

Emergence of two legal cultures in Sri Lanka and the growth of a litigious nation under western powers

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Abstract

The king of Sri Lanka was the fountain of justice and wielded absolute authority subject to *Dhamma* and *Vyavahara*. His authority was delegated to and exercised by his officials corresponding to their executive duties and also by judicial institutions that evolved over the years. These laws and legal institutions seem to have evolved over the years from the recollections of laws and institutions familiar to the early settlers who had migrated from India and other parts of Asia, modified and adjusted to local circumstances and also to the Buddhist principles. The laws thus evolved were flexible and elastic and administered humanely and imaginatively according to the nature and circumstance of the issue. It had a menu of dispute resolution techniques such as mediation, conciliation, negotiation, arbitration, adjudication or combination of such techniques.

When the western powers became the masters of Sri Lankan territories, they continued the same system with moderate changes to suit their objectives. The British who succeeded the Dutch introduced their own legal institutions and procedures without abolishing the existing system, and also made too many experiments within a short period. The system thus introduced was novel and alien to Sri Lankans and was inconsistent with the spirit of simplicity to which they had been long accustomed. It was soon evident that the English laws, institutions and procedures led to costs and delays amounting to an absolute denial of justice, and perjury was rampant. Steps were taken in this context to resurrect the basic indigenous legal institutions and to follow the traditions and customs. Thus by the end of the nineteenth century two legal cultures had evolved and the spirits of litigency seem to have been well rooted among the natives.

Text

A trial in Sri Lanka according to the chronicles was a solemn occasion, where the Judge had to observe certain rituals to remind him of the way in which he should approach his task. Including a course of clean mind, unaffected by prejudices and irrelevant considerations. The judge was to adjudicate in accordance with the law of the country and had to act without fear or favour, affection or ill will, impartially and independently, without bias or prejudice or the appearance of bias or prejudice. He had to hold a fair trial, showing patience and attentiveness and endeavouring to ascertain the truth, and in exercising his discretion with regard to the punishment of offenders. He had to impose a sentence that was within the prescribed or customary sentencing policy, applicable to the circumstance of the case (Amerasinghe 1999).

The matrix of Sri Lankan ideology of judicial management was different from that of the western powers who ruled the Maritime Provinces since 1597 and later the Kandyan provinces from 1815. The laws and legal institutions of Sri Lanka seem to have evolved from the recollections of laws and institutions that were familiar to the early settlers who had migrated from India. They were subsequently modified by the Buddhist principles, local usages, traditions and beliefs and the needs of the settlers. Therefore, it is necessary that to understand the nature of the judicial administration at work in early Sri Lanka one has to look at it through the window of India rather than through the British eyes.

Sri Lankan law, which evolved over the years were flexible and elastic, and in adjudication took into account the laws of the place, and interpreted humanely and imaginatively according to the circumstance of the case. It had a menu of dispute resolution techniques such as mediation, conciliation, negotiation, arbitration, adjudication or combination of such techniques (Amerasinghe 1999).

The King was the fountainhead of justice – *dharmapravartaka*, (E.Z.Vol.1, p.131) and was expected to rule righteously by a conscientious, rightful and impartial discharge of his duties. In India and in Sri Lanka, the King's authority was not absolute, it was not untrammelled, unqualified, and unconditional (Amerasinghe 1999). According to Paranavitana, his descent traced back to mythical personages of the past, the traditional rituals undergone by him at the consecration and the magical potency believed to

reside in the regalia in his possession made the person of the King sacred and the commands emanating from his demanded implicit obedience as the expression of the will of the gods. The King therefore, wielded absolute authority and had power of life and death over the most exalted of his subjects. This absolute power which the King possessed in theory was, however, limited to a great extent in practice by public opinion which demanded the ruler to follow the principles of justice and equity (dhamma) and custom and precedent (vyavahara or charitta, s. sirith) as established by the policies followed by former rulers who served as models of kingly behaviour. The idea implanted in the minds of every member of the royal family by their early training as well as by the social milieu in which he had his being that the ruler should hearken to the counsel of the elders and the Sangha limited his freedom of action” (Paranavitana 1959).

The King had original jurisdiction, and at times sat in judgement hearing even simple cases (E.Z. vol.1, pp. 35-37), but often the kings' judicial authority was exercised by officials to whom he had delegated such powers. However, dispute involving the members of the royal family or high dignitaries of the state were generally heard by the king himself. The king usually exercised original jurisdiction in respect of disputes between principal chiefs, principal officers of state, servants of the king's household and the priests. The king alone could impose a sentence of death.

Except a few officials with specialized functions every official exercised judicial powers corresponding to his executive duties. Thus during the Kandyan Kingdom the Adigars, Disāves, Mohottāles, K• rales, Vidānes, Liyanarālas, Undirālas and Ārachchies all functioned as judges adjudicating civil and criminal jurisdiction within the ambit of their administrative positions.

In exercising the judicial powers the king consulted his chiefs and obtained their opinion. In the early days Rajasabhā or the king's court and during the Kandyan period Maha Naduwa, advised the king on highest judicial matters as the Privy Council of Great Britain. This court was consisted of the Adikaramas, Disavas, Lekams and Muhandirums who were distinguished for their ability and judgement. There were two kinds of civil and criminal matters referred to the Maha Naduwa i.e. the cases referred by the king, and those which were originally instituted before the Maha Naduwa usually by a chief under whose original jurisdiction was the complainant. In the examination, plaintiff had to state his case first and the defendant followed by the witnesses of both parties. The proceedings were oral, and no records were kept. The decision was by majority, and in case of a doubt the matter was decided on oath. If the decision so arrived was confirmed by the king, a sittuwa, the decision of the court, was given to the successful party.

Gamsabhava was the lowest court and probably the earliest tribunal in the judicial hierarchy of the Sinhalese. The concept of this institution was brought by the early settlers who wanted peace and order maintained in their agricultural zone. However, no chronicle gives an account of the judges of this court or of the legal proceedings. It may be due to the fact that the village communities enjoyed a great deal of independence in settling their disputes and that such disputes being very trivial in nature and the intervention of higher tribunals was not necessary (Geiger 1960).

There were other courts known as Ratasabhā, composed of delegation from each village in a Korale or Pattu. The delegates were from the principal citizens and officials such as Mohottālas, (Scribes) Liyanarāla (Clerks), Badderālas (tax collectors), and Undirālas (collector of royal revenue). Matters affecting caste, marriage and social status were adjudicated by these tribunals.

Thus it is clear that from the very early days of Sri Lanka history a hierarchy of courts from village level Gamsabhāva through district level Ratasabhāva to Mahanaduwa and through courts of officials to the king existed in the island. These courts and tribunals have maintained the law and order among the countrymen to such an orderly manner that a beautiful woman could walk alone in the country carrying a precious jewel, without anyone daring even to ask her what she had her in hand (E.Z. vol.1, p.134).

Judicial precedent was not a criterion of validity in the judicial system of Sri Lanka. Yet precedents were important because regularity in the way in which matters were decided was a feature of the system. The mechanism dealing with cases of conflict and breach, the emphasis was not on sanctions, but on compliance; on reconciliation and settlement rather than vengeance. 'An eye for eye' formed no part of the laws of Sri Lanka. (Amerasinghe 1999). The law was not mechanically applied, the law itself provided that attention should be paid to time, place and circumstances as stated by Manu. (Manu viii, 45). Thus the Sinhala courts did not pronounce any judgment on interpretation of rules per-se, but rather on a combination of legal principles with the situational aspects of any particular case.

The Portuguese (1597 – 1658) and the Dutch (1638 – 1796) who ruled the maritime provinces of Sri Lanka since 1597 did not come with judicial institutions and tribunals of their own, but continued to use the existing system. Over the period of their rule new tribunals evolved to meet the needs of the day. The institutions thus emerged over the years were an amalgam of the more formal European models and the traditional local institutions. However, there was no clear separation of the judicial, executive and administrative functions then both in Sri Lanka and Europe. Hence, beginning with the headman all the way to the highest official performed judicial as well as administrative executive functions (Kotelawele 1995).

Portuguese did not make much change in the traditional judicial order, but the Dutch introduced several changes that had significant consequence. Over and above the existing tribunals of the headmen they established several formal courts, the most important of these being the Civiele Raad, the Landraad and the Raad Van Justitie - a High Court. The judicial functions of the headmen were reorganized and orders were issued by means of Placcaats that the inhabitant, should go to the village headman in the first instance with the complaint (Hovy 1991). No native could by-pass the village headman to lay his complaint before a higher tribunal.

It is evident from the instructions issued to the Disava of Colombo in 1661 by Van Goens (Senior) that some authority was left in the hands of Korales in administering justice and that the practice of Sinhala Kings continued under the Dutch. However, it was in 1706 that the authority of the headmen was recognized by an order of the government. This order was reissued in 1744, and the inhabitants were ordered to go in the first instance to their headmen Mudaliyārs, Vanniyārs and Vidanēs. The position of the headman in the judiciary was further strengthened by subsequent orders until it was firmly established by the Instructions of January 1787 (Hovy 1991).

Accordingly the complainant had to go to the village headman first and the headman had to examine the complaint thoroughly in the presence of elders of the village after summoning all parties to the dispute and finally pronounced the judgment. If the parties were not satisfied with the headman's decision they could go to the Vidāne who administered a group of villages and later to Pattu or Kōrale Mudaliyārs' tribunals. In each occasion the complaint had to be re-examined in the presence of all parties. The headmen at each level were expected to keep a record of the case and issue the verdict in writing.

The judicial institution of the headman provided the natives an easy accessible, simple, inexpensive tribunal without much delay. The aim of this tribunal was to settle the disputes amicably and to sustain the village solidarity. The parties in dispute had to present their cases in the light of evidence that was probably truthful, because in small caste based village societies the facts connected with the dispute were usually known to the village chiefs in whose presence the parties had to present their case and there was less chance of bringing forth false charges or witnesses to support them.

If the parties at dispute were not satisfied with the decision of the headmen's tribunal, they could proceed to the level of Company Officials. In addition to the Disāve who administered a bigger area there were the post-holders of strategic places like Negombo, Kalutara, Batticaloa, Puttalam, Chilaw, Karnavelpattu and Magampattu who wielded judicial powers in adjudicating minor disputes.

The Fiscal was another officer with judicial powers and was an innovation of the Dutch. He functioned as the prosecutor in criminal cases before the Raad Van Justitie. In addition to that the Fiscal exercised civil jurisdiction in cases of small debts not exceeding one hundred rix dollars in value and criminal jurisdiction in assaults and other petty cases with power to impose a fine not exceeding one hundred rix dollars or whipping (Nadaraja 1972).

The Civiele Raad also known as Stads Raad established in towns were introduced by the Dutch, and had purely civil jurisdiction up to the value of 125 rix dollars, the upper amount varying from town to town. The jurisdiction of the court mainly related to matrimonial affairs. By the end of the eighteenth century Civiele Raad came to be merged with another Dutch minor court that functioned in the cities with exclusive jurisdiction over matrimonial affairs namely the Commissioners for Matrimonial Affairs. As the name indicated the Court of Commissioners for Matrimonial Affairs dealt with matters pertaining to the observation of ordinances passed by the Dutch government on matrimonial affairs (Memoir of Van Imhoff, p.64). In the towns, in which this court functioned, the Commissioners had to solemnize the marriages according to the practices of the Dutch Reformed Church.

The Dutch introduced several Judicial institutions when they were holding a few fortresses with their suburban areas between 1638 -1655. Like the Commissioners for Matrimonial affairs, they established an institution called Commissioner of Daily Causes. By 1658 this court was replaced by another court called Landraaden consisting of the Disava as the chairman and a few senior Dutch officials and several principal headmen of the district. The court was empowered to decide on all matters up to the value of 80-rix dollars other than criminal matters. Though there are early references to the Landraaden of Matara and Colombo the Landraaden had no fixed composition of members and no fixed abode and could meet anywhere in the Disāvony. Thus it functioned as a Circuit Court under the Disāve disposing disputes mainly pertaining to land with the assistance of the principal headmen of the division. Disāve kept notes of the proceedings.

From 1740 onward Landraads were given an additional function when the Dutch commenced the systematic compilation of Tombos. Members were instructed to attend to daily work of calling up people and requesting them to present such information as was necessary to prepare the Head and Land Tombos. Later they were given the responsibility with regard to transfer and registration of lands.

It is evident that the intention of establishing the institute of Landraaden was to make access to justice easy and inexpensive to the native population, in keeping with the norms of their traditional systems under the Sinhala kings. At the beginning, as said earlier there was no uniformity in the working of the Landraaden; it did not have a fixed composition of members and fixed abode. In some courts the cases got dragged on undecided for three, four and more years. Some of the members of Landraaden were old and sick people who had little time to examine the intricate customary issues brought before the tribunal, in addition to their primary duties as company officers (Kotelawele 1995). Landraaden did not have a full time Secretary and the assistance of a permanent staff and the persons who attended to functions of the tribunal were called for other duties.

However, the instructions issued in 1789, formalized the practices with regard to the functioning of the court, the judge, the secretary, the procedures to follow in appealing, translation, and the form of oath. Thus the institution that originated at the beginning of the Dutch rule to assist the provincial administrator, the Disāve to dispense justice according to the customary laws and traditions in which he was not quite conversant, for him to be guided by the knowledgeable natives, had finally, by the end of their rule, taken the form of a formalized court more in the European model within a permanent building and with the assistance of a permanent staff.

After the Treaty of 1766 between the Dutch and the King of Kandy which ultimately decided the legality of the Dutch holdings in the Maritime Provinces of Sri Lanka an institution by the name Landsvergadering or Country Assembly was set up in the newly acquired provinces of east, north east and north west to decide minor disputes of the natives of the area. The assembly was consisted of the chief resident and the local headmen or the heads of principal families of the area. These assemblies exercised administrative functions and also decided and disposed all minor disputes among the inhabitants. Thus disputes such as ownership, inheritance, marriage contracts etc. were decided according to the customs of the people. It was within the powers of the tribunal to direct the guilty party to indemnify the innocent party, and impose heavier corporal punishment. When imposing heavier punishments such as condemning a person to chains, prior authority had to be obtained from Colombo; similarly the imposition of capital punishment needed the authority and sanction of Colombo (Hovy 1991).

The highest court in the hierarchy of judicial administration of the Dutch was the Raad Van Justitie or the High Court. There were three such courts established by 1660 at Colombo, Galle and Jaffna and the fourth was established after the Kandyan Treaty of 1766 at Trincomalee. The High Court was consisted of seven members appointed by the Governor and Council at Colombo from the Company's highest Civil and military officials. Originally, the Colombo Court was presided over by the Governor himself, and from 1732, the Hoofd Administrateur took his place. The Commandeurs of Galle, Jaffna and Trincomalee, presided over the Galle, Jaffna and Trincomalee High Courts. Fiscal, a member of the High court presented the criminal cases while in civil cases he functioned as a member of the court. Some of the members of the court were trained lawyers. (Kotelawele 1995).

The High Court of Colombo was the most important judicial tribunal of the province having both original and appellate jurisdiction in civil and criminal matters. The other High Courts enjoyed similar powers within their territorial limits. Appeals could be made from Civiele Raad and Landraaden to the respective

High Courts within the territory. Appeals were also possible from the High Courts of Galle, Jaffna and Trincomalee to the High Court of Colombo in cases exceeding three hundred rix dollars in value. An appeal was also possible from the High Court of Colombo to the High Court of Batavia.

The Dutch also introduced a new element to the judiciary, the Procurers or pleaders, from 1754 onwards. They could appear in Civiele Raad, the Landraaden and Raad Van Justitie. They had to be sworn in annually before the President of the Raad Van Justitie, and had to keep guarantors to the value of 100 rix dollars, in order to indemnify any who may suffer as a result of neglect, ignorance or abuse on their part. They were instructed to furnish proper "procuratie" or proxies before they appeared on behalf of a principal. They were advised on how to initiate a case before the court, and about the pleading and counter pleading of case. They were exhorted to be reverential towards the judges, and present their cases decorously; listen to the pleadings of opposing parties without interruption, calmly and accept the verdict of the court calmly and advised not to prolong and unduly delay the cases. They were advised not to take cases more than they could handle. In violation of these principles the court had the right to suspend and punish such pleaders. The rules of conduct were imposed along with severe punishments for their breach or transgression. A pleader could be suspended for six months for the first offence and could be dismissed for the second occasion in addition to a fine of 1000 rix dollars (Kotelawele 1995).

The laws enforced in the Dutch tribunals was very well explained in the memoir of A. Paviloen, the Commandeur of Jaffna, to his successor in 1665. Accordingly, the laws administered to the Dutch and other Europeans were the laws in force in the Fatherland and the Statutes of Batavia, and for the natives the customs of the country. If the customs were not clear in settling a dispute the Dutch Laws were enforced (Pieters 1908).

It has been pointed out that the way a community settles its disputes is part of its social structure and the value system (Bohannan 1967). During the Dutch rule many features of the social structure in the maritime provinces came under stress and changed as a result, likewise the imposition of Dutch Calvinist value system on the Buddhist Sinhala value system further accelerated this change. In promoting Protestant Christianity the Dutch interfered with the Sinhala and Tamil social institutions such as the family and marriage. Cross cousin marriage, which was a common phenomenon in the society, was banned as incest, and declared illegal, and the age of adulthood was raised from sixteen to twenty-five. Marriage contracted in accordance with the traditional manner was not accepted as legal, and the offspring of such union was declared illegitimate. Only the evidence given by a baptized person was accepted as true before the newly established courts. The illegitimates had to forgo the right to their ancestral property. This interference with the institution of family had undoubtedly have led to a great deal of confusion and uncertainty (Goonewardene 1990). The laws introduced by the Dutch pertaining to landownership and inheritance and the restrictions imposed in clearing chenas after the compilation of tombos, retarded the natural growth of villages, and led to the fragmentation of family holdings which became a source of constant dispute and feuds.

Though the Dutch, in principle, allowed the native laws to be in operation, there were instances that the Dutch authorities denied the legal recognition to the native usages which were not in accordance with their own conceptions of morality and public policy; while some compilations of "clear and reasonable" native customs were given legislative force by those authorities (Nadaraja 1968).

In August 1706, Governor Simon directed that a compilation of the local customary laws should be prepared, and the work in Jaffna was undertaken by Class Isaaksz, the Disave of Jaffna who had acquired an intimate knowledge of the customs by long residence well over 37 years in the District. In April 1707, Isaaksz, submitted the draft of his Code to the Commandeur of Jaffna which was translated into Tamil and was referred to twelve sensible Malabar mudaliyars for their approval. The mudaliyars approved the draft subject to certain modifications relating to the rights of masters over their slaves. In June 1707 Simon in Council approved the Code as drafted by Isaaksz without the alterations suggested by the Mudaliyars. The main subjects that the Code dealt with were succession to property, adoption, possession of land, slaves, mortgage of land, pawn of jewels, donation, sale of lands or cattle, hire or loan of cattle and loans of money (Nadaraja 1968).

When Keerti Sri Rajasinghe, the Kandyan King ceded the Puttalam district to the Dutch in 1766 in accordance with the treaty, Governor, I.W. Falck took steps to collect the customs of the district on the basis of information supplied by the chiefs of the Mukkuvar caste and the Muslims of the district. However, when implementing this code, Falck, found that the Mohammedan people were ignorant of

what was or was not their law and subject, and that each headman was deciding cases according to his own interpretation and opinion (4 November 1807, SLNA, 5, 79). Thereafter, Governor Falck got the Batavian Code relating to the law of inheritance and marriage and applied it to the Moors of Sri Lanka in 1770 as the law in operation in all Dutch Courts (Nadaraja 1968).

However, no customary laws were compiled of the Sinhalese community during the Dutch times though they adhered to the customary laws of the Sinhalese in courts. The assimilation of habits and ways of life that had been taking place ever since the advent of Portuguese, between the Europeans and the Sinhalese, had tend to debase the customary laws and the supersession of the Dutch laws in the urban areas would have accelerated the process. For convenience the Dutch applied their laws in places where the traditional laws and customs were silent and the gradual enforcement of new laws connected with Christian practices and mode of social conduct would have further made it worse.

It is evident that towards the end of the Dutch rule a new courts system had been superimposed over and above those of the courts that were in existence since immemorial times and new laws and traditions added to the traditional law. Consequently their procedures were alien and Governor Van Gollonnesse had noted that the people were paying scant respect to the oaths they took in the Christian manner at the Landraaten (Goonewardene, K.W. 1990, pp. 319 – 52). The new courts and laws enforced with authority submerged the old structure and two legal cultures were emerging at the end. The consequence of this situation was that the more powerful in the society frequently abused the traditional customs and procedure of courts giving way to unending litigation that bedeviled the society. The birth of the "inherently litigious native" was the consequence of the Dutch judicial administration and the stabilization of the western concept of the rule of law. (Kotelawele 1995).

The British inherited this system when they captured the Dutch possessions of the maritimes provinces of Sri Lanka in early 1796. The precarious conditions that prevailed at the time brought a complete breakdown in the revenue and judicial system. The terms of capitulation referred to the settlement of pending cases within a year, but the non availability of funds for the judicial officers and the refusal of the Dutch officials to serve the British frustrated any attempt to make use of the Dutch judicial officers. Colonel James Stuart, the Military Commander who was responsible for the administration of the newly acquired provinces was faced with the problems of the adjudication of the daily complaints for which he had no remedy. To avert a crisis he empowered the Commandants of the military posts to appoint Courts Martial for settling disputes among the natives and reported the inconveniences attended on him to Madras Government for instructions.

Madras Government authorized Stuart to re-establish the Dutch Courts, which he did by an "Act of Authorization" promulgated on 1st June 1796, but the refusal of the judges to take oath of allegiance under the British frustrated the attempt. As there was no alternative, Stuart empowered the Collectors to adjudicate all crimes and misdemeanours among the natives. In the meanwhile the changes carried out in revenue administration antagonized the native headmen and they refused to carry out the orders given by Superintendent of Revenue conveyed through Malabar Officials. In August 1796, the powers of the mudaliyars and headmen were taken away by a proclamation. In the meanwhile, service tenures were abolished and a tax of half the produce of the land was levied and a new tax on coconut trees were enforced. Both measures were proved unwise and resulted in an open rebellion that completed the breakdown of the judicial administration that was long in operation (De Silva 1953).

This confusion lasted till September 1799. Frederick North, the Governor appointed by His Majesty of Great Britain in 1798 was instructed to re-establish the Dutch system of justice and police. North after personal consultation with the Governor General of Bengal and on the advice of Codrington Edmond Carrington, a legal officer who had come from Bengal promulgated the re-organized plan of judicature by the Proclamations of 23rd September and 14th of October 1799. A Supreme Court of Criminal Jurisdiction was created with the Governor as the President and five other higher officials in place of the Dutch Raad Van Justitie. Town Courts were established in Colombo, Galle, and Jaffna towns to try petty matrimonial cases and other civil disputes. Landraads were established outside those towns to try civil cases. To hear appeals from Town Courts and Landraads two courts of Appeal called Higher Court of Appeal and Lesser Court of Appeal was established. They were empowered to hear appeals in cases exceeding 500 rix dollars and below 2000 rix dollars in value. All courts were to be public and open, and examination was to be by viva voce. Because of the urgency, one Judge was declared competent to constitute a civil court and three for a criminal court. The procedure in civil cases was to be summary in

view of the heavy arrears. Torture and barbarous punishments inflicted on convicts under the Dutch were abolished. The law administered in courts was the Roman Dutch Law (De Silva 1953).

These makeshift arrangements of Governor North were approved and complemented by issuing the Charter of Justice of 18th April 1801, by which a new Supreme Court headed by the Chief Justice and a Puisne Justice appointed by the King was created. It was vested with the supervision of criminal justice throughout the maritime provinces and a civil and equitable jurisdiction over Town and Fort of Colombo and over all Europeans and Eurasians of the maritime provinces. The Higher Court and Lower Court of Appeal were abolished. The Governor was conferred with supreme legislative and executive powers and a share of the judicial administration. Supreme Court was empowered to enlist Advocates and Proctors. Appeals from the Supreme Court to Prevy Council were permitted. A High Court of Appeal consisting of the Governor, Chief Justice and Puisne Justice was established to hear civil appeals from Landraads. The Judges of the Supreme Court were instructed to follow the rules and procedures of the High Court of Chancery in Great Britain and also to adhere to the customary laws of Sri Lanka.

To facilitate the work of the Supreme Court in circuits, an Advocate Fiscal was appointed. He was to conduct the prosecution of the public offenders, and to be counsel for the Crown, and to advise and draw up regulations of the Government. The presiding judges of the subordinate courts had to furnish the monthly returns to him and he advised the judges in judicial problems. The Fiscals under the Dutch were given new appointments by the Governor and was kept attached to Collectors and Provincial Judges.

To impress upon the people, of the authority of the Supreme Court, the Colonial Office laid down that its sessions should be commenced with much pomp and decorum. It was ordered that a salute of 13 guns be given to the Chief Justice and 11 to the Pusine Judge before the commencement of the session. When the Court was in circuit, tom tom beaters accompanied it. The Judges were provided with their interpreters, tipstaff. Gate Muhandirums were appointed to carry the sword and mace (Pieris 1950).

Having the Magistracy of England in mind, and in order to make the authority of the new rulers felt in the country, North conferred the powers of Magistracy on a large number of European officers, civil and military, who held other appointments by a Proclamation issued on 30 July 1801. Some of them were designated Sitting Magistrates subsequently and charged them with the duty of watching over the police and giving daily attendance to it.

The establishment of the Civil Service necessitated the transfer of superior judicial power to new hands that led to the gradual disappearance of the Civil Courts and Landraads. In 1802 Landraads and Civil Courts were amalgamated in the principal towns into Provincial Courts and a civil servant was appointed as its President. The Courts were given the power to determine all civil matters in the district. The mudaliyars were thus displaced from the share of judicial power (Kannangara 1966).

At each of these courts a Dutch secretary and clerks and a native interpreter with or without the rank of mudaliyar or muhandiram assisted the civil service judge. In keeping with the instructions given in the Charter of Justice, the rules of proceedings drafted for the conduct of these courts were in accordance with the rules and procedures prevalent in Great Britain. The fact that the judges had constantly in mind the Courts of Justice familiar to them in England made the transformation easier. Pleadings were by affidavit, and the litigants, were required to pay certain fees, which varied in amount from time to time. Governor had the power to regulate them by executive order.

The Charter of Justice of 1801 empowered the Supreme Court to make necessary rules to enroll properly qualified persons as Advocates and Proctors. Only such appointees enrolled were permitted to appear and plead on behalf of suitors. The Supreme Court was also entrusted with the general superintendence and control of these legal practitioners and also to decide on chargeable fees. The earliest recruits to the bar were from the British descendants and later from the Burgher Community. The Dutch pleaders seem to have not been considered for such appointments.

During the makeshift arrangements, the British set aside the most effective the closest, reliable and popular village level adjudicator, the headman, on whom the Dutch had heavily depended for a smooth judicial administration. In a short period the British made too much of experiments on the administration of the land tenure and caste services. North correctly observed that, Robert Andrews, the Revenue Commissioner under the Madras system brought about an "abrupt and total revolution" on property laws and civil policy. North termed them as "premature and sudden and imprudent and violent" (Wickramaratne 1996).

Although there was confusion at the beginning, the British were able to build their own judicial apparatus in a short time. Roman Dutch Law was given preference while the customary laws of the natives too were given judicial recognition. Subsequently the traditional Tamil Laws compiled by Isaakez and the code of Muslim Laws compiled under the Dutch were declared part of the law and the judges were instructed to take judicial note of the Sinhala customary laws in Provincial Courts and in Sitting Magistrates Courts. But when it came to decision making, it was soon evident that these codified laws did not always make their way clear, they were silent in some areas, ambiguous in others, and obsolete in yet other areas (Wijeyasamaraweera 1981).

Neither, Governor, nor the Supreme Court took up this challenge to guide the Civil Servants to overcome this impasse. Without such guidance, the judges followed the path of least resistance by not availing of such provision unless it was brought to their notice in pleading of evidence by the party that desired to take advantage of the situation. (C.O. 416, 13, p.20). In dealing with such disputes, some judges depended on the strength of evidence produced by the parties before the court. The judges often found technical points to dismiss such cases. The mistaken judgments due to ignorance of the customary laws would have had disturbed the social fabric of the peasant society.

Court proceedings were recorded and often became a precedent for the other judges. Gradually those decisions became part of the law and the enforcement of such decisions was carried out by the administrative organs of the government. When a matter of breach of tradition was taken in court for adjudication, villagers thronged to the court to hear the decision. Thereafter they also acted according to the decision given by the court. The contravention of customary laws through ignorance in this manner had a disruptive effect on the whole society often giving way to violence.

British legal system in Sri Lanka was largely alien in origin and carried out in an alien language. For the great-majority of the population the access to judiciary was through mediators. The link that developed in due course was the interpreter and the petition drawer, the former being legitimated while the latter informal or para-legal.

When the Kandyan provinces were annexed in 1815 the British assured the nobility, clergy and the citizens by the "convention" of 2 March 1815, that their rights, privileges and powers of the respective offices, the safety of their persons and property, civil rights and immunities, institutions and customs in force would be preserved and maintained and that their religion declared inviolable. (Skeen, vol.1, pp. 180 – 181). The administration of criminal justice and police was exercised according to established forms, and by the traditional authorities, leading to Government the right to redress grievances and reform abuses in all instances whatever, peculiar or general. The Governor assumed the right to exercise full powers vested in the King. A loose form of European authority was super-imposed over that of the administrative machinery of the deposed monarch.

However, soon the chiefs, priests and the people found that they had been deceived and the consequence was the great uprising in the Kandyan provinces, which took place towards the end of 1817. The British suppressed the uprising with great cruelty and harshness. It provided the much waited and desired opportunity for the British to enforce harsh terms and establish the British hold in the Kandyan provinces on a firm footing which they enforced by the Proclamation of 21 November 1818 (Skeen vol.1, pp.223 – 229).

In the judicial administration the Governor assumed some of the powers exercised by the King of Kandy. Governor was the final court of appeal in cases where the object of dispute was either land or personal property exceeding 150 rix dollars in value, provided that the appeal was lodged within ten days of a decision. No punishment could be carried out by any court exceeding 100 lashes, imprisonment with or without chains or labour exceeding four months, or a fine exceeding 50 rix dollars without the conformation of the Governor. The exercise of the general executive and judicial authority in the Kandyan Provinces was declared to be delegated to a Board of Commissioners and under their supervision to the Resident Agents of Government. The Judicial Commissioner was entrusted with the overall management of judicial administration subjected to the Board of Commissioners and the Governor. The Judicial Commissioner with two or more Kandyan Chiefs as Assessors was empowered to hear all civil and criminal cases except treason, murder or homicide, with power in criminal matters to award any punishment short of death or mutilation subject to the ratification of the Governor. All civil and criminal cases in which a superior chief was a defendant were to be decided by the Judicial Commissioner. The Judicial Commissioner's Court was also an appellate court for appeals made within

10 days of a decision of the Courts of the Agents. Thus it is seen that the Board collectively, and the members independently were given executive and judicial powers which were originally enjoyed by the principal Kandyan Chiefs. Under the 1818 Proclamation Kandyan Chiefs were converted into Assessors. The Agents of Government were now entrusted with the judicial and executive powers enjoyed by the Disava and other chiefs. The Agents could hold a court with two Assessors.

The Kandyan Chiefs lost their judicial powers and had to sit as Assessors in courts of the British Officials. The Assessors were called upon to give their opinion, both on the facts of a case and the Kandyan law applicable to the issue. The Judicial Commissioner or the Agent summed up the evidence at the end of the trial and called upon the Assessors to pronounce the verdict. The Judicial Commissioner's Court and the Agent's Court contained a mixture of old and new. It assumed the form of an English Court house. The presence of the Kandyan Chiefs as Assessors may however have given an oriental look. A procedure, based on the practices of English Courts was followed. The proceedings of the Courts were conducted in the same manner as those of the Sitting Magistrates Courts in the maritime province. The interpreters were often used to interpret the evidence. From 1825 onwards the Proctors were allowed in Agent's Court. However the judges being strangers to caste feudal social concepts on which a majority of cases had arisen a great deal of deviations and changes in normal procedures would have continued to prevail.

The enforcement of the Charter of Justice of 18 February 1833 on 1 October 1833, formulated on the recommendations of the Royal Commissioners Charles Hay Cameron and Colonel William Colebrooke, after an exhaustive investigation in Sri Lanka, completed the establishment of a British model judiciary in Sri Lanka. Cameron, the chief architect of the Charter, observed in his report that 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 was the attainment of cheap and expeditious justice (Mendis 1956).

All previous Charters were repealed and the uniformity in judicial administration was established with the promulgation of the new Charter of Justice. The Provincial Courts, the Courts of Sitting Magistrates, the Court of Judicial Commissioner, the Courts of Judicial Agents, the Courts of Agents of Government, the Revenue Courts, the Court of the Sitting Magistrate of Malabadda, the Minor Courts of Appeal, and the High Court of Appeal were abolished. A Supreme Court of the Island of Ceylon was established at the apex of the new judicial set up and the District Courts at the district level at the base. The administration of the entire civil and criminal administration of justice in the Island of Sri Lanka was vested in the Supreme Court. The Governor and the Council were prohibited from establishing new Courts. However, the long established Gamsabhava was spared and its procedure under the new system was left to the Supreme Court to be formulated (Mendis 1956).

The Supreme Court of the Island of Sri Lanka was established with a Chief Justice and two Puisne Judges appointed by the Crown. The Supreme Court in consultation with the Governor was empowered to appoint a Registrar and the other officials necessary to run the Supreme Court office. The island was divided into District of Colombo and three circuits namely the Northern, Southern and Eastern. There were to be two sessions of the Supreme Court a year in each circuit. The Supreme Court was vested with the original jurisdiction of major criminal matters throughout the island and appellate jurisdiction of the District Courts. The Supreme Court was to hold Criminal and Civil Sessions separately on circuit.

Each judicial circuit was further subdivided into Districts in each of which a District Court was established with a District Judge. The Judge was assisted by three Assessors of whom one was designated and appointed the Permanent Assessor. The District Court was empowered to adjudicate all civil and criminal matters within the judicial district. However in criminal matters its jurisdiction was limited to suits that could inflict an imprisonment less than 12 months, inflicting less than 100 lashes and a fine up to £ 10. The judge was to pronounce the judgement in consultation with the Assessors. The testamentary jurisdiction and the adjudication of revenue suits were bestowed on District Court. Appeals were possible from the District Court to the Supreme Court.

By establishing a uniform judicature Cameron took steps to check the suitors against the danger of employing the judiciary to perpetuate injustice. In order to strengthen the procedure in the decision making and to ensure their correctness, Cameron suggested that the Judges of the Supreme Court should look over the records of the courts of original jurisdiction. When an irregularity was detected the judge was to take note of it and in consultation with the other judges draw up drafts of declaratory law and submit to the Governor for necessary legislation.

The Charter empowered the Judges of the Supreme Court to frame, constitute and establish rules and orders of courts necessary to give effect to their functions. Accordingly the judges formulated a code of rules and orders in keeping with the judicial system at home (The Charter and Rules and orders 1838). According to these rules, to initiate an ordinary civil or criminal case the complainant had to submit a libel in writing by himself or by his lawyer to the Secretary of the court in the prescribed form stating briefly the complaint and the course of action and the remedy he seeks in the suit with the relevant supporting documents and the names of witnesses supporting his course. Thereafter, the Secretary had to issue summons to the defendant to appear before the court on a given date. The Fiscal of the court issued the summons. The defendant was expected to reply the court in the prescribed form his innocence, if there was any. In the case of a civil charge, if the defendant admits the guilt and was ready to pay the damage, the judge in open court could give the verdict. Otherwise, the complainant, had to submit in another prescribed form and inform the court whether the court should proceed with the case. For all these submissions the complainant and defendant had to pay stamp fees. If the court was to proceed with the case, the judge was to fix a date for trial. The trial itself took several days. Pleading was by *viva voce*, and the parties were subjected to cross examination by the lawyers of both parties. At the end of the hearing the judge pronounced the verdict. The whole process took several months or years.

Viscount Goderich, Secretary of State for the Colonies, while transmitting the Charter of Justice of 1833, claimed that a greatly improved judicial system has been established, with a large portion of the recommendations of the Commissioners having been incorporated in it. Yet, a better part was left to the Judges of the Supreme Court to decide when it was in operation, as unforeseen exigencies or local circumstances could defeat its aims. Therefore, much discretion was left in the hands of the local authorities to enable them to bring in subordinate and supplementary provision as and when it was necessary. (23 March 1833 SLNA 4, 18 No.115).

With two months of the receipt of the Charter, and within an allocated sum of expenditure, the new arrangements had to be formulated under the leadership of Charles Marshall, the Chief Justice, who was not in sympathy with the recommendations. Some of the salient features such as the appointment of persons trained in the fields of law to the judicial positions had to be set aside due to the reduction of several highly paid civil service posts so that the separation of the judiciary from the executive was not practicable. Cameron tried to create a *laissez faire* state and superimpose the Benthamite system of judicature suitable for England. The new judicial system had no roots in Sri Lanka. The superimposition of formal law courts alien in origin over the peasant society which could not understand the procedures of formal law gave rise to a lawyer ridden society and an expensive and extortionate process of justice.

Even before the new District Court system could be given a fair trial, it became evident that the District Judge of Colombo No.1 could not cope up with the heavy judicial work, and that a heavy accumulation was taking place by the end of 1833. (Judges of the Supreme Court to Horton, 8 December 1833, SLNA, 6/1196). To overcome this, a new court was established in addition to the existing court and designated them as District Court, Colombo No.1 North and District Court, Colombo No.1 South, and distributed the judicial work among them. Sir Colin Campbell (1841 – 46) soon after his assumption of duties as Governor informed the Secretary of State for the Colonies that the administration of justice in Sri Lanka was not by any means in a creditable, useful and economical condition, and that the existing District Courts, were too numerous, and some judges unfit to hold their positions. He saw the need for an amended Charter conferring the authority on Governor in Council to make the necessary amendments. (22 November 1841, SLNA. 5/28, No.3).

Colebrooke reported in 1831 that some of the hereditary holdings of the villagers were limited to fractional portions valued at a few pence and often subject of protracted law suits. For example he found that the inheritance of one person was nine-tenth of a seer of rice, in land and five twelfth of a coconut tree and two thirds of a jak tree (Mendis 1956). In adjudicating these land disputes, a thorough knowledge of local customs and habits of the people and a vast degree of patient discernment was necessary on the part of the judge. The absence of clear title deeds, the unavoidable necessity of defending upon oral evidence as to the descent, inheritance, and investigation of a great number of witnesses, tenancy in common or individual, pedigree carrying back to more than a century, the implication of planters or improvers rights were issues that the District Judge had to make note of before pronouncing the judgment.

With the breakdown of the existing order under the influence of a market economy, even the slight violation of obligation was challenged in the District Court. The case was decided by a civil servant

judge who often did not know the tradition and a decision contravening the customary tradition had a disruptive effect on the agrarian society. The abolition of rajakariya system in 1832 without proper substitution to monitor the traditional obligatory services vital for the agrarian community, gave rise to violation of customary traditions. Frequent disputes arising over fencing, cleaning of waterways, adjustment of boundaries, cattle trespass came before the District Judge. The attachment of the native to hereditary possessions was often the subjects of protracted lawsuits. By 1850, it was reported that one-third of the land cases instituted in District Courts of the three major cities were less than £ 5 in value. In some parts of the island where there were no District Courts or ready access to a court, endless disputes arisen on matters of property never came before any court at all, and remained forever a source of vexatious mutual hatred. (11 March 1850, S.L.N.A. 5/37 No.52).

The British Courts system in Sri Lanka was not a natural growth from within the society. The substitution of Roman Dutch Law in place of traditional law in courts, and its administration in European model tribunals through judges who did not have a legal training with advocates and proctors of a low quality who associated in the process of decision making had a deteriorating effect. All what Cameron expected in his judicial package had failed within a few years. Empson, the Professor of Law at the East India College, Hailybury, who examined the reports sent by the Judges of the Supreme Court of Sri Lanka between 1838 – 1841 of the working of the new judicial system pointed out to Lord John Russell, the Secretary of State, that the defects had arisen due to the non-implementation of the Charter correctly and completely in true spirit by the judges of the Supreme Court and by the Government. (17 April 1841, S.L.N.A. 4 30 No.43 Enclosure II).

Heavy accumulation of judicial work was reported from all corners of the island and Governor Campbell thought that the establishment of minor courts would be a solution to the problem. He wrote to Lord Stanley that the administration of justice was a subject of universal complaint with greatest reason, and further stressed that – The delay and practical denial of Justice both in Civil and Criminal matters, is I am certain unparalleled in any country. In civil matters this arises much from the peculiarities of the Charter increased by rules of practice far more calculated, to benefit Proctors than to ensure a speedy decision. The same forms of procedure are applicable to a cause where five shillings is in dispute or ten thousand pounds is at stake, there is no summary form of procedure for small or simple cause, and the forms laid down preclude the possibility of the District Judge giving a more speedy or summary decision in trifling cases in consequence where a poor man has a claim for ten or fifteen shillings which is a very common occurrence, besides the heavy payments to Proctors which are almost inevitable, it is impossible for him to escape a three weeks attendance at the court before he can carry through the simplest cause, the consequence is that justice is in effect almost denied to the poor, and this is the direct result of a Charter, the avowed principle of which is to favour the poor mans' case “ (18 April 1842, SLNA 5/29 No.56).

In an attempt to find solutions to this problem of heavy delay in District Courts the Government Agents and their Assistants highlighted the importance of rejuvenating the traditional Gamsabha. However the judges did not support this view and the judicial changes that followed created the Police Courts and the Courts of Requests of the British model in 1845.

The establishment of these minor courts reduced the number of District Courts but did not arrest the delay in adjudication. In the new set up the original criminal jurisdiction was divided between three courts i.e. (i), in the Supreme Court where investigation were carried out before a judge and a jury, (ii), in the District Court in which the judge associated with three Assessors with or without the intervention of a Public Prosecutor, and the judgment being subject to an appeal both on matters of law and fact, (iii), in the Police Court justice was meted out by an individual Magistrate in a summary manner, whose decision was subject to a review only as regards mistakes of law. The original civil jurisdiction was divided between two courts of which the higher one, the District Court, was composed of a judge and three Assessors from which an appeal could lay to the Supreme Court, whether interlocutory or final, and whether upon matters of fact or law. The Court of Request, consisting of one judge could be brought to review only with reference to a alleged mistake in law. The abolition of certain District Courts virtually shut up justice for the people of those areas and the substitution; the Court of Request was by no means an equivalent. The new court did not have the jurisdiction on land issues. The administration of law was thus rendered more imperfect both in civil and criminal matters in some districts.

Apart from these hindrances the complainant had to fill a nine page printed form introduced by the Judges of the Supreme Court to institute a case. A coolly or a hopper woman who sued for his wages for her quota of food served respectively had to fill this form which contained some legal terms which the

ordinary petition drawer whose services he or she solicited did not properly understood. In the prescribed form of the plaint there were some legal terms such as acto ex delicto, (a charge instituted on stress) ex contractu (by contract) plene administravit (compelled testamentary), lien in detenu (forcibly kept) which neither the petition drawer nor the client really understood (Berwick to Irving 23 June 1871, SLNA 6/3526).

It is worth noting here the observation made by Sri Lankan District Judge. F.D Livera, on the defect of the existing judicial system and suggestions he made for the improvement on 30 March 1849 to the Committee which looked into the Fixed Establishments. Livera remarked thus, "Had the system which the Commissioners recommended been more liberally adopted and worked out in all the simplicity with which it was invested, had suitable rules of practice been introduced in accordance with the spirit and objects of the Charter, and the Judges duly qualified for their duties been appointed to preside in these courts, I feel convinced that they would have been found to answer the expectations of those who recommended the system, and fully sufficient for the demands of the country. The Charter, no doubt, required and admitted of some amendments, which might have been without engrafting thereon, and super adding to it, a totally new system, new Courts and new mode of procedure, quite inconsistent with its spirit, leading to an increase of false and frivolous litigation, introducing confusion and conflict of jurisdiction, and a considerable increase of expenditure. The present system appears to me to be altogether an anomaly." (Report on Fixed Establishments 1850).

The series of judicial changes that we discussed in this essay did not reduce the extra ordinary large number of cases instituted in the Courts. The British Governors, Sir Colin Campbell (1841 - 1846), Sir Henry Ward (1850 – 1860). Hercules Robinson (1865 – 1871) and H.T. Irving (1872) successively noted that the British legal institutions had failed to provide cheap and expeditious justice but enhanced perjury and litigiousness among the natives. Though steps were taken to combat the situation the root of the evil remained untouched and the ill effects emanating merely got diverted to other channels stimulating the fondness for litigation. They were of the view that the British rule had destroyed every vestige of the system of village government and replaced in its place about forty minor courts, scattered over the country presided over by European Magistrates and conducted according to European forms of civil and criminal procedure (Governors' Address, 4 October, 1871).

The good that the legal reformers did according to the Inspector General of Police was the repression to a considerable extent the murder and robbery and other grievous crimes, and the evil they brought in was the oppression through legal process and encouragement to litigious spirit by fostering lying, forgery and fraud and the infliction of penalties upon innocent persons (ARIGP 1869).

Thomas Skinner (1819 – 1867), the pioneer road builder of the nineteenth century in Sri Lanka testified before the select Committee of the House of Commons in July 1849, which inquired into the trouble of Sri Lanka in 1848, that "probably in no people in the world does there exist so great a love of litigation as in the Sinhalese Perjury is made so complete a business, that cases are regularly rehearsed in all their various scenes by the professional perjurers as a dramatic piece is at a theater" (Skinner 1974).

The situation was so grievous that the Inspector General of Police reported that in 1869 around 168426 person or one thirteenth of the whole population of Sri Lanka were charged before the Magistrates of which about a tenth (17434) were convicted and 112367 were dismissed without trial and around 26487 remained untried at the end of the year. The rest were discharged or acquitted by order of Queens' Advocate (ARIGP 1869).

As the majority of these cases emanated from the disputes of ownership of lands often below £ 5 which were held in joint ownership by the peasants, the Government Agents of Provinces had repeatedly shown the necessity to resurrect the age old Gamsabhava. The people were very much attached to the Gamsabhava, as it arrayed in the robes of equity and time honoured custom, dispensed speedy and liberal handed justice free as well from the technicalities and the glorious uncertainty of law as from the great delay and heavy expenses necessarily attendant on legal proceedings." According to an old adage "the Gamsabhava was greater than the King's Council because the King decided on evidence while the Gamsabhava had also a personal knowledge of the incident" (S.P. XVI – 1867, p.40).

This long drawn discussion to revive the Gamsabhava, though remained unheeded by the judicial reformers came to the limelight as the litigancy and perjury had had reached its climax, Governor. Robinson took steps to resurrect the Gamsabhava in the form of Village Tribunals in 1871. The Village

Tribunals established in a village or a group of villages with a President and Councillors chosen from the natives were empowered to decide summarily all petty civil and criminal disputes up to the value of £ 2.

The consequence of all these changes was that towards the end of the nineteenth century two legal cultures had emerged in Sri Lanka and the spirit of litigation was well established among the masses.

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Abbreviations

- AR. - Administration Reports.
- C.O. - Colonial Office, Dispatch Series.
416, Colebrooke Cameran Commission Papers.
- S.L.N.A. - Sri Lanka National Archives
Lot 4 Despatches of the Secretary of States for the Colonies to the Governor of Ceylon.
Lot 5 Despatches of the Governor of Ceylon to Secretary of States for the Colonies.
- E.Z. - Epigraphia Zeylanika