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: Lanka -- highlighting the assumptions
: relating to individual rights to property
: made in colonial law. The author then
: discusses the move away from adjudication by
: means of an adversarial system towards the
: establishment of conciliation boards for
: dispute resolution. The impact of
: sociopolitical forces on the legal relations
: between land owners and professional rice
: harvesters (Govias) is then described.
: Legislation within the land reform programme
: which impinges on individual ownership of
: land in the commercial interests of Sri
: Lanka as a whole is reviewed. The system of
: administrative tribunals precluding access
: to the courts is discussed. Judicial review
: from this legislation and the constitutional
: issues arising therefrom in a sociopolitical
: context are also discussed.
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DEVELOPMENT IDEOLOGY PERSPECTIVE

LAKSHMAN MARASINGHE*

1. _AN INTRODUCTION_

The focus of this paper is to enquire as to what happened to the
laws and legal institutions as a result of the introduction of socialism. This enquiry shall be conducted here under the following headings:

(a) The Colonial Model
(b) Changes to the legal system of the Institutional level.
(c) Changes to the legal system at the conceptual level.
(d) The _`Umbrella Provisions' for State Participation in Commerce_.
(e) Accommodation of the Land Reform Programme by the Legal System: Legal Process vs. Political Process.
(f) The Changing Role of the Courts regarding Judicial Review of legislation.
(g) Conclusions.

2. _HISTORICAL OVERVIEW_

The political history of Sri Lanka has to a large extent influenced the nature and the character of its Laws and its Legal Institutions. The conquest of the Maritime provinces by the Portuguese in 1505 A.D., commenced a new chapter of European influence, in the history of that island. The defeat of the Portuguese in 1656 A.D., at the hands of the Dutch provides the historical reasons for the introduction of the Roman-Dutch Law which has now, after three centuries, become established as the Common Law of Sri Lanka. The conquest of the Maritime Provinces by the expeditionary forces of the British East India Company in 1796 A.D. did bring the Dutch rule to an end, but not the Roman-Dutch Law. Between the defeat of the Dutch on the 15th February, 1796 and June 1st of that year the Courts that had been established by the Dutch appear to have stood still. Therefore by an _Act of Authorization_ issued by the Commanding Officer of the forces of the British East India Company, declared:

"I, James Stuart Colonel Commanding the British forces on the Island of Ceylon having been vested by the Government of Madras

with all authority civil as well as military in all the settlements which formally owned the Dutch authority on this Island seeing the inconvenience to which the inhabitants of the settlement are exposed on account of the confinement powers under which the court of Justice of this place now acts, have in consequence judged it expedient to re-establish the Court of Justice, not only in Colombo, but also at point-de-Galle and Jaffnapatnam, and give them the same powers and authority which they formerly held under the late Dutch Government, both in Civil and Criminal cases. You are, therefore, hereby authorized and empowered, to try and give judgment in all cases Criminal and as well as Civil, which may be brought before you, whether they are pending previously to the 15th of last February or have occurred subsequent to that date."(1)

The political transformation of the island from being a possession of the British East India Company to one of a Crown Colony in 1802 paved the way for the introduction of English legal institutions and a measure of English laws, but the bulk of the Roman-Dutch law was left untouched throughout the next one and a half centuries. Namely; until Independence in 1948. The post-Independent administrations preserved the Roman-Dutch aspect of the Common Law, while retaining some of the Statutory introductions of the English procedural, evidentiary and the Commercial Laws during the 19th century. The Charters of Justice of 1801 and 1833 merely provided the legal infra-structure to support the Common Law of the Island. The infra-structure thus provided was transplanted from England. The result, therefore, in a summary was as follows: The substantive rules were derived from three sources: Namely; the Roman-Dutch Law, the indigenous customary laws and the statute law. The Statute Law was Law imposed by the Colonial administration. The infra-structure, namely the court system and the procedural laws, were also English transplants. This in sum-total was the legal system that the British administration gave Ceylon when they left the Island on the 4th of February, 1948.(2)

3. _THE SUBSTANCE_

a. _THE COLONIAL LEGAL MODEL_

Colonialism is generally considered to rest upon a capitalist base espousing both a legal and an economic regime rooted in a free market economy.(3) At the very core of this colonial arrangement are a number of assumptions. First, there was the assumption that the freedom to own property was immutable and unless there were some overwhelming reasons the State should not interfere with this fundamental right. Second, there was the assumption (arising out of the First), that an individual enjoyed an unrestricted freedom to utilise his property primaril;y to his maximum economic advantage. Third, the assumption that ownership was a right superior in law to all other rights and therefore the rights of the tenant, the tiller and the cultivator were left to be determined by the owner through the medium of the Law of Contract. Fourth, the

assumption that the principle of the freedom of contract was recognized as being illimitable by the general law of the land.

Fifth, the assumption that legislation was exclusive source of new law and that they were drafted in a way that any changes of the new law should emerge as a result of amending legislation and not through ministerial directions published in the Gazette. Sixth, the assumption that rights and duties between citizens _inter se_ and their rights and duties _vis a vis_ the State were subject to the exclusive cognizance of the Courts of Law within a hierarchical system of Courts. Seventh, the assumption that the citizen has a right to assume that his rights shall always be subjected to a process of judicial review by appellate tribunals. Eighth, the assumption that the persons who perform the role of adjudicators in disputes involving the citizen shall always be persons who derive their authority from a politically independent source in a way that they remain answerable to no authority outside the law. And ninth, the assumption that such persons carry with their appointment a security of tenure so that their total independence from the political system could be assured to them.

This catalogue of nine assumptions are central to this paper. They in no way are exhaustive of the list of assumptions that provided the base for a colonial arrangement. Among the many results of colonialism one significant result was the formation of counter-ideologies.(4) Colonialism has its own actions and indeed its own reactions. The most powerful counter-ideology to colonialism arose out of its economic substratum. That was the ideology of socialisation of its economic base. The political party that formed the first independent Government in Sri Lanka in 1948 - The United National Party - continued to maintain the colonial economic substrate which they inherited from the previous British colonial administration. That was a free market economy based on the aforementioned assumptions. The core issue at the 1956 election was socio-economic change. The opposition attack spearheaded by the Sri Lanka Freedom Party (SLFP) was mounted upon the grounds that the Island's socio-economic base required re-orientation from a capitalist ideological economic posture to one of socialism. It is towards this end that the SLFP began working soon after its victory in 1956. The period between 1956-1977 in the Island's politics was dominated by the SLFP. During that 21 years the legislative programme of the several administrations formed by the SLFP became principally concerned with a programme for the socialisation of the socio-economic base on the Island. This programme of change was not limited to the socio-economic formations on the Island but did extend to the laws and legal institutions inherited from the colonial times.

b. _CHANGES TO THE LEGAL SYSTEM AT THE INSTITUTIONAL LEVEL_

The English Common Law which formed the matrix of the legal system of Sri Lanka was spun within an adjudicatory framework. This portrayed a gladiatorial contest between two disputing

parties leaving it to a supposedly impartial judge to select one out of the two as the winner. The process of selection, commonly denoted as the legal process was interlaced by a surfeit of rules. It is to be assumed that where the selection process had abided by the rules, which are of a value neutral nature, the resulting choice of one option out of the many available to the adjudicator was deemed to be just because it was legal.(5) The assumption was that the indicator of Justice was co-terminus with the correct application of the rules of the legal system. This process had no space for socio-economic considerations of an evolving society unless they were somehow located within the existing system of rules. The result therefore appeared to be that changes in the existing rules became a precursor for socio-economic changes on the Island. However, there were two limitations for changes in the rule system. First, there were certain assumptions underpinning the system which were so fundamental that any changes at that level could have transformed the legal system into something basically different to what it was before. This was the change of approach to dispute settlement from one of adjudication to one of conciliation.(6) Associated with this was the second limitation. This was the need to provide every opportunity for legal representation in the dispute settlement process. The role played by the lawyering class was deemed to be an issue central to the settlement of disputes. The economic factors that govern the question of legal representation which in turn may govern the result of the adjudicatory process was a disturbing feature for any socialist Government. Whether the result obtained was a result of the correct application of the rules or a result of superior legal representation became a worrying issue in many litigations. Besides, the set hierarchy established among the lawyering class ranged between a `senior-silk' to a `raw-junior', supported the principle of a 'variable fee-system'. Ultimately it became more a question of which side could afford the highest fee and in many disputes that became the key to success or failure in litigation.

The two foregoing factors lay at the base of the institution and it is to these that the SLFP administration directed its attention. Changes at this basic level, it must be emphasized, provided the key to institutional changes as necessary props for the process of introducing socialism into the island. Each of these require some close scrutiny.

(a) _From Adjudication Towards Conciliation_

The Government recognised that conciliation was a new and radical approach to the settlement of disputes on the Island. It further recognised that the existing legal institutions were unsuited and were incompetent to implement this new system of dispute settlement. The decision, therefore, was made to create new institutions referred to as Conciliation Boards, staffed by persons very different to those that were to be found in the courts ordinarily established, subject to a loose set of procedures and functioning under no established sets of substantive rules or laws. The Conciliation Boards Act of

1958,(7) which created these Boards, circumscribed its jurisdiction to the following categories of disputes:

Section 6 reads:

(a) any dispute in respect of any movable property that is kept, or any immovable property that is wholly or partly situate, in that Conciliation Board area;
(b) any dispute in respect of any matter that may be a cause of action arising in that Conciliation Board area for the purpose of the institution of an action in a civil court;
(c) any dispute in respect of a contract made in that Conciliation Board area;
(d) such offences specified in the Schedule to this Act as are alleged to have been committed in that Conciliation Board area.(8)

The way the Conciliation Board Act was drafted makes it an enabling Act. The Act itself remains dormant and inoperative unless by Gazette notification, the Minister of Justice proclaims its application.(9) Its application was at a village-level so that Conciliation Boards take the appearance of a neighbourhood court. The power to appoint members, nominate a chairman of the Board and to terminate such appointments were left to the absolute discretion of the Minister of Justice.(10) This ran counter to the common law tradition of Judicial independence. Besides by Section 7 of the Act the Conciliation Boards were given new and extra-ordinary powers. These are

"(a) to procure and receive all such written or oral evidence, and to examine all such witnesses,
as the Board may think it necessary or desirable to procure or examine;

(b) to summon any person residing in Ceylon to attend any meeting of the Board to give evidence or produce any document or other thing in his possession, and to examine him as a witness or require him to produce any document or other thing in his possession;

(c) notwithstanding any of the provisions of the Evidence Ordinance, to admit any written or oral evidence which might be inadmissible in civil or criminal proceedings."(11)

One of the key points of difference surfaces in sub-section (c) of the foregoing section. The freedom to admit, any evidence insofar as it seems relevant to the enquiry is a necessary element in the conciliation process. The common law tradition, however, is differently established. There the question of admissibility becomes a question of law while relevance remains a question of mixed fact and law. This distinction becomes vital to justify the total prohibition of legal representation before the Board. The forensic skills in cross-examination and the analytical presentation of the dispute within a framework of legal rules become an unnecessary event before the

Conciliation Boards. This is linked to the fact that the Board is comprised of laymen educated wholly in the vernacular, with little or no understanding of the English language and therefore totally untrained in the common law. Respectability, honesty and a commitment to the social cause of the village and incorruptibility were the hallmarks of the Board members. The need to link the Board with the established system of common law courts was considered more as a matter of practical necessity than of any commitment to the common law system. Towards this end the Act declared in Section 14, that all disputes falling under section 6 must first be heard before a Conciliation Board before "proceedings [are] instituted in, or [are] entertained by a civil court."(12) The production of a certificate from the Chairman of a panel of conciliators stating that, "such disputes have been inquired into by a Conciliation Board, or that a settlement of such dispute made by a Conciliation Board has been repudiated by all or any of the parties to such settlement" is a necessary pre-requisite to the commencement of proceedings before a civil or a criminal court. The Court of Appeal in _Nonahamy v. Holgart Silva_(13) affirmed, that reference to a Conciliation Board of matters falling under section 6 of the Act was a pre-requisite to the commencement of civil or criminal proceedings before the ordinary courts.

Conciliation and adjudication pursue very different goals. In adjudication the goal is to find `the winner'. Built into the system of adjudication is the belief that the adjudicator could be in error in finding for one of the two disputants. Built into the system is a process of judicial review for the review of the decision arrived at by the adjudicator. This is the system of appeals through a hierarchical structure of courts. No such need is seen necessary for a system of conciliation as persons are assumed to be reconciled to the decision with no further claims. This is pursued by the Act. But where parties do not succumb to the process of conciliation then they are free to pursue their remedies in the common law courts. The two systems are kept separate and distinct. With one preceding the other.

The adjudicatory process must be viewed as a narrow construct. It rests on a system of rules and the legitimacy of its decision is linked to the correct and consistent application of rules of law. This method of dispute settlement does not take into consideration issues to be found outside the system of rules. The conciliation process in contrast, abandons the rule system. The process rests on procedures and approaches which lie outside the rule system and within the confines of the society in which the Conciliation Board sits.

The adjudicatory process declares a victor and a vanquished. The conciliation process doesn't. Its highest achievement is to produce a compromised solution rather than a condemnation of one in the favour of the other. These are some of the distinctions between the two approaches to dispute settlement.(14) Conciliation produces a decentralised method for dispute settlement which draws into the process a

multiplicity of social forces. The adjudicatory process is state-oriented and therefore locks the popular interest in its success. Leading out of the ideological mould which supported the conciliation process for dispute settlement resulted a new policy regarding the legal profession. This formed the second institutional change which resulted out of the socialist political re-orientation of Sri Lanka.(15) Preceding the change of attitude towards the legal profession, was the implementation of a legal language switch-over on the island.(16) It was felt that unless the legal language on the island was changed from English to Sinhala, the elite formation at the supra-structural level of the society could not be halted. For less than 5% of the population in 1956 were functionally literate in the English language.(17) The official Language Act of 1956(18)18 which declared Sinhalese to be the official language of the island was followed by the language of the Courts Act of 1961.19 The latter Act(19?) declared Sinhala to be the legal language on the island. Subsequently, by the Language of the Courts (special provisions) Act of 1973(20) certain necessary concessions of a practical nature were provided to the Tamil language. These changes formed the background for changes in the legal profession. These have received attention in two previous articles on that subject.(21) The socialist orientation of the political scenario on the island provided a further impetus making changes in the direction of the legal profession compelling. The socialist orientation influenced a role change in the legal profession. The role of a lawyer became one of a sociologist when he was called upon to interpret laws designed towards implementing a particularised social change. Changes at other levels of Government required him to act as an economist, a developmentalist or even as a political scientist within the framework of the legal system. This expanded role of the lawyers called for the recognition of new assumptions as the basis for the lawyering class. This predicated the need for a new theory of legal education. One serious defect of the changes was that they did not commence from the bottom. That would have required a revamping of the system of legal education as a precursor to the aforementioned changes at the top. This point needs particular emphasis, because the absence of suitably trained legal personnel who could have provided the necessary institutional support for the changes, compelled the Government to look beyond the ranks of the established lawyering class. While going beyond these ranks, the Government by legislation widened the area of legal representation, by first providing certain new institutions suitable for para-legal representation and then providing for para-legal representation before existing institutions. To the first belongs the creation of new institutions, such as the Conciliation Boards,(22) Agricultural Productivity Tribunals(23) and Housing Boards(24) and to the second belongs the right given to disputants to have para-legal representation by way of engaging legal agents before courts of law. The right to be represented by legal agents other than lawyers was a recognised right in certain disputes. Some months before the general elections of the 21st June, 1977, Mr. Felix Dias Bandaranaike, the then Minister of Justice had the

representation in Courts Bill in draft.(25) The contents of the draft make interesting reading. The draft, however, was never passed into law, and as events turned out, the likelihood of it ever becoming law seems very remote. However, as the draft reads, it contains provisions which appear to be a part of a continuing movement towards eliminating social contradictions. Had the draft been passed into law, it would have recognised the right of audience of legal intermediaries in Sri Lankan courts. The draft "enables persons other than attorneys-at-law to appear, plead or act before any court or other institutions established by law for the administration of justice."(26) Citizens appearing before the court may charge a fee, and are "subject to the same privileges and liabilities as lawyers".(27) The Bill excludes "those citizens who are not voters, those who have been found guilty of corrupt practices and those who have served a sentence of imprisonment during the preceding seven years"(28) from the right of representation in Courts. Commenting on the draft, the Minister of Justice stressed the importance of the right of a litigant to choose his own representative to argue his case from the general citizenry his peers in society if he so wishes. To deny that right, the Minister thought, would constitute "an anomaly" considering the way Sri Lankan society had recently developed.

The far-reaching societal consequences of the foregoing draft provisions need little emphasis. The immediate result could surely have been the broadening of "access to justice" in Sri Lanka. The ultimate result would probably have been the merger of the legal profession generally with the legal intermediaries. The resulting amalgam may well have affected the quality of the legal profession, but the claim was heard that a breeding ground for elitism, raising a number of social and economic contradictions may have been neutralized.

c. _CONCEPTUAL CHANGES_

Prior to the colonisation of Ceylon by the British in 1796, the Maritime Provinces of the island had been colonised by the Dutch. That was in 1656. The concept of `ownership' which the British administration found in 1796 was one that had been recognised under the Roman Dutch Law. That concept differed from its counterpart in the English Law in one very important aspect. That was this. In the English `ownership' meant the person who had the best `Title' to a corpus and he remained as its owner until another with a better `Title' managed to dislodge him. But in the Roman-Dutch Law, `ownership' was dominium, because any defects of a person's Title was cured either by _usucaptio_ or by _longi temporis praescriptio_.(29) Once these two curative doctrines become applicable to an incomplete Title, the Title becomes complete, being rid of the defects and thereby become `absolute'. This absolute nature of the Title to both movable and immovable property had become established in the Maritime Provinces at the advent of the British in 1796. The British administration made no attempt to alter this conceptual form of `ownership' because they found

that the resulting regime of land tenure minimised disputations and controversy. `Titles' under the Roman Dutch law could not be repudiated after many years, on the grounds of its impurity due to inherent defects, because _usucaptio_ and _longi temporis praescriptio_ under certain circumstances(30) did cure such defect. The British administration not only retained the Roman Dutch Law for the Maritime Provinces, but also extended its application to the newly conquered Kandyan provinces in 1833.(31) This conceptual framework within which `ownership' was cast was inherited by the Independent administration of the island, in 1948. By 1956, the concept had aged three centuries and it was found to be well-settled and difficult to be overthrown for the sake of development or socialism. This naturally raised some very significant problems for the programme of land reform which the SLFP administrations after 1956 were designing the problem was that the absolute nature of the concept of ownership had somehow to be overcome before any concrete steps were taken towards the Reform of land. The Government had two path-ways open to it. First, the Government could have acquired privately owned property as an initial step towards redistribution of wealth. This could have created a strain on the Government's financial standing, for such an event would attract the need to pay compensation out of the national funds. This path-way was however used by the Government in particular circumstances through the application of the Land Acquisition Ordinance.(32) The second method which the Government chose to utilise was to alter the nature of the `rights' inhering to the concept of `ownership' so that `rights' of other categories of persons may under certain circumstances appear in a stronger legal light than those of the `owner'. In other words the plan was to eclipse the rights of the `owner' in a way that the `rights' of the Tenant-Cultivator, the Tenant of a house or a seasonal farmer became more wholesome than that of the owner. This approach retained the concept of `ownership' intact but downgraded its effect in the light of other legal and social arrangements into which an owner may of necessity have entered. The position of the Tenant-Cultivator affords a good example.

Problems and issues concerning paddy lands have a complicated background. The growing of paddy unlike any other agricultural crop require the help of not only the initiated but also the experienced. The several stages the paddy land must be put through before sowing the paddy seed needs a great deal of experience and skill. The stages the paddy fields must be put through, both in the art of irrigation and `bunding', between sowing the seed and harvesting, require a great deal of dedication, attention and skill. Equally `the harvesting', `the thrashing' and `chaffing' involve experience and hard labour. Out of these energies and exercises have arisen a determinable group of persons called the Paddy Farmers or the _Govias_. The latter is a recognised profession and a committed _Govia_ by necessity must abandon all other means of livelihood. As much as the unskilled owner of a motor car may engage a chauffeur to drive him about; an unskilled owner of a paddy field must of necessity engage a _Govia_. For in Ceylon, as a result of family interests in land and private ownership

of property, many paddy land owners have little or no skill in farming paddy. The position of the _Govia_ is therefore an important part in the paddy planting industry in Sri Lanka. The _Govias_ were engaged upon an Ande basis which means, at least in the Northwestern Province, the provision of three-quarters of the crop to the _Govias_ if the land owner provided nothing or one-quarter of the crop to the _Govia_ if the land owner provided everything. In the latter arrangement the work of the _Govia_ is limited to providing his skills as the head of a `gang of labourers' when engaged in preparing the earth for the sowing. The land owner in this case provides the labour. The _Govia_ checks the progress of the plant, sprays with insecticide, prepares the bund, supplies the water and then again acts as the head of a `gang of hired labourers' during the harvesting, reaping, and thrashing period. Whether it was the three-quarter Ande arrangement or the one-quarter Ande arrangement the importance of a _Govia's_ position in the whole enterprise is undeniable.

Until 1953 there was no law governing the relationship between the _Govia_ and the owner. The Paddy Lands Act of 1953(33) was the first attempt ever to be made towards regulating the historic relationship between the _Govia_ and the owner. By this Act, the Government made the Ande statutory, which meant that Govias were entitled by law to a particular portion of the yield subject to performing particular types of duties. These were spelt out by regulations made under the Act.(34)

The Act prohibited any adjustment of the stated proportions.(35) The Act in addition gave the tenant farmer or the _Govia_ a security of tenure. The Act forbade the owner from engaging a _Govia_ for a period less than 5 years.(36) The Act, however, prescribed several grounds upon which a sitting _Govia_ may be dispossessed.(37) The Act introduced a legalised system of rights and duties between the _Govia_ and the owner. In addition it provided a limited security of tenure up to five years. That was all, the thrust of the Paddy Lands Act of 1958(38) was to provide a greater security to the Govia whom the Act describes as a Tenant-Cultivator. The 1958 Act gives the Tenant-Cultivator complete security. Section 4 of the Act details the extent of his interest.

"(3) The rights of the Tenant-Cultivator of any extent of Paddy Land shall not be affected in any manner by the sale (whether voluntary or in execution of the decree of a court), the transfer by gift, testamentary disposition or otherwise, the assignment or disposal or otherwise, or the devolution under the law of inheritance of the right, title and interest of the landlord of such extent.

(4) The rights of a tenant-cultivator or any extent of paddy land shall not be sequestrated, seized or sold in execution of the decree or process of any court."

In addition a Tenant-Cultivator may nominate any citizen of Ceylon to succeed him,(39) which he may cancel during his lifetime and make a fresh or further nomination.(40) The Act

prescribes the way in which such nominations, cancellations and re-nominations may be made.(41) In the absence of a nomination of a person who would succeed to his rights as a tenant-cultivator, his rights shall devolve upon his spouse.(42) If there is no spouse then it would fall, with the elder taking precedence over the younger in the following order of precedence:

His-Sons, Daughters, Grandsons, Grand-daughters, father, mother, brothers, sisters, uncles, aunts, nephews and nieces.

Where all these persons fail to accept the rights and the duties of a Tenant-Cultivator, the Act nominates the Cultivation Committee of the area, only as a temporary successor.(43) Where the Cultivation Committee of the area assumes the position of the Tenant-Cultivator, the landlord may if he so wishes, give notice to the Cultivation Committee that he would like to become an owner-cultivator of that paddy land.

If no such notice is given within 30 days, the owner will lose the chance of breaking the grip held by the Act over his paddy land. In such an event, the Cultivation Committee is required to select a suitable person from the locality who would assume the position of the Tenant-Cultivator.(44) During the hiatus, the Cultivation Committee will remain responsible to perform the duties that may have been performed by the deceased Tenant-Cultivator.(45) The Act of 1958 provided that the owners of paddy lands may within the first five years of its operation apply to the Cultivation Committee of the area to have him/her declared as the owner-cultivator.(46) In the case of an infant owner, in 1963, he or she has six months after gaining majority to make that application.

The thrust of the Act is clear. Aside from conditions which may give the owner a cause to have the Tenant-Cultivator removed, the Tenant-Cultivator is not only secure throughout his own lifetime but he also acquires a proprietary interest which he could devise by will or other instrument to his heirs.

The proprietary nature of a Tenant-Cultivator's interests is further enhanced by the Act giving him the power to transfer his interests to anyone, other than a non-citizen, by way of gift or sale, subject to the giving of notice to the owner of the paddy land in question.(47) The primary effect of the Act was to secure the position of the Tenant-Cultivator by creating a parallel interest in the paddy land in his favour. The proprietary nature of his interest secures to him, rights which are similar in character to those enjoyed by the owner. Namely, such interests as those that could be alienated by the Tenant-Cultivator.(48) The Agricultural Lands Law of 1973(49) closely followed the provisions of the Act of 1958(50) which it replaced. It however, made one basic change.

Under the 1973 law, the Tenant-Cultivator was limited in his power to transfer his interests to persons mentioned in the schedule to the law, which in fact is the same as the list of those who stood to succeed at his death, if he were to die

intestate.(51) Unlike under the 1958 Act, the 1973 Law permitted the Tenant-Cultivator to transfer his rights to the owner with the written consent of an Agricultural Tribunal.(52)

The 1973 Law created an Agricultural Tribunal to which _inter alia_ all defects in the system could be referred.(53) The Cultivation Committees under both the Act of 1958 and under the Law of 1973 had identical tasks. Namely, to provide the administrative base for the running of the system which the Act and the Law generates so as to facilitate state intervention in Agriculture. Aside from securing the position of the Tenant-Cultivator vis-a-vis the owner, which indeed is a new step in the agricultural enterprises on the island, the Law of 1973 (and before that the Act of 1958) introduces a basic administrative infra-structure which merits some comment.

The Law of 1973, requires the Minister to create a Cultivation Committee for Agricultural Lands situated in each such area as to be determined by him.(54) The Minister is empowered to appoint not less than ten persons who are engaged in agriculture or such other persons as the Minister may deem suitable.(55) The role of the Cultivation Committee is one of an agency of the Agricultural Productivity Committee.(56) The latter is a creation of the Agricultural Productivity Law of 1972.(57) The Agricultural Productivity Committee was created to supervise the utilisation of agricultural land for its maximum productivity. It was meant to be a watch-dog committee which would report back to the Minister if a particular land owner was lapse in his duty to make the maximum use of his land. In such an event the Minister may under the Agricultural Productivity Law,(58) issue a `supervision order' which would require such owner to cause a satisfactory improvement of his land within the space of one year.(59) Failure to do so would result in his land been taken out of his possession and been vested in some other person or body under the condition that its productivity be increased. Towards this end the Minister was empowered to issue an `order of dispossession' against the owner.(6) The Agricultural Productivity Committee, created under the 1972 Law,(61) performs a watch-dog function towards helping its implementation. Returning to the Cultivation Committees established under the Agricultural Lands Law of 1973,(62) these Committees were required by section 39 of the 1973 Law to assist the Agricultural Productivity Committee, _inter alia_,(63) in the preparation and in the maintenance of a register of the agricultural lands, recording the names of the landlords, owner cultivators, tenant cultivators and collective farmers, as the case may be.(64) In addition, section 40 of the 1973 Law left the Cultivation Committee with some specific fiscal matters. And section 41 provided the Minister with the power to determine, confer or impose further powers and duties by regulations made under this law. The multiplicity of committees and authorities could tend to confuse the duties left to each of these bodies, which may sometimes cause difficulties of some magnitude to the citizen. To solve such problems, the 1973 Law created an Agricultural Tribunal with wide powers.(65) The Tribunal while settling disputes and consenting to the transfer of the rights of a

Tenant-Cultivator to the owner(66) was empowered to award damages against the landlord and in favour of a Tenant-Cultivator where the latter had been unlawfully evicted.

The Agricultural Productivity Committees, the Cultivation Committees and the Agricultural Tribunals provided the infra-structure for the workings of an integrated policy towards paddy cultivation on the island. In classical jurisprudence,

"Ownership denotes the relation between a person and an object forming the subject-matter of his ownership. It consists in a complex of rights, all of which are rights _in rem_, being good against all the world and not merely against specific persons. Though uncertain situations some of these rights may be absent.---"(67)

The emerging jurisprudence merely adjusted the catalogue of `rights' associated with the concept of `ownership'. The result was to by-pass the need for `nationalisation' which is often considered in the Third World Countries as a means for achieving `socialism'.

d. _THE `UMBRELLA-PROVISIONS' FOR STATE PARTICIPATION IN COMMERCE_

Prior to independence there were no legal provisions which justified state participation in Commerce. The legal system responded to the classical theory of Government that its functions are merely legislative and executive. In so far as the commercial activities are concerned the theory was held that they all fell under one of two laws: The Companies Ordinance or The Partnership Ordinance of Ceylon. Since the advent of Independence and more particularly after 1956, the Governments developed the propensity to partake in Commerce, particularly wherever it felt compelled to do so for the furtherance of development. Along that line the Government proceeded to consider its participation in Commerce as a necessary step towards the introduction of a command economy, which was considered as a precursor for the rapid introduction and spread of socialism. Against that background the SLFP Administrations of 1957 and 1972 proceeded to create three `umbrella statutes' under which the Government could at any time enter into commercial and agricultural enterprises without the prior consent of Parliament. A key feature of the two 'umbrella statutes' was that they each created parallel institutions to the ones that resulted under the Companies Ordinance. These three `umbrella statutes' were The State Industrial Corporation Act of 1957,(68) The Sri Lanka State Trading Corporation Act of 1970(69) and The State Agricultural Corporation Act of 1972.(70)

(a) _The State Industrial Corporation Act of 1957_(71)

The Act declared:

"Where the government considers it necessary that a Corporation

should be established for the purpose of:

a) setting up and carrying on any industrial undertaking previously carried on by any corporation -- [The Minister may by order published in the Gazette] --- declare that a Corporation shall be established for the purpose of setting up and carrying on, or taking over and carrying on, as the case may be, the specified Industrial undertaking."

An important feature of this Act is that a Cabinet decision to take over an existing Corporation or a decision to create a new Corporation through which the State could penetrate into a particular area of activity could be achieved very rapidly and without reference to the legislature. The Act expressly set aside the application of the provisions of Companies Ordinance and subjected the resulting creature of law exclusively to its own provisions.

(b) _The Sri Lanka Trading Corporation Act of 1970_(72)

This Act provided the "umbrella" legislation under which the Government could establish `satellite' Corporations for the importation, exportation, distribution, supply, promotion and expansion of any article which the Minister may from time to time determine by orders published in the Gazette.(73) The Act declares that the Minister may specify the objects of the Corporation in the incorporation order.(74) By a different section the Act gives the `satellite' Corporation the "power to do anything necessary for or conducive or incidental to the carrying out of its objects.(75) Under this Act the Government established a number of Corporations in areas which became important within a given `Time-Frame'.

(c) _The State Agricultural Corporations Act of 1972_(76)

The Act declares that:

"Where the Minister considers it necessary that a Corporation should be established for the purpose of the planning, promotion, co-ordination or development of any agricultural undertaking, the Minister may, with the concurrence of the Ministry of Planning and the Minister of Finance, by order (hereinafter referred to as the "Incorporation Order") published in the Gazette",(77) establish a Corporation under this Act. Following closely, The State Trading Corporations Act of 1970, this legislation declares that the objects of the Corporation shall be specified in the order of Incorporation and that the Corporation shall have a general power to do what is deemed to be necessary for carrying out the objects of incorporation.(78)

The three `umbrella legislations' cover a wide area of state activity in the development of Sri Lanka. In Industry, in Commerce and in Agriculture, the `umbrella legislations' empower the Government to establish satellite corporations whenever it feels necessary to do so. The political policy of the Government determines the objects and, the extent to which

powers are given to the new `legal creatures' to act towards achieving them. The flexibility, free from parliamentary controls, that the Government of the day enjoys in these three key areas of development could be considered as vital to those `Third World' Countries with a parliamentary form of two or more party Governments.

The three `umbrella' legislations carry five distinctive features which distinguish legal-entities established under them, from companies established under the Companies Ordinance.

First, the `objects and powers' of these satellite corporations are laid down by the umbrella statutes. Parliament has the ultimate control over such objects and powers and therefore could, without reference to Courts as in the case of ordinary companies alter their scope or ambit. _Second_, the appointment to the Board of Directors and of the Chairman fall within the absolute discretion of the Minister. _Third_, the power to issue special and general directions and issue regulations fall within the absolute discretion of the Minister. _Fourth_, Parliament has the ultimate control over the Corporation's capital, as this eventually becomes the concern of the consolidated Fund of the Government. _Fifth_, the satellite has a statutory power to acquire private property under the Land Acquisition Ordinance. This power is subject to the payment of compensation. The foregoing catalogue of particular features of the legal creatures established under the aforementioned `umbrella legislations', draw a sharp distinction between themselves and the company.

e. _ACCOMMODATION OF THE LAND REFORM PROGRAMME BY THE LEGAL SYSTEM: LEGAL PROCESS V. POLITICAL PROCESS_

As a fact of history the passage of the Land Reform Law of 1972(79) marked the first step ever to be taken by any administration on the island, to introduce a system of property reform aimed towards equalisation of land holdings in Ceylon. The aims of the law was succinctly stated in Section 2 of the Law of 1972 in this way:

"The purpose of this law shall be to establish a Land Reform Commission with the following objects:
(a) to ensure that no person shall own agricultural land in excess of the ceiling; and
(b) to take over agricultural land in excess of the ceiling; and
(c) to take over agricultural land owned by any person in excess of the ceiling and to utilize such land in a manner which will result in an increase in its productivity and in

the employment generated from such land.

The statute fixed the ceiling for land holdings at fifty acres.

And thereafter declared that any land in excess would be held under a Statutory Trust by the owner for the Land Reform Commission, prior to its utilization by the Land Reform

Commission for the purposes of enhancing productivity.(80) The `1972 Law' dealt with the Reform of all land, both paddy and non-paddy, but left the Estate Land untouched. An amendment to the `1972 Law' was passed in 1975. This was the Land Reform (Amendment) Law of 1975.(81) That law was aimed at Estate Land, owned largely by public companies. The law declared that such Estates shall:

"be deemed to vest in and be possessed by the [Land Reform] Commission---; and (b) be deemed to be managed under a statutory trust for and on behalf of the Commission by the agency house or organisation which, or the person who, on the day immediately prior to the date of such vesting, was responsible for, and in charge of the management of such estate land, for and on behalf of such company, and such agency house, organisation or person shall, subject to the provisions of this part of this law, be deemed to be the statutory trustee of such estate land."(82)

The law clearly laid down the duties of the statutory trustee and the way he was required to manage the vested lands. The government appears to have had some concern as to the reaction of the Agency Groups in Sri Lanka to these radical and unprecedented steps. After all, the amendment was effectively dismantling a vast financial empire which the sterling companies had created for the metropolis since the earliest days of British rule in Ceylon. Fearing the possible counter moves the directorates in the metropolis may take through their agents, the Agency Houses in Sri Lanka, the amending Law(83) enacted the following section:

"Where the Minister in consultation with the Minister in charge of the subject of trade, the Minister in charge of planning and economic affairs and the Minister in charge of Finance, is of the opinion that it is necessary, for the purpose of giving effect to this part of this law, to vest in the government, the business undertaking of any Agency house or organisation which,under this part of this law, is the statutory trustee of any estate land vested in the Commission, the Minister may request the Minister of Finance to vest such business undertaking in the government under the provisions of the business undertaking (Acquisition) Act, No. 35 of 1971, and accordingly, the Minister of Finance may by order made under section 2 of that Act, vest such business undertaking in the Government."(84)

Besides the power to vest any Agency house in the Government, the amendment empowered the Minister to replace any Director or other Executive Officer of any Agency House established on the island. This effectively gave the government the power to control the activities of the Agency Houses, without actually nationalising them. This in turn facilitated the Land Reform Commission in its quest to direct the way in which Estate Land vested in the Commission is administered. The amendment declared that the Government may replace existing Director and other persons if it appears that such a substitution was needed "for the good and proper management of any Estate Land vested

in the Commission". This provided the Government with the means to act without actually having to acquire a particular Agency House under the Business Undertakings (Acquisition) Act of 1971.(85)

The combined effect of the Principal Law and its amendment was to reform the Land tenure system on the island in a way that the ownership of land shall not hereinafter be totally exploitative of the national economy but would to a large extent become a means to an end. The end being the progressive economic development of the island for the common good of its citizens. This end is naturally linked to the method of distribution and utilisation of the land acquired from the effective implementation of the Laws of 1972 and of 1975. The island at this point appears to have come a full-circle. The theme of the mid-nineteenth century was the extraction of land by
lawful means, so that they could form the base for the successful
implementation of a process of capital accumulation for the metropolis. The theme, almost a 125 years later, was the return of that land back to the nation, again within the parameters drawn by the laws of the land for national development.

What was left out of this socialist scenario was Housing reform. By a law of 1973, the National State Assembly declared that:

(1) The maximum number of houses which may be owned by an individual who is a member of a family shall be such number of houses which together with the number of houses owned by the other members of that family is equivalent to the number of dependent children, if any, in that family, increased by two.

(2) The maximum number of houses which may be owned by an individual who is not a member of a family shall be two.

(3) The maximum number of houses which may be owned by any body or persons, corporate or unincorporate, shall be such number of houses asis determined by the Commissioner to be necessary for the purpose of providing residence to the employees and functionaries of such body or of carrying out the objects (other than any object for the letting of houses on rent) of such body:
Provided, however that ---------

(4) An individual shall for the purposes of this law be deemed to be a member of a family if such individual has a spouse or a dependent child or is a dependent child of any individual.(86)

Despite the complexity of the wording in the foregoing section, the law limits an individual to two houses.Any number of houses owned by a person in excess of two become vested in the Commissioner for National Housing. In computing this number, the law requires that a person who constructs houses for sale shall not be considered as a person who owns them(87) provided

that the house is not occupied by any person before it is sold and provided that it is in fact sold within a period of 12 months after its completion.(88) But a person who has taken steps to demolish existing houses so that the number shall become two, will be deemed to be the owners of the demolished houses, provided he had demolished them at a time on or after November 9, 1971.(89) Amalgamation of two or more houses is permitted, if it appears to the Commissioner of Housing that the requirements of any particular family demands such an amalgamation.(90) Houses built on land leased by the government to an individual or by an individual to another individual will be considered as a house owned by the lessee.(91) This provision catches the _chena_(92) owner who farms the _chena_ land granted or leased by the Government, in some remote part of the island who may have constructed more than two modest houses. The value of this kind of housing bears no real significance to the overall purposes of this law, namely for the control of wealth. The only part of the law which appears to relate to the question of wealth is Part II. Under that part, no person is permitted to construct a house in excess of a floor space of 2,000 square feet including the thickness of the external walls.(93) The Law further places a limit on the space on which such a property is built. In municipal areas the maximum extent of the land permitted to be utilised is 20 perches while in the urban areas it is 10 perches. No control of this sort is placed in rural areas.(94) Further, the cost of construction of a house is limited to a sum fixed by the Minister of Housing, as per square foot of construction. A violation of this provision was made a criminal offence, punishable by a fine of not less than three times the amount spent in excess of the fixed amount.(95) It is a curious fact that the Government, while attempting to tie houses-to-be-built to a value indicator, fails to use the same indicator as a basis for housing reforms. By an amendment(96) to the Principal Law, the government added in 1976 four additional grounds on which housing property may vest in the National Housing Commission. These four new grounds are; where the owner of a house:

(i) has left Sri Lanka and has obtained a foreign citizenship;
(ii) has been residing abroad for a continuous period of 10 years;
(iii) has left Sri Lanka for the purposes of settling abroad;
(iv) is not in existence, is not known, or cannot be traced.

In each of these instances, the tenants of such houses may purchase the house from the Commissioner of National Housing. This naturally affects absentee landlordism which has recently become prevalent in Sri Lanka, due to the increase of immigration by Sri Lankans to foreign countries.

The foregoing catalogue of provisions indicate the complex legal questions that may arise out of the Land Reform Programme. This may, therefore, suggest the importance that

`Access to Courts' may have in this area of development. The Government, however, considered `Access to Courts' as counter productive for the programme as a whole was devised within a socio-political and socio-economic framework. The Courts, the Government thought, were ill-equipped and did not have the competency to adjudicate from a non-legal standpoint. And, therefore, the aforementioned statutes carried express provisions excluding the adjudication of disputes arising under them by the Courts.(97)

The express exclusion of `Access to Courts' was a novel feature in the legal system of Sri Lanka. Disputes arising under the Land Reform Laws were subject to resolution by administrative action rather than by adjudication in a court of law.(98) The process which the reforming laws had structured for the disputants led them through various administrative tribunals and ultimately to the political decision making process of the Minister.(99) The Statute empowered the Minister with the responsibility of appointing the members of the administrative tribunals.(100) Equally it lay within his power to remove them at his absolute discretion.(101) The exclusion of `Access to Courts' was so phrased that the decisions of the administrative tribunals could not be judicially reviewed even for a gross violation of `Natural Justice'.(102) For it was conceded by the Government that Land Reform from its beginning to its end was a political process and not a judicial process. The need to use the `vehicle of legislation' was considered to be a peripheral one; namely, to unknot the legal binds that kept the idea of private ownership of property secure and firm. Once that knot was cut, no further use of the laws or of legal institutions should be made to achieve the goals of land reform.

It must be pointed out that the aforementioned administrative tribunals were conceived within a very different jurisprudential framework to the one within which the Conciliation Boards were founded. In the latter, the citizen had the right to seek his remedy in the Courts if he decides either to reject the `plaintiff's' attempt to seek conciliation or to reject the decision arrived at by the Board, as a result of conciliation. This was at the disputants absolute discretion irrespective of whether he was the `plaintiff' or the `defendant' during the conciliation process. The `Access to Courts' which was left open to him was in the nature of an original hearing and not as an appeal from the Conciliation Board. The Conciliation Board in this sense was a mere `institutional by-pass', which the citizen was required to go through as a prelude to gaining `Access to Courts'.

The effectiveness of the conciliation process could be gleaned from the available statistics. During the last two years of its existence an average of 47% of the disputes that went before the Board were settled and therefore did not proceed any further towards the adjudicatory system. Be that as it may, the land reform laws avoided both the adjudicatory process and the conciliation process. By doing so the legislature introduced a third dimension to the dispute settlement process

of Sri Lanka, namely the political process.

f. _THE CHANGING ROLE OF THE COURTS REGARDING JUDICIAL REVIEW OF LEGISLATION_

Fundamental to the legal tradition inherited from the colonial period was Judicial Review of legislation. _Cooray-Peiris_(103) commented on this Constitutional attribute in this way:

"The independence Constitution of 1948 was construed by the Courts as conferring on the judiciary the power of judicial review of the Constitutionality of legislation. Legislation which infringed Constitutional provisions was held to be valid."(104)

Throughout the period between 1948-1972, the Courts used this power to strike down the validity of a number of Legislations.(105) The political response to this kind of power was initially subdued, in spite of the fact that some of these strikes were aimed by The Judicial Committee of the Privy Council sitting in England. However, the last judicial straw that appeared to break the political back of the country was the decision of The Privy Council in the Bribery _Commissioner v. Ranasinghe_,(106) in 1964. The central issue in that case was the Constitutionality of the appointment of a Bribery Commissioner under the island's Bribery Amendment Act.(107) Under that Act, the Minister of Justice was empowered to appoint The Bribery Commissioner who was declared to hold the ranking and status of a judge, performing judicial functions.(108) The 1948 Constitution,(109) however, left the appointment of the judiciary in the hands of an independent body, namely, the Ceylon Judicial Service Commission.(110) The crisp question was whether the Bribery Amendment Act was _ultra vires_ the Constitution. The Judicial Committee, relying on the special provisions(111) laid down in the Ceylon Constitution for constitutional change, gave a positive answer.

Once the conclusion was reached that the Act was ultra vires the Constitution, the Committee concluded that unless the Act was passed as a Constitutional amendment receiving "not less than two-thirds of the whole number of Members of the House (including those not present)"(112) the appointment of Bribery Commissioner under the Act was invalid. Thus far the Advice of the Committee raised no rumblings. The Judicial Committee, however, went further than what was necessary for the judgment by commenting on section 29 of the Constitution which concerned entrenched religious and racial rights. In that part of their Advice the members of the Judicial Committee expressed the view that, _Per Lord Pearce_:

"The voting and legislative power of the Ceylon Parliament are dealt with in section 18 and 29 of the Constitution.18. save as otherwise provided in subsection (4) of section 29, any question proposed for decision by either Chamber shall be determined by a majority of votes of the Senators or Members,

as the case may be, present and voting--- .

29(1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace order and good government of the island. 29(2) No such law shall (a) prohibit or restrict the free exercise of any religion; ---.There follow (b), (c) and (d), which set out further entrenched religious and racial matters, which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which _inter-se_ they accepted the Constitution; _and these are therefore unalterable under the Constitution_."(113)

The courts in Ceylon had no opportunity before 1972 to examine the precise effect of that _dictum_. In so far as _The Bribery Commissioner_ case was concerned, the _dictum_ may be regarded as an _obiter_. Nevertheless, the possibility of a future Judicial Committee declaration that certain portions of the 1948 Constitution were unalterable, even with a 100 percent majority, resulted in a political movement aimed at Constitutional reform. The 1970 general election was considered as a kind of a referendum by the Sri Lanka Freedom Party (SLFP), seeking a mandate from the people to have the 1948 Constitution replaced by a second Independent Constitution. The success at the Polls of the SLFP rapidly led to the creation of a Constituent Assembly, in July 1970, and the drafting of the 1972 Constitution by that body. The 1972 Constitution was promulgated on May 22nd of that year. The legal implications of this Constitution-making process has received comment in another place.(114) One of the important departures that the 1972 Constitution made from the one it replaced concerns Judicial Review.

The 1972 Constitution, by Article 54(1) created a Constitutional Court which was made the exclusive from responsible for the review of legislation. The Constitution provided that upon a Bill being placed on the agenda of the National State Assembly, any person may within seven days thereafter inform the speaker that the Bill as published appears to be in conflict with the Constitution.(115) Such a communication with the speaker, requires him to refer the question of Constitutionality to the Constitutional court(116) and the Court is consequently required to report back to the Assembly within 14 days.(117) If the Court concludes that:

"---this Bill or any provision there in is inconsistent with the Constitution or that the Constitutional Court entertains a doubt whether the Bill or any provision therein is consistent with the Constitution such Bill may not pass into law except with the special majority required for the amendment of the Constitution."(118)

Once the Constitutionality of the Bill is determined by the Constitutional Court at the `Bill Stage', no further Judicial Review of the Legislation is thereafter permitted under the Constitution.(119) Explaining the policy behind this departure, the Hon. Dr. Colvin R. de Silva(120) told the

Constituent Assembly:

"So, I do not think it is possible for anyone to go further within the principle that laws cannot be challenged after they are passed in the interests of certainty of the law and the security of the citizen.(121) --What I want to stress is that I am seeking to build into the Constitution various precautions which will prevent any laws being passed that ought not to be passed except by a special majority. Those are precautions which the British Parliament do not have, they are precautions they do not observe, because even by a snap majority they may pass a law and that law would be good law. I am seeking to build into the Constitution these precautions."(122)

The Constitutional Court was considered to be a special court which had the mandate to function within a political framework.

For, it was considered that the question of the constitutionality of a Bill was not exclusively a legal question but was also partly a political one. The 1978 Constitution retained the foregoing provisions regarding Judicial Review except the Constitutional Court as constituted under the 1972 Constitution. In its place the government substituted The Supreme Court of Sri Lanka, which in fact is the highest Court of Appeal.(123) Aside from this substitution of Courts, so that the issue of Constitutional validity, once more, becomes exclusively a question of law, `Judicial Review of Legislation' by Courts remain limited to its Review at the `Bill-Stage'. The width of Judicial Review in Anglo-American Jurisprudence, therefore, is absent in Sri Lanka today. In its place the island has a "one-shot-attempt" at a point well before the legislative proposal becomes law. And in this sense it is really a question of Judicial Review of `Bills' rather than of `Legislation'. By limiting Judicial Review to the `Bill-Stage' of all legislation, the government has effectively provided an absolute degree of certainty; that once political policy is translated into law, never again would that law be re-opened for judicial consideration of its Constitutional validity. That appears to have been considered as an element of prime importance for the success of the programme for the socialisation of the economic substrate of the island. What Parliament does, it was thought only Parliament should undo.

g. _CONCLUSIONS_

As postulated at the beginning, the `imposed legal systems' during the colonial period were based on assumptions fundamentally different from those upon which a programme for socialism rests. It was this that made certain changes to the colonial legal system necessary, as a part of the socio-economic changes associated with the change of political direction. Commenting on the implementation of the Arusha Declaration through the instrumentalities of the Courts, Professor James, after discussing "the state of the law before the [Arusha] Declaration and the political biases in resolving the issues after the Declaration",(124) wrote:

"The latter poses a conflict with the existing laws. Thus the Courts would be embarrassed in solving the disputes raised where they to adjudicate them according to law, for their decisions will conflict with the implications of the Arusha Declaration - a course of conduct which is not to be tolerated when every leader including the judges and magistrates and signatories to the documents of compliance with the Declaration. The development in the conundrum is that since the judges and magistrates, by their oath, are also bound to apply the law of the land in adjudicating disputes, there is an attempt to stifle resort to the Courts and the concept of non-justifiability looms large in fact, if not in law. This course must of necessity lead to the frustrating of some litigants who are numerically not insignificant. They are left with rights but denied remedies to enforce them. I have, therefore, characterised the implementation of policy as based on expediency rather than law."(125)

Professor James gives a number of examples where disputes regarding the payment of compensation for owners of land which had been absorbed into the _Ujamaa_(126) system had been stalled by the High Court, as a deliberate judicial policy. The Chief Justice of Tanzania has been quoted as declaring that:

"Since Tanzania believed in Ujamaa then, the interest of many people in land cases should override those of some few individuals. The judiciary could not be used as a tool to oppose _Ujamaa_ -- As citizens and Tanu members, the Courts are duty bound -- to further Ujamaa."(127)

By preserving the right to have "access to courts" the Tanzanian model places the judiciary in an invidious position. Caught in a classic conundrum the judges, particularly, at the highest appellate level could do no more than leave the appeal on file. _Professor James further states_:

"As a result, such claims which got as far as the High Court are still pending. Those started in the Magistrates' Courts in recent times are referred to the High Court in compliance with the statement of the Chief Justice that cases involving individuals and Ujamaa villages or vice-versa should not be heard in the primary or district courts but should be taken directly to him be fore or after trial. The embargo is stated to be verbal and has reached the ears of most magistrates through hearsay evidence."(128)

The attitude taken by the National State Assembly in Sri Lanka, in the light of the Tanzanian experience, seems preferable. Instead of leaving intact the ancient right of `access to courts' whenever the right to private ownership of property is tampered with, the legislature made a deliberate decision to alter the course for redress from a judicial process to a political process. By this shift of emphasis for the settlement of disputes the Sri Lanka Government subjected, particularly the issue of compensation to the political process. The reasonable compensation payable to the former

owners in Sri Lanka became a political decision and not a legal one. Commenting on the Tanzanian scene regarding compensation, _Professor James wrote_:

"Moreover, it is the view of many of the political functionaries that even if it were possible to pay compensation, this would not be permitted as the peasant, on receiving compensation, will use it to start on his own elsewhere thus making the goal of villagisation more difficult."(129)

In Mozambique, Angola and Guinea-Bissau the successful National Liberation Movement successfully brought down the monumental edifice of colonial (Portuguese) Law and succeeded in building a whole new system of laws and legal institutions. Neither Sri Lanka nor Tanzania has attempted such a monumental task. Besides, its socio-political base may not permit such a fundamental alteration within the historical context of its political evolution into independence. Elsewhere I have shown how the socio-political institutions that result from a successful National Liberation Movement (as distinct from a mere coup d'etat) require a very different set of laws and legal institutions from those which result out of a constitutional transfer of power. In the former the laws and legal institutions arise out of the ideological base of the movement. In the latter they are inherited from the preceding constitutional structure. Both Sri Lanka and Tanzania do fall under the last category. Therefore, in each case some internal changes become necessary in their legal systems to meet the ideological changes of the changing socio-political institutions. The legislations altering the ideological foundations. Namely, those implementing the Arusha Declaration and establishing the Ujamaas(130) had not considered the necessity to introduce certain reforms to the legal supra-structure. The Sri Lanka Government on the other hand had taken this precaution by separating the `change' from the determination of the resulting rights-duties-claims. While utilising the instrumentalities of the law to achieve the change - namely legislations - the determination of rights arising out of the new situation was left squarely in the area of governmental policy. For Professor James, this would clearly be a case where expediency has eclipsed legality.

ENDNOTES

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1. C.O. 55.1 June 1st, 1796.
2. See Marasinghe, (M.L.) (1979) 12 Verfassung Und Recht in Ubersee, 115, pp. 118-122.
3. Amin, (S.), Imperialism and Unequal Development, The Harvester Press, Ltd., England, 1977, Chapter 2; Rodney, (W.), How Europe Underdeveloped Africa, Howard University Press, Washington, D.C., 1974, pp. 147-201.
4. Goonatilake, (S.), Development Thinking as Cultural

Neo-Colonialism - The Case of Sri Lanka, (Unpublished), Institute of Development Studies, University of Sussex, Discussion paper No. 63 (1974).

5. Between 1956 and 1977 there were six general elections. Namely: April 1956, March 1960, July 1960, March 1965, May 1970 and in July 1977. The SLFP won three of the six elections but ruled the country for 16 of the 21 years. The three SLFP victories were recorded in April 1956, July 1960 and in May 1970.

6. Marasinghe, (M.L.), The Use of Conciliation for Dispute Settlement: The Sri Lanka Experience, [1980] 29 Int. & Comp. L.Q.

7. Act No. 10 of 1958.

8. Viz: voluntarily causing hurt (s. 314 Penal Code); voluntarily causing hurt on provocation (s. 325 Penal Code); wrongful restraint (s. 332 - Penal Code); wrongful confinement (s. 333 - Penal Code); using criminal force otherwise than on grave and sudden provocation (s. 334 - Pena Code); assault on criminal force with intent to dishonour a person otherwise than on grave and sudden provocation (s. 346 - Penal Code); assaulting or using criminal force on grave and sudden provocation (s. 349 - Penal Code); committing mischief (s. 409 - Penal Code); committing mischief and thereby causing damage to the amount of fifty rupees (s. 410 - Penal Code); mischief by killing or maiming any animal of the value of ten rupees (s. 411 Penal Code); mischief by killing or maiming cattle, etc., or any animal of the value of fifty rupees (s. 412 - Penal Code); criminal trespass (s. 433 - Penal Code); house trespass (s. 434 - Penal Code); intentional insult with intent to provoke a breach of the peace (s. 484 - Penal Code); criminal intimidation (s. 486 - Penal Code); unlawful removal of any cattle from custody of person entitled to keep or detain such cattle (s. 12A - Cattle Trespass Ordinance); causing animals to trespass (ss. 13 and 13A - Cattle Trespass Ordinance). However, s. 27 of the Animals Act, No. 29 of 1958 has now repealed the Cattle Trespass Ordinance.

9. Fn. 1, s.3(1).

10. Fn. 1, s.3(7).

11. Fn. 1, s.7.

12. Fn. 1, s.14(a).

13. 73 New L. Rep. 217.

14. Tiruchelvam, (N.), The Ideology of Popular Justice, in The Sociology of Law, Edited by Reasons, (C.E.) and Rich, (R.M.), Butterworths, Toronto, 1978, 263. This article provides an interesting comparison between the two approaches to dispute settlement.

15. Tiruchelvam, op. cit wrote:

"The de-professionalalization of the administration of the justice in the historical or planned development of a number of socialist societies is one of the more intriguing phenomena in contemporary legal history. It is reflected in the emergence of diverse institutional forms for facilitating popular participation in conflict - management and law enforcement, distinctively labelled in each society and generally referred to as "popular tribunals". (p. 263).

16. Marasinghe, (M.L.), Some Problems Associated with a Language Switch-Over in the Third World in (1977), 10

Verfassung Und Recht in Ubersee, 507.
17. According to the 1946 statistics: 0.2% of the population spoke English only. 2.9% of the population spoke both English and Sinhalese. 1% of the population spoke English and Tamil. A total of 4.1%. Ceylon Census Report, 1946, Government Printer, Colombo, Vol. IV, p. 803.
18. Act No. 33 of 1956.
19. Act No. 3 of 1961.
20. Act. No. 14 of 1973.
21. Marasinghe, (M.L.), Fn. 16 above and Marasinghe, (M.L.), The Social Consequences of Legal Language Switch-Over in Sri Lanka, (1979), Lawasia (N.S.)
22. Fn. 7 above.
23. Agricultural Productivity Tribunals were established under the Agricultural Productivity Law No. 2 of 1972.
24. Protection of Tenants (Special Provisions) Act, No. 28 of 1970 provided special provisions to prevent landlords from ejecting tenants by resort to threats, violence and harassment by discontinuing or with holding amenities, by interfering in the use and occupation of premises or by other means, and to provide for matters incidental thereto or connected therewith.
25. Ceylon News, Vol. 41, No. 26 of June 24, 1976 at p. 1.
26. Ibid.
27. Ibid.
28. Ibid.
29. Buckland, (W.W.), Textbook of Roman Law from Augustus to Justinian, Ed. by Stein, (P.), Cambridge University Press, 1963, Section LXXXVII-Usucaptio and Section LXXXIX-Longi Temporis Praescriptio.
30. Ibid., the law required that the curative effect of the title be subjected to certain conditions, such as assumption of possession of the Res in question in bona fides.
31. Nadaraja, (T.), The Legal System of Ceylon in its Historical Setting, Brill, Leiden, 1972, Chapter 2, particularly at p. 67.
32. Cap. 460, Legislative Enactments of Ceylon, Revised in 1956.
33. Act No. 1 of 1953.
34. Ibid., s. 5.
35. Ibid., s. 7.
36. Ibid., s. 4.
37. Ibid., s. 10(4).
38. Act No. 1 of 1958.
39. Ibid., s. 6(1).
40. Ibid., s. 6(2).
41. Ibid., s. 6(3).
42. Ibid., s. 7.
43. Ibid., s. 10.
44. Ibid., s. 11(1) and (2).
45. Ibid., s. 12.
46. Ibid., s. 14.
47. Ibid., s. 8.
48. Ibid.
49. Law No. 42 of 1973.
50. Paddy Lands Act, Act No. 1 of 1958.
51. Ibid., s. 10(1).
52. Ibid., s. 10(2).

53. Ibid., s. 3.
54. Ibid., s. 36(1).
55. Ibid., s. 36(3).
56. Ibid., s. 38.
57. Law No. 2 of 1972.
58. Ibid., s .6(1).
59. Ibid., s. 7(1).
60. Ibid., s. 8(1).
61. Law No. 2 of 1972.
62. Law No. 42 of 1973.
63. Ibid., s. 40.
64. Ibid., s. 39.
65. Ibid., s. 3.
66. Ibid., s. 10(2).
67. Salmond, Jurisprudence, 12th Edn., Edt. Fitzgerald, (P.J.), Sweet & Maxwell, 1966, p. 246.
68. Act No. 49 of 1957.
69. Act No. 33 of 1970.
70. Act No. 11 of 1972.
71. See footnote 69 above.
72. See fn. 70 above.
73. Fn. 70, s. 2(i)-(ix).
74. Fn. 70, s. 3., above.
75. Fn. 70, s.5(1), above.
76. Fn. 71 above.
77. Fn. 71 above, s.2(1).
78. Fn. 71, above, s.3.
79. Law No. 1 of 1972.
80. Ibid., s. 3(1) and (2).
81. Law No. 39 of 1975.
82. Law No. 39 of 1975, s. 2 which introduces a new section s. 42(f@(i).
83. Law No. 39 of 1975.
84. Ibid., s. 2 which introduces s. 42K to the Principal Law, Law No. 1 of 1972.
85. Act No. 35 of 1971.
86. The Ceiling on Housing Property Law, Law No. 1 of 1973.
87. Ibid., s. 4.
88. Ceiling on Housing Property (Amendment) Law, Law No. 18 of 1976, s. 3.
89. Ibid., s. 5.
90. Ibid., s. 6.
91. Ibid., s. 7.
92. Cultivation of low country bush land, particularly, in the dry zone is referred to as Chena cultivation.
93. Ibid., s. 40.
94. Ibid., s. 41.
95. Ibid., s. 42.
96. Fn. 90 above.
97. The Land Reform Law, Law No. 1 of 1972, s. 38. See also The Ceiling on Housing Property Law, Law No. 1 of 1973, s. 39(3).
98. The Land Reform Law, fn. 99 above, Part IV. See also Law No. 1 of 1973, fn. 99 above, ss. 29-39.
99. The Land Reform Law, fn. 99, above, s. 47. See also Law No. 1 of 1973, fn. 99 above, s. 44.
100. The Land Reform Law, fn. 99 above, s. 45. See also Law

No.
1 of 1973, fn. 99 above, s. 29.
101. The Land Reform Law, fn. 99 above, s. 45(6). See also Law No. 1 of 1973, fn. 99 above, s. 29(4).
102. The Land Reform Law and The Ceiling on Housing Property Law, expressly declare that the proceedings before the Board was final, "and shall not be called in question in any Court, whether by way of writ or otherwise". Fn. 99 above.
103. Cooray-Peiris, (M.), "Fundamental Rights, Judicial Review and The Constitutional Court of Sri Lanka", (1979) (1) Lawasia, (W.S.), 24-73.
104. Ibid.
105. Fn. 105.
106. [l964] 2 W.L.R. 1301 (P.C.).
107. Bribery Amendment Act of 1958.
108. S. 41, ibid.
109. The Ceylon (Constitution) Order-in-Council, which now is the 1948 Constitution of Ceylon.
110. S. 55, ibid.
111. S. 29(4) of the Constitution, which reads: "In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the island:

Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present) .

Every certificate of the speaker under this subsection shall be conclusive for all purposes and shall not be questioned in any court of law".
112. Lord Pearce, fn. 108, p. 1307.
113. Ibid.
114. Marasinghe, (M.L.), "Ceylon - A Conflict of Constitutions", The International and Comparative Law Quarterly,
1971, vol. 20, pp. 645-674.
115. 1972, Constitution of Ceylon, s.54(2)(c).
116. Ibid., s. 54(2).
117. Ibid., s. 54(2)(e).
118. Ibid., s. 55(4).
119. Ibid., s. 54(4).
120. The Minister in charge of Constitutional Affairs.
121. Constituent Assembly (Official Report), Department of Government Printing, Ceylon, 1971, July 4th, 1971, Col. 2855.
122. Ibid., col. 2877.
123. 1978, Constitution, Section 120. 123. James, (R.W.), "Implementing the Arusha Declaration - The Role of the Legal System" (1973), 3 African Review 179.
124. Ibid., p. 180.
125. Ibid.
126. This was local level social formation introduced into

Tanzania.
127. Ibid., p. 182.
128. Ibid.
129. Ibid.
130. For an excellent exposition of the Ujamaas see Saidi Mwamindi v. R (1972), 6 Tanzania High Court Digest, Case No. 212.