



Oriental and Occidental Laws in Harmonious Co-existence: The Case of Trusts in Sri Lanka

Anton Cooray*

Readers are reminded that this work is protected by copyright. While they are free to use the ideas expressed in it, they may not copy, distribute or publish the work or part of it, in any form, printed, electronic or otherwise, except for reasonable quoting, clearly indicating the source. Readers are permitted to make copies, electronically or printed, for personal and classroom use.

Introduction

Sri Lanka's legal system is a rich mix of native laws and two great received legal traditions, the Roman-Dutch law and English law. The recorded history of Sri Lanka begins with the arrival of Vijaya, an exiled North Indian prince, and his entourage about 500 BC. The community that Vijaya founded in Sri Lanka flourished and established its own language Sinhalese and developed its own distinct culture and traditions, which was undoubtedly influenced by Indian law and custom.¹ The Sinhalese came under the benevolent influence of Buddhism brought to them by the Great Indian Emperor Asoka's son.

By the time the Portuguese landed in Colombo in 1505, the Sinhalese community had established an almost exclusive presence in the interior of the island, known as the Kandyan Kingdom—the upcountry. There they had developed their own law, the Kandyan law, which shows an Indian ancestry and Buddhist influence.

Probably in the third century BC, South Indians began to arrive in Sri Lanka in large numbers either as invaders or settlers and established their presence mainly in Northern Sri Lanka. They brought along with them their Hindu religion, South Indian culture and their Tamil language and in the course of time developed their own customary law—the Thesawalamei, which today applies to Tamils settled in the North of Sri Lanka.

Today, the Sinhalese constitute over 74% of the local population and about 90% of them are Buddhists. The Tamils account for around 14% of the population and a large majority of them are Hindus. There is a third ethnic community in Sri Lanka, the Muslims, who account for about 8% of the population. The establishment of the Muslim community has been traced to Arab traders, known as Moors, who settled in Sri Lanka. In later years Indian Muslims who settled in Sri Lanka integrated into the Moor community. Malays, who arrived from South East Asia during the time of Dutch occupation of Sri Lanka, are the other important section of the Muslims of Sri Lanka. There might be a small minority of Sinhalese or Tamils who have embraced Islam. Whatever racial origin a Muslim may have, all Muslims

* Professor Anton Cooray is the Associate Dean of Law of City University of Hong Kong. The author wishes to thank Professor Esin Orucu for valuable comments on a previous draft of this article. It is appearing in the Journal of Comparative Law (JCL, ISSN 1477-0814) and is published in the EJCL with the permission of the JCL Editorial Board.

¹ See Derrett JDM (1956) 'The Origins of the Laws of the Kandyans' (XIV) University of Ceylon Review 105.

are united by their religion—Islam, which is not only a religion but also a well-established code of law.²

It is in this backdrop of the three major customary laws that the influence of the Portuguese (1505-1656), the Dutch (1656-1796) and the British (1796-1948) must be viewed. The Portuguese made no attempt to introduce their law to the coastal areas of Sri Lanka which they controlled and only succeeded in introducing their religion, Roman Catholicism. The Dutch, who too could not extend their authority beyond coastal areas, not only introduced their version of Christianity, they also introduced their laws and their judicial and administrative system.

With the Dutch occupation in 1656, Sri Lanka came under the influence of Roman-Dutch Law. Just as place names like Hulftsdorf, Bloemendaal and Wolfendaal continue to feature on the Island's map, Roman-Dutch law has withstood many a tide of legal and political change to remain as the foundation of Sri Lanka's general or common law.

The surrender of the Dutch possessions in Sri Lanka in the twilight years of the Eighteenth Century was a blessing in disguise for the future of Roman-Dutch law: The British administration, which undertook to continue to apply existing laws,³ extended the application of Roman-Dutch law beyond the Dutch-controlled coastal areas when in 1815 British sovereignty was extended to the whole of Sri Lanka.

The British not only extended their authority to the whole of Sri Lanka, but also established a modern system of judicial and civil administration. They respected the prevailing laws, namely Roman-Dutch law and the customary laws, which they pledged to continue to apply. However, laws prevailing at the time of British occupation were applied through courts of law modelled on the British system by judges trained in the English legal tradition. These judges were not impressively familiar with Roman-Dutch law, or even the local customary laws which had not been comprehensively codified or at least well documented with sufficient clarity.⁴ Perhaps because of unfamiliarity with the existing laws, or more probably dissatisfaction with their state, the British administration introduced English law to cover large areas of law—especially constitutional law, criminal law, evidence, criminal and civil procedure and commercial law. Even in areas like property and family law—areas largely governed by Roman-Dutch law and the customary laws—the introduction of English law through legislation and judicial decisions has made significant changes in order to modernise the law.⁵

² See the judgment of Justice M Jameel, a prominent Muslim judge, in the Supreme Court case of *Ramupillai v Minister of Public Administration* [1991] 1 Sri Lanka Law Reports 11, where he said at 45-46 that a 'Muslim' is a person who has 'received' or 'embraced' or 'follows' Islam. He said 'Taken in its literal Dictionary meaning, Muslim will denote the religion and not the race of the individual' and that 'the Muslims (that is to say followers of Islam, be they Ceylon Moors, Ceylon Malays, Sinhalese Tamils or of any other race or Nationality) in Sri Lanka are governed by the Muslim Law.'

³ The Proclamation of 23rd September 1799 stated that 'the temporary Administration of Justice and Police in the Settlements of the Island [...] should, as nearly as circumstances will permit, be exercised by us, in conformity to the laws and Institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations in consequence of sudden and unforeseen emergencies, or to such expedients and useful alterations as may render a departure therefrom, either absolutely necessary and unavoidable, or evidently beneficial and desirable'.

⁴ The British administration took active steps to compile native laws for codification. The Mohameden Code and the Code of Thesawalamai were compiled in the early years of British rule and formed the basis for legislation of later years, which modified or improved the original codes to meet the changing needs of the society. The British had no success in codifying Kandyan law, but compilations of Kandyan law by several civil servants such as D'Oyly, Sawers and Turner have served the nation well. See Nadaraja T (1972) *The Legal System of Sri Lanka in its Historical Setting* EJ Brill 183-188.

⁵ See generally Cooray, A (1996) 'Sri Lanka: Oriental and Occidental Laws in Harmony' in Ötücü, E, Attwooll, E and Coyle, S (eds) *Studies in Legal Systems: Mixed and Mixing* Kluwer International 71-88 and Cooray, A

Roman-Dutch law, though enjoying a territorial expansion, did not experience the same fortune in relation to its substantive reach. Under the British rule it began to be replaced or modified by English law, just as place names like Amsterdam, Rotterdam and Middelburg gave way to local names in Northern Sri Lanka. English law succeeded in establishing a greater presence in Sri Lanka by infiltrating the common law. This it did firstly through legislation by replacing Roman-Dutch law in many important areas⁶ and secondly through judicial law-making by modifying or even repealing Roman-Dutch law.⁷

The reception of the concept of trusts into Sri Lanka provides an excellent example of judicial and legislative incorporation of English law. More importantly, it illustrates how Sri Lanka has evolved as a mixed legal system, enabling the quintessentially English concept of trust to operate side by side with Roman-Dutch law without touching the sensitivities of religion and custom.

Trusts, in the sense we know it, was unknown to Roman Dutch law, although attempts have been made to find some Roman-Dutch origins especially in *fidei commissum*. Trusts, an equitable remedy evolved to mitigate the harshness of or to supply omissions in the common law, did not sit easily with Roman-Dutch property law which did not recognise equitable ownership of property. This did not prevent the reception of trusts in Sri Lanka, first through judicial decisions and then through legislation. Indeed, as we will see later, the concept of equitable ownership had all but in name found its way into the Sri Lankan law.

The reception of trusts in Sri Lanka was not by way of an offensive intrusion into the Roman-Dutch based common law of Sri Lanka, but as a welcome device to resolve disputes which Roman-Dutch law was seen to be ill-equipped to handle. In that process of judicial law-making we witness the application of English and Roman-Dutch legal principles to different aspects of a legal dispute before the court, amply justifying the description of the Sri Lankan legal system as a genuine mixed legal system.

It was not only the Roman-Dutch background that judges and the legislature had to contend with in introducing the concept of trust. They had also to take account of the range of customary laws, commonly referred to in the Sri Lankan legal literature as personal laws or special laws. These special laws operate as the first law of application, in the sense that the common law becomes applicable only where a special law—Thesawalamai, Muslim law or Kandyan law—is silent. While in that sense common law is subordinate to special laws, legislation occupies a place superior to both the common law and special laws. Therefore, provisions of the Trusts Ordinance of 1917 and other trust related legislation are applicable in derogation not only of the Roman-Dutch based common law but also Sri Lanka's own customary laws. For that reason, the draftsmen of the Ordinance took great care to provide for the preservation of some aspects of religious laws in Sri Lanka to exist side by side with the English law based provisions of the Trust Ordinance.

(1995) 'Asian Customary Laws through Western Eyes: A Comparison of Sri Lankan and Hong Kong Colonial Experience' in Knalpa, LA and Binnie, SWS (eds) *Law, Society, and the State: Essays in Modern Legal History* University of Toronto Press 145-177.

⁶ The most obvious examples are in the areas of criminal law and commercial law.

⁷ During the early period of British rule, when the judiciary played an important part in ascertaining the scope of substantive principles of law drawn from Roman-Dutch law and customary laws which they were mandated to apply, there is a manifest bias towards English law with which the judges were familiar. Judges were selective in applying Roman-Dutch law, insisting that not the whole of Roman-Dutch law but only so much of it as had been received and applied consistently in Sri Lanka as was suitable to local needs and circumstances would apply. In the process of this selective application, courts instead of applying Roman-Dutch law pure and simple, adapted it to suit changing local needs, and where Roman-Dutch law was wanting or unsatisfactory, resorted to English law. See Nadaraja supra n 4 at 241-247.

Of three main customary laws, there was no need to make special provision for the Thesawalamai or Kandyan law, as the concept of trust was alien to them. In contrast, Muslim law had its own rules relating to religious trusts. Similarly, Hindu law too has its own idea of religious trusts, and, although Hindu law is not as such a source of law in Sri Lanka, any Indian Hindu religious practices regularly followed in Sri Lanka have binding legal force as local customs.⁸

The Trust Ordinance in its chapter on charitable trusts expressly provides that in determining any questions relating to the existence of a trust, the devolution of trusteeship or the administration of trust, or, in settling any scheme of management for a religious trust, the court must have regard to 'the religious law and custom of the community concerned'.⁹ While in relation to religious charitable trusts the Trust Ordinance is the primary source of law, religious law and custom continue to play an important role not only in determining the meaning and scope of charity but also in relation to regulating the management of religious trusts.

The Trusts Ordinance governs only trust matters: any matters that are ancillary to the determination of a trust matter will be governed by Roman-Dutch law or any relevant custom or special law. For instance if a question arises in relation to the capacity of parties, the common law or applicable special law will apply except where the Trusts Ordinance makes special provision.

The law of trusts is mainly contained in a codifying statute, the Trusts Ordinance of 1917, which is modelled on the Indian Trusts Act of 1882. In this paper I will briefly examine the process of reception of trusts in Sri Lanka and the role of the judiciary and the legislature in facilitating such reception. This paper focuses more particularly on two issues:

- (a) Does Sri Lankan trusts law recognise the English distinction between legal and equitable ownership, a distinction not known to the Roman-Dutch law which provides the foundation of Sri Lanka's common law.
- (b) To what extent has Sri Lanka's trusts law accommodated local custom and religion, while exerting a significant influence on the administration of religious trusts?

Judicial Reception of Trusts into Sri Lanka

By the time the Trusts Ordinance was enacted in 1917 the concept of trust had already been judicially received, judges having a free hand to import the concept of trusts so long as that was not inconsistent with the promise of the British administration to continue in force laws prevalent at the time of the British occupation.¹⁰

⁸ For instance before the introduction of the Trusts Ordinance in 1917, courts had given effect to local customs derived from Indian Hindu religious practices in disputes relating to trusteeship of Hindu Temples. See *Ramanathan Kurukkal* (1911) 15 New Law Reports 216. *Murugasu v Aruliah* (1913) New Law Reports 217 is a case where there was no evidence that an Indian customary Hindu law relating to Hindu temple administration had been received and acted upon in Sri Lanka.

⁹ Trusts Ordinance of 1917, s106.

¹⁰ A view was expressed by the Supreme Court of Sri Lanka in the 1969 case of *De Costa v the Bank of Ceylon* 72 New Law Reports 457 that the Proclamation of 1799, when it declared that the laws subsisting under the Dutch government in Sri Lanka would continue subject to modifications and alteration to be effected by 'lawful authority,' intended to authorise the legislature and the executive and not the judiciary to alter or modify the Roman-Dutch law. However, the reality is that Sri Lankan judges not only modified Roman-Dutch law, but sometimes simply ignored Roman-Dutch law and resorted to English law.

The Charter of Justice of 1801, which was proclaimed when Sri Lanka became a Crown Colony just four years into British occupation of the Maritime Provinces of Sri Lanka, replaced the then existing Dutch courts with a system of courts based on the English model. It provided that the court at the apex, the Supreme Court, was also a court of equity with the power to administer justice according to the rules and proceedings of the High Court of Chancery in Great Britain, as nearly as may be. Thus the way was paved for the Supreme Court to import the greatest ever invention of equity—the trusts—into Sri Lanka, where the dominant Roman-Dutch jurisprudence did not draw a distinction between legal and equitable ownership of property. If the Charter of Justice of 1801 appeared to confer equitable jurisdiction on the Supreme Court alone, local judges proved such interpretation to be wrong: In 1827 the Court of Appeal held that provincial courts could also exercise equitable jurisdiction by granting an injunction and ordering specific performance.¹¹ Thus, any court of civil jurisdiction could exercise equitable jurisdiction, including most notably in relation to trusts.

The Charter of Justice of 1833, which replaced the Charter of Justice of 1801, and subsequent statutes relating to the constitution of courts did not refer to any equitable jurisdiction. However, this was not for the reason that the legislature intended to deny courts of law any equitable jurisdiction. In fact, as will be seen later, courts continued not only to exercise an equitable jurisdiction making copious references to English precedent,¹² but, more importantly for the present purposes, in the years leading to the enactment of the Trusts Ordinance in 1917, to apply trust principles simply by assuming that trusts was part of the law of Sri Lanka. The judicial recognition of trusts was well assisted by several local statutes which implicitly recognised the applicability of equitable principles. For instance the Prescription Ordinance of 1834 provided for a limitation period for trusts, and the Trustees Ordinance of 1871 had a number of provisions relating to the administration of trusts.

Judges were aware of their duty to apply Roman-Dutch law that subsisted under the Dutch administration¹³ and whenever they applied English law in preference to Roman-Dutch law they gave reasons for so doing. An obvious excuse was that there was no Roman-Dutch principle relevant to a matter before the court. In *Ramalingam v Mohideen*¹⁴ a person who had hired the complainant's car had refused to pay the hire on the ground that the car broke down soon after the start of the journey and he had to use alternative means of travel. The Supreme Court was unable to find a Roman-Dutch authority dealing with breach of contract by refusal to pay a lump sum contract price. English law, on the other hand, had a solution in *Cutter v Powell*¹⁵ which had set out the principle that where there was a contract to do work for a lump sum, the price of it could not be recovered until the work is completed. The Supreme Court had no hesitation in filling the gap in the local contract law saying that the *Cutter v Powell* was 'a reasonable principle' to apply in Sri Lanka.

English law was introduced even where there was a relevant Roman-Dutch principle, if the court considered that English law would be useful to refine it. For instance in the 1903 case of *De Zilva v Cassim* the Supreme Court recognised the Roman-Dutch principle that no one is allowed to avail himself of his own fraud, a principle recognised in English law too.¹⁶ The facts indicated, however, that the intended illegal purpose, namely to defraud creditors,

¹¹ *Mathes Pulle v Rodrigo* (1827) Ram 119. Cooray LJM (1971) *The Reception in Ceylon of the English Trust* Lake House Printers, provides an excellent analysis of the Trusts Ordinance.

¹² As in *Perera v Perera* (1907) 10 New Law Reports 230.

¹³ By virtue of the Proclamation of 23 September 1799, giving effect to the rule in *Campbell v Hall*. See *supra* n 3.

¹⁴ (1921) 23 New Law Reports 409.

¹⁵ 6 Term Reports 320

¹⁶ *De Zilva v Cassim* (1903) 7 New Law Reports 230.

had not in fact been carried out. Middleton J stated that he could not find any Roman-Dutch principle that covered such a situation and turned to English trusts law, according to which a resulting trust would arise where the intention to defraud has not been carried into effect.¹⁷

In the early years of the British rule, judges took great pains to draw analogies between trusts and *fidei commissum* in order to facilitate the reception of trusts. Having found the justification, what the courts did in fact was to import the English law of trusts rather than to apply the Roman-Dutch principles. In *Samuel Silva v Warnakulasuriya de Silva*¹⁸ the Supreme Court held that a trust had been created and it had to be interpreted according to the principles of *fidei commissum*. However, it went on to apply principles of trusts law.¹⁹ In *Ibrahim Saibo v Oriental Banking Corporation*²⁰ (A) had transferred his property to the plaintiffs gratuitously in order to defraud his creditors. There was an agreement between (A) and the plaintiffs that the property would be transferred back to (A), once the debt was compounded. While A was yet insolvent the plaintiffs claimed that they were the absolute owners of the property. The Supreme Court approved the decision of Berwick J of the District Court where he had applied the principle of ‘implied trusts’ (presumed intention resulting trust as we know it today) and held that the plaintiffs held the property in trust for (A). The result was that (A)’s creditors were entitled to receive his beneficial interest towards the satisfaction of the outstanding debt.

Berwick J justified his resort to the English terminology of ‘implied trusts’ on the ground that the Roman-Dutch law on implied contract was in substance the same as implied trusts. Berwick DJ said:

With respect to the objection that the doctrine of implied trusts is no part of the Dutch Law, it is quite true that we have no technical terms corresponding to implied or resulting or constructive trusts, but we have the things themselves; and the only reason we have not the terms arises from the difference in the system of administration of law and equity being such that there is no occasion for them. But it is to be remembered that English trusts are the very offspring of the Roman Law, enlarged and developed from the Roman *fidei commissa* (which were only testamentary), so as to embrace trusts created by parties *inter vivos* and ultimately embracing trusts created by implication of law, which are analogous to what, ages before, were known to the Civil Law as obligations arising *ex quasi contractu*, such as the *condictio indebiti*.²¹

In later years, the courts asserted that since trust principles had found their way into Sri Lanka by a series of cases, it was not necessary to trace the origin of trusts in Roman-Dutch law.²² In *Soysa v Cecilia*,²³ a case decided after the introduction of the Trusts Ordinance of 1917, Bertram CJ, having observed that condition and modus were ways of imposing limitations on property in the hands of an administrator, said: ‘But we have received into our legal system a principle which is of a more far-reaching character and of more convenient application, that of the trust, a principle which our system had assimilated long before the enactment of the Trusts Ordinance.’²⁴ In some other cases English trusts principles were applied without any reference to how and when they had been incorporated into the law of Sri Lanka.

¹⁷ Citing *Symes v Hughes* LR 9 Eq 475 and *May on Fraudulent and Voluntary Disposition of Property*.

¹⁸ (1910) 5 Weer 16.

¹⁹ See Cooray supra n 11 at 23.

²⁰ See *Ibrahim Saibo v Oriental Banking Corporation* (1874) 3 New Law Reports 148.

²¹ Id at 150-151.

²² See *Carimjee v The Municipal Council* (1905) 1 Balasingham Reports 75, discussed in Cooray supra n 11 at 24.

²³ (1921) 23 New Law Reports 74.

²⁴ Id at 77.

The question whether the origin of trusts could be traced to *fidei commissum* became no longer relevant when the Trusts Ordinance of 1917 explicitly stated that a trust does not include a *fidei commissum*.²⁵ Most significantly, *fidei commissum* was finally abolished in 1981 thereby making way for the permanent and exclusive presence of trusts in Sri Lanka.²⁶

Incorporation of Trusts by Legislation

The courts had a limited role in incorporating trust principles into the law of Sri Lanka primarily because they could do so only in the context of litigation involving issues that needed to be resolved by reference to trust principles. The true extent to which judges had this opportunity is uncertain in the absence of comprehensive law reporting in the early years of British rule.

Before the enactment of the Trusts Ordinance in 1917, even where a trust principle was relied upon by courts, there was no certainty as to the precise content and scope of such principle. This was mainly because English legislation relating to trusts had not been extended to Sri Lanka. The courts, however, did not hesitate to extend the content of such English legislation to Sri Lanka to cure uncertainties in the local law. In a case decided in 1909 *Middleton J*, having observed that the English Trustee Act 1893 was not part of Sri Lankan law, said: 'We should apply to questions arising on the subject the best principles we can derive from Imperial legislation (where it does not specifically apply) and English judicial decisions because the law relating to trustees is decidedly of English origin'.²⁷

It was this uncertainty of the scope of the law of trusts that led to the enactment of the Trusts Ordinance of 1917. The Attorney-General said in 1916, when introducing the Trusts Bill, that the 'introduction of the English law of trusts into the Roman-Dutch law of the colony, which is its common law. [...] has been gradual, partial, and it is not very clear to what extent it has gone'. He said that 'it would not be easy to define the law of trusts in the Colony'.²⁸

The enactment of the Trusts Ordinance was so significant that a Supreme Court judge observed in 1927, rather incorrectly, that 'the whole subject of trusts as known to the English law is foreign to our law and the Ordinance No 9 of 1917 may be said to have first introduced the law of trusts into our legal system'.²⁹

The Long title of the Ordinance describes the Ordinance as one enacted to define and amend the law relating to trusts. As the purpose of the Ordinance was not to repeal the existing law, it could be argued that pre-1917 case law is still relevant and continues to be in force so far as such decisions are not inconsistent with statutory provisions. It may also be possible to refer to pre-1917 cases to illustrate and supplement the Ordinance. This is especially because the Trusts Ordinance has only 117 sections and has no Schedules or subordinate legislation.

It is the Indian Trusts Act of 1882 that provided the model for the Sri Lankan statute, with two main exceptions:

²⁵ Trusts Ordinance section 3(b). It is interesting to note that in South Africa too the current view is that a trust, and particularly a testamentary trust, does not take effect by way of a *fidei commissum*. See *Braun v Blann & Botha NNO* 1984(2) SA 850 (A). See generally Cameron E et al (eds) (2007) [2002] *Honore's South African Law of Trusts* Juta (5th edn) at 54-57.

²⁶ The Abolition of Fidei Commissa, Entails, Settlements and Restraints on Alienation Law No 80 of 1981, s.3.

²⁷ *Mohamado v Ussen* (1909) 1 Current Law Recorder 53.

²⁸ (1916) Ceylon Hansard 247-248.

²⁹ *Chetty v Finlay* (1927) 29 New Law Reports 66, 70-71.

- (i) The Indian Act specifically excludes from its application (1) rules of Mohammedan law as to Wakf and (2) public or private religious or charitable endowments. On the other hand, the Sri Lankan Ordinance contains a chapter dealing with charitable trusts.³⁰ Section 106 provides that in charitable trust matters the courts must have regard not only to the trust instrument if any, but also to (1) the religious law and custom of the community concerned and (2) to the local custom or practice with reference to the particular trust concerned. Thus unlike in India, where the nature and scope of charity is left to be determined with reference to general and customary law of India, the starting point for charitable trusts in Sri Lanka is the Trusts Ordinance, which will be applied in the context of applicable religious or customary principles.³¹
- (ii) The Sri Lankan Ordinance contains a *casus omissus* section, namely section 2, which enables courts of Sri Lanka to draw on English equitable principles where the Ordinance is wanting. Although the Indian Act has no such section, it has not prevented Indian courts from applying English law so long as they are not inconsistent with the Act.³²

Integration of the English Concept of Trust into the Sri Lankan Law

The Trusts ordinance is a fairly comprehensive code and deals with express trusts, implied trusts, charitable trusts, powers and obligations of trustees, rights and liabilities of beneficiaries, and administration of trusts. In the following pages we will briefly examine the interaction of the English law of trusts in Sri Lanka with the common law and special laws. To examine the first relationship we will focus on the distinction between legal and equitable ownership. To examine the second relationship we will focus on charitable trusts.

Law and Equity

Law and equity, while they have had different historical beginnings, are today seen as complimentary rather than competing systems. At the time the Trusts Ordinance was introduced it was well appreciated that Roman-Dutch law, just as the Indian law, did not recognise the distinction between legal and equitable property rights. As a result, the draftsmen followed the Indian Trusts Act, which drew no distinction between legal and equitable ownership. While the historical origins and development of law and equity may be forgotten and the distinction between legal and equitable rights in the property law area may not be as clearly marked as it once was, the basis of English trusts law continues to lie in the separation of legal and equitable ownership.³³

While Indian and Sri Lankan judges have repeatedly said that the distinction between equitable and legal ownership forms no part of their legal system, courts have gone on to recognise and enforce several aspects of equitable ownership. For instance in *Richard Taylor v Sri Krishna Chandra*³⁴ it was said that trusts in India could be recognised and enforced

³⁰ It must be noted that English law relating to charitable trusts may become relevant in India under tax statutes which grant tax relief for charitable donations and which use the traditional English definition of charitable trusts. See for instance *Trustees of Tribune Press v The CIT* (1939) 43 CWN 1065 (PC).

³¹ See *Kumarasamy Kurrukal v Karthigesu Kurrukal* (1923) 26 New Law Reports 33 and *Fernando v Sivasubramaniam* (1959) 61 New Law Reports 241.

³² *Dev Lakshmi v Vishwakant* (1971) 73 Bombay Law Reports 594.

³³ Alternative foundations of trusts have been suggested, but none enough to replace the separation of legal and equitable ownership.

³⁴ 32 Mad 443.

without relying on a legal-equitable division. The Privy Council held in the case of *A Krishna v Kumara K Deb*³⁵ that trusts law could operate without relying on the distinction between legal and equitable ownership of property because the Supreme Court of India was a court of law and equity.

A careful examination of the case law shows that the idea of equitable ownership has to a large extent become part of trusts law in Sri Lanka. For instance, in a series of cases the Supreme Court has recognised that an equitable lease would prevail over a forfeiture clause in a legal lease.³⁶

The Trusts Ordinance contains two specific provisions that appear to suggest that a beneficiary has no equitable interest in the trust property. The interpretation section defines 'the beneficial interest' as 'his right against the owner of the trust property'. Section 8 provides that 'the subject matter of a trust must be property transferable to the beneficiary. It must not be a merely beneficial interest under a subsisting trust'. While these two sections appear to indicate that a beneficiary has less than an equitable interest, Indian courts have narrowly interpreted the corresponding provisions in the Indian Trusts Act. In *Pestonji v Jalbhoy*³⁷ it was held that what the Indian equivalent of section 8 prohibits is the creation of a trust over the beneficiary's right to proceed against the trustees. It was held that a beneficiary may create a trust of his beneficial interest, meaning the benefit he receives as beneficiary under an existing trust.³⁸ This decision emphasises that a beneficiary has not only a right against the trustee for maladministration, for instance to receive what he is entitled to receive under the trust, but also a proprietary interest in what he is entitled to receive under a trust.

There are other provisions that give substance to the beneficiary's interest. For instance, a beneficiary may not only compel a trustee to perform his duties and restrain him from committing any breach of trust, he may follow and trace trust property in the hands of strangers.³⁹ Thus, unlike in South Africa, the beneficiary not only has a right *in personam* against the trustee but has a right *in rem*, which must necessarily mean that the beneficiary has an equitable interest, which he can enforce against anyone other than a bona fide purchaser for value.⁴⁰

The rule in *Saunders v Vautier*,⁴¹ which is the best illustration of the beneficiary's proprietary interest in the trust property, is incorporated in the Trusts Ordinance through section 58. This section permits beneficiaries to direct the trustee to collapse the trust and transfer the trust property to them. This section together with section 60 clearly shows that the beneficiary's right is not a mere right against the trustee for due performance of his trust duties.

³⁵ (1869) 4 *Bombay Law Reporter Oudh Cases* 270.

³⁶ These cases include *Perera v Thaliff* (1904) 8 New Law Reports 118, *Perera v Perera* (1907) 10 New Law Reports 230 and *Sanoon v Theyvandra-Rajah* (1963) 65 New Law Reports 574.

³⁷ 1934 AIR Bombay 64.

³⁸ The Privy Council in the case of *Valliyammai v Majeed* (1947) 48 New Law Report 289, 292-3 referred to an argument based on the Prevention of Frauds Ordinance which assumed that the beneficial owner under a trust of land acquires a proprietary interest, and, not merely a right to proceed against the trustee. Their Lordships considered that such an assumption would involve that the Law of Sri Lanka recognizes the distinction between legal and equitable estates in land. Their Lordships found it unnecessary to decide that question, as they were able to dispose of the case with reference to the Trusts Ordinance, having concluded that the Prevention of Frauds Ordinance had no direct application to the facts of the case.

³⁹ See section 65 etc in Chapter III 'Of the Duties and Liabilities of Trustees'.

⁴⁰ *Seelachchy v Visuanathan* (1922) 23 New Law Reports 97 recognised the equitable interest of a wife in relation to community property which she could enforce in rem, other than against a bona fide purchaser for value.

⁴¹ See *Sriskandan v Abilin Nona* (1961) 63 New Law Reports 217, 223 and *The Missionary Society Corporation v Jayawardene* (1918) 20 New Law Reports 359.

Another illustration of how Sri Lankan law protects the beneficiary's equitable interest comes from the area of property law. The Partition Ordinance of 1863, in order to ensure finality of a partition decree, states that a partition decree wipes out any property interest which is not specifically preserved by it. Section 9 of the Partition Ordinance provides that the decree is 'good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property'. In *Marikar v Marikar*⁴² Bertram CJ held that a partition decree wipes out only legal rights that are not expressly preserved in the decree, and does not affect equitable interests. Bertram CJ's view impliedly supports the view that a beneficiary has equitable title, different from legal title.⁴³

The above discussion shows that while the legislature and the judiciary seem to profess that the English distinction between legal and equitable ownership is not of significance to the operation of the concept of trust in Sri Lanka and India, in reality many important aspects of that division have become part of our law. What Varada Chariar J said in the 1942 case of *Punjab Province v Daulat Singh*⁴⁴ is equally true of Sri Lanka: 'On an analysis of the legal incidents involved, it will be found that for all practical purposes there is little or no difference between a beneficiary under the English law and a beneficiary under the Indian Trusts Act, so far as the substance is concerned'. This view is reinforced by the elementary fact that a trust seeks to protect the interests of the beneficiary the law does not recognize, especially in implied trusts. Sri Lankan courts have on many occasions protected the interests of an intended beneficiary where such interests had not been formally declared, by holding that formality requirements affect legal transactions but not trusts.⁴⁵

It is clear that the division of legal and equitable ownership between the trustee and the beneficiary has an immediate relevance to incompletely constituted trusts. Where a person wishes to set up a trust by making a gratuitous transfer of the trust property to another on trust, the trust will not be completely constituted until legal title in the trust property is transferred to the intended trustee. The validity of the transfer is governed by the common law relating to transfer of gifts. The common law rule relating to gifts is that a promise of a gift is not specifically enforceable: Equity will not assist a volunteer. In other words, where the donor has done everything necessary to transfer the property to the intended donee, legal ownership continues to remain in the donor. This rather harsh principle laid down in *Milroy v Lord*,⁴⁶ has been softened in a series of cases by resort to constructive trusts. The *Re Rose*⁴⁷ principle recognises that where the donor has done everything within his power to divest himself of property, the equitable interest passes to the donee, and the donor becomes a mere legal owner. Thus comes into being a constructive trust, which makes the intended donee the 'true owner'.⁴⁸ The English Court of Appeal in *Pennington v Payne*⁴⁹ took this principle a great leap forward when it held that even where the donor has *not* done everything within his power

⁴² (1920) 22 New Law Reports 137.

⁴³ The Partition Act of 1951 which replaced the Partition Ordinance of 1863 provides that a partition decree wipes out not only legal rights but any encumbrance on the land including a trust.

⁴⁴ All India Reports 1942 FC 38, at 43.

⁴⁵ See for instance *Narayanan Chetty v James Finlay* (1927) 29 New Law Reports 66.

⁴⁶ (1862) 4 De GF & J 264.

⁴⁷ [1952] Ch 499.

⁴⁸ Evershed MR famously said in *Re Rose* [1952]Ch 499 at 510: 'If a man executes a document transferring all his equitable interest, say, in shares, that document, operating, and intended to operate, as a transfer, will give rise to and take effect as a trust; for the assignor will then be a trustee of the legal estate in the shares for the person in whose favour he has made an assignment of this beneficial interest'. See Martin, JE (2005) *Hanbury and Martin Modern Equity* (17th ed by Martin JE) Sweet & Maxwell 4-011.

⁴⁹ [2002] 1 WLR 2075.

to transfer the property to the donee, equity will intervene if the stage has been reached where it would be unconscionable for the donor to resile from his promise of a gift.

In Sri Lanka, Roman-Dutch law governs formation of contracts, except in relation to contracts that are expressly intended to be governed by English law, such as sale of goods contracts. Therefore, in the generality of contract disputes valuable consideration in the English sense has no relevance. What Roman-Dutch law requires is *justa causa* (just cause or serious intention) and not valuable consideration: any promise of a gift made with a serious mind and accepted by the donee is enforceable. Thus, in Sri Lanka, where a person has entered into a binding agreement with another to make a gift, the donee has a common law right to seek specific performance.⁵⁰ To that extent, the donee does not have to rely on a claim of equitable ownership and a consequential constructive trust to benefit from the failed promise of trust. However, where a promise of a gift has been made (on trust or not) but there is no valid contract of gift between the donor and the donee, the only way in which the donee could found a claim is through the *Re rose* principle or the newer *Pennington v Wayne* principle of unconscionability.⁵¹ If Sri Lankan law is to benefit from these principles it is necessary for the courts to liberally construe the rights of the beneficiary. This is an area not specifically dealt with in the Trusts Ordinance or the general law of Sri Lanka.

LJM Cooray takes a pragmatic approach to the divide between equity and law. He argues that:

[T]he distinction between law and equity and its consequences which flow from this distinction are not relevant in the law of Ceylon. The beneficiary under a trust in England has an equitable interest. The whole concept of the trust in Ceylon resembles and was copied from the English concept. But the content of the law of trusts in Ceylon, including the beneficiary's rights are statutory and to be found in the sections of the Trusts Ordinance.⁵²

He admits that such an approach may not suit an analytical jurist who would want to analyse the interest of the beneficiary and the trustee in conceptual terms.

Such a pragmatic approach might be suitable when one deals with fairly straightforward disputes between the beneficiary and the trustee, which can be resolved by a simple application of the provisions of the Trusts Ordinance. However, if the law of trusts is to become an evolving law rich enough to meet novel situations and challenges, it is essential that we give full effect to trusts' underlying concepts.

Charitable Trusts

The Trusts Ordinance deviates from its model, the Indian Trusts Act of 1882, when it deals with religious and charitable trusts. The Indian Trusts Act excluded from its scope religious or charitable endowments, leaving that area to be governed by Muslim law and Hindu law. The reason for this is that Hindus and Muslims, the dominant communities in India, have a long established tradition of making donations for the upkeep of temples and mosques and other religious purposes. These endowments were managed in accordance with ancient religious practices. The Colonial administration was careful not to be seen as interfering with native religion and custom and intervened only to regulate the administration of such institutions which in substance had much in common with English trusts.

⁵⁰ See Weeramantry CG (1999) [1967] *The Law of Contract Lawman* (India) at para 984 'Want of Mutuality'.

⁵¹ Martin *supra* 48 at 4-012.

⁵² See Cooray *supra* n 11 at 187-189.

The British administration in Sri Lanka took a different approach to the regulation of religious and charitable trusts in 1917. It brought religious trusts within the general scope of the Trusts Ordinance. The statement of objects and reasons appended to the Trusts Bill stated that:

The originating cause of this Ordinance is the unsatisfactory condition of the law relating to religious trusts, more particularly as far as it concerns the Hindu religious trusts. The defects in this department of the law which principally occasion inconvenience are:

- (a) the informal nature of the constitution of many of these trusts;
- (b) the uncertainty of the law as to the recognition in our courts of the customary religious law of the community concerned;
- (c) the uncertainty as to the person in whom the title to the temple or other religious foundation in question is vested;
- (d) the absence of any proper control over trustees and their accounts.

While the Trusts Ordinance applies to all trusts in Sri Lanka, it made certain important concessions to religious communities.

Chapter 10 of the Trusts Ordinance deals with charitable trusts. The chapter starts with section 99, which adopts Lord Macnaghten's classification⁵³ of charitable purposes, with a slight modification in order to give a wider scope to religious trusts. Section 99(1) (with the modification in favour of religious trusts italicised) reads as follows:

The expression "charitable trusts" includes any trust for the benefit of the public or any section of the public within or without Ceylon of any of the following categories:

- (a) for the relief of poverty;
- (b) for the advancement of education and knowledge;
- (c) for the advancement of religion *or the maintenance of religious rites and practices*; or
- (d) for any other purposes beneficial or of interest to mankind not falling within the preceding categories.

The italicised words were intended to accommodate local religious practices some of which might not have satisfied the requirement of public benefit as understood in England. This has enabled courts of Sri Lanka to uphold trusts to observe an annual Muslim festival,⁵⁴ and to keep a lamp burning in a Buddhist temple.⁵⁵

Section 100 provides that 'the court has the same power for the establishment, regulation, protection and adaptation of all charitable trusts as are exercised for the time being with reference to charitable trusts within the meaning of English law by the High Court of Justice in England'. At the same time, the Ordinance expressly provides that in determining any question relating to the constitution of any trust, the devolution of trusteeship and the administration of a trust, or in settling a scheme of arrangement for a religious trust, the court must have regard to the religious law and custom of the community concerned, and to the local custom or practice with reference to the particular religious trust concerned.⁵⁶

⁵³ In *Commissioners for Special Purposes of Income Tax v Pemsell* [1891] AC 531 at 583.

⁵⁴ *Mohamadu v Meera Kandu* (1923) 24 New Law Reports 390.

⁵⁵ *Ratgama Pannasekara Nayaka Thero v Caldera* (1956) 58 New Law Reports 331.

⁵⁶ See s106 of the Trusts Ordinance.

Hindu temple charities illustrate the difference between the Indian and Sri Lankan response to local religious laws and practices. The practice in India has been for the well-wisher to dedicate a property for a religious purpose such as by building a temple and installing an idol. When a property is dedicated, ownership of property passes for the religious purpose. A problem arose in relation to endowments to install an idol or establish a temple where generally there was no body of persons to receive the property. It came to be accepted that in such a situation the property would vest in the idol, which was regarded as a juristic person, and would be managed for the religious purposes by the manager or other person responsible for administration.⁵⁷ Thus the manager, who in the English sense would be the trustee, did not have legal ownership of the property.⁵⁸

In Sri Lanka the Hindu religious practice had to be in tune with the Trusts Ordinance, which required the trustee to have legal ownership of trust property.⁵⁹ In *Kumaraswamy Kurukkal v Karthigesu Kurukkal*⁶⁰ members of a Brahmin family built a Hindu temple, with public donations, and dedicated it. They executed an instrument providing for the administration of the temple designating S and T as the founder administrators. T transferred his interest in the temple to his son by way of donation and the son sued T for declaration of title as owner of the temple. T pleaded that the temple was a charitable trust. The Supreme Court agreed that the temple was intended as a religious charity but there was a formal defect in creating the charitable trust, in that no instrument of trust was executed.

Bertram CJ conceded that according to Hindu religious law prevalent in India, the temple becomes the property of the deity to whom it is dedicated, with the manager of the temple serving as trustee, but pointed out that religious law and custom must yield to legislation. He said:

We are no doubt authorized in these questions to have regard to the religious law and custom of the community concerned, but [...] we cannot subordinate to any such law or custom our own express law. According to our own law as declared and defined by the Trusts Ordinance, the *dominium* of the property remains vested in the legal owners.

Thus the Supreme Court upheld the charitable trust not on the basis that the temple became the property of the deity, as in India, the trust was upheld on the basis that the founders remained legal owners but bound as de facto trustees.⁶¹ In another case⁶² Bertram CJ said:

When a person who is the owner of property purports to transfer it to a Temple, the effect of his so doing is to constitute himself a trustee of the Temple. The document of dedication is in fact a declaration of trust and the dominium remains with the dedicator and passes on his death to his heirs subject to the trust.⁶³

While in India the nature of a charitable trust is determined by the local religious law alone, in Sri Lanka the nature of a charitable trust is determined in accordance with the provisions of the Trusts Ordinance construed in the context of local religious practices and

⁵⁷ See *Vidya Viruthi v Bala Swami* Law Reports 48 Indian Appeals 302.

⁵⁸ *Prosunna v Golap* Law Reports 2 Indian Appeals 145 (PC).

⁵⁹ The Trusts Ordinance defines a trust as 'an obligation annexed to the ownership of property' in the sense that the owner of the property is under an obligation to hold it for the benefit of another.

⁶⁰ (1923) 26 New Law Reports 33.

⁶¹ Section 107 of the Trusts Ordinance that Bertram CJ relied on is headed 'de facto trusts'.

⁶² *Karthigasu Ambalavaner v. Subramaniam Kathiravelu* (1924) 27 New Law Reports 15 at 21.

⁶³ See also *Murugesoe v Chelliah* (1954) 57 New Law Reports 463, 468 where it was reaffirmed that unlike a deity in India, a temple in Sri Lanka was not a juristic person and that the dedication of a temple was considered a declaration of trust and the donor was regarded as the trustee.

customs. While both in India and Sri Lanka, a Hindu religious trust of a temple would in reality operate through a manager, the conceptual basis is different. The Trusts Ordinance thus provides a harmonious co-existence of statute law which is based on English law and religious laws which are rooted in local usage.

An important aspect of religious trusts in India is that to create a religious trust of immovable property *inter vivos* there is no requirement of writing and registration.⁶⁴ For instance, there is no requirement that there should be express words of gift or trust where property is dedicated to a deity. All that is needed is evidence that the donor set aside a property to be dedicated for the religious purpose.⁶⁵ This flexible rule is somewhat unruly. For instance in the case of *Howard v Pestonji*⁶⁶ two brothers solemnly declared that the temple they erected on their land was for community worship, but the property continued to be under their control. Upon insolvency, the property was held to be their private property and not property held on a religious trust.

The Trusts Ordinance of Sri Lanka, while it applies to religious and charitable trusts, relaxes its rule relating to formal constitution of trusts.⁶⁷ Section 107 states as follows:

In dealing with any property alleged to be subject to a charitable trust, the court shall not be debarred from exercising any of its powers by the absence of evidence of the formal constitution of the trust, if it shall be of opinion from all the circumstances of the case that a trust in fact exists, or ought to be deemed to exist.

It has been held that section 107 gives power to courts to define terms of a trust where it appears that a charitable trust is intended. *Kumaraswamy Kurukkal v Kathiragesu Kurukkal*,⁶⁸ which is discussed above, is a good illustration of the application of that section. *Suppramaniam v Erampakurukkal*⁶⁹ is a case where the settlor who wished to dedicate property to build a religious institution declared himself trustee with a co-trustee but did not formally transfer the property to the co-trustee. The Supreme Court refused to hold that a valid charitable trust can be created by transferring the property to a trustee without compliance with the necessary formalities. However, since the settlor had made a self-declaration of trust, the failure to transfer property to the co-trustee did not stand in the way of a valid trust.

It must be noted that the exemption from formality rules is consistent with the then prevailing English law. Gareth Jones in his classic work on the history of the law of charity shows how in the early years judges were magnanimous in giving effect to charitable trusts and how the judicial attitude gradually turned into one of careful scrutiny.⁷⁰

There might be instances where English concept of a charitable trust may be in conflict with the religious laws. Such a well recorded conflict came to light in the Indian case of *Abul Fata v Rassonmony*⁷¹ which concerned a family wakf. A wakf in Muslim law is a

⁶⁴ Section 5 of the Indian Trusts Act requires formal constitution of trust. The Act, however, does not apply to religious and charitable trusts.

⁶⁵ *Prosonno v Prosonno* Indian Law Reports 25 Calcutta 112.

⁶⁶ Discussed in Mukherji BK (1983) *The Hindu Law of Religious and Charitable Trusts* (5th ed) Eastern Law House at 372.

⁶⁷ Section 5 of the Trusts Ordinance which prescribes formalities for the creation of trusts is declared to be subject to section 107.

⁶⁸ (1923) 26 New Law Reports 33.

⁶⁹ (1922) 23 New Law Reports 417.

⁷⁰ Gareth J (1986) *History of the Law of Charity 1532-1827* Gaunt & Sons at 60-65 'The Perfection of Imperfect Instruments 1545-1700' and at 135-138 'The Perfection of Imperfect Instruments 1700-1827'.

⁷¹ (1894) Law Reports 22 Indian Appeals 76.

dedication of property to god in perpetuity for the benefit of mankind. There was however a prevalent view that a wakf could be created for the benefit of one's family without any public benefit. In *Abul Fata* case the Privy Council held that while a wakf may be validly created for the benefit of the family with a substantial residual benefit to the public, a wakf which in substance is nothing but a family settlement would offend the rule against perpetuity.

There was much public dissatisfaction with this ruling and the Indian legislature had to intervene and overrule the Privy Council decision. In 1913 the Mussalman Wakf Validating Act was passed to uphold the validity of family wakfs. That Act defines a wakf as 'the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable'. The effect of this law is to recognise family wakfs not only as religious trusts but also as charitable trusts. Such trusts do not attract the common law principle of perpetuity. Tax legislation, however, would not recognise family wakfs as charities for the purpose of tax relief as they do not satisfy the public benefit requirement that tax statutes invariably impose.

The Muslim Intestate Succession and Wakf Ordinance of 1931 of Sri Lanka provided that 'charitable trust' includes 'any trust or wakf for the benefit of the Muslim public or any section of it' for any of the four '*Pemsel*' categories. When in 1956 a new Muslim Mosques and Charitable Trusts or Wakfs Ordinance was passed the definition of wakfs was altered by giving the '*Pemsel*' categories a Muslim flavour. Category 4 'for any other purposes beneficial or of interest to mankind in general' became 'any purpose beneficial to Muslims or any section thereof and any other purpose recognized by Muslim law as religious, charitable or pious'. This change would probably bring the Sri Lankan law in line with the Indian law which recognises family wakfs.⁷² However, family wakfs will not enjoy tax relief because Sri Lankan tax legislation too would insist on public benefit in addition to charitable purpose.⁷³

It is interesting to note that after the enactment of the Wakfs Ordinance of 1931, the Trusts Ordinance was amended to provide that Chapter 10 of the Ordinance on charitable trusts does not apply to religious trusts regulated by the Wakfs Ordinance in so far as it is inconsistent with the provisions of the Wakfs Ordinance'.⁷⁴ In *Bhai Beebi v Naeem*⁷⁵ the Court of Appeal examined Indian authorities on the meaning and scope of wakfs. While the principles enunciated in Indian cases were useful to understand the concept, the Court of Appeal felt that wakfs operate in Sri Lanka in the context of charitable trusts, in the sense that provisions in the Trusts Ordinance apply to wakfs. What does not apply to a wakf is any provision in the chapter on charitable trusts, which is inconsistent with the Wakfs Ordinance. There was no inconsistency between Chapter 10 of the Trusts Ordinance and the Wakfs Ordinance; the definition of wakf in the Wakfs Ordinance of 1931 was very similar to the definition of charitable trusts in the Trusts Ordinance. The Court of Appeal decided that when a property is dedicated for a Muslim charitable purpose, such as for the purpose of a Muslim burial ground, legal title to the property remains in the dedicator (the *wakif*) but he becomes a trustee holding the property in trust for the benefit of the objects of the dedication. Where no provision is made for the appointment of trustees, the *wakif* is trustee and the devolution of trusteeship would be as in the case of Hindu religious trusts.

⁷² A view has been expressed that Indian law which recognises family trusts is based on the Hanafi law and does not apply in Sri Lanka because Muslims in Sri Lanka belong to the Sahfei sect. See Jaldeen MS (1993) *The Muslim Law of Succession Inheritance and Wakf in Sri Lanka* Aitken Spence at 293.

⁷³ See for instance *Caffoor (Trustees of the Abdul Gaffoor Trust) v Income Tax Commissioner (Colombo)* [1961] AC 584 (PC) where what appears to be a private wakf was held not to satisfy the public benefit requirement.

⁷⁴ See s109 of the Trusts Ordinance.

⁷⁵ [1981] 2 Sri Lanka Law Reports 335.

Conclusion

The Trusts Ordinance was introduced at a time the judiciary had warmly welcomed the English law of trusts into Sri Lanka in order to supply omissions in the common law and the customary laws. Both Roman-Dutch law and the customary laws, namely the Muslim law and Hindu law, had institutions which closely resembled trust. The entry of trusts, therefore, necessarily occasioned conflicts.

The conflict with Roman-Dutch law related to the theoretical basis of trusts, particularly whether the separation of legal and equitable ownership was of the essence of trusts. The Privy Council said in the case of *Sitti Kadija v De Saram*, quoting RW Lee⁷⁶ that ‘the distinction between the legal and the equitable estate is of the essence of the trust; the idea is foreign to *fidei commissum*.’ We have seen that, despite claims that the Trusts Ordinance was intended not to be burdened with the idea of equitable interest, courts of Sri Lanka had relied on the idea of equitable interest not only in relation to trusts but also in relation to other property issues.

The conflict between English law of trusts and religious and customary laws arose from the fact that Muslim law and Hindu law had developed their own ideas of trusts in their religious context, which were not easily reconcilable with the English concept of trusts. We saw how courts of Sri Lanka gave effect to the Trusts Ordinance in relation to Muslim and Hindu trusts, avoiding any friction between the local practices and the imported English law. The Trusts Ordinance made inroads into traditional religious practices, not so much to oppress, but to regulate religious charities in accordance with the Trusts Ordinance.

There are examples of positive contribution that the English concept of trust made to special laws. *Seelachchy v Visuanathan*,⁷⁷ where the court gave effect to the Thesawalamai concept of community of property between husband and wife, provides a good illustration. Community of property requires that any property acquired by a spouse becomes part of the community of property. However, unless the acquiring spouse transfers a share of it to the other in compliance with formalities, the legal title remains with the acquiring spouse. This meant that the acquiring spouse could dispose of that property thereby prejudicing the other party’s interest. Bertram CJ held that the other spouse acquires an ‘equitable right’ to have that property declared part of the community and held that section 99 of the Trusts Ordinance covered the situation by imposing a constructive trust.⁷⁸

While Hindu and Muslim religious trusts are regulated by the Trusts Ordinance, trusts relating to the administration of Buddhists Temples are regulated by a separate statute, the Buddhist Temporalities Ordinance of 1981. That Ordinance contains provisions relating to the administration of Buddhist temples through the medium of a trust under the Public Trustee’s supervision. Kandyan law, the law applicable to Sinhalese people resident in the Kandyan Provinces, does not know of trusts and therefore Kandyan Sinhalese will have to use English law of trusts, as set out in the Trusts Ordinance, if they wish to create a trust. The problem with Kandyan law in relation to trusts is that gifts are revocable under Kandyan law. As a general rule trusts are irrevocable and the settlor has no control over the administration of the trust. While there was judicial opinion that a donation was irrevocable if such was the express intention of the donor,⁷⁹ it was thought necessary to make statutory provision that it would be

⁷⁶ Lee RW (1931) *An Introduction to Roman-Dutch Law* (3rd ed) Clarendon Press at 372

⁷⁷ (1922) 23 New Law Reports 97.

⁷⁸ Section 99 provides that ‘where [...] the person having possession of the property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.’

⁷⁹ See *Kirihenaya v Jotiya* (1922) 24 New Law Reports 149.

unlawful to revoke a gift which creates a charitable trust or passes property to the trustee of a Buddhist temple.⁸⁰

It remains to be said that a trust created by a person governed by a special law will be bound by his special law only where there is anything in it which relates to the trust, such as a religious trust. It would also be possible for him to create a trust, expressly providing that the trust will not be governed by the special law, which would otherwise apply. While there is no case law on this point, an analogy may be drawn from cases where courts have recognised the right of Muslims and Kandyan Sinhalese to create a *fidei commissum* (since abolished) although the institution was unknown to either special law,⁸¹ and where the legislature has recognised the need to enable people governed by a special law to enter into transactions under the common law. For instance it is lawful for Kandyans to marry under the General Marriage Ordinance rather than the Kandyan Marriage and Divorce Ordinance.⁸²

In Sri Lanka, as in many other English-speaking countries, English law has been welcomed for its modernity and versatility. Sri Lanka has not, however, received English law in order to entirely undermine the role played by Roman-Dutch law and the local laws and customs. What the introduction of trusts law into Sri Lanka shows is how the arrival of a great legal tradition, through codification at that, can still respect the established legal traditions in the host jurisdiction, and operate side by side with them.

Cite as: Anton Cooray, *Oriental and Occidental Laws in Harmonious Co-existence: The Case of Trusts in Sri Lanka*, vol. 12.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW (May 2008), <<http://www.ejcl.org/121/art121-5.pdf>>.

⁸⁰ See The Kandyan Law Declaration and Amendment Ordinance No 39 of 1956 section 5.

⁸¹ See *Assistant Government Agent, Kandy v Kalu Banda* (1921) 23 NLR 26 (for Kandyan Law) and *Weerasekera v Peiris* (1933) 34 NLR 281,PC (for Muslims).

⁸² See *Sophia Hamine v Appuhamy* (1922) New Law Reports 353.