon. See: (1949) 7 U.C.R. 198; (1949) 7 U.C.R. p. 269 and 278; (1949) 7 U.C.R. 135; (1950) 8 U.C.R. 110; (1950) 8 U.C.R. 203 and (1950) 8 U.C.R. 264.
22. Act No. 5 of 1960, as amended by Act No. 8 of 1961.
23. Legislative Enactments of Ceylon, 1656-1879, Vol. 1, published by the Government Printer, Colombo, 1900, pp. 7-11.
24. Ibid., Article 6.
25. Ibid., p. 10.
26. Pridham, (C.H.), An Historical Political and statistical account of Ceylon and its Dependencies, published by Tand W. Boone, 29 New Bond Street, 1849, Chapter VII.
27. Ibid., pp. 429-432.
28. Ibid., p. 430.
29. Palm, (Rev. J.D.), "The Education Establishments of the Dutch in Ceylon," (1846) 1 The Journal of the Ceylon Branch of The Royal Asiatic Society, pp. 105-133, p. 405.
30. Ibid.
31. Ibid., pp. 106-108.
32. Ibid., p. 106.
33. Ibid., p. 107.
34. Ibid.
35. Fn. 2, pp. 161-162.
36. Ibid.
37. Fn. 29.
38. Fn. 2.
- 38a. Ibid.
39. Ibid., p.165.
40. Ibid., pp. 164-165.
41. Ibid., p. 165.
42. Ibid.
43. Ibid.
44. Ibid., p. 166.
45. Ibid.
46. Jayaweera, (C.S.V.), The Control of Education in Ceylon - The Last 50 years of British Rule and After, (1900-1962) unpublished, M.A. Thesis, London University, 1966, p. 11.

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47. Tennent, (Sir James, E.), Christianity in Ceylon: Its Introduction and Progress Under the Portuguese, The Dutch, The British and American Missions, John Murray & Co., London, 1850, p. 283.
48. Hon. James Twistleton.
49. Turner, (L.J.B.), fn. 2, pp. 163 and 170.
50. See footnote 47.
51. See p. 153 for Sir James' description was of a Mission School in the Tamil speaking districts of the Island. But the method described by the author is applicable, in my own experience, generally, to any mission school on the Island.
52. Taking just one example, The Wesleyan's inaugurated the vernacular education of 1,000 scholars in 1817. In 1818 their intake had arisen to 4,000. In 30 years, 21,000 persons had passed through their schools. See Tennent, fn. 47, p. 295, and Pridham, (C.), An Historical Political and Statistical Account of Ceylon and Its Dependencies, fn. 26, pp. 432-435.
53. Tennent, (Sir James E.), fn. 47, pp. 249-255.
54. Ibid., p. 304.
55. Ibid., pp. 300-305.
56. Ibid., p. 305.
57. Pridham, (C.H.), fn. 26, pp. 432-435 and Tennent, pp. 172-174.
58. The attitude of the Sinhalese-Buddhists towards the missionaries who had attempted to establish religious schools amongst them had met with a degree of coldness verging on hostility. See Tennent, pp. 251-252.
59. Mendis, (G.C.), The Colebrooke-Cameron Papers, Vols. 1 and 11, 1796-1833, Oxford University Press, London, 1956.
60. Colebrooke, (W.M.G.), arrived on the Island on 11th April, 1829 and Cameron, (C.H.) joined him on 25th March, 1830. The Commission was read to them on the 29th March, 1830. They left the Island on the 4th February, 1831. Their report was dated 24th December, 1831.
61. Mendis, (G.C.), Vol. 1, fn. 59, pp. 69-71.
62. Ibid., p. 70.
63. Ibid.
64. Ibid.
65. Ceylon Report of the Special Commission on the Constitution, H.M.S.O., 1928, cmd. 3131.
66. Ceylon Report of the Commission on Constitutional Reform, H.M.S.O., 1945, cmd. 6677.
67. Mendis, (G.C.), Vol. 1., fn. 59, p. 73.
68. Turner, (L.J.B.), fn. 2, pp. 161-166 also Tennent, (Sir James E.), fn. 47, pp. 294-295.
69. Tennent, (Sir James. E.), fn. 47, p. 285 and Pridham, (C.H.), fn. 26, pp. 432-435.
70. Assisted Schools and Training Colleges (Special Provisions) Act, Act No. 5 of 1960.
71. See fn. 67.
72. Gratien, (L.J.), The Story of Our First Schools' Commission 1834-1841, Colombo, 1927.
73. Ibid., p. 9.
74. Governor's Minute of 27th March, 1841, C.054/188.

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75. The Central School Commission Reports, Nos. 4-9.
76. The Central School Commission Reports, No. 4, p. 8.
77. The first rebellion took place in 1818.
78. The Central School Commission Report, No. 9.
79. Gratien, (L.J.), "The Central School Commission", Vol. XXI, Journal of the Royal Asiatic Society, Ceylon Branch.
80. Ibid., p. 489.
81. Report of the South India Missionary Conference, 1858, S.P.C.K., Press, Madras, 1858.
82. Ibid.
83. Gratien, (L.J.), fn. 78, p. 491.
84. Minutes of the Legislative Council, 14th October, 1865.
85. Sessional Paper VIII of 1867, Government Printer, Colombo, 1867.
86. Ibid., p. 9.
87. January 1869 - Mr. J. S. Laurie was appointed the first Director of Public Instruction.
88. Jayaweera, (C.S.V.), fn. 46, p. 25.
89. Sessional Paper XXXIII of 1898, Government Printer, Colombo, 1898.
90. Administration Report, of the Director of Public Instruction, 1880.
91. Jayaweera, (C.S.V.), fn. 46, p. 26.
92. The Revolt in the Temple, fn. 94, p. 116. The debate was held in 1873 between a Buddhist priest and a Protestant clergyman.
93. He was a Colonel in the American Army during the Civil War, and had fought many and successful battles on the side of the Negroes.
94. The Revolt in the Temple, Sinha Publications, Colombo, 1953, p. 117. Also Jayasuriya, (J.E.), fn. 110, p. 269.
95. Ibid., p. 116.
96. Ibid., pp. 116-117. Also Jayasuriya, (J.E.), fn. 110, p. 225.
97. Ibid., p. 117. Also Jayasuriya, (J.E.), ibid.
98. Administration Report of the Director of Public Instruction, 1900.
99. Ibid.
100. Mendis, (G.C.), Vol. 1, fn. 59, pp. 74-75.
101. Fn. 47, pp. 294-295.
102. Fn. 47, p. 295.
103. See fn. 64.
104. The Buddhist, Vol. IV, No. 1, 1st January, 1892.
105. Ibid., see also The Buddhist of November, 1898, Vol. X, No. 35 - complained of the restriction placed on opening new schools, by limiting them to an area, of 2 miles (1870) and to 1/4 mile (1880). The Buddhist sought its complete removal.
106. 89th Report of Wesleyan Methodist Missionary Society, published by W.M.M.S. 17 Bishops Gate St., 1903.
107. Census of Ceylon 1901, Government Printer, 1901.
108. 60% Buddhists and 25% Hindus.
109. 10% Christians.
110. Arumuga Navalar was educated in a Christian Missionary School. He had also been converted into Christianity. However, he later abandoned Christianity and reverted to his original Hindu faith. Jayasuriya, (J.E.), Educational policies and progress during British Rule in Ceylon (1796-1948), Associated Educational Publishers, Colombo, (undated), p.225.

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111. Ibid.
112. The Elementary Education Act of 1870, Chap. 75, Section 4 et cet. and The Education Act of 1902, Chap. 42.
113. Jayaweera, (S.), "Local Government Institutions and Education in Ceylon 1870-1930", (1966) 24 University of Ceylon Review, 29, pp. 29-31.
114. Municipal Councils, Local Boards and Sanitary Boards.
115. An Ordinance to facilitate the administration of village communities, and to provide for the establishment of village Tribunals. Ordinance No. 26 of 1871, re-enacted in Ordinance No. 24 of 1889.
116. Ibid., s.6(2) in both Ordinances.
117. In 1882. See fn. 118.
118. Jayaweera, (S.), fn. 113, p. 33.
119. Ibid.
120. Ibid., pp. 33-34.
121. See Hansards for 13/2/1883. Also Sessional Paper IX of 1884, Legislative Council of Ceylon, Government Printer, Colombo, 1884.
122. Sessional Paper IX of 1884, Legislative Council of Ceylon, Government Printer, Colombo, 1884.
123. The passage could be found in Jayaweera, (S.), fn. 113, p. 35.
124. The Maintenance of Schools Ordinance, Ordinance No. 33 of 1884. This was repealed by Ordinance No. 5 of 1906 which was an Ordinance to provide for compulsory vernacular education in Municipal and Local Board towns and in towns under the operation of 'The Small Towns Sanitary Ordinance', 1892.
125. Jayaweera, (S.), fn. 113, pp. 35-36.
126. Ibid., p. 37.
127. Ibid.
128. Ibid.
129. Ibid.
130. Jayaweera, (C.S.V.), fn. 46, p. 43. These figures have been culled from The Addresses delivered in the Legislative Council of Ceylon by Governors of the Colony, Vol. IV (1896-1903), Government Printer, Colombo, 1903.
131. Olcott, (H.S.), Old Diary Leaves, Third Series, Madras, 1929, p. 165 also The Buddhist, Published by the B.T.S. 14th February, 1890. See also Jayasuriya, (J.E.), fn. 110, p. 224, paragraph 10.
132. The colonial framework for educational and economic advancement was chartered taking English Education as the base line. This was a result of the Colebrooke-Cameron reforms. See: Mendis, (G.C.), Vol. 1, fn. 59, pp. 74-75.
133. Hansard, Legislative Council, Ceylon, 18/10/1900, Government Printer, Colombo, 1900.
134. In 1900 it was Rs. 869,837 as compared with Rs. 474,387 in 1890. See Governors' addressed to the Legislative Council, Vol. IV (1890-1903) - Published by the Government Printer, Colombo, 1905.
135. Sessional Paper XXVIII of 1905, Government Printer, Colombo, 1905.
136. An Ordinance to Provide for Compulsory Vernacular Education in Municipal and Local Board Towns and in Towns Under the Operation of "The Small Towns Sanitary Ordinance, 1892", - Ordinance No. 5 of 1906.

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137. An Ordinance to make provision in Rural and Planting Districts for the Education of children in the Vernacular Languages - Ordinance No. 8 of 1907.
138. Fn. 136.
139. Ibid., s.3.
140. Ibid., s.6(1).
141. Ibid., s.7.
142. Ibid., s.8(1)(b).
143. Ibid., s.8(1)(a).
144. Ibid., s.7(1).
145. Ibid., s.8(1)(b).
146. Ordinance No. 18 of 1892.
147. Ibid.
148. See Legislative Enactments of Ceylon, 1889-1900 Vol. III, Government Printer, Colombo, 1900, pp. 224-225.
149. Ordinance No. 6 of 1910.
150. Ibid., s.45(1)(d).
151. Ibid., ss.4 and 5, by implication limited the application of this Ordinance to Municipalities.
152. Jayaweera, (S.), fn. 113, pp. 44-45.
153. Ibid., p. 46.
154. Ordinance No. 34 of 1916.
155. Ibid., s.2.
156. Fn. 152.
157. Jayaweera, (S.), fn. 113, p. 45.
158. Fn. 137.
159. Ibid., ss.23-25.
160. Ibid., ss. 26-33.
161. Ibid., s.4.
162. Ibid., s.5(1).
163. Ibid., s.6.
164. Ibid., s.6(a).
165. Ibid., s.6(b).
166. Ibid., s.6(c).
167. Ibid., s.6(d).
168. Ibid.
169. Ibid.
170. Jayaweera, (S.), fn. 113, p. 46.
171. Ibid.
172. Ibid.
173. See Tambiah, (S.J.), "Ethnic Representation in Ceylon's Higher Administrative Services, 1870-1946", [1955] 13 University of Ceylon Review, 113-134.
174. Director of Public Instructions.
175. Jayaweera, (S.), fn. 113, p. 38.
176. An Ordinance to make better provision for Education and to revise and consolidate the law relating thereto, Ordinance No. 1 of 1920.
177. Ibid., and Ordinance No. 31 of 1939.
178. Namely, Section 9 of "The Town Schools Ordinance", Ordinance No. 5 of 1906 and Section 21 of "The Rural Schools Ordinance" Ordinance No. 8 of 1907.

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179. See fn. 140.
180. Section 9(2) (a)-(e), Ordinance No. 5 of 1906.
181. Mr. E. B. Denham.
182. Ceylon Census Report of 1911, Government Printer, Colombo, 1911, p. 434.
183. Ibid., p. 349
184. Sessional Paper XXI of 1912, Government Printer, Colombo, 1912.
185. Ibid., p. 18.
186. Jayasuriya, (J.E.), fn. 110, pp. 407-408, particularly paragraphs 11 and 12.
187. Bond, (H.M.), Negro Education in Alabama: A Study in cotton and steel, Octagon Books, New York, 1939 (reprinted, 1969).
188. Sessional Paper XXVIII of 1905, Government Printer, Colombo, 1905.
189. Ibid., Rev. Rigby's evidence.
190. Ibid., Rev. Brown's evidence. The Anglican Mission's view carried an enormous political clout. Their representative Rev. Brown said:
"I believe that any government which calls itself progressive and up-to-date ought to make ample provision for the proper education of its children and it ought to do this without asking benevolent and religious organisations to assist. I suppose that the Ceylon Government would resent being called unprogressive or out of date; therefore, I believe that it is time the government ceased to play at educating its children."
Ibid.
191. There were no Buddhist organisations representing the educational interests of the Buddhists until after Col. Olcott's arrival on the island in 1880.
192. Administration Report of the Director of Education in 1915.
193. Piyadasa Sirisena authored a number of novels, of those the following depicted, cultural and religious conflicts on the Island at the time in question: Mahesvari, Vimalatissa Hamuduruwange Kasi Pettiya (Reverend Vimalatiss'a money box) and Rosalind and Jayatissa.
194. The Ceylon Daily News, February 11th, 1920. The governor made the statement on 31st October, 1919 but appears to have been published nearly four months later.
195. Ordinance No. 1 of 1920.
196. Namely: An Assistant Director, Inspectors, Assistant Inspectors and Sub-Inspectors of schools, the Secretary to the Board and such other officers and clerks and peons, as may in the opinion of the Governor seem necessary.
197. Section 5(3), Ordinance No. 1 of 1920.
198. Published by the Catholic Messenger, Colombo, 1919.
199. Ibid., p. 40.
200. Hansard, February 25th, 1926, Government Printer, Colombo, p. 371.
201. Section 10 of Ordinance No. 1 of 1920.
202. Fn. 200.
203. Section 15(1), Ordinance No. 1 of 1920.
204. Ibid.
205. Report of Wesleyan Methodist Mission Society, dated July, 1920, p. 32.

206. Having observed the working of the Ordinance for two years, namely, between January 1st, 1924 and June, 1926.
207. Ibid., dated June, 1926, p. 25.
208. Section 30, of Ordinance No. 31 of 1939.
209. The Ordinance received the Governor's assent on February 19th, 1920. It was not promulgated until January 1st, 1924. It was, however, first tabled on the 20th November, 1919.
210. Ordinance No. 8 of 1907.
211. Namely, under Section 10 of the Ordinance No. 1 of 1920.
212. Section 27 of Ordinance No. 1 of 1920.
213. See fn. 202.
214. Section 39, Ordinance No. 1 of 1920.
215. Section 40, Ordinance No. 1 of 1920.
216. Section 41, Ordinance No. 1 of 1920.
217. Jayaweera, (C.S.V.), fn. 46.
218. Ibid., p. 211.
219. Wilson, (A.J.), The Manning Constitution of Ceylon (1924-1931), Unpublished thesis, Ph.D., London, 1956.
220. Some Sinhalese were Christians others were Buddhists.
221. See the Evidence given by The All-Ceylon Tamil Conference before Donoughmore Commission, The Donoughmore Commission Oral Submission, Vol. II. Also Fernando, (Q.G.), The Minorities in Ceylon, 1926-1931, unpublished thesis, Ph.D., London, 1973, Chapter II.
222. Fernando, (Q.G.), fn. 221, p. 95.
223. Ibid.
224. Dr. Drummond Sheils and Lord Passfield (formerly Sydney Webb) were both members of the Fabian Society.
225. Cooray, (J.A.L.), Constitutional and Administrative Law of Sri Lanka, Hansa Publishers Ltd., Colombo, 1973; pp. 43-53.
226. Administration Report of the Director of Education, 1931, Government Printer, Colombo, 1931.
227. Hansard, 1933, Government Printer, Colombo, 1933, p. 1864.
228. Hansard, 1938, Government Printer, Colombo, 1938, p. 3619.
229. Ibid.
230. Ibid.
231. Ordinance 31 of 1939, Section 32(1) Proviso.
232. Namely, Ordinance 31 of 1939.
233. By Ordinance 1 of 1920, Section 10.
234. An Ordinance to make better provision for Education and to revise and consolidate the law relating thereto, Ordinance No. 31 of 1939.
235. Hon. C.W.W. Kannangara.
236. Sessional Paper XXIV of 1943, (containing the Report of the Special Committee on Education) Government Printer, 1943, p. 8.
237. Ibid.
238. Ibid., p. 6.
239. Ibid., p. 8.
240. Ibid., p. 27.
241. History of Ceylon, Vol. 3., Edited by K. M. deSilva, published by the University of Ceylon Press Board, Colombo, 1973, pp. 461-475.
242. Ibid., p. 465.
243. Ordinance No. 26 of 1947.

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244. Act No. 33 of 1956.
245. Section 6, Ordinance No. 26 of 1947.
246. Section 7, ibid.
247. Section 4, ibid.
248. Section 29 of the 1948 Constitution.
249. Ibid.
250. Roberts, (M.), "Elite formation and Elites, 1832-1931", History of Ceylon, Vol. 3., University of Ceylon Press Board, Colombo, 1973, pp. 263-284.
251. Ibid., pp. 267-273.
252. Pieris, (R.), Sinhalese Social Organization, The Ceylon University Press Board, Colombo, 1956, Chapter II.
253. The equivalent of the Indian untouchables.
254. The best example of a religious contradiction at the infra-structure level is Northern Ireland. Manifested at the supra structure level was the elitism of the Protestants and their domination of the Catholic community.
255. Roberts, (M.), fn. 250, p. 264.
256. Act No. 33 of 1956.
257. Ibid., section 2.
258. Ibid., s.3(1).
259. The following figures which support the percentage were taken from the Census Report for 1946, Vol. IV, Government Printer, Colombo, 1946, p. 803.
- | <u>Literacy</u> | <u>Ceylon</u> | <u>Jaffna</u> | <u>Colombo</u> |
|--|---------------|---------------|----------------|
| (1) Sinhalese + English | 2.9% | 0.1% | 7.0% |
| (2) Tamil + English | 1.0% | 7.6% | 0.9% |
| (3) English, Sinhalese and Tamil, Distributing Line (3) in Terms of Lines (1) and (2). | 2.4% | 1.0% | 5.7% |
| (4) Sinhalese + English | 4.1% | 0.6% | 9.85% |
| (5) Tamil + English | 2.2% | 8.1% | 3.75% |
260. The following figures which support these percentages were taken from the Census Report for 1946, Vol. 1, Part I, Government Printer, Colombo, 1946, p. 151.
Low Country Sinhalese and Kandyan Sinhalese: 4,620,507. Ceylon Tamil Population: 733,731.
Total Population: 6,657,337.
Therefore the percentage of the Sinhalese and the Tamils are: 69.4 and 11.02 respectively.
261. See fn. 259.
262. Ibid.
263. Ceylon Census Report, 1946, Vol. IV.
264. The distribution of Religious Communities was culled from the 1953 Census Reports. Those calculations have been supported by the work of Phadnis, (U.), Religion and Politics in Sri Lanka, Hurst, London, 1976, pp. 4-6.
265. Department of Census and Statistics Preliminary Report on the Socio-economic survey of Ceylon, 1969-1970, also Phadnis, (U.), Ibid.
266. Census Report for 1946, Vol. IV, Government Printer, 1946, p. 803.
267. The English medium was available to those who were neither Sinhalese nor Tamil.

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268. Act No. 33 of 1956.
269. The Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960.
270. Ibid.
271. Ibid., sections 8-10.
272. Wilson, (A.J.), Politics in Sri Lanka, 1947-1973, MacMillan, Toronto, 1974, page 21.
273. See fn. 269.
274. Wilson, (A.J.), fn. 272, pp. 22-23.
275. Act No. 8 of 1961.
276. Act No. 5 of 1960 became Law on 17th November, 1960 and Act No. 8 of 1961 became Law on 2nd March, 1961.
277. Fn. 275, section 26(1)(c).
278. Act No. 28 of 1958.
279. Act No. 5 of 1960 and Act No. 8 of 1961.
280. Section 6 of The Assisted Schools and Training Colleges (Special Provisions) Act, Act No. 5 of 1960 required the proprietor of a school who had made an election under section 5 to make it unaided, to observe the following educational guidelines: Namely that he -
- "(a) shall educate and train the pupils in such school in accordance with the general educational policy of the Government;
 - (b) shall continue to maintain all such facilities and services as were maintained by such school on the day immediately preceding the 21st day of July, 1960;
 - (c) shall not after the date of such election, admit a pupil whose parent does not profess the religion of such proprietor unless prior permission is obtained from the Director;
 - (d) shall not levy fees other than any fees for facilities and services which are permitted by regulations made in that behalf under the Education Ordinance, No. 31 of 1939;
 - (e) shall make no reduction in the accommodation provided in such school for pupils;
 - (f) shall not dismiss or discontinue any pupil who was in that school on the day prior to the date of such election, except upon disciplinary grounds and with the approval of the Director;
 - (g) shall comply with the provisions of any written law applicable to such school and matters relating to education."
281. Where the Minister is satisfied that the proprietor of an unaided school has breached his statutory duties, Section 11 of Act No. 5 of 1960 authorises him to declare by order published in the Gazette that: "(i) such school shall cease to be an unaided school, (ii) such school shall be deemed for all purposes to be an assisted school and (iii) the Director shall be the manager of such school."
282. (1961) 63 N.L.R. 322.
283. Section 4(1), Act No. 8 of 1961.
284. (1963) 65 N.L.R. 376, reversed by the P.C. (1966) 68 N.L.R. 217; [1967] 1 A.C. 13.
285. Fns. 281 and 283.

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286. Namely; Act No. 5 of 1960 and Act No. 8 of 1961.
287. The day the Bill was published.
288. Section 6(b) of Act No. 5 of 1960.
289. See fn. 280.
290. (1961) 63 N.L.R., p. 330.
291. The wording of Section 11(b) of the Act of 1960 requires the Minister to be "satisfied" before he acts under that section.
292. (1959) 61 N.L.R., 505 (P.C.).
293. (1961) 63 N.L.R., pp. 327-332.
294. (1961) 63 N.L.R., p. 331
295. (1961) 63 N.L.R., p. 332.
296. The judgment of the Supreme Court in the Hindu Schools Case was delivered on the 10th November, 1961. By that time Act No. 8 of 1961 had been passed as a supplementary statute to Act No. 5 of 1960.
297. Section 3, of Act No. 8 of 1961.
298. Section 4, ibid.
299. Fn. 284.
300. A proprietor of an unaided school: "shall pay to every teacher and employee on the staff of such school the salary and allowances due to such teacher or employee in respect of any month not later than the tenth day of the subsequent month."
301. (1966) 68 N.L.R., p. 220.
302. Fn. 281.
303. (1966) 68 N.L.R., p. 225.
304. Section 6(k) of Act No. 5 of 1960.
305. Both the school and the Minister belonged to the Sunni Muslim Faith.
306. (1966) 68 N.L.R., pp. 221-224.
307. Fn. 279.
308. (1966) 68 N.L.R., 376.
309. (1963) 65 N.L.R., p. 378.
310. Ibid.
311. (1963) 65 N.L.R., pp. 220-221.
312. (1963) 65 N.L.R., p. 378.
313. (1966) 68 N.L.R., 217; [1967] 1 A.C. 13.
314. Fn. 280.
315. Fn. 282.
316. (1966) 68 N.L.R., p. 223.
317. (1966) 68 N.L.R., p. 221.
318. Having referred to the 12 conditions laid down under Section 6 of the Act of 1960 the Minister said:
"The law further provided that a school should be taken over for Director-Management if any of these twelve conditions was violated. The procedure was also laid down. According to it, the Minister, in consultation with the Director of Education has to publish an order declaring the school to be Director-managed. The law does not give the Minister any discretion to excuse the violation of any of the above mentioned conditions or to adopt any course of action other than director-management." ((1966) 68 N.L.R., p. 221).

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319. Fn. 284.
320. [1951] A.C. 66 (P.C.), See de Smith, (S.A.), (1951) 14 Modern Law Review, pp. 72-73.
321. Ibid., p. 77.
322. [1967] 2 A.C. 337 (P.C.).
323. [1964] A.C. 40 (H.L.).
324. Ibid., p. 86.
325. Ibid., p. 125.
326. Ibid., pp. 140-142.
327. Ibid., p. 81.
328. Ibid., p. 136.
329. Van de Westhuizen v. Engelbrecht (1942) O.P.D. 199, p. 199, quoted by Eckelaar, (J.M.), "Breach of Natural Justice: void or voidable?", (1967) 30 Modern Law Review, pp. 701-705, fn. 1.
330. Eckelaar, (J.M.), fn. 324 and Wade, (H.W.R.), "Unlawful Administrative Action: void or voidable", 84 Law Quarterly Review, pp.95-115.
331. Ibid., p. 115.
332. Harelkin v. The University of Regina (1979) 26 National Reports, 364 (Supreme Court of Canada).
333. Fn. 323, p. 77.
334. (1863) 14 C.B.N.S. 180.
335. (1723) 1 Stra. 557.
336. Fn. 322, p. 348.
337. Eckelaar, (J.M.), fn. 329, p. 702.
338. Fn. 312.
339. Fn. 322, p. 349.
340. Ibid.
341. Seidman, (R.B.), "Law and Development: The interface between policy and Implementation", (1975) 13 Journal of Modern African Studies, pp. 641-652.

FOOTNOTES FOR CHAPTER 4

1. The Ceylon News (Weekly), August 31st, 1978.
2. As from the Advent of the British in 1796.
3. Education, see Chap. 2 and Religion, see Chap. 3.
4. See Chap. 2.
5. See Chap. 3.
6. Ordinance No. 5 of 1906; Ordinance No. 8 of 1907; Ordinance No. 1 of 1920; Ordinance No. 31 of 1939; Ordinance No. 26 of 1947; Act No. 5 of 1960 and Act No. 8 of 1961.
7. Ordinance No. 8 of 1905; Ordinance No. 14 of 1907; Ordinance No. 27 of 1912; Ordinance No. 15 of 1919 and Ordinance No. 19 of 1931.
8. Sessional Paper III, 1948, Government Press, Colombo, 1948.
9. Ibid., Section 29(2) (a)-(d).
10. The Bribery Commissioner v. Ranasinghe [1964] 2 W.L.R. 1301 (P.C.). See also Marasinghe (M.L.), 20 [1971] International and Comparative Law Quarterly, pp. 645-674.
11. Ibid., p. 1307.
12. Mendis, (G.C.), The Colebrooke-Cameron Papers, Vol. 1, 1796-1833, Oxford University Press, London, 1956, pp. 69-71.
13. (1895) 1 N.L.R. 248, p. 250.
14. Act No. 33, 1956.
15. The Assisted Schools and Training Colleges (Special Provisions) Act, Act No. 5 of 1961.
16. Act No. 28 of 1958.
17. Act No. 3 of 1961.
18. A more detailed analysis of this model was made in an earlier writing. See Marasinghe, (M.L.), "The Legality of National Liberation Movements", [1978] Malayan Law Journal, 1, pp. 27-34.
19. Fn. 10.
20. Fn. 11.
21. Miller, (R.A.), (1974) 12 Journal of Modern African Studies, p. 251.
22. Ibid., p. 527.
23. Fn. 11.
24. Article 29(2) (b) & (c) of the 1948 Constitution, see fn. 8.
25. D.C. - Colombo, 1026/Z.
26. A more detailed analysis of this model was made in an earlier writing. See Marasinghe, (M.L.), fn. 18.
27. Africa, March 1972, p. 12.
28. D. C. Colombo, 1026/Z at first instance was reversed by the Divisional Court (1968) 70 N.L.R. 121. A further appeal to the Privy Council by the petitioner Kodeswaran was successful. See Kodeswaran v. A.-G. (1970) 72 N.L.R. 337.
29. Fn. 24.
30. An excellent exposition of this doctrine may be found in an unpublished thesis by Achimu, (V.O.), Autochthony - An Aspect of Constitutionalism in Certain African Countries, Ph.D., London, 1972.
31. The figures in this Table were taken from the Census Report of Ceylon, 1953.
32. Ibid., Vol. 1, p. 191.

33. Ibid., Vol. 3(i), p. 606.
34. Ibid.
35. Fn. 32.
36. Act No. 18 of 1948.
37. Ibid., Section 4(1).
38. Ibid., Section 4(2).
39. Census Report for 1946, published by the Ceylon Government Printer, Colombo, 1950, Vol. 1, part 1, p. 151.
40. Act No. 18 of 1948, Section 4(1)(a).
41. Ibid., Section 4(1)(b).
42. Ibid., section 4(2).
43. Ibid., section 12(2).
44. Ibid., section 12(a)(i).
45. Ibid., section 12(a)(ii).
46. Act No. 48 of 1949.
47. See fn. 31.
48. Ibid.
49. The ratio of 506,101:181,585 is approximately 2:1 as a ratio.
50. The ratio of 5,616,705:884,703 is approximately 6:1 as a ratio.
51. Act No. 33 of 1956.
52. Vittachi, (T.), Emergency '58, Deutsch, 1958.
53. Namely, The Dravida Munnetra Kazhagam.
54. Dr. Colvin R. De Silva, M.P., summarising the Tamil concerns expressed in the speech of G. G. Ponnambalam, Q.C., M.P. during the second reading of the Official Language Bill in the House of Representatives, Parliamentary Debates, House of Representatives, Government Printer, Colombo, 1957, Vol. 24, 1956-57, Col. 1919.
55. Hon. S.W.R.D. Bandaranaike, M.P., ibid., col. 1920.
56. (1958) 59 N.L.R. 289.
57. (1895) 1 N.L.R. 248.
58. Ibid., p. 250.
59. (1951) 53 N.L.R. 179.
60. Ibid., p. 180.
61. Panditha Watugedera Amaraseeha Thero v. Tittagalle Sasanatilleke Thero (1958) 59 N.L.R. 289.
62. These matters were discussed in Chapter 2, Section 111(c), See Saranakara Unnanse et al. v. Indrajoti Unnanse (1919) 20 N.L.R. 385.
63. The Council of lay devotees who were charged with the duty of running the temple.
64. Fn. 59.
65. (1951) 53 N.L.R., p. 248.
66. (1963) 64 N.L.R. 1.
67. Ibid., p. 5.
68. Gunasekera, Weerasooriya and Fernando, J.J. decided in favour of dismissing the appeal by applying section 5(1) of the Court of Criminal Appeal Act, Cap. 7. See fn. 69.
69. Section 5(1) of the Court of Criminal Appeal Act, Cap. 7 reads:
"Provided that the court may, notwithstanding that they are of opinion that the point raised in appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."
70. [1963] 3 All. E.R. 632.

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71. Ibid., p. 635.
72. The Criminal Procedure Code of Ceylon gave an accused a power to elect to be tried before one of three types of juries. Namely, English speaking, Sinhala speaking or a Tamil speaking jury.
73. Fn. 70, p. 634.
74. (1964) 65 N.L.R. 73.
- 74a. Ibid., p. 86.
75. The Constitution of Sri Lanka, 1972, Government Press, Colombo, 1972, Chapter 111.
76. December 20th, 1960.
77. Act No. 3 of 1961.
78. Ibid., section 3(1).
79. Namely, Act No. 3 of 1961.
80. Ibid., sections 6 and 7.
81. (1964) 65 N.L.R. 69.
82. The decision in Liyanage (see fn. 81) was given on the 12th February, 1963. The decision in the Fawzia Begum case was delivered on March 15th, 1963.
83. (1964) 65 N.L.R. 69.
84. Ibid., p. 71.
85. Act No. 33 of 1956.
86. (1968) 70 N.L.R. 121.
87. Ibid., p. 138.
88. O. L. de Kretser, Esq.
89. The decision at First Instance.
90. Namely the Official Language Act, Act No. 33 of 1956.
91. (1968) 70 N.L.R., p. 139.
92. Ibid., p. 138.
93. Ibid.
94. Ibid.
95. Ibid., p. 139.
96. Ibid., p. 138.
97. (1970) 72 N.L.R. 337.
98. Ibid., p. 338.
99. Ibid., pp. 346-347.
100. Fn. 96.
101. The United National Party administration of the late, Hon. Dudley Senanayake.
102. The Sri Lanka Freedom Party with the two Marxist Parties, headed by Hon. Mrs. Sirimavo Bandaranaike.
103. See chapter 8, section IV(b)-(c).
104. Article 10(2).
105. Fns. 66 and 70.
106. Fn. 74.
107. Fn. 81.
108. Law No. 14 of 1973.
109. Ibid., Preamble and Section 5.
110. Ibid., section 3(a), proviso.
111. Ibid., section 3(b).
112. Ibid., section 3(b) proviso.
113. Ibid., section 3(c).
114. Law No. 44 of 1973.
115. Ibid., section 11.
116. Not being subject to the Judicial zones to which the country was divided and as a superior court of Record its jurisdiction encompassed the entire Island and it sat in Colombo in the Western Province. Ibid.

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117. Namely, Law No. 14 of 1973.
118. Ibid.
119. The principal provision of Article 11 of the 1972 Constitution reads:
- 11(1) The language of the courts and tribunals empowered by law to administer justice and of courts, tribunals and other institutions established under the Industrial Disputes Act and of Conciliation Boards established under the Conciliation Boards Act, No. 10 of 1958, shall be Sinhala throughout Sri Lanka and accordingly their records, including pleadings, proceedings, judgments, orders and records of all judicial and ministerial acts, shall be in Sinhala.
- Provided that the National State Assembly may, by or under its law, provide otherwise in the case of institutions exercising original jurisdiction in the Northern and Eastern Provinces and also of courts, tribunals and other institutions established under the Industrial Disputes Act and of Conciliation Boards established under the Conciliation Boards Act, No. 10 of 1958, in the Northern and Eastern Provinces.
120. The United National Party held a Conference of lawyers - both practitioners and judges - to examine The Administration of Justice, Act No. 44 of 1973, during the last two weeks of December, 1977. The papers presented at that Conference documents the difficulties experienced as a result of this Law. Law No. 44 of 1973 was subsequently repealed on December 31, 1977 and replaced by the pre-1973 Law. See Cap. 101 - The Civil Procedure Code.
121. Law No. 14 of 1973, section 6(1).
122. Ibid., section 6(2).
123. Namely the Sinhalese and the Tamils. Admittedly, the Sinhala speaking people in the Eastern and in the Northern provinces were in a minority.
124. Law No. 14 of 1973.
125. Of the Sri Lanka Freedom Party.
126. Wilson, (A.J.), Politics in Sri Lanka, 1947-1973, MacMillan, London, 1974, p. 142.
127. Ramanathan, (Sir P.), Riots and Martial Law in Ceylon, Colombo, 1915; The Revolt in the Temple, Sinha Publications, Colombo, 1953, pp. 120-129.
128. Namely, the Muslims and the Sinhalese.
129. Parliamentary Debates, House of Representatives (1958-59), Vol. 31, Government Press, 1959, Cols. 1940-41.
130. Vittachi, (T.), fn. 52.
131. Act No. 28 of 1958.
132. Member of Parliament for Maturata.
133. Fn. 129, col. 1938.
134. Ibid.

135. Ibid., cols. 1938-1939.
136. Ibid., cols. 1939-1940.
137. In Act No. 28 of 1958.
138. Ibid., section 7.
139. See Chap. 3.
140. Assisted Schools and Training Colleges (Special Provisions), Act No. 5 of 1960 and Assisted Schools and Training Colleges (Supplementary Provisions), Act No. 8 of 1961. The combined effect of these two provisions was to nationalise the schools. Chapter 2 dealt with this aspect.
141. Namely, Non-government run schools whether assisted or un-assisted.
142. Published by the Ministry of Defence and Foreign Affairs, Colombo, on 26th July, 1976 by Mr. W. T. Jayasinghe, Secretary to the Ministry - ref: A 21988/1,010 (76/07).
143. Sri Lanka Freedom Party.
144. Fn. 142, p. 6.
145. Fn. 142.
146. Fn. 142, p. 6.
147. Under the system of 'standardisation' the Ministry of Education under which the schools and the universities fall, was required to allocate university positions according to the ratio in which the two communities were represented across the nation. This meant, in practice, that for each candidate selected from the Tamil medium, 6.5 candidates were required to be selected from the Sinhala medium.
148. The Sri Lanka Freedom Party was defeated at the elections of June 21st, 1977 and the United National Party assumed power with a huge popular vote in their favour.
149. Under this method, examination questions were translated into English, Sinhala and Tamil. Answers were written in each respective language. Answers in each language were separately evaluated. The evaluators thus produced determined, as a single set of marks, the entrants to the University.
150. Mr. Cyril Mathew, Cabinet Minister and Member of Parliament raised this matter in Parliament, during the month of December, 1978. See Parliamentary Debates, House of Representatives, Government Press, 1978.
- 150a. Fn. 142, p. 11.
151. See fn. 153.
152. Namely, The Tamil Language Special Provisions Act, Act No. 28 of 1958.
153. Fn. 142, p. 11.
154. Fn. 152.
155. Act No. 28 of 1958, s. 3.
156. Ibid., s.3(a).
157. Ibid., s.3(b).
158. Fn. 146.
159. Fn. 150.
160. Section 4 of Act No. 28 of 1958 reads:
"Correspondence between persons other than persons in their official capacity, educated through the medium of the Tamil language and any official in his official capacity or between any local authority in the Northern or Eastern Province and any official in his official capacity may, as prescribed, be in the Tamil language."

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161. Act No. 28 of 1958, s. 5.
162. Fn. 142. In addition the White Paper says:
"It is also worthy of mention that Sri Lanka Tamils have been appointed to many of the higher offices. Apart from a Cabinet Minister, four Supreme Court Judges, the Attorney-General, two Secretaries to Ministries and a number of Heads of Departments, are Tamils."
(p. 12).
163. Namely, the English language.
164. Mr. M. M. Mustapha, Member of Parliament for Pottuvil. See fn. 129, cols. 1956-57.
165. Inexplicably, Muslims who were as indigenous to Sri Lanka as the Tamils and the Sinhalese, were given the option to be educated in Sinhala, Tamil or English. They fell into the category of aliens - viz the Eurasians, Burghers and those of mixed parentage in this respect. There was no whimper of protest heard from the Muslim minority regarding this curious classification.
166. Fn. 129, col. 1957.
167. See comment, fn. 165.
168. Act No. 3 of 1961.
169. Act No. 44 of 1973, chap. 1.
170. Ibid., ss. 33 and 36.
171. Ibid., chap. 11.
172. Law No. 25 of 1975, as amended by Law No. 20 of 1977.
173. Seidman, (R.B.), "The Communication of Law and the Process of Development" (1972) Wisconsin Law Review, pp. 636-719.
174. Ibid., p. 700.
175. Act No. 28 of 1958.
176. Act No. 3 of 1961 and The Language of the Courts (Special Provisions) Act, Law No. 14 of 1973.
177. Fn. 15.
178. Ibid.
179. Fn. 86.
180. Ibid.
181. Law No. 14 of 1973.
182. The Constitution of the Democratic Socialist Republic of Sri Lanka, printed by the Government Printer, Colombo, 1978.
183. Ibid., s.18.
184. Ibid., s.19.
185. Ibid., s.20.
186. Ibid., s.23.
187. Ibid., s.23(1).
- 187a. Ibid., s.22(4).
- 187b. Namely, Act No. 33 of 1956; Act No. 28 of 1958; Act No. 3 of 1961 and Law No. 14 of 1973.
188. Ibid., s.21(1).
189. Ibid., s.21(2).
190. Fn. 175.
191. Fn. 182, s.22(1).
192. Ibid., s.22(1), proviso.
193. Fn. 175.
194. Fn. 182, s.22(2).
195. Fn. 175.

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196. Fn. 86.
197. Fn. 182, s.22(5).
198. Ibid., proviso.
199. Mr. N. Satyendra, Attorney-at-Law.
200. Ibid., Ceylon Daily News, 4th October, 1978.
201. Fn. 182, s. 24.
202. Ibid., s.24, proviso.
203. Ibid., s.24(2).
204. Ibid., s.24(3).
205. Fn. 176.
206. Ibid.
207. The Official Language Act, Act No. 33 of 1956.

FOOTNOTES FOR CHAPTER 5

1. The Report upon the Judicial Establishments and Procedures in Ceylon, C.O.54.122.
2. The Report upon the compulsory services to which the Natives of Ceylon are subject - C.O.54.145. The Report upon the Establishments and Expenditure of Ceylon - C.O.54.122 and The Report on the Administration of Ceylon (in three parts) - C.O.54.122.
3. Wilson, (A.J.), The Manning Constitution of Ceylon (1924-1931), Ph.D. London, 1956, De Mei, (F.J.M.), "Reform of the Ceylon Legislative Council" - The Ceylon National Review, Vol. II, No. 4, July, 1907; Digby, (W.), "An Oriental Colony Ripe for Representative Government", The Ceylon National Review, Vol. II, No. 6, May, 1908. Jennings, (Sir Ivor), "Notes on the Constitutional Law of Colonial Ceylon", Journal of the Ceylon Branch of the Royal Asiatic Society (N.S.), Vol. 1, p. 51.
4. Wilson, (A.J.), and Digby, (W.), ibid.
5. Jennings, (Sir. I.), fn. 3.
6. The warrant issued by the British Government on September 2nd, 1829, directed the Commissioners appointed under Colebrooke's chairmanship to enquire into 'Laws, Regulations and Usages' of the 'Settlements at the Cape of Good Hope, Mauritius and Ceylon' - Mendis, (G.C.), The Colebrooke-Cameron Papers, Vol. II, Oxford University Press, 1956, p. 1.
7. Jennings, (Sir. I.), fn. 3, p. 66.
8. C.O.55.74. The reforms were contained in two communications to Governor Horton from the Secretary of State for the Colonies. First, "the King's Supplementary Commission to Governor Horton" (hereinafter referred to as 'The Commission' of 1833), issued on 19/3/1833 and second, "The King's additional Instructions to Governor Horton" (hereinafter referred to as 'The Instructions' of 1833), issued on the 20th March, 1833. See also Mendis, (G.C.), fn. 6, pp. 303-319.
9. Ibid., The Commission of 1833. In addition see Mendis, (G.C.), fn. 6, p. 303.
10. Ibid., The Instructions of 1833, Article 5. In addition see Mendis, (G.C.), fn. 6, p. 308.
11. 28 & 29 Vic., Cap. 63.
12. The Ceylon Independence Act, 11 Geo. 6, Cap. 7.
13. The Instructions of 1833, fn. 8, Article 36.
14. White, (H.), The Ceylon Manual for 1910, Edt., by Sueter, (E.B.F.), Stanford, London, 1910, p. 59.
15. Ibid.
16. The Queen's Advocate was designated the Attorney-General in 1883, ibid.
17. Article 11, The Instructions of 1833, fn. 8. Although Article 11 deals with the Governor's powers at a meeting of the Legislative Council, where he has both an initiating vote and a casting vote, it is conceivable that he, as the chairman of the Executive Council would be compelled to initiate legislations and in doing so would be expected to speak in support of them and vote in favour of them. At the same time, according to the way in which the Council was composed, namely, with a member-

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ship of six, he would be called upon to break any even votes by using his casting vote. If there was no casting vote it is difficult to see how the Executive Council could have functioned. If there was no initiating vote, then it would be difficult to see how the Governor could initiate business, when in the nature of things, he surely must. Therefore, the conclusion is irresistible that although the Instructions and The Commission of 1833 are both silent on this point, the powers given to the Governor by Article 11 of the Instructions may well have been extended to cover the meetings of the Executive Council. This means that he had both an initiating vote and a casting vote in both departments of government.

18. The Instructions of 1833, fn. 8, Article 5.
19. White, (H.), The Ceylon Manual (1904), The Government Printer, Colombo, p. 44.
20. Ibid.
21. In 1889, the appointment of unofficial members was reduced from life to three years. In 1890, it was increased to five years. See Weiman, (J.R.), Our Legislature, The Ceylon Daily News Press, 1947, Colombo, at p. XI and White, fn. 14.
22. Weiman, (J.R.), ibid., p. 7.
23. The Europeans were concerned with such legislations as: An Ordinance for better preservation of Public Health and the Suppression of Nuisances, Ordinance No. 15 of 1862; An Ordinance to provide for the Medical wants of Immigrant Labourers in Certain Planting Districts, Ordinance No. 17 of 1880 and such others.
24. Dated April 23rd, 1866.
25. Wilson, (A.J.), fn. 3, p. 76.
26. Ibid.
27. Ibid., pp. 77-82.
28. See fn. 17.
29. Instructions of 1833, fn. 8, Article 18.
30. Ibid., Article 19.
31. Ibid., paragraph 20.
32. Ibid., paragraph 21.
33. Ibid., paragraph 22.
34. Ibid., paragraph 28.
35. Ibid., paragraph 23.
36. Ibid., paragraph 24. This provision applies to those who have married under the local customary laws.
37. Ibid., paragraph 25.
38. Ibid., paragraph 26.
39. Ibid., paragraph 27.
40. See fn. 33.
41. Ibid., paragraph 13.
42. Ibid., paragraph 14.
43. Ibid., paragraph 15.
44. Wilson, (A.J.), fn. 3.
45. Ibid., pp. 74-75.
46. This table is mine. But the facts have been culled from varying sources.

47. Mills, (L.A.), Ceylon Under British Rule (1795-1932), Oxford University Press, London, 1933, pp. 111-117.
48. See fn. 46.
49. Dr. Rockwood was the sponsor of Mr. Ponnambalam Coomaraswamy who emerged as the front runner to succeed Sir Ponnambalam Arunachalam. Mr. Coomaraswamy was Sir Ponnambalam's son. Dr. Rockwood presided at several public gatherings to sponsor Mr. Coomaraswamy's candidacy. In a surprise move, prompted by the Secretary of State for the Colonies, Sir West Ridgeway broke the family line of succession by appointing Dr. Rockwood. Not without considerable embarrassment did Dr. Rockwood decide to accept the Tamil seat. Thereafter, the government departed from the Coomaraswamy family in the next two appointments. This incident is referred to by Weiman, (J.R.), fn. 21, p. 6 and in the Hansard Report of December 11th, 1918, p. 374.
50. Weiman, (J.R.), Fn. 21, p. 89.
51. Wilson, (A.J.), fn. 3, provides this information regarding the social formation among the Burgher Community. See particularly pp. 65-66.
52. White, (H.), fn. 14, p. 59.
53. The first Kandyan representative was Hulugalle. He was followed by Moonemalle and Meedeniya. They belonged to no single family. The first Muslim representative was a merchant from Pettah. They were all appointed in 1889. Twenty-three years later, in 1912, the Colebrooke system of government came to an end with the Crewe-MacCallum reforms.
54. Weiman, (J.R.), fn. 21, p. 6.
55. See fn. 50.
56. Digby, (W.), Forty years of Official and Unofficial life in an Oriental Crown Colony; being the life of Sir Richard F. Morgan, Queen's Advocate and Acting Chief Justice of Ceylon, Madras, 1879, Vol. 1, p. 30.
57. The Revolt in the Temple, Sinha Publications, Colombo, 1953, pp. 136-140.
58. Namely; the Governor, the Queen's Advocate and the Colonial Secretary.
59. Namely; the members of the Executive Council (6), the ex-officio members appointed by the Governor (4) and unofficial members also appointed by the Governor (6). See footnotes 18-22.
60. Namely; the six members of the Executive Council and the four ex-officio members appointed by the Governor.
61. See fn. 22.
62. Mills, (L.A.), fn. 47, pp. 108-109.
63. A control of a solid block of ten votes out of a total membership of sixteen in the legislative council.
64. Except on the Military budget vote of 1865, the European unofficial members have not been known to have voted with the native un-officials on major issues of government policy. Mills, (L.A.), fn. 47.
65. See Hansard, 1918, p. 371.
66. See fns. 60 and 63.
67. Wilson, (A.J.), fn. 3.
68. Ibid., pp. 36-37.
69. See Wilson, (A.J.), The Manning Constitution of Ceylon, 1924-1931, Ph.D. thesis, London, 1956, pp. 160-176. The legislation that was required to make, the arrangements worked out under the

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Crewe-MacCallum reforms, for electoral reforms Law, was contained in Ordinance No. 13 of 1910.

70. The official members of the Legislative Council comprised of the following:

1. The Officer commanding the Armed Forces.
2. The Colonial Secretary.
3. The Attorney-General.
4. The Controller of Revenue.
5. The Colonial Treasurer.
6. The Government Agent for the Western Province.
7. The Government Agent for the Southern Province.
8. The Government Agent for the Central Province.
9. The Principal Civil Medical Officer.
10. The Governor.
- 11 & 12.

Two members to be appointed by the Secretary of State for the Colonies according to Instructions sent to the Governor from time to time.

71. Namely; the Sinhalese and the Tamil Communities.

72. Ordinance No. 13 of 1910, s.15.

73. Ibid., s.13.

74. Ibid., s.12.

75. Ibid., s.14.

76. Ibid., s.5.

77. Ibid., ss.15 and 16.

78. However, the qualifications for potential candidates under s.16 was somewhat narrower than those qualifications applying to voters which were laid down under s.15.

79. See fns. 77 and 78.

80. Ordinance No. 13 of 1910, s.15(ii)(a) to (c).

81. Ibid., s.15(d).

82. Ibid., s.15(f).

83. Ibid., s.15(h).

84. Ibid., s.15(g).

85. Ibid., s.15(i).

86. Ibid., s.15(j).

87. Ibid., s.15(k).

88. Ibid., s.15(l).

89. Ibid., s.12 (concerns the Urban European representation) and s.13 (concerns the rural European representation).

90. Ibid., s.14.

91. Denham, (E.B.), The Census of Ceylon, 1911, The Ceylon Government Printer, Colombo 1912, The volume on Population, Table XIII, p. 104.

92. Ordinance No. 13 of 1910, s.9(1)(b).

93. Ibid., s.15(i).

94. Ibid.

95. Ibid., s.16(2)(a).

96. By adding: 29353 + 3320 + 12195 + 1984.

97. Fn. 91, Table VII, p. 30.

98. Namely; the low-country Sinhalese, the Kandyan Sinhalese, the Ceylon Tamils and the Ceylon Moors.

99. fn. 91.
100. The Ceylon Reform League was formed in 1917.
101. The Ceylon National Association was formed in 1917.
102. The Ceylon Reform League and the Ceylon National Congress came together with the blessings of the Jaffna Association to form the Ceylon National Congress in 1919. See DeSilva, (K.M.), "The formation and character of the Ceylon National Congress, 1917-1919", Ceylon Journal of Historical and Social Studies, Vol. X, pp. 70-102.
103. Fernando, (Q.G.), The Minorities in Ceylon, 1926-1931, Ph.D. London, 1973, pp. 30-47 gives a vivid description of the Sinhalese reaction. The references in the footnotes give an insight into the depth of his research.
104. Denham, (E.B.), Fn. 91, p. 195.
105. Ibid. It is theoretically incorrect to take into consideration 530,983 Indian Tamils who were no more than indented labour brought into Ceylon to work in the plantation industry. They were reduced to the status of stateless persons soon after Independence.
See Caps. 349 and 350, Legislative Enactments of Ceylon, Government Printer, Colombo, 1956.
106. Denham, (E.B.), fn. 91, pp. 26 and 28 in the volume on: occupation and statistics.
107. This category consists of "All officers described as Government servants or Government clerks". Ibid., p. 26.
108. Ibid., p. 26.
109. Ibid., p. 26.
110. Ibid.
111. Ibid., Lawyers, namely the locally trained Advocates, Proctors and Notaries and the British trained Barristers.
112. Ibid., p. 28.
113. Ibid.
114. Ibid. This category includes: Veterinary Surgeons, Oculists, Dentists and Physicians.
115. Ibid.
116. Ibid.
117. Ibid., p. 28.
118. Ibid.
119. Ibid.
120. Turner, (L.J.B.), Report on the Census of Ceylon, 1921, The Government Printer, Colombo, 1923.
121. Ibid., p. 314. The categories included here correspond to those mentioned in fn. 107 for the 1911 figures.
122. Ibid., p. 316. The categories included under this heading are the same as those under fn. 111.
123. Ibid. The categories included there are the same as those to be found in fn. 114.
124. Ibid. Here schoolmasters, tutors and school teachers are mentioned.
125. Ibid., p. 314.
126. Ibid., p. 316.
127. Ibid.
128. Ibid.
129. Ibid., p. 314.
130. Ibid.

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131. Ibid.
132. Ibid.
133. Ibid.
134. Ibid.
135. Ibid.
136. Ibid.
137. Denham, (E.B.), fn. 91, p. 195.
138. Ibid., Low Country Sinhalese: 1,716,859 and Kandyan Sinhalese amount to 998,561 making a total of 2,715,420.
139. Turner, (L.J.B.), fn. 120.
140. Ibid.
141. Namely; the two un-official seats and the Kandyan seat. All three were 'selective' by the Governor. None of these "representatives" were elected.
142. Hansard, The Government Printer, Colombo, December 13th, 1916, p. 355.
143. Ordinance No. 13 of 1910, ss. 15 & 16. See fns. 77-87.
144. Statutory Rules & Orders, 1920, Vol. II, p. 1572. See paragraph 2 of the Order which brought the Legislative Council established under the Crewe-MacCallum reforms to an end.
145. Mendis, (G.C.), Ceylon Under the British, 2nd Edn., Colombo, 1948.
146. Ibid., p. 122.
147. The Revolt in the Temple, fn. 57, p. 140.
148. The speech was delivered on April 2nd, 1917, to the Ceylon National Association entitled: "Our Political Needs".
149. Fn. 57.
150. Fn. 57, p. 141.
151. Sir John Anderson died on March 24th, 1918. He was a much beloved Governor. He had succeeded Sir Robert Chalmers who had gained somenotoriety in the way he had handled the riots of 1915. Sir John was sent to pacify the Island.
152. Statutory Rules & Orders, 1920, Vol. II, p. 1572.
153. The Ceylon (Legislative Council), order-in-council, 1923. See Statutory Rules & Orders, 1923, p. 1035.
154. Fn. 3.
155. Fns. 152 and 153.
156. Fn. 152.
157. Statutory Rules & Orders, 1920, Vol. II, p.1607.
158. Sessional Paper II, 1910.
159. C.O.55.74, Paragraph 35.
160. Fn. 157, para. IV.
161. A British business man who had thus far kept out of politics - Mr. James Lochore.
162. Sir Ambalavanar Kanagasabai - who was once a nominated member of the Legislative Council under the Colebrooke Constitution.
163. Sir Marcus Fernando, an un-official member of the Legislative Council, nominated by the Governor. Under the Crewe-MacCallum reforms he represented the Karawe Community as the second Sinhalese member.
164. Order-in-Council, 1920, fn. 152, paragraph 5(I).
165. Fernando, (Q.G.), The Minorities in Ceylon, 1926-1931: With Special Reference to the Donoughmore Commission, Ph.D. London, 1973, p. 32.

166. Fn. 152, paragraph 4(I).
167. Ibid., paragraph 49.
168. Ibid., paragraph 50.
169. Ibid., paragraph 4(II).
170. Ibid., paragraph 6.
171. Ibid., paragraph 5(1).
172. Ibid., paragraph 5(2).
173. Ibid., paragraph 5(3).
174. Ibid., paragraph 19.
175. Ibid., paragraph 5(4).
176. Ibid., paragraph 17.
177. Namely, representing the commercial interests on the Island and the Low-Country Produce Association. Ibid., paragraph 17(c) and (e) respectively.
178. Namely, European electorate (Urban), European electorate (Rural) and Burgher. Ibid., paragraph 17 (a), (b) and (d) respectively.
179. Fn. 152, paras: 20 and 29 (Burgher), 26(European-Urban), 27 (European-Rural), 28(Commercial), 30(Low-Country Products Association).
180. Ibid., paras: 17(f) - (p). Namely, Western, Central, Northern, Southern, Eastern, North-Western, North-Central, Uva and Sabaragamuwa.
181. Ibid., paragraph 17(h).
182. Fn. 182.
183. Ibid., p. 32.
184. Fn. 3.
185. Wilson, (A.J.), fn. 3, pp. 276-277 says:
 - "Thus a measure could be carried through in the Legislative Council by the Government in any of the following ways:
 - (i) 14 officials + 3 Europeans + 1 Burgher + the Governor's original vote making in all 19 votes in a Council of 37.
 - (ii) 14 officials + 7 nominated un-official members and/or the Governor's original vote making in all 21 or 22 votes in a Council of 37 assuming that the 3 Europeans and 1 Burgher (communally elected members) were to vote against the Government.
 - (iii) There was---the possibility of Government attracting to its side at any time 4 members from either of the two groups of 4 communally elected members (3 Europeans, 1 Burgher) or of the 7 nominated un-official members or a mixed group of adherents from both groups. All that the Government needed was the support of 4 members from its 9 sympathisers to push through a measure in Council. There would have been little difficulty in obtaining this support.
 - (iv) Finally, the Government had the option of introducing measures which would win the support of any 4 of 23 un-official

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members of the Legislative Council. This too was not a difficult proposition for a shrewd and vigilant government."

186. Order-in-Council, 1920, fn. 152, paragraph 52(2).
187. One half of 5 ex-officio members and 9 nominated unofficial members amounts to 7. A majority should be 8.
188. Namely: 5 ex-officio, 9 nominated officials, 7 nominated un-officials under paragraph 5(1), (2) and (3) and 16 elected members. In addition the Governor who has a casting vote and an originating vote. A total of 39 or 38 votes respectively.
189. Wilson, (A.J.), fn. 3, pp. 273-274.
190. The occupant of the seat representing the commercial interests on the Island was always a European.
191. The occupant of the seat representing the low-country Products Association was a Sinhalese.
192. The 9 members elected from the Sinhalese areas.
193. The members for the Northern Province and for the Eastern Province were Tamils. Those were the Tamil speaking areas.
194. Order-in-Council, 1920, fn. 152, paragraph 8.
195. Wilson, (A.J.), fn. 3, pp. 291-335.
196. Statutory Rules & Orders, 1923, p. 1035.
197. Fernando, (Q.G.), fn. 165.
198. The Ceylon (Legislative Council) Order-in-Council, 1923, fn. 196, Paragraph V.
199. Ibid.
200. Ibid., Paragraph VI (1).
201. Ibid., Paragraph VI (2).
202. Ibid., Paragraph VII (1).
203. See fns. 173 and 174.
204. The Order-in-Council, 1923, fn. 196, Paragraph VII (2).
205. Ibid. The procedure for elections was, as before, laid down in Paragraph XXI.
206. Ibid., Paragraph VII (3). The procedure for elections was laid down in paragraph XXI.
207. Ibid., Paragraph XIX.
208. Namely, by creating a North, South, East, West and central sub-division out of the Northern province. See Ibid., sub-paragraphs XIII-XVII.
209. Ibid., sub-paragraph (x).
210. Namely, into Trincomalee Revenue District and Batticaloa Revenue District. Ibid., sub-paragraphs XXI and XXII respectively.
211. Namely, by creating a Western sub-division and an Eastern sub-division. Ibid., sub-paragraphs XXIII and XXIV respectively.
212. Namely, by creating an urban division and a rural division. Ibid., sub-paragraphs XI and XII respectively.
213. Namely, by creating an Eastern Division and a Central Division. Ibid., sub-paragraphs XIX and XX respectively.
214. Ibid., sub-paragraph VIII.
215. Ibid., sub-paragraph IX.
216. Ibid., sub-paragraph XXVII.
217. Ibid., sub-paragraph XXVIII.

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218. Namely, Colombo Town (North), Colombo Town (South) and Colombo District. Ibid., sub-paragraphs (V - VII).
219. The former two European seats - Urban and Rural were preserved. Ibid., sub-paragraphs 1 and 11 respectively.
220. Ibid., sub-paragraph 1V.
221. Ibid., sub-paragraph 111.
222. Ibid., paragraph XXX which reads: "Every member of the Ceylon Chamber of Commerce, not otherwise disqualified, shall be qualified to have his name entered on the register for the Commercial Electorate".
223. See fn. 186.
224. Order-in-Council, 1923, fn. 196, paragraph LIV (1).
225. Ibid., paragraph LIV (2).
226. Ibid., paragraph VI (1) (i) & (ii).
227. Ibid., paragraph VI (2).
228. See fn. 187.
229. See fns. 169 and 170.
230. Order-in-Council, 1923, fn. 196, paragraph VI (2).
231. For a comprehensive analysis of the forces and the circumstances which brought about the Ceylon National Congress, see: de Silva, (K.M.), fn. 102.
232. See fn. 173.
233. deSilva, (K.M.), "The Reform and Nationalist Movements in the Early Twentieth Century", History of Ceylon Vol. 111, Edt. by de Silva, (K.M.), University Press Board of Ceylon, Colombo, 1973, p. 402.
234. Ibid., pp. 402-403.
235. Sir Arunachalam claimed that at the point of the formation of the Ceylon National Congress, the Sinhalese leaders Mr. (later Sir) James Pieris and E.J. Samarawickreme had given an undertaking that when constitutional reforms were discussed, the Sinhalese group in the new body - the congress - would support the idea of a communal seat for the Tamils in the Western province. In 1921, the Sinhalese group maintained that the undertaking was a broad one and was merely to accept a scheme put forward by the Jaffna Association which excluded any alteration of the 'territorial' concept of representation which indeed was a fundamental point upon which the Congress would not budge. See deSilva, (K.M.), fn. 231, p. 93 etc.
236. Fn. 233.
237. Ibid., p. 400.
238. Order-in-Council, 1923, fn. 196, Article XIX (x).
239. An exhaustive exposition of the social upheavels have been presented by Fernando, (Q.G.), fn. 165, chapter II.
240. Ibid., p. 95.
241. Ibid.
242. Ibid., p. 98.
243. Ibid.
244. Fn. 242.
245. Maheswari, 3rd Edn., Gunasena & Co. Ltd., Colombo, 1959, particularly pp. 6-12.
246. Ibid., p. 9.

Chapter 5

247. Order-in-Council, 1920, fn. 152, Article 13.
248. Order-in-Council, 1923, fn. 196, Article XV.
249. Mills, (L.A.), Ceylon Under British Rule 1795-1932, Oxford University Press, 1933, p. 267. See also The Report of the Special Commission on the (Ceylon) Constitution, H.M.S.O., 1928, Cmd. 3131, p. 82.
250. Ibid.
251. The Sinhalese Constituencies were: Colombo Town (North), Colombo Town (South), Colombo Town, Negombo, Kalutara, Central Province (urban), Central Province (rural), Southern Province (Eastern), Southern Province (Central), Southern Province (Western), North Western Province (Western), North Western Province (Eastern), North Central Province, The Uva, Kegalle and Ratnapura. See Order-in-Council, 1923, fn. 196, Article XIX.
252. The Tamil Constituencies were: Western Province (Ceylon Tamil), Northern Province - North, South, West, East and Central, Trincomalee and Batticaloa. See Order-in-Council, 1923, fn. 196, Article XIX.
253. Order-in-Council, 1923, fn. 196, Article VII (3).
254. Ibid., Article VII (2).
255. Ibid., Article XIX, (i), (ii) & (iii). Apart from the European (Rural) and European (Urban) The Commercial seat traditionally was a European seat because the electorate was limited to the Ceylon Chamber of Commerce. The latter was dominated, at the time, by the European community.
256. Ibid., Article XIX (iv).
257. Ibid., Article VI (1). Add the Governor to the list, making it 6.
258. Ibid., Article VI (2).
259. Ibid., Article VII (1).

FOOTNOTES FOR CHAPTER 6

1. The Commissioner's commenced their hearings in 1927.
2. The reforms were introduced in the form of a new Constitution in 1931.
3. See chapter 5, section iv(b).
4. Mills, (L.A.), Ceylon Under British Rule 1795-1932, Oxford University Press, 1933, p. 269. Also Ceylon Report of the Special Commission on the Constitution, H.M.S.O., London, 1928, Cmd. 3131, p. 88.
5. The Constitution was contained in The Ceylon (State Council) Order-in-Council, 1931, Statutory Rules and Orders, 1931, H.M.S.O., London, 1931, p. 1448.
6. Jeffries, (Sir Charles), Ceylon The Path to Independence, Pall Mall Press, London, 1962.
7. Ibid., p. 47.
8. See fn. 5.
9. Cooray, (J.A.L.), Constitutional and Administrative Law of Sri Lanka, Hansa Publishers Ltd., Colombo, 1973, pp. 43-53.
10. The Ceylon (Legislative Council) Order-in-Council, 1923, Statutory Rules & Orders, 1923, H.M.S.O., London, 1923, p. 1035, Article VI gives six ex-officio members and seven nominated official members.
11. Order-in-Council, 1931, fn. 5, Article 7(a).
12. Ibid., Article 5.
13. Order-in-Council, 1923, fn. 10, Article L11.
14. Ibid., Article L111.
15. Order-in-Council, 1931, fn. 5, The Second Schedule:
 - I. Chief Secretary: External Affairs, Defence, The Public Services.
 - II. Legal Secretary: The Administration of Justice, Drafting of Legislation, Legal Advice to Government, Criminal prosecutions and civil proceedings on behalf of the Crown, Elections to the State Council, Functions of the Public Trustee.
 - III. Financial Secretary: Finance, Supply, Stores and Printing, Establishments, Customs, Estate Duty and Stamps, Valuations on behalf of Government.
16. Order-in-Council, 1931, fn. 10, The First Schedule:
 - I. Home Affairs: Police, Prisons, Excise and Local Option, Functions of the Government Analyst, Religious Associations and Temporalities, Subjects of internal administration not otherwise allotted.
 - II. Agriculture and Lands: Lands, Forests, Irrigation, Agriculture, Veterinary Services, Surveys and Meteorology, Co-operative Societies.
 - III. Local Administration: Local Government, Mines and Salt, Fisheries, Acquisition of land for public purposes.
 - IV. Health: Medical Services, Sanitary Services, Housing.
 - V. Labour, Industry and Commerce: Labour, Industrial welfare, Commerce, Functions of the Registrar-General, Poor Relief.

VI. Education: Education, Museums, Archaeology.

VII. Communications and Works: Public Works, Railways, Electrical Undertakings, Posts and Telegraphs, Ports and Harbours.

17. Order-in-Council, 1920, Statutory Rules & Orders, 1920, Vol. II, p. 1572, Article 52(2), and Order-in-Council 1923, fn. 10 Article LIV.
18. Ceylon Report of the Special Commission on the Constitution, H.M.S.O., 1928, Cmd. 3131, pp. 72-73.
19. Order-in-Council, 1931, fn. 5., Article 72.
20. Ibid., Article 22.

There was only one occasion when paramountcy was invoked. Another occasion when its use was contemplated but the measure was passed even without the unofficials realizing that the Governor intended to exercise his rights. The final occasion when the unofficials were informed that the Secretary of State had given instructions that the right be exercised if the un-officials proved recalcitrant and insisted on throwing out the measure. On this occasion the unofficials gracefully gave in without provoking an incident.

These are the details: On July 5, 1929 the Government moved a resolution regarding "increase of import duties" as a matter of urgency. Notice of this had been given by the acting Colonial Secretary on the day previous, that is the 4th of July, 1929, to the effect that he will introduce a resolution to confirm the order of his Excellency the Governor as regards a surcharge on customs revenue as a matter of urgency (refer Hansard 1929, p. 623).

On the 5th of July, 1929 a resolution was introduced but the un-officials opposed it to a man. There were 27 of them present, including the European representatives. They all voted against the resolution. While those who voted for it were only the 12 official members (see Hansard 1929, p. 665 for the Division list). The acting Colonial Secretary then declared that he was authorized by his Excellency the Governor to declare the resolution as a matter of paramount importance (Hansard 1929, p. 666).

The second incident was where the use was contemplated and the measure was passed without the unofficials even realizing it. For the details (refer Hansard 1922, p. 577). On the 28th of September, 1929 at the Committee stage of the Supply Bill for 1929-30 the Clerk called Head 66. This head related to 1. Passages of Officers etc. 2. Holiday warrants and, 3. Miscellaneous services rendered by the railway.

The select Committee had recommended that the amounts allocated to these items by the Government be deleted, but the acting Colonial Secretary, when the Clerk called 'Head 66', moved that the amounts be restored. He added "the house is aware that the Government attaches much importance to the restoration of these items". (Hansard 1929, p. 1233). And he went on to add later that the Secretary of State had stated inter alia that the withdrawal or reduction of the votes for passages and holiday warrants, without warning and without inquiry, should

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properly be resisted, if necessary, by the use of the Governor's reserve powers. The necessity to use the Governor's special powers, however, did not arise as a motion of the acting Colonial Secretary for the restoration of the cut was passed with twenty-six voting for it and eleven against (see Hansard 1929, pp. 1277, 1279 and 1280).

See also: Jennings, (Sir Ivor.), "The Emergency Procedure of the State Council" The University of Ceylon Review 1943, Vol. 1, No. 1, p. 8 and Weerawardana, (I.D.S.), "The Governor's Reserve Powers During the First State Council", The University of Ceylon Review 1949, Vol. VII, p. 41.

21. Fn. 18, p. 76.
22. Ibid., Article 23(2).
23. Ibid.
24. Ibid., Article 23(1) and (2).
25. Ibid., Article, Secretary of State for the colonies has a power to refuse legislations. See Order-in-Council, 1931, Fn. 5, Article 73.
26. Ibid., p. 72.
27. Ibid.
28. Fn. 18, p. 99.
29. London County Council.
30. An excellent historical survey of the Nationalists lobby is to be found in The Revolt in the Temple, Sinha Publications, Colombo 3, 1953, Chapter III. Fernando, (Q.G.), The Minorities in Ceylon, 1926-1931: With special reference to the Donoughmore Commission. Ph.D., London, 1973, chap. II.
31. Fn. 18, pp. 47-48.
32. Order-in-Council, 1931, fn. 5, Article 7(b).
33. Ibid., Article 7(c).
34. Ibid., Article 7(a).
35. Ibid., Article 30(1).
36. Fn. 16.
37. Order-in-Council, 1931, Fn. 5, Article 34(1).
38. Ibid., Article 34(2).
39. Fn. 16.
40. See fn. 46.
41. This must be because the first speaker is elected before the formation of the Executive Committees - See Order-in-Council, 1931, fn. 5, Article 30(1).
42. Order-in-Council, 1931, fn. 5, Article 34(2).
43. The ex-officio members are limited to representing their portfolios as detailed in the Second Schedule of the Order. Ibid., Article 33.
44. See fn. 16.
45. Order-in-Council, 1931, fn. 5, Article 30(2).
46. Ibid., Article 34(2).
47. Ibid., Article 35(1).
48. Ibid., Article 35(2).
49. Ibid.
50. Fn. 18, p. 89.
51. Ibid.
52. Ibid., p. 89.

53. Ibid., p. 90.
54. Representation of the People (Equal Franchise) Act, recognised Universal Adult Suffrage in the U.K. in 1928. 18 & 19 Geo. 5, chap. 12.
55. Fn. 52.
56. See fn. 30.
57. Wilson, (A.J.), Politics in Sri Lanka, 1947-1973, MacMillan & Co. Ltd., 1974, pp. 46-52.
58. deSilva, (K.M.), "The History and Politics of the Transfer of Power", History of Ceylon, Vol. 3, University of Ceylon Press Board, pp. 489-533.
59. Messrs: E.W. Perera, S.W.R.D. Bandaranaike and R.S.S. Gunawardene representing the Ceylon National Congress. Ibid., p. 493.
60. Sir Ponnambalam Ramanathan, representing the Tamil Mahajana Sabhai. Ibid., p. 493.
61. Ibid., p. 493.
62. All these matters with interesting asides could be found in Jeffries, (Sir Charles E.), fn. 6, Chapter VI.
- 62a. Fernando, (Q.G.), fn. 30.
- 62b. These were subsequently published by H.M.S.O., London, 1929, Cmd. 3419.
63. Fn. 5.
64. See fn. 54.
65. Order-in-Council, 1931, Fn. 5, p. 1482.
66. Order-in-Council, 1931, Fn. 5, p. 1484.
67. Section 7, ibid., p. 1485.
68. Ibid.
69. Section 8, ibid.
70. Section 9, ibid., p. 1486.
71. Ceylon Report of the Commission on Constitutional Reform, H.M.S.O., 1945, Cmd. 6677, p. 59, Paragraph 220.
72. See fns. 66-70.
73. The Ceylon (Parliamentary Elections) Order-in-Council, 1946, Statutory Rules and Orders, 1946, Vol. 1, H.M.S.O., 1947, p. 2279.
74. Jeffries, (Sir Charles), fn. 6, p. 60.
75. See fn. 6.
76. Jeffries, (Sir Charles), fn. 6, p. 67 mentions 708, 318 persons as representing 59% of the electorate at the 1931 elections. Therefore, 100% must have been 1,200,539.
77. Fn. 18, p. 80.
78. Jeffries, (Sir Charles), fn. 6, pp. 68 and 76.
79. Ibid., p. 68.
80. Fn. 71, p. 54, paragraph 190.
81. Fn. 71, p. 58, paragraphs 214 and 215.
82. Fn. 71.
83. This table was constructed from the data made available to the Soulbury Commission, see fn. 71.
84. See recommendation 223, fn. 71, p. 60.
85. Fn. 73.
86. This table was culled from the figures worked out by Dr. A. J. Wilson. Wilson, (A.J.), fn. 57, p. 170.
87. Act No. 18 of 1948. The Act was amended by Act No. 40 of 1950 and Act No. 18 of 1948. But the amendments had no effect on the Indian question.

Chapter 6

88. Act No. 48 of 1949.
89. Fn. 87, s.4(1)(a).
90. Ibid., s.4(1)(b).
91. The first Indian Tamil came to Ceylon in 1837. But systematic recruiting did not commence until 1839. The Indian Labour immigration was terminated in 1939. In 1946, there were about 700,000 Indian Tamils on the Island. See fn. 71, paragraphs 123-124.
92. Act No. 18 of 1948.
93. Ibid., s.4(2)(a).
94. Ibid., s.4(2)(b).
95. Ibid., Part III, ss. 11-17. In the Indian and Pakistani (Residents), Citizenship Act, Act No. 3 of 1949, it was provided by sections 3 and 4 that Residents of Indian and Pakistani origin may under certain conditions apply for citizenship by registration. The Act came into effect soon after it received the assent on February 29th, 1949 and was limited in its period of application for two years only (s.5). The Act attracted much litigation. See also Act No. 37 of 1950 and Act No. 45 of 1952 which amended the Act No. 3 of 1949 in minor aspects.
- 95a. Ibid., s.11(2)(b).
96. Fn. 88.
97. Fn. 88, ss. 2 and 3.
98. Fn. 88, ss. 4 and 5.
99. Fn. 86.
100. Sir Charles Jeffries discusses the history of the Donoughmore reforms 1936-1947, at chapter X. See fn. 6.
101. Donoughmore Commission Report, fn. 18.
102. Ibid., p. 31.
103. The Ceylon Independence (Constitution) Order-in-Council, 1946, Statutory Rules and Orders, Vol. 1, H.M.S.O., 1947, p. 2248. s. 12 states: "Subject to the provisions of this order, a person who is qualified to be an elector shall be qualified to be elected or appointed to either chamber". Qualification for voters was made equivalent to those that were found under the Donoughmore Constitution. See The Ceylon (Parliamentary Elections) Order-in-Council, 1946, ibid., p. 2279, sections 4-7.
104. Namely, the electors and the elected.
105. Jennings, (Sir Ivor), and Tambiah, (H.W.), The Dominion of Ceylon, Greenwood Press, Connecticut, 1970.
106. Fn. 71, chapter VII, p. 38.
107. Ibid., paragraph 119.
108. These figures have been worked out from a Table to be found in The Census of Ceylon, 1953, Report published by the Department of Census and Statistics, Colombo, 1957, Volume I, p. 191.
109. The 21.6% of the Tamil population is comprised of 11.0% Ceylon Tamils and 10.6% Indian Tamils. See fn. 108.
110. These figures are originally from Kearney, (R.N.), Communalism and Language in the Politics of Ceylon, Duke University, Durham, 1967, p. 9 and adopted by Phadnis, (U.), Religion and Politics in Sri Lanka, Hurst, London, 1976, p. 5. The 1946 Census reports do not provide such a breakdown.

111. Department of Census and Statistics of Ceylon, Preliminary report on the socio-economic survey of Ceylon, 1969-70, published in 1971, p. 7, Table 50.
Previous census reports have not worked out such a table. In using the figures worked out for 1969-70 one is making an assumption that these figures are correct for 1946. The point, however, is this. Due to lack of mobility and education, there could have been a higher concentration of the Rural Population embracing all the religions, than what is represented in the table. That would only have strengthened the socio-economic argument further. For, that would have given the Soulbury Commissioners a greater need to recommend the enactment of the entrenched clauses in the Constitution.
112. These tables were formulated from a writing by Tambiah, (S.J.), "Ethnic Representation in Ceylon's Higher Administrative Services 1870-1946", University of Ceylon Review, Vol. 13, 1955, pp. 133-134.
113. Census of Ceylon for 1953, Department of Census and Statistics, The Government Printer, 1957, Vol. 3(i), p. 606.
The figures are not available for the year 1946. That Census did not produce such a classification. These figures for 1953 could if at all represent a greater degree of English literacy than what it was in 1946. The difference in reality between these figures and English literacy at 1946 could be very small.
114. Fn. 71, recommendation 242(iii) p. 64.
115. Fn. 103.
116. Fn. 103, s.29(4).
117. Ibid., s.29(2).
118. Fn. 106.
119. Particularly with reference to the Language issue. See Chapter 4
120. See in Chapter 4, concerning Language, the discussion on the Kodeswaran Case (1969) 72 New L.R. 337 (P.C.). See also Cooray, (J.A.L.), Constitutional and Administrative Law of Sri Lanka, Hansa Publishers Ltd., Colombo, 1973, pp. 197-198.

FOOTNOTES FOR CHAPTER 7

1. de Silva, (K.M.), History of Ceylon, Vol. 3, University of Ceylon Press Board, p. 529.
2. Statement of Policy on Constitutional Reform, Cmd. 6690, H.M.S.O., London, 1945, paragraph 4.
3. Fn.1.
4. Ibid., p. 530.
5. Ibid., pp. 530-531.
6. Report of the Commission on Constitutional Reform, H.M.S.O., London, 1945, Cmd. 7667.
7. Fn. 1, p. 531.
8. The Ceylon (Constitution) Order-in-Council, 1946, Statutory Rules and Orders, Vol. 1, H.M.S.O., 1947, p. 2248.
9. Ceylon Sessional Papers 111, 1948, Ceylon Government Press, 1948, pp. 9-37.
10. Jeffries, (Sir Charles), Ceylon - The Path to Independence, Pall Mall Press, London, 1962, pp. 93-127, Jennings, (Sir Ivor), The Dominion of Ceylon, Greenwood Press, Connecticut, 1970.
11. Fn. 8, s.7.
12. Ibid., s.74.
13. Ibid.
14. Fn. 8.
15. Fn. 8, s.11(5).
16. Ibid., s.27(1).
17. Ibid., s.8(1).
18. Ibid., s.9(2).
19. Ibid., s.10(1).
20. Ibid., s.8(2).
21. Ibid., s.73.
22. Ibid., s.13(2) and (3).
23. Ibid., s.13(1).
24. Fn. 8.
25. Parliament Act, 1911, 1 & 2 Geo. 5 as amended by Parliament Act, 1949, 12, 13 and 14 Geo. 6. Sections 32 and 34 of the Soulbury Constitution is nearly verbatim of ss.1(1) and 2(1) of the Parliament Act of 1911.
26. Fn. 8.
27. See fn. 25.
28. Ceylon (Constitution and Independence) Amendment Act, Act No. 36 of 1971.
29. Fn. 8, Section 13(3)(f).
30. Namely, 1948-1972.
31. The Ceylon (Constitution) Amendment Act, Act No. 29 of 1954 and The Ceylon (Constitution) Amendment Act, Act No. 4 of 1959 were concerned entirely with the Indian issue. Act No. 71 of 1961, Act No. 8 of 1964 and Act No. 29 of 1970 introduced minor changes of form to the Soulbury Constitution.
32. Act No. 18 of 1948.
33. Act No. 48 of 1949.
34. Fn. 31.
35. Chapter 6, Section V.

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36. The leader of the Lanka Samasamaja Party, Dr. N.M. Perera. Parliamentary Debates (House of Representatives), Ceylon Government Printer, 1948, August 19th, 1948.
37. Ibid., Col. 1685.
38. Ibid., Col. 1686.
39. Ibid., Cols. 1691-1692.
40. (1952) 53 N.L.R. 25.
41. Fn. 8, s.29.(2)(b) & (c).
42. Fn. 40, p. 46.
43. Ibid.
44. The case is reported as Kodakan Pillai v. Mudanayake, (1953) 54 N.L.R. 433 (P.C.).
45. Ibid., p. 439.
46. Ceylon Report of the Commission on Constitutional Reform, H.M.S.O., 1945, Cmd. 6677, Chapter X.
47. Soulbury Commission Report recommended the retention of the franchise recommended by the Donoughmore Commission.
48. Parliamentary Debates (House of Representatives), 2nd March, 1950, Government Printer, Colombo, 1950, Col. 1779.
49. Act No. 29 of 1954.
50. Act No. 35 of 1954, Act No. 36 of 1954 and Act No. 4 of 1959.
51. This section has been previously published as a part of an article Marasinghe, (M.L.), "Ceylon - A Conflict of Constitutions", (1971) International and Comparative Law Quarterly, pp. 645-650.
52. [1964] 2 W.L.R. 1301, Also [1964] 2 All E.R. 785; [1965] A.C. 172 and 66 N.L.R. 73.
53. S.41 of the Bribery Amendment Act of 1958, Act No. 40 of 1958.
54. S.55 of the Ceylon (Constitution) Order-in-Council, which is now the Constitution of Ceylon. That section reads: "the appointment---of Judicial Officers is hereby vested in the Judicial Service Commission."
55. Fn. 8, section 18.
56. Ibid., section 29(4).
57. S.29(4) of the Constitution, which reads: "In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty-in-Council in its application to the Island:
Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present).
Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any court of law."
58. [1964] 2 W.L.R. 1310, p. 1312.
59. Ibid., p. 1313.
60. A-G for New South Wales v. Trethowan [1932] A.C. 526; compare McCawley v. The King [1920] A.C. 691.

Chapter 7

61. Harris and Another v. Minister for the Interior and Another, 1952(2) S.A.L.R. 448(A.D.) and New Modderfontein Gold Mining Co. v. Transvaal Provincial Administration 1919 A.D. 367 (both decisions are from South Africa).
62. [1964] 2 W.L.R., 1301, p. 1307.
63. Fn. 63.
64. Fn. 62.
65. House of Commons (Debates), Hansard, H.M.S.O., 1943, dated 26th May, 1943, Cols: 1555 to 1557.
66. Ibid., col. 1557.
67. Fn. 65, col. 1556, para. 1.
68. Fn. 65, col. 1557.
69. The Constitutional proposals were delivered to Sir Andrew Caldicott, the Governor on 2nd February, 1944. See Appendix 1 to the Soulbury Report, fn. 46.
70. Jeffries, (Sir Charles), fn. 10, pp. 90-91.
71. House of Commons (Debates) Hansard, H.M.S.O., 1944, dated 5th July, 1944, col. 1143.
72. Fn. 10.
73. Ibid., p. 94.
74. The Ministers did meet the Commissioners socially, but not in their official capacity. Sir Oliver Goonetilleke was in charge of several field trips that the Commissioners made and Hon. D. S. Senanayake did meet the Commissioners on several social occasions. Jeffries, (Sir Charles), fn. 10, p. 95.
75. See The Report, fn. 46, pp. 112 and 139 for these dates. Page 139 gives a valuable itinerary which shows the areas of the Island which the Commissioners had visited.
76. Ibid., pp. 112-118 where a summary of the recommendations are found.
77. Ibid., paragraph 32.
78. Jeffries, (Sir Charles), fn. 10 above gives a very valuable summary of the White Paper, pp. 103-104.
79. House of Commons (Debates) Hansards, H.M.S.O., 1945, 31st October 1945, Cols. 431-432, col. 432.
80. November 8th and 9th, 1945.
81. See Hansard, State Council Debates, Government Printer, Colombo, 1945, for November 8th and 9th, 1945.
82. Statutory Rules and Orders, Vol. 1, 1946, H.M.S.O., 1946, pp. 2248-2277.
83. House of Commons (Debates) Hansard, H.M.S.O., 1947, date 21, November, 1947, cols. 1477-1524.
84. Liyanage v. R. [1967] 1 A.C. 259; British Coal Corporation v. R. [1935] A.C. 500; Edwards v. A-G for Canada [1930] A.C. 124; Patel v. Comptroller of Customs [1966] A.C. 356; Dullewe v. Dullewe [1969] 2 A.C. 313.
85. Marshall, (G.), Parliamentary Sovereignty and the Commonwealth, Clarendon Press, Oxford, (2nd Edn.), 1962.
86. Ibid., p. 125.
87. Fn. 83.

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88. Ibid., col. 1483.
89. Ibid.
90. As Assistant Under-Secretary of State at the Colonial Office, Sir Charles Jeffries became a member of the British team that conducted the negotiations during the final, and indeed the most crucial stage of transfer of power, in 1946.
91. Fn. 10.
92. Ibid., p. 115.
93. 11 Geo. 6. ch. 7.
94. Statutory Rules and Orders, Vol. 1, 1947, H.M.S.O., 1948, p. 204.
95. Fn. 10, Chapter XIII.
96. Fn. 83, col. 1485.
97. Fn. 62.
98. I have dealt with this in detail in an earlier writing, See fn. 51.
99. Dr. Colvin R. de Silva, a leading constitutional lawyer who subsequently became the Minister of Constitutional Affairs. In that capacity he became the Minister in charge of drafting the 1972 Constitution. At the time of the debate in question, he was the chief opposition spokesman on The Bribery Commissioner case. Parliamentary Debates (House of Representatives), Government Printer, Colombo, 1969, August 16, 1969, cols. 1153-1176.
100. Parliamentary Debates, ibid., Col. 1158.
101. Fn. 99.
102. Fn. 109.
103. Ibid.
104. Per Lord Pearce, The Bribery Commissioner v. Pederick Ranasinghe [1964] 2 W.L.R. 1307.
105. Ibid.
106. The debate on August 16, 1969, was on the appointment of a select Committee to draft a new constitution, bearing in mind the observations made by the Privy Council in The Bribery Commissioner case.
107. Consisting of a collection of left-wing political parties under the banner of the United Left Front, led by the Hon. Sirimavo Bandaranaike who was then the leader of the opposition.
108. Parliamentary Debates (House of Representatives), Fn. 99, cols. 1164-1175.
109. Consisting of a collection of right-wing political parties led by the Hon. Dudley Senanayake as the Prime Minister. The latter was the leader of the United National Party which was responsible for negotiating both the independence of the country and the Constitution now in question.
110. Throughout the debate the Minister of State, the Hon. J. R. Jayawardene, on behalf of the Government pointed out that Lord Pearce's remarks about the unalterability of section 29 were limited to the present Constitution, and not if a new constitution was enacted. See the passage from the Parliamentary Debates, fn. 99, cols. 1158-1160, which brings out this point.

111. In Ibralebbe v. The Queen [1964] A.C. 900, decided on December 11, 1963. The judgment in The Bribery Commissioner case was delivered on May 5, 1964.
112. Ibid., p. 923.
113. Ibid.
114. Fn. 99.
115. The Privy Council in Ibralebbe v. The Queen.
116. Addressing the Hon. Speaker of the House.
117. i.e., The Bribery Commissioner, fn. 111.
118. Fn. 109.
119. The Manifesto of the United Left Front, reprinted by the Government Printer, Colombo, Ceylon.
120. Parliamentary Debates (House of Representatives), June 14, 1970, Government Printer, Colombo, 1970.
121. The words within brackets are mine. The Island of Ceylon was known as "Sri Lanka" prior to its conquest by the Portuguese in 1505. The Dutch and the British continued to use that name. The nationalists had always asked for a change of name to "Sri Lanka". It was therefore expected that the new Constitution would, inter alia, bring about that change.
122. The proceedings of July 19, 1970, at the Navarangahala, Ceylon Government Printer, Colombo, Ceylon, p. 4.
123. The Prime Minister having first referred to the speech from the throne (see fn. 120), and its adoption by the House of Representatives on June 24, 1970, invited the members of the House in the following passage from her communication: "Now Therefore I, Srimavo Ratwatte Dias Bandaranaike, Prime Minister, do hereby call upon you...Member of Parliament, to attend a Meeting of the Members of the House of Representatives at the Navarangahala, Royal Junior School, Colombo on the 19th day of July at 11:00 a.m. to consider and adopt the following Resolution: ..." (The Communication Convening the Meeting - published at p. 3 of The Proceedings of July 19, 1970, at the Navarangahala - Ceylon Government Printer, Colombo, Ceylon).
124. Fn. 122.
125. The proceedings of July 19, 1970, at the Navarangahala, Ceylon Government Printer, Colombo, Ceylon, p. 5.
126. The leader of the Marxist, Trotskyite, Lanka Samasamaja Party and the Minister of Finance of the coalition Government at the time.
127. The Proceedings of July 21st, 1970, at the Navarangahala, Ceylon Government Printer, Colombo, 1970, p. 507.
128. The White Paper containing the procedure laid down for the working of the Constituent Assembly could be found at [1971] 20 I.C.L.Q. pp. 673-674.
129. Fn. 127.
130. [1971] 20 I.C.L.Q. pp. 673-674.
131. Ibid., p. 673, para. 1.
132. Ibid., para. 2.
133. Ibid.
134. Ibid., para. 3.
135. Ibid., para. 4.
136. Ibid.

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- 137. Ibid., para. 5.
- 138. Ibid., para. 6.
- 139. Ibid., para. 7.
- 140. Ibid.
- 141. Ibid., para. 8.
- 142. Fn. 8.
- 143. Fn. 9.

FOOTNOTES FOR CHAPTER 8

1. Cooray, (J.A.L.), Constitutional and Administrative Law of Sri Lanka, Hansa Publishers Ltd., Colombo, 1973.
2. A number of articles in the 1978 Constitution have been adopted from the 1972 Constitution.
3. The Constitution of Sri Lanka, Dept. of Government Printing, Sri Lanka, 1972, the preamble, p. 22.
4. The Constitution of the Democratic Socialist Republic of Sri Lanka, Dept. of Government Printing, Sri Lanka, 1978.
5. Constituent Assembly (official Report), Dept. of Government Printing, Ceylon, 1971, March 14th, 1971, col. 2226.
6. Ibid., March 16th, 1971, cols. 379-380.
7. Fn. 3, p. 3.
8. See chapter 7, sections II(d), III and IV.
9. Fn. 3, Article 129(1) and (3).
10. Fn. 3, Article 130(2).
11. Fn. 4.
12. Ibid., p. 3.
13. Ibid., Articles 107(1) and 111(2).
14. Ibid., Article 107(2).
15. Fn. 3, Article 125.
16. Fn. 8.
17. Fn. 3, Articles 48 and 49.
18. Fn. 4, Article 80(1).
19. Fn. 3, Article 92(1).
20. Ibid.
21. Ibid., Article 92(2).
22. Ibid., Article 94(1).
23. Ibid., Article 94(2).
24. Fn. 3.
25. Fn. 4.
26. Fn. 4, p. 30.
27. Fn. 4, Article 43(3).
28. Fn. 4, Article 44(1).
29. Fn. 4, Article 32(3).
30. Fn. 4, Article 32(2).
31. Fn. 4, Article 44(2).
32. Fn. 4, Article 43(1).
33. Article 44(2) reads:

"The President may assign to himself any subject or function not assigned to any Minister under the provisions of paragraph (1) of this Article ---, and may for that purpose determine the number of Ministries to be in charge, ---."
34. The Ministers of the Government of the United States are not answerable to the House or to the Senate for Policy, although they may be brought before Congressional Committees for hearings.
35. This refers to the Hegelian thesis of dialectics where each reaction between two opposing social elements result in a higher synthesis, producing its own antithesis.

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36. Fn. 8.
37. [1964] 2 W.L.R. 1301.
38. Fn. 3.
39. Fn. 3, Article 46(1).
40. Fn. 5, July 4th, 1971, cols. 2852-2854.
41. Fn. 3, Article 54(2)(c).
42. Fn. 40.
43. Fn. 3, Article 54(2)(b).
44. Fn. 3, Article 54(2)(c).
45. Fn. 3, Article 54(2)(d).
46. Fn. 3, Article 54(2)(e).
47. Fn. 3, Article 54(2).
48. Fn. 3, Article 55(2).
49. Fn. 5, July 4th, 1971, col. 2852.
50. Fn. 3, Article 55(4).
51. Fn. 3, Article 51(5).
52. Fn. 5, July 4th, 1971, col. 2855.
53. Ibid., col. 2857.
54. Subsequently Mr. Jayawardene became the President of the Republic under the 1978 Constitution.
55. Fn. 5, July 4th, 1971, Cols. 2868-2869.
56. Ibid., col. 2894.
57. Fn. 109, Article 61(2).
58. Ibid., Article 61(1).
59. Ibid., Article 54(1).
60. The author of the book on the 1972 Constitution, see fn. 1.
61. Fn. 4, Article 120.
62. Ibid., Article 118.
63. Fn. 55.
64. Fn. 4, Article 121(2).
65. Fn. 4, Article 122(1)(c).
- 65a. Fn. 4, chap. XIII.
- 65b. Fn. 4, Article 1.
66. Fn. 4, Article 3.
67. Fn. 4, Article 2.
68. Fn. 4, Article 6.
69. Fn. 4, Article 7.
70. Fn. 4, Article 8.
71. Fn. 4, Article 10.
72. Fn. 4, Article 11.
73. Fn. 4, Articles 30(2) and 62(2).
74. Fn. 4, Article 83(a).
75. Fn. 4, Article 86.
76. Fn. 4, Article 85(2).
77. Fn. 4, the proviso to Article 85(3).
78. As the country was known until the midnight of May 21st, 1972.
79. As the country became known after the commencement of the 22nd May, 1972.
80. Fn. 3, Article 6, which is also chap. II.
81. Fn. 4, Article 9, which is also chap. II.
82. Act No. 33 of 1956.
83. Act No. 28 of 1958.

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84. Fn. 3, Articles 7 and 8.
85. Fn. 3, Article 11.
86. Act No. 3 of 1961.
87. Fn. 4.
88. Fn. 4.
89. Fn. 4, Article 19.
90. Fn. 4, Article 22.
91. Fn. 4, Article 23.
92. Fn. 4, Article 24.
93. Fn. 4, Article 23.
94. The Constitution of Ceylon, sessional paper III., 1948, Part VII.
95. Ibid., Article 58.
96. Fn. 3, Article 105.
97. Fn. 94, Article 57 defined a public officer as: "every person holding office under the Crown in respect of the Government of the Island.
98. Fn. 3, Article 111.
99. Fn. 3, Article 112.
100. Fn. 3, Article 120(1).
101. Fn. 3, Article 120(2).
102. Fn. 4, Article 54.
103. Namely the 1978 Constitution, fn. 4.
104. Fn. 4, Article 56.
105. Fn. 4, Article 56(2).
106. Fn. 94, Part VIII.
107. Fn. 94, section 66 (Soulbury Constitution); fn. 3, Article 85 (1972 Constitution) and fn. 4, Article 149 (1978 Constitution).
108. Fn. 94, section 68 (Soulbury Constitution); fn. 3, Article 87 (1972 Constitution) and fn. 4, Article 151 (1978 Constitution).
109. Fn. 94, section 67 (Soulbury Constitution); fn. 3, Article 86 (1972 Constitution) and fn. 4, Article 150 (1978 Constitution).
110. Fn. 94, section 70 (Soulbury Constitution); fn. 3, Article 89 (1972 Constitution); fn. 4, Article 153 (1978 Constitution).
111. Mr. P.M.W. Wijesuriya.
112. Ordinance No. 25 of 1947. See also cap. 40, Legislative Enactments of Ceylon, 1967.
113. Act No. 8 of 1959.
114. Fn. 3, Article 134(2).
115. Fn. 94, section 3.
116. Fn. 3, Article 20.
117. Fn. 4, Article 155(1).
118. Ibid. The Parliamentary control of a declaration of emergency is to be found in Article 155, sub-articles (4) - (11).
119. Hon. Dr. Colvin R. de Silva, M.P.
120. Fn. 5, May 15, 1971, col. 974.
121. Fn. 3, chap. V.
122. Cooray, (J.L.), fn. 1, p. 545.
123. Fn. 5, May 15th, 1971, cols. 987-988, where Mr. J. R. Jayawardene, M.P. (as he then was) presents a list of other constitutions containing statements of "principles of state policy".
124. Fn. 121.
125. Fn. 4, Article 28.

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126. Fn. 3, Article 17 (1972); fn. 4, Article 29 (1978).
127. Fn. 94.
128. The interpretation given to Section 29(2) of the Soulbury Constitution (fn. 94) by Lord Pearce in The Bribery Commissioner v. Ranasinghe [1964] 2 W.L.R. 1301, p. 1307.
129. Fn. 94, Article 29(4).
130. Fn. 3, Article 18(2).
131. Fn. 4, Articles 10-17.
132. Fn. 130.
133. Fn. 4, Article 17.
134. Fn. 94.
135. The District Court (D. C. Colombo 1026/2) held that the Official Language Act of 1956 was ultra vires Article 29(2)(b) and (c) of the Soulbury Constitution. The Supreme Court of Ceylon (70 N.L.R. 121) expressly avoided the issue of constitutional validity and instead gave their judgment on the grounds that an officer of the Crown under the English Law could not sue for his salary. On a further appeal to the Privy Council (72 N.L.R. 337) it was held that a servant of the Crown under the Roman Dutch Law, as practiced in Ceylon, was entitled to sue the Crown for his salary. The case was sent back to the Supreme Court of Ceylon to hear the matter regarding the constitutionality of the Official Language Act. The hearing was postponed sine die in the light of the proceedings of the Constituent Assembly which was at the time in the final stages of drafting the 1972 Constitution.
136. The only other alternative was to stage a political revolution and rest the de jure validity of the new Constitution upon its success, thus relying on the Kelsenian theory concerning the establishment of a new Grundnorm. See [1971] 20 I.C.L.Q. 645.
137. The Court officials concerned with the re-hearing delayed the re-hearing so that the whole dispute raised in the Kodeswaran case became academic after the promulgation of the 1972 Constitution, which was at that stage nearing completion. However, it may be questioned as to whether any re-hearing of the Kodeswaran case ought to have been conducted under the Soulbury Constitution, thus making the 1972 provisions irrelevant to the dispute.
138. Fn. 4, chap. XXI, p. 107.
139. de Silva, (C.R.), Monkeying with the Judiciary, published by Austin Perera, 457 Union Place, Colombo 2, Sri Lanka, 1978.
140. Fn. 4, Article 161(d)(iii).
141. Fn. 4, Article 161(b)(i).
142. Fn. 4, Article 66(f).
143. The case concerning the Member of Parliament for Kalawana (unreported) provides a classic example. At the General Elections of 1977, Mr. Abeyratne Pilapitiya was elected M.P. for Kalawana from the United National Party (U.N.P.). This election was challenged in the High Court by one of the defeated candidates, Mr. Sarath Muthetuwagama, of the Communist Party (C.P.). While the action was pending, Mr. Pilapitiya met with a motor accident and suffered bodily injuries. As a result of this calamity, he was compelled to absent himself from Parliament. He did so, without leave, for a period of time exceeding three

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months. No reasons have been provided as to why he or his party did not obtain the necessary leave from Parliament, for his absence, which could have been obtained pro forma. At the end of the three month period, Mr. Pilapitiya ceased to be a Member of Parliament under Article 66(f) of the 1978 Constitution. The seat for Kalawana being now vacant, it became the duty of the Secretary of the U.N.P., the party to which Mr. Pilapitiya belonged, to nominate a person to occupy that seat as a Member of Parliament. This is provided for by Article 161(d)(iii) of the 1978 Constitution. The Secretary of the U.N.P., nominated Mr. Pilapitiya, and he was duly accepted by the speaker as M.P. for Kalawana under that Article. This was in late 1978. Subsequently, the original election petition was heard by the High Court and Mr. Pilapitiya was found to have committed an election offence. The Court declared that Mr. Pilapitiya's election in 1977 was null and void. This decision was appealed to the Court of Appeal and ultimately to the Supreme Court. Both appeals were dismissed and by the end of 1980 Mr. Pilapitiya exhausted all avenues of appeal to the Courts of Justice. As a result of this dismissal the Commissioner of elections called for nominations and declared January 12th, 1981, as the election day for the Kalawana electorate. Subsequent to this declaration by the Commissioner of elections, in a surprise move, the speaker of the House of Representatives, Mr. Bakeer Markar, M.P. announced in Parliament, that the Kalawana seat was not vacant, and that Mr. Pilapitiya was in fact the Member for that seat and his nomination by the Secretary of the U.N.P. in 1978, under Article 161(d)(iii), was a valid nomination and that the Supreme Court had no jurisdiction to interfere with a valid nomination under that Article. This announcement was made a few days before the holding of the by-election, on January 12th, 1981. To solve this difficult problem, the Government tabled a Bill, making provisions for dual representation for Kalawana. The purpose of the Bill was to recognise the person elected at the by-election as a second member for Kalawana. This Bill was challenged before the Supreme Court under Article 83(b) of the 1978 Constitution. The Supreme Court delivered its judgment on the eve of the by-election. By a unanimous decision of that court, the Bill was declared ultra vires the Constitution. In its opinion the Court characterised the Bill as one which was attempting to enlarge the membership of the House not through the normal channels provided by the Constitution (i.e. through the Delimitation Commission, see Articles 95 and 96) but through a very different method which falls squarely under Article 83 (b). That Article, according to the Supreme Court, calls for the holding of a Referendum, without which the Bill in question, as proposed, could never be valid under the 1978 Constitution. The by-election was, nonetheless, held, and Mr. Sarath Muthetuwagama, the petitioner in the original election petition, was elected from the Communist Party. Subsequent to this result, by a letter addressed to the Secretary-General of Parliament, on January 15th, 1981, Mr. Pilapitiya resigned as a Member of Parliament. This was done under Article 66(b) of

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the Constitution. The Government is now (February 1981) hoping that this would be the end of a long and costly saga. However, the matter raises a further interesting issue. Is the Secretary-General now under a duty under Article 161(d)(iii) to request the Secretary to the U.N.P., the party to which Mr. Pilapitiya belonged, to nominate a person to the position vacated by Mr. Pilapitiya? I think he is. If so, is the Secretary of the U.N.P. obliged to nominate? If he is obliged to do so, then could he take the extraordinary step as to nominate Mr. Sarath Muthetuwagama as that person? Or, must he appoint a person from his own party? If he were to appoint any person other than, Mr. Sarath Muthetuwagama, the country would surely face the burden of a Referendum which, according to Mr. Pilapitiya, could cost the taxpayer nearly 50 million rupees (see his letter of resignation dated 15/1/81). Article 161(d)(iii) is quite clear that the Secretary-General of Parliament is bound by law to "require the Secretary of the political party" to which Mr. Pilapitiya "belonged to nominate a member of such party to fill such vacancy". The Constitution gives no option to the Secretary-General of Parliament or to the Secretary of the political party to which the member belonged, but to act. The Secretary of the political party has no option but to appoint a member of that Party. The conundrum, therefore, remains unresolved, requiring the utilisation of the Referendum.

144. Fn. 4, Article 161.
 144a. Fn. 4, Article 98(1).
 145. Fn. 4, Article 98(2).
 146. Fn. 4, Article 98(3)-(9).
 147. Fn. 4, Article 98(4).
 148. Ibid.
 149. Fn. 4, Article 98(5).
 150. Fn. 4, Article 98(6) and (7).
 151. Fn. 4, Article 99(2).
 152. Ibid.
 153. Fn. 150.
 154. Fn. 4, Article 99(3).
 155. Fn. 4, Article 99(4).
 156. Fn. 4, Article 99(5)(a).
 157. Fn. 4, Article 99(5)(b).
 158. Fn. 4, Article 99(6).
 159. Fn. 4, Article 99(4).
 160. Ibid.
 161. Fn. 4, Article 99(5)(b).
 162. Fn. 4, Article 99(6) and 99(7).
 163. Fn. 156.
 164. Fn. 4, Article 99(6).
 165. Fn. 4, Article 99(8) and (9).
 166. Ceylon Observer, Sunday, May 20th, 1979.
 167. (i) Colombo: 74-62 = 12%; (ii) Kandy: 61-53 = 12%; (iii) Jaffna: 78-16 = 12%; (iv) Galle: 67-46 = 20.1%; Average difference: 14%

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168. Ibid.
169. Fn. 166.
170. See Appendix 1.
171. MacKenzie, (W.J.M.), Free Elections, an Elementary Textbook,
George Allan and Unwin Ltd., London, 1958, chap. VII.
172. Ibid., p. 50.
173. Ibid., p. 51.
174. Fn. 4, Articles 93 and 94.
175. Ibid., Article 94(1)(a).
176. Ibid., Article 94(1)(b).
177. Ibid., Article 94(3)(a).
- 177a. Ibid.
178. Ibid., Article 94(3)(b).

FOOTNOTES FOR CHAPTER 9

1. Dixon, (W.C.), The Colonial Administration of Sir Thomas Maitland, Cass, London, 1968, Chapter II.
2. Namely, 15th February, 1796 - the day the Treaty of Capitulation was signed by the Dutch.
3. The Treaty of Amiens of 1802 under which Napoleon, as First Consul of France made peace with England, carried a settlement among the European powers in which it was agreed that the Island of Ceylon be recognised as a possession of the British Crown.
4. Turner, (L.J.B.), The Madras Administration of the Maritime Provinces of Ceylon, Ceylon Antiquary and Literary Register, Vol. IV, Part I, pp. 36-41.
5. Fredrick North, was commissioned as Governor on 26th March, 1778, C.O.55.61.
6. Col. Stuart was the official who represented the British East India Company in Ceylon. He carried the rank of Governor.
7. Turner, (L.J.B.), fn. 4, pp. 36-37.
8. Ibid., pp. 37-38.
9. Ibid., p. 37.
10. Wilson, (A.J.), The Manning Constitution of Ceylon, 1924-1931, Ph.D. thesis, London, 1956.
11. Ibid., p. 7.
12. Ibid., p. 8.
13. Dixon, (W.C.), fn. 1, p. 19.
14. Ibid.
15. Ibid.
16. Ibid.
17. The Treaty is reproduced by Dr. G. C. Mendis in its original form. See Mendis, (G.C.), The Colebrooke-Cameron Papers, Vol. II, Oxford University Press, 1956, pp. 59-65. See also the original C.O.55.1, dated 30th September, 1795.
18. Namely the Government of the United Provinces. The Signatories were: J.G. Van Angelbeek (The Governor) and P.A. Agnew (Adjutant General).
19. James Stuart (Colonel and Officer commanding the British forces) and A.H. Gardner.
20. A draft of the agreement may be found in Mendis, (G.C.), fn. 17, pp. 59-65. Also see a collection of Legislative Enactments of Ceylon, Government Printer, Colombo, Ceylon, 1853, Vol. I, p. 1.
21. Mendis, (G.C.), fn. 17, p. 64.
22. de Silva, (C.R.), Ceylon under the British Occupation 1795-1833, Vol. I, The Colombo Apothecaries & Co., Ltd., Colombo, 1953, p. 10.
23. C.O.55.1 dated 23rd September, 1799. The Act of Authorization has been reproduced in The Statutory Rules and Orders - Revised to December 31st, 1903, published by H.M.S.O. 1903.
24. Ibid., in paragraph 2.
25. Ibid.
26. de Silva, (C.R.), fn. 22, p. 311.

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27. Ibid.
28. Ibid.
29. Ibid.
30. Mendis, (G.C.), fn. 17, p. 162.
31. Ibid., pp. 165-167.
32. Ibid., p. 165.
33. Ibid., p. 166.
34. Ibid., p. 166.
35. Ibid.
36. Ibid.
37. de Silva, (C.R.), fn. 22, p. 313.
38. Mendis, (G.C.), fn. 17, pp. 163-165.
39. Ibid., p. 163 and de Silva, (C.R.), fn. 22, p. 313.
40. de Silva, (C.R.), fn. 22, p. 313.
41. Ibid.
42. Ibid., fn. 22, pp. 313-314.
43. Mendis, (G.C.), fn. 17, pp. 167-169.
44. Ibid., p. 166.
45. Appeals from the Dutch Courts should be in excess of 300 Rix Dollars (150 pounds) and appeals from the Court of Equity in Colombo should be in excess of 500 Rix Dollars (250 pounds).
46. C.O.55.61. See also Mendis, (G.C.), fn. 17, pp. 170-199.
47. Article VII.
48. Even at this present day, the Roman Dutch Law is considered as the Common Law of the country, while the English Law is treated as law introduced by Statute or by Ordinance.
49. Boultjens, (A.E.), "The Dutch East India Company and the peace of Amiens, 1802", The Ceylon Antiquary and Literary Register, Vol. III, Part iv, pp. 237-242. The Dutch East India Company's reluctance to hand over the Maritime Provinces may be related to the company's interest in holding on to the Trincomalee harbour. The Directors of the Company therefore pressed the Dutch Government to claim the Maritime provinces during the negotiations at Amiens.
50. Tambiah, (S.J.), "Ethnic Representation in Ceylon's higher administrative services, 1870-1946", University of Ceylon Review, Vol. 13, 1955, pp. 113-134. The author provides statistical data of the extent to which the descendants of the Dutch appeared to have participated in the British Colonial administration of Ceylon.
51. C.O.55.61, Articles XXIV to XXVIII.
52. Ibid., Articles XXIX to XXX.
53. Ibid., Articles XXXII and XXXIII. These articles deal with Sinhalese and Muslim laws of Inheritance and of Succession.
54. Ibid., Articles XXXIX to XLV.
55. Ibid., Articles LII to LXXII.
56. Ibid., Articles LXXXII to LXXXVII.
57. Ibid., Articles LXXXVIII to XCII.
Regarding the High Court of Appeal and appeals to the King-in-Council, see Articles XCIII to XCVI.
58. de Silva, (C.R.), fn. 22, pp. 316-317.
59. For an interesting description of the Wemyss affair see de Silva, (C.R.), fn. 22, pp. 318-321.
60. This incident has been taken from de Silva, (C.R.), fn. 22, pp. 323-325. See Also Dixon, (W.C.), fn. 13, chap. X.

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61. Ibid., Dixon, (W.C.), chap. III.
62. Ibid., chap. IV.
63. de Silva, (C.R.), fn. 22, p. 325.
64. C.O.54.31. See also Mendis, (G.C.), fn. 17, pp. 200-210.
65. C.O.54.31, the Preamble.
66. Ibid., Article III.
67. Ibid., Articles X and XI.
68. Instructions accompanying the charter which were issued in London on 30th September, 1810 - C.O.55.62. See also C.O.54.31, Article IX. See also Mendis, (G.C.), fn. 17, pp. 208-213 for a careful reproduction of the Instructions.
69. Ibid.
70. Mendis, (G.C.), fn. 68 paragraph 10.
71. C.O.54.31, Article XVI.
72. Ibid., Article IX.
73. These were the precursors of the present police magistrates. Their jurisdiction was limited to minor criminal offences with a local bias. They sat in the locality.
74. Mendis, (G.C.), fn. 68, paragraphs 8-9.
75. Fn. 68.
76. Mendis, (G.C.), fn. 68, paragraph 8.
77. Ibid., reads:
"It is His Majesty's pleasure that the appointment of sitting magistrates in the different districts, as it contributes greatly to the reduction of the power of the native Headmen and to the regular Government of each district should be extended and continued according to the plan already practically adopted by you, and that the time for extending this system to all the several districts, as it is a point entirely dependent on local knowledge should be arranged by the Governor-in-Council."
78. Ibid., paragraph 16.
79. Ibid., paragraph 17.
80. Ibid.
81. Ibid.
82. Ibid., paragraph 19.
83. Ibid., paragraph 20.
84. Ibid.
85. Dixon, (W.C.), fn. 1, p. 113.
86. C.O.54.41, dated August 30th, 1811. From Maitland to Peel.
87. Ibid.
88. C.O.55.62, dated November 5th, 1811. From Liverpool to Brownrigg.
89. C.O.55.62, dated 5th November, 1811. From Liverpool, to Brownrigg. See also Mendis, (G.C.), fn. 17, pp. 214-218.
90. C.O.55.62, The Preamble.
91. See fns. 74, 76 and 77 above.
92. Mendis, (G.C.), fn. 17, pp. 216-217.
93. Instructions accompanying the Charter of Justice of 1811, issued on 5th November, 1811. C.O.55.62, Mendis, (G.C.), fn. 17, pp. 219-220.
94. Mendis, (G.C.), fn. 17, p. 220.
95. Ibid.

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96. See fns. 79-81.
97. See fn. 94.
98. de Silva, (C.R.), fn. 22, pp. 329-337.
99. The Colebrooke-Cameron Commission was appointed on 18th January, 1823. The Commissioners, however, did not arrive in Ceylon until six years later.
100. de Silva, (C.R.), fn. 22, p. 329.
101. William Macbean Colebrooke, 1783-1870, was trained primarily for a military career at the Woolwich Military College. He served in the British Army, particularly in Ceylon between 1805-1809.
Charles Hay Cameron, 1795-1880, was trained primarily in the Legal Profession. He was called to the Bar in 1820. After working on the Commission, he became a member of the Law Commission of India. He thereafter became a member of the Supreme Council in Bengal in 1843. Thereafter he returned to Ceylon as a planter, in 1875.
102. Namely, the 'Report upon the Judicial Establishments and procedure in Ceylon'.
103. Administration of Justice Law, Law No. 44 of 1973.
104. The Legislative Enactments of Ceylon, Vol. 1, 1707-1888, Government Printer, Colombo, 1923, p. 59. See also Mendis, (G.C.), fn. 17, pp. 227-230.
105. Namely, those contained in Articles 6, 7 and 9.
106. Article 8 of the Kandyan Convention of 1815.
107. C.O.54.64.
108. C.O.54.71. This was contained as an enclosure in a letter addressed by Brownrigg to Bathurst on the 17th July, 1818.
109. This has been pieced together from two sources. Namely, Kannagara, (P.D.), The History of The Ceylon Civil Service, 1802-1833, Tisara Prakasakayo, Ceylon, 1966, pp. 19-20, and de Silva, (C.R.), fn. 22, pp. 335-336.
110. Kannagara, (P.D.), fn. 109.
111. This is culled from C.O.416.13 and C.O.416.16.
112. C.O.416.16.
113. C.O.416.14.
- 113a. See fn. 77.
114. See fn. 91.
115. de Silva, (C.R.), fn. 22, p. 335.
116. Ibid., p. 333-334.
117. Ibid., p. 333.
118. Namely, the Colebrooke-Cameron Commission. See fn. 101.
119. Kannagara, (P.D.), fn. 109, pp. 223-224.
120. Namely: 'Report upon the Compulsory Services to which the Natives of Ceylon are subject' - C.O.54.145; 'Report upon the Establishments and Expenditure of Ceylon' - C.O.54.122; 'Report on the Administration of the Government of Ceylon' - submitted in three part extending over 700 pages. C.O.54.122.
121. Ibid. And the 'Report upon the Judicial Establishments and Procedure in Ceylon' - C.O.54.122.
122. Kannagara, (P.D.), fn. 109, p. 204.
123. See the section dealing with the dependence of the judges on the Governor. C.O.416.17.

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124. Note the numerous cases to which the report refers, viz; Isabella Perera's Case, Nilegoodegederage Kalu Ettina v. Kapoogedera Menike and such others.
125. i.e. Recommendation (1) See Mendis, (G.C.), fn. 17, p. 164.
126. Reasons for Recommendation (1) See Mendis, (G.C.), ibid., p. 165.
127. Recommendation (2); Mendis, (G.C.), ibid., p. 165.
128. Ibid.
129. Recommendation (25); Mendis, (G.C.), ibid., p. 187.
130. Recommendation (19); Mendis, (G.C.), ibid., p. 184.
131. Recommendation (3); Mendis, (G.C.), ibid., p. 167.
132. Fn. 130.
133. Recommendation (14)-(18); Mendis, (G.C.), ibid., pp. 182-183.
134. Ibid., and Recommendations (22)-(24); Mendis, (G.C.), ibid., p. 186.
135. The Legislative Enactments of Ceylon, Vol. I, 1707-1808, The Government Printer, Colombo, 1923. See Also Mendis, (G.C.), fn. 17, pp. 320-349.
136. Fn. 20.
137. Administration of Justice Law, Law No. 44 of 1973.
138. The Conquest of Kandy, 2nd March, 1815.
139. Since 1796, the pre-occupation of the British Administration was first to consolidate their hold over the Maritime Provinces and thereafter to conquer the Kandyan Kingdom. Once the conquest of Kandy was completed in 1815, the problem thereafter was to win over the hearts and minds of the proud inhabitants of Kandy. The Kandyan rebellion of 1818 was a clear manifestation of these difficulties. See Vimalananda, (T.), The Great Rebellion of 1818, M. D. Gunasena & Co., Ltd., Colombo, 1970.
140. Namely, 1833-1974.
141. The Charter, fn. 135. See Articles 2 and 3.
- 141a. The tendencies towards the fusion of Equity and the Common Law was shown prior to 1873. The following historical sketch suggests this:
- 1825 - Eldon Commission into Chancery - collection of evidence - no real outcome.

Common Law

- 1831 -1838 - Common Law Procedure Act - gave jurisdiction to Common Law Courts in interpleader proceedings to avoid expense of separate action in equity.
- 1860 - Common Law Procedure Act enlarged earlier Acts.
- 1852 - Common Law Procedure Commission recommended fusion of law and equity as regards to defences and discretionary relief.
- 1854 - Act - equitable defences available in replevin.

Chancery

- 1838 -1852 - Chancery Procedure Acts - power to examine witnesses, affidavits, in Chancery, no longer needed to send issue to Common Law Courts for determination.
- 1858 - Lord Cairns Act - Chancery power to award damages.

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All reforms created a certain amount of fusion of administration, but they worked by giving Chancery remedies and powers to the Common Law Courts and by giving more legal powers to Chancery. 1852 comes close to the idea of fusion.

142. The Supreme Court of Judicature Act, 36 & 37. Vict., Cap. 66, ss. 16 and 24.
143. Lord Mansfield - Born 1705, died 1793. He was made Solicitor-General of England in 1743 and Attorney-General of England in 1754. He presided over the Supreme Court of Judicature of England as its Chief Justice between 1756-1788.
144. The Charter, fn. 135. See Article 2.
145. Ibid.
146. The Charter, fn. 135, Article 3.
147. Ibid.
148. Ibid.
149. The Charter, fn. 135, Article 4.
150. Ibid.
151. Article 4, Ibid.
152. 'Gamsabaves' were village Councils which pre-dated the colonial period in Ceylon. Tambiah, (H.W.), The Principles of Ceylon Law, Cave & Co. Ltd., Colombo, 1972, pp. 1-2 traces the Gamsabhave to 425 B.C. The proviso was a result of a recommendation made by Colebrooke in his report on Administration. Cameron was persuaded by Colebrooke's research that the Gamsabhave should be preserved wherever and whenever necessary in Ceylon. See Mendis, (G.C.), fn. 17, pp. 28-30.
153. The Charter, fn. 135, Article 18.
154. Ibid., Article 19.
155. Ibid., Article 20.
156. Ibid., Article 24.
157. Ibid., Article 25.
158. Ibid., Articles 26-29.
159. Ibid., Article 24.
160. Ibid., Article 5.
161. Ibid., Article 6.
162. Ibid., Articles 9 and 10.
163. Ibid., Article 9.
164. Ibid., Article 10.
165. Ibid., Article 6 for the appointment of Judges of the Supreme Court of Judicature and Article 20 for the appointment of District Judges.
166. Ibid., Article 7.
167. Ibid., Articles 31-33.
168. Ibid., Articles 31 and 40.
169. Ibid., Articles 34-36.
170. Ibid., Articles 34 and 35.
171. Assessors were abolished by Ordinance No. 21 of 1852.
172. The Charter, fn. 135, Article 52.
- 172a. 3 & 4 William IV, Cap. 41.
173. Ibid., Articles 30, 34, 35, 37, 38, 45, 49, 50, et cetera.
174. See fn. 137.
175. Chapters 4 and 11.
176. Civil Procedure Code, Reenacted, Cap. 109 of 1978.

FOOTNOTES FOR CHAPTER 10

1. See Chapter 5.
2. Administration of Justice Law, Law No. 44 of 1973.
3. The Court of Appeal Act, Act No. 44 of 1971.
4. Fn. 2.
5. Ibid.
6. Ibid., s.18 and Schedule.
7. Mendis, (G.C.), The Colebrooke-Cameron papers (1796-1833), Vol. 1, Oxford University Press, 1956, pp. LVii, 28, 69-70 and 323. See in addition: Tiruchelvam, (N.), "Popular Courts on the eve of British Rule", Colombo Law Review, 1978, p. 27.
8. Ordinance 12 of 1945 and s.2(2), cap. 8, 1956.
9. See fns. 18-29 below for examples of quasi-judicial or administrative tribunals adopting the method of extra-judicial settlement of disputes.
10. Act No. 10 of 1958.
11. This portion has been published. See Marasinghe, (M.L.), "The Use of Conciliation for Dispute Settlement: The Sri Lanka Experience", International and Comparative Law Quarterly, Vol. 29, 1980, p. 389.
12. A history of Sri Lanka from very early times. The history was written originally as a chronicle by the Buddhist clergy and was kept constantly updated. The present English version is a translation by a German scholar, Geiger, (W.), The Ceylon Gov't Information Dept., Colombo, 1953
13. Ibid., chap. X, p. 103.
14. Principles of Ceylon Law, Cave & Co. Ltd., Colombo, 1972.
15. D'Oyly, (Sir John), A Sketch of the Constitution of the Kandyan Kingdom, Tisara Prakasakayo Ltd., Colombo, 1975, pp. 42-43.
16. 327 B.C.-307 B.C.
17. Fn. 14, pp. 1-2.
18. Chap. 139, s.30.
19. Chap. 152, s. 11 and chap. 150, s. 12.
20. Chap. 274, ss. 19 and 21.
21. Chap. 131, ss.4(2), 31a and 31b.
22. Chap. 460.
23. Act No. 4 of 1963, ss. 97-99.
24. Act No. 62 of 1961.
25. Chap. 115, s. 47.
26. Act No. 1 of 1958.
27. The Medical Ordinance, Chap. 105, s. 33.
28. The Courts Ordinance, Chap. 6, s.17a and The Law Society Ordinance, Chap. 277, s. 9.
29. University of Ceylon v. Fernando (1960) 61 N.L.R. 505.
30. Act No. 10 of 1958.
31. Act No. 12 of 1963.
32. Hansard (Senate Debates), 1958, Government Printer, Colombo, Col. 1148.
33. Goonesekera, (R.K.W.), & Metzger, (B.), "The Conciliation Boards Act: Entering the Second Decade", Journal of Ceylon Law (1971), Vol. 2, pp. 48-49.

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34. Fn. 32.
35. Parliamentary Debates, House of Representatives, 1958, Government Printer, Colombo, Col. 1653.
36. Fn. 35, Col. 1655.
37. Fn. 30, s.3(1).
38. Fn. 30, s.3(8).
39. Ibid.
40. Fn. 30, s.3(7).
41. Fn. 30, s.4(1).
42. Fn. 30, s.4(2).
43. Fn. 30, s.3(3). These associations are: inter alia The Rural Development Societies, The Praja Mandalaya and the Co-operative Society.
44. Fn. 30, s.7.
45. Fn. 30, s.12(1).
46. Fn. 30, s.12(2).
47. The New Websters Encyclopedic Dictionary of The English Language, The Consolidated Book Publishers - Chicago, p. 171.
48. Fn. 30.
49. Fn. 30, s.14(a).
50. (1968) 71 N.L.R. 121.
51. Ibid., p. 124; per Alles J.
52. (1970) 73 N.L.R. 217.
53. The court comprised of Fernando, C.J., Alles J., and Wijayatilake, J. In line with his decision in the Wickremaratchi case (fn. 50) Allles, J. dissented.
54. Fn. 30, s.8(4)(b).
- 54a. See Marasinghe, (M.L.), fn. 137.
55. Act No. 10 of 1958. See Goonesekera, (R.K.W.), Metzger, (B.), "Mandatory pre-trial conciliation", Journal of Ceylon Law (1970), Vol. 1, pp. 170-176; Goonesekera, (R.K.W.), "Conciliation Boards" ibid., pp. 143-146. Also, Goonesekera, (R.K.W.), and Metzger, (B.), "The Conciliation Boards Act: Entering the second decade" ibid., (1971), vol. 2, pp. 35-100 and "The Conciliation Boards Act: Necessary amendments and administrative reforms" ibid., pp. 283-304.
56. Viz: voluntarily causing hurt (s.314 - Penal Code); voluntarily causing hurt on provocation (s.325 - Penal Code); wrongful restraint (s.332 - Penal Code); wrongful confinement (s.333 - Penal Code); using criminal force otherwise than on grave and sudden provocation (s.334 - Penal Code); assault or criminal force with intent to dishonour a person otherwise than on grave and sudden provocation (s.346 - Penal Code); assaulting or using criminal force on grave and sudden provocation (s.349 - Penal Code); committing mischief (s.409 - Penal Code); committing mischief and thereby causing damage to the amount of fifty rupees (s.410 - Penal Code); mischief by killing or maiming any animal of the value of ten rupees (s.411 - Penal Code); mischief by killing or maiming cattle, etc., or any animal of the value of fifty rupees (s.412 - Penal Code); criminal trespass (s.433 - Penal Code); house trespass (s.434 - Penal Code); intentional insult with intent to provoke a breach of the peace

56. cont'd

(s.484 - Penal Code); criminal intimidation (s.486 - Penal Code); unlawful removal of any cattle from custody of person entitled to keep or detain such cattle (s.12A - Cattle Trespass Ordinance). However, s.27 of the Animals Act, No. 29 of 1958 has now repealed the Cattle Trespass Ordinance.

57. Goonesekera, (R.K.W.), & Metzger, (B.), "The Conciliation Boards Act: Necessary Amendments and Administrative Reforms", Journal of Ceylon Law, 1971, Vol. 2, p. 281.

58. Arnolis v. Hendrick, (1972) 75 N.L.R. 532 (partition actions are excluded); Lordon v. The Director of Machinery and Equipment, Irrigation Department (1973) 76 N.L.R. 454 (the State is excluded).

59. Fn. 51.

60. Goonesekera, (R.K.W.), & Metzger, (B.), fn. 57.

61. Ibid., p. 292.

62. Ibid.

63. Non-contentious proceedings: Matrimonial actions, including actions for the custody of a minor; partition actions; adoption proceedings; actions in lunacy; testamentary actions; actions in regard to guardians; curators or receivers; actions under the Registration of Births and Deaths Ordinance; insolvency proceedings; actions under the Trust Ordinance other than those involving constructive or resulting private trusts; hypothecary actions under the Mortgage Act.

Interim Relief: Applications for injunctions, arrest or sequestration before judgment, or restraint of waste. Administrative actions: Actions entrusted by law or by agreement to administrative or quasi-judicial tribunals or to arbitration.

Inappropriate parties and subjects: Actions to which a party is under legal disability; proceedings in admiralty; election petitions; actions to which the State, State enterprises, another governmental body; or its authorized agent is a party; actions to which a member of the clergy, a clerical organization or a temple or church is a party; actions for enforcement of a foreign judgment or upon judgment obtained in any court in Ceylon.

64. Fn. 9.

65. Fn. 49.

66. Fn. 60, p. 293.

67. Ibid., p. 296.

68. Ibid.

69. This group of case-types has been placed under the broad rubric 'administrative actions'.

70. Fn. 60, pp. 297-298.

71. Act No. 49 of 1950.

72. Act No. 25 of 1956; Act No. 14 of 1957; Act No. 62 of 1957; Act No. 27 of 1966; Act No. 37 of 1968 and Act No. 39 of 1969. See also Ceylon Transport Board v. Samastha Lanka Motor Sevaka Samithiya (1963) 65 N.L.R. 185; Walker Sons Ltd. v. Fry and Others (1965) 68 N.L.R. 73 Moosajes v. Fernando (1966) 68 N.L.R.

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414; Rambanda v. River Valleys Development Board (1968) 71 N.L.R. 25. These decisions were responsible for the amendments that were made necessary for the principal statute, namely Act No. 43 of 1950.

73. Cap. 274.

74. To cite a few: The Workman's Compensation Board; Debt Conciliation Board; The Income Tax Appeals Board and the Boards created under the Land Reform Commission.

75. Fn. 63.

76. Act No. 11 of 1959 and Act No. 72 of 1961.

77. Fn. 60, p. 300.

78. Fn. 60, pp. 293-296 and p. 298.

79. Fn. 63, where those categorised under the heading 'non-contentious proceedings'.

80. Fn. 60, p. 299.

81. Law No. 27 of 1975.

82. Ibid., s.3.

83. Ibid., s.5(3).

84. Ibid., s.5(3)(a).

85. Ibid., s.5(3)(b).

86. Ibid., s.5(3)(c).

87. Ibid., s.5(3)(d).

88. Ibid., s.5(3)(e).

89. Ibid., s.5(3)(f).

90. Ibid., s.5(3)(g).

91. Ibid., s.5(4).

92. Ibid., s.6(1).

93. Ibid., s.6(2).

94. Ibid., s.5(3).

95. Section 7(c) of the Conciliation Boards Act, 1958.

96. Of Walahapitiya, in Pitigal Korale South, Yatakalam patthu in the North Western province.

97. Except for Australia, New Zealand some of the Pacific Islands of the Commonwealth Singapore, Malaysia, the countries of the Caribbean and Cyprus, the rest of the Commonwealth has severed their ties with the Judicial Committee of the Privy Council.

98. Dias, Jurisprudence, 4th Edn., Butterworths, England, 1976, at pp. 234-237. See also the cases referred to at footnote 4 on p. 234 of his work.

99. "What use have defence counsel when majority cannot afford them?" an interview given by Naugu Wolfango Dourado, Attorney General of Zanzibar to the Daily Nation, Kenya, February 2nd, 1975.

100. Berman, (J.), "The Cuban Popular Tribunals", Columbia Law Review, Vol. 69, 1969, p. 1317.

101. Marasinghe, (M.L.), "An Empiricist's View of the Chinese Legal System", Valparaiso University Law Review, Vol. 15, 1981, pp. 283-317.

102. Ibid., pp. 312-317.

103. Fn. 96.

104. According to statistics issued by the Ministry of Justice, the average settlement rate of disputes before Conciliation Boards for the five year period between 1964-1969 was 58%. See fn. 109.

105. The Late Mr. M. W. H. de Silva, Q.C.

106. Under Section 13 of the Act, any party to the settlement may within 30 days of that settlement by giving notice in writing to the Chairman of the Board, seek to repudiate that settlement.
107. Fn. 106.
108. Fns. 44-46.
109. This part of the paper is based upon some of the writings of Goonesekera, (R.K.W.) and Metzger, (B.), particularly their essay on: "The Conciliation Boards Act: Entering the Second Decade," Journal of Ceylon Law, (1971) vol. 2, p. 35.
110. Fn. 52.
111. Fn. 109, p. 81.
112. Ibid., p. 80.
113. Ibid.
114. Ibid.
115. Ibid., pp. 80-81.
116. Fn. 109, p. 98.
117. (1970) 73 N.L.R. 217.
118. Ibid., pp. 220-221 per Fernando C.J.
119. Ibid., p. 222.
120. Fn. 45.
121. Fn. 46.
122. Ibid.
123. (1965) 68 N.L.R. 265.
124. Under Sections 86 and 87 of the Courts Ordinance, the District Courts are empowered to issue injunctions.
125. Fn. 46, pp. 223-225.
126. See Jayawickrema v. Nagasinghe (1971) 74 N.L.R. 523, Kurera v. Fernando (1972) 75 N.L.R. 179 and Fernando v. Fernando (1971) 74 N.L.R. 57.
127. (1972) 75 N.L.R. 179.
128. (1971) 74 N.L.R. 57.
129. Fn. 101.
130. Fn. 101, p. 180.
131. (1971) 74 N.L.R. 523.
132. Ibid., p. 528.
133. op. cit.
134. Fn. 86.
135. Smith v. Avery (1856), 5 H.L. Cas 811; Czarinkow v. Roth, Schmidt & Co. [1922] 2 K.B. 78.
136. (1968) 71 N.L.R. 348.
137. Tiruchelvam, (N.), "The Ideology of Popular Justice", The Sociology of Law, Edt., Reasons, (C.E.), and Rich, (R.M.), Butterworths, Toronto, 1978, p. 263, pp. 277-278 and Marasinghe, (M.L.), "An Empiricist's View of Chinese Law and Legal Institutions", Valparaiso Law Review, Vol. 15, 1981, pp. 283-317.
138. Tiruchelvam, (N.), fn. 136, pp. 266-267 and Lloyd, (D.), Introduction to Jurisprudence, 4th Edn., Stevens, 1979, pp. 744-747.
139. Ibid., p. 267.

FOOTNOTES FOR CHAPTER 11

1. Ordinance No. 12 of 1911.
2. Ordinance No. 8 of 1947.
3. Ibid., s.60.
4. Ordinance No. 24 of 1940.
5. Act No. 10 of 1950, Cap. 238 of 1956.
6. Ordinance No. 32 of 1946, Cap. 453 of 1956.
7. Ordinance No. 16 of 1907, Cap. 451 of 1956.
8. Ordinance No. 10 of 1861, Cap. 193 of 1956.
9. Ordinance No. 9 of 1899, Cap. 231 of 1956.
10. Ordinance No. 9 of 1940, Cap. 188 of 1956.
11. The Law of Things, The Institute of South African Law, Book II, Juta & Co., Ltd., (undated) ed. by Maasdorp, (A.F.S.) 5th Edn., p. 42.
12. The Treasure Trove Ordinance, Ordinance No. 17 of 1887, Cap. 189 of 1956.
13. Ibid., s.1.
14. Act No. 9 of 1950, Cap. 460 of 1956.
15. Act No. 33 of 1950, Cap. 462 of 1956.
16. Act No. 30 of 1968. 16a. Ibid., s.2.
17. Ibid., s.3.
18. Addresses delivered by British Governors in the Legislative Council of Ceylon, Vol. II (1860-1877), published by the Government Printer, Colombo, 1873, p. 332 - an address made by Governor, Sir William Gregory.
19. See chapter 2 on Land, Religion and Underdevelopment.
20. See The Registration of Temple Lands Ordinance, Ordinance No. 10 of 1856, Cap. 468, of 1956.
21. Service Tenures Ordinance, Ordinance No. 4 of 1870.
22. Fn. 20.
23. C.O.54.346, dated November 12, 1859 - a despatch from Governor Sir Henry Ward to the Colonial Secretary.
24. Ibid.
25. Ibid.
26. Ibid.
27. Ibid.
28. C.O.54.351, dated March 29, 1860.
29. Ibid., total rejected: 8171 Acres, and total registered 1704 Acres, a ratio of 1:8 in favour of registration.
30. See footnote 20, total rejected 1268 and the total registered 1051 Acres, a ratio of 1:1.2 in favour of registration.
31. Priests, Peasants; A Study of Buddhism and Social Structure in Central Ceylon, Humanities Press, U.S.A., 1973.
32. Fn. 23.
33. Fn. 31, p. 76, Table 14 (source: Report of the Temple Land Commissioners 1857-58).
34. C.O.54.351, dated March 29, 1860. This despatch was acknowledging a message of thanks sent to the Governor by the Colonial Secretary. The Colonial Secretary had written to Sir Henry Ward expressing the British Government's appreciation of the work done by the Temple Lands Commission as revealed in the report contained in despatch C.O.54.346 - see fn. 23.

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35. In Re Southern Rhodesia [1919] A.C. 211 (P.C.).
36. Ordinance No. 7 of 1840.
37. Ibid., s. 2.
38. Ordinance No. 8 of 1863.
39. C.O.54.380, dated October 23rd, 1863.
40. C.O.54.240, dated November 22nd, 1847.
41. C.O.54.247, dated March 16th, 1848. A despatch from Lord Torrington to Lord Grey.
42. Ibid.
43. C.O.54.247, undated may be found at folio page 246.
44. Ibid.
45. Ordinance No. 4 of 1866, as amended by Ordinance No. 2 of 1917 and consolidated in Cap. 458, Legislative Enactments of Ceylon, 1956.
46. Ibid., s. 2.
47. Ibid., s. 6.
48. i.e., 20th October, 1866.
49. Sannases and Old Deeds Ordinance, Ordinance No. 6 of 1866 as amended by Ordinance No. 15 of 1867 and consolidated in Cap. 118, Legislative Enactments of Ceylon, 1956.
50. Ordinance No. 8 of 1863 as amended by Ordinance No. 5 of 1877 and Ordinance No. 14 of 1891 and consolidated in Cap. 119 of the Legislative Enactments of Ceylon, 1956.
51. Ibid.
52. Fn. 49.
53. Ibid., s. 2.
54. Registration of Titles to Land Ordinance, Ordinance No. 8 of 1863.
55. C.O.54.170, dated May 2nd, 1839.
56. Ibid.
57. A minute appended to the despatch referred to in fn. 55.
58. Ibid.
59. C.O.54.188, dated June 30th, 1841.
60. C.O.54.375, dated February 16th, 1863. A despatch from Sir Charles MacCarthy to the Duke of Newcastle.
61. Ibid.
- 61a. There is no clear indication as to the precise meaning of 'letters of denigration'. However, under the droit d'aubaine, droit de detraction and droit de retrait the continental systems recognised a denigration of the position of aliens in terms of rights and duties given to them in the continental legal systems. (Meekison (V.V.), "Treaty Provisions for the Inheritance of Personal Property", (1950) 44 American Journal of International Law, p. 319. As for Great Britain too, Lauterpacht says: "Thus, a State can exclude aliens from certain professions and trade; it can exclude them from holding or inheriting real property; ----" Oppenheim's International Law, Part I, Longmans, 8th Edn., p. 689.

This is the nearest explanation one could find to the term 'letters of denigration'. The term has no recognition in International Law. But, the context in which it is used seems to indicate that the term was used to signify the denigration of the position of Aliens under the Law of Ceylon by excluding them from a power to own land.

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62. C.O.54.213, dated October 17, 1844. A despatch from Sir Colin Campbell to Rt. Hon. Lord Stanley, by a minute appended to the original despatch.
63. Ordinance No. 4 of 1887 as amended by Ordinance No. 2 of 1943, No. 57 of 1942 and Act No. 22 of 1955 and now consolidated by Cap. 455 of the Legislative Enactments of Ceylon, 1956.
64. Ibid., s.2(1).
65. 'Chena' is a Sinhala word for a jungle of short shrubs in the dry zone of the Island. 'Chena' land is cultivatable provided that there is sufficient water supply. Being of short shrubs the 'chena' land could easily be cleared of the jungle and turned into farmland.
66. Ordinance No. 1 of 1897, as amended by Ordinance Numbers: 5 of 1900, 4 of 1903 and 16 of 1907. The Ordinance was repealed and partly re-enacted in the Land Settlement Ordinance, Ordinance No. 20 of 1931, now consolidated in Cap. 463 of the Legislative Enactments of Ceylon, 1956.
67. Ibid.
68. Ibid., s.3.
69. Ibid., s.4.
70. Ibid., s.5.
71. Ibid., s.18(1).
72. Ibid., s.24. This section is modelled on Ordinance No. 12 of 1840.
73. Ordinance No. 20 of 1931 as amended by Ordinances No. 22 of 1932 and 31 of 1933 and Act No. 22 of 1955, and now consolidated by Cap. 463 of the Legislative Enactments of Ceylon, 1956.
74. Ibid., ss. 3, 4 and 5.
75. Ibid., s.4(c).
76. Land Development Ordinance, Ordinance No. 19 of 1935 and amended by Ordinance No. 3 of 1946, and Act Numbers 49 of 1953 and 22 of 1955. Now consolidated in Cap. 464 of the Legislative Enactments of Ceylon, 1956.
77. Ibid., s.2.
78. Ibid., s.171.
79. Fn. 76.
80. Ibid., s.8.
81. Ibid.
82. This has been discussed in the chapter on Judicialism. See Chapter 9.
83. Fn. 80.
84. Ibid., s.8(n).
85. The Land Registration Ordinance, Ordinance No. 8 of 1863.
86. Ordinance No. 1 of 1897.
87. Ibid., s.29.
88. (1900) 3 N.L.R. 218.
89. Ordinance No. 12 of 1840.
90. The Ordinance will be examined later, see fns. 100 and 101.
91. Fn. 88, p. 220.
92. (1914) 17 N.L.R. 109.
93. Ordinance No. 10 of 1856, now Cap. 468, Legislative Enactments of Ceylon, 1956.

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94. (1914) 17 N.L.R., p. 111.
95. Fn. 88.
96. Fn. 92.
97. Fn. 88.
98. Ibid., pp. 220-221.
99. Ordinance No. 12 of 1840, as amended by Ordinance No. 22 of 1931, Ordinance No. 8 of 1847 and Act No. 8 of 1954 and now consolidated in Cap. 465 of the Legislative Enactments of Ceylon, 1956.
100. Cap. 465, Legislative Enactments of Ceylon, 1956, s. 2.
101. Ibid., s.7..
102. Ibid.
103. C.O.55.100, dated November 8, 1859. A despatch from the Duke of Newcastle to Sir Henry Ward.
104. Ibid.
105. Fn. 99.
106. Ordinance No. 12 of 1840.
107. Ordinance No. 10 of 1856.
108. Ordinance No. 12 of 1840.
109. The Common Law recognised the Crown's right of Escheat, "whereby land of which there was no longer any tenant returned, by reason of tenure, to the Lord by whom, or by whose predecessors in title, the tenure was created". Halsbury's Laws of England, Butterworths, London, 1976, vol. 17, paragraph 1435.
110. Meek, (C.K.), Land Law and Custom in the Colonies, Frank Cass & Co. Ltd., 1968.
111. Ibid., p. 78.
112. Act No. 1 of 1953.
113. Ibid., s. 5.
114. Ibid., s. 7.
115. Ibid., s. 4.
116. Ibid., s. 10(4).
117. Act No. 1 of 1958.
118. Ibid., s.6(1).
119. Ibid., s.6(2).
120. Ibid., s.6(3).
121. Ibid., s.7.
122. Ibid., s.10.
123. Ibid., s.11(1) and (2).
124. Ibid., s.12.
125. Ibid., s.14.
126. Ibid., s.14(1) proviso.
127. Ibid., s.8.
128. Ibid.
129. Law No. 42 of 1973.
130. Paddy Lands Act, Act No. 1 of 1958.
131. Fn. 129, Ibid., s.10(1).
132. Ibid., s.10(2).
133. Ibid., s.3.
134. Ibid., s.36(1).
135. Ibid., s.36(3).
136. Ibid., s.38.
137. Law No. 2 of 1972.
138. Ibid., s.6(1).
139. Ibid., s.7(1).
140. Ibid., s.8(1).

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141. Fn. 137.
142. Law No. 42 of 1973.
143. Ibid., s.40.
144. Ibid., s.39.
145. Ibid., s.3.
146. Ibid., s.10(2).
147. Law No. 1 of 1972.
148. Law No. 39 of 1975.
149. Law No. 1 of 1972.
150. Ibid., s.2.
151. Ibid., s.3(1)(a) and (b).
152. Ibid., s.3(2)(a).
153. Ibid., s.3(2)(b).
154. Ibid., s.15(a).
155. Ibid., s.15(b)(i) and (ii).
156. Law No. 39 of 1975.
157. Law No. 39 of 1975, s.2 which introduces a new section s.42 (f)(i), to the Principal Law, Law No. 1 of 1972.
158. Law No. 39 of 1975.
159. Ibid., s.2 which introduces s.42k to the Principal Law, Law No. 1 of 1972.
160. Ibid., s.2 which introduces s.42L to the Principal Law, Law No. 1 of 1972.
161. Act No. 35 of 1971.
162. Namely, Land acquired under the Land Reform (Amendment) Law No. 39 of 1975.
163. Namely, land acquired under the Land Reform Law, Law No. 1 of 1972.
164. Act No. 11 of 1972 as amended by Law No. 39 of 1975 which by Section 2 introduces s.42(h) (c) into the Principal Law, Law No. 1 of 1972.
165. Act No. 4 of 1958.
166. Ibid., s.42H(e).
167. Ibid., s.42H(b).
168. Ibid., s.42(h)(a).
169. Ibid., s.42H(d).
170. Law No. 1 of 1972.
171. Ibid., s.22(1)(a).
172. Ibid., s.22(1)(f).
173. fns. 168 and 169.
174. Law No. 1 of 1972.
175. Ibid., s.45(1).
176. Ibid., s.45(1)(a).
177. Ibid., s.45(1)(b).
178. Ibid., s.45(1)(c).
179. Law No. 1 of 1972.
180. Ibid., s.44(a).
181. Ibid., s.44(b).
182. Ibid., s.44(c).
183. Ibid., s.44(d).
184. Ibid., s.44(e).
185. Ibid., s.44(f).

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186. s.57(1), empowers the Commission to make rules in respect of:
"(a) for which rules are required or authorized by this Law to be made; and (b) which are required by this law to be prescribed."
187. Law No. 1 of 1972, s.44(g).
188. Ibid., s.44(h).
189. Ibid., s.44(i).
190. Ibid., s.44(j).
191. Ibid., s.44(k).
192. Ibid., s.44(l).
193. Ibid., s.44(m).
194. Law No. 25 of 1976.
195. Ibid., s.2(b).
196. Ibid., s.9(a) and (b).
197. Ibid., s.3(1).
198. Ibid., s.5.
199. Ibid., s.7.
200. Ibid., s.10(1).
201. Ibid., s.10(2).
202. Ibid., s.11.
203. Ibid., s.12.
204. Ibid., s.20.
205. Ibid., s.24(1).
206. Ibid., s.24(2).
207. Ibid., ss. 28-32.
208. Ibid., ss. 25-27.
209. Ibid., s.47.
210. Ibid.
211. Ibid., s.3(4).
212. Act No. 20 of 1972.
213. Ibid., s.5.
214. Ibid., ss. 2 and 3.
215. Law No. 1 of 1972, s.28(1)(a).
216. Ibid., s.28(1)(d).
217. Ibid., s.28(2).
218. Law No. 1 of 1972, s.38.
219. Ibid.
220. Ibid., s.42.
221. Ibid., s.41.
222. Ibid., s.42(a).
223. Ibid., s.42(b).
224. Ibid., s.42(b)(i) & (ii).
225. Ibid., s.42(b)(ii) & (iii).
226. Ibid., s.42(b)(iii).
227. Ibid., s.42(c).
228. Law No. 1 of 1973.
229. Ibid.
230. Ibid., s.2.
231. Ibid., s.4.
232. Section 3 Ceiling on Housing Property (Amendment) Law, Law No. 18 of 1976.
233. Fn. 228, Ibid., s.5.
234. Ibid., s.6.

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- 235. Ibid., s.7.
- 236. Ibid., s.40.
- 237. Ibid., s.41.
- 238. Ibid., s.42.
- 239. Ceiling on Housing Property (Amendment) Law, Law No. 18 of 1976.
- 240. Fn. 228.
- 241. Ibid., s.11.
- 242. Ibid., s.12(1).
- 243. Law No. 18 of 1974.
- 244. Ibid., s.2.
- 245. Ibid., s.3(1).
- 246. Ibid., s.3(2)(a).
- 247. Ibid., s.3(2)(b).
- 248. Ibid., s.3(2)(c).
- 249. Ibid., s.3(2)(d).
- 250. Ibid., s.12(2).
- 251. Law No. 9 of 1977.
- 252. Ibid., s.2.
- 253. Ibid., s.16.
- 254. Ibid., s.16(1).
- 255. Ibid., s.16(2).
- 256. The Condominium Property Act, Act No. 12 of 1970.
- 257. Law No. 11 of 1973.
- 258. Ibid., s.16.
- 259. Ibid., s.13.
- 260. Ibid., s.9(1).
- 261. Ibid., s.9(2).
- 262. Ibid., s.6.
- 263. Ibid., s.3.
- 264. Ibid., s.5.
- 265. Law No. 10 of 1973.
- 266. Ibid.
- 267. Ibid., Preamble.
- 268. Apartment Ownership Law, Law No. 11 of 1973, s.15.
- 269. Act No. 37 of 1954, Cap. 401 of 1956.
- 270. Ibid., ss. 6 & 7.
- 271. Ibid., ss. 10-25.
- 272. Ibid., ss. 27-28.
- 273. Ibid., ss. 29-30.
- 274. Ibid., s.8.
- 275. Ibid., s.9.
- 276. Ibid., s.2(1).
- 277. Ibid., s.2(1)(i).
- 278. Ibid., ss. 10, 24, 27 & 44.
- 279. Ibid., s.46(1).
- 280. Ibid., s.46(2).
- 281. Ibid., s.49.
- 282. Ibid., s.50.
- 283. Ibid., s.90(2)(b).
- 284. Act No. 37 of 1954.
- 285. Law No. 34 of 1974.

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286. Ibid., s.2.
287. Law No. 1 of 1973, s.28(1).
288. Ibid., s.28(2)(a).
289. Ibid., s.28(2)(b).
290. Ibid., s.28(2)(d) (i) - (v), also see fn. above.
291. Ibid., s.23(a).
292. Hon. Hector Kobbekaduwa, M.P.
293. Hon. Pieter A. Kenuman, M.P.
294. Namely, Land Reform Law, Law No. 1 of 1972. Ceiling on Housing Property Law, Law No. of 1973 and Land Reform (Amendment) Law, Law No. 39 of 1975.
295. Hon. D.P.R. Gunawardene M.P.
296. Parliamentary Debates, House of Representatives, Government Printer, Colombo, 1957, Col. 1904, 12th December, 1957.
297. Ibid., 1951, Col. 263, 20th November, 1951.
298. Ibid., 1952, Cols. 294-295, 26th September, 1952.
299. Ibid., Col. 296.

FOOTNOTES FOR CHAPTER 12

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2. The Bank of Ceylon, The People's Bank, The Hatton Bank Ltd., and The Commercial Bank of Ceylon Ltd.
3. The Mercantile Bank Ltd., The National and Grindlays Bank Ltd., The Chartered Bank Ltd., and the Hong Kong and Shanghai Bank Ltd.
4. The State Bank of India, The Indian Overseas Bank Ltd., and the Indian Bank Ltd.
5. The Habib Bank (Overseas) Ltd.
6. Act No. 65 of 1961.
7. Act No. 58 of 1949.
8. Ordinance No. 12 of 1859.
9. Act No. 6 of 1955.
10. Ibid., s.7.
11. Ordinance No. 16 of 1931, Cap. 398 of 1956.
12. Ibid., s.51.
13. The Ceylon State Mortgage Bank and Finance (Amendment) Act, Act No. 33 of 1968.
14. Fn. 11.
15. Fn. 13, s.51(1)(a)(i).
16. Ibid., s.51(1)(a)(ii).
17. Ibid., s.51(1)(a)(iii).
18. Ibid., s.51(1)(a)(iv).
19. Ibid., s.51(1)(a)(v).
20. Law No. 1 of 1973.
21. Fn. 13, s.51(1)(a)(vi).
22. Ibid., s.51(1)(a)(vii).
23. Ibid., s.51(1)(b)-(e).
24. Ibid., s.51(1)(e).
25. Ibid., s.51(1)(c).
26. Ibid., s.51(1)(h).
27. Ibid., s.51(1)(f) & (g).
28. Ibid., s.51(1)(h).
29. Ibid., s.51(1)(i).
30. Ibid., s.51(1)(u).
31. Ibid., s.51(1)(v).
32. Ibid., s.51(1)(w).
33. Fn. 11.
34. Ordinance No. 19 of 1943, Cap. 402 of 1956.
35. The Ceylon State Mortgage Bank and Finance (Amendment) Act, Act. No. 33 of 1968.
36. Fn. 33.
37. Ibid.
38. Fn. 34.
39. Fn. 11, ss. 35-39.
40. Ibid., s.40.
41. Fn. 35.

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42. Act No. 35 of 1955.
43. Ibid., s.7(1).
44. Namely, The Stage Mortgage Bank, The Agricultural and Industrial Credit Corporation and The Co-operative Federal Bank Ltd., (Financial Aid).
45. Act No. 29 of 1961.
46. Ibid., s.8(1).
47. Ibid., s.9(1).
48. Ibid., s.5(1).
49. Chap. 11, section III.
50. Act No. 29 of 1961.
51. Ibid., s.4.
52. Act No. 65 of 1961.
53. Ibid., s.2.
54. Ibid., ss. 3-6.
55. Ibid., s.8(a) - (n).
56. Ibid., s.22(1).
57. Act No. 58 of 1949.
58. Ibid., s.5(e).
59. The Finance Act, Act No. 11 of 1963, s.67.
60. Ibid.
61. Ibid.
62. Fn. 35.
63. Ibid.
64. Ibid.
65. Fn. 34.
66. Law No. 13 of 1975.
67. Ibid. s.2.
68. Ibid., s.7.
69. Ibid.
70. Ibid., s.19.
71. Ibid., s.37(1).
72. Ibid., s.38(1).
73. Ibid., s.40.
74. Ibid., s.75.
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76. Fn. 34.
77. Fn. 35.
78. Ordinance No. 12 of 1859.
79. Ordinance No. 53 of 1938.
80. Ordinance No. 16 of 1931.
81. Ordinance No. 19 of 1943.
82. Cap. 397, Schedule 1, Part II, s.3.
83. Act No. 34 of 1968, s.2.
84. Finance Act No. 11 of 1963, s.22(1).
85. Weerasooriya, (W.), and others, fn. 1, pp. 44-45.
86. Act No. 33 of 1968, s.18.
87. Law No. 13 of 1975.
88. Act No. 15 of 1961.
89. Act No. 27 of 1961.
90. Act No. 35 of 1961.

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91. Act No. 15 of 1961, s.2 and Schedule 1.
92. Act No. 27 of 1961, s.3.
93. Act No. 35 of 1961, ss. 4-7.
94. Act No. 19 of 1962.
95. Ibid., s.2(1).
96. Finance (No. 2) Act, Act No. 2 of 1963.
97. Ibid., s.20.
98. Act No. 11 of 1963.
99. Ibid., ss. 28 and 29.
100. Act No. 10 of 1965, s.5.
101. Act No. 22 of 1957.
102. Ibid., s.2.
103. Ibid., s.6.
104. Ibid., s.5.
105. Ibid., s.8.
106. Act No. 23 of 1952.
107. Act No. 13 of 1967.
108. Act No. 23 of 1952, s.22.
109. Law No. 28 of 1976.
110. Law No. 28 of 1976 - Preamble.
111. Act No. 28 of 1968, repealed by Law No. 17 of 1977, s.2(1).
112. Originally introduced by Act No. 42 of 1957 and subsequently repealed by Act No. 10 of 1965, s.2 and re-enacted later in Act No. 27 of 1970. Its amendment by Law No. 32 of 1975 is irrelevant to the present discussion here.
113. Ibid.
114. Ibid.
115. Act No. 36 of 1961.
116. Act No. 11, 1963, Part VI.
117. Weerasooria, (W.), and others, fn. 1.
118. Ibid., pp. 56-57.
119. Act No. 11 of 1963, part VI.
120. Ibid., s.58(1).
121. Act No. 19 of 1961.
122. Baran, (P.A.), "On the Political Economy of Backwardness", in Essays on The Economics of Underdevelopment. Edited by Agarwala, (A.N.), and Singh, (S.P.), published by Oxford University Press, Delhi, 1958.
123. Ibid., p. 89.
124. Act No. 51 of 1949.
125. Act No. 14 of 1970.
126. Act No. 51 of 1949, s.8.
127. Act No. 14 of 1970, s.8.
128. Jiggins, (J.), Caste and family in the Politics of the Sinhalese 1947-1976, Cambridge, 1979, chapter 4.
129. Act No. 29 of 1957.
130. Ibid., s.3.
131. Ibid., s.4(1).
132. Ibid., s.4(2).
133. Ibid., s.5.
134. Act No. 4 of 1956.
135. Act No. 21 of 1966.
136. Act No. 20 of 1950.

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137. Act No. 3 of 1950.
138. Act No. 6 of 1954.
139. General Information to investors - wages, Greater Colombo Economic Commission, Sri Lanka, 1979.
140. Law No. 4 of 1978.
141. Ibid., s. 4.
142. Ibid., s. 3.
143. Ibid., s. 2(2).
144. Ibid., s. 17.
145. Ibid., s. 5(1).
146. Ibid., s. 5(2).
147. Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Article 157.
148. Namely: Australia, France, Belgium, Hong Kong, Denmark, India, Fiji, Iran, Japan, Singapore, Korea, Sweden, Leichtenstein, Switzerland, Luxembourg, Thailand, Malaysia, United Arab Emirates, Netherlands, United Kingdom, Norway, United States, Pakistan, West Germany and Saudi Arabia.
149. The projects are in the areas of: Building Materials, Cashew Processing & Oil, Children's Tights, coir products, Cultivation of green tropical plants, cane furniture, electrical products and accessories, engineering consultancy services, electronics - assembly of microprocessors, fishing gear and accessories, footwear (excluding leather), garments, glass, gloves, high fashion jewellery and lapidary, Industrial chemicals, leather goods, packing materials, rubberised products, sailing crafts and accessories, silk fabrics and textile weaving, textiles, tea-bags, warehousing and trading, yarn and yacht building.
150. Information contained in fns. 148 and 149 is from a report entitled: Sri Lanka's Investment Promotion Zones, published by the Investment Promotion Division, Greater Colombo Economic Commission, dated December, 1979.
151. Fn. 147.
152. See the discussion on this in chapter 8, section XII.
153. See the discussion on this in chapter 7, section IV.
154. Fn. 147.
155. Fn. 140, s.26(5).
156. Ibid., s.26(2)(b).
157. Ceylon Government Gazette, published by the Government Printer, Colombo, 31/10/1978.
158. Fn. 140, s.3(b) and Fn. 142.
159. Fn. 150.
160. See fns. 148 and 149.
161. Act No. 35 of 1971.
162. Law No. 19 of 1974.
163. Fn. 140, s.29.
164. Fn. 140, s.2(2).
165. Fn. 140, s.26(2)(a).
166. Fn. 140, s.32.
167. Chapter 13.
168. Fn. 140, s.13.

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169. Fn. 140, s. 34.
170. Fn. 165.
171. Fn. 155.
172. Fn. 140, s. 19.
173. Ibid., s.23.
174. Ibid., s.24.
175. Frank, (A-G), Capitalism and Underdevelopment in Latin America, Monthly Review Press, 1969, pp. 194-196.
176. Ibid., p. 195.
177. Ibid.
178. The Poverty Curtain: Choices for the Third World, Columbia University Press, 1976.
179. Ibid., pp. 12-26.
180. Fn. 13.
181. Fn. 15.
182. Fns. 17-19.
183. Fn. 21.
184. Fns. 23-36.
185. Fn. 124.
186. Fn. 125.
187. Sri Lanka, Lehman, Lazard and Warburg & Co. Ltd., London, 1979, p. 24.
188. Ibid., p. 24.
189. Ibid., p. 25.
190. Fn. 172.
191. Fn. 178, p. 23.
192. This information was culled from a report issued by the International Bank for Reconstruction and Development and published in Sri Lanka, fn. 187, p. 29.
193. Ibid.
194. Ibid.
195. Fn. 1, pp. 55-56.
196. Fn. 192.
197. Ibid.
198. Fn. 175.

FOOTNOTES FOR CHAPTER 13

1. The Legislative Enactments of Ceylon, Vol. 1 (1707-1888), printed by H. Ross Cottle, Government Printer, Ceylon, 1923, p. 73.
2. Ordinance No. 7 of 1853, as amended by Ordinance No. 24 of 1884 and by Ordinance No. 22 of 1909.
3. By Regulation No. 4 of 1833.
4. Ibid.
5. Ordinance No. 12 of 1859.
6. Ibid., s.29. Now s.33, Cap. 399, Legislative Enactments of Ceylon, 1956.
7. "An Ordinance to promote the establishment of Joint Stock Companies, both with unlimited and limited liability", Ordinance No. 4 of 1861.
8. 19 and 20 Vict. c.47.
9. Ordinance No. 2 of 1897.
10. Ordinance No. 4 of 1888 - "an Ordinance to enable Joint Stock Companies to compound for the stamp duties payable on certain shares issued by them unstamped," - Ordinance No. 6 of 1888 - designed to amend the 1861 Ordinance in a number of peripheral matters. Ordinance No. 3 of 1893 was however intended to amend the 1861 Ordinance and the 1888 Ordinance in marginal matters.
11. The Companies Act of 1862, 25 & 26 Vict. Cap. 89 and the Companies Act of 1867, 30 & 31 Vict. Cap. 31. The latter enactment amended and re-enacted the 1862 Act.
12. C.O.55.115, dated January 21st, 1868.
13. Ordinance No. 51 of 1938.
14. Namely, the Joint Stock Companies Ordinance, Ordinance No. 4 of 1861 and the Joint Stock Banking Ordinance, Ordinance No. 2 of 1897.
15. Ordinance No. 7 of 1863.
16. Ordinance No. 4 of 1900.
17. The others were: Ordinance Nos: 6 of 1865; 6 of 1880; 3 of 1884; 4 of 1899; 11 of 1907; 13 of 1917; 5 of 1894; 3 of 1886 and No. 4 of 1906.
18. Civil Law Ordinance, Ordinance No. 5 of 1852.
19. Ibid., s.1.
20. Ibid., s.2.
21. Ibid.
22. Ordinance No. 21 of 1866.
23. Ordinance No. 11 of 1896.
24. Ordinance No. 25 of 1927.
25. Nadaraja, (T.), The Legal System of Ceylon in its Historical Setting, Brill, Leiden, 1972.
26. Ibid., p. 182.
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29. Ibid., p.2.
30. Ghai, (Y.), fn. 34.
31. Ibid., p.18.

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32. See Chapter 12, Section IIb.
33. Ghai, (Y.), fn. 34, pp. 29-42.
34. Ghai, (Y.), Law in the Political Economy of Public Enterprise (African Perspectives), Scandinavian Institute of African Studies, Uppsala, 1977, pp. 206-266.
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36. Act No. 19 of 1955.
37. Ibid., s.2(1)(a).
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39. Ibid., s.2(1)(d).
40. Ibid., s.2(1)(e).
41. Ibid., s.2(1)(c), (f)-(i).
42. Ibid., ss. 9-36.
43. Ibid., ss. 37-52.
44. Ibid., ss. 52-55.
45. Ibid., s.57(1).
46. Ibid., s.57(2).
47. Ibid., s.66(1) and (2).
48. Act No. 49 of 1957. 48a. i.e. Sri Lanka Freedom Party.
49. Ibid., s.2(1).
50. Ibid., s.2(1)(ii).
51. Ibid., s.34(1).
52. Ibid., s.39.
53. Ibid., s.34(2).
54. Act No. 9 of 1950.
55. Act No. 49 of 1957.
56. Act No. 19 of 1955.
57. Hon. P.H. William Silva, M.P.
58. Parliamentary Debates, House of Representatives, Government Printer, 1957, Col. 950, 18 October, 1957.
59. Act No. 33 of 1970.
60. Ibid., s.2(1).
61. Ibid., s.2(i)-(ix).
62. Act No. 33 of 1970.
63. Ibid., s.3.
64. Ibid., s.5(1).
65. Act No. 11 of 1972.
66. Ibid., s.2(1).
67. Ibid., s.3.
68. Namely, The State Industrial Corporations Act, Act No. 49 of 1957; The Sri Lanka State Trading Corporation Act, Act No. 33 of 1970 and The State Agricultural Corporations Act, Act No. 11 of 1972.
69. Namely, Industry, Commerce and Agriculture.
70. Weerasooria, (W.), and others, p. 337, fn. 1.
71. Act No. 49 of 1957.
72. Act No. 4 of 1958.
73. Act No. 2 of 1961.
74. Act No. 48 of 1957.
75. Namely, in 1947, 1952, 1956, 1960 (March), 1960 (July), 1965, 1970 and 1977.
- 75a. Act No. 9 of 1950, Cap. 460 of 1956.
76. Amerasinghe, (A.R.B.), Public Corporations in Ceylon, Lake House Investments Limited, Colombo, 1971.

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77. Ibid., p. 304.
78. Ibid., p. 317.
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83. ~~fn. 76~~
84. fn. 76, pp. 306-307.
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87. See Dr. J.B. Kelegama's speech reported in the Ceylon Daily News of April 22nd, 1964.
88. Rajapakse, Cabinet Sub-Committee Report, dated 2nd September, 1971, p. 214.
89. Fn. 76, p. 313, and footnote 21 on that page.
90. Penal Code, Cap. 19, Legislative Enactments of Ceylon, 1956, Chapter IX.
91. Cap. 103, Legislative Enactments of Ceylon, Government Printer, 1956.
92. Cap. 190, Legislative Enactments of Ceylon, Government Printer, Colombo, 1956.
93. (1962) 64 N.L.R. 49.
94. Narayanaswamy Naidu v. Krishnamurthi A.I.R. (1958) Madras 343.
95. Fn. 93, pp. 59-60.
96. Ibid., p. 60.
97. (1968) 71 N.L.R. 271.
98. Cap. 280, Legislative Enactments of Ceylon, Government Printer, Colombo, 1956.
99. Fn. 97, p. 272.
100. Fn. 97, p. 272-273.
101. (1969) 72 N.L.R. 422.
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104. Fns. 93, 97 and 101.
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106. Law and Public Enterprise in Asia, International Legal Centre, Praeger, New York, 1976, Chapter 9.
107. Ibid., 329.
108. State Industrial Corporation Act, Act No. 49 of 1957, s. 32.
109. (1963) 67 N.L.R. 1.
110. Tea Propaganda Ordinance, Cap. 169, Legislative Enactments of Ceylon, 1956.
111. Fn. 109, p. 3.
112. Ghai, (Y.), fn. 34.
113. The British Transport Commission was created by The Transport Act of 1947, which nationalized the Railways in the United Kingdom.
114. [1950] 1 K.B. 18 (C.A.).
115. Ibid., pp. 23-24.
116. Ghai, (Y.), fn. 34, p. 16.
117. A view expressed by Sir Arthur Lewis, see fn. 76, p. 78.

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118. A view expressed by a group of Visiting Economists to Ceylon, see fn. 106, p. 341.
119. Ibid.
120. Act No. 35 of 1971.
121. Ibid., s.2.
122. Ceylon Government Gazette, published by the Government Printer, Colombo, Ceylon, Extraordinary issue No: 14991/16; 14991/17; 15004/4, dated 4th January, 1972.
123. Ibid., No: 14998/6, 25th January, 1972.
124. Ibid., No: 14991/17, 4th January, 1972.
125. Ibid., No: 14991/17, 4th January, 1972.
126. Ibid., No: 14999/6 - 14999/8, 2nd March, 1972.
127. Ibid., No: 15000/8, 8th March, 1972.
128. Finance Act, Law No. 38 of 1971.
129. Ibid., ss. 9 and 10.
130. Ibid., s.9(1).
131. Ibid., s.9(2).
132. Ibid., s.10(2).
133. Ibid., s.10(3).
134. Ibid., s.10(4).
135. Fn. 117.
136. Fn. 128, s.10(5).
137. Fn. 106, pp. 349-350.
138. Act No. 35 of 1971.
139. Law No. 19 of 1974.
140. Act No. 49 of 1957.
141. Act No. 33 of 1970.
142. Friedmann, (W.), "The New Public Corporations and the Law", Modern Law Review, Vol. 10, 1947, p. 33.
143. Ibid., p. 235.
144. Ibid.
- 144a. Ibid., p. 237. 145. See PP. 529 - 530
- 145a. Law No. 2 of 1972.
- 145b. Ibid., s.3.
146. Ibid., s.2.
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148. Ibid., s.42.
149. Ibid., s.6.
150. Ibid., s.7.
151. Ibid., s.9.
152. Ibid., s.8.
153. Ibid., s.10.
154. Ibid., s.11.
155. Ibid., s.17.
156. Ibid., Part II.
157. Ibid., s.7(4) and s.32(1).
- 157a. Ibid., s.36.
158. Ibid., s.35.
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160. Namely, The Agricultural Productivity Law, Law No. 2 of 1972.
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162. Ibid., Part IV.
163. Ibid., s.38.
164. Ibid., s.39.

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165. Ibid., s.23(1).
166. Ibid., s.23(2).
167. Ibid., s.24(1).
168. Ibid., s.6(2).
169. Ibid., s.23(3).
170. Ibid., s.41.
171. Ibid., s.37(1).
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174. Ibid., s.37(5).
175. Ibid., s.37.
176. Ibid., s.38(1).
177. Ibid., s.38(2).
178. Fn. 160.
179. Frank, (A-G), Latin America: Underdevelopment or Revolution, Monthly Review Press, New York, 1969.
180. Ibid., pp. 3-17.
181. Ibid., pp. 5-6. The passage has been taken from a report published by the National Indian Institute of America Latina, Ano 6, No. 4 (October - December, 1963), p. 8 - see p.16, fn. 1.
182. This is a rural town in Sri Lanka with which I have some personal connections. It has no other significance.
183. Ibid.
184. Ibid.
185. A tea growing province of Sri Lanka.
186. Ibid.
187. The price that tea fetches in the world market channelled through 'Mincing Lane' would inter alia determine the value of the Ceylon Rupee. The buying power of the Rupee in turn would determine the price of Lactogen, Tea or Coconuts sold at the point of sale.
188. Fn. 179, p. 6.
189. Ibid.
190. "Economic Dependence, class structure, and underdevelopment policy", Dependence and Underdevelopment, a book of essays edited by: Cockcraft, (J.D.), Frank, (A-G), and Johnson, (D.L.), Anchor Books, New York, 1972.
191. Ibid., pp. 22-23.
192. Fn. 142, pp. 234-235.

FOOTNOTES FOR CHAPTER 14

1. Lloyd, (D.), Introduction to Jurisprudence, 4th Edn., Stevens, London, 1979, pp. 645-648.
2. Trubek, (D.), "Towards a Social Theory of Law: An Essay on the Study of Law and Development", The Yale Law Journal, Vol. 82, 1972, pp. 1-21.
3. Ibid.
4. Lloyd, (D.), fn. 1, pp. 2-6.
5. Namely; Trubek, (D.) and Galanter, (M.) (both from the University of Wisconsin); Seidman, (R.B.), (Boston University); Paul, (J.C.N.), (University of Rutgers) and a few others.
6. See fn. 1.
7. Particularly, in the writings of Professor Yash Ghai, University of Warwick.
8. Then at the University of Wisconsin and now at Boston University, but presently (1981) on secondment to the Government of Zimbabwe.
9. Seidman, (R.B.), The State, Law and Development, Croom Helm, London, 1978.
10. Seidman, (R.B.), "The Lessons of Self-Estrangement: on the Methodology of Law and Development", Research in Law and Sociology, Vol. 1, 1978, pp. 1-44.
11. Ibid., 8.
12. Martin, (R.), "The Use of State Power to overcome Underdevelopment", The Journal of Modern African Studies, Vol. 18, 1980, pp. 315-325.
13. Ibid., p. 323.
14. Seidman, (R.B.), "Law and Development: the interface between policy and implementation", The Journal of Modern African Studies, Vol. 13, 1975, pp. 641-652.
15. Ibid., p. 645.
16. Myrdal, (G.), "The Soft State in Underdeveloped countries", University of California Review, Vol. II, 1968, pp. 1118-1134, particularly pp. 1118-1120 and Asian Drama: an inquiry into the poverty of Nations, Pantheon, New York, 1968, p. 896.
17. Myrdal, (G.), "The Soft State in Underdeveloped Countries", Ibid., p. 1120.
18. Fn. 16.
19. Fn. 17.
20. Ibid., p. 1120.
21. Trubek, (D.), fn. 2, pp. 1-10; Trubek, (D.), and Galanter, (M.), "Scholars in self-estrangement: some reflections on the crisis in law and development studies in the U.S.", Wisconsin Law Review, Vol. 4, 1974, pp. 1062-1102. Trubek and Galanter in the "Scholars in Self-estrangement ----" wrote:

"Because of the cumulation of these features of liberal legalism, this brand of thought led the assistance effort to focus on reform of formal rules, to work with the established professions, to believe that changes in the education of the professional legal class would ultimately produce desired social change and, above all, to assume almost automatically that any activity that was designed to change legal institutions of Third World Countries to make more like those of the United States would be an effective and morally worthy pursuit." (Ibid., pp. 1179-1180).
22. Trubek, (D.), fn. 2, pp. 10-11.
23. "Scholars in self-estrangement ----", fn. 21.

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24. Ibid., pp. 1083-1088.
25. Ibid., p. 1088.
26. Ibid., pp. 1099-1100.
27. Ibid., pp. 1100-1101.
28. Ibid.
29. Ibid., p. 1099.
30. Ibid.
31. Fn. 10, p. 20.
32. Fn. 21, p. 1100.
33. Fn. 9.
34. Seidman, (R.B.), Research in Law and Sociology, Vol. 1, 1978, pp. 1-29 and 41-44.
35. Merryman, (J.H.), "Comparative Law and Social Change: on the Origins, Style, Decline and Revival of the Law and Development Movement", The American Journal of Comparative Law, Vol. 25, 1977, pp. 457-490. See also Burg, (E.), "Law and Development: A Review of the Literature and a Critique of Scholars in Self-Estrangement", The American Journal of Comparative Law, Vol. 25, 1977, pp. 492-530.
36. Merryman, ibid., p. 481.
37. Ibid., p. 482.
38. Ibid.
39. What Now?: The 1975 Dag Hammarskjold Report on Development and International Co-operation, Sweden, 1975.
40. Ibid., pp. 30-33.
41. North-South: A programme for survival, Pan World Affairs, 1980.
42. Ibid., p. 48.
43. Ibid., chaps. 2 and 5.
44. Ghai, (Y.P.), "Law and Another Development", Development Dialogue, Vol. 2, Sweden, 1978, pp. 109-126. Ghai says:
"five basic features of Another Development must be need oriented; it must meet the basic needs - such as education, health, food and shelter - of man, especially the vast depressed, dominated and exploited majority of mankind." (ibid., p. 110).
- 44a. This list is culled from three sources. Namely, fn. 39, pp. 30-32, fn. 43 and fn. 44.
45. Paddy Lands Act, Act No. 1 of 1958.
46. Paddy Lands Act, Act No. 1 of 1953.
- 46a. See page 443 for a description of the Govia.
47. Fn. 45.
48. Agricultural Lands Law, Law No. 42 of 1973.
- 48a. Ibid., Part I.
- 48b. Ibid., Part II.
- 48c. Agricultural Productivity Law, Law No. 2 of 1972.
49. Ibid., Part I, particularly, s.3.
50. Ibid., s.3(3).
51. Ibid., Part II.
52. Ibid., s.6.
53. Fn.48(c).
- 53a. Ibid., s.24.
54. Ibid., ss.3 and 6.
55. Ibid., s.24(2)(d).
56. Ibid., s.24(1).
57. Ibid., s.23(3).

- 57a. Village-level organisations centred around Temples and churches, women's organisations (i.e. Kantha Samithi), Village development Associations (Grama Sangwardhana Samithi) and Death benefit Associations (Maranadhara Samithi) are some of these local social organisations.
- 57b. Village-level organisational associations created by the National political parties.
58. Fn. 57.
59. Janawasa Law, Law No. 25 of 1976.
60. Agricultural Productivity Law, Law No. 2 of 1972, s.37.
61. Ibid., s.38.
62. Ibid., s.39.
- 62a. Ibid., s.6.
63. Ibid., ss. 7 and 8.
64. Fn. 44.
65. Ibid., p. 110.
- 65a. Law No. 13 of 1975.
- 65b. Act No. 29 of 1961.
- 65c. Act No. 19 of 1943, Cap. 402 of 1956 as amended by Act No. 5 of 1970.
66. Fn. 60, s.3(3)(b).
67. Ibid., s.3(3)(d).
- 67a. Ibid., ss.23 and 41 and also Part III which deals with the Agricultural Tribunals to which the people at the village-level could take their disputes for settlement. The Tribunals do not permit legal representations before them.
- 67b. Ibid., Part III.
68. Fn. 60.
69. Fn. 59.
70. Fn. 60, s.37.
71. Fn. 60, s.38.
72. Fn. 60, s.39.
73. This term is used in some of the development literature to indicate people who have been identified as potential beneficiaries of a development programme. See fn. 108.
- 73a. An Internal Memorandum originating from the Ministry of Planning and Plan Implementation. The Secretary to this Ministry, Dr. Wickrama Weerasooriya have been a central figure in the programme for administration decentralisation and the creation of District Ministries.
74. The Island of Sri Lanka has been divided into 24 Districts and each District has been placed under a Minister with specific duties which includes the administration of a decentralised budget. This responsibility places all village-level social organisations in each District in a position of dependence to the District Minister. The 24 Districts (in 1981) are as follows:
- | | |
|--------------------------|------------------------|
| 1. Colombo District | 7. Galle District |
| 2. Gampaha District | 8. Matara District |
| 3. Kalutara District | 9. Hambantota District |
| 4. Matale District | 10. Jaffna District |
| 5. Kandy District | 11. Mannar District |
| 6. Nuwara Eliya District | 12. Vavuniya District |

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74. cont'd

- | | |
|--------------------------|---------------------------|
| 13. Mullativu District | 19. Anuradhapura District |
| 14. Trincomalee District | 20. Polonnaruwa District |
| 15. Batticaloa District | 21. Badulla District |
| 16. Ampara District | 22. Moneragala District |
| 17. Puttalam District | 23. Kegalle District |
| 18. Kurunegala District | 24. Ratnapura District |

75. Fn. 60.

76. Ibid., Part III.

76a. Fn. 41.

77. Fn. 44.

78. Ibid., pp. 110-111.

79. Land Reform Law, Law No. 1 of 1972 and Land Reform (Amendment) Law, Law No. 39 of 1975.

80. Ceiling on Housing Property Law, Law No. 1 of 1973.

81. Law No. 1 of 1972, s.3.

82. Fn. 80, s.2.

83. Fn. 81, Part IV.

84. Fn. 8, s.11.

85. Land Reform (Amendment) Law, Law No. 39 of 1975.

86. Ibid., Part IIIA.

87. Fn. 80, s.17.

88. Central Bank of Ceylon, Review of the Economy 1977, Central Bank, Colombo, 1977.

89. Ibid., p. 24.

90. Ibid.

91. Fn. 39, p. 32.

91a. 'Base Hospitals' provide all the medical and surgical facilities of any advanced hospital on the Island. These have a group of Specialists in all the major fields of health care.

91b. 'Ordinary Hospitals' do not have specialists and are equipped to handle mainly emergencies. These often refer and transfer complicated cases to 'Base Hospitals' or even to General Hospitals -in Colombo, Kandy, Jaffna and Galle.

91c. Official Language Act, Act No. 33 of 1956.

91d. These have been discussed in the chapter on Education, see Chapter 3.

92. See pp. 106-117.

93. Assisted Schools and Training Colleges (Special Provisions) Act No. 5 of 1960 and Assisted Schools and Training Colleges (Supplementary Provisions) Act No. 8 of 1961.

94. See pp. 110-117.

95. See chapter 3.

96. See chapter 2.

97. See chapter 4.

98. See chapters 5, 6, 7 and 8.

99. See chapter 11.

100. See chapter 12.

101. Act No. 1 of 1958.

102. Law No. 25 of 1976.

103. Law No. 2 of 1972.

104. Ibid., s.24.

104a. Ibid., s.23(10) and (11).

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- 104b. Ibid., ss.37(4) and 38(6).
104c. Ibid., ss.37(4) (iii)-(v) and 38(7).
104d. Ibid., Part III.
104e. Act No. 10 of 1958.
104f. Fn. 104(d).
104g. Dag Hammarskjold Foundation, see fn. 39.
105. Law No. 2 of 1976, s.37.
106. Ibid., s.37(5).
107. In an unpublished paper Law and Administration in Alternative Development: Some Issues, Choices and Strategies, presented to the Law and Development Symposium: Law in the Strategies of Alternative Development, held on March 19-21st, 1981 at the University of Windsor, Windsor, Ontario, Canada. The paper in question was jointly authored by Professor Paul of Rutgers University School of Law and Dr. Clarence Dias of the International Centre for Law in Development.
108. Ibid., p. 6.
109. Act No. 1 of 1958.
110. Act No. 2 of 1972.
111. Ibid., s.3.
112. Fns. 49 and 50.
113. Fn. 110, s.2.
114. Ibid., s.6.
115. Ibid., s.3(3)(a).
116. Ibid., s.3.
117. Fns. 49 and 50.
117a. See pp. 520-544.
117b. See pp. 544-552.
118. Act No. 10 of 1958.
119. Fn. 93.
120. Act No. 33 of 1956 and see chapter 4.
121. Administration of Justice Law, Law No. 44 of 1973.
122. See chapter 3.
123. See chapter 8.
124. Act No. 28 of 1956.
125. Act No. 3 of 1973.
126. (1966) 68 N.L.R. 217.
127. (1970) 72 N.L.R. 121.
128. Fn. 93.
129. Act No. 33 of 1956.
130. The Constitution of Sri Lanka, Department of Government Printing, Sri Lanka, 1972.
131. Ceylon (Constitution), Order-in-Council, of 1946.
132. Fn. 130, chapter V.
133. Ibid., Article 16(2)(d).
134. Ibid., Article 16(2)(e).
135. Ibid., Article 16(6).
136. Fns. 79 and 80.
137. Compulsory Savings Act, Act No. 6 of 1971.
138. See chapter 10.
139. The principle of the Volksgeist has been attributed to the works of Von Savigny (1779-1861). In its present form, the principle is understood to mean that 'Law is a reflection of the Spirit of the People'. The word Volksgeist itself was coined by Von

139. cont'd
- Savigny's pupil, Puchta (see Dias, (R.W.M.), Jurisprudence, Butterworth, 1976, p. 519). Puchta explained the principle in a way that he linked 'laws to the national spirit of a people'. Puchta wrote:
- "Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality". (see Dias, ibid., p. 518).
- See also: Lloyd, (D.), Introduction to Jurisprudence, 4th Edn., Stevens, London, 1979, pp. 653-658.
140. Maine, (H.S.), Village-Communities in the East and West, John Murray, London, 1872.
141. Ibid., 175-176.
142. Hambotota, and Beruwala in the South, Arugam Bay area in the East, Puttlam in the Northwest and some parts of the Hill country are predominantly Muslim. In these areas the village-level social organisations would reflect the religious, cultural and ethical mores of that community.
143. These are: Badahela, Bedde, Bandara, Batgama, Berawa, Durawa, Durayi, Embetta, Gadi, Gahala, Gattaru, Goigama, Hakuru, Halagama, Hinna, Huluvai, Hunna, Karawa, Lokuru, Navandanna, Nekati, Oli, Padu, Panna, Panikka, Patti, Porokara, Rada, Rodi, Salagama, Vanni, Vahampura, Bharata, Lansu, Miko, Eurasian, Kapiri, Mukkaru, Paravasu, Ahikuntoka, Waggai, Ja, Marakkala - (Wijesekera, N.D.), The People of Ceylon, Gunasena & Co., Ltd., Colombo, 1965.
144. See page 571.
145. de Smith, (S.A.), Judicial Review of Administrative Action, 4th Edn., Stevens, London, 1980, p. 6.
146. Re Grosvenor Hotel, London (No.2), [1965] Ch.D. 1210.
147. Ibid., p. 1261.
148. Griffiths, (J.A.G.), and Street, (H.), Principles of Administrative Law, 4th Edn., Pitman, London, 1967.
149. Ibid., p.2.
150. The center for Law and Development was created by transforming the International Legal Centre into this new form. The Centre for Law in Development was established in 1977. In July, 1979 the new creature, I.C.L.D. declared the following three areas as their principal concerns for research on development:
1. The development of legal resources for the mobilization and organisation of the rural poor.
 2. Law in the 'Design and Administration' of State programmes to provide resources for human needs.
 3. Legal aspects of New International and National Economic Order to meet basic human needs.
151. Paul, (J.C.N.), and Dias, (C.J.), Law and Legal Resources in the Mobilization of the Rural Poor for Self-Reliant Development, I.C.L.D., New York City, 1980.
152. Ibid and fn. 107.
153. Fn. 107.
154. Professor J. C. Paul and Dr. C. J. Dias, see fn. 107.
155. Fn. 107.
156. Ibid., p. 7.
157. Fns. 39, 44 and 107.