Preliminary Year

Sri Lanka Law College

Legal History & Legal Systems

iGuide

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Independent Law Student Movement

Reviews, responses and criticism
iGuide,
Sri Lanka Law College,
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Administration of justice in the pre-colonial period

The Pre-Colonial Period:

The pre-colonial period is the period prior to the establishment of European rule in Sri Lanka. In the case of Maritime Provinces, this period begins in 1505 while 1815 could be considered the beginning of the end of the pre-colonial period of the entire island with the capture of Kandyan provinces by the British.

There were no written records of the laws that applied during the reign of kings in the pre-colonial period.

Maritime Provinces:

There is certain evidence that there were some Sinhalese laws in the Maritinme Provinces. When Malvana Convention was signed between the Prtugese and Singhalese leaders in the Maritime Provinces, an assurance was given to the Singhalese officials that their laws will continue without any change. Very little evidence survives as to what these laws were.

Kandyian Kingdom:

The primary Sinhala source providing an account of the manner in which justice was administered in the Kandyan Kingdom before British conquest is the Niti Niganduwa and British sources include Sri John D'Oyly, Simon Sawer, John Armours and Robert Knox.

Niti Niganduwa: In the year 1880 C.J.R. le Mesurier and T.B. Panabokke, president of Dumbara, published in Sinhala and English what they said was a translation of an earlier Singhalese text which was entitled Niti Niganduwa, or the vocabulary of law, as it existed in the last days of the Kandyan Kingdom in which they gave an account of its origin. They say that a Committee of chiefs that assembled had pr code of Kandyan law which was arranged as far as possible in a systematic manner, by the Secretary of the Committee, a priest of the Malwatte Chapter. The original copy had been in the possession of Armour and passed through various hands before it came into the hands of Le Mesurier and Panabokke who translated it. Modder and Hayley are of the opinion that this account of origin cannot be accepted for many reasons:-

(1) Similarity between early portions of Armour's work and Niti Niganduwa and discrepancies later on
(2) Evidence that Niti Niganduwa was written by an individual and not a Committee
(3) Appears to be the work of a lawyer and not a priest
(4) Author was familiar with English

(5) Author had recourse to English court records (not available to a priest)

Kandyan law is a clear example for the existence of Sinhala laws during the period of Kings in the form of customs.

The King

- The King in the Kandyan Kingdom was described by British rules as the possessor of 'stupendous and absolute' powers but actually the powers were actually constrained by other forces such as powerful provincial chiefs and norms e.g. the king should follow 'the path of good and ancient custom'. The King was the ultimate authority in judicial administration and possessed significant judicial powers.
- The King had exclusive jurisdiction over:- ○ Disputes between principal chiefs and charges involving the royal retinue or those who directly served the King and the royal family
  - ○ Crimes such as treason, rebellion, conspiracy and homicide
- All in the kingdom could appeal to the King directly for the resolution of disputes through the process of supplicating a royal audience or other appropriate occasion.
- The King hears the disputes and charges personally or in consultation with the principal chiefs or referred them to the Maha Naduwa or the Great Court for decision.

Judicial Officers

- No separately structured judicial branch in the Kandyan administrative system
- The king was paramount and beneath him a host of royal officials with judicial authority functioned
- The powers of the officials were not compartmentalised so virtually all the officials jointly exercised all power including judicial power
- "Adhikaramvaru" were the highest ranking officers and "vidanas" were the minor officers and headmen of villages

Adhikaramvaru

- These were the principal ministers of the King
- There were usually two Adhikaramavru who were each assigned administrative duties in one of the tow administrative regions into which the kingdom was partitioned
- The First Adhikaram was given precedence on all occasions but in their respective provinces, both had equal powers
- Comprehensive powers included:- ○ Revenue ○ Administrative ○ Military ○ Judicial ○ Police

- Judicial powers of the Adhikaramvaru were restricted by the authority vesting in the King and the Maha Naduwa – they could not hear cases involving the King's retinue and could not consider charges relating to homicide because only the King could impose capital punishment

Disavas

- Governors of the twelve principal divisions known as disavani into which the Kandyan kingdom was divided
- Within the respective disavani, Disavas had administrative, judicial and military power and ranked next to the Adhikaramvaru in the administrative hierarchy
- Judicial power extended to all persons and lands within the respective disavani
- Limitations on power:- ○ No jurisdiction over matters falling within the purview of the King or the Maha Naduwa
    - No authority over the people and lands which were subject to the direct authority of the King or the Adhikaramvaru
- Disava was usually assisted in hearing cases by principal headmen and had the liberty to refer cases to a higher authority

Other Ranking Chiefs

- Number of royal ranking officials such as muhandirams and ratemahatmayas
- They held territorial based subject-matter related offices and on account of such office were vested some judicial authority in addition to other duties.
- Sometimes vested with general jurisdiction over petty matters
- Endeavoured to mediate and settle issues rather than impose sanctions

Other State Officials

- Other officials could be classified as:- ○ Vidanes: the officials with the least judicial power, possessing a minor civil and criminal jurisdiction. Their duties were similar to police officers – could levy small fines and inflict corporal punishment on persons of low caste
    - Liyanaralas, undiyaralas and koralas: could hear about complaints such as petty theft. Limited power to puish but slightly wider powers than vidanes
    - Mohottalas and arachchis: more extensive jurisdiction – could write decrees known as wattoru after adjudicating

a land dispute and had power to deal with criminal offences

- Chiefs: the lekams, ratemahatmayas and the chief royal officials attached to the King's court had civil jurisdiction over all persons subject to their orders

Judicial Tribunals:

Apart from royal officials, there were judicial tribunals engaged in the administration of justice in the Kandyan Kingdom.

The Maha Naduwa or Great Court

- Only the King ranked above the Maha Naduwa in administration of justice
- Consisted of principal chiefs such as Adhikaramvaru, Disavas and Muhandirams who took seats in their respective ranks
- Defence was paid to the Adhikamvaru who functioned as the inquiring officer of the court
- The original function of the Maha Naduwa was to advise the King
- Proceedings were characterised by strict formality
- Heard cases brought directly to it and has referred cases to the King
- Jurisdiction did not exceed that of the Adhikaramvaru
- Decisions made by consensus, where no consensus the King's intervention was necessary

Rata Sabha

- District Council was an assembly of principal persons and officials of the administrative sub division known as rata (district)
- Met to resolve conflicts on:- o Social status o Social conduct o Agricultural disputes o Caste conflicts
    - Behaviour which was socially inimical (sorcery)
- Ad-hoc tribunals with power to punish but focussed on resolving the matters before it
- Elaborate ritual and formality surrounding proceedings

Gamsabha

- Village Council – best known for administration of justice
- British were captivated by its effectiveness in dispute resolution in the villages
- Gamsabha was made a statutory tribunal by the British with the enactment of the Ceylon Village Communities Ordinance 1871 empowering it to deal with a multitude of problems at village level

ranging from rampant "frivolous" litigation to breakdown in customary irrigation practices
- Ad-hoc, informal and non-adversarial and held without ceremonial trappings
- Ultimate goal to provide advice, admonition and compromise rather than determine fault

Sakki Balanda

- Little information about this instiution
- Tribunal of inquiry such as to ascertain cause of death (coroner's court)

Procedure in Courts

- In the informally constituted tribunals like the gamsabha there was no prescribed procedure in the judicial sense
- Maha Naduwa and Royal Officials were endowed with formality and elaborate ceremony
- Trial proceedings were oral and there were no written pleas
- No lawyers and each party recited its own facts
- Decisions were arrived at by means of evidence or by a system of oath
- Decree of court given orally and no records of court kept
- All fees and charges went to judicial officers
- No formality surrounding appeal procedure and no time limits therefor
- Res Judicata: In Sinhalese procedure there appears to have been no law to prevent the retrial of a case previously heard and decided. The appointment of a new chief or headman offered an opportunity of obtaining a difference decision to that given by the predecessor in office. This ancient Sinhalese law did not know of the concept of res judicata. This position is diametrically opposed to the concept of 'res judicata' in the law of evidence
- No clear distinction between civil and criminal wring e.g. for robbery there was a double penalty i.e. compensation to victim and fine by the state
- Very important consideration of the caste of the wrongdoer in judgements
- Murder – lands confiscated
- If a person brought a grave accusation which he could not prove his property was forfeited to the other party
- Punishments included imprisonment, flogging, mutilation, banishment, degradation, fine and death

Administration of justice between 1505 – 1832

The Portuguese Rule between 1505 – 1658:

There is scarce information on the administration of justice during the Portuguese period. We are aware that the Portuguese did not introduce an entirely new and different form of general administration.

The Dutch Rule between 1658 – 1796:

The Dutch introduced their own courts of law – this did not mean the elimination of established traditional bodies i.e. the new courts supplemented the preexisting machinery of administration of justice.

The Dutch introduced the Roman Dutch law and procedure in the maritime provinces. The Dutch also began the process of codifying the indigenous law systems (they eventually completed two codifications – the Tesawalamai and the laws of the Mukkuwars). Noteworthy Dutch courts are:-

(a) Civile Raad

- Lowest of the Dutch courts
- Established in Colombo, Jaffna and Galle
- Also known as Stads Raad (town court) and had purely civil jurisdiction
- Jurisdiction originally limited to matters arising within town but later extended to respective provinces
- 1783 – matrimonial jurisdiction vested in Civile Raad
- This court helped ease the workload of the Raad Van Justitie
- No criminal jurisdiction
- Appeal could be made against and order of the Civile Raad to the Raad Van Justitie of the same Province

(b) Land Raaden

- Functioned at various times in Colombo, Jaffna, Galle, Matara, Batiicaloa, Trincomalee, Multivu, Mannar, Puttalam and Chilaw
- Court comprised of Dutch and local officials as members
- Designed to be simple and convenient accessible justice to indigenous people – did not always live up to this function
- Set up mainly to settle land disputes – after 1743 it was Land Raaden which settled the civil dispute of Asian inhabitants residing out of Colombo
- Appeal could be made to the Raad Van Justitie
- At times they exceried criminal jurisdiction

- Members of Land Raaden differ from district to district
- Members consist of officials of the Company and local cheiftans.
- Permanent members of Colombo Land Raaden were Disava (President), Fiscal (Vice President), person in charge of 'tombos', Chief Surveyor, Mahabadde Captain and Maha Mudali and Atapattu Mudali

(c) Raad Van Justitie

- Dutch introduced Roman Dutch law and their own procedures into these courts
- 'procurers' (or pleaders) were allowed to practice in court – elaborate rules formed to regulate their practice
- Courts established in Galle, Colombo and Jaffna
- At least seven members sitting in these courts, appointed by Governor from and out of the Raad Van Polity and from among civil and military officials
- Seldom that lawyers were appointed as members
- Session chaired by Governor initially but later chaired by Chief Administrative Officer
- Colombo High Court had civil and criminal jurisdiction and an first instance and an appellate jurisdiction
- Appeals could be made to the High Court of a district of Land Raaden and Civile Raad in that district
- Any decision of the High Court in Galle or Jaffna could be appealed to Colombo High Court where the value of the case exceeded 300 Rix Dollars

Administration of Justice in the maritime provinces under the British between 1796 1832

- The British conquered the maritime provinces from the Dutch in 1796
- During the period 1796 -1832 the form and shape of judicial administration of the maritime provinces was determined locally by the Governor and in England by royal prerogative instruments
- The Proclamation of 1799 ○ The first Governor F. North revived the Dutch system which effectively ceased to function at that time.
    - The Dutch system was not revived in its entirety and those institutions and procedures which were deemed repugnant to the English law were rejected
- The Charter of Justice 1801 ○ Introduced a new judicial framework
    - However, did not immediately lead to the scrapping of the Dutch courts which had been given formal recognition by the Proclamation of 1799
    - Established a Supreme Court with original and appellate jurisdiction ○ Established a separate Court of Appeal to hear appeals from lower courts

- Structure and jurisdiction of lower courts to be decided by the Governor ○ In addition to the judiciary, the entire system of administration of provinces was transformed

- Charter of Justice 1810 ○ The Supreme Court and the Chief Justice emerged as the dominant institution and the role of the executive and the Governor was subdued
- Charter of Justice 1811 ○ Radical change was short lived and Governor obtained a new instrument which restored the pre-existing structure
    - Supreme Court remained the centrepiece of judicial administration – safeguarding rights of colonial population against encroachment from executive authority
        - With exclusive jurisdiction the Supreme Court was able to mold its role as the champion for Europeans more clearly while looking after the interests of the indigenous population too
- Lower Judiciary ○ Two sets of courts become dominant in the lower judiciary – the Provincial Courts and the Sitting Magistrate's Courts
        - Provincial Courts first established by Governor F. North were more important of the two because they had more jurisdiction
- Manned by civil servants directly under the authority of the Governor
        - Magistrate's Court also originated under F. North as Fiscal's Courts
    - These two courts resulted in the elimination of Dutch Courts
        - Note that the Land Raad had a second lease of life under the short lived Charter of Justice 1810 – however, with the passage of time, it too caesed to exist
- The Jury System ○ The introduction of the jury system under the Charter of 1810 (and continued under the Charter of 1811) was considered by the British as one of their significant achievements in the administration of justice
    - Unlike in Britain, jurors were summoned and empanelled on the basis of ethnic identification and caste distinctions among Sinhala and Tamils were given recognition in selecting jurors (only with the reforms of 1833 were these removed)

Administration of justice in the Kandyan Provinces under the British between 1796 - 1832

- British were ceded the Kandyan kingdom under the terms of the Kandyan Convention signed in 1815
- Kandyan provinces were not annexed to the maritime provinces and were retained as a separate administrative entity ○ Authority of the Supreme Court did not extend to this territory
- Governor replaced the King
- In accordance with the Kandyan Convention 1815, new rulers retained traditional offices and functionaries and the Kandyan people were granted the maintenance of their customs and institutions ○ Kandyan Judicial Administrative

System continued undisturbed ○ Resident, in his judicial capacity, heard complaints brought to him by chiefs and people from areas neighbouring Kandy and supervised administration of justice

- In terms of judicial powers, the first significant step was appointment of a Magistrate in Kandy
- In 1816 the superimposed structure was revised by creating a board of commissioners with a commissioner specifically entrusted with judicial authority ○ The board, acting with the principal chiefs, effectively replaced the Maha Naduwa

Administration of justice and the development of the court system between the period 1833 – 1947

1833 Judicial Reforms:

Ceylon Charter of Justice 1833 which radically transformed the judicial arrangements was the result of unique circumstances:-

Cameron came to Sri Lanka and was given the task of examining the judiciary with the aim of providing "cheap and expeditious" justice for the local population. To achieve this he set two goals:

(a) Have a sufficient number of courts which would provide justice with the least possible delay and expense; and
(b) Making certain that the decisions these courts made were correct by
    a. Investigation of the truth of every allegation made before the courts
    b. Making it punishable to wilfully mislead the courts
    c. Make it difficult for person to use courts to inflict injury upon another

This provided the basis for Cameron's recommendations for the reform of the judiciary which were incorporated into the Charter of Justice he formulated for application in Sri Lanka

Major reforms touching on virtually every aspect of the government of Sri Lanka were introduced in 1833 on the basis of the work of Colebrooke and Cameron (the Colebrooke-Cameron Reforms" –

Intended to end the executive/judiciary conflict – intensity and openness of clashes lessened but problems still persisted as there was not complete separation

1833 Charter drafted by Cameron was elegant and simple in form which contained substantial and not procedural matters pertaining to the judiciary:-

(1) Dual system of administration of justice, one for maritime provinces and the other for the Kandyian provinces, to be replaced by a uniform common system – made possible by Colebrooke's reforms pertaining to a unitary government in the colony

(2) Supreme Court retained but new powers added – in charge of entire judiciary, given the role to create a strong and independent judiciary:-
   a. Judicial posts from the civil service (therefore Governor has some hold on the judicial branch)
   b. Supreme Court judges appointed by the Crown
   c. Supreme Court to consist of the Chief Justice and two Puisne Judges
   d. Designed to be only civil appeal court in the country
   e. Original criminal jurisdiction exercised with the assistance of jurors
   f. Situated in Colombo but required to go on circuit to make it more accessible
   g. Given authority to administrate and discipline Proctors and Advocates

   The Supreme Court underwent changes after 1833 which were not significant. It was notable that in 1852 judges were authorised to exercise criminal jurisdiction without jurors and in 1865 single justices were given power to hear interlocutory appeals, criminal appeals from District Court and all appeals from civil courts

(3) Entire new system of courts established (District Courts) whose civil jurisdiction was complete and exclusive but limited in criminal jurisdiction

   District Courts were not able to deal with the volume of cases and Cameron's ambition of providing cheap and expeditious justice was not achieved – concerns expressed over the increase in frivolous litigation and led to the thinking that a body is required to deal with the situation:-

      The Courts of Request were created by the Ordinance No. 10 of 1843 and were given jurisdiction over inferior civil matters

      Police Courts created by the Ordinance No. 11 of 1843 and were given jurisdiction over inferior criminal matters

         Initially these courts functioned without formality and lawyers and appeals were allowed to the Supreme Court. Remarkable changes thereafter resulted in lawyers being allowed to represent clients in Police Courts from 1852 and in Courts of Request from 1859; appeals were possible on wider grounds; procedure became more formal; delays and cost increased

As the number of Courts of Request and Police Courts increased, there was a corresponding decrease in the number of District Courts

The criminal jurisdiction of the District Courts was expanded from time to time and began to be viewed as more significant than others

District Court of Colombo gained importance as the centre for financial, mercantile and shipping activities whereas Kandy District Court was important for plantation issues

Administration of Justice Ordinance 1868

Laws in relation to courts were consolidated through the Administration of Justice Ordinance 1868 which did not introduce any new provisions and which repealed the Charter of 1833 save for a few provisions

Village Communities Ordinance 1871

- Attempt to revive the Gamsabha order which was not given a formal place by the Charter of 1833
- Gamsabha were valuable for solving frivolous litigation and was considered the ideal mechanism for dealing with problems at a village level
- The Ordinance conferred village tribunals jurisdiction over rules issued by the village committees which were set up by the Ordinance
- Village tribunals were set up with great expectations which were not met

Developments after 1889

Changes introduced by the Administration of Justice Ordinance 1868 necessitated another consolidation of laws relating to the organisation and power of courts – Courts Ordinance of 1889 (which repealed the 1868 Ordinance which in turn repealed the 1833 Charter). In addition to the consolidation, the 1889 Ordinance made provision for the appointment for Commissioners of Assizes by the Chief Justice when necessary to conduct criminal sessions of the Supreme Court

Changes to administration of justice pursuant to Courts Ordinance 1889:-

(a) 1938, Police Courts renamed as Magistrate's Courts
(b) Rural Courts Ordinance 1945 replaced village tribunals with Rural Courts
(c) Emergence of Municipal Councils as principal local authority in Sri Lanka – led to the establishment of Municipal Magistrate's Courts under Municipal Councils Ordinance 1947 which are empowered to deal with matters arising out of Municipal by-laws and other related laws
(d) Supreme Court declared the Colonial Court of Admiralty and admiralty jurisdiction granted to District Courts by Courts of Admiralty Ordinance 1891
(e) 1938 Court of Criminal Appeal established

(f) Children and Young Persons Ordinance 1939 established juvenile courts – eventually only one was set up in Bambalapitiya
(g) The Appeal (Privy Council) Ordinance 1909 solidified the position of the Privy Council as the final appellate authority in Sri Lanka

Rural Courts: successor to village tribunals expected to settle disputes amicably without formality and having limited civil and criminal jurisdiction with appeal to District Courts

Courts of Request: no formal procedure, more jurisdiction that Rural Courts, civil jurisdiction limited by monetary limit, no jurisdiction on family matters except under Adoption of Children Ordinance 1941, appeal to Supreme Court

Magistrates Court: meant to exercise exclusive criminal jurisdiction but also heard maintenance actions of wives and children under the Maintenance Ordinance No. 19 of 1889; jurisdiction to try summary actions brought under Criminal Procedure Code and non-summary jurisdiction to conduct preliminary inquiries into offences triable by District Courts and Supreme Court under Criminal Procedure Code; exercised power to issue warrants, requiring securities and inquiring into sudden deaths; empowered to sit as juvenile courts; appeal to Supreme Court

District Courts: served as primary trial courts; Civil Jurisdiction primarily determined by the Civil Procedure Code 1889; vested with testamentary; Matrimonial and insolvency jurisdiction; jurisdiction over lunatics, minors and wards and over guardians, estates of beneficiaries and trustees; Criminal Procedure Code determined criminal jurisdiction of District Courts; appeals to Supreme Court; District Courts were an appellate court for Rural Courts

Supreme Court: apex of judicial system in Sri Lanka; civil and criminal, original and appellate jurisdictions; functioned as Admiralty Court; dealt with admission and discipline of Advocates and Proctors; had broad injunctive powers and powers of punishment of those found guilty of contempt of court; criminal jurisdiction over any crime but in practice only heard serious crimes – exercised through its own justices or through Commissioners of Assizes who held proceedings in circuit; appeals from lower courts heard in Colombo

Court of Criminal Appeal: right of appeal to convicts of the Supreme Court; comprised of a bench of three Supreme Court justices excluding the judge who gave the conviction

Judicial Committee of the Privy Council: Ultimate appellate authority – such right of appeal recognised in 1798; dealt with important constitutional issues; rarely exercised criminal appeal authority given to it

Administration of Justice Law No. 44 of 1973

Several radical changes were introduced by the Administration of Justice Law No. 44 of 1973.

It repealed the Courts Ordinance 1889, Court of Criminal Appeal Ordinance, Ceylon Courts of Admiralty Ordinance, Court of Appeal Act, Criminal Procedure Code and the Rural Courts Ordinance. By amendment to this Law, inter alia, the Civil Procedure Code and the Courts of Request (Special Procedure) Act were also repealed.

It introduced a new system of courts and procedure in an attempt to streamline administration of justice in Sri Lanka:-

(1) Supreme Court:
   a. no original jurisdiction conferred on Supreme Court;
   b. no need for a Court of Assizes.
   c. Appellate jurisdiction and other various powers were similar to those conferred by the Courts Ordinance 1889;
   d. the Law curtailed powers to issue mandates in the nature of writs by stating that such mandates could not be issued against a Criminal Justice Commission established under the Criminal Justice Commission Act

(2) High Courts:
   a. Original criminal jurisdiction previously exercised by the Supreme Court under the Courts Ordinance was transferred to the High Courts.
   b. Trial was by jury before a High Court judge and no provision for trialat-bar on a direction of the Minister.
   c. Every High Court judge had concurrent District Judge and Magistrate in the High Court's zone;
   d. had power to grant injunctions and to hear and try election petitions and admiralty jurisdiction

(3) District Courts:
   a. Apart from civil, criminal and revenue jurisdiction exercised by District Courts the District Judge had concurrent jurisdiction with every Magistrate in the relevant district.
   b. Civil and criminal jurisdiction was subject to territorial but not monetary limits

(4) Magistrate's Courts
   a. Law significantly changed the role of Magistrates Courts
   b. Pre-existing division of summary and non-summary was done away with

c. With the abolition of Rural Courts and Courts of Request the original jurisdiction in respect of minor disputes was transferred to Magistrate's Court
d. Civil jurisdiction subject to monetary limit
e. Criminal jurisdiction subject to monetary and territorial limit
f. Could not try offences for which the maximum punishment exceeded seven years imprisonment for a fine of seven thousand rupees
g. Types of sentences were also restricted by law

(5) Appointment of Judges:
   a. Supreme Court and High Court judges appointed by the President while District Courts and Magistrates were appointed by Cabinet Minsters upon the recommendation of the Judicial Service Advisory Board
      i. Previous position was that Supreme Court judges were appointed by Governor General whereas other judges were appointed by Minister of Justice

(6) Chapter II of the Law
   a. Deals with criminal procedure

(7) Chapter III of the Law
   a. Deals with testamentary procedure

Reception of English Law in Sri Lanka

One of the important characteristics of the British policy regarding administration of their colonies was that they did not introduce English law by replacing prevailing laws in a colony with their laws. This was because the British had some fundamental principles regarding the administration of colonies which are reflected in the decision in *Campbell v Hall* e.g. laws in colony should be continued without disruption' laws should be applied to respective persons and property within the colony; if colonial laws were primitive, English law would carry etc.

Proclamation of 1799 and Proclamation of 1815 ensured the continuity of existing laws. Similarly other statutes promulgated by the British administration in Sri Lanka such as the Charter of Justice 1801, 1833 and the Ordinance of 1835 reflected the approach set out in Campbell v Hall.

English law entered into Sri Lanka by two separate methods:-

A. Reception of English law by legislation

(1) Statute passed by the Parliament of the United Kingdom – copied and enacted as law by the local legislature e.g. Sale of Goods Ordinance 1896 and Bills of Exchange Ordinance 1927

(2) Principles underlying the decisions of the English Courts were codified and adopted by the local legislature e.g. Penal Code 1883 and Trusts Ordinance 1917
(3) English law extended to the island by local legislation without further elaboration of the substance thereof in the enabling enactment or incorporation of
English law by reference e.g. Introduction of the Laws of England Ordinance 1852
(4) Provision in local statute for the application of English law where local law was silent e.g. Section 58(2) Sale of Goods Ordinance 1896
(5) Extensions of UK Acts to colonies prior to 1948 e.g. Copyright Act
(6) English law became applicable as a consequence of the assumption of British sovereignty (severed by the First Republican Constitution of 1972)

B. Reception of English law by judicial activism

- Law reports contain many instances when English principles (other than those incorporated by statute) were referenced in judicial decisions
- Proclamation 1799 "the laws and institutions that subsisted under the Dutch government would be continued subject to such deviations and alterations as have been or shall hereafter be by lawful authority ordained"
- *De Costa v Bank of Ceylon* – observed that only legislation could modify the sources of law recognised by the Proclamation of 1799 "Proclamation did not authorise deviations or alterations to be made by the courts of law"
- *Samed v Seguthamby* – "Proclamation of 1799 established the Roman Dutch law as it subsisted under the ancient Government of the United Provinces as our common law and the presumption is that every one of those laws, if not repealed by the local legislature, is still in force"
- Dr. Cooray states that in view of the Proclamation of 1799, the adoption of English law principles through judicial decisions was a technically improper use of the judicial technique.
- As the judiciary became conscious of their obligation to administer the prevailing law, the attempted to justify the stand taken by them in derogation of the laws they were bound to administer:- ○ The Roman Dutch law does not provide for the situations which confront the courts (De Zilva v Cassim)
    - The rules peculiar to life in Holland are not part of the law of Sri Lanka (Ramasamy v Tamby)
    - Roman Dutch law is similar to English law (Wright v Wright) ○ Roman Dutch law should be adapted to suit the circumstances of modern life by reference to English authorities (Noordeen v Badoordeen)
- Arbitrary methods used to justify the derogation of the Roman Dutch law include:- ○ Fernando v Bastian – it was held that it must be proved that a Roman Dutch rule relied upon was applied by the courts during Dutch rule.

- Since records were in Dutch this was virtually impossible to prove and as such the courts had a practically unfettered discretion to reject Roman Dutch law rules and apply the English principles instead

- Arbitrary approach where English law is applied because the Roman Dutch rule is obsolete (Silva v Balasuriya)

- English principles have also been incorporated where, ○ There is a salutary character to the English rule (Silva v Balasuriya) ○ The parties agreed to be governed by English law (Proncihamy v Davithhamy) ○ Where Dutch jurists disagree on a rule, the same may be disregarded (Ramasamy v Tamby)

In the above ways, the courts in the 19th and early 20th century have restricted the application of the Roman Dutch law. However from about 1920, there was a revival of the original sources of the Roman Dutch law and an amalgam of the Roman Dutch and the English law created by judicial activism.

Roman Law

Sources of Roman law:

(1) Customs – based on Roman customs but customs were later absorbed into other sources, particularly the 12 tables (codification)
(2) Leges – laws resulting from deliberation of Romans in assemblies known as leges; the leges regiae were enactments of the kings; the foundation of the Roman law is the leges embodies in the 12 tables
(3) Plebiscita – enactment of a council of plebeians; later on made applicable to all others
(4) Magistratum edicta – magistrates had the power to make laws in the administration of justice. At the beginning of his service he announces a set of rules which will apply during his time in office and this declaration becomes a law – in addition he had the power to develop the law to meet new developments and achieve justice.
(5) Senatus consulta – resolutions of the senate – a direction to a magistrate which becomes law upon inclusion in the magistrate's edict. These lost their importance as a source of law when senate's power was confined to confirmation of proposals by the Emperor and by the 3rd century AD they had lost all importance and had given way to principum placita
(6) Responsa Prudentum (Responses of Jurists)
(7) Principum Placita (Imperial constitutions) emperor's unlimited legislative power in excercise

Roman law concepts:

- "Jus" had several meanings e.g. "the place where justice is dispensed"; "a strict law distinct from equity"; "a right derived from a rule"; and also the general man made law incorporating the rules of law and the rights conferred on a person by the rules - "Aequitas" means fairness or justice
- **Jus Publicum –** the law that relates to the affairs of Romans; the relationship between individuals and the state including criminal, constitutional and administrative law
- Jus Privatum – the law that governs the relationship among individuals; including family, obligations, succession and property laws
- **Jus naturale –** according to Justinian this is what nature has taught all living things (a philosophical concept) and is therefore of universal application and must be observed by all of mankind; the rules of natural law are derived from the common nature of all people; natural law is suggested by nature and is found in the law of all nations; an ideal which man should seek to confirm
- **Jus Civile –** the law of a particular State; compared with the "Jus Gentium" and military law or sometimes with "jus honorarium"; it sometimes means the part of Roman law which is based on ancient Roman customs and statutes and on the other hand may refer to the entire body of Roman law; it generally covers the law of Rome that was originally applicable to the citizenship of Rome
- **Jus Gentium –** (a) the law universally applicable to all the civilised people; (b) part of Roman law applicable to govern relationship between Romans and foreigners living under the authority of Rome and later developed into a body of law applicable to Romans and foreigners –stratred as a set of rules for commerce and the office of a magistrate ("Praegor Peregrinus") was created to administer the same and consequently developed to govern all affairs of Rome
- **Jus Honorarium –** body of law developed by magistrates where they do not find an existing solution to a new issue and declare a new solution (indictum) and thereby contribute to the development of the law
- **Jus Scriptum –** the written law; unwritten law comprises of customs

Roman Personal Law:

The Roman personal law concerns the status of persons of which there were 3:-

A. Libertas

Justinian defined "libertas" as the natural ability of every man to act has he wishes except where force or law prevents him. A man can be free by birth or as a freed man.

Slavery is defined by Justinian as an institution in jus gentium by which a man is subject to the ownership of another man and that this is contrary to nature

Legal Status of a Slave: at the outset, the status of a slave was not very bad because there were not that many slaves in early Rome. This deteriorated with the increase in the number of slaves:-

- They lacked legal status
- Belonged to the master as property (Res) – could be tortured and killed
- Could not acquire property and if he did the master owned it. Slave could loan money from the master as creditor
- Marriages between slaves not recognised

Rigid rules relating to slaves were later relaxed e.g. under Emperor Hadrian, slave could only be killed with the permission of a magistrate

Slavery is caused under:-

(a) Jus Gentum – by decent (child follows status of the mother) and captured enemies
(b) Jus Civile – manifest thief could be enslaved; woman who co-habited with a salve; those who were condemned to death; those who evaded military service; guilty of ingratitude to former masters; insolvent debtor could be slave to creditor

Slavery could be terminated by:-

(a) Formal methods whereby the master would free the slave after following certain formalities, by enrolling the slave as a free man during the census and by setting a slave free under a will
(b) Informal methods whereby the master frees the slave among friends, master has dinner with slave
(c) Conversion to Christianity (at later stages)

B. Civitas

A person is free whether he is a Roman citizen or a foreigner

C. Familia

Every Roman citizen was a member of a family. The basis for Roman family was the absolute power of the "Pater familias", the eldest living male of the family

Patria Potestas (power of the Pater Familias):-

- Right to inflict death on his subjects (this was later restrained)
- Power of marriage of subjects
- Power of property rights of subjects (later relaxed by permitting child to keep property for personal use)

- Benefit acquired from a contract of subject accrued to Pater Familia

Pater Familias created by:-

- Birth
- Marriage
- Legitimisation
- Adoption

Pater Familias terminated by:-

- Death
- Change of status e.g. becoming a slave or where woman marries the pater familas changes
- Abrogation
- Emancipation

Civil Marriage (Justae Nuptae)

This is the only marriage which creates legal consequence and only Romans could enter into it. Civil status created is "manus".

Qualification:-

- Only Romans and foreigners with right to marry could enter into marriage
- Blood relatives, relations by marriage, relations by adoption and certain prohibited classes could not marry (e.g. marriage between senator and actress)
- Consent of both parties is required
- Those under pater famila must have his consent
- 14 years for male; 12 years for femal

Formality:-

- A religious ceremony
- 5 citizens as witnesses and an official of the court

- Living together for one year (after which status of manus is acquired)

Legal consequences:-

- Woman becomes part of the husband's family
- Belongs to pater familia for husband
- Children subject to patria protesta
- Marriage without manus means that the wife belongs to original pater familia, has full legal capacity and can acquire property

Romans also recognised dowry (dos)

Termination of marriage:- - Death of one party

- One party becomes a slave
- Operation of law e.g. husband joins army
- Captured by enemy
- divorce

Law of Delicts

Romans recognised four major delicts:-

(1) Injuria

An insulting act which is injurious to a free man's dignity – a wilful violation of his right to safety and reputation e.g. assault without just cause, forced entry to home, defamatory statement.

The twelve table recognise compensation as a remedy

Action injuriam introduced by a magistrate required action to be brought within a period of one year from the commission of the wrongful act and the cause of action cannot be transferred to the heirs of the defendant

Romans recognised the following elements of an action injuriarum –

- Action cannot be instituted where the defendant acted in self defence
- Amount of damage estimated by the plaintiff is unreasonable (then can be altered by the Priter)
- Some other person e.g. parter familias of the plaintiff could bring action on his behalf
- Affected party must show immediate resentment

Aggravated Insult – insult may be aggravated and quantum of damages increased –

- By reasons of rank of the injured
- Nature of act committed
- Nature of place where act is committed
- Special vulnerability of the part of the body injured die to the act of the defendant

(2) Damnum injuria dataum (damage caused to property)

Damnum Injuria Datum is a Latin term used in Roman law. It means 'damage unlawfully inflicted or wrongful injury to the property of another.' It refers to damages or loss caused by the actions of a person who was acting

without any legal basis. Damage caused by a trespasser; a gratuitous assault on a person or upon property are few examples of Damnum Injuria Datum. The word damnum refers to economic loss, not the physical damage caused.

Liability under Lex Acquilia for Damnum Injuria Datum requires:

i. An Act
   a. A positive act; not an omission
   b. An omission committed with a prior assumption of liability may result in liability e.g. doctor abandoned slave after surgery
ii. Wrongful Act
   a. Act is wrongful when committed (i) intentionally and (ii) neglisgently
   b. Act becomes intentional when defendant causes it expecting the result or intending to cause damage
   c. Act becomes negligent when he fails to observe duty of care
   d. Considered whether the act could be justified e.g. owner killing slave is exonerated
iii. Financial loss caused by the wrongful act
   a. Wrongful act must result in financial losses
   b. Attention given to quantum of damages – actual damages calculated but later losses due to special circumstances could also be quantified and awarded
   c. Only the owner could bring action but later a bona fide possessor could also bring action
   d. Damages were awarded for direct losses only but later indirect losses also awarded

(3) Furtum (Theft)

(4) Rapina (Robbery)

<u>Law of Property</u>

"Res" – the Roman law of property mainly deals with res, which means objects and rights in objects which have economic value

Classification of Res:-

(1)
   a. Res Corporales – physical or tangible things
   b. Res incorporales – non-physical things such as servitudes

(2) Classification of giaus
   a. Humani juris – things of which ownership is vested in human beings or in other words, private ownership and public ownership:-

i. Res Mancipi – could be transferred only by "mancipatio" (legal procedure involving a solemn verbal contract) e.g. houses, lands and horses
ii. Res nec-mancipi – things that can be transferred by modes other than macipatio e.g. wild animals and public land

b. Divini juris – things in divine ownership e.g. things dedicated to the Gods such as family graves, things protected by Gods such as city walls and temples

(3)

a. Res mobiles – movable things
b. Res immobiles – immovable things

(4) Justinian classification

a. Things that vested in private ownership
b. Things not owned privately e.g. the sea, state property such as the harbour and "res nullius – things not owned by anybody
c. Corporals and incorporals in property
d. Things in divine ownership

Ownership and Possession:-

Ownership is the legal relationship to a res expressed in terms of mine or yours

Possession is the physical control over the property. It carries two elements, viz, (i) Animus – the intention to possess and (ii) Corpus – physical possession

(a) Dominum injure civile – right to possess, alienate and destroy the property

(b) Bonitory ownership – if the sale of res mancipi is not executed with the requisite formality, seller is still the owner until 1 year thereafter for movable property and 2 years thereafter for immovable property

(c) Peragrine ownership – foreigners could not acquire ownership under jus civile; they could acquire only by means of traditio

(d) Bona fide possession – bona fide purchaser who buys stole property can protect his right to possess against all except the actual owner

Modes of acquiring ownership:-

(1) Original Modes

a. Occupation – taking possession of unowned property with the intention of becoming owner e.g. capturing wild animals (note that it is not enough just to would the animal), property of an enemy

(property captured in Rome belongs to the capturer and property captured outside Rome belongs to the State)

b. Accessio – means whereby one res becomes attached to another res e.g. soil becoming added to land by river becomes property of the land owner
c. Confusio – inseparable things become common property unless the parties have agreed otherwise e.g. draw a picture on X's canvass - X owns it
d. Specificatio – creation of a new res e.g. ship building or wine making. The Proculians said that the owner would be the owner of the raw materials. The Sabinians held that it belonged to the creator. Justinian decided that if it can be changed back to a raw material, it belongs to the owner, if not it belongs to the creator
e. Thesauri invention – finding treasure hidden for safety where the owner is unknown. Hadrian decided that (i) where person finds it on his own land, cemetery or religious land he becomes owner (ii) where accidentally found on another's land, joint ownership (iii) found intentionally on another's land belongs to the land owner

(2) Derivative acquisition

a. Mancipatio - is effected in the presence of not less than five witnesses, who must be Roman citizens and of the age of puberty, and also in the presence of another person of the same condition, who holds a pair of brazen scales and hence is called Libripens. The purchaser, taking hold of the thing, says: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO ISQUE MIHI EMPTUS ESTO HOC AERE AENEAQUE LIBRA (I affirm that this slave is mine according to quiritary right, and he is purchased by me with this piece of bronze and scales). He then strikes the scales with the piece of bronze, and gives it to the seller as a symbol of the price

b. Traditio – mode of acquisition under jus gentium (International Law) – transfer of property with intention of transferring ownership

c. Cession in jure – transfer completed before court

d. Dontaio (gifts)
    i. Donatio inter vivos – means of gift between two living persons (generally cannot be cancelled unless done expressed ingratitude). Justinian ordered that gift to free man is revocable where the owner was childless and subsequently child was born to him. Justinian also ordered against gifts over 500
    ii. Donatio mortis causa – gift made in contemplation of death – operates on death of donor. Justinian required 5 witnesses at the making of such a donation

(3) Prescriptive acquisition – acquisition of ownership by a person who has possessed the property for a certain length of time. Usucapio was a concept in Roman law that dealt with the acquisition of ownership of something through possession. It was subsequently developed as a principle of civil law systems, usucaption. It is similar to the common law concept of adverse possession, or acquiring land prescriptively. Requirements to be fulfilled under usucapio are:-

a. Property must be actually possessed not just retained
b. Possessor must have right to enter into commercial transactions
c. Possession must be for the entire period (possessor can add his predecessor's possession period)
d. Possession must be uninterrupted
e. Certain res are not subject to usucapio e.g. Emperor's property
f. Possession must be bona fide
g. Must be some ground of acquisition recognised by law e.g. acquisition of mancipi property without proper formality

Concepts similar to usucapio:-

(1) Longi termportis Prescriptio (long term prescriptive right) – period of possession was changed e.g. where land was in one province the period was 10 years whereas where the land covers two provinces it was 20 years. Applicable to land situated outside Rome
(2) Longissimi Temporis Prescriptio (possession by a long term) – latter development whereby the 40 year possession was defeated by vindicatio action – period of time reduced to 30 eyars

Justinian's reforms to Usucapio:-

(1) Usucapio was for movable property only – period was 3 years
(2) Term longi temporis used for land – period of 10 years and 20 years as described above
(3) Limitations applicable to usucapio were applicable subject to changes e.g. bana fide possessor was granted ownership to both movable and immovable property with the possession of 30 years

Law of Succession

The Romans recognised two kinds of succession, testate succession (where owner has left a will and succession takes place in terms thereof) and intestate succession (where owner has not left a will)

Universal succession - succession under Roman or civil law to the totality of a man's estate including both his rights and liabilities according to the principle that the **heir is the same person as the deceased**

Validity of a will:-

(a) Must be valid from the beginning (ab initio)

- Will is made in a recognised form
  - Will made before the Comitia Calata, an assembly before which partricians could appear to make an oral will
  - Will made by soldier before battle orally to his colleagues
  - Testator makes will in front of five witnesses and an officer
  - Tripartite will – (i) witnesses required at the time of making (jus civile) (ii) seals of 7 witnesses required (iii) testator's signature was required
  - Public written will – formally presented to the Emperor for conformation
  - Special type of will –
    - Illiterate persons could make a will in the presence of witnesses who know the names of the heirs
    - Blind testators must recite the names of heirs
    - Seven witnesses required for wills of testators with contagious diseases not required to be present
    - Rural area wills – 5 witnesses sufficient
    - Soldiers could make wills informally during period of service and for one year thereafter
- Heirs must be appointed
- Certain persons are required to be appointed as heirs or disinherited
- Certain persons were necessarily required to be appointed as heirs
- Witnesses and heirs must have capacity to participate in the will

(b) Must remain valid until the heirs enter their inheritance

(c) The heirs must really enter upon their inheritance

Capacity to make a will:-

(a) Testamenti Factio Activa – testator must have capacity at time of making the will and at the time of death. The following exceptions had no capacity:-

a. Prodigal (spendthrift)
b. Deaf, dumb and blind (blind will had special requirements)
c. Captives
d. Those without capacity to enter into commercial transactions
e. No right to alienate property e.g. lunatics

f. Incapacitated persons as a result of penalty e.g. libels
g. Persons with uncertain status e.g. son of pater familias whose death was uncertain

(b) Testamenti Factio Passiva – heirs must have capacity at the time of making the will, death of the testator and inheritance. All Roman citizens except the following had capcity:-

a. Uncertain persons
b. Foreigner without capacity to enter into commercial transactions
c. Some women
d. Children of traitors
e. Childless and unmarried prohibited from taking half of the inheritance

(c) Testamenti faction relativia – witnesses must have capacity at the time of witnessing. Every free man had capacity except women, slaves, those convicted of bribing Magistrates, family members of the testator and the heir

Interpretation of a will:-

- Ordinary meaning given to words
- Extraneous evidence not admitted to prove meaning of illegible writing
- Act of erasing proves intention to revoke the will
- Conflict of words – known intention of the testator prevails

Invalidation of a will:-

- Lack of capacity of the parties
- Refusal of the heirs to accept inheritance
- Death of heir before testator
- Testator or heir changing status
- Revocation by second will
- Opening will in unofficial manner (during the classical period)

Kandyan Law

Kandy remained an independent kingdom till it was taken over by the British in 1815 and therefore, customs and laws remained intact until then.

"the Kandyans have no written laws and no record whatever of judicial proceedings was preserved in civil or criminal cases"

- Sir John D'Oyly, a British administrator in Kandy

The British government, while preserving the existing law of the Kandyans (which should be called Sinhalese law in light of the fact that prior to 1505, up-country and lowcountry laws were mainly identical), administered Roman Dutch law to all low-country Singhalese on the assumption that this was followed during Dutch rule

Sinhalese law was enforced in Kandy in the 18th and 19th century as territorial law rather than personal law and was not confined to the Singhalese.

Sinhalese kings applied Kandyan law to all subjects regardless of whether they were Kandyan or not; they also applied Kandyan law to all lands situated in Kandyan territory; Kandyan law was applicable to Tamil inhabitants in Kandyan territory – *Mongee v Siarpaye*

"the Singhalese law as enforced in the Kandyan territory during the 18th and 19th centuries was in no sense a personal law. Originating in the customs of the Singhalese, it had long since become the law of the country as administered by the authority of the King in respect of all races alike, foreigners no less than subjects"

- A.F. Hayley

British knew that Kandyan law was applicable to all entrants to Kandy including the British

They considered Kandyan law to be uncivilised due to the harsh punishments in the criminal law e.g. amputation; and polyandry in the marriage law and therefore, they did not want it to apply to the British settlers – this was the reasoning behind the Proclamation of 1815 which set different courts for different parties

Kershaw v Nicoll – wife of a Scot domiciled in Kandy was held to be entitled to hold property acquired by her as a separate estate in accordance with Kandyan law

Today Kandyan law is not territorial but a personal law. This was brought about as a result of radical changes by the Supreme Court on the applicability of Kandyan law:-

William v Robertson – overruled Kershaw v Nicoll; in this case a full bench held that Kandyan law was personal law which applied only to Kandyan Singhalese

It is argued that William v Robertson marks a turning point in the erroneous misconception that Kandyan law is a personal law. Dr. Cooray substantiates this argument as follows:-

1. Examination of the early proclamations between 1815 and 1835 shows that British applied Kandyan law to all inhabitants of Kandy and not only to Kandyans.
2. Proclamation of 1816 regarded Kandyan law applicable as territorial law until such time her Majesty declared that distinction should be drawn between applicability

to natives and Europeans. The lack of such a declaration meant that law was still territorial

3. 1851, Supreme Court recommendation to the Governor on Kandyan law being restricted to the Kandyans (such a recommendation is redundant if Kandyan law is personal)
4. The words "adjudication within the Kandyan Provinces" in Ordinance No. 5 of 1852 strongly suggests territorial nature of Kandyan law
5. Early case law suggests that Kandyan law is territorial

Transformation of Kandyan Law to a personal law:-

In Williams v Robertson, the defendants were two Europeans, a husband and a wife, who argued that as they were domiciled in Kandy, the Kandyan law applied to them and the wife had a right to possess her property independent of her husband:-

(1) Can a person who comes to Ceylon and resides in Kandy acquire Kandyan domicile as a choice distinct from Ceylon domicile?

The court decided in the negative

(2) Would European domiciled in Ceylon by reason of residence in Kandy give wife the status of a Kandyan wife?

The court decided in the negative given the differences between Christian and Kandyan marriages

Wijesinghe v Wijesinghe – court followed the decision in the Robertson case when deciding whether Kandyan law applied to a couple from maritime provinces who had acquired land in Kandy; held that Roman Dutch law applied to them

Narayanee v Muthuswamy – immigrant Tamils in Kandy could not marry under Kandyan marriage law and mixed marriage between Kandyan Singhalese and low country Singhalese could not be contracted under the Kandyan Marriages Ordinance

Manikkan v Peter – succession to property of a Kandyan woman married to a low country Singhalese man living in Kandy is held to be governed by Kandyan law

Kapuruhamy v Appuhamy – Roman Dutch law applied to a child of a mixed marriage between Kandyan woman and low country Sinhalese man

Mudiyanse v Appuhamy – child of mixed marriage between Kandyan man and low country Singhalese woman – where parents are governed under different systems of personal law, child is governed by the general law of the land

Punchihamy v Punchihamy – court decided that children of a marriage between Kandyan man and low country woman are not to be regarded as Kandyans

The above decisions were said to be contrary to Kandyan custom. The government appointed a Commission and upon the recommendations of such Commission passed the Kandyan Succession Ordinance No. 23 of 1917 which provides that children of a –

(a) Marriage between a Kandyan man resident in the Kandiyan provinces and a woman not subject to Kandyan law
(b) Marriage contracted in binna between a Kandyan woman resident in the Kandyan provinces and a man not subject to the Kandyan law

shall be governed by Kandiyan law

Who is Kandyan for the purpose of application of Kandyan law?

Kandyan means the descendents of a person living in the Kandyan provinces in 1815, including Muslims and Tamils – Kandyan Succession Ordinance (making the above decisions invalid)

Also may be argued that Kandyan is one who is a descendent of a Singhalese subject to the Kandiyan king domiciled in the Kandyan provinces in 1815

Those families who have long lived rooted to the soil of any provinces where the Kandyan law prevailed and speak the language and follow the customs there may be regarded as Kandyans - Balasingham

What are the Kandyan provinces?

Kandyan Marriage Ordinance sets out the limits of Kandyan provinces in its schedule

Kandyan Marriage and Divorce Act 1952 – Central Province, NorthCentral Province, Uva Province and Sabaragamuwa Province leaving out the North-Western Province

Sources of Kandyan Law

- Law of Kandyan provinces was not reduced to writing upto 1815
- In land cases there were written decrees called sittu and if decided by oath, divi sittu, which were delivered to the parties entitled to the land
- Sannasa (royal grants) written on copper plates and talipots
- Sir John D'Oyly's books on Kandyan law is one of the few sources which reduced the Kandyan law to a comprehensible level
- Niti Niganduwa
- Modern statutes restated and modified ancient principles and is the most important source of the modern law

Muslim Law

Application of Muslim law depends merely on whether that person is adherent to Islam.

It is important to distinguish moral or religious obligations on the one hand and the legal obligations the other and also the Shariat (cannon law which embraces the totality of Allah's Commandments and subsequent developments to it) and Fiqh (cannon law which is confined to describe law as a science or jurisprudence and which a citizen is legally bound to obey).

The Sri Lankan Muslims are descendants of migrant traders in 8th and 9th centuries and Malays who were recruited by the Dutch to serve as soldiers.

Sources of Muslim law in Sri Lanka:-

(1) Mohammedan Code
- Promulgated in 1806 (uncertain if prepared by the British or merely a translation of the code complied by the Dutch)
- First Title of the Mohammedan Code deals with succession, inheritance and other incidents occasioned by death
- Second Title dealt with matrimonial affairs
- Not an exhaustive collection of Muslim laws – it was a rudimentary compilation with many gaps and certain provisions which were inconsistent with Muslim law

(2) General Principles of Muslim law
- *Rex v Miskin Umma* – Code described asrough codification of a very great system of jurisprudence
- *Bandirala v Mariuma Natchia* – where the provisions of the Code are clear, effect must be given to them even where they clash with principles of Islamic jurisprudence
- When the Code is silent, could reference be made to general Islamic law?

- *Abdul Rahiman v Ussan Umma* – Muslim law applicable in Sri Lanka is not the entire civil law but only that portion which was adopted by the Muslims in Sri Lanka
- *Mattalibu v Hameed* – held that benami transactions, a principle of contract in Islamic law, was not in force in Sri Lanka ○ *Zaibu Natchia v Mohamadu* – Kaikuli is a legal conception unknown to the ordinary Mohammedan law and seems to be a feature of Muslim marriage only in Ceylon
- *Narayanen v Saree Umma* – where Code is silent in cases where no custom can be proved, Roman Dutch law will apply

(3) Statute law

- Mohammedan Code has been repealed – not included in Legislative Enactments of Ceylon 1938
- Muslim Marriage and Divorce Act 1951
- Muslim Intestate Succession and Wakfs Ordinance 1931 (as amended)

Sources of Islamic law

(1) Historical Sources –
   a. Quran
   b. Hadiths and Sunna
(2) Subsidiary Sources - Ijma and Qiyas (knowledge deduced by way of analogical deduction from the principles laod down in the Quran and Hadiths
(3) Schools of Muslim law – four Sunni schools and four Shiah schools. It has been recognised that Sri Lankan Muslims are *Shafies – Mohamedu Cassim v Cassie Lebbe* and *Rabia Umma v Saibu*

Thesawalamai Law

"Thesawalamai" means the customs of the land. This is the system of law applicable to the Tamil inhabitants of Jaffna. The customs usages of Malabar were derived from the Marumakattayam law which constitutes the main basis and ground work for the Thesawalamai law.

Thesewalamai was codified by the by the Dutch and after approval by the Mudaliyars as to its accuracy, it was applied in resolving civil disputes from 1707 to 1806. The law codified was not the original Thesawalamai but one with the modifications made during the Portuguese and Dutch rule. Application continued under British (Proclamation of 1799).

Sabapathi v Sivaprakasam – the 1806 English translation of the Thesawalamai Code was authoritative (not the Dutch Code)

After the Legislative Enactments in 1938, there is no doubt that the English translation is law since it is incorporated into the said enactment.

Applicability of Thesawalamai:-

- 1806 regulation declared the phrase "Malabar" inhabitants giving rise to the argument that Thesawalamai Code contains only the indigenous laws of the Tamisl from Malabar and that the Code was only applicable thereto.
- However, Dutch considered that Thesawalamai applied to all Tamils in Jaffna and the British used the phrase "Malabar" to refer to the Tamils of Ceylon
- *Chetty v Chetty* – court rejected the argument that Thesawalamai applied only to the Malabar inhabitants of Jaffna on 1806 and did not apply to Tamils from India or Ceylon who have settled in Jaffna after 1806 and held that the term "Malabar" was synonymous with the term "Tamil" and that the Code was applicable to all Tamil inhabitants of the Jaffna province
- *Tharmalingam Chetty v Anurasalam Chetty* – Thesawalamai Code applies to Tamil inhabitants of Jaffna province
- *Savundranayagam v Savundranayagam* – Son of Colombo Chetties who settled in Jaffna not subject to Thesawalamai as Colombo Chetties did not have a Jaffna inhabitancy
- *Velupillai v Sivakamipillai* – 'inhabitancy' applied to a person who has acquired permanent residence in the nature of a domicile in Jaffna; Middleton J "One who has his permanent home in Jaffna"
- "Jaffnapatam" only applied to the Jaffna peninsula during the Dutch period. But as a result of interpretation by courts of "Province of Jaffna" was extended to a wider area almost coinciding with the Northern Province of Modern times.
    - Thesawalamai has been applied to the Tamils of Mannar District – *Marisal v Savari* ○ Thesawalamai does not apply to Tamils of Trincomalee or Batticaloa – *Wellapulla v Sitabelem*
- *Seelatchy v Visuanathan* – a person subject to Thesawalamai who owns property in Colombo; Thesawalamai law will apply to right of succession and matrimony over such property.
- *Sivagnanalingam v Suntheralingam* – Thesawalamai applied to them wherever they are and to their property wherever it is located

Thesawalamai can be described as a personal law with a territorial basis. Therefore a person could change his personal law by shifting his permanent residence.

Where there are gaps in the Thesawalamai Code, judges will fill the gaps with the Roman Dutch law.

Sources of Thesawalamai are the Thesawalamai Code and the customary laws of the people.