

MATRIMONIAL PROPERTY AND GENDER INEQUALITY

- A Study of THESAWALAMAI



Kamala Nagendra

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A Study of THESAVALAMAI



'Reading maketh a full man; Conference a ready man; and writing an exact man'

Francis Bacon

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MATRIMONIAL PROPERTY AND GENDER INEQUALITY

A Study of THESAVALAMAI

KAMALA NAGENDRA



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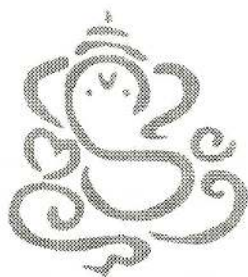
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Namaami Vigneshwara, paada pankajam

BHAGAWAN SRI SATHYA SAI BABA SAYS, “We now believe that the acquisition of knowledge is for the acquisition of wealth. But this is not right. Just as a bird has need of two wings; a cart must have two wheels. Man too must have two types of knowledge – to Live on and to Live for. The one helps him to eke out his livelihood; and the other rewards him for having lived at all”.

SSS: Vol, X ; page - 177

Dedicated with deep affection and gratitude to the
cherished memory of my dear parents to whom I
owe so much

“By a girl, by a young woman, or even by an aged one nothing must be done independently even in her own house”.

[Manu V , 147.]

“Proprietary rights of women went on developing in spite of the doctrine”.

[Dr. A. S. Altekar, *The position of women in Hindu Civilisation*, (2nd edition) p. 331.]

How far is it true of women governed by Thesawalamai?

Why the apathy? - Author

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දිනය } 20th October, 2007
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A MESSAGE

I take great pleasure in writing this Message to Mrs. K. Nagendra's maiden publication, 'Matrimonial Property and Gender Inequality A Study of Thesawalamai', which I am certain will be read by all those who wish to understand the interplay of modern concepts in the traditional fabric of customary law.

Communities that have lived in harmony with nature have evolved rules and practices based on knowledge accumulated over several thousands of years that have withstood the test of time. Sometimes these rules and practices come into conflict with modern notions such as gender equality, and contemporary jurisprudence grapple with the problem of achieving equality without losing traditional values and customs. Although there is an emerging scholarship of feminist issues and increasingly effective lobbying by women's activists, there is limited consensus as to the most appropriate means of attaining gender equality, or indeed, a vision of a world liberated from the stranglehold of gender oppression.

It is therefore refreshing to note that Mrs. K. Nagendra's pioneering study, 'Matrimonial Property and Gender Inequality A Study of Thesawalamai', views the problematic areas of discrimination in the matrimonial property relations of spouses

governed by Thesawalamai law without losing sight of the fact that the Thesawalamai regarded women as a protected species. Having meticulously examined the institutions of muthusam, cheedanam and thediathettam, in the background of Sri Lankan customary law and in comparison with similar concepts found in Sinhalese and Muslim law, Mrs. Nagendra suggests ways and means of resolving some of the problems presented by the law in consonance with the aspirations of the people who themselves fashioned the Thesawalamai through centuries of hard experience.

Reading this book is a wonderful experience indeed. Although we hear now and then of the birth of a star in some part of the universe, it is rarely that we ourselves can experience the light of a star just born. We are therefore fortunate that we can simulate that experience through Mrs. K. Nagendra's maiden publication, which sheds so much light on thorny aspects of Thesawalamai on matrimonial property from the perspective of the woman in the backdrop of the complex fabric of Sri Lankan customary law.

I commend this book to all those interested in Sri Lankan law.



Justice Saleem Marsoof, PC

Judge of the Supreme Court of Sri Lanka

FOREWORD

Essentially, this book is a study of matrimonial property viewed from the perspective of gender equality in relation to one of the legal systems prevailing in Sri Lanka, namely Thesawalamai. Yet the themes explored and the conclusions that the writer comes to result in the work becoming far more universal in nature.

The writer defines matrimonial property in very wide terms. She includes *muthusam* and *cheedanam* as matrimonial property, justifying this premise on the basis firstly, that such property is brought into the marriage and secondly, that it is used or made use of by both spouses.

The writer traces the origins of *cheedanam* and points out that it was originally given to make provision for a new household. It was non-exploitive in nature. In the course of time it became the consideration for a marriage. This phenomenon is not peculiar to Thesawalamai. Similar developments are seen in the Indian sub continent. The writer emphasizes that with social emancipation and economic independence of women, the concept of dowry becomes a social anachronism. Thus, she argues that a social and ideological re-thinking is necessary as regards the giving and taking of dowries.

The greater part of the book however, is concerned with *thediathettam* or acquired property. The study analyses the legislation and the conflicting judicial decisions as to whether *thediathettam* is separate property or remains the joint property of the spouses. Entitlement to and equal share of acquired property has, in the author's view, been a feature of Thesawalamai. What was now required was participation of both spouses in the administration and control of partnership

property. Here the customary Thesawalamai and even the statutory rules attaching to the Thesawalamai appear to be deficient.

This book includes a chapter on *locus standi in judicio* of a married woman. The author discussing the early customary law states that the early courts proceeded on the basis that there was a separation of interest and property between husband and wife and that the law had to provide an adequate remedy for either party whose rights were infringed. The Thesawalamai Code having made no provision on *locus standi in judicio* opened the doors to the introduction of Roman Dutch Law into this area. The writer opines that such insidious and indiscriminate application of Roman Dutch Law led to the undermining and displacement of the more liberal values of the customary law.

The value of this work apart from its in-depth account of the origins of the Thesawalamai law relating to matrimonial property and its evolution is that it has brought to light the main problematic areas of discrimination in the area of matrimonial property. The writer makes it strikingly clear that in the Thesawalamai, unlike in most property regimes the disparities between the spouses do not lie in the distribution of family property but in the rights over the property.

The writer Mrs. Kamala Nagendra must be commended for this in-depth analysis of matrimonial property in Thesawalamai in a historical and comparative perspective. Clearly, this book is a valuable contribution to Sri Lankan legal literature.

Professor Sharya Scharenguivel

Faculty of Law

University of Colombo

PREFACE

Matrimonial property is not a new subject for thesis writing. What I have ventured in this study is to look at the matrimonial property structure of Thesawalamai from a perspective of gender equality. The Tamil words “thesa” and “valamai,” when transliterated into English, would appear as follows. “Thesa” means a country and “Valamai” means customs. So, in this sense, this research is about “country customs”; the country is Jaffna, now the Northern Province of Sri Lanka and the subjects are Tamils. To be exact, the word Tamil has to be spelt and pronounced as “Thamil”. But the former spelling is used in the work so as not to confuse readers, since it is that spelling that is used in relevant statutes and judicial decisions.

A word of explanation, is, I think, warranted at the beginning of the book itself, as to what components constitute this law of Thesawalamai. As more fully explained in the body of the book, it is a combination of customs and statutory provisions. The customs are supposedly codified into the Thesawalamai Code; the statute being the Jaffna Matrimonial Rights and Inheritance Ordinance. The Ordinance itself has been legally accepted as an instrument which is declaratory of the customs. However, neither the Code nor the Ordinance can be considered as a comprehensive re-statement of the customs, thereby giving room for judicial recognition of customs that are in practice but not so incorporated; as long as they are not “inconsistent with the provisions of

this Ordinance”¹. Hence a reference in this book to the customs of the Tamils of Jaffna would have reference to the customs in practice, as well as to those given statutory form. The peculiarity of this customary law is that it is both a personal as well as a territorial law. As a personal law it does not apply to all who are Tamils. To qualify, the Tamil has in addition to be an inhabitant of Jaffna. It is not proposed to go into the legal implications of the term “inhabitancy”. Suffice to say that the Tamil should have acquired permanent residence in the nature of a domicile in the Northern Province of Sri Lanka. A study of customary law is by itself heavy going. So to keep the study within bounds such topics which were found not really vital to the study of the subject matter of the work have been safely avoided. As regards being a territorial law Thesawalamai applies to movable and immovable property wherever situated in Sri Lanka, of persons governed by Thesawalami. One variation however relates to rules regarding pre-emption. The right to pre-empt co-owned property proposed for sale applies only to lands situated in the Northern Province. The law relating to pre-emption does not come within the purview of this work.

Matrimonial property has been given a wider interpretation to bring within its fold not only property acquired during marriage but also all property brought into the partnership on marriage. Apart from property acquired during marriage any socially realistic law of

1. Section 40, Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911 as amended by Ordinance No. 58 of 1947.

matrimonial property has to take into full account the emerging importance of the “new property” coming in the form of pensions, gratuities, bonuses, golden hand shakes and the like. It is remarkable that this ancient customary law, by defining the concept of *thediathetam*, or acquired property, in just a few words as “profits during marriage” made it wide enough to incorporate such new developments. What is attempted to show in this book in relation to matrimonial property in Thesawalamai is, that issues regarding gender are not concerning **rights or entitlement to property**, [emphasis added] for these women besides getting a fair share of parental property on marriage as *cheedanam* (dowry) become entitled to an equal share of property acquired by their husbands during marriage. Thus equality of spouses in partnership gains was recognized in Thesawalamai ages before any theories or legal norms of profit sharing in matrimonial property were propounded by the western countries. It is however very unfortunate that having had that fine start these women lag far behind their counterparts in their legal status as they are deprived of **rights over** [emphasis added] their properties. This is fundamentally the disparity in matrimonial property relationship in Thesawalamai. This book, by a brief anthropological and an involved legal analysis attempts to go into the root causes for such a predicament. I have worked on the findings of both scholars and historians to arrive at the proposition that the original people who went to form this community of people are of matriarchal origin. It is from such a beginning that I have sought to analyse as to why and how these women, who had been matriarchs

themselves of their respective family units, came to lose hold of rights over their properties.

The scheme of this study is to highlight legal provisions, mainly in the Jaffna Matrimonial Rights and Inheritance Ordinance, and also examine the larger forces that have been instrumental in the formulation of gender biased provisions into the law of Thesawalamai. Introduction and assimilation of patriarchal principles into Thesawalamai and adherence to hoary archaisms of the Roman Dutch Law (like the marital powers of the husband and the lack of *persona standi in judicio*) by colonial rulers, the legislature and the judiciary, have been identified as the root causes for such disparity in gender status. The exhibition of stubborn persistency to adhere to such concepts-which have however been superseded by a gradual process of disintegration and restatement in the other main countries which have been predominant partners to this system of law, namely British Guiana and South Africa-resulted in undermining the personal and proprietary rights of women governed by Thesawalamai. The intention is not to underrate the values of this great and ancient system of law, the Roman Dutch Law. It is simply that these concepts of patriarchy and the marital powers of the husband have long since run out of harmony with the spirit of the age. With deep concern it is urged that action is taken without further loss of time to erase the unfortunate consequences that flow from application to modern socio-economic conditions of such archaic concepts relating to property rights of married women.

Thesawalamai is an area which has received very little or in fact no attention by law reformers. The result has been to let remain many anachronistic provisions in the Ordinance. The baneful impact of these provisions on gender equality is analysed and some suggestions for rectification given. The objective sought to be achieved is legal reforms by a two prong process. The first is repeal of out-moded concepts and the second, retention by reform. Repeal is recommended with respect to statutory provisions incorporating Roman Dutch Law concepts and retention by reform with respect to laws and customs relating to *cheedanam* and *thediathettam*.

Lack of sufficient resource material hampered the pace of study and research. Considerable material was collected from the Conimara Library, Chennai and the Library of the University of Madras (Chennai). I also had the opportunity to get access to some works relating to the study, specifically of the connection of Malabar (Kerala) customary laws and Thesawalami, from the School of Oriental and African Studies library, UK. Some were obtained from the Sri Lankan archives too. I realize that it is not an easy task to analyse and evaluate a living customary system and to prepare a touchstone to determine its survival quality or weigh it with modern norms of spousal property relationships. The difficulties that confronted the Legislature in the task of putting into statutory form the customs of Thesawalamai, and the judiciary when it had to fill lacunae in the Jaffna Matrimonial Inheritance Ordinance, have also been pointed out.

My great aspiration in wanting to finish this venture which I started several years ago is primarily to make known, to my community and also to the rest of the world, that these customs of the Tamils of Jaffna are not, as made to appear in various seminars and writings, a “dead law”, but one very much alive and amenable to new developments in property matters of the modern industrialized societies and economies. The aspiration is interwoven with an urge to see the necessary reforms in Thesawalamai come through so that the “living law” of Thesawalamai would be more meaningful and fully empowered to meet the demands of the modern socio-economic conditions. The words of Mr. Mohan Kantawala, that Thesawalamai, the “beautiful system of archaic law,” as he called it, has to be preserved before “an over-zealous legislature begins to use the pruning knife,” come to my mind here.² He declared his wish thus: “But it is my earnest and humble opinion that any further attempt at wiping out the beauties of the Thesawalamai would not be a consummation devoutly to be wished”.³ This sincere wish, coming from a non-Tamil, should ring a bell to us who belong to that community and remain dormant. In an attempt, I have pointed out the areas requiring urgent changes and suggested a few ways of reform. If they are able to stir the minds of my readers, especially the learned members of my community and those involved in the process of law making, either in

2. *A Thesis on the Thesawalamai*, (The Saiva Prakasa Press, Jaffna. 1929) p. 1.

3. *Ibid*, pp 2 - 3

the legislature or in courts, I would consider my effort worthwhile.

I have dedicated this book to the memory of my beloved parents who instilled into me the realization that the value of education is not mere academic achievement but how you live by it. For a faithful acknowledgement of the completion of this work, members of my family come first for their sacrifices and encouragement. A special word of appreciation is due to my husband, first for his tolerance and forbearance of all inconveniences and secondly for his tacit support in innumerable ways, starting from print-outs of draft copies to the final publication of this book; to my daughters for their persistence that I finish this study and put it up for publication. If not for the family backing I might have abandoned this work and let all the labour and research go in vain.

I am greatly indebted to Professor Sharya Scharenguivel of the Faculty of Law, University of Colombo, who suggested that I research in this area. As an academic she saw it as an area in need of an indepth study. She did not stop with that. She has encouraged and supported me in every step of my academic career and took time to read the chapters and make valuable suggestions. I am deeply grateful to Mr. N. M. Udeshi who helped me in numerous ways to finish this work without hindrance, especially when my computer refused to cooperate with me. My special thanks are due to the persons behind the making of the cover page. Firstly, the artist, Mr. N. S. Gnanakurubaran for his skill and the

patience he showed to put into art form the image of my parents and their matrimonial home which appears at the back cover of the book. Secondly, to Jeyadevy, for her suggestions and all the trips we made to the artist and to Harsha Indika of Stamford Lake for the cover illustration. I am thankful to many others who helped in various ways towards the making of this book; to Mr. Francis Piertes, retired civil servant, for reading through the chapters, to Buddhinee for preparing the bibliography and directing my attention to some material and to Ruwanthy, Selvaranjini and Menaka for proof reading parts of the typescript. I am also thankful to Jeyadevy and Selvaranjini for helping me with the list of cases and index. I wish to express my appreciation to a host of other unnamed persons, both friends and relatives, who have in many kind ways helped me in making this work take shape.

My thanks are due to the publishers, Stamford Lake, and especially to Mr. Niroshan Jayasundera for his skill and patience in attending to matters of detail involved in the publication.

Kamala Nagendra

INTRODUCTION

This study examines the status of the woman governed by Thesawalamai in relation to matrimonial property. Though the area is confined to women who belong to a particular ethnic community the issues involved are general and universal in character affecting womankind in the history of social evolution.

The Sri Lankan legal system is a reflection of the multi cultural social set up of the country. Uniform laws that are applicable to all citizens are superseded by ethnic and religious laws of the various communities of the country, termed as special or personal laws. Amongst these personal laws, Thesawalamai, as discussed in the forthcoming chapters, was greatly influenced by the legal values of colonial statutes and the non-statutory Roman Dutch Law. Matrimonial property rights in the customary laws which were positive to the women governed by Thesawalamai were undermined by the gender discriminatory values of the Dutch and English laws of the seventeenth and eighteenth centuries. The General Law is more egalitarian in matters relating to matrimonial property rights, as the benefits of the matrimonial property rights reforms of the nineteenth and twentieth centuries of the western world were received into the General Law. Unfortunately they were not made applicable to those governed by Thesawalamai.¹ The judiciary too, which

1. The Married Women's Property Ordinance No. 18 of 1923 was not made applicable to those governed by Thesawalamai by section 3 of this Ordinance.

was imbibed in western values, helped only to entrench gender discriminatory norms into the provisions of the law pertaining to those governed by Thesawalamai.

The term 'gender' which refers to the fact of being male or female is often used interchangeably with the word 'sex'. The Constitution uses the word 'sex' in connection with equality. But the relations between men and women are socially constituted. It is not derived from biology. In this sense while the term 'sex' falls within the province of biology, gender comes within the province of social science. The qualities thereby differ, in that, in sex the qualities are fixed and remain unchangeable, while in gender the qualities are shaped through out the process of social development; its relations and interactions. A.R.B. Amarasinghe, while explaining gender, quotes from "Gender: The concept and Its Meaning and Uses – A think piece" which explains that, "The nature of gender definitions varies among cultures and changes over times. The use of the word 'gender' highlights the insight that these differences are not innate or predetermined and are not the same as the biological differences between men and women. Rather gender differences and definitions have been built over the centuries and reinforced by socio-cultural institutions and conventions."² That gender inequities are built over a period of time and due to various interacting forces is very true in the history of the evolution of the Jaffna society. This book attempts an indepth study of this gender based development in the

2. *Gender and the Law*, p. 20.

matrimonial property structure of Theswalamai with a view to identifying the core areas for reform.

The concept of gender equality in the Sri Lankan context has a constitutional mandate³. The Constitution guarantees fundamental rights to all its citizens.⁴ This includes equality before the law.⁵ It is also one of the directive principles of state policy to ensure that the citizens do not suffer any disability on the ground of sex.⁶ Though technically the Constitution confers equality of status to all citizens irrespective of race, religion, language, caste, sex, etc⁷ the constitutional guarantees of the right of freedom of conscience, religion and to promote one's cultural affairs, when read with Article 16(1) which declares that "All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter," has the negative effect on the right not to be discriminated and in the efforts to achieve gender equity. This is by reason of the fact that the above constitutional provision imports a strategy that all personal laws existing at the time of the Constitution cannot be made subject to fundamental rights enshrined in the Constitution. As such, if a provision in a personal law is in violation of fundamental rights to gender equality the court has no power to declare it as such. It is only a new piece of legislation that can be challenged

3. Article 12 (2)

4. Chapter 111.

5. Article 12 (1)

6. Article 27.

7. Article 12 (2)

and that too only during its passage through Parliament. The gender discriminatory provisions existing in the law of Thesawalamai which could be challenged as a breach of fundamental rights to equality⁸ enshrined in the Constitution, remains thus 'protected' by Article 16.

The Sri Lankan position is in contradistinction to Article 13 (1) of the Indian Constitution which empowers the court to declare that all laws in force before the constitution are void if they conflict with the fundamental rights embodied in the constitution. Despite the enabling provision which empowers the Indian courts with the power to perform judicial review of legislation, they have generally shown a reluctance to hold that gender bias in personal laws rises to the level of a constitutional violation.⁹ It is difficult to envisage how our courts, especially in the absence of a provision similar to Article 13 (1) of the Indian Constitution, would respond to a like situation involving article 16 (1) of our Constitution. The need to reform the laws of Thesawalamai in order to attain the constitutional prescriptions of gender justice and equality has long remained unquestioned. Apart from the Constitutional prescriptions the State has to fulfill its international obligations too as it has ratified the International Convention on the Elimination of All

8. Article 126.

9. *State of Bombay v Narasu Appa Mali*, 1952. A.I.R. 84. (Bom) ; *Krishna Singh v Mathura Ahir*, 1980 A.I.R. (SC); Despite Article 13, for decades the constitutional provision and the religious laws of India have co-existed in contradiction with each other - Women's Rights - Human Rights, Asian Woman's Profile, Asia Pacific Forum on Women, Law and Development, Kuala Lumpur, Malaysia.

Forms of Discrimination against Women and also adopted it in 1993 in the Women's Charter of Sri Lanka. The draft Bill of 2004 on Women's Rights (Sri Lanka) provides for the enforcement of " the protection, promotion and advancement of women's rights in accordance with the framework of the Women's Charter of Sri Lanka as set out in the schedule to the Act and the international treaties relating to women's rights to which Sri Lanka is a party" as one of its objectives.¹⁰ It is sought to bring out in the forthcoming chapters the core areas of discrimination in order to facilitate a holistic understanding of the problems encountered by women governed by Thesawalamai.

It is important initially to explain the plan or the strategy of the writer in bringing all the different kinds of property classified under the Thesawalamai Code, namely *muthusam*, *cheedanam* and *thediathettam* under the umbrella of 'matrimonial property'. The categorization of the different kinds of property recognized in Thesawalamai is on the basis in which they were brought into marriage.¹¹ Under a rigid definition of 'matrimonial property' *thediathettam*, which is property acquired by the spouses during marriage, would be the only kind to fit into it. But *muthusam* and *cheedanam* too are included in the analysis. *Muthusam* is defined as hereditary property brought into marriage by the husband, and *cheedanam* as dowry property brought by the wife.¹² The incorporation

10. Section 2 (12)

11. The Thesawalamai Regulation No: 18 of 1806, (hereafter referred to as the Code) Part 1:1

12. *Ibid.*

of the latter two kinds is done on two premises. Firstly, on the basis that they are property brought into marriage irrespective of who the holder is or in what form it is brought. Secondly, on the basis that during marriage they are enjoyed or made use of by both the spouses and their offspring. In addition, the customary as well as the statutory laws of Thesawalamai embody the concept that profits from the separate properties are also *thediathettam*. The definition given to “matrimonial rights” “as the respective rights and powers of married partiesof property belonging to either party or to which either party may be entitled during marriage”¹³ helps further to justify the incorporation of *cheedanam* and *muthusam* along with *thediathettam* under matrimonial property. As matrimonial asset, it involves the other spouse in the maintenance, improvement and development of these properties irrespective of how they are brought into marriage.

The law regulating matrimonial property relations is fundamentally an index of social relations between the spouses.¹⁴ This makes an anthropological study useful. But practical considerations of having to concentrate on the main scope of the work allow only a very limited analysis on this line. It is only in instances when it was found evidently necessary to explain certain fundamental concepts and principles entrenched in the customary law

13. Jaffna Matrimonial Rights and Inheritance Ordinance No: 1 of 1911(as amended in 1947) Section 39.

14. Kevin J. Grey, *Reallocation of Matrimonial Property on Divorce*, (England; 1977) Page 1.

that some insight has been made into matters, such as, the origins of the social structure of those governed by Thesawalamai, their original mode of family living and the cultural background to the marital roles assigned to the spouses. Such an approach was found particularly necessary to explain how the concept of dowry came to be introduced into the Jaffna society and the circumstances which enabled the husband to assume marital powers in matters relating to matrimonial property.

Under Thesawalamai, categorization of property, as well as rules relating to its succession depends entirely upon the original nature of the property. Thus the chapters dealing with property brought into marriage by the spouses, as against property acquired by them during marriage, receive precedence. *Muthusam* being ancestral property is given foremost place. Except for the difficulties faced by courts in defining and categorizing property obtained otherwise than by ancestral inheritance, the law relating to *muthusam* has been the least controversial. Hence it is the briefest of all the chapters in the book. *Cheedanam*, on the other hand, is quite comprehensive. It commences with a brief and general survey of the system of dowry in selected foreign jurisdictions and amongst the different communities of the island itself. Such an abridged account was considered useful for a clear perspective of the concept of *cheedanam*. The dowry system of the Roman and Roman Dutch Law together with the *sridhanam* of the Indian sub-continent have been touched upon because of the closeness of these systems with that of our legal jurisdiction. The systems under our General Law and the Special laws have been

dealt with in similar vein. A close research into the origins of *cheedanam* is attempted in order to bring out its real objectives and to make clear that in its making *cheedanam* was but a noble gesture; that it was the impact of several subsequent socio-economic developments coupled with change of human attitude that transformed it into a corrupting influence. It is the opinion of the author that the Indian experience with reforms can be useful in our attempts to cure evils prevalent in our dowry system. In this context it is analyzed as to why abolition would neither be effective nor be the beneficial remedy. What has been suggested is reform and restructuring of the laws pertaining to *cheedanam*. Another matter that is made clear is that, in the whole process of giving and receiving dowries it is not the males alone who come out as beneficiaries. Though as recipients they may be in an enviable position it would not be similarly so when they are duty bound to dower their sisters. Further more dowries takes such pride of place in the Jaffna society that the sons of Jaffna often stand to lose their opportunities of inheriting parental property. This was particularly so under the customary law¹⁵ and remains so in practice even to-day.

As matrimonial property in its strictest sense, *thediathettam* touches more closely upon the property relations of husband and wife. The unique characteristics of *thediathettam* are better understood when an insight is made into its origin. With that purpose in view an effort

15. Thesawalamai Code, Part I: 11; Reference page 153 chapter on *cheedanam*

is made at the commencement of the chapter to picture the socio-economic background of Jaffna at the time of its early stage of social development. The matriarchal origin of the Jaffna society and the subsequent intrusion of patriarchal principles resulting in a fusion of both are brought out in the process. It was necessary to do so in order to make clear that *thediathettam* is a concept of matrimonial partnership despite the exalted position usurped by the husband under the influence of patriarchy and later stabilized by the unwarranted application of Roman Dutch Law principles. It is of vital importance to note that when the marital powers of the husband are expunged in the law of Thesawalamai the concept of *thediathettam* provides an ideal legal model of spousal partnership in matrimonial property law. The evolution of *thediathettam* as matrimonial property is interesting study. The chapter shows how from its very inception the Thesawalamai recognized the wife's labour in the fields alongside the husband and sons,¹⁶ when it entitled the wife to a half share and how the rationale was widened to enfold her contributions via the domestic base she provided for her husband to earn and save in employment¹⁷, trade or business.¹⁸

The central focus of the chapter is however on the moot question as to whether to-day *thediathettam* is the separate property of the acquiring spouse or does it

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16. *Seelatchy v Visuvanathan Chetty* (1922) 23 NLR p. 97; See further chapter on *thediathettam* page 160.
 17. Driberg J. in *Thamotheram v Nagalingam*, (1929) 31 N.L.R. 257 at p. 258.
 18. *Nagaratnam v Suppiah*, (1967)74 NLR p. 54

remain the joint property of the spouses. The analysis involves a detail examination of specific sections of the Jaffna Matrimonial Rights and Inheritance Ordinance before and after the amendment of 1947. Initially, a look into the background to the amendment is made as it helps to understand the objectives underlying such amendments. The chapter proceeds thereafter to fathom out whether the objectives were achieved. That necessarily involves discussion of the repealed sections vis- a-vis the substituted sections. The stand point of the judiciary, expressed by its judicial pronouncements and decisions, provides a good base for an in-depth study of the whole question, to which is added views expressed by eminent jurists and legal writers. A brief evaluation of the judicial stand point is also made with a fervent hope that it could help to avoid adverse implications in future reform moves. In similar vein some recommendations for reforms too are made which, it is believed, would fulfill the aspirations of the Jaffna people, especially of its women population.

The rights of spouses to hold, deal, inherit and otherwise enjoy all that property that is here brought under the canopy of matrimonial property is central to the analysis of gender inequality. As such, each category of property is taken up individually. *Muthusam* is back-pedalled to come after *cheedanam* for convenience in analysis, as these two kinds of properties come under the category of separate property and a woman's rights over her *cheedanam* are, more or less, the same as over her *muthusam*. (after 1911 *muthusam* lost its character of being the property brought into marriage solely by the

husband and became the inherited property of either the husband or wife.¹⁹⁾ As regards *thediathettam*, it being partnership property, rights of spouses in relation to it occupies the major part of the chapter in importance as well as in number of pages. It is pertinent to make clear from the outset itself that gender inequality as regards spouses' rights surfaces not at the stage of entitlement but only later, that is, when the wife moves to deal with it. A striking feature in the customary and statutory law of Thesawalamai regarding matrimonial property is the dichotomy between the rights of woman to be entitled to hold separate property and share in the common property and the husband's marital powers over the exercise of such rights. A pragmatic approach is attempted in order to make clear that the exercise of marital powers by the husband is not something inherent in Thesawalamai, but an aspect very much foreign to the concepts and principles of this country customs which had its origins in a matriarchal society. It is pointed out that the legislature and the judiciary are culpable for the predicament of the Jaffna woman, for, it was by reception of Roman Dutch law and English law patriarchal values into statutes and judicial decisions that legal sanction has been provided to perpetuate male preference and gender inequality in the area of family law in Thesawalamai. These institutions therefore carry the burden to rectify them.

Where relief from the constitution, which is itself the legal foundation of all laws of a country, is

19. For fuller discussion see *infra* p. 10.

not available and legislative amendments have so far not been forthcoming, it is to the judiciary that the women of Jaffna can turn round to obtain relief from the predicaments they are faced with. It was thus sought to have a chapter regarding the *locus standi* of women governed by Thesawalamai to see how the judiciary has sought to give relief when women approached it, or when action which could work to the detriment of their interests was brought before it. The chapter reveals how the early courts, in several instances, were sensitive to women's rights and took the stand that as the Thesawalamai recognizes that there is separation of interest and property between husband and wife the law too must provide adequate remedy to either party whose rights may be infringed.²⁰ The chapter proceeds to show how the courts reversed the position by its application of Roman Dutch Law principles on the basis of *cassus omissus*. The conclusion however is with a ray of hope with the innovative judgment of H.N.G. Fernando J. in *Annapillai v Easwaralingam* and with a plea to the judiciary to be the guardians of the rights of the women governed by Thesawalamai.

20. See page 2-3 Chapter on *locus standi* of women governed by Thesawalamai.

CHAPTER I

MUTHUSAM

(ANCESTRAL PROPERTY)

Introduction

The Code categorises *muthusam* as one of the different kinds of property brought together into marriage. It is therefore matrimonial property in the same sense as *cheedanam* is. However, it is distinguishable from *cheedanam* as hereditary property brought into marriage by the husband and in that sense akin to the *paraveni* of the Kandyan Law. In early Thesawalamai the rule was that the father's goods brought into marriage should be inherited by the sons and the mother's *cheedanam* given as dowries to the daughters¹. This rule enabled these two categories of property to retain the character of their respective sources. In process of time however the rule underwent changes when dowry came to be given indiscriminately from the spouses' separate properties and their acquired property, (*thediathettam*) which was common to both.² Thus *muthusam* of the father could become *cheedanam* in the

1. Code 1:1

2. Code 1:2 ; "But as shown in section 1 sub-section 2 of the Thesawalamai the rule gradually fell into disuse; the dowry being given to the daughters indiscriminately from the *chidenam* of the mother and the *mudusam* of the father. It followed as a corollary that the sons inherited what remained of **both** (emphasis added) the *mudusam* of their father and the *chidenam* of the mother. The old line of division between *mudusam* and *chidenam* was obliterated so far as inheritance by children was concerned". *Nagaratnam v Muttutambay et al.* (1915) 18 N.L.R. p. 257 pp. 259-260

hands of the daughter when given as dowry. It is so with the *cheedanam* of the mother. If there were only sons in the family then on death intestate of the mother her *cheedanam* would become the sons' *muthusam* from the maternal side. It is interesting analysis as to how in Thesawalamai, [which had it's origins in a matriarchal society³] succession to ancestral property came to be the right of the males, as the Code declares it to be. It needs also to be noted that the Code's concept of *muthusam* underwent quite a radical change with the Ordinance of 1911. Both these developments would be analysed in this chapter. The term *muthusam* is used as if it is synonymous with the term "hereditary property". How and why it came to be so used is also discussed in the process.

Hereditary property in Thesawalamai – during the early stage of social development

In a matriarchal society

Hereditary property is what a person inherits from his parents and ancestors in the ascending line. To understand the development of *muthusam* it becomes necessary to analyse the position of hereditary property in Thesawalamai from the origin of social development in Jaffna. Coomarasamy notes that one of the aspects of the Dravidian race in their early or matriarchal stage was the tying down of property to females and not to males.⁴ It was shown that such practices were prevalent in the Jaffna society in its

3. *Infra* chapter on *cheedanam*.

4. *Hindu Organ* of 23-10 33 ; See also chapter on *cheedanam*.

early stages as evidenced by the rule embodied in the Code that females succeed females.⁵ The tracing of lineal descendents in the female line was, as noted, a reflection of the influence of Mukkuwa and Marumakkalthayam Laws⁶. In these systems what the males of a family acquired were left to the sisters and their children. Though in Mukkuwa law too the terminology *muthusam* is used it is with reference to the inherited property of the females⁷. The rule of succession to property of females by females in Thesawalamai, as evidenced by the provisions in the Code, is a reflection of this early stage of social development akin to that under the Mukkuwa and Marumakkalthayam Laws. The Thesawalamai Code however does not use the terminology "*muthusam*" to denote female inheritance as used in the Mukkuwa law.

(ii) In a matriarchal cum patriarchal society

This system by which the property of a female was preserved seems to have undergone quite a radical change with the second wave of colonization from the Coromandel coast of India.⁸ These colonists brought with them the patriarchal system of family organization into which the Dravidian society had slowly transformed itself in South India. They were Hindus by religion and subject to Aryan religious obsequies based on the notion that it is the son

5. *Ibid.*

6. *Ibid.*

7. Britto, *The Mukkuwa Law* (Madras: 1999, Reprint) p.57 ; See also Thambiah, *Laws and Customs of the Tamils of Jaffna* (The times of Ceylon) P.08

8. For fuller discussion see chapter on *Cheedanam*. pp. 87-89.

who can perform the religious rites for the dead and who can redeem the parents from hell. The exalted position of the sons and the relegation of the females to the background as being incapable of conferring benefits on parents, husbands and others resulted in incapacitating the females from owning and inheriting property. The effects of these developments were however not felt in full in Jaffna, for, by the time of the second colonization the customs and practices of the earlier colonists, especially the right of a female to a dowry and the principle of female succession had become recognized as well established customs having the force of law. Coomarasamy notes, "The only source open to the later settlers from Coromondel, who were followers of the Hindu Law, was to adopt the customs and usages of the original settlers and to modify the rigors of the Malabar usages and customs in matters of inheritance by rules such as "males succeeded males" and "sons succeeded to father's property" etc, necessary corollaries from the corresponding rules regarding female succession in Malabar".⁹ These later modifications by the Coromondel settlers together with the earlier customary law introduced and nurtured by the Malabar colonists 'with a slight veneer of Roman Dutch Law principles', as Coomarasamy puts it¹⁰, became embedded in the Thesawalamai Code. It is this compromise of matriarchal and patriarchal principles which paved the way for *muthusam* to be denominated in the Code as hereditary property of the males and explained further by noting that, "On the death of the father all the goods

9. *Op. cit.*, 23-10 33; S. Arasaratnam, *Ceylon*, (1964) p.109; *Valliammaipillai et al v C. Ponnampalam*, 2 Brownes Reports, p. 234

10. *Ibid*

brought in marriage by him should be inherited by the son or sons,....". One other factor needs to be noticed. Under the customary law of Thesawalamai the son's acquisitions before marriage formed the *thediathettam* of his parents¹¹ and his right to succession to parental property was made subject to the obligation of the parents to dower the daughters. It was only if anything remained after dowering the daughters that the sons became entitled to succeed.¹² It is not to say that the rule of female succession of the matriarchal society gave way completely to the rule of male succession of the subsequent settlers though the Code in categorizing the different kinds of property in Part 1:1 speaks of inherited property as the sole right of the males. There is evidence to show that in early Thesawalamai sons and daughters succeeded to parental inheritance and we find several rules in Thesawalamai which speak of female succession. Mutukisna's collection of cases gives a few instances. In *Canny v Murugen* it was accepted that sisters who were not dowered succeeded to parents' property equally with the sons.¹³ Similarly in *Sidembram Tavasiar* it was held that the girl not being married and dowered, her brother and she had an equal share in their mother's property.¹⁴ In *Tamar Tilliambalam v Wairevan Ameal* the assessors agreed with the opinion of the court that the property in question which devolved from the widow should be divided between the sons and daughters equally.¹⁵ The

11. Code 1:7; IV: 5.

12. Code 1:9 : 1:11

13. M. p. 3. (1815) Case No: 1,793.

14. M. p. 13 (1820) Case No: 804

15. M. pp. 48-49. (1835) Case No: 261; See also *Valliammaipillai et al v C. Ponnampalam*, *op. cit.* p. 234 at 235

same rule applied to a deceased father's property.¹⁶ The question then is, why was importance given to *muthusam* as the son's due.

It should be noted that even before the colonization of Jaffna by the Coromandel settlers, marriage, dowry and setting up of family units on the model of the *tavazhi illams* had become the order of the day.¹⁷ The early polyandrous system of social living had given way to organized family living.¹⁸ In the family unit the husband's position came to be recognized. The odds of having to eke out a living in the arid climatic conditions of Jaffna and the physical prowess of the man raised the husband's position as the head of the family.¹⁹ The frame-work, it can be said, was therefore ready and suitable to blend in some of the patriarchal principles, chief of which was the rule regarding male inheritance. The main reason however for assigning a less important position in the Code to the woman's right to inheritance is the primary place given to *cheedanam*²⁰ and the corresponding rule of forfeiture by dowered daughters to parental inheritance.²¹ Thus it is noticeable that the judicial decisions that pronounced equal entitlement to both sons and daughters were, generally, where the girls had remained unmarried or were not dowered. There is yet another reason. The properties though inherited by the daughters were categorized under *cheedanam*. In *Murugesu v*

16. M. p. 69.(1850) Case No: 2530.

17. Ref: chapter on *cheedanam*. pp. 75-87

18. *Ibid.*

19. *Ibid.*

20. Code I:1; 1: 2 ; 1: 3 ; 1: 9 ; 1 : 11.

21. Code 1:3

Subramaniam Tambiah J. declared that it is not only what is given on marriage to a woman but all property that she brings as acquisition or even by inheritance is her dowry or *cheedanam*.²² Viewed from this angle the necessity would not have risen to separately identify a woman's hereditary property by another denomination. To include it under *muthusam* would have been to duplicate provisions. When however a re – categorization of property took place under the Ordinance of 1911 all doubts and confusions that existed in the Code in the name of *muthusam* were cleared.

Judicial view of the concept of *muthusam*

The judiciary has expressed the view that the concept of *muthusam* as per the words of the Code, is confusing. Withers J. made note of this confusion when he stated, “It does not appear from the report what was meant by “hereditary property”, whether *muthusam*, oddly enough translated “hereditary property”...”²³ His lordship called the translation of *muthusam* as hereditary property as odd and preferred to name it as a person's separate estate.²⁴ In the subsequent paragraph he explained that, “...according to the Thesawalamai as interpreted by decisions, the separate property of the spouses is that which either party brings to the marriage or acquires during the marriage by inheritance or donation made to him or her particularly...”²⁵

22. (1967) 69 N.L.R.532 at 534

23. *Jivaratnam v Murugesu*, (1895) 1 NLR 251 at 254.

24. *Ibid*.

25. *Ibid*.

What is clear from His Lordship's judgment is that he considered *muthusam* as comprising the entire separate estate of the husband. It is submitted that such an explanation of *muthusam* helps clear many doubts. In the first instance it is not correct to restrict *muthusam* to hereditary property as the Code does; for, a son under the customary law, though not entitled to hold to himself the property he acquired whilst living with the parents, could however do so with presents given to him by his relatives and others²⁶. It was only acquisitions that he had to leave behind to the community of his parents. Further more, if *muthusam* is confined to what could be identified as hereditary property and which is brought by the husband into marriage then it would exclude from its fold legacies, gifts and inheritances to which a man could become entitled during marriage. Withers J. was faced with precisely this situation in *Jivaratnam v Murugesu*²⁷. In this case the husband had bought a land during marriage with money bequeathed to him during marriage. A query was raised as to whether by the customary law that land could be regarded on his death as his separate property which should devolve on his heirs. The court held in the affirmative, but added that to be so it should have been purchased with money specially donated to him by his mother. A note of importance is that this judgment was given long before the Ordinance came into operation. It therefore becomes clear that the judiciary, faced with an irksome situation of having to accommodate a species of property which could not squarely fit into the definition given by the

26. Code, IV: 5

27. 1 N.L.R. p. 251

codifiers either by oversight or inadvertence, found the definition not comprehensive. This made De Sampayo J. to aptly, nevertheless cautiously, give an extended meaning to Muthusam by adding the words "...whether strictly called *muthusam* or not".²⁸ The Legislature took note of the facts pointed out by the judiciary that a person under Thesawalamai could become entitled to ancestral property other than by inheritance from his ancestors when by the Ordinance of 1911 it re-categorized property governed by Thesawalamai.²⁹

The statutory concept of *muthusam*

As stated, *muthusam* in the customary law was taken to mean property devolving by descent and to the males. De Sampayo J. took it to be the sole meaning in ancient days.³⁰ It is submitted that "ancient days" should be taken to mean with the second colonization, for reasons discussed above. The sole meaning attributed to *muthusam* as hereditary property by De Sampayo J. suited the then purely agricultural society where the sons could not hold to themselves property acquired by them before marriage as whatever they acquired was in collaboration with the parents and went to form the latter's *thediathettam*.³¹ Thus only whatever property remained after dowering the daughters were inherited by them.³² Inheritance was confined to males

28. De Sampayo J. in *Nalliah v Ponnamma*, (1920) 22 N.L.R. 198 at p. 204.

29. Part 111, Inheritance..

30. *Nalliah v Ponnamma*, *op. cit.* at p. 204.

31. *Ponnammah v Kanagasuriam*, (1916) 19. N.L.R. 257

32. Code 1:11.

also because of the rule in Thesawalamai that a dowered daughter forfeits her rights to inheritance.³³ Moreover even if a daughter, being the sole child, did inherit property or was given gifts or legacies all that comprised her *cheedanam* and were not categorized as her inherited property.³⁴ *Muthusam* was thus confined to inherited property of the males. The difficulty of so confining *muthusam* to hereditary property was discussed above in *Jivaratnam v Murugesu*.

The Ordinance of 1911 has re-defined in section 15 the concept of *muthusam* and also widened its scope to include the hereditary property of the wife by stating that it could be property devolving on a **person** at the death of **his or her parent** or of any other ancestor in the ascending line. [Emphasis added] Thus a woman too came to be recognized as a person who could be entitled to hold property as *muthusam*. This change cannot however be described as a new feature introduced into the law of Thesawalamai, for, as seen, the courts had recognized the right of women to succeed to inherited property. Though the Ordinance retains the original character of *muthusam* as hereditary property, it limits the scope of the inherited property to what devolves on the descendants from parents and their ancestors in the ascending line; termed in brief patrimonial inheritance. Inherited property from other sources either on intestacy or otherwise is shut out and included under a new category termed “*urumai*” or non-patrimonial inheritance.³⁵ Lord Upjohn in the Privy Council commented:

33. Code, I:3.

34. Thambiah J. *Murugesu v Subramaniam*, (1967) 69 N.L.R.532 at p 534.

35. JMARIO, section 16.

“The word ‘*mudusam*’ requires some explanation. It is defined quite strictly by the Jaffna Matrimonial Rights and Inheritance Ordinance as property devolving on a person by descent at the death of his or her parent in the ascending line...”³⁶ This restricted definition is a marked deviation from the position under the Code which included all inherited property irrespective of the source. A further point of difference is that the Ordinance classifies the same properties in two different categories. In sections 6 and 7 it brings inherited properties under the separate properties of the spouses. Thus *muthusam* is accommodated with other separate properties to which a husband or wife may become entitled at the time of his or her marriage. The same hereditary property is again brought into the category of patrimonial inheritance in section 15. The different classifications serve two different purposes. Under sections 6 and 7 it helps to identify the way in which the property was acquired so as to ascertain the spouses’ rights over them. In section 15 and other connected sections in the Part on Inheritance it serves the purpose of ascertaining a person’s rights to inheritance. One important feature recognizable in the statutory categorizations is that, though it has divided hereditary property into patrimonial and non-patrimonial inheritance it has not deviated from the principle that runs through the whole of Thesawalami, as in Kandyan Law³⁷ that succession to hereditary property should retain

36. *Kanayson v Rasiah* (1967) 69 N.L.R.553 at 557.

37. F.A.Hayley *A Treatise on The Laws And Customs of The Sinhalese*. (Re print, 1993 Navarang, New Delhi 1923) p. 409 citing from Niti Niganduwa and Perera’s Armour.

the character of its source³⁸ and reach ultimately the source from whence it came.³⁹ It is only in very exceptional cases that the course of reaching the source changes direction, that is when there are no kindred on either side to succeed; in which case the surviving spouse would become entitled to succeed.⁴⁰

An explanation of the concept of *muthusam* would not be complete by only explaining or interpreting it from the provisions of the Code or the Ordinance. It is basically a customary law concept and it is interesting to note that *muthusam* as used by the people of Jaffna is generally taken to mean all property inherited by either the husband or wife, irrespective of the fact as to from whom or in what form it is inherited. It is equally interesting to note that it was not in the courts of our country but in the Privy Council that mention was made of the meaning people gave to it. Lord Upjohn said "... but it has a colloquial meaning closely equivalent to dowry or the acquisition of property from marriage".⁴¹ Lord Upjohn saw a link between *muthusam* and dowry not in the manner the two kinds of properties were obtained or in the kinds of properties that went to form them but in the manner it stood in relationship to the holder. Thus *muthusam* if taken to be what Lord Upjohn means constitutes not only hereditary property but all property that a person possessed before marriage, just as *cheedanam* is not only dowry but all what the wife brings into marriage. Thus he said it to be equivalent to "dowry or the acquisition of property before

38. JMARIO, sections 17 and 18.

39. JMARIO, sections 21-28.

40. JMARIO, section 31.

41. *Kanayson v Rasiah*, *op. cit.* at p. 557.

marriage". It needs to be mentioned that it was also the view of Tambiah J. when he said of *cheedanam* as encompassing not only what was given on marriage but all what belonged to her separate estate.⁴² It is submitted that His Lordship should be taken to have meant the same when he said of *muthusam* as closely equivalent to dowry.

Another matter of importance in relation to *muthusam* is the effect the definition of *thediathettam* by the Ordinance of 1911, before it was amended, produced on a person's separate property. By defining *thediathettam* as the property of "any husband or wife" it made it legally possible for the sons to retain as their separate property all what they acquired by their own efforts before marriage and while under parental roof. Therefore parts 1:5 and 1:7 of the Code have now to be considered as obsolete or impliedly repealed.⁴³ It is submitted that had such a logical basis been put forth in *Nalliah v Ponnamma* it could have made it easier for the court to pronounce, as it did, that the savings before marriage was the separate property of the husband.

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The 1911 statutory definition of *thediathettam* had also a reverse effect on *muthusam* in that it resulted in taking away from its fold property by altering its original character. Property bought during marriage between 1911–1947 with consideration that formed part of the separate property of a spouse was designated *thediathettam* regardless of the fact

42. *Murugesu v Subramaniam* (1967) 69 N.L.R. p. 532 at p. 534

43. *Manikkavasagar v Kandasamy* (1986) 2 S.I.R. 8 at p 9.

that the consideration for its purchase was itself not *thediathettam*.⁴⁴ The anomalies that arose as a consequence of such transmutation were rectified in 1947.⁴⁵ The Legislature went back to the pre-Ordinance position by its new definition of *thediathettam*.⁴⁶

Conclusion

The law relating to *muthusam* has not been controversial as *thediathettam* or *cheedanam* has been, except in two spheres. The first related to difficulties of categorizing property obtained by a male otherwise than by inheritance and the second to the effect of investments or transmutations of *muthusam* property during the period 1911 to 1947. Both these issues could now be considered as settled law. Presently there are no controversies relating to *muthusam* as in the case of *cheedanam* or *thediathettam* which call for immediate action. A woman's rights over her *muthusam* will get resolved when the anomalies in the law relating to her rights to property are rectified.

44. Reference chapter on *Thediathettam* for fuller discussion. pp. 206-210

45. *Ibid.*

46. *Ibid.*

CHAPTER II

A. DOWRY IN GENERAL

Introduction

According to the dictionary, 'dowry' means "property or money brought by a bride to her husband".¹ Generally it is understood to be a custom or practice that originated as a means of providing for the woman. It is not purely an indigenous concept. It has world wide application and has been practiced from time immemorial. Maine in his work, "*Early Laws and Customs*," says: "No where so far as I know are women left without provision in ancient societies which have made even a slight degree of advance".² It is proposed initially to analyze dowry in a general sense by selecting a few foreign jurisdictions, so that *cheedanam* or dowry in Thesawalamai could be better understood. In order to do so, a brief study of dowry as practiced in the Roman and Roman Dutch Law jurisdictions and in the Indian sub-

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1. The Concise Oxford Dictionary, of current English. (Eighth edition) edited by R.E.Allen.
 2. Maine Henry, *Dissertations on Early Laws and Customs*, (London: John Murray, 1907.) p.110. F.A.Hayley, *A Treatise on The laws and customs of the Sinhalese*, (Delhi: Navrang, Reprint, 1993) p. 333.

continent is undertaken, since these jurisdictions have at some point of history influenced the Sri Lankan jurisdiction. In our country itself, “this kind of gift or dowry to the husband on marriage is found to be common to most communities in Ceylon”.³ A similar view was expressed by Hutchinson C.J. when he observed that dowry amongst Muslims and Christians is what is given either to the wife alone or to the husband alone or to them jointly.⁴ The fact of its common existence across the different communities of Sri Lanka makes an analysis of dowry as practiced amongst those governed by the general law, Kandyan Law and Muslim Law both necessary and useful.

Dowry under the Roman Law

In Roman Law dowry, or *dos*, as it was called, is property given by the wife or some one else on her behalf to the husband so that he may bear the burdens of marriage.⁵ The custom was so general and so deeply ingrained that a marriage without *dos* was almost inconceivable in Roman Law.⁶ Buckland states that *dos* was not legally necessary; but since there was no legal requirements of form for

3. De Sampayo J. , *Meera Saibo v Meera Saibo*, 2 C.W.R., p. 263.

4. *Pakeer Bawa v Hassen Lebbe*, 4 C.W.R., p. 61 at 64.

5. *Commentary on the Pandects*, Johannes Voet, 23.3.2. (Opinions of Grotius, Translated by D.P. de Bruyn,) p. 147-148; See also Sir Maine Henry, *Lectures on the Early History of Institutions* (London: J. Murray, 1897) p. 319; Sohm, *Sohm's Institutes of Roman Law*, Translated by Ledlie, 3rd edn. Oxford; 1907) p. 465 ; J. W. Wessels too in *History of the Roman Dutch Law*, (Cape Colony: African Book, Co. 1908) p.461. notes : “The Roman bride always brought some goods or money to her husband for the purpose of the joint household called the *dos*”.

6. J. W. Wessels, *History of the Roman Dutch Law*, *op. cit* ,p.453

marriage, it provided the best evidence that it was marriage and not mere concubinage that was intended.⁷ Therefore he states that at times fathers insisted on giving *dos*.⁸ Notwithstanding the fact that it was not a legal requirement, in course of time it became obligatory on the father to dower his daughters and he could be even compelled to do so against his wish.⁹ It appears that in Roman Law there was even legislation under which the father was required to give a *dos*.¹⁰ *Dos* was categorized generally as, *dos profectitia*, *sui juris* and *adventitia*, depending on the source or by whom it was given.¹¹

Buckland notes that in early Roman Law *dos* was simply the husband's property and he was under no obligation to restore it.¹² But Sohm is more cautious and says "the husband was bound on principle to restore the corpus of the *dotal* property to the wife on dissolution of marriage. It was only the use and the fruits that he could claim absolutely for himself as a contribution towards the charges of the marriage state".¹³ Some similarity with *cheedanam* can be drawn from Sohm's statement, since Thesawalamai too regards *cheedanam* as the property of the wife, though in order to make use of it in the interest of the family the husband was given the power of managing it. Mayne

7. A Text book of Roman Law (Cambridge: 1921) p. 107. See also Leage, *Roman Private Law*, (2nd edn., London 1951) p.104;

8. Buckland, *A text book of Roman Law* (Cambridge 1921) 107.

9. Shirani Ponnambalam, *Law and the Marriage Relationship in Sri Lanka*, (2nd edn. Colombo: Lake House, 1987) p. 29

10. *Ibid* ; Voet 23.3.1: .

11. *Ibid*.

12. A Text Book of Roman Law, *op.cit.*p.107. See also Leage, *op.cit.*p.104.

13. *Institutes of Roman Law*, (3rd edn. Oxford; 1907)

explains that the wife's entire property was given to the husband, "because she was assumed to be, in law, his daughter".¹⁴ He was technically the owner of the whole *dos*¹⁵ and acquired a legal right of free disposition by sale or mortgage of the wife's *dos*.¹⁶

The situation however changed during the time of Justinian, when the position of women improved. Sohm states that the "*Lex Julia de adulterius* of the 18th century BC – called the *Lex Julia de fundo dotalia* in so far as it deals with this subject, prohibited the husband from alienating or mortgaging any *fundus Italicus* comprised in the *dos*. Not even the wife's consent could validate a mortgage or sale of the *fundus dotalets* by the husband".¹⁷ The object of the provisions was to preserve the land intact for the wife to whom it was presumed the *dos* would revert.¹⁸ The husband was bound to administer the *dos* like a *bonus pater familias*.¹⁹ If he had carelessly disposed *dos* property he was liable for negligent damages when the *dos* came to be returned.²⁰ Sohm sums up the position thus: "In all these rules as to the *dos* – in the rule prohibiting the alienation and mortgaging of *dotal* land and the rule requiring the husband to exercise care in regard to *dotal* property on the one hand, and in the rule concerning the restitution of the *dos* as shaped by Justinian's legislation, on the other hand

14. *Treatise on Hindu Law and Usage*, (7th edn, Madras: Higginbotham, 1906)

15. Buckland, *op.cit.* p. 107; Sohm, *op.cit.* p.465; Leage, *op.cit.* pp.104-105.

16. Sohm.*op.cit.*p465.

17. *Ibid.*

18. *Ibid.*

19. Buckland, *op.cit.*p.108.

20. *Ibid*

— we can trace the gradual recognition by the law of a truth which had long been acknowledged in practice, the truth namely that the *dos* belonged in substance to the wife and only in form to the husband, the truth, in other words that the *dos* was neither more or less than a portion of the wife's property - *les uxoria* - which was entrusted for a certain time to the husband. The husband's ownership thus was reduced in law as well as in fact to a mere form; practically speaking, all that remained to him was the usufruct of the dotal property together with the legal right to manage it".²¹

Donate ante / propter nuptias

In Roman Law there was in existence counter to the *dos* a form of gift by the man to his betrothed called the *donatio ante nuptias*.²² It originated as a bride price in the Eastern Empire, denoting what the intending husband had to pay the bride's father. Subsequently it became a gift to the bride herself. *Donate ante nuptias* was a later development than the *dos*.²³ After Justinian it became possible to make the gift even after marriage and the terminology by which the gift was called was also changed to *donatio propter nuptias*. For all purposes, it appears to be a contribution from the husband to the wife by way of return for the *dos* and as security for it.²⁴ The object

21. Sohm, *Op. cit.* p. 472. See also Buckland, *op.cit.* p. 108; B. Nicholas, *An Introduction to Roman Law* (Oxford: 1962) p.88 as cited by Shirani Ponnambalam, *Law and the Marriage Relationship in Sri Lanka* (1st edn, Stamford Lake, (Pvt) Ltd 1982) p. 32-33.

22. Sohm, *op.cit.* p.473.

23. Buckland, *op.cit.* p. 111.

24. Voet, *op.cit.* 23.2.21.

therefore appears to have been to secure a provision for the wife in the event of her surviving the husband, or, in the event of the marriage ending by divorce through the husband's misconduct.²⁵ It was in another form a tacit hypothec over the husband's estate to secure the restoration of the *dos*. Sohm states that the *donatio ante nuptias* was essentially a different form of gift made with the object of making provisions for the pecuniary demands of the marriage state, thereby enabling the marriage to take place.²⁶ He observes that it was not a gift out of affection but was done with the definite "objective of endowing the future marriage with the requisite pecuniary means".²⁷ It can be seen therefore that there was in vogue under the Roman Law a system by which mutual sharing of the burdens of marriage was possible. Whilst the wife brought in the *dos* into marriage, the husband brought the *donatio ante nuptias*, later to be termed the *donatio propter nuptias*. In Sri Lanka this feature is present as an important incident of Muslim marriages in the form of *Mahr*,²⁸ but not in Thesawalamai or Kandyan law.

Dowry under the Roman Dutch Law

Under the Roman Dutch Law the nature of the *dos* and the *donatio propter nuptias* underwent modifications. The Roman Law of dowry however did not apply in the Netherlands.²⁹ It is interesting to note that the origins of the

25. Leage, *op.cit.*p.104.

26. *Institutes of Roman Law*, *Op. cit.* .p. 473.

27. *Ibid.*

28. *Infra* pp. 33-36

29. Wessels, *op.cit.* .p.461.; Voet.23.3.1.

Roman Dutch Law has to be traced not to Roman Law but to the customs of the Germans,³⁰ who inhabited the Netherlands at the beginning of the Christian era. The *dos* was not an institution of the early Germans.³¹ With the Roman conquest and the introduction of the Civil law into Holland, the native German Law and the Civil law fused to form the Roman Dutch systems.³² Wessels says of the Roman Dutch Law thus: "That our laws have been formed in the main from Germanic customs, modified by the principles of Roman Law, will admit of no doubt".³³ According to the customs of the Germans the wife did not bring the husband any marriage gifts. To the contrary it was the husband who had to provide for the wife and family. The *Lex Repuria* made provisions for such dowries.³⁴

Wessels however remarks that it would be an error to imagine that the wife never brought anything into the marriage as bringing a dowry has been recognized as a common feature and "all the world over women have found favour in men's eyes when richly endowed".³⁵ So, while the practice of the German husband endowing the wife continued in Holland the Roman custom of *dos* was also introduced.³⁶ It was usual under the Roman Dutch Law for the spouses to enter into *dotal* agreements by which they excluded the properties that were received as contributions to meet the expenses of marriage.³⁷ By such ante nuptial

30. Wessels *J.op.cit* .453.

31. *Ibid* at 461.

32. Burge, *Colonial and Foreign Law*, (Volume I) , p. 64.

33. *History of Roman Law*, *Op. cit.* p.6

34. Wessels , *Op.cit.* p. 461.

35. *Ibid.*

36. *Ibid.*

37. Voet.24.3.2.

agreements the *dos* and *donatio ante nuptias* remained the separate property of the spouses. Dowry had to be expressly brought in by *dotal* agreements, since, according to the matrimonial property regime of Holland, on marriage all the movable and immovable properties of the spouses were brought into a common fund, the *communio bonorum*. The property so amalgamated became the common property of the spouses ; owned by them jointly.³⁸

These ante nuptial contracts were necessary therefore to prevent such settlements becoming co-mingled in the *communio bonorum*.³⁹ The *dos* and donation existed under Roman Dutch Law, though in a modified form. It did not have the same importance as in Roman Law because of the institution of community of property.⁴⁰ Voet shows that there was equality between dowry and donation. He quotes the Code of Justinian and shows that this was true as to increases, for the provision was that there should be no increases except simultaneously and in equal amount on both sides so that equality may not be upset in any way at all.⁴¹ This practice of endowing the wife by the husband is foreign to Thesawalamai where contributions to ease the burdens of marriage are one sided in that it is the wife who is expected to bring some property. There is no parallel contribution from the side of the husband as the *donatio propter nuptias*. The burden of the woman entering matrimony in Thesawalamai is definitely heavier.

38. Wessels, *op.cit.* p. 461.

39. *Ibid.* at p. 464.

40. Savitri Goonesekere, "Recovery of Dowry and Other Property on a Dissolution of Marriage", Colombo Law Review, Volume 3, Colombo 1972

41. 23.3.21.

Dowry under the General Law

Dowry under the General Law is not synonymous with the *dos* or the *donatio propter nuptias* of the Roman Law. While *dos* is a settlement made by the woman or someone on her behalf upon the man, dowry is bestowed on the woman herself. "It is a custom in this island to give a dowry"⁴² and in the social framework of Sri Lanka it is usual for a woman to be given a dowry at the time of marriage. Where a marriage is solemnized after the execution of a dowry deed it amounts to a settlement made in consideration of marriage and is regarded valuable.⁴³ Hutchinson C.J. made a similar remark when he stated that, "a conveyance of land made by the father for the benefit of his daughter on her marriage is prima-facie a conveyance for valuable consideration".⁴⁴ Being a kind of gift it is governed by the requirements of the Prevention of Frauds Ordinance and has to be notarially executed and stamped.⁴⁵ Burge referring to the position in Ceylon [as Sri Lanka was then] states that the *pacta dolia* had to be made before a marriage is solemnized so that it had to be performed before a sworn clerk and two witnesses and lodged in the office of the secretary.⁴⁶ Though dowry is considered a gift, the presents given normally on the day of marriage by parents or friends do not form the consideration for the man marrying the

42. Per Maartensz J. in *Karunanayake v Karunanayake*, (1937) 39 N.L.R. p. 275 at 281.

43. Balasingam, *Laws Of Ceylon*, (Colombo: 1933) Vol. II, p. 608.

44. *Jayasekera v Wanigaratne*, (1909) 12 N.L.R. 364 at 365; See also *De Silva v De Silva*, 27 N.L.R. 289

45. *In the Application of K.S. Veeravagu* (1921) 23 N.L.R. p. 67.

46. Burge Commentaries on Colonial and Foreign Law p. 320.

woman and is not dowry. They are only presents or gifts given as a pure act of liberty.⁴⁷

Dowry under general law being essentially a gift to the woman, cash given to the husband on the occasion of marriage, would not, in the absence of expression of intention to that effect, become a free will gift to the man, but presumed as having been intended for the wife to bear the burdens of marriage.⁴⁸ In *Karunanayake v Karunanayake*⁴⁹ it was shown in evidence that it was the custom in this country to handover the money or gift to the husband and that he cannot take it absolutely, but had to preserve it for the wife. The District Judge thereupon held that the sum of money given to the husband and claimed by him as a wedding present was a dowry intended for the wife. Maartensz J. found no reason to dissent from this finding of fact.⁵⁰ Nevertheless, since there was no proof that the husband had contracted himself out of the provisions of section 19 of the Matrimonial Rights and Inheritance Ordinance of 1876, he held the some of money as an absolute gift to the husband.⁵¹ Jewellery, brass ornaments and furniture were also considered dowry property of the spouses.⁵²

47. *Ranaweera Menike v Rohini Senanayake*. [1992] 2 Sri L. R. p. 180 at 206

48. Savitri Goonesekere, *The Legal Status of the Female in the Sri Lanka Law on Family Relations*, p. 30

49. (1937) 39 N.L.R. p. 275.

50. *Ibid* at p.280

51. *Ibid* at p. 281

52. *Musheen et al v Habeeb* (1935) 37 N.L.R. p 198 Property that was not in existence at the time of the deed could not be given as a gift under Muslim Law.

Dowry can also be given in the names of both the husband and the wife. Dalton J. in *de Silva v de Silva*⁵³ observed that this system obtains in Ceylon whereby settlements can be made by the parents on one of the parties to the marriage or to both of them.⁵⁴ Likewise in *Valliamma v Kanagaratnam*⁵⁵ properties were donated to the daughter and the bridegroom elect by deeds executed on the day of marriage. In *Musheen v Habeeb* a deed by which a sum of rent from certain properties was given to both the husband and wife, was considered a dowry deed and not a gift under Muslim Law.⁵⁶ The ordinary law of the land was therefore made applicable to the deed of gift.

In *Fernando v Fernando*⁵⁷ a half share of the property was donated in equal shares to the parties (the husband and wife) by the brother of the wife. It was made towards the marriage of the said parties, two months prior to the marriage and "as a token of mental pleasure and for their future prosperity." Tambiah J.'s inference seems to have been that the quarter share held by the husband was not held or preserved by him on behalf of the wife but as an absolute gift made to him. His Lordship however does not specifically state the category into which the property fell. The principle underlying dowry is that, whether it is given to the husband, or to the husband and wife jointly, it is presumed

53. (1925) 27 N.L.R. 289 at p.314

54. See also *Poopatharatnam v Sabapathippillai*, (1921) 2 C. L. Rec. p. 210 where the parents had agreed by deed to transfer certain properties to their daughter and son-in-law after their "Lawful Marriage".

55. (1925) 27 N.L.R. 203

56. (1935) 37 N.L.R., p. 198.

57. (1961) 63 N.L.R. 416.

to have been intended for the wife, unless a free will gift to the husband can be established. The exact nature of the document is thus a question of law. The court has to determine it. It was noted in *Ranaweera Menike v Rohini Senanayake* that the court would not permit itself to be misled by the terminology used in the document.⁵⁸

After the abolition of community of property and the introduction of the separate property regime⁵⁹ there arises no necessity for ante nuptial contracts to cover the separate properties of the spouses. It is therefore now not possible to identify a marriage settlement made in contemplation of marriage with the ante nuptial contracts of the Roman Dutch Law. Such settlements now form the separate properties of the wife.

Dowry in Kandyan Law

Dowry is an important component of Kandyan marriages. Hayley says, "The bridegroom usually insists upon a large dowry and the parents of the bride deem themselves disgraced if one suitable to their social status cannot be given".⁶⁰ The dowry system under the Kandyan Law is clearly understood in the background of the Kandyan system of marriages. There are distinctly two forms of marriages, namely the *diga* and *binna* marriages. To constitute a *diga* marriage, the bride, in accordance with

58. *Ranaweera Menike v Rohini Senanayake Op. cit.* at p.195. See also *Jayasekera v Wanigaratne* 12 N.L.R. 364; *In re, the application of K.S. Veeravagu* (1921) 23 N.L.R.67

59. Section 7, Matrimonial Rights and Inheritance Ordinance of 1876

60. "Hayley, F. A. *Customs of the Sinhalese or Kandyan Law*, (Navarang,; (1923) New Delhi, Reprint (1993). p. 333.

the contract of marriage, should be conducted away from the ancestral home and settled in the home of the husband.⁶¹ When a daughter is married in *diga* the customary law considered the marriage bond precarious as the daughter was liable to be sent back at any time to her father's house by the husband and his family. It is to save her from poverty and impoverishment that she was given a dowry.⁶² In the *binna* marriage, considered as the older form, the husband is brought into the house of the wife or of her parents.⁶³ Hence the matrimonial life of the spouse begins in the property of the wife's family.

The custom of dowering seems to have existed in ancient Kandyan Law, for Modder while writing on Kandyan customs and institutions says that the first step by a father towards arranging a match for his son included among other things "to pay the master of it a visit and if the information he receives respecting the lady's dowry be satisfactory he formally proposes his son".⁶⁴ It is after this visit, on being satisfied with the dower that a subsequent visit is made to see the lady and make inquiries respecting qualification, age and disposition.⁶⁵ Just as in Thesawalamai, dowry, under Kandyan Law, could be given even after marriage for Modder notes of the practice of the wife's parents paying a visit to the young couple after the lapse of several days or sometimes even months and on that occasion bestowing

61. Modder Frank, *Principles of Kandyan Law*, p. 229;

Hayley, *op. cit.* p.193

62. Hayley, *op. cit.* p. 331

63. Modder, *op. cit.* p. 232 Hayley, *op. cit.* p. 193

64. Modder, *op. cit.* Intro: p.XXVIII

65. *Ibid.*

according to their means a dowry on their daughter.⁶⁶ Writing about dowry in the Kandyan Kingdom Robert Knox states “They do give according to their ability, cattle, slaves and money with their daughter.”⁶⁷ In the form of *diga* marriage the daughter becomes a member of the husband’s family as long as the marriage subsists. It was thus not usual in traditional Kandyan societies to dower her with land.⁶⁸ Nevertheless gifts of land as dowry are common in the present day.⁶⁹ Speaking of modern times Hayley states that amongst the modern Kandyans dowry consists largely of jewels, money and other movables; land being given only rarely, due to the desire to keep it in the family. This accounts for the different approach followed by Kandyans with regard to dowering daughters married in *binna*. “The *binna* – married daughter however, who remains in the *mulgedera* or on the family estate requires no dowry as a rule”, states Hayley.⁷⁰ Nevertheless, at times dowry was given to *binna* married daughters too.⁷¹ A portion definitely settled upon a daughter on the occasion of her *binna* marriage becomes her property and disentitles her to future claims on the remainder of paternal property. The moral obligation to provide a dowry is primarily on the father. After the death of the father it extends to the mother and brother and subsequently to relations who may be in *loco parentis*.⁷² Thesawalamai too imposes a similar obligation.

66. Modder, *op. cit.* p. XXXIV. See also Colin de Soysa – *Everyone’sLawyer*, vol.1 p.101

67. *An Historical Relation of the Island of Ceylon*, (London: 1681 p. 188

68. Savitri Goonesekera, *The Legal Status of the Female in Sri Lankan Law of Family Relations*, *op.cit.* p.31

69. *Ibid.*

70. Hayley, *op.cit.* p. 334

71. *Ibid*; p. 67

72. Hayley, *op. cit.* p. 335

Dowry or the provision to the woman on her marriage cannot be separated from her right of succession. They served as alternative methods of providing for her and are true as far as it relates to Kandyan law too. The exclusion of the *diga* married daughter from the succession to her father's estate was because she received her share of the inheritance when dowered on marriage.⁷³ Dowry under Kandyan Law therefore appears to have been an alternate method of providing for the daughter and in this respect has resemblance with *cheedanam* under Thesawalamai.⁷⁴

The Kandyan Law of inheritance has been modified by the Kandyan Law Declaration and Amendment Ordinance no. 39 of 1938. Nevertheless, the traditional law continues to apply where provisions to the contrary have not been made in the statute. The amendment in fact implicitly sanctions the concept of forfeiture in Sec 12 (1) wherein it states that, "The Diga marriage of a daughter after the death of her father shall not affect or deprive her of any share of his estate to which she shall have become entitled upon his death....". So if the marriage had been before the death of the father, that is during his lifetime, it is implied that it would have the effect of so depriving her of rights to paternal inheritance. A similar effect is created by part 1:3 of the Thesawalamai Code; but with a difference in that, forfeiture of rights to inheritance in Thesawalamai applies to parental property in general whereas in Kandyan Law it is in respect of only paternal property.

73. *Infra*, pp. 135-136.

74. *Ibid.*

Gifts under Kandyan law are as a general rule revocable⁷⁵ other than those specially excepted.⁷⁶ Dowry may be termed a special type of gift. To fall into the category of dowry the gifts should be given in consideration of marriage. In *Ram Menika v Banda Lekam Pereira* J. said, "Dowry is usually the inducement agreed upon in the course of negotiations for a marriage, for contracting the marriage".⁷⁷ But he qualified this and said that it is not one of universal application. It can be, "a spontaneous and free will gift by a parent to the contracting parties. It may even come as a surprise on the dowers."⁷⁸ In the circumstances of the above case, where the father having promised to give the daughter a dowry before marriage, donated some lands after the said marriage, Pereira J. held that there was nothing to show that the promise was the inducement to contract the marriage, and all that was clear, was that, it was a free will gift and therefore revocable.⁷⁹ It can therefore be concluded that dowry need not always be an inducement for contracting a marriage and given in consideration of marriage. It can be a spontaneous and free will gift of a parent.

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75. H.W. Tambiah. *Sinhala Laws and Customs*, p. 325; Hayley *op.cit.* p.306; *Sawyer's Memoranda*, p. 20; Perera's *Armour on Grammar of Kandyan Law*, pp. 91, 92.
76. Perera's *Armour on Grammar of Kandyan Law* p. 95. Sec. 5 (b) of the Kandyan Law Declaration and Amendment Ordinance No.39 of 1938 provides that "any gift in consideration of and expressed to be in consideration of a future marriage which marriage has subsequently taken place" is excepted.
77. (1912) 15 N.L.R. p..407 at 410
78. *Ibid*
79. *Ibid*

But in *Kandappa v Charles Appuhamy*, Jayawardene J. in appeal declared that, “where the parents give a deed as dowry before or at the time of the marriage, or even after marriage, if it be in pursuance of a promise made before marriage the deed should be regarded as a deed for valuable consideration and so irrevocable.”⁸⁰ The District Judge had found on the facts and it was accepted in appeal that the dowry deed of gift was made as a marriage settlement in consideration of the marriage and that it served as an inducement for the husband to marry the plaintiff’s daughter. In response to the contention that there was no valuable consideration as the dowry deed was in favour of the daughter and not in favour of the son-in-law, Jayawardene J. declared that the husband derives advantages from the property settled on the wife in various ways.⁸¹ He is relieved from the provision he would have had to otherwise make for the wife and he could make use of it to cover family expenditure and to sustain the burdens of marriage.⁸² He noted also that it serves as a common fund for the benefit of the wife and family.⁸³ Therefore, he opined, that such a deed “is for valuable consideration even as regards the husband as it operates as an inducement to him to contract the marriage”.⁸⁴ The decision appears to lay the basis that the donees of dowry gifts are not bound to prove that the deed operated as an inducement to contract the marriage. In the words of Pereira J. however, “a dowry

80. (1926) 27 N.L.R. p.433 at p. 438

81. *Ibid*

82. *Ibid*

83. *Ibid.* at 439

84. *Ibid.* p. 69

may be a spontaneous and free will gift by a parent to contracting parties”.⁸⁵ In such an instance, to satisfy the requirement of irrevocability, words in the deed to the effect that, “It is given for and in consideration of marriage” or “by way of dowry” would not be sufficient. There has to be, in addition, evidence that it was given in pursuance of a promise of a marriage made before the marriage.⁸⁶

Modder’s views on a gift under Kandyan Law become relevant here. He says, “a Kandyan deed of gift is revocable when made in consideration of marriage that has already taken place or in view of a contemplated marriage so long as it has all the elements of a mere free will gift”.⁸⁷ However, if a donation is made in consideration of marriage and such marriage is contracted accordingly then it would be inequitable to revoke such a gift.⁸⁸

Dowry in Muslim Law

“There is no provision in Muslim Law requiring the parents of a Muslim bride to provide a dowry. Yet there is nothing to prevent them from doing so”.⁸⁹ It has become customary among the Muslims of Sri Lanka to grant a dowry and at present it forms an essential ingredient of Islamic marriages. Different forms of marriage portions can be identified in Muslim Law. They are namely, *Mahr*, *Kaikuli*, *Sridhanam*, *Seethanappanam* and *Rokkam*. Decided

85. *Ram Menika v Banda Lekam* (1912) 15 N.L.R. p. 407 at 410.

86. *Kirihamy et al and Sadi Kumarihamy*, (1959) 60 N.L.R. p. 532

87. *Principles of Kandyan Law*, p. 162.

88. *Ibid*

89. *Jayah v Saheeda* (1957) IV MMDLR p. 127 at 128.

cases on the subject reveal a lot of confusion in the usage of the terms. The Muslim Marriages and Registration Ordinance of 1934 only provided columns for *Mahr*, *Kaikuli*, and *Sridhanam* in the Muslim Marriage Register. Where cash was offered it was either to be *Kaikuly* or *Rokkam* and since no separate provision was made for *Rokkam* it was entered under *Sridhanam*. *Rokkam* in Tamil refers to cash and thus cash dowry came to be named *Rokkam*. In *Shariffdeen v Rahuma Beebi* however cash dowry was construed as *Kaikuli*.⁹⁰ Jaldeen distinguishes them and says, "where cash was offered and there was a requirement that it had to be returned, then, it was called *Kaikuli*. If on the other hand there was no such understanding it was called *Rokkam*".⁹¹ Since there was no separate column for *Rokkam* several decided cases show money as having been entered in the column for *Sridhana*.⁹²

The dower referred to in the *Quran* is the *Maskawinen* or *Maggar* noted in the Mohommeden Code of 1807.⁹³ The *Quran* obliges the husband to give the wives their dower as a free gift. "*Mahr* or dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage."⁹⁴ It is also defined

90. (1957) IV MMDLR p. 134

91. *The Muslim Law of Marriage Divorce and Maintenance in Sri Lanka*, Jaldeen, M.S. (FAMYS; Colombo, 1990) p. 85

92. *Safir v Jameela Ununa* (1956) IV MMDLR p. 105. *Jayah v Saheeda* (1957) IV MMDLR Pg. 127 *Shariffdeen v Rahuma Beebi* (1957) IV MMDLR p. 134 *Meevi Mohamed Afleen v Nona Juliaya*, (1942) II MMDLR, p. 150

93. Section 67, 68 of the Code of 1806

94. Mulla, *Principals of Mohemeden Law* (M & A Hidayathullah), Chp. XV p. 308

as property given in exchange for the usufruct of the wife.⁹⁵ Though made as a gift to the bride *Mahr* generally remains in the hands of the husband who has exclusive control and management of it until demanded by the wife.⁹⁶ The wife can demand it at anytime, even during the subsistence of the marriage.⁹⁷ When the right becomes vested in her it is not lost by any subsequent misconduct on her part.⁹⁸ If she dies *Mahr* must be paid to her heirs and on her husband's death she has a preferential claim over his estates. *Mahr* is either prompt or differed and is confirmed on consummation of marriage. It is more akin to the *donatio propter nuptias* of the Roman Dutch Law but finds no similar provision in Thesawalamai.

Apart from *Mahr* there is prevalent among the Muslims of Sri Lanka another form of dowry called *Kaikuli*. It is a system foreign to Mohammedan Law in that it finds no place in recognized authorities like Tyabji and Ameer Ali. Nevertheless it is a concept familiar to the Muslims of Sri Lanka and is generally an incidence of marriage which is recognized by the usages of the country.⁹⁹ It is defined as a sum of money given by the parents of the bride to the husband or intended husband who possesses and owns it; which however he has to pay over to the wife if she demands it, or to her heirs, if she is dead. He is, in other words, a

95. *Beebi v Pitchie* 1 MMDLR p. 84 at 86; (1924) 1 MMDLR p. 105 at 106

96. *Beebi v Pitchie*. *op. cit.* at p. 86

97. *Ibid.* at p. 86

98. *Ibid*

99. *Muslims in Sri Lanka*, H. W. Tambiah and M. Markhani p. 22

trustee of the *Kaikuli* of his wife or of her heirs.¹⁰⁰ The Muslim Marriages and Divorce Act too defines *Kaikuli* in more or less similar terms.¹⁰¹ Originally payment of *Kaikuli* was in *Kalangies* of gold but subsequently it became customary for the father of the bride to contribute or stipulate a certain sum as *Kaikuli*.¹⁰² Though usually it took the form of money sometimes immovable property was given in lieu of money.¹⁰³ *Kaikuli*, in brief, is therefore a present received by the bridegroom from the bride's father in consideration of marriage.¹⁰⁴ Unlike *Mahr*, *Kaikuli* corresponds closely to *cheedanam* under Thesawalamai.¹⁰⁵ *Mahr* on the other hand bears resemblance to the *donatio propter nuptias* of the Roman Law.

Muslim Law – *Sridhanam*

The terminology *Sridhanam* or *Seethanabbanam* too has been used in Muslim Law to denote marriage portions. The word *Sridhanam* is a Tamil word of Sanskrit origin. *Sri* means 'woman' and *Dhanam* 'wealth'. Taken together it is literally and conceptually woman's wealth or property.¹⁰⁶ The word *Sridhanam* has been taken from other systems of law and used by the Muslims in a sense different from

100. *The Muslim Law of Marriage Divorce and Maintenance in Sri Lanka*, Jaldeen, M.S. *op. cit.* p.83

101. Muslim Marriages and Divorce Act No. 13 of 1951.

102. *Zainabu Natchia v Usuf Mohamedu* (1936) II MMDLR p. 12 at p. 17

103. *Meera Saibo v Meera Saibo* 2 C.W.R. p. 263

104. *Pathumma v Idroos* (1929) I MMDLR p. 105

105. *Muslims in Sri Lanka*, Tambiah and M. Markani, *op.cit* p.22

106. *Meevi Mohamed Afleen v Nona Julaiya* (1942) II MMDLR p. 150
Also *Jayah v Saheeda* IV MMDLR p. 127 at 128

their original connotation.¹⁰⁷ As a concept however it lacks definition, for, unlike *kaikuly* it has not been defined either statutorily or judicially. Besides, when used, there is no uniformity or similarity in the legal incidence that attaches to it.¹⁰⁸ It appears that the Muslims being unfamiliar with the term *Kaikuly* used the word *Sridhanam* when they made a gift for the benefit of their daughters.¹⁰⁹ Thus what was intended as *Kaikuli* was entered in the column *Sridhanam* in the marriage registration form.¹¹⁰

Grant of dowry by way of *Sridhanam* was not confined to money payments, though it was the usual method.¹¹¹ Several cases regarding immovable property given as *Sridhanam* have come up for interpretation before *Quazis* and courts.¹¹² De Kresten J. is of the opinion that *Sridhanam* covers a wider ambit than *Kaikuly*, in that *Kaikuly* is generally the money contribution whereas *Sridhanam* encompasses immovables, movables and money. He separates the money payment and calls it *Kaikuly*.

The courts therefore had to interpret the words with reference to the intention of the parties concerned. The principle that could be deduced from such judicial pronouncements is that, where there is a conflict between the terminology used and the intention of the parties making

107. 2 C.W.R. p. 263

108. *Safir v Jameela Umma* (1956) IV MMDLR p. 105 *Meera Saibo v Meera Saibo*, 2 C.W.R. 227 at 263

109. *Meevi Mohamed Afleen. v Nona Julaiya* (1942) II MMDLR p..150

110. *Ibid*

111. *Meevi Mohamed Afleen v Nona Julaiya op. cit. Safir v Jameela Umma* (1956) *op.cit. Jayah v Saheeda* (1957) IV MMDLR p.127

112. *Sharifdeen v Rahuma Beebi* (1957)IV MMDLR p.134

the donation, the intention has to prevail.¹¹³ De Krester J. after explaining that *Sridhanam* means “gift to a woman” declared, “in the absence of any evidence showing that this gift was for any other purpose than is implied by the meaning of the word or any local custom or usage to the contrary, I would hold it as a gift to the woman the custody of which was entrusted to her for her benefit”.¹¹⁴

The need for interpretation also arose to decide whether the property given was meant to be the property of the wife left in trust with the husband or whether it was to be an absolute gift to the husband. De Sampayo J. in *Meena Saibo's* case observed, “Whatever the intrinsic meaning of the words may be, we have to take account of the meaning which the parties themselves attached to them in this particular deed”.¹¹⁵ In this case, cash and property was bestowed on the wife and termed as “*Kaikuli*” and “*Sridhanam*”. De Sampayo J. and associated with him Woodreaton J. declared that the terms were used in ignorance of their true meaning.¹¹⁶ Interpreting the terms of the deed they said that the intention was to make a gift to both the husband and wife and thus the husband became entitled to a half share. In *Zainabu Natchiya's*¹¹⁷ case the parents of a Muslim bride made payment of *Kaikuly* by two deeds in favour of the bridegroom. Though it was contended by the wife that the lands were held in trust for her by the husband it was rejected on the ground that the

113. *Jayah v Saheeda op.cit.* at p. 129

114. *Meevi Mohamed Afleen v Nona Julaiya op. cit.* at p. 151

115. *Meera Saibo v Meera Saibo* 2 C.W.R. p. 227 at 263

116. *Ibid*

117. 11 MMDLR p. 12

operative part of the deed conveyed unqualified dominion in the property to the transferee, the husband.

*Jayah v Saheeda*¹¹⁸ is a controversial judgment. In this case De Silva J. refused to agree with the view that in no circumstances could a gift described as “*Sridhanam*” be construed as a gift to the bridegroom. Such a proposition, he declared, would be too wide and finds no support from the recent decisions of the court. He came to the conclusion that “if it is clear that the intention of donor was to make an absolute gift to the bridegroom the use of the word, “*Sridhanam*,” to describe the gift is no bar to holding it to be a gift to the bridegroom”. Though De Silva J. refused to concede that it would be a contradiction in terms to describe a gift given to the man as *Sridhanam*, it is submitted that while the intention behind the gift should be given effect to, the use of the expression “*Sridhanam*” to denote a gift to the bridegroom would sound ridiculous. De Kresten J. very aptly remarked, “It may be that dowry may be given to a husband, but when it is so given, certainly it cannot bear the Tamil name, “*Sridhanam*,” which is a gift to the woman only”.¹¹⁹

Irrespective of the terminology used, *Sridhanam* or *Kaikuly*, when it amounts to a gift to the bride, though held in trust by the husband, bears close resemblance to *cheedanam* under Thesawalamai.

To add to the confusion is “*Rokkam*”, yet another term used amongst Muslims to denote payments in consideration

118. IV MMDLR p. 127 at 129

119. *Meevi Mohamed Afleen v Nona Julaiya op. cit.* at p.. 151

of marriage. “*Rokkam*” means cash or money. De Krester J. in *Meevi Mohamed Afleen v Nona Juliya* held that the *Rokkam*, entered in the *Sridhanam* column, was intended to be “a dowry gift to the daughter to be held in trust for her by the husband”.¹²⁰ The question whether *Rokkam* is *Kaikuli* came up for determination in *Safir v Jameela Umma*.¹²¹ It was held that, since the *Rokkam* given “was intended by the parties to the marriage contract to be *Sridhanam* it could not be recovered as *Kaikuli*”. It appears that, it was the intention of the granter that was considered important and not the term used. If it was intended not as *Kaikuli*, but as a donation to the husband, and the operative part of the deed vests the husband with the dominion, then, irrespective of the use of the word *Kaikuli*, it will be construed as conferring absolute dominance of the property on the husband.¹²² Apart from such gifts on marriage we see prevalent in Muslim society the practice of giving donations to the husband. As discussed in subsequent paragraphs we see the emergence of a similar concept with the nomenclature ‘donations’ in Thesawalamai too.

***Sridhana* under Hindu Law and women’s right to hold property – Early position**

Sridhana in Sanskrit means all properties owned by a woman. Sen Gupta after a brief analysis of the Vedic texts says, “Women’s property therefore in these texts enumerating *sridhanas* meant all the properties which a

120. *Supra*.

121. IV MMDLR p. 105 at p. 106

122. *Muslims in Sri Lanka*, *op.cit.* p. 22

woman could have”.¹²³ Traditionally it consisted of movables like money, jewellery and the like presented by family members and friends to the bride.¹²⁴ In order to understand the dowry system prevalent in India it is necessary to look briefly into the historical process by which woman gradually acquired the capacity to own property. According to research studies of scholars Indian women of the early Vedic period, that is, from 2500 BC to 1500 BC enjoyed equal status with men in all fields, whether it be political, social, economic or religious.¹²⁵ In this respect Coomarasamy quotes West J. as having remarked: “In the dim twilight of the early Vedic period it is possible to discern sound indications of a theory of perfect equality once subsisting between the parties to a marriage”.¹²⁶ Sen Gupta says “the position of the wife in the Vedas is an elevated one and corresponds in some measure to that of the mater-families of the early Roman Law”.¹²⁷ Radhika Coomarasamy in agreement declared that women in the early Vedic years were considered as equals

123. *Evolution of Ancient Indian Law*, University of Calcutta, Tagore Law Lectures, 1950. (Calcutta: 1953) p.130 ;See also J.D.M.Derrett *A Critique of Modern Hindu Law* (Bombay : 1970) p.193

124. Altekar. A.S. *The position of women in Hindu civilization* 217-33. (2nd edition 1987) as quoted by Gita Gopal in *Gender and Economic Inequality in India – the Legal Connection*, an article published in the Boston College Third World Law Journal. Vol. XIII Winter 1993 No.1. p 69.

125. Kamaladevi Chattopadhyay – *Indian Women's Battle for Freedom* , Chapter 1, p.9. See also A. S. Altekar *The position of women in Hindu Civilization from pre historic times to the present day*. (Banaras: Culture Publishing House. 1938); Coomarasamy *The Hindu Organ*, 3.8.1933

126. Coomarasamy *The Hindu Organ*, 3.8.1933 at p.3

127. *Evolution of Ancient Indian Law*, *op. cit.* p.102 See also V.V.Prakasa Rao and V.Nandini Rao, *The Dowry System, Marriage. The Family and Women in India*. Colombia, Missouri, 1982. p.172

with men in rituals and sacrifices.¹²⁸ Besides, according to the Vedas there was joint ownership of property by the husband and wife.¹²⁹

Women's subjugation began in the late Vedic period.¹³⁰ Kamaladevi Chattapadhya states that it was the later Aryan period, that is after 300 BC, which marked the curtailment of women's freedom.¹³¹ By the time of the actual composition of the Vedas women had been declared as incapable of reading the texts or of inheriting property.¹³² The wives were treated as chattels, in fact as cattles for producing offsprings¹³³ and were considered not fit for independence.¹³⁴ Manu states the position of the Indian women of his time in a nutshell: "Her father protects her in childhood, her husband protects her in youth, and her sons protect her in old age."¹³⁵ According to Manu woman does not deserve her freedom.¹³⁶ We see therefore that it was the Brahmin law givers who had set out the schemes which entrenched women's inequality. Prakasa Rao and Nandini Rao observe that, though it is difficult to specify the exact

128. *The Impact of Traditional Culture and Religion On Women in South Asia*, ICES, p 16-17

129. Kamaladevi Chattapadhayay, *Indian Women's Battle for Freedom - Our Heritage* New Delhi; 1983 at p.20

130. Radhika Coomarasamy *op.cit.* pp. 16-17

131. *Indian Women's Battle for Freedom op. cit.* at p. 20. See also Prakasa Rao and Padmini Rao *op. cit.* 172

132. Coomarasamy -*The Hindu Organ* of 3.8.1933

133. Sen Gupta, *op. cit* p. 102

134. Roop. L. Chaudhary, *Hindu Women's Rights to Property*, Calcutta : 1961 quoting Manu p. 3

135. As quoted by Chaudhary, *op cit.* p. 3. The author also quotes Yajnavalkya, another sage as having expressed a similar opinion. *Institutes of Narada* by Dr. J. Jolly 1876. 111. Vs.28-30.

136. Prakasa Rao and Nandini Rao *op cit.* p. 177.

chronological time as to when the deterioration in women's status started, it can be stated that the changes appeared during the age of the Brahmins.¹³⁷ Many authorities on Hindu Law, both European and Indian, believed that women in very ancient times were regarded as chattels, inferior to males and incapable of holding property.¹³⁸ Prakash Rao and Nandini Rao attribute the degradation of women mainly to denial of education to them.¹³⁹ Chaudhary also notes that the lack of capacity of females to read the Vedas and sacred texts, or *Sastras*, must have affected the status of women actually as well as formally.¹⁴⁰

The Vedic literature has very little to say about the rights of women. Only meager references are made to women's right to hold property.¹⁴¹ They too indicate to only a very few kinds of movable property consisting of ornaments of the wife, *paribanda* or domestic utensils and gifts received by the women on her wedding.¹⁴² In the *Dharmasastras* the kinds of property were increased and we find several enumerations of *Sridhana*.¹⁴³ Manu for instance enumerates six kinds of property and Visnu makes it seven.¹⁴⁴ Indian women's rights to property was a slow development marked by a growing concession of property rights just as Roman Law conceded rights to *Peculium* to

137. *The Dowry System, Marriage, the Family and Women in India op. cit* p.172

138. Roop. L. Chaudhary *Hindu Women's Rights to Property, op.cit.*, p.1

139. *op.cit.* at p.176

140. *Hindu Women's Rights to Property, op. cit.*at. p.1

141. Sen Gupta, *op. cit.* pp. 125,128

142. *Ibid.* p.126: See also J.D.M. Derrett, *op.cit.* p.193

143. *Ibid.*

144. *Ibid.*

women.¹⁴⁵ A strict order of evolution of such properties is not possible as authorities differ and there are gaps in the sequence. Property by way of inheritance or partition does not fall into *Sridhana*. It was confined to bequests and gifts by friends and relatives over which the woman had absolute rights of disposal. The rights however were not of uniform applicability. It varied from province to province and from Presidency to Presidency.¹⁴⁶ There is no legal right as such to receive *Sridhana* but it has become a customary obligation on the parents of the woman to provide the daughters with such properties, movables at the early stages and subsequently immovable also.¹⁴⁷

Development from *Sridhana* to *Varadakshina* and dowry

We have seen that presents or gifts bestowed on the daughter constituted her *Sridhana*. The tradition of bestowing gifts on daughters has become institutionalized in India for many centuries. Originally they were given voluntarily out of love and affection and worked as a sort of financial security in adverse circumstances.

An approved marriage among Hindus, both in India and Sri Lanka has always been considered a *Kanyaden* or *Kanyathanam* in Tamil, which literally means giving away

145. Sen Gupta. *op.cit.* p.128; See also Chaudhary, who states , "...gradually both their status and proprietary position were elevated..." . *op. cit.*p.1.

146. Coomarasamy, *The Hindu Organ*, 3.8.1933

147. Dr. Gita Gopal, "*Gender and Economic Inequality in India - The Legal Connection*", Boston College, Third world Law Journal, Vol: XIII, Winter, 1993 No: 1.p. 63 . at 69.

of the virgin girl.¹⁴⁸ It has been an approved practice amongst Hindus, irrespective of the form of marriage, to give a *dakshina* or *thatchanai*, [gift] in Tamil, on *Kanyaden*. The bride was decked with costly jewels and dressed in costly garments by the father who also made a present in cash or kind to the bridegroom known as the *Varadakshina*.¹⁴⁹ A royal bride referred to in *Atharvaveda* is said to have brought with her 100 cows.¹⁵⁰ Likewise brides brought horses, elephants and jewels from their parents.¹⁵¹ These presents to the bridegroom were voluntarily and without coercive overtones. It varied according to the financial position of the bride. Jaswal and Nishantha Jaswal are of the opinion that, “today it is the concept of *Varadakshina* which has taken the form dowry and converted marriage into a commercial transaction”.¹⁵² Paras Diwan however is of the opinion that both “the gifts to the bride as also to the bridegroom got entangled and later on assumed the frightening name of dowry”,¹⁵³ making most Hindu marriages a bargain. As long as dowry was voluntary it was not a financial block to marriage. But since the medieval period however, dowry demands increased significantly

148. Paras Diwan (Former Professor and Chairman, Dept. of Laws, Punjab Univ.) *The dowry prohibition law*, Journal Of The Indian Law Institute Vol 27:4 1985: p. 565

149. Paras Diwan [Former Professor and Chairman, Dept. of Laws, Punjab Univ.] *The dowry prohibition law*, Journal of the Indian Law Institute Vol 27:4 of 1985: p.565

150. Jaswal P.S. and Nishtha Jaswal [Faculty of Law, University of Jammu] *Anti-dowry legislation in India: An appraisal* , Journal of the Indian Law Institute Vol 30:1 (1988) p.78

151. *Ibid.* p.78

152. *Ibid.*

153. *The Dowry Prohibition Law, op.cit.* at p.564

reaching menacing proportions.¹⁵⁴ It has now become a prestige issue, an effort by parents to boost their self esteem and as an avenue for some families to display their economic worth and enhance their social status.

Dowry as *Varadakshina* alone, or combined with *Sridhana* became a widespread social evil, making life miserable for the bride as well as for her parents. Child marriages or forced marriages came into being as a means of avoiding heavy dowries. Very young daughters were sometimes forced to marry old men. It also resulted in spinsterhood. To mitigate the suffering of their parents some girls resorted to suicide. Where they were married it led to wife beating, torture, like being strangled, starved for days after being locked up in dingy rooms or being burnt alive. It was with a view to eradicating such evils that the Dowry Prohibition Act of 1961 was introduced.

The Indian Dowry Prohibition Act of 1961

A very brief study of selected provisions of the Act is relevant to understand not only the current position of dowry in the sub-continent but also to assess its usefulness as a guideline for prospective reform of our laws relating to *cheedanam* or dowry in general.

The Act defines dowry as, "Any property or valuable security given or agreed to be given either directly or indirectly (a) by one party to a marriage to another party to the marriage or (b) by the parents of either party to a marriage or by any other person, to either party to the

154. Prakasa Rao and Nandini Rao. *op. cit.* at p.,61

marriage or to any other person at or before or any time after the marriage in connection with the marriage of the said parties...”¹⁵⁵.

The definition appears to be very wide and encompasses all possible forms of dowry, no matter how it is termed or to whom it is given. But dowry in the Indian context is in fact “a price paid to the bridegroom’s family in connection with the marriage”.¹⁵⁶ In this respect the difference between *Sridhana*, dowry and *cheedanam* under Thesawalamai has to be noticed. While *Sridhanam* resembles *cheedanam* as it remains the property of the wife, dowry in the Indian context does not. The Dowry Prohibition Act of 1961 prohibits and penalizes the giving or taking of dowry.¹⁵⁷ Demanding a dowry, directly or indirectly is also a punishable offence. Where dowry is given or taken in contravention of the Act the consequence is not that the transaction is invalid. It only results in making the beneficial interest in it going to the wife. The taker becomes only a trustee.¹⁵⁸ Section 6 of the Act lays down that the dowry has to be transferred to the wife within three months of its receipt. The trustee therefore must hold it for the benefit of the woman. If the trustee denies it to her he is guilty of criminal breach of trust and action is maintainable under the Penal Code.¹⁵⁹ Section 6 is therefore a salutary provision

155. Section 2, Dowry prohibition Act of 1961

156. Gita Gopal. *op.cit.*, p. 69

157. Section 3 of the Dowry Prohibition Act of 1961

158. *Abbas v Kunhipathy*, AIR 1975 Kcr. 129.

159. *Bhai Sher Jang Singh v Virinder Kawr*, (1975) Cri. L. J.p. 493. (Punj and Har). Contra *Vinod Kumar v State of Punjab* AIR 1982 (Punj. and Har.) 372 over ruled in *Pratibha Rani v Suraj Kumar* A.I.R. (1985) SC 628.

of the Act. Though practice has it that dowry is a price paid to the bridegroom's family there is thus a legal provision protective of the wife's interest and it is interesting to note that courts have held that if the dowry is in the hands of the husband or his parents they hold it as trustee to the wife.¹⁶⁰ As early as 1946 the court in *T. I. Sundaram v S.I. Thandaveswara*¹⁶¹ laid an important rule. It declared that when money is paid to the father of the bridegroom as *Varadakshina* the intention that could be presumed is, not that the father should keep it and use it for his own purpose as for example to dower his own unmarried daughter but that it should "serve as a nucleus of the married couple's matrimonial estate".¹⁶² It is submitted that this view of the position of *Varadakshina* is in keeping with the general objectives of dowry. Consequently such money is held by the father as an express trustee. The Act also includes several other provisions enabling judicial intervention to the benefit of the woman.¹⁶³ Though no similar legal provisions exist in the laws of Thesawalamai the Sri Lankan courts too have used the same premise based on trust principles when deciding cases to determine rights of spouses though with regard to acquired property (*thediathettam*).¹⁶⁴

160. In *Pratibha Rani v Suraj Kumar* A.I.R. S.C..628 it was clearly observed that the *Sridhana* property of a married woman, even if it is placed in the custody of her husband or in-laws they would be deemed to be trustees and bound to return the same if and when demanded by her.

161. [1946] Trav. L.R. 224 (FB)

162. *Ibid.* See also Derret. J. D. M. *Introduction to Modern Hindu Law*. (London: Oxf. Uni, 1963) p.146

163. Sections 3 and 4.

164. Reference chapter on *Thediathettam*.

Though well intentioned, these legislative reforms have however not only proved ineffective but have also significantly adverse effects on women's rights and personal safety. By the Hindu Succession Act of 1956 women in India, regardless of whether they were married or unmarried, with or without children, were given equal right to inherit parental property. Since by legislation women gained access to family property it was regarded redundant to continue with the traditional *Sridhana* after the Divorce Prohibition Act was enacted. It appears to be a technically logical step. But it has had the adverse effect on Indian women. In Indian law a will takes priority over the devolution of property¹⁶⁵ and both spouses, without discrimination, have full testamentary powers. But in the patrilineal and patriarchal social structure of India the unrestricted testamentary powers works against the woman. The court in *Khusbir Singh v The State* declared that, "it is not unknown of Indian parents to deprive their daughters of any share of their estate".¹⁶⁶ Further, the Indian joint family or the "coparcenery" is a patrilineal family unit where three generations of patrilineal kinship live in the common household.¹⁶⁷ Coparceners acquire rights to ownership by birth and control the joint property. Women are not coparceners and have only the right to be maintained from the joint family property. The Hindu Succession Act did not do much to alter the inequitable distribution of the joint family property. It only resulted in partial amendment of the customary property rules by allowing a coparcener's interest

165. Hindu Succession Act, No: 30. (1956)

166. 1990 A.I.R 59 (Del)

167. Gita Gopal, *op. cit.* p. 80.

to devolve through a will or through the Act to a surviving female relative specified in Class I or to a male relative in Class I who claims through such female relative.¹⁶⁸ The patriarchal tradition is so rooted in India that women, despite the Hindu Succession Act, have only very meager chances of inheriting family property. Women have no protection from the parent's testamentary power to will ancestral and family property exclusively to the sons. Consequently prohibition of dowry only resulted in weakening women's access to property¹⁶⁹ as it deprived her of the only means of acquiring property.

The Act, wedding presents and *varadakshina*

The definition of dowry in the Act expressively excludes wedding presents and the like from the purview of the definition of dowry, unless they are made as consideration for the marriage.¹⁷⁰ The amendment Act of 1984 has somewhat enlarged the definition by replacing the phrase, "as consideration of marriage" with, "in connection with the marriage". Section 3 (2) of the Act now permits presents to be given to the bride or bridegroom at the time of marriage. Further, two safeguards are laid down in the Act. Firstly, that the presents be entered in a list and secondly, that the value of the presents should commensurate with the financial status of the giver.¹⁷¹ Jaswal and Nishantha Jaswal observe that "such a provision indirectly acquiesces in the practice of dowry and defeats

168. *Ibid* p. 81.

169. *Ibid* at p. 71.

170. Dowry Prohibition Act of 1961, Sec 2 : Explanation 1.

171. Sec. 3 (2) of the Act

the object of the legislation.¹⁷² Derrett is of the opinion that *Varadakshina*, which falls into this category of ceremonial presents, is in fact a bridegroom price to induce the bridegroom's family to consent to the marriage and that it should certainly fall into the definition of dowry within the meaning of the Act.¹⁷³ Parents of an unmarried man with good earning capacity would be in a position to hold him out for a high value present. Given the context of the social and religious obligation as parents to secure the marriages of their daughters at whatever cost, the gravity of the burden is imaginable. Dowry has only changed its form or name and proved that legislation is but a mere pretense. The Act, as noted above, prescribes that the presents should not be excessive. But the question that arises is, who is to determine what is excessive or whether it is commensurate with the financial status of the giver. The Act is silent and only creates a lacuna.

Effectiveness of the Act

Thirty five years have lapsed since legislation prohibited dowry in India. But the legal reforms have not been effective. The law lacks the muscle to change ancient traditions and beliefs. Bride burnings, often framed as kitchen accidents, are the commonest forms of violence on women in India.¹⁷⁴ "Eight out of ten wives can anticipate some violence either of battery at home or among the least

172. *Anti-dowry legislation in India: An appraisal op. cit.* at p.79

173. *Introduction to Modern Hindu Law*, p.146

174. Dr. Gita Gopal *op. cit.* p. 71

fortunate being murdered for a new dowry or being buried alive.”¹⁷⁵

The manifold problems and troubles facing the families across the sub continent are concerned not only with those young women on the threshold of marriage. It includes female infants and even a girl foetus. Society has taken upon itself the charge of eradicating the problems relating to dowry in the most horrendous and barbaric way possible. Hundreds of girl children, many of them new born, are ‘murdered’ by the parents themselves to overcome the future burden of providing a dowry or merely to make life more comfortable for themselves. Television is bombarding the villages said BBC reporter Emily Bichanan “for the poor villagers are being lured by television commercials and western consumerist luxuries”.¹⁷⁶ If the ultra sound scan on a pregnant Indian mother determines the foetus to be a girl it is as if gloom and doom have fallen over the family. An Indian doctor who tries to fight this trend remarked “having a daughter is as good as a death warrant”.¹⁷⁷ The pregnancy is terminated. But it does not stop with that. They will stop only after having a male child who alone, it is believed, can nurture his parent’s soul and preserve the lineage of the family. Devaki Ghanshan also notes that female foeticide is on the increase in India and asserts that it is due to traditional

175. Charlotte Bunch, *Women's Rights as Human Rights: A Revision of Human Rights*, (Social Scientists' Association) 1994 p. 5 quotes Georgina Ashworth in *Violence and Violation: Women and Human Rights*. See also Radika Coomarasamy “*The Impact of Tradition, Culture and Religion on Women in South Asia*,” *op. cit.* p. 24.

176. Quoted by Karnel Roberts, *Girl – child killing syndrome*, Sunday Island of 7th Nov. 1993 Family and Leisure Section.p.1

177. Karnel Roberts, *Girl – child killing syndrome*, Sunday Island of 7th Nov. 1993 Family and Leisure Section. p.1 See also Zanita Careem *In Nepal The bane of being born a Woman* same newspaper.

son preference and is intrinsically linked to the dowry system which has technically been illegal since 1961.¹⁷⁸

The courts have punished such offenders by imposing life imprisonment as sentence.¹⁷⁹ The Dowry Prohibition Act too has been amended by the Amendment Act of 1986 so as to empower sterner action to be taken when confronted with what is termed by the Amendment Act as “Dowry deaths”. Section 304B has been inserted as a new section in the Penal Code. This section provides that when a wife dies due to burns or other bodily injuries, it can be presumed that the husband or any relative of the husband caused the death, if the burns or injuries have been caused otherwise than under normal circumstances and within seven years of her marriage, it being also shown that soon before death she was subjected to cruelty or harassment by her husband or relatives.¹⁸⁰ The Evidence Act too has been correspondingly modified by the introduction of a new section 113B. It is widely hoped that these amendments will help bring convictions for dowry deaths.

The picture looks grim in the face of the effectiveness of the Act. But by the twentieth century the Indian woman's role began to change for the better. Several factors contributed to the emancipation. One that is generally applicable is the release of the principles of democracy and liberalism all over the world. Further, industrialization and urbanization together with women's accessibility to education

178. Devaki. M. Ghanshan, *Female foeticide and the dowry system in India*, Paper presented at the Townsville International Women's Conference – Australia; [Women's Studies Research unit, School of Social Work, University of Melbourne.]

179. *Surendra Kumar v The State* (1987: A.I.R.) SC 692

180. Section 304B of the Penal Code by the Amendment of 1986.

enhanced women's opportunities of becoming a "supplemental earner;" thereby enhancing her status in the family and society.¹⁸¹ Men began to realise that a working wife is economically advantageous. Nevertheless the covert norms based on patriarchy and age-old customs continue to impede changes to an appreciable extent. Devaki Ghansham ends with a solemn note, that though some women have made achievements in the fields of education and professions, and India has had a woman Prime Minister and a President of the UN Assembly, the fact remains that ordinary women's condition is a grim reality.¹⁸² She however indicates that reforms are in the offing in the sub-continent. The National Policy for the Empowerment of Women in India (2001) has among its objectives to eliminate all forms of discrimination against the girl child. To achieve the objective it proposes to undertake strong measures both preventive and punitive within and outside the family. The measures specifically relate to strict enforcement of laws against prenatal sex selection and the practices of female foeticide, female infanticide, child marriage, child abuse and child prostitution.¹⁸³ It is a real solace to note that the Indian courts have taken seriously the matter of female foeticide when it very recently passed sentence of imprisonment on a medical practitioner when he was found guilty of carrying out an illegal abortion on a woman after the scan report revealed that she was carrying a female fetus.¹⁸⁴

181. Prakasa Rao and Nandini Rao. *op. cit.* at p.178

182. Devaki. M. Ghanshan, [Women's studies Research unit, School of Social Work, University of Melbourne.] *Female foeticide and the dowry system in India*, Paper presented at the Townsville International Women's Conference – Australia.

183. *Ibid* at p. 4.

184. BBC news report on Television on 30th March 2006.

B. *Cheedanam*

Introduction

Dowry in the context of the Indian, Roman and Roman Dutch jurisdictions as well as in the general and personal laws of Sri Lanka were analysed in the earlier part of this chapter as a prelude to a better understanding of *cheedanam* under Thesawalamai. In this part it is proposed to identify the structure of society in which *cheedanam* originated and developed, as it provides a useful backdrop for the study of the socio-economic principles underlying *cheedanam*. A brief examination of such principles helps to comprehend easily the objectives behind the concept that gradually took the form of a custom, imposing a moral obligation on the society. The process of such an examination is interesting study for it helps one to decipher whether *cheedanam* in its original form, or in its present form, was discriminatory against or in favour of women. The chapter also makes it clear that though it is the custom and not the law which makes it obligatory on the parents to dower a daughter, yet it is the law makers, the Legislature and the judiciary, who gave it form as matrimonial property and subjected it to concepts very much alien to Thesawalamai. Such an endeavour helps to unravel how a usage which originated for the betterment of women turned detrimental to them. It is, in other words, an effort to show how *cheedanam* became dowry in the modern sense. The factors responsible or those that were conducive in bringing about this metamorphosis, which transformed *cheedanam* into a commercial transaction, are brought out in the process. The social reality would be lost if the dichromatic attitude

of the youth, or for that matter of their parents towards dowry, when debating against the practice on platforms and demanding it silently in personal lives, is not made known. This chapter also deals with the resultant social and legal impact on gender related issues regarding *cheedanam* as matrimonial property. The work seeks to emphasize that the protection and security that dowry provides, especially to women of the developing countries like ours where economic empowerment of women remains only in the realms of policy, does not make abolition the best remedy. The Indian experience of legislative reforms pertaining to dowry is also analyzed to show that legislation by itself cannot normally solve deep rooted social problems. Nonetheless, the need for legislation to provide sanctions and the mechanism necessary to combat the devastating consequences of dowry is brought out. The work does not lose sight of the fact that fundamentally there is a need to educate the public and create legal awareness in order that dowry can be understood, as in the past, as a method of providing for the newly married; and not as a commercial bargain.

Structure of society

Practice of polyandry and matriarchy

Cheedanam under Thesawalamai has an independent origin and took its form in a matriarchal system of society. It is not derived from the *Sridhana* of the Hindu Law,¹⁸⁵

185. Kantawala, M.H., *A Thesis on Thesawalamai*, (1929) p. 20.

which in fact had its origins in a patriarchal society.¹⁸⁶ The matriarchal principle underlying *cheedanam* is made clear in several provisions in the Code itself. At the commencement itself, while categorizing the different kinds of property in Thesawalamai, the Code says, “when a daughter or daughters married they should each receive dowry or *chidenam*, from the mother’s property”¹⁸⁷ Invariably therefore, the mother’s property always remained with the female heirs. Subsequent to this provision, paragraph 11 of Part 1 lays down the custom that, when on the death of the wife the husband re-marries he should leave the children and all the property of the mother that is due to them with the maternal grand-mother. The same section also provides that, when the young daughters so left with the grandmother are ready for marriage, the father should go to them and give them a dowry both from their mother’s property and from his own hereditary property; and that the sons should not claim anything from the property of their parents until the last daughter had been dowered. A more striking custom recorded in the Code¹⁸⁸ is that on death intestate and issueless of a dowered daughter her property should devolve in the female line; on her other sisters, their daughters and grand-daughters. Ehrenfels writing about the matrilineal family background in South India notes that the matrilineal order predominated not only in the West Coast of South India but also that it survived among “the early

186. Coomarasamy, *op. cit.*, 3. 8.1933; Tambiah, *Laws and Customs of the Tamils of Jaffna*, *op. cit.* p. 160;

187. Part 1 :1

188. **Part 1;5:** This provision should be now considered obsolete because of section 21 of the JMRO.

immigrants into Northern Ceylon who preserved (also linguistic) features of an earlier South Indian culture-pattern".¹⁸⁹ Raghavan, who authored several books about Ceylon and has served in the National Museum of this country, is very specific that in the early Jaffna society the tendency was to hand down the property to the female members of the family.¹⁹⁰ Tambiah accentuates the matrilineal principle underlying Thesawalamai by noting that, unlike as in Hindu Law where in the event of the wife dying intestate her property reverts to her father or brother, in Thesawalamai it devolves on her children or sister's children.¹⁹¹ K. Kanapathipillai expresses a similar opinion when he states that on the death of the wife issueless and intestate the husband cannot make any claims to it but has to leave to the wife's family her property.¹⁹²

It is generally agreed that this type of society, which traces its generation to females, originated among people

189. Ehrenfels U. R. "Matrilineal Family Background In South India", (JSTOR, Journal of Educational Sociology, Vol. 26, No. 8 (Apr., 1953) pp 356-361) Foot-note to p. 357.

190. *India in Ceylonese History, Society and Culture*, (Indian Council for Cultural Relations; Asia Publishing House 1964) p. 174.; See also Coomarasamy, *The Hindu Organ*, 6.7.1933; Tambiahs H. W., *The Laws And Custom Of The Tamils Of Jaffna*, (Colombo: The Times of Ceylon, First edition] p.160; Arasaratnam, *Ceylon*, chapter 3, *Tamils of Ceylon*, p. 108

191. Tambiah, H. W., "Tamil Culture in Ceylon." (1971) p. 206.

192. "The Habits and Customs of Jaffna" (Tamil) (Kumaran Press, Colombo, Chennai. 2001)

who practiced polyandry.¹⁹³ As a mode of life polyandry marked the original phase in the social evolution, where the woman as mother and wife was the nucleus of the family. The ancient rule appears to have been for the woman to remain in her house and be visited by her so called husbands.¹⁹⁴ Starke seems to agree with the often made assertion that there was no marriage among primitive men and that they were contented with such a temporary connection, where the men did not marry but frequented houses as suitors, without ceasing to live at home and without being in any degree detached from the maternal family.¹⁹⁵

Polyandry, associated as it is with matriarchy, is inter-linked with the system of inheritance in the female line. In a society where the bond of a marriage relationship was not in vogue and only a loose pattern of relationship was in existence the children happened to know only their mother. The men who fathered the children never looked upon them

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193. Lewis Moore, *Malabar Laws and Customs*, (Madras: Higginbothams, 1905.) p.56. ; Heinz Bechert , *Mother Right And Succession To The Throne In Malabar And Ceylon*. (The Ceylon Journal of Historical and Social Studies, Volume 6, No: 1, [1963] p. 28 [Article translated from German into English by K. Kanapathippillai.]. See also M.D. Raghavan. *India in Ceylonese History, Society and Culture* (1964) at p.150. He analyses matrilineal societies in Kerala and *Binna* marriages amongst the Singhalese of Ceylon; F.A.Hayley, *A Treatise on The Laws and Customs of the Sinhalese*. [Navarang: (1923) New Delhi , Re-printed 1993] p.167; Kathleen Gough, Changing Households in Kerala, Prof. K. M. Kapadia Commemorative Issue, 1974
194. Lewis Moore, *Malabar Laws and Customs op. cit.* p.56 ; Kamaladevi Chattopadthay, *Indian Women's Battle for freedom*, p. 1; Heinz Bechert, *Mother Right And Succession To The Throne In Malabar And Ceylon* . p. 25 (The Ceylon Journal of Historical and Social Studies, Volume 6. No. 1. 1963)
195. "The primitive family", International Scientific series, volume LXVI, p. 81. (Kyan Paul, Trench and Co 1989)

as their offsprings,¹⁹⁶ even if strong resemblances existed. In such a set up it is natural that the property remained in the family of the mother. The father not owning the children bequeathed no property to the children. Inheritance to property was therefore based purely on mother- right.¹⁹⁷ Starke declared that the primitive character of the female line of succession had been on the assertion of the loose or temporary relationship of men and women.¹⁹⁸

This type of social living appears to have been an accepted feature of ancient societies all over the world¹⁹⁹ and it appears to have existed in primitive times amongst many races of India and Sri Lanka as well.²⁰⁰ In relation to India it is agreed that it was in existence in the Northern, Northeastern and amongst peoples and tribes of Southwest India.²⁰¹ It is of importance to note that it was most widespread amongst the Nayar (Nair) caste of Kerala.²⁰² Lewis Moore, giving expression to the opinion of European writers, says that it was generally agreed by them that the system of inheritance in the female line that was prevalent

196. Heinz Bechert, *op. cit.*, p.25

197. *Ibid.*

198. *The Primitive Family*, *op. cit.* p .81.

199. Sir Henry Maine, " I should be sorry to have it supposed that I doubt the existence of Polyandry, and especially in the plurality of husbands who were brothers, as an occasional practice of the ancient world", *Early Laws and customs*, (London: John Murray, 1907) p. 123; Kamaladevi Chattopadhyay, *op.cit.*, p.11

200. Hayley, *op. cit.*, p.164

201. Heinz Bechert, *op. cit.* p. 28

202. *Ibid.* See also Chic Nakane, (University of Tokyo, Japan) *The Nayar Family in a Disintegrating Matrilineal System*, International Studies in Sociology and Social Anthropology, Vol. 1 *Family and Marriage*, p.22; H.Parker, *Ancient Ceylon*, (New Delhi, Madras, AES, Re print 1999)

among the Nayars must have originated “from a type of polyandry resembling what is termed free love”.²⁰³

In relation to Sri Lanka, associate husbands was a common feature in Kandyan society and “it was not merely tolerated but openly recognized and approved.”²⁰⁴ The earliest inhabitants of the northern most part of Ceylon had been those identified as the Nagas.²⁰⁵ As to whether the Nagas were polyandrous is a matter of conjecture. Kapadia gives an explanation of the social structure of the Nagas on

203. *Malabar Laws and Customs*, *op. cit.* p. 56 ; Heinz Bechert writing about the Nayar (Nair) caste of Kerala and their polyandrous style of living remarks that the husband was considered only as a casual visitor of his ‘wife’. *Op. cit.* p. 25. For a more detail account about the Nayars’ social structure see Adrian C. Mayer “*Land and Society in Malabar*”, chapter 11, *The social system in Malabar*. (Bombay, London and New York; Oxford University Press, under the auspices of the International Secretariat, Institute of Pacific Relations.1952) pp 25-155; A. R. Kutty, *Marriage and Kinship in an Island Society*, Delhi:National Publishing House. 1972) Introduction and Chp. V.

204. Hayley, *op. cit.* p. 170, 172

205. Whether they were the original settlers of ancient Ceylon or indigenous to the island are matters clouded in history. But several scholars like Muthucumaraswamipillai, *The Colonisation of Jaffna – From Ancient Time to the Dutch period.*(in Tamil) Publisher M. Muthukumaraswamipillai, Pulavarakam, Chunnakam, Jaffna, 1982. [Formerly Lecturer in Tamil. Loyala College, Chennai, and Principal, Hindu College Araly, Jaffna] p.4; Mudaliyar C. Rasanayagam, *Ancient Jaffna, p.1.*; Tennent James Emerson, *Ceylon* (Dehiwala, Tisara Prakasakayo, 1859, 6th edn. p. 283; Swamy Gnanapragasar *A critical history of Jaffna, The Tamil Era* (New Delhi, Madras, AES Re print 2002.) p.20-21; *Mahavamsa*. i.; Dr. K. Kunarasa, *The Jaffna Dynasty*, (Colombo, Dynasty of Jaffna Kings’Historical Society, 2003) pp. 2-28 ; Swami Gnana Prakasar, “*Ceylon originally a land of Dravidians*”, say that there is a wealth of information in the form of traditional legends, chronicles (*Mahavamsa*) pre-historic ruins from Munisvaram in Chilaw up to Jaffna relating to Naga settlements.

the basis of a matrilineal system.²⁰⁶ So does Heinz Bechert who declares that the "Aryan immigrants brought the patriarchal family system, while the older inhabitants whom we described as the Nagas, were the bearers of the mother-right system."²⁰⁷ As noted, polyandry, matriarchy and matrilineal rights to inheritance are all so closely interconnected that with respect to ancient Jaffna too it gives rise to a presumption that this society could have passed through these phases. The fact that like the Nagas²⁰⁸ the Nayars too were serpent worshippers²⁰⁹ and both, as above noted, were adherents of a matrilineal form of society are thus matters which cannot be easily ignored with respect to the nature of the early society of Jaffna. Parker however ventures a step further and attempts to associate the Nagas to the Nayers by suggesting that the Nagas who occupied Northern Ceylon were an off-shoot of the Nayars of South

206. K. M. Kapadia, *The Matrilineal Social Organisation of the Nagas of Assam*, (Bombay India, Sociological Bulletin, Feb. 1951)

207. *Mother Right and Succession to the Throne in Malabar and Ceylon*", *op. cit.* p. 33; Kunarasa, K., *The Jaffna Dynasty* (Jaffna : Dynasty Of Jaffna Kings' Historical Society, 2003) citing Navaratnam, C.S. *Tamils and Ceylon*, (1958, Jaffna) says that the settlements had been ruled as a patriarchal kingdom. Note should be had that it does not indicate that the settlers were patriarchal.

208. Tennent, *op. cit.* p.283; Swami Gnanapirakasas, *Ceylon originally a land of Dravidians*, p.29; See by same author *A Critical History of Jaffna*, p. 20; Dr. Kunarasa, *Eelzhaththavar Varalaaru* - in Tamil (Poopalasingam Publishers Ltd. Colombo) p.11;

209. Lewis Moore, *op. cit.* pp.2 -3; Tambiah, *Laws and customs of the Tamils of Jaffna*, *op. cit.* p.11; Dr. Kunarasa, K., *op.cit.* p.6

India.²¹⁰ Muthucumaraswamypillai however refutes the theory and opines that it would be more appropriate to say that the Nagas subsequently got mingled with the Nayers.²¹¹ As to the Nayar's affiliation with the matrilineal system and their connection with Jaffna, a fuller discussion follows with the analysis of matriarchy, Marumakkalthayam Law and the Jaffna society.

There is general consensus that apart from the Nagas the northern part of Ceylon was peopled by also the Mukkuwas.²¹² They belong to the fisher caste and are considered as one of the indigenous people of Malabar²¹³ who migrated to north Ceylon from Malabar before the Christian era.²¹⁴ They seem to have been ordered out from the coastal areas of Keerimalai, Jaffna by King Pandu on allegations that they were desecrating the holy place close

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210. Parker. H. *Ancient Ceylon*, AES, (1999 ed.) Reprint. p.16. He bases his suggestion on grounds of first the identity of the name of Nagas to Nayers and secondly by reason of the existence of some social features resembling those of the Indian Nayers amongst the Kandyan Sinhalese. He refers especially to the practice of polyandry, the elasticity of marriages, re-marriage of wives and widows, and the absence of Sati and conjectures that they should have been introduced through the Nagas who once inhabited not only the northern but also the western parts of Ceylon; Tennent, *op. cit.*, 6th ed. vol: 1. p. 283
211. *Colonisation of Jaffna* (Author-Publisher, Chunnakam, Jaffna, 1982)
212. Mailvaganapulavar, *Yaalpaana Vypavamaalai*, with notes by Mudaliyar Kula Sabanathan, pp. 9-10 ; Nadaraja T. *The Legal System of Ceylon in its Historical Setting*, (1972) p. 187; Tambiah, *Laws and customs of the Tamils of Ceylon*, *op. cit.* pp. 8-11
213. Lewis Moore, *op. cit.* p.7 ; He says the Nayars of Malabar are immigrants from the north of India.
214. Tambiah, *Laws and Customs of the Tamils of Jaffna* *op. cit.* p. 11. He also says that the Mukkuwas of Ceylon are Tamils. See also Heinz Bechert, *op. cit.* p.30.

to the temple.²¹⁵ The Mukkuwas, in their social life were purely matriarchal. Accordingly the Mukkuwa law represents a mother-right legal system. Tambiah expresses the opinion that it is more probable that the Nayars adopted the customs of the Mukkuwas, the indigenous people of Malabar.²¹⁶ Notwithstanding the present situation of the Mukkuwas and the position of the Mukkuwa law in this country,²¹⁷ what is of importance to our analysis is the fact that the early inhabitants of north Ceylon, whether they be the Nagas, Mukkuwas or Nayars, all came from the Malabar coast and were matrilineal. Thus it is not surprising that *cheedanam* took form as a custom in this type of society.

Matriarchy, the Marumakkalthayam Law and the Jaffna society

The practice of giving *Cheedanam*, as noted, can be traced to the origins of the Jaffna society at its matriarchal stage of social evolution. A study of the process of its social evolution is necessary to understand the concept, as it originated and subsequently developed. The views of several historians and scholars have been that, Jaffna with its close proximity to the Tamil land of South India would have been

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215. Brito C. *The Yallpana – Vaipava – Malai* (Translation, AES Re print, 1999) Heinz Bechert, op.cit. p.30
216. Laws and Customs of the Tamils of Jaffna, op. cit. p. 11; see also Raghavan, M. D. *Malabar Inhabitants of Jaffna: A Study in the Sociology of the Jaffna Peninsula*, (Royal Asiatic Society, Sir Paul Pieris Felicitation Vol: 1956) p. 124
217. The Mukkuwa law was applicable to these people till it was impliedly abrogated by the enactment of the Matrimonial Rights and Inheritance Ordinance in 1876. The Thesawalamai now applies to the Mukkuwas of Jaffna.

occupied by the maritime Tamils of India earlier than by other racial elements.²¹⁸ Sir Paul Pieris, a renowned scholar, accepts that the North of Ceylon was a flourishing settlement centuries before Vijaya was born or at any rate before the commencement of the Christian era.²¹⁹ Raghavan comments that these observations have been sustained by the remarks of Emerson Tennett that, “Jaffna has been peopled by Tamils for at least two thousand years, the original settlement being of a date coeval with the earliest Malabar invasion of the island...”.²²⁰

Coomarasamy who traces the traditional accounts of the history of Jaffna from the *Kalyanamalai* and the *Vaipavamalai*, states that the first of the two colonisations of early Jaffna was on an extensive scale from Malabar on

218. *India in Ceylon History, Society and Culture*, Raghavan MD; (Indian Council for Cultural Relations; Asia Publishing House) 1964.p.55; Coomarasamy, *op.cit.*, 23.10.33 ; Dr. S. Arsaratnam, “*Ceylon*”, (Prontice Hall, Inc, Eglewood-cliffs, New Jersey; Chp: 3. “*Tamils Of Ceylon*” p. 108; H. W. Tambiah, *Principles of Ceylon Law*, p. 214 ; Tennent.J.E. *Ceylon*, (Dehiwala , Usara Prakasakayo Ltd. 1971) 6th edn. Vol, I, p.350-351 ; Dr. G.C.Mendis, “*Ceylon to-day and yesterday*”, (Associated Newspapers of Ceylon Ltd, Lake House Colombo, 1957) He points out the geographical proximity to India to trace the origins of the early settlers of the island from Malabar and the Coromondel coasts of South India. He says thus, “...though Ceylon is an island, it is geographically a projection of the Deccan with two zones corresponding to the Malabar and the Corromondel regions. The early settlers too corresponded to the races in India and definitely came to Ceylon from there” .

219. *Journal of the Royal Asiatic Society*, (C.B.)Vol.XXVIII) , pp. 72,65 as quoted by Raghavan, *op.cit.* p.55

220. Raghavan quotes Tennent in, *Ceylon* , vol. 11, p..539.

the western coast of South India.²²¹ This part of India covered the Indian states of Travancore and Cochin and the district of Malabar and South Canara which formed the ancient kingdom of Kerala.²²²

Claas Isaaksz, Dissawe of Jaffna in his compilation of the customary laws of the Tamils of Jaffna, refers to Thesawalamai as the “Malabar” laws and customs, and the people to whom it applied as the “Malabar” inhabitants of Jaffna.²²³ The word ‘Malabar’ used to refer to the inhabitants of Jaffna raised some controversy.²²⁴ It is however now judicially settled that Malabar means the Tamil

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221. 23. 10. 33 ; See also Nadarasa.K.S *Vyapaadal An Anlysis* (Colombo, Tamil Sangam, 1980) pp. 20 – 34 ; Mudaliyar Kula. Sabanathan, *Yalpana Vypavamalai, Research notes*, Colombo:1953) pp. 4, 24 27. Brito's Translation of the *Yalpana-Vaipava-Malai or The History Of The Kingdom of Jaffna*, (AES, New Delhi, Madras, 1999); Tambiah. H. W. *Laws and customs of the Tamils of Jaffna*, *Op. cit.* p. 12; Swamy Gnanapirakasar, *A critical History of Jaffna*, *op. cit.* Raghavan notes that it would not be in the true nature of things to divide the two colonisations into two stages or epochs in the history of Jaffna, as done by several writers. *The Malabar Inhabitants of Jaffna: A study in the Sociology of the Jaffna Peninsula*, *op. cit.* p.126 ; It is submitted that colonisation in the form of infiltrations and settlement of small colonies must have occurred over a period of time, marked perhaps by historical incidents or epochs, like the arrival of the blind flutist and the establishment of the kingdom of Jaffna by Arya Chakkravati in the middle of the thirteenth century.
222. H.W. Tambiah, *Laws and Customs of the Tamils of Ceylon* (Tamil Cultural Society: Ceylon. 1954.) p.129. Raghvan, *op. cit.* p. 147. Arsaratnam, Ceylon, *Op. cit.* p.102
223. Coomarasamy, Article titled *Thesawalamai- it's Genesis and Development*, Hindu Organ, 19.6.33.
224. In the foot-note to *Tillainathan et al. v Ramasamy Chetty, et. al.* (1900) 4 N. L. R. 328 at p.333 ; *Chetty v Chetty*, (1935) 37 N.L.R. 253 ; Simon Casie Chetty, *The castes, customs, manners and literature of the Tamils of Ceylon*, (1934, Re print, New Delhi Madras, AES. 1985.)

inhabitants of Jaffna.²²⁵ Claas Isaaksz's reference to the inhabitants of Jaffna, in the preface to the Thesawalamai Code, as **Malabar or Tamil inhabitants**²²⁶ [emphasis added] appears to make more sense. What is clear is that Thesawalamai applies to Tamils who have come from the Malabar coast as well as from the Chola, Chera, and Pandya kingdoms. Nevertheless, as Soertsz J in *Tharmalingam Chetty v Arunasalem Chetty* puts it "...but all of them displaying a preponderant Malabar bias in the matter of customs and principles, the majority of them or the most

225. Tambiah, commenting on the opinion expressed by Sir Ponnambam Ramanathan in 4 N.L.R. p.328 at 333 that the Tamils came from the east coast (called by the Dutch the Coromandel coast) and that it is an error to speak of the Tamils as Malabars, says that, the Malabars as such were not regarded as a distinct race from the Tamils in ancient times and that many Europeans used the word 'Malabar' as synonymous with Tamil. As to the point of difference in language raised by Sir P. Ramanathan, Tambiah explains that the Malayalam language is an off-shoot of the Tamil language, *Laws and customs of the Tamils of Jaffna op. cit.* p.52; Arsaratnam makes it more explicit by his words that, "The people of Malabar, from whom these early immigrants were drawn, broke away from the mainstream of the Tamil language by evolving a separate language for themselves (Malayalam) from the twelfth century onward", *Ceylon, Op. cit* p. 102.; It should be noted that history has on record that the Tamil homelands of South India in ancient times corresponded to what are to-day the states of Madras and Kerala; a stretch of land from the eastern and western coasts which in different times comprised the Chola, Chera and Pandyan kingdoms of South India...Tennent, *op. cit.* p. 335; William Logan says that the whole of South India, including Kerala in the seventh century A.D. were under the sway of the Pallavas of Conjeevaram and that the Tamil and Malayalam languages were in those days practically identical. *Malabar*, Volume I, Chapter 1, p. 257 See also Raghavan, *The Malabar Inhabitants of Jaffna, op. cit.*, p.p.123 -124; See also *Tesawalamai* Commission Report - 1920 p. 3.

226. Tambiah, *Laws And Customs of The Tamils of Jaffna, op. cit.* p. 54; Soertsz J. in *Tharmalingam Chetty v Arunachalam Chetty*, 45 N.L.R. 414 at 416.

influential of them being of Malabar origin".²²⁷ His Lordship explains the position further. He says, "It is difficult to read such well known authorities as Lewis Moore, Mayne and others without being convinced of the Malabar origin of most of the customs collected by Claasz Isac as radically different from the customs appertaining to the general Hindu Law which obtained in other parts of the Deccan. And that fact leads almost inevitably to the inference that even those Tamils who had come from other parts of India such as the Coromandel Coast, adopted the Malabar customs".²²⁸ His Lordship's explanation makes it easier to understand Coomarasamy when he refers to the Malabars as the first colonists of Jaffna who brought with them the customs and usages of the Dravidians in their matriarchal stage.²²⁹ Raghavan makes reference to a manuscript²³⁰ which contains folk stories about migrations of people from Malabar. He concludes by saying that, "All this indicates that their presence may have been just the chance of a mercenary career".²³¹

The early colonists, who were men attracted by the opportunities of making a living in Ceylon seem to have

227. *Tharmalingam Chetty v Arunachalam Chetty*, 45 N.L.R. p. 414 at 416.

228. *Ibid*; See also Arsaratnam, *Ceylon*, *Op. cit.* p. 102

229. *Thesawalambe And Its Origin*, The Hindu Organ, 21-12-33, p. 3.

230. Ms (0-6) Colombo Museum Library.

231. He refers specifically to the story of the Seven Malabar Princes, called the *Malala Kathava*; the term *malala* being a Sinhalese form of Malabar and the people referred to as Malayalees or Malayalis and as people trained in arms. He also refers to the Sinhalese manuscripts-the Vittipot and the Kadayampot—which speaks of the Malala princes bringing presents to the king of Ceylon and seeking refuge in Ceylon. *Op. cit.* pp. 185-186.

been initially traders, and professional soldiers - the Nayars of Kerala. William Logan notes that “the ruling caste of Nayars were already settled in Malabar in the early centuries A.D. and may possibly have been on the coast at a very much earlier period”. Arsaratnam says that there were two types of immigration by the Tamils: the peaceful settlers and the invaders.²³² There is reference to a flourishing trade in the northern part of Ceylon, around Anuradhapura, and of the establishment of colonies of Tamil merchants, apart from the indigenous merchants.²³³ Scholars of history have recorded the existence of large Tamil colonies in the harbour areas and in the capital city in the early period where these colonists had continued with their practices regarding their ways of life, language and religion.²³⁴ It appears that by the tenth century the first stage of Tamil settlements was complete.²³⁵ Muthucumaraswamipillai is more with details when he says that traders from the Chera kingdom (roughly comprises modern Kerala; Malabar is now a part of Kerala) came over and traded with men from the south who brought the goods on backs of bulls and that as a result there occurred close connections between Chera and Jaffna.²³⁶ This

232. William Logan, *Malabar, Volume 1, chapter 1*, p. 257; *Ceylon*, *op. cit.* p. 100.

233. K.M.De Silva, *A History Of Sri Lanka*, (Delhi, Oxford University Press: 1981) p. 43. He also expresses the opinion that the earliest attempts of Dravidian adventurers to seize power by men like Sena and Guttika, Elara and Bhalluka and others during the time of Vattagamini may have had trade as one of their objectives.

234. Arsaratnam, *op. cit.* pp. 100, 101; He also refers to Mantota as a port of call of traders and to evidence of a Tamil householder's terrace discovered in Anuradhapura. with inscriptions labeling the seats of the members., p. 100.

235. *Ibid.*, p.102

236. *The Colonisation of Jaffna*, (In Tamil) *Op. cit.* pp. 8-9

connection, he says, greatly facilitated settlement from this area into Jaffna.

The Nayars were the free lance fighting men of Kerala who reinforced the army of the ruling Tamil chiefs in South India²³⁷ and were also absorbed into the armies involved in the internecine wars and expeditions of South India from time to time against Ceylon, which history has on record.²³⁸ It appears probable that with the break-up of the Chera kingdom these soldiers who had tasted free lance life crossed over to Ceylon either to settle to a peaceful life in the island or to step up their career by taking service under Sinhalese princes."²³⁹ It also appears that these mercenaries, when they were not paid by the princes, deserted their armies, went to Jaffna and settled there to peaceful life.²⁴⁰ Mayne, who is perhaps the first writer to point out the remarkable similarity between the Thesawalamai and the Marumakkalthayam Law says, "that there has been a constant stream of emigration of Tamilians into Ceylon formerly for conquest and latterly for commerce".²⁴¹

237. William Logan, *The Malabar Manual*, vol. 1 pp. 256-257; Lewis Moore, *op.cit.* p. 64 ; Dr. Mrs. Prabha Chopra, *A panorama of Indian Culture*, p.1.

238. G.C. Mendis, *The Early History of Ceylon*, (1940) pp. 10-11 ; G.C. Mendis, *Ceylon To-day and Yesterday*, (Colombo: Associated newspapers of Ceylon, 1957) pp.19-25 ; Raghavan, *India in Ceylonese History , Society and Culture*, *op.cit.* pp.147-148

239. Raghavan, *op.cit.* pp. 148, 185

240. Muthucumaraswamypillai *op. cit.* p. 9 ; Tennent says that these men trained to arms in Malabar came in large numbers and were used in civil commotions to depose or restore kings at their pleasure, *Op. cit.* p. 338, 339

241. *A Treatise on Hindu Law and Usage, Nature and origin of Hindu Law*, (8th edition, 1914) p.48. See also Raghavan, *India in Ceylonese History , Society and Culture*, *op. cit.* p.174.

As analysed, since tradition and history has it that the original settlers of Jaffna were from the Malabar coast, it becomes necessary to see to what extent the customs of Malabar and its people influenced the social life and mode of living of the people of Jaffna. The customs of a number of castes in Kerala on the Malabar coast are based on a mother-right legal system known as Marumakkalthayam²⁴² and it is most widespread amongst the Nayar caste.²⁴³ The domestic or family unit of these men was the *taward*, a matrilineal joint family organization with a system of inheritance in the female line. Lewis Moore opines that such a system “must have originated from a type of polyandry resembling what is free love”²⁴⁴ and accepting that it was popular with the Nayars propounded several theories as to its origin amongst them.²⁴⁵ Whatever may be the theories there can be no doubt that it suited their warlike propensities.

242. Sreedhara Variar, *Marumakkalthayam and Allied Systems of Law in the Kerala State*, (1996, 1st ed. Introduction, pp. 3-5 Heinz Bechert, *op.cit.* p.25;

243. Prabha Chopra, “A *Panorama of Indian Culture*”, at p.1 notes thus : “... the Nairs who were originally the fighting men to the ruling chiefs”. ; M.D.Raghavan, *India in Ceylonese History, Society and Culture*, *op.cit.* p. 150.

244. *Malabar Laws and Customs*, p 56. See also Lewis Moore *op. cit* p. 65 where he cites report by Mr. Warden, Collector of Malabar from 1804 – 1816 wherein he states thus, “ The profession of arms by birth, subjecting the male of a whole race to military service from the earliest youth to the decline of mankind was a system of polity utterly incompatible with the existence amongst them of the marriage state”. See also Kathleen Gough writing about the Nayar household states that “ both men and women were permitted more than one spouse at a time and husbands visited their wives at night or in leisure hours in the wives natal homes”. *Changing house-holds in Kerala*, Article published in *Explorations in the family and others*, the Commemorative issue of Prof: K.M. Kapadia. (1974) at p. 225.

245. Lewis Moore, *op. cit.* p. 62.

Attachment to wives and children would not have been helpful to men duty-bound to meet the calls to the battle-field. Without matrimony the common Hindu laws of inheritance were also incompatible. Relationship was counted only by female consanguinity and descent, for, the Nayar men never looked upon the children born of their mistresses as theirs.

This having been the pattern of family living in their places of origin, the professional warriors, the Nayars, naturally adopted it in their new place of abode where they settled to peaceful living.²⁴⁶ As discussed in the foregoing pages, it appears that polyandry and associated with it matriarchy, were also wide spread in Ceylon.²⁴⁷ Many of the usages and customs of the Tamils as well of the Sinhalese, are ultimately traceable to Kerala and of significance is the connection between the Marumakkalthayam law of Malabar, the dowry system of Jaffna and the Binna marriage system of the Kandyans.²⁴⁸ Several marriage customs of the Sinhalese as well as of the Hindu Tamils show close correspondence to that of Kerala, as for example the pouring of water from a *sembu* or *kindi* on the feet of the bridegroom as he arrives in procession and the giving of a gold or silver coin by him in return.²⁴⁹

It is admitted that the "customs and usages of the Malabar inhabitants constitute the main basis and ground

246. Lewis Moore, *op. cit.* p. 148.

247. Heinz Bechert, *op. cit.* p. 31.

248. Raghvan, M. D. *India in Ceylonese History, Society and Culture*, *op. cit.* pp 150 – 160. Coomarasamy, *op. cit.* 6.7. 1933.

249. Raghavan, *India in Ceylonese History, Society and Culture*, *op. cit.* p 151.

work of the law of Thesawalamai".²⁵⁰ The vast majority of the Hindus of Kerala follow customary laws [most of which are now codified] like the Marumakkalthayam Law, Namburdi Law or the Aliasantana Law; of which the Marumakkalthayam Law based on the matrilineal system and preserved in its purest form is of prime importance and administered by the courts in these areas.²⁵¹ Tambiah concludes that Thesawalamai is an off-shoot of the Marumakkalthayam Law.²⁵² Mayne is of the view that there exists remarkable similarity of the Marumakkalthayam law in Malabar to the usages of the Tamil inhabitants of the North of Ceylon, as stated in the Thesawalamai.²⁵³ The Code embodies several principles which are clearly traceable to a state of society in which the tendency was to hand down the property to the females of a family from generation to generation. Part 1:1 of the Code provides that the mother's dowry or *cheedanam* goes to the daughters in similar capacity. The practice of giving *cheedanam* had acquired such a place of importance that it seems to have been the accepted norm that the sons could not claim anything by way of inheritance until the last daughter was dowered and take only whatever remained thereafter.²⁵⁴ Such undue

250. Mayne, Hindu Law, 7th ed. p. 3 ; Raghvan, M. D. *India in Ceylonese History, Society and Culture*, op.cit. pp. 174 – 181 ; Coomarasamy, op.cit. 19.6.1933 ; Tambiah H.W. *Laws and customs of the Tamils of Jaffna* . op. cit. pp 12 – 20.

251. Sreedhara Variar, *Marumakkalthayam and Allied Systems of Law in the Kerala State* (1969), 1st ed, Introduction, pp.3 -5

252. *Laws and Customs of the Tamils of Jaffna*, p. 20.

253. *A Treatise on Hindu Law and Usage, Nature and origin of Hindu Law*, (7th edition, 1914) p. 3

254. Code, 1:9 and 1:11; *Nagaretnam v Alagaretnam*, (1911) 14 N.L.R. 60, *Thambapillai v Chinnatamby* (1915) 18 N.L.R. 348, *Sinnathangachy v Poopathy* (1934) 36 N.L.R. 103, etc.

importance placed on the right of a daughter to receive a dowry, and the precedence given to it over rights to inheritance by the sons, are not features which can appear out of place in a matriarchal society. The principle of females succeeding females²⁵⁵ and a dowered sister and her descendents inheriting or succeeding another dowered sister on her death to the exclusion of the brothers²⁵⁶ and the principle of reversion of property to the source²⁵⁷ are all indicative of the influence of matriarchal principles of a polyandrous society. The customs which endowed the daughters with preferential rights to parental property also imposed on them the obligation to support the parents. Mutukisna notes that, "The country customs say that if the parents would give all their property away in dower, and they have nothing left to support themselves, the daughters must support them. The general custom is for the parents to reside with one of the daughters and the others (if there be any) jointly to contribute to their support".²⁵⁸ Apart from reflecting a matriarchal based family living the customs bring a fine principle of jurisprudence that rights and duties (between parents and children) are reciprocal.

255. Code 1:1., 1:5

256. 1:5; *Kuddiar v Sinnar*, 17 N.L.R. 243; *Thambar v Chinnatamby* (1903) 4 Tamb 60; *Thiagarajah v Paranchotipillai* 11 N.L.R. 46; *Francis Daniel David v David et al* (1929) 31 N.L.R. 266 at 268; Mutukisna, *The Thesawalamai*, *Daniel David v David* (Colombo: Ceylon Times Office) p.103. Evidence of custom was given where it was said that the married sister inherits alone the dower of such of the married sisters who died without children.

257. Code, 1:15.

258. Mutukisna, *The Thesawalamai*, at p. 136.

Parallel to these rules the Code also embodies rules pertaining to exclusive male succession.²⁵⁹ Reference to the second colonisation mentioned by Coomarasamy and other scholars become relevant here.²⁶⁰ Philippus Baldaeus making note of the areas in which Cingalesche, [as he refers to the Sinhalese] was spoken states, “But in other parts of the island which are contiguous to the Coromendal coast *Malabarsche* is the prevailing language. I have heard it often asserted by the inhabitants of the Jafnapatnam that, that part of the country was in times past peopled from the Coromendel coast and hence the dialect of their fatherland.”²⁶¹ Thus, though Thesawalamai is called by Claas Isaac as a compilation of the customs and usages of the Malabar inhabitants of Jaffna it is an over emphasis as history shows that there was a second wave of colonisation in the middle of the thirteenth century from the Coromondel coast on the East of India. They were Tamils and followers of the Hindu religion. Due to Brahminical influence a patriarchal form of society had taken root there. When these colonists came over to Jaffna they brought with them such customs based on a patriarchal system of society. But there was already in existence in Jaffna, for seven to eight centuries the matriarchal system of society in which the right of the female to a dowry on marriage and the principle of female succession had become embedded and recognised as customs and usages having the force of law. What then

259. I:7;

260. *Infra*, notes 309 -313 ;.

261. *The true and exact description of the Great Island of Ceylon*. The author accompanied the expeditions against the Portuguese in 1658. The book was published in Dutch in Amsterdam in 1672. (trans. Pieter Brohier. (Dehiwala: Sri Lanka, 1960) p. 287

occurred was a smooth fusion of concepts of the two systems. Thus the Thesawalamai we have to-day is a compromise and blend of the matriarchal and patriarchal systems.

The family under Marumakkalthayam Law

A brief over view of the fundamental principles of the Marumakkalthayam law of Malabar is therefore made necessary to fully comprehend the principles underlying *cheedanam* under Thesawalamai. Marumakkalthayam Law, as noted, is based on principles of a mother-right family system.²⁶² The Marumakkalthayam family, termed the *taward* consists of all the descendents of the family line of one common ancestor, in fact an ancestress, the other being the Aliasanthana Law. *Marumakkal* in Tamil refers to nieces and nephews and in the context of Marumakkalthayam Law which recognises only descent through females, it means sister's children.²⁶³ A father's property did not devolve on his offspring but on his nieces and nephews.²⁶⁴ This system finds recognition especially amongst the Nair community of the Kerala State who

262. Sreedhara Variar, *Marumakkalthayam and allied systems of law in the Kerala State*, (Published by author, India: 1969) Introduction, p. 4 ; Lewis Moore, *op. cit.* pp. 64-65; Raghavan, *India in Ceylonese History, society and Culture*, *op. cit.* p. 150; Heinsz Bechert, *op. cit.* p. 25; Coomarasamy *The Hindu Organ*, 21-12 1933

263. Sreedhara Variar, *op.cit.* p 4

264. William Logan described it as closely corresponding to what the Romans called the *gens*, with the marked distinction that whereas in the Roman system all members of the *gens* traced their descent in the male line from a common ancestor, in Malabar the members of the *taward* trace their descent in the female line, from a common ancestress. *Malabar Manual*, (Volume1, First edition,1887) p. 153.

developed it more logically.²⁶⁵ Several customs and usages, recorded in the Code, which reflect matriarchal values are further evidence that the first category of migrants into North Ceylon were these men who were adherents to the mother-right family system. Because of their military constitution, marriage amongst the Nayars was not recognised as a legal institution for quite a long time.²⁶⁶ This state of affairs led to the customs of female inheritance amongst them and Lewis Moore after analysing the opinions expressed by several European writers concludes that “the system of inheritance in the female line prevalent among the Nairs might have originated in a type of polyandry resembling what is termed free love”.²⁶⁷ In this social set up the women remained in their own houses with their own families and were visited by their paramours. The family unit, termed as the *taward*, was therefore composed of the women and the children begotten from their association with paramours.

The family unit – the *Taward*

This matrilineal joint family of the Nairs, termed the *taward*, is a characteristic feature of the Marumakk-

265. *Ibid.*

266. Lewis Moore, *op.cit.* at p. 68 says that, “The generally received opinion is that, at all events, up to the date of the passing of Act IV. of 1896 [Madras] it was impossible for a man or woman who followed the Marmakkalthayam Law to contract a valid marriage, using the word marriage in its ordinary popular significance”.

267. *Malabar Laws and Customs, op.cit.* p. 56. According to these writers, namely, Castenheda, Sonnerat and Buchanan (covering a period from A.D. 1550-1800) the relations between the Nayar ladies and their paramours, no limit being placed on the numbers, “were of the loosest and most fugitive description”

althayam system.²⁶⁸ As regards membership of the *taward* Sundara Iyer's states, "The joint family in a Marumakkalthayam Nair *taward* consists of the mother and her male and female children and the children of the female children and the children of those female children and so on. As a result though male children belonged to the *taward* of their mother their children did not. They belonged to the *tarward* of their consorts".²⁶⁹ *Taward* membership, in brief, was matrilineal and only by birth. William Logan compares it to what the Romans called a *gens* and distinguishes it by showing that while in Rome the members traced their descent in the male line from a common ancestor "in Malabar the members of a *taward* traced their descent, in the female line only, from a common ancestress"²⁷⁰. All members of the *taward* were entitled to maintenance.

As father or husband the male stood in no legal relationship to the children or to the woman who bore them.²⁷¹ The Nayer men of Kerala had therefore duolocal residence.²⁷² Like most matrilineal societies the house-name of the *tarward* is that of the mother.²⁷³ Parallel to this custom we find the children of Kandyan Sinhalese married in *binna* taking the *ge* names of the mother and rarely that of the

268. The Madras Marumakkalthayam Act defines a *taward* as "a group of persons forming a joint family with community of property governed by the Marumakkalthayam Law of inheritance" Section 3 of the Act No. XII of 1933.

269. Sundara Iyer, "*Malabar and Aliyasantana law*" p. 7 quoted by Sreedhara Variar in *Marumakkalthayam and Allied Systems of Law in the Kerala State.* (Published by author : 1969) p.4 -5.

270. *Malabar Manual*, (Volume I, First edition, 1887) p. 153.

271. *Ibid.*

272. A.R.Kutty, *Marriage and Kinship in an Island Society*, Preface p.x

273. Raghavan, *op. cit.* p. 150.

father. It is submitted that the practice by the Nairs of a polyandrous form of social living and its subsequent development to a form of marriage or *sambandan*, which was recognised only as a loose form of union where neither party to the marriage becomes thereby a member of the other's family,²⁷⁴ must have been the factors that contributed to the emergence of this form of matrilineal joint family system.

The property of the *taward* was impartible property²⁷⁵ and common to all females and males who composed it. Every member born in it had equal interest in the family properties, whether female or male and however remote. The limited estate of a Hindu woman is thus not recognised in the Marumakkalthayam system.²⁷⁶ In a Hindu Joint family every member does not become a coparcener. A member becomes a coparcener only if the person is a male and is within three generations next to the owner in unbroken descent. Male members beyond this degree have only lesser rights as women. It is thus a much narrower body and gender biased in comparison to the *taward* of the Marumakkalthayam Law. We will see in subsequent pages that, in respect to gender relations, Thesawalamai is more akin to the Marumakkalthayam system. Though membership and right to inheritance to a *tarward* flows from a woman, the man was not without a position of importance in it. The eldest or most competent male, the *karnavan*, had absolute

274. Coomarasamy, *op. cit.* 21, 12, 33.

275. Adrian C. Mayer, *Land and Society in Malabar*, p.46; Sreedhara Variar, *op.cit.*p.4.

276. *Uthe Amma v Mani Amma* 1935- 68;M.L.J.372, cited by Shreedhara Variar, *op.cit* p. 31.

authority over the affairs of the *tarward*²⁷⁷ and served as its managing member.²⁷⁸ *Karnavanship* is a birth right recognized by the customary law of Malabar²⁷⁹ and his position is not that of a mere trustee or an officer of an organization like a corporation or the like.²⁸⁰ The properties of the *taward* actually vest in him and he stands in a fiduciary relationship with other members.²⁸¹ Though generally it is a male who becomes the *karnavan* the courts have held that usage does not preclude a female member from so managing the affairs of the *taward* if it was found that there was no male member capable of doing so.²⁸² She was called the *karnawathi*.²⁸³ The powers of the *karnavan* are in some respects comparable to that of the husband under Thesawalamai which will be discussed in this and subsequent chapters.²⁸⁴

Marmakkalthayam is in fact a system of inheritance on matrilineal lines. In the language of Hindu Law it can be called female *coparcenery* as opposed to the male

277. Adrian C. Mayer, *op. cit.* p. 46.

278. Sreedhara Variar, *op.cit.* p. 36 ; Section 3 of the Marumakkalthayam Act. Note also that Chie Nakane found a traditional Nair *taward* as " a property group consisting of a matrilineal lineage exclusively headed and represented by the senior member called the *karnavan*." The Nayer family in a disintegrating matrilineal system", an article published in the magazine *International Studies in sociology and social anthropology*. [Edited by John Moge] p.17

279. Sreedhara Variar, *op. cit* p. 36-37

280. Mayne, *Treatise on Hindu Law and Usage*, *op.cit.* p.981; *Unni Krishnan V Sankara Menon A.I.R.* (1966) S.C. 411. as cited by Sreedhara Variar, *op.cit.*p.38.

281. Sreedhara Variar, *op. cit.*p. 38

282. Cases cited by Sreedhara Variar, *op. cit.* foot- note p.36.

283. This principle is now incorporated in Section 3 of the Act.

284. *Infra* p. 83-85; See chapter IV, 'Spouses Rights and Obligations to Matrimonial Property, pp. 343-345

coparcenery. Though principles relating to the rules of succession in the Marumakkalthayam Law, especially customary law, are discussed in this work it needs to be said that this system of inheritance, like other customary or statutory systems of succession of India, has now been superseded by the Hindu Succession Act of 1956. The purpose of analysing the principles of the customary Marumakkalthayam Law is to show the remarkable similarity between it and Thesawalamai in the incidents relating to *cheedanam*, its social aspects, rules of succession and generally the influence this law of Kerala had on the inhabitants of Jaffna.

From *taward* to *tavazhi*

The term *tavazhi* is composed of two Tamil words – *tayi* meaning mother and *vazhi* meaning way or manner or descent.²⁸⁵ The concept of a *taward* family, as an indissoluble unit which does not recognise the separate rights of its members, disintegrated over a period of time and led to the creation of a number of *tavazhis* or branch *tarwards*. The break-up occurred, initially as a matter of course, when the *tarward* became unwieldy and the population of its members exceeded the limit of accommodation of a *tarward* building.²⁸⁶ The increase in numbers caused inconvenience

285. Raghavan, *op.cit.* p.174.

286. Adrian C. Mayer. *op. cit* p 46

to its members.²⁸⁷ This resulted in residential separation into small segments of a matrilineal group who had the same grand-mother or great grand-mother. The branch *tarward* was initially headed by a mother and her children. The physical separation as a separate house-hold in the course of time evolved into a separate economic unit, though ancestral property initially continued to be held in common by all members of the *taward*. This separate unit or residential sub-group subsequently became a semi-independent productive and consumptive unit when the income generated within the group was not pooled into the main *tarward* but was consumed by the sub-group itself.²⁸⁸ By this process of development the *taward* lost its essential character of being a co-residential and economic unit. Thus, Chic Nakane who did some field work on matrilineal systems in India, sees economic changes, accompanied by modernization, as the major cause of the break-up of the *taward* system.²⁸⁹

It also happened when a member, either a male or female, set out from his/her *taward* house and founded a

287. A.R.Kutty, *op.cit.* p.114 ; H.W.Tambiah quotes Justice Holloway in *Erampapalli Korappen Nayer v Erampadi Chennan Nayer* (6 Madras H.C. 411) as stating that, "In Malabar as elsewhere the inconvenience of this state of things made itself felt and families becoming very numerous have split into various branches have become new families".

288. H.W.Tambiah, *Laws and customs of the Tamils of Ceylon*, p. 131; Chic Nakane, *op. cit.* p. 18.

289. The Nayer family in a disintegrating matrilineal system, an article published in the magazine *'International Studies in sociology and social anthropology'*. [Edited by John Moge]

separate branch (*tavali*) of the *taward*.²⁹⁰ This change from the *taward* to the *tavazhi* primarily occurred when marriage amongst the *marumakkalthayees* lost the character of being mere “*sambandans*” [which can be taken to mean mere associations] and came to be recognised as a legal institution with the underlying concept of one man to one woman. In this manner duolocal²⁹¹ gave way to matrilocality.²⁹² The modern tendency however is, says Derrett, for the husband, wife and their children to form a separate home while drawing allowances from both homes when need arises.²⁹³

The disintegration could also be seen in the change of life pattern of the Nayars. When the Nayars actively involved themselves in wartime activities marital ties were not much regarded.²⁹⁴ It did not much matter then to a Nayar that his own acquisitions descended on his own *taward* and not to his children.²⁹⁵ The situation changed however when

290. Logan, *op.cit* Vol: 1, chapter 1 p. 154 ; Kathleen Gough states that during the nineteenth century some Nayar men used their independent cash earnings and built private houses for their wives and wives' uterine descendants in joint ownership. *Changing house-holds in Kerala*, Article published in *Explorations in the family and others* , the Commemorative issue of Prof: K.M. Kapadia. (1974) at p. 225. Coomarasamy notes that it somehow happened that a husband or father sets up a home, the *tavazhi illam* for his 'wife and children out of his self acquired property ; See also Coomarasamy, *op. cit.* 21.12.1933 and 23.10. 1933; Raghavan, *op.cit.* p.174;

291. Refers to a household containing one or more married woman who are visited by their husbands.

292. Kathleen Gough.*op.cit.* p. 242.

293. J. Duncan M. Derrett, *Introduction to Modern Hindu Law* (Oxford University Press: 1963) p. 350.

294. Logan,*op.cit.* Volume I, chapter 1, pg;154; See also Ehrenfels, U. R. in *Matrilineal Family Background in South India*, *op. cit.* p. 359

295. *Ibid.*

he ceased going out as a warrior and settled to family life.²⁹⁶ Each man began to marry one woman, live with her separately and rear his children as his own. His natural affections gained importance and he desired and required some legal mode, other than the recognized *taward* system, for conveying to his children and to their mother all his self acquired property.²⁹⁷ When he thus started settling down to family life the new development in the form of the *tavazhi illam* or breakaway unit formed the legal mode he was searching for. How a similar form was found suitable by the early migrants of Jaffna and how the daughter who was given a dowry was instrumental for the branching off are aspects discussed in subsequent pages. The institution of the formal type of marriage and conjugal living with the husband in charge of family affairs led to the disarray and subsequent dispersion of the matriarchal based family unit and to its replacement by a patriarchal based one, which too would be discussed in further detail in subsequent pages.

The role of the *karnavan* in the *taward* also underwent transformation. He shed his duo-local form of living for matri-local residence, thereby creating a nuclear family of the modern type consisting of only his wife and children. His loyalties and interest were directed towards his own *tavazhi* rather than the common *taward*. His actual contribution as father towards his children, whose guardian he had hitherto not been, thereafter became significant. It also led to division of property in the wife's *taward* as the husband who settled permanently with the wife evinced

296. *Ibid.*

297. *Ibid*

interest and willingness to help in the economic activities of his wife's group.²⁹⁸ The change of residence by the men had significance. It resulted in the emancipation of men from their natal households. Instead of merely contributing to the coffers of their mothers' or the dowries of their sisters', they started contributing their earnings to the welfare of their wives and children, a natural gesture of love and affection to one's own family. It is possible to identify by analogy this transformation that occurred in Malabar with the changes that took place in Jaffna much later. The custom that was in existence in early Jaffna, where by the son's earnings during bachelorhood went into the common fund of his parents community gradually lost its significance and practicability, when men started moving from homes and villages in search of white collar jobs. The Jaffna Matrimonial Rights and Inheritance Ordinance of 1911 [before amendment] reflects the socio-economic changes, when it defined *thediathettam* as property acquired by the husband or wife;²⁹⁹ thereby emancipating the bachelor sons of Jaffna from having to leave behind their earnings with their parents on marriage. The change was retained in the amendment of 1947,

By the middle of the last century most of the *tawards* in Kerala had ceased to exist as functional bodies though they continue to be still conceptualized as distinctive social

298. A.R.Kutty, op.cit. p. 114.

299. Section 19 of the unamended 1911 Ordinance. See also *Manikkavasagar v Kandasamy*, (1986) [2 S.L.R.] p. 08 at p.12.

and cultural groups.³⁰⁰ It is interesting to note how a system, based on strict matrilineal principle which never allowed cohabitation of husband and wife, gradually re-organized itself into many individual elementary families. It is even more interesting to note that *cheedanam* in Thesawalamai is a development of the matrilineal principle underlying the Malabar *tavazhi*. When a Malabar *karnavan* settled property on his children, particular solicitude was ensured for the daughter in preference to the sons. This feature bears remarkable similarity to the customary laws codified in the Thesawalamai. The Code lays down definite rules for the allotment of dowries to daughters at the time of their marriage³⁰¹ and specifically provides that the sons cannot make any claims on parental property until all the daughters of the family have been dowered.³⁰² The purpose of the analysis of the disintegration of the *taward* system of the Malabars of Kerala is to show that the system that evolved in Jaffna with the settling down of the Malabar migrants is a reflection of happenings in Malabar where the beginnings of the nuclear family were witnessed and which developed side by side with the traditional communal way of living. Why the Jaffna settlers found the new system, the nuclear family, suitable has been analysed in subsequent paragraphs.³⁰³

300. Chie Nakone, *The Nayer family in a disintegrating matrilineal system*, an article published in the magazine 'International Studies in sociology and social anthropology.' [Edited by John Mogey] . p. 19; J. D. M. Derrett *Religion, Law and the State in India*, London; 1968 p. 406

301. Part I:1, I:2, I:3, I:5, I:9, I:11. Coomarasamy, *Hindu Organ*, 6.7.1933.

302. I:11.

303. *Infra*, pp. 91-95

The mother-right family or the matriarchal form of society was peculiar not only to north Ceylon. In the south, amongst the Kandyan Sinhalese, the marriage customs did not vary much from the Malabars.³⁰⁴ In both cases it was the social aspect which received more emphasis as the ceremonies had to be performed under the aegis of the people. In the Kandyan social structure we see the matriarchal system co-habiting with the patriarchal system as reflected by the two forms of Kandyan marriages, namely the *binna* and *diga* marriages. Raghavan expresses the view that the *Binna* marriage amongst the Kandyan Sinhalese is something that could be seen as parallel to the traditional Malabar marriages.³⁰⁵ Heinz Bechert calls the *binna* marriage a matriarchal marriage and finds a parallel between the cross-cousin marriages amongst the Kandyans and the custom of the head of the Kerala family giving his daughter in marriage to his sister's son.³⁰⁶ The same writer associates the *diga* form of marriage with the patriarchal system and remarks that he is "tempted to ascribe the spreading of the father-right system to the strong TAMILIAN cultural influence of the mediaeval period".³⁰⁷ However, he continues to say that though the influence could have facilitated the spread of the father-right system "...its origin in Ceylon must undoubtedly be traced to the Aryan immigrants".³⁰⁸ One noticeable difference however is that

304. Heinz Bechert. *op.cit.* p 33

305. *India in Ceylonese History, Society and Culture op.cit.* p.152

306. *Mother-right and succession to the throne in Malabar, op. cit.* p. 31.

307. *Ibid.* pp. 31 – 32.

308. *Ibid.* p.32.

in its ceremonial celebration a Sinhalese marriage, whether Kandyan or Low country, is purely secular without priests officiating and performing religious rites.

The fusion of the two systems — matriarchy and patriarchy

The second colonisation into Jaffna was, as noted, by people from the Coromandel coast who perpetuated a patriarchal system of society. These Tamils were Hindus and influenced by Brahminism followed rules of inheritance based on patrilineal descent. When however they came over to Jaffna there was already in existence for seven to eight centuries the matriarchal system of society which gave importance to females; to their rights to inheritance and to receive a dowry. These practices were so strongly embedded that there did not occur in the Jaffna society a total transformation from the matriarchal to the patriarchal system. What resulted is witnessed as a happy blend of both systems. Thus we find in the Code, parallel to provisions relating to matrilineal inheritance also provisions relating to patrilineal inheritance³⁰⁹ and inferences to the marital powers of the husband.³¹⁰ As to whether the reference to marital powers of the husband is a reflection of patriarchal influence of the subsequent south Indian colonists or of the Roman Dutch Law introduced by the Dutch rulers of Ceylon is

309. I:1 ; I:7; Coomarasamy notes that the division of property into *cheedanam* and *muthusam* owes its origins to the two different systems of inheritance in Thesawalamai, *The Hindu Organ, New Year Publication*, 13.4.1936.

310. Code, IV:1

discussed in subsequent paragraphs.³¹¹ One other reason for only a compromise, as against substitution, is that Brahminism, the pillar of patriarchy, did not gain a strong hold over the temporal life of the Jaffna society as it achieved in India. The Brahminical caste structure has no validity for the Tamils of Jaffna. One major difference between the pattern of social stratification in south India and in north Ceylon is the absence in north Ceylon of the primary role of the Brahmins in society.³¹² In the Indian social hierarchy as well as in the government bureaucracy the Brahmins occupied the top most positions. In Jaffna however, this did not take place. They were numerically less and outnumbered by people of the *Vellala* caste who dominated the higher rungs of the social hierarchy. As religious elders the Brahmin priests command respect; but as a caste their duties and obligations are largely defined in terms of their priestly functions and religious rites. Moreover, it needs to be mentioned that the religious and philosophical ideologies of the people of Jaffna, though based on Hinduism, differed in many fundamentals and rituals from that of their south Indian brethren who are largely Vaishnavites. The Jaffna Tamils are generally Saivites. The gender based values of Hindu sacerdotal legal writings³¹³, especially the shastric norms, did not have an overwhelming impact on the freedom of the Jaffna woman. Thus, the overtly gender based vicious and inhuman practices like female infanticide, sati or widow burning are not prevalent in the Jaffna society.

311. *Infra*, Chapter on Spouses' Rights and Obligations to Matrimonial Property, pp. 284-297

312. S. Arsaratnam, *op.cit* p.108.

313. The traditional Hindu Law is contained in the Sanskrit texts of the *Dharmashastra*.

Community living in Jaffna and the origins of *cheedanam*

According to researches made by various scholars the law relating to *Cheedanam* developed out of the customs and practices that were in existence in a matrilineal society and is a relic of the Marumakkalthayam Law.³¹⁴ Coomarasamy notes that the joint family system of the Hindu Law is similar to the *taward* system of the Marumakkalthayam law with the difference that under the Marumakkalthayam Law the females and their descendents are only included.³¹⁵ Tambiah is of the view that the joint family system was first recognised by the laws and customs of the Dravidian race of South India and that the Hindu Law merely developed this concept.³¹⁶ This fact is made clear in the Thesawalamai where the practices of the matriarchal joint family system appear to harmonize quite well with those of the patriarchal system introduced by the subsequent colonists. Mayne writing about the joint family system amongst the Aryans, Punjabs and the Dravidians of South India opines that, "Next to them, perhaps the strictest survival of the undivided family is to be found in North Ceylon among the Tamil migrants from the South of India".³¹⁷

314. Raghvan, *op.cit.* op.174; Coomarasamy, *op.cit.* 21.12.33. See also Tambiah, *Laws and customs of the Tamils of Ceylon*, *op.cit.* p.133. S.Arsaratnam, *op.cit.* p.108.

315. *The Hindu Organ*, *Op. cit.* 21.12.33..

316. *Laws and customs of the Tamils of Ceylon*, *op.cit.* pp.127-128.

317. *Nature and origin of the Hindu Law*. p. 7. See also *Understanding the Jaffna society*, p.17 where Professor Sivathamby notes that in yester years an extended family system was in vogue in Jaffna. Children of uncles and aunts from the mother's or father's side and their children all formed the family.

The existence of a joint family system has received judicial recognition too. Lawrie A.C.J. declared that there were traces of the system in the customary laws of the people of Jaffna.³¹⁸ De Sampayo J. while analysing the principles under Thesawalamai, refers to an “undivided family”, though he conceives it as a Hindu Law idea.³¹⁹ It can therefore be concluded without hesitation, that there was in existence in Jaffna in early days a joint family system, initially on a matriarchal and subsequently on a combined matriarchal and patriarchal basis. The question that arises is whether the system was identical to the *taward* system of Malabar, the place of origin of the earlier migrants. Coomarasamy is doubtful as to whether the *taward* system was ever introduced into Jaffna by the Malabar migrants.³²⁰ The *taward* system was, for reasons stated previously,³²¹ fast disintegrating in Kerala, the country of its origin. Besides, conditions in Jaffna, unlike as in Malabar were not conducive to community living on the scale of a Malabar *taward*. In Jaffna, “Nature smiles grudgingly to the toil and moil of the agriculturist”, noted Coomarasamy.³²² In the arid climatic conditions of Jaffna a closely knit individual family was perhaps found more conducive as concentrated effort

318. Umatevipillai Murugesu, 3.Balasingam Reports, p.120; See also *Nagaratnam v Muttutambay* (1915) 18 N.L.R. p. 257 at 260

319. *Tambapillai v Chinnatambay op. cit* at p. 351; See also Dalton S.P.J. in *Kandar v Sinnachipillai* 36 N.L.R. 362 at p. 366 concurs with the D.J.’s view in *Seelatchy V Viswanathan Chetty*, (*op cit* at p. 100) that the people of Jaffna, even at the time of the codification, were mainly agriculturists and the sons joined with their parents in working the fields and had a common home under the parental roof, at least till they got married.

320. *Op.cit.* p.21.12.33.

321. *Supra.*, p.

322. *The Hindu Organ*, *op.cit.* 21.12.33.

was needed to eke out a living. As such, pooling of resources on the basis of joint holdings or community of property on an extensive scale could not have been possibly advantageous to the people. Coomrasamy opines that, "It is hardly possible that communities or even groups of families condescended to pool their resources or tolerated the retainance of a common purse and looked up for their feeding and clothing to the senior member of their community or group of families descended from a common ancestor".³²³ So the tendency must have been from the very beginning not to have large communities on the Malabar model but to split up into smaller groups of families drawing limited community of property interests, not extending beyond two or three generations.³²⁴ Thus, it is possible to presume that the institution by which the Malabar husband or the father provided a separate house, the *tavazhi illam*, could have been adopted in Jaffna in a way to suit the climatic condition of the area.³²⁵ Kantawala notes that the joint family system was recognised only in a modified form by the Tamils of Jaffna.³²⁶

Certain provisions in the Thesawalamai too support the above view. One of the fundamental principles in Thesawalamai administered in Jaffna until recently³²⁷ is that females inherit property of the females; daughters succeeded to their mother's property and so does a dowered

323. *Op. cit.* 21. 12. 1933.

324. *ibid.*

325. Tambiah, *Laws and Customs of the Tamils of Ceylon. op.cit.* p.134.

326. *Thesawalamai* (Saiva Prakasa Press) p. 28.

327. The Jaffna Matrimonial Rights and Inheritance Ordinance of 1911 amended the rules regarding inheritance in section 21.

sister to another dowered sister.³²⁸ It is similar to the rule in Marumakkalthayam law that one *tavazhi illam* succeeds to the property of another when members of that *illam* become extinct.³²⁹ Tambiah is of the view that this rule is attributable to the introduction of the institution of the *tavazhi illam* into Jaffna.³³⁰ Raghavan is more explicit when he declared: “In the event of a *tavazhi* becoming extinct for failure of heirs, the property devolving on the next of kin of a matrilineal *tavazhi*, has it’s counterpart in Thesawalamai in that “females inherit property of the females and that dowered sister succeeds to another dowered sister.”³³¹ The provision in the Code that the bachelor sons’ earnings went into the parents’ common estate too reflects the principle in the Marumakkalthayam Law that the sons’/ brothers’ acquisitions went into the *taward* of their mothers’/sisters’. So does the rule that the property of a deceased on failure of descendents reverts to the source whence it came, so that property coming from the mother’s side goes to the mother’s side relations. “All these principles”, says Coomarasamy, “are clearly traceable to a state of society in which the tendency was to tie down the property to the females from generation to generation”.³³²

It is however quite difficult to come to a conclusion as to the extent to which common living was practiced in Jaffna. The Code makes out that close relatives too were in certain

328. Coomarasamy, *op. cit.* 21-12-1933; Code 1:5.

329. Sreedhara Variar, *op. cit.* p.110 ; Krishnan V Damodaran, 38 Madras , 48 (FB)

330. *Laws and Customs of the Tamils of Jaffna*, p.164

331. *Op. cit.* p.175

332. *Op. cit.* 6-7-1933.

specified situations involved in the affairs of the joint family.³³³ These provisions show that if the husband and the wife, who could have normally exercised functions regarding care of children and giving of dowry to them were dead, those who had similar powers in allied families could come forth to exercise these powers. This reflects a principle of the *taward* system of the Marumakkalthayam Law where, under specified circumstances, the allied *taward* stepped in to perform similar powers. The voluntary act of relatives in coming forward to give their property in order to enlarge the dowries of a related bride³³⁴ shows closeness strong enough to evince such interest. Nevertheless, whether these provisions reveal a wider joint family as to include uncles and aunts is not clear. Taking into consideration the family set up generally in Jaffna, it could have been that grand parents and parents of both spouses and their unmarried children lived with a married son or daughter. It needs to be mentioned that the practice in some areas of Jaffna for the parents and their parents, if alive, to live with the sons and in certain others with the daughters, again reflects the adherence to either the matriarchal or patriarchal principles.

333. Part I:3 of the Code provides that, "The nearest relations, either on the father's or the mother's side from a particular regard to the bride, in order that such bride may make a better marriage, often enlarge the dowry by adding some of their own property to it...."; It also appears that there had been in practice in ancient Jaffna for relatives on both sides to assemble and decide to whose care children who had become orphans should be left. They were again expected to assemble to consult what part of the dowry was to be given and to whom 1:12; See also IV : 2 of the Code which states that if an issueless husband and wife desire to give some of their hereditary properties and dowry to their nieces and nephews "it cannot be done without the consent of their mutual relations".

334. Code Part I: 3

Coomarasamy notes that, when a daughter of the earlier settlers married, it was possible that the parents, following the customs of their former place of abode, provided the daughter with a separate house or a part of the house in which they were living and some other property and implements of husbandry, household utensils, jewellery etc;³³⁵ Tambiah expresses a similar view when he notes that, “On marriage a new *tarward* consisting of the daughter and her husband emerged comparable to the *thayvali illam* of the Marumakathayam law. The father of the daughter made a marriage settlement which enabled the new couple to set up a separate family unit”.³³⁶ The Code gives expression to this theory when it provides that when the daughters got married they should each be given a dowry, initially from the mother’s dowry.³³⁷ Thus, similar to the branching off in Malabar, the daughter of a Jaffna household started the branching off from the parental home and created a new home on the *tavazhi illam* model.³³⁸ Raghavan too notes that in Thesawalamai ancestral property devolved on the females of the family from generation to generation, as it was in the Marumakkalthayam Law and it formed the basis of *Cheedanam* in Thesawalamai.³³⁹ It can therefore be said with some assurance that joint family living, at least to a limited extent, was introduced and developed in Jaffna by the early migrants. In Jaffna, just as in Kerala, several

335. Coomarasamy, *op.cit.*, 21 – 12- 1933; Tambiah, *Laws and Customs of the Tamils of Ceylon*, p. 134.

336. *Principles of Ceylon Law*, p.214.

337. Part I:1

338. See also, Tambiah J. in *Murugesu v Subramaniam*, (1967) 69 N.L.R. 532 at 540.

339. *India in Ceylonese History, Society and Culture*, *op. cit.* p.174 -175

factors such as modernisation, emergence of nuclear households, economic mobility etc; resulted in breaking up even the limited, in other words, the extended joint family structure. Legislation too seems to have acknowledged such changes.³⁴⁰

Objectives of *Cheedanam*

To make provision for the new house-hold

As shown earlier, dowry in its original form, whether in Roman, Roman Dutch, Hindu, Kandyan or Muslim law, served as a means of sustaining the burden of marriage. Voet says that dowry is “property given to a husband by a woman or someone else on her behalf in order that he may bear the burdens of marriage”.³⁴¹ Maine and Sohon express similar views.³⁴² In addition, Sohon adduces a similar motive to *donatio ante nuptias*, the converse of the *dos*, and says that, it was “primarily not a gift in consideration of natural affection but had a perfectly material object, the object namely of endowing the future marriage with the requisite pecuniary means and to bear the burdens of the joint

340. Section 19 of the Ordinance of 1911 impliedly abrogated Part 1:7 of the Code. See Chapter on *The diathettam* for a fuller discussion, *Infra* pp. 197, 210

341. 23.3.2.

342. Maine declares, “It is a contribution by the wife’s family, or the wife herself, intended to assist the husband in bearing the expenses of the conjugal house hold”, *Lectures on early history of institutions*. (Second edition . 1875) p. 120. Similarly Sohon speaking of the *dos* says, “The husband had to support the expenses of the joint household. It was customary, however, to give him a *dos* ie; to make over to him some property intended as contribution of the wife towards defrayal of the expenses....”, *Institute of Roman Law*, (Oxford: 3rd Edition, Translated by Ledlie.1907.) p. 465.

household". *Dos* and *Donatio ante nuptias*³⁴³ were thus intended to serve a definite material object, that of making provision for the new household".³⁴⁴ Savitri Goonesekere notes that, "the single criterion for distinguishing dowry is that it is a gift created for the marriage or to bear the burdens of marriage."³⁴⁵ It is no different in Thesawalamai.

It is important to analyse the objectives of *cheedanam* in relation to its origin, in order to understand the concept fully. Coomarasamy writing about the origins of *cheedanam* states that when a female got married she was provided with several items in order to assist her and her *karnavan* to establish a new household; a *tavazhi*.³⁴⁶ The judiciary too reflects these views for Tambiah J. in *Murugesu V Subramaniam* declared: "The object in granting a dowry is to make provision for the daughter in order that she may set up a new home".³⁴⁷ Though the objective of *cheedanam* under Thesawalamai does not appear to be very different from that of the Roman or Roman Dutch law yet a remarkable difference lies between the early jurisdictions of Rome and Jaffna in that, while in the Western jurisdiction the husband too was expected to contribute by way of a *donatio ante / propter nuptias*, as against the *dos* of the wife, in Thesawalamai it was always a one sided

343. Which during the time of Justinian came to be termed *donatio propter nuptias*.

344. *Ibid* at p. 473.

345. *Recovery of dowry and other property on dissolution of marriage*, Colombo Law Review. *Op. cit* at p. 10.

346. *The Hindu Organ*, 21.12.1933, *Op.cit*. Tambiah in agreement declared, "When the daughter got married he [the father] provided her with a dowry in order that she may start a separate household".. Nadarajah expresses a similar view. *Op.cit* at p. 214.

347. 69 N.I.R. 532 at 539

contribution. When we consider the situation amongst the Muslims of our country we can note, that in Muslim Law too a gift by the husband to the wife in the form of the *Mahr* is made compulsory. The giving of *Mahr* is regulated by practice as well as by law, as against only a social practice of *Sridhana* to be brought by a Muslim wife. To be more precise it needs to be noted that the general Muslim Law recognises only the contribution by the husband. There is no place for *Sridhana* or contribution by the wife at all in Muslim Law, though that has now been accepted as a practice.

Cheedanam as consideration of marriage

The objective seems to have changed with the passage of time. "The responsibility to grant a dowry was derived from the paternal duty to secure for one's daughter the best possible marriage", says Voet.³⁴⁸ But he qualifies his statement by stating, "Nor would you correctly urge that marriages are contracted on condition of giving a dowry" and that marriages have not been suspended against the payment of dowry as a condition.³⁴⁹ The Code reveals an obligation on the part of the parents to provide a dowry to a daughter when she got married.³⁵⁰ It stipulates that when a daughter or daughters married they should each receive a dowry or *cheedanam*³⁵¹ and continues with the words that "... a well drawn up and executed *doty ola* must take effect

348. 23.3.3 ; 23.3.11

349. *Ibid*

350. I: 3 and I:4.

351. I:1

for it is by this means that most of the girls obtain husbands, as it is not for the girls but for the property that most of the men marry”.³⁵² There is provision in the Code for the dowry to be enlarged by relatives to enable a bride to make a better marriage.³⁵³ It is interesting to note that, though the original objective of *cheedanam* had been to make provision when a new household on the lines of the *tavazhi* was formed, the Code nowhere states dowry to be such, but impresses the idea that it is for the dowry that most men marry. This view is reflected in judicial pronouncements as well. Judge Burleigh observed, “Young men marry here solely to obtain a dowry”.³⁵⁴ In the general law too the position appears to be the same. Hutchinson C.J. remarked, “And in this country, as most others the dowry is almost always the consideration for the man taking the woman as his wife”.³⁵⁵ Agreeing with the above view Jayawardene J. applied the same principle to a deed of gift governed by Kandyan Law.³⁵⁶

The issue arose in *Murugasar et al v Ramalingam*³⁵⁷ as to whether the marriage has to be a strictly legal marriage for the dowry deed to be binding on the grantor. In this case the marriage was not registered

352. 1:5

353. 1:3

354. H. F. Mutukisna, *The Thesawalamai*, (Ceylon Times Office: Colombo) p. 136.

355. *Jayasekera V Wanigaratne*, (1909) 12 N.L.R. p.364 at 365

356. He said, “I would say that in every case where the parents give a deed as dowry before or at the time of marriage or even after marriage, if it be in pursuance of a promise made before marriage the deed should be regarded as a deed for valuable consideration and so irrevocable” *Kandappa V Charles Appuhamy*, (1926) 27 N.L.R. p. 433.

357. Tamb. Rep. IV. (1881) 176.

but the parties had gone through a Hindu marriage and were living as husband and wife when the dowry deed was made. The court upheld the gift on the basis that though the marriage might not be strictly a legal marriage for want of registration the validity of the grant cannot be denied since the donor was satisfied with the sufficiency of the marriage. The above case can be useful in assessing the validity of several marriages that have taken place in Jaffna, especially during the period of civil strife. During this period when avenues for registering of marriages were hampered due to unavailability of administrative personnel, like registrars, and the security situation did not permit congregation of people or access to temples to perform the customary rituals, new practices to suit the situation were adopted. The couples garlanded each other with garlands of flowers and a chain or a piece of saffron tied on a saffron dyed cord was tied round the neck of the bride, in the presence of a few relatives or friends. This was considered sufficient to recognize that a marriage had taken place.³⁵⁸ A really novel practice seems to have been followed during this period which witnessed an exodus of Tamil boys from the area to foreign countries. Girls were considered as having been given in marriage even in the physical absence of the bridegrooms. The ceremony, so to say, was as follows. The girl dressed up as a bride was taken by her parents and relatives to the groom's mother's residence and there garlanded by the mother with a garland or chain. This act was followed by the parties of both sides having meals at each others' residences. The bride thereafter was sponsored by the man, but as his

358. Personal interview in the village of Moolai.

fiancée, for migration purposes.³⁵⁹ Though in the eyes of the law there was no legal marriage, the bride here in Jaffna and the groom in a foreign country considered themselves bound by matrimony. In this arrangement, so to say, money transactions too went through in the name of *cheedanam*. The people governed by Thesawalamai accepted such a practice as constituting a valid form of marriage. The *cheedanam* so given too becomes the consideration for the 'marriage' that had taken place without even the physical presence of the groom. Where the couple marries legally in the foreign country no problems relating to the rights over the dowry can be foreseen. But if the groom/ husband refuses to accept her as his wife and the gift had been made to the husband solely as consideration of marriage, then several legal issues are bound to rise. One such issue could possibly concern the legality of the so called marriage that was solemnized in Jaffna.

A gift made in contemplation of marriage would invariably become the consideration of that marriage, where the marriage subsequently takes place. If however the marriage does not take place, the deed making the dowry grant can be considered as avoided.³⁶⁰ It appears that, by the customary law *cheedanam* can be given long before or long after marriage. The Code provides that *cheedanam* may be given when the daughters are grown up and are able to marry".³⁶¹ De Sampayo J. in *Tambapillai v*

359. Personal interview with a girl now resident in Canada.

360. Cayley C.J. in *Murugesar et al v Ramalingam* (1881) Tambiah Reports.IV. p. 176.

361. 1:11.

Chinnatamby declared that, the customs do not prevent the parents from determining beforehand what they shall give the daughters as dowry and from gifting to them the destined property even though a marriage may not actually be in view.³⁶² He was more explicit in *Re The applicability of Veeravagu* when he declared that, “under the customary law prevailing in Jaffna a dowry may be given at, before or after the marriage, the fact of the marriage being prior to the deed would not make it any less a dowry, if in fact it was”.³⁶³ The provisions could be interpreted to mean that the real act of giving the dowry could be at any time the daughter is ready for marriage, indicating puberty as the earliest stage. Based on such interpretation, the courts have held in several instances that, gifts though given long before or after marriage fall into the category of dowry.³⁶⁴ In *Pathmanathan v Aiyathurai*³⁶⁵ the principle seems to have been stretched quite far. In this case the gift was given long after marriage, after the husband himself had died. Nevertheless, construing the intention as expressed in the recital of the deed.³⁶⁶ Alles J. held it to be a subsequent fulfillment of an earlier obligation to dower and as satisfying

362. (1915) 18 N.L.R. 348 at 350 ; 23 N.L.R. p. 67

363. (1921) 23 N.L.R. p.67.

364. *Murugesar et al v Ramalingam IV Thamb*: Reports p. 176 : *Tambapillai V Chinnatamby*, *op. cit* *Thesigar v Ganeshalingam* (1952) 55 N.L.R. p. 14 : *Murugesu v Subramaniam* (1967) 69 N.L.R. p.532.

365. (1971) 74 N.L.R. p. 331

366. The deed which stated that “....for and in consideration of marriage that has taken place earlier unto my daughter Ponnammah, widow of Ramalingam of the same place and in consideration of the promise made by me to her I shall give her a dowry, I do hereby grant and convey by way of dowry unto her the lands mentioned therein” *Op. cit.* at p. 333

the requirements of being the consideration of marriage. The courts seem to have viewed the question as to whether a subsequent gift by a parent to a married daughter operates and was intended to operate as a donation simpliciter or as a postponed fulfillment of the earlier obligation to provide her with a dowry, as eventually a question of fact.³⁶⁷ Savitri Goonesekera seems to be in agreement when she noted that, “it is not specially relevant that the gift was given before or after marriage”³⁶⁸ to come to a conclusion whether it is a dowry meant for the wife or a free will gift to the husband.

The transition from a provision for the new household to a consideration of marriage

The evolution of the concept of *cheedanam* from being a provision to set up a new household to one of being a consideration of marriage is a historical as well as a socio-economic development. The Jaffna society at the outset was matriarchal in character and when the daughter on marriage set out to form a new house-hold the need was there to make provision for it. Property belonged to the family, the *tavazhi illam* and not to an individual. That property was invariably that of the wife, since the man could hardly take any property worthy of it into his newly formed family. When he got married and formed a new household he had no separate property to take with him except wrought gold

367. *Thesigar v Ganeshalingam, op. cit* ; *Murugesu v Subramaniam; Op.cit. Pathmanathan v Aiyathurai, op. cit.*

368. Colombo Law Review, *op. cit.* Vol; 3 pp. 9-10

and silver which he wore on his body.³⁶⁹ He could not have taken even property by way of inheritance as the property of the parents was invariably given as dowry to his sisters,³⁷⁰ he becoming entitled only if anything remained.³⁷¹ The men therefore needed landed property, implements of husbandry, etc. to commence married life. In this setup it was inevitable that on marriage the wife had to bring some property to start a new family. It was in this way that the dowry system took root in Jaffna. Coomarasamy notes that, "The development of the *tavazhi illam* property as distinguished from *taward* property supplies the clue for the dowry system gaining stronghold in Thesawalamai".³⁷² Thus the need was there for the daughters, the wives, to bring these requirements. Coomarasamy explains how it was met. He states that, "When therefore a daughter of the early settlers married, she was according to the customs that prevailed among them in their former place of abode, Malabar, provided with a separate house or a distinct share in the parental house, other landed property, implements of husbandry, household utensils, jewellery etc. suitable to her station in life".³⁷³

369. In early Jaffna society unmarried men lived with their parents and tilled their parent's soil jointly with them. Whatever they earned went to form the *thediathettam* of their parents. See discussions in chapter on *Thediathettam*

370. Code I:9 ; I:11.

371. *Ibid.*

372. *The Hindu Organ*, t.21-12-33; See also Tambiah, *Laws and customs of the Tamils of Jaffna*, *op. cit.* p.20.

373. *The Hindu Organ*, 21-12-33.

Patriarchy and the transition

When the daughter started the branching off on the lines of the *tavazhi illam* of Malabar, the family became the unit of production. Since the early Jaffna society was largely agrarian, the main responsibility of production fell on the man because of his physical prowess. Consequently, the burden of providing for the family was foisted on him. It was thus a natural process that he assumed authority and came to be recognized as the head and manager of the family unit. This recognition was not something very new to the settlers from Malabar, where, by the customs and later by statutes, the oldest male member of the family functioned as the *karnavan*,³⁷⁴ on whom was also vested the administrative authority of the *taward*.³⁷⁵ Male dominance which was thus set in process is characteristic of the institution of patriarchy; and it has been suggested by researchers that patriarchy became rooted in society with the advent of agrarian economies.³⁷⁶ These socio-economic branch units of early Jaffna, on the *tavazhi illam* model of Malabar, may have augmented the conditions required for the introduction of patriarchal principles into the Jaffna matriarchal society.

374. The word *karnavan* used in this context is not synonymous with the Tamil word used to denote the designation of the husband..

375. Sreedhara Variar, *Marumakkalthayam and Allied Systems of Law*, (India: Author, 1st edition, 1969) p. 36. Section 3 of the Marumakkalthayam Act which defined *karnavan* as “ the oldest male member of the tarward or of the tavazhi in whom the right to management of its properties vest...”.

376. Vidyamali Samarasinghe, *Gender inequality in developing countries*, p. 2, Article published in “*Women at the cross roads*”, A Sri Lankan Perspective (New Delhi: Vikas Publishing House, 1990)

The second stage of colonization was with the advent of Aryachakravarti, when his chieftains, retainues and their relations from the east coast of India came over and settled in Jaffna.³⁷⁷ These settlers were followers of Hindu Law and due mainly to Brahminical influence adhered to a patriarchal system. They however found that in their new place of abode the matriarchal system introduced by the previous settlers of not less than seven or eight centuries before their arrival had become firmly embedded in the customs and were recognised as well established principles of law. One such custom was the right of the woman to obtain a dowry on marriage and the other was the principle of female succession, both of which had acquired the force of law by long usage and universal acceptance.³⁷⁸ The continued adherence to such practices even after the onset of patriarchal principles is a distinguishing feature of Thesawalamai. It shows how basically differing principles can happily blend in a society when nurtured by its constituent members. The followers of Hindu Law did not, and, perhaps because the matriarchal-based customs were so entrenched could not, make an overall change in the structure of society. All that they could do was to adopt the customs and usage of the settlers with certain alterations which suited their patriarchal instincts.³⁷⁹

377. Mailvagana Pulavar, *Yalpana Vaipavamalai*, Commentary by Mudaliyar Kulasabanathan, (Jaffna: Saraswathy Book Depot: 1953). p.27; Tambiah, *Laws and customs of the Tamils of Jaffna*, *op. cit.* p.20;

378. Coomarasamy, *op. cit.* 19.6.33.

379. Coomarasamy, *op. cit.* 23.10. 33

One of the main reasons for the failure of the patriarchal system to intervene and make ineffective, or claim precedence over the existing matriarchal system, is the inability of the Brahmins to play a supreme role in Jaffna as they were able to do in south India. The Brahmins in South India occupied the highest stratum of society. Because of the very extensive temple properties under their control their influence over the temporal life of the communities was also immense.³⁸⁰ Under British rule they held high posts in the native bureaucracy. But this sort of development did not take place amongst the Jaffna Tamils where the *Vellalas* are the key caste. They outnumber the Brahmins numerically as well as in key positions, both administrative and commercial. The Kandyan Law too shows the adherence to both principles, but with a difference, in that the Kandyan Sinhalese recognise these principles in their two distinct forms of marriage, *Binna* and *Diga*. The former reflects the matriarchal and the latter the patriarchal principles. It is interesting to note that the custom of providing the daughter with a *cheedanam* while sacrificing the rights of inheritance of the sons was, at least before the customs of Jaffna were put in statute form, more favourable to the women, in this respect, and to that extent, discriminatory of men. It appears however, that the men worked the concept of *cheedanam* to their advantage and did nothing to upset it other than to amend the rules affecting rights to inheritance.

Jaffna society was then, as now, dominated by the male species and the men who sat on the Commissions saw to it that the Ordinance of 1911 incorporated rules of

380. S. J. Arsaratnam, *Ceylon*, p.108.

inheritance indiscriminate of the sexes, in the order of descendents, ascendants and collaterals³⁸¹. At the same time, rules regarding dowry and forfeiture were also incorporated, thereby depriving a dowered daughter of rights to parental inheritance.³⁸² It is interesting that this rule of forfeiture is also a characteristic feature of Kandyan *Diga* marriages.³⁸³ The men found in *cheedanam* a concept that could be used in their favour. Patriarchy and *cheedanam* seem to go hand in hand. "In South Asia", says Vidyamali Samarasinghe, "the manifestation of patriarchy is demonstrated in the demand for dowry in India and in Sri Lanka".³⁸⁴ In Thesawalamai too the effect is noticeable. The objective of *cheedanam* as a provision for the new household lost its significance with the strong hold of patriarchal principles and thereafter gained importance as a consideration made to the men for marrying the women.³⁸⁵ The expression in the Code, that it is not for the girls but for the dowry that most men marry cannot certainly be a reflection of the age old customs of a matriarchal society which gave preference to the custom of providing for a daughter on marriage over rights to inheritance. The provision is without doubt very derogatory of women. It reflects male chauvinism. Whether it was only an expression of opinion by the Dutch codifiers of the customs of Jaffna

381. Section 21, JMARIO.

382. Section 33, JMARIO.

383. Section 12, Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938.

384. *Gender Inequality in Developing countries*, article published in *Women at the cross roads: A Sri Lankan perspective*, (New Delhi: Vikas publishing House, 1990) at p 13.

385. Code I:5

or of their own experience in their homeland makes hardly any remarkable difference, for, the Dutch were as much male chauvinists as were the Hindu settlers.

If dowry is simply a consideration of marriage, then it follows that it is a right based purely on the incidence of birth as a male. Thus it becomes a bridegroom price. The opposite form of bridegroom price is the bride-price, which means that it is the husband or his family who has to present the girl's family with cash or kind. Eight forms of marriage are enumerated by Manu, who is considered a paramount authority on Hindu Law. Four of these were based on bride-price.³⁸⁶ We do not generally hear of the custom of bride-price in Jaffna society although *cheedanam* originated in a matriarchal society. Bride-price is an essential element of the *Asura* form of marriage, that is where the person who gives a girl in marriage receives consideration for it.³⁸⁷ Else Skjonsberg writing about Tamil women of Sri Lanka says that, some out-castes followed the custom of bride-price and refers specially to the Palla castes.³⁸⁸ Explaining the logic behind it, he says among the outcastes women have always played a very important role in inter-family economic exchanges.³⁸⁹ The males of this caste found it difficult or impossible to support a family and so women too were forced to sell their labour³⁹⁰. He continues that from this point of

386. Ranjana Sheel, *Institutionalisation and Expansion of Dowry System in Colonial India*, Article published in The Economic and Political Weekly.(July 12, 1997.) 1709.

387. *Ibid.*

388. A Special Caste-Tamil Women of Sri Lanka. p.52.

389. *Ibid.*

390. *Ibid.*

view outcastes men and women are equal.³⁹¹ Bride-price is however not a custom generally practiced in the peninsula.

Whether as provision for the new household or as consideration of marriage the ensuing result of dowry remains the same. It helps to sustain the burdens of marriage. But with the process of transition *cheedanam* lost its voluntary nature, became compulsory and very often was made a pre-condition of marriage. It thus assumed characteristics of a contract and operated to the detriment of women. The main cause for its negative effect on women is the overpowering influence that was exerted by patriarchy on the matriarchy based Jaffna society. In Jaffna, as in India, the joint family system of the Hindu order resulted in making the man the head of the family. In the process it relegated the woman to a subordinate position with the main role of preservation of the species and care of the family. It needs to be remembered that this occurred despite the fact that the customs reflect a happy blend of the two principles. In the social context where the woman was the common ancestress marriage did not confer any legal status on the husband.³⁹² He did not occupy a place of importance in that set up. He had no rights over his father's property and he belonged to the *tavazhi* of his mother. The supremacy of the woman is reflected in the Code which states that females succeeded females and sisters, dowered sisters.³⁹³ With the subsequent colonization and introduction of the Hindu joint family system and the attended patriarchal principles the

391. *Ibid.*

392. Coomarasamy, *op.cit.* 23.10 33.

393. I:5, I:6.

rule of males succeeding males too came into use and was assimilated into the customs of the country. The *modesium* or hereditary property brought into marriage by the father came to devolve on the sons³⁹⁴ and a brother's property to another brother.³⁹⁵ Though the newly introduced patriarchal principles blended well, the development was not a balanced one mainly because of the overpowering nature of the patriarchal system. This feature, ingrained in the patriarchal system has made it as the foremost among the institutions which were inspired by beliefs in male dominance and female inferiority. It is not surprising that this influence gradually translated itself into a fact of life in the social set up of Jaffna.

As the corollary of the Hindu joint family system Brahminism too had a part to play in the transition. Brahminical influences over a long period of time resulted in the basically matriarchal society being encroached on by a patriarchal one.³⁹⁶ This was because the Brahmins arrogated to themselves exclusive privileges. Religion, with its caste basis was the instrument which secured the social privileges of the upper caste male. The ancient Hindu texts, "came to be tortured out of their original text to support the new social pattern".³⁹⁷ When that happened religious sanction was received for degrading women; to restrict their freedom and lower their status.³⁹⁸ Kamaladevi says that a woman's status can be graphically depicted when she is

394. Code I:1

395. Code, I:7.

396. *Op. cit.* chp. 3, p....

397. Kamala Chattopadhyay, *op. cit.* p. 18.

398. *Ibid.*

directed to walk behind the husband, in fact “in his shadow”.³⁹⁹ As for the man, his superiority emerged at the time of conception itself, for a passage in the *Atharva Veda* is considered as having generated the idea that the embryos were normally males and that only evil spirits turned them into females.⁴⁰⁰ Women were, in fact, reduced to an unwanted progeny. Brahminical ideals of male supremacy thus fostered the preference for dowry marriages and it became a necessary ingredient for Hindu marriages.⁴⁰¹ However, the overt forms of subjugation of Hindu women based on Brahminical ideals, like widow seclusion, prohibition of widow marriages, ‘*sati*’ or the practice of forcibly making the woman to mount the funeral pyre of the husband, female infanticide etc. did not penetrate into the Jaffna peninsula. The religious philosophy of the people of Jaffna is Saivasim and not Brahminical Hinduism of the Indian type. Nevertheless, some patriarchal concepts based on Brahminical ideals like the superiority of the male species and their supposed indispensability in certain rituals, especially in funeral services of their parents, did infiltrate Jaffna society and found acceptance especially amongst the so called high caste Hindus.

The ascendancy of the male is reflected in the provisions of the Code, for it provides that a man did not require the consent of the wife to give away only one-tenth of his hereditary property whereas his wife, “... being subject to the will of the husband may not give anything

399. *Ibid.*

400. *Ibid* at p.19.

401. Ranjana Sheel, *Op. cit.*

away without the consent of her husband”.⁴⁰² The Ordinance went a step further and removed even that restriction on the man; while however retaining same on the wife, thereby making her totally subservient.⁴⁰³ Legal reforms have thus helped to sustain patriarchal norms and foster the dependence of women. It is very pertinent to add here what Sir Pollock said about the maternal system coming into contact with the paternal system. He said: “So far as the evidence has gone, the maternal system appears to be unstable when people who live under it come into contact with paternal families: in such cases the husband’s predominance pretty soon begins to assert or re- assert itself”.⁴⁰⁴ Hayley, while discussing *Binna* marriages, expresses a similar opinion. He quotes Mc Lennan from, “Primitive Marriages” to show that the patriarchal family was in many cases preceded by a system in which the woman was the basis of the household.⁴⁰⁵ It is submitted that the Code, which contains a mixture of matriarchal and patriarchal principles, shows a similar development in Jaffna. Thus we see that, these norms of patriarchy based on cultural, anthropological and religious factors had a pervasive impact on the creation of gender inequality in the Jaffna society. Vidyamali Samarasinghe, writing about gender inequality in developing countries notes: “It is clear that although the process of patriarchy was based on economic

402. Code IV:1

403. Sections 6 and 7 of the JMRO.

404. Note written in Sir Henry Maine’s *Ancient law* (London: J. Murray) at p.180.

405. *The Laws and Customs of the Kandyan Sinhalese or Kandyan law* (Reprint 1993) p. 168.

relations it was legitimised by attitudes and perceptions of male superiority ranging from biological, religious and other social factors".⁴⁰⁶ This is very true of developments that took place in Jaffna. The arid climatic conditions necessitated hard labour for survival and thus fostered male supremacy. To add to the biological factor were the socio-religious impact of Hindu Law and the joint family system discussed above. All these factors put together fostered preference for dowry marriages.

Roman Dutch Law and the transition

Thesawalamai is not written law but consists of customs of the people which were preserved in the memories of elders of the community. These customs had come under the influence of first the Portuguese and then the Dutch for about two centuries before it was codified by the latter. That some erosion of customs and usages had occurred during this period is beyond doubt. The Code itself bears testimony to some such changes made during Portuguese rule.⁴⁰⁷ It does not specify all such changes except to say that dowry came to be taken indiscriminately from the husband's and wife's property when daughters were given in marriage.⁴⁰⁸ The Dutch, in keeping with their

406. *Gender Inequality in developing countries: A reiteration of some leading issues*, op. cit. p. 4.

407. Code 1:2 states thus, "But in process of time and in consequence of several changes of Government, particularly those in the times of the Portuguese several alterations were gradually made in those customs and usages, according to the testimony of the oldest Mutaliyars....."; See Supra note 2.

408. Code 1:2.

colonial policy, sought to administer Jaffna by its customs even before the codification of the customs in 1707. But when these customs were not reasonable or clear or when Thesawalamai did not provide for a particular situation, they followed the Roman Dutch Law.⁴⁰⁹ It appears then, that the law that was codified was not altogether the original Thesawalamai but one which incorporated the modifications made during Portuguese and Dutch times⁴¹⁰ and the customs as understood by the Dutch codifiers.⁴¹¹ The Thesawalamai is a rough and primitive compilation and Pereira J. in *Chellappa v Kanapathy* borrowed the words of Tennyson to describe it as, “a wilderness of single instances”.⁴¹²

It is against this background that we have to see how principles of Roman Dutch Law helped to foster the transition. By the time of the codification, patriarchal values brought in by the colonists into Jaffna from the Coromondal coast had become firmly embedded in the originally matriarchal society. As a result the hegemony of the man in the family as well as in society was firmly established. In such circumstances, it is not surprising that the Dutch codifiers, who were heirs to the Roman legal tradition, which itself was based on patriarchal values, viewed marriage

409. This approach of the Dutch rulers is evident from the instructions given by Pavilojen, the Commander of Jaffna, to his successor in 1665. He said thus, “The natives are governed according to the customs of the country if they are clear and reasonable . Otherwise according to our laws” *Tambiah, Laws and customs of the Tamils of Jaffna*. Op.cit. p. 25

410. L.J.M. Cooray, *An introduction to the Legal system of Ceylon*. [1972] p. 139.

411. Dalton J., *Iya Mattayer v Kanapathipillai*, (1928) 29 N.L.R. 301 at p. 307.

412. (1914) 17 N.L.R. p. 294 at 295.

settlements made by the parents of Jaffna on their daughters as something similar to the *dos* of the Roman and the Roman Dutch Law. Dalton J.'s remarks in *Iya Mattayer v Kanapathipillai* that, "Having regard however, to the auspices under which the collection of laws and customs of Jaffna was composed and by whom it was composed, it is difficult to think that the provisions of the Roman Dutch law did not exercise some influence..."⁴¹³ seems to lend support to the above view. It is submitted that the opinion of His Lordship, though expressed in relation to *thediathettam*, could be taken to have a general applications so as to cover other provisions in the Code too. When looked at from this point of view, the impetus given to *cheedanam* in the Code, as a consideration of marriage, is understandable.

The twelve *mudaliyars*, who were requested to ascertain the correctness of the codified customs, on their part approved them. That the "sensible *mudaliyars*" found no discrepancies in them is not surprising since they were themselves well rooted in patriarchal norms. As could be expected they found nothing wrong in, or perhaps must have been very comfortable with, the proclamation in the Code that dowry was a means by which most of the girls obtain husbands and that the Jaffna men marry not so much to acquire a wife but to obtain a dowry. Tambiah writing about *thediathettam* says, "the concept of community of property in *thediathettam* is entirely borrowed from the Roman Dutch Law and perhaps might have been an innovation of the twelve sensible *mudaliyars* who were influenced by

413. (1928) 29 N.L.R. 301 at 307

concepts known to Roman Dutch Law”.⁴¹⁴ Though not to say the same of *cheedanam*, it is nevertheless possible to come to a conclusion that the idea of *cheedanam* as a consideration of marriage, if not introduced by the Dutch, must have been definitely perpetuated by them.

We noted how a maternal system becomes unstable when the people living under it come in contact with the paternal system.⁴¹⁵ It is also true that when customary laws come into contact with a powerful system such as the Roman Dutch Law it becomes inevitable that some imprints are left by the latter on the former.⁴¹⁶ Both these circumstances were found in Jaffna society before and during Dutch rule and accounts for the ready acceptance of the Dutch patriarchal norms and concepts which further endangered the woman's status and pride. Thereby the well intentioned marriage settlement that the father made on the daughter so as to enable her and her husband to set up a new family unit, the *tayvazhi illam*, came to be expressed and countenanced as a consideration of marriage. It is not a novel development. The transformation is similar to developments in India when nuclear households became the general pattern of social living. Gita Gopal puts it briefly but lucidly when she stated: “The practice of *sridhan* has changed over the years and has been replaced by the concept of dowry: a price paid to the bridegroom's family in

414. *Laws and Customs of the Tamils of Ceylon*. .p. 136.

415. Ref; p. *supra*

416. Tambiah, *Laws and Customs of the Tamils of Ceylon*, p. 136.,

connection with the marriage.”⁴¹⁷ In Jaffna, besides patriarchy and influence of Roman Dutch law, various other general factors like industrialization, urbanization and liberal education, to mention the main ones, led to the establishment of nuclear households very often away from parental homes. With English education, sons who had hitherto tilled the soil with their parents found it more profitable and prestigious to take up to white collar jobs. Thereby they became independent income earners. As office workers they needed houses nearer to their workplaces and as businessmen substantial capital for investment. Dowry as consideration of marriage needs to be seen from these two perspectives; firstly from the point of view of the demands of the new economy and secondly from the resultant effect of social mobility of those governed by Thesawalamai.

Consideration of marriage - the judicial approach

The extent of judicial reception of Roman Dutch Law during the Dutch and in the early British period is however not clear due to deficiency of information for lack of reporting. During the Dutch period and particularly in the early days of the British the judges were in the practice of consulting local assessors and *mudaliyars* to determine native customs.⁴¹⁸ The practice however did not bring satisfactory results as these assessors were sometimes not only partial but also ignorant of their own customs. The

417. *Gender and economic inequality in India: The legal connection*. An article published in the Boston College Third World Law Journal, (Vol: X111, Winter 1997, No: 1.)

418. Mutukisna, *op. cit.* 324 at 325.

judges also accommodated principles alien to Thesawalamai. One such principle erroneously applied concerned *cheedanam*, when it was made to appear as a consideration of marriage. The Dutch who were familiar with the concepts of *dos* and *donatio propter nuptias* of the Roman Dutch Law found it easy and convenient to understand *cheedanam* as something given in consideration of marriage. The disparaging words in the Code, in relation to *cheedanam*, that “it is not for the girls but for the dowry that most of the men marry,”⁴¹⁹ bear ample testimony to the attitude of the Dutch. The British Judges too followed the trend as it was after the British occupation of Ceylon that the Roman Dutch Law became entrenched. Further, English Law principles of consideration too came to be applied. The impact of principles of foreign law on *cheedanam* is amply testified by a whole range of judicial pronouncements in several reported cases.⁴²⁰ We cannot also lose sight of the fact that the judiciary was then totally, (and even now overwhelmingly) male dominated.

Academics and jurists are vehemently critical of the judicial conservatism and patriarchal stand taken by the judiciary especially on issues concerning women. Savitri Goonesekere commenting on the part played by the judiciary in such matters has this to say: “The patriarchal values and principles in family law have sometimes been introduced through legislation, but they are invariably the product of

419. 1:5.

420. *Tambapilai v Chinnatamby*, (1915) 18. N.L.R 348. ; *Kandappa v Veeragathy*, (1951) 53 N.L.R., p.119; *Thesigar v Ganeshalingam*, (1952) 55 N.L.R. p 14; *Murugesu v Subramaniam*, (1967) 69 N.L.R. 532.

development in Sri Lankan courts. Judicial conservatism and the reception of Roman Dutch Law and English common law values through the courts and their mechanical and often unnoticed rather than deliberate reception into statute law have strengthened male preference and gender inequality in the areas of family law.”⁴²¹ Radhika Coomarasamy, quoting Diane Polan, attributes it to the fact that Judges have grown up in a patriarchal culture and as such their attitudes are invariably shaped by their life experience.⁴²² This attitude of the judiciary is manifested in the way they have projected *cheedanam* as a consideration of marriage; an approach which totally ignores the magnanimity of the parents’ intentions.

Customary rules are gradually displaced by legislation and judicial pronouncements. Tambiah quotes the words of Sir Henry Maine to explain, that once a system of law is codified conscious development takes place as it happened to the XII Tables of the Romans.⁴²³ With reference to Thesawalamai he says, “We shall see how true the words of Sir Henry Maine are when we consider the development of Thesawalamai.”⁴²⁴ As far as *cheedanam* is concerned it was a negative development in that the multifarious

421. *Women and Law*, article published in a publication by the Ministry of Health and Women’s affairs - Sri Lanka, March 1993 titled *Status of Women*, at p.4

422. *Towards a theory of Law and Patriarchy*, quoted in Radhika Coomarasamy’s article *Women, The Law and Social Justice – A case study of Sri Lanka*, article in *Women at the cross Roads: A Sri Lankan perspective*, (Colombo: International Centre for Ethnic Studies in association with NORAD, New Delhi: Vikas Publishing Housing (Pvt) Ltd; (1990) p.119 at 120.

423. *Ibid.*

424. *Ibid.*

objectives underlying the original customary concept of *cheedanam* were ignored in the Code which projected it only as a consideration of marriage. Subsequent legislation did not bother to make any changes to it. The Jaffna Matrimonial Rights and Inheritance Ordinance does not provide for *cheedanam* other than to include it under the separate property of the wife⁴²⁵ and to lay down rules of inheritance.⁴²⁶ The male dominated judiciary too helped only to unduly emphasise the provision of *cheedanam* as consideration of marriage by following blindly the principles of Roman Dutch Law.⁴²⁷ It is the bounden duty of the Legislature to revoke or rescind rules, practices or laws which are detrimental to the interests of its subjects or which create an absurd or difficult situation. Where the Legislature fails to do so, the judiciary should come to the rescue to see that no harm or hardship is caused by such deviation from such customs or law.⁴²⁸

It took more than seventy five years for the judiciary to change its stand and to view pragmatically view the concept of dowry. The decision of Justice Amarasinghe in *Ranaweera Menike v Rohini Senanayake*⁴²⁹ is, without doubt, a land-mark judgment in that respect. Savitri Goonesekere commenting on the case declared, “The decision of the Supreme Court challenges the authority of

425. Section 6.

426. Sections 17 and 33.

427. *Murugasar v Ramalingam*, Tambiah Reports, IV, (1881) p 176; *Thamppillai v Chinntamby* (1915) 18 N.L.R. 348; *Murugesu v Subramaniam*, (1967) 69 N.L.R. p. 532.

428. Sharvananda C.J. in *Tennekone v Somawathie Perera alias Tennekone*, (1986) 1 Sri L. R. p. 90

429. [1992] 2 Sri L.R. p. 180.

an earlier view that a dowry is a property transaction for 'valuable consideration' or a financial inducement for a man to enter into the marriage contract".⁴³⁰ The decision makes it clear that dowry or *cheedanam* need not, as a rule, be considered as a gift made in consideration of marriage or a *donatio propter nuptias*, as Amarasinghe J. puts it. His Lordship holds that it can also be an ordinary gift, but given on the occasion of marriage. The distinction is made clear by his following remark that, "Perhaps the distinction between a donation *propter nuptias* and an ordinary gift given on the occasion of a marriage might become somewhat clearer if I might say this: People do not marry because of the wedding presents – the gifts – they might receive; nor are wedding presents given to bring about the marriage. A wedding present is a pure act of liberality, unconditionally given, without any sense of compulsion or obligation, with no hope of recall or recovery if the marriage does not take place. A donation *propter nuptias* is not".⁴³¹ These pronouncements neutralize the injudicious statements in the Code as regards the objective of *cheedanam* and agree well with the noble objectives of *cheedanam* in its original form. It is submitted that it is such judicial positivism that can help remedy a situation where the Legislature chooses to remain inactive. To women governed by Thesawalamai the judicial stance appears presently to be the only available remedy in respect of their denied rights and status in society.

430. *Realizing Gender Equity through Law: Sri Lanka's Experience in the post Nairobi Decade, Facets of Change*. (Cenwor publication)

431. *Ranaweera Menika v Rohini Senanayake*, [1992] 2 Sri L.R. 180 at p. 206

Consideration of marriage - the notarial approach

The Code mentions the execution of dowry deeds as an act of *doty*,⁴³² sometimes referred to as a *doty ola*.⁴³³ Under the customary law the normal method of giving dowry was a promise by word of mouth coupled with possession by the couple.⁴³⁴ The harmful consequences of this method were noted in a case cited in Muthukisna.⁴³⁵ An assessor giving evidence in this case made clear that when dowry was promised verbally it was possible for parents who became displeased with the daughters to threaten them that they would take away the lands given as dowry. This, if done he said, created the risk of the husbands turning the daughters out of the house.⁴³⁶ The Judge considered the happiness and welfare of the daughters and recommended that dowry should be made binding and dowry deeds should accompany dowries.⁴³⁷ It appears that the Dutch saw to it that dowries were put in deed form and the *chattambus* or school masters were entrusted with the task of registering them in the books of the church.⁴³⁸ The Dutch, apart from administrative conveniences, were interested in the revenue that could be derived from registration of dowry deeds. With the enactment of the Prevention of Frauds Ordinance dowry of lands has to be notarially executed for validity.⁴³⁹

432. I:3,

433. I:4

434. M. 136 at 137; Coomarasamy, *The Hindu Organ* 6-7-1933

435. M. 136 at 137.

436. *Ibid.*

437. *Ibid.*

438. Order 29. [of the 72 orders]

439. Section 2.

Deeds conveying dowry property often bear words to the effect that they are given in consideration of love and affection and as consideration of the marriage between the said parties. It is possible for the parents to gift to their daughter whatever they wished without intending it to be a consideration of marriage. In such an instance it becomes a gift *simpliciter*. The notary however generally includes the words, "in consideration of marriage" in the deed. Varied reasons can be assigned for showing dowry as a gift made in consideration of marriage. One such reason is the need to adhere to the age old custom of giving a dowry to a daughter. Putting it in the form of a document lends it greater recognition and acknowledgement. The other and perhaps a more serious one is that a gift *simpliciter* or one made out of pure liberality, though generally irrevocable⁴⁴⁰ stands the risk of revocation for specified reasons such as gross ingratitude of the donee.⁴⁴¹ On the other hand if the conveyance is *propter nuptias*, that is, not made out of pure liberality but as a gift in marriage settlements, it becomes irrevocable on account of the donee's ingratitude.⁴⁴² But it needs to be noted that our courts have held that nothing prevents a donor from expressly reserving a power of revocation in the deed itself.⁴⁴³

440. Grotius 3.2.16 ; Lee, *An Introduction to Roman Dutch Law*, 4th edition (1946; Clarendon Press Oxford) p.290.

441. Voet, 39.5.22; Lee, *An Introduction to Roman-Dutch Law*, [4th Edition] p 291..

442. Voet 39. 5. 31 ; Amarasinghe J. quoting from *Avis V Verspeput* [1943] A.D. 331, in *Ranaweera Menike's case*. *Op. cit* at p. 201.

443. De Sampayo J. in *Ponnamperume v Goonasekera*, 23 N.L.R. p. 235 at p. 238 ; *Government Agent, Western Province v Palaniappa Chetty* 11 N.L.R. p. 151; *Naganathar v Sinnammah* 31 C.L.W. 78; *Stephen v Hettiarachchi and another*, [2002] 3 Sri. L. R. 39.

In addition a gift *simpliciter*, if not made for valuable consideration cannot gain priority by registration over an anterior, unregistered deed of sale⁴⁴⁴ as, “The law of Sri Lanka confines the advantage of priority by registration to deeds supported by the passing of valuable consideration”.⁴⁴⁵ Our courts have held that a conveyance of land by way of dowry on the marriage of the daughter is *prima facie* a conveyance for valuable consideration.⁴⁴⁶ It is possible that it is to guard against these difficulties that even in instances where dowry is motivated purely by love and affection it is mentioned in the deed that it is also given in consideration of marriage.

In Thesawalamai a dowry deed is different from a woman’s *cheedanam*, though the nomenclature in the Tamil language is the same. A dowry deed is written for the marriage. It is usually done immediately before or after, or at the time of marriage. *Cheedanam*, on the other hand can be given in contemplation of marriage, even long before any marriage is arranged.⁴⁴⁷ It is also not confined to what is given by the parents. As noted, property received by the woman in other forms, for example by way of inheritance, also becomes the woman’s *cheedanam*.⁴⁴⁸

444. G.L. Peris, *The law of property in Sri Lanka*, Volume I, Second Edition [1983] p.209. See also *Fernando v Fonseka*, (1989) 1 C.L.R. 82.

445. *Ibid.*

446. *Noorul Hatchiya v Noor Hameem* (1943) 44 N.L.R. 524; For further reading see Shirani Ponnambalam, *op.cit.* p.36.

447. For fuller discussion see pages *supra* 101-102

448. Code 1:3; IV:3 See also *Murugesu v Subramanaim*, (1967) 69 N.L.R. 532 at 534

It often happens that a bride-to-be has already become entitled to inherited property from a deceased parent or parents or has received prior to marriage a share of her destined property as a gift. These properties constitute her *cheedanam* on marriage.⁴⁴⁹ Nevertheless the parents of the bridegroom have in some instances insisted that these properties be included in the dowry deed.⁴⁵⁰ The primary reason for such insistence is perhaps ignorance of the law that, whether as inherited property of the wife or as *cheedanam* given in consideration of marriage the property becomes the separate property of the wife. It has also led to improvisations of conveyancing practices. In order to satisfy the aspirations and fears of the parties concerned lawyers have adopted various methods such as writing Deeds of Declaration by which those properties are declared as the wife's *cheedanam*.

Does *cheedanam* form the consideration for marriage? an evaluation

Dowry to be a consideration of marriage has to be on a promise of marriage.⁴⁵¹ The gift then becomes a *donatio propter nuptias*, as Amarasinge J. puts it.⁴⁵² Several cases have used the term to connote what was given in consideration of marriage. Such conveyances are then not mere acts of generosity and liberality.⁴⁵³ The question is, can *cheedanam* be so placed? Amarasinge J. posed several

449. *Ibid.*

450. Personal interviews conducted in Colombo and Jaffna.

451. *Ranaweera Menike v Rohini Senenayake*, [1992] 2 Sri.L.R. p. 108

452. *Ibid*

453. *Ibid.*

questions in *Ranaweera Menike*'s case to come to a finding as to whether the gift made under the general law was dowry given in consideration of marriage or a gift made out of pure liberality.⁴⁵⁴ Such questions become relevant in the evaluation of *cheedanam* as well. Is *cheedanam* generally a conveyance made to encourage or promote or generally to 'tempt' the male to marriage? In other words is the transfer the condition on which the marriage rests? To prove that it is so there must be evidence to conclude that the transfer was prompted by, or it brought about the marriage. In *Kandappa v Charles Appuhamy*,⁴⁵⁵ a case decided under Kandyan Law, it was proved that the promise of the plaintiff to give the deed of gift was wholly or partly the inducement to contract the marriage. Such proof however was not forthcoming in *Ram Menika v Banda Lekham*⁴⁵⁶ and therefore the conveyance was considered as a free will gift, rather than as one for valuable consideration.

When *cheedanam* is given on marriage, as consideration for that marriage, it is easy to conclude that it is a *donatio propter nuptias* or dowry as in the general law and would form the consideration for such marriage. But as seen earlier⁴⁵⁷ *cheedanam* can be given long before or long after marriage. De Sampayo J. finds nothing in Thesawalamai which shows that such previous apportionment is wrong.⁴⁵⁸ On the contrary according to His Lordship Thesawalamai contemplates such previous

454. *Ibid*

455. (1926) 27 N.L.R. 433.

456. (1912) 15 N.L.R. 407

457. *Supra*, pp. 101-102

458. *Tampapillai v Chinnatamby, op. cit.* at p.350.

apportionments.⁴⁵⁹ Tambiah J. declares that Part:1:1 and 1:2 of the Code do not say that *cheedanam* must be given only at the time of marriage or to promote a particular marriage.⁴⁶⁰ When *cheedanam* is given long before marriage there could neither be a promise of marriage nor any particular marriage arranged. In this sense it is difficult to comprehend *cheedanam* as a consideration of marriage, as a *donatio propter nuptias*, in its literal sense. This is what perhaps prompted De Sampayo J. to say that, "he never understood dowry under Thesawalamai to mean the same thing as a marriage settlement".⁴⁶¹ Mutukisna cites a case where mention is made of the country custom that a daughter could be given dowry even though she had not arrived at the proper age of marriage.⁴⁶² When *cheedanam* is so given at such a tender age it could so happen that some daughters did not subsequently enter matrimony at all.⁴⁶³ In such instances the theory that in Thesawalamai, dowry is consideration for marriage fails to hold ground as it did not prompt, tempt or result in making a marriage. Moreover there can be instances of parents making gifts to their daughters which need not necessarily be in the form of a dower but can be just simple donations.⁴⁶⁴ Hutchinson C.J. was of the opinion that such gifts would not form the consideration of marriage.⁴⁶⁵ His Lordship calls them "pure gifts".⁴⁶⁶

459. *Ibid.*

460. *Murugesu v Subramaniam*, *op. cit.* p. 534 -535.

461. *Tambapilai v Chinnatamby*, *op. cit.* at p. 350.

462. *The Thesawalamai* p.103 at 104.

463. Mutukisna, *op.cit.* p.115-116.

464. Mutukisna, (1834) p. 132.

465. *Jayasekera v Wanigaratne*, (1909)12 N.L.R. 364 at 365.

466. *Ibid*

When a gift is made in consideration of marriage the subject matter of the gift becomes the property of the recipient no sooner the consideration is satisfied.⁴⁶⁷ But it is also a widely accepted practice, generally and amongst those governed by Thesawalamai, to make gifts subject to the life interest of the donor. When the gift is so made it is only title that passes on the marriage taking place. The right to enjoy the property is postponed. Amarasinghe J. poses the question as to how could such a gift, which does not enable immediate possession and enjoyment of the property, satisfy the objective or motive of dowry being an inducement by lightening burdens of matrimony. On that basis His Lordship held that, “The reservation of a life interest showed that the conveyance was not *propter nuptias*”. The above conclusion when applied to *cheedanam* negates the popular notion of *cheedanam* as consideration of marriage where the gift is made subject to a life interest.

The provision in the Thesawalamai as to what constitutes a wife’s *cheedanam* further helps to show that *cheedanam* in Thesawalamai cannot be generalized as a consideration of marriage. In its analysis of the different kinds of goods brought together in marriage by the husband and wife the Code says, “when brought by the wife were denominated *chidenam*”.⁴⁶⁸ Tambiah J. elucidates it when he declared that, “All the properties brought by the wife, whether they were inherited by her, dowered to her or even acquired by her before marriage become her dowry at the

467. Voet 39.5.4; *Ranaweera Menike v Rohini Senanayake*, *op.cit* at p. 213

468. Part 1 :1

time of marriage".⁴⁶⁹ How can property that a wife inherits or what she on her own acquires form a consideration of marriage? The definition of *cheedanam* in Part 1:1 would then be rendered meaningless. The disparaging words found in Part 1:5 of the Code suggest that it is not for the girls but for the dowry that men marry. It is obvious that such an objective could not have been behind the country custom of a society which was basically matriarchal, but an alien concept introduced into the Code by the codifiers. Thus *cheedanam*, at least in its origins, was never intended to be a *quid pro quo*. To be a consideration of marriage, it must be given *propter nuptias*, but, as analyzed above, *cheedanam* need not be given at the time of marriage or to promote a particular marriage. In his book *Laws and customs of the Tamils of Jaffna* Tambiah makes this difference very clear. He says, "Hence dowry property under the Thesawalamai must be distinguished from property granted by a deed of dowry. Our courts have held that the term "consideration" in the Registration of Documents Ordinance must be given the same meaning as in English Law. In such cases the dowry should be given as a *quid pro quo* to consummate the marriage, but under Thesawalamai the term dowry has a different connotation".⁴⁷⁰ So the concept of dowry in Thesawalamai has to be understood as *cheedanam* in its customary form and as dowry in its ordinary parlance, purposefully put in deed form to satisfy statutory requirements.⁴⁷¹ The Code embodies yet another provision explaining a Tamil proverb

469. *Murugesu v Subramaniam*, *op. cit.* at p. 534.

470. *Laws and Customs of the Tamils of Jaffna*, *op. cit.* at p. 170.

471. Prevention of Frauds Ordinance. Section, 2.

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“*Ottiym chitanamum pattiya*”.⁴⁷² The explanation to it is also given as meaning that immediate possession must be taken of dowry and pawns otherwise the property would revert to the common estate as though they were not given to the young couple. If the *cheedanam* so given has to be considered as having been made in consideration of the marriage that took place, then the above custom provided in the Code too becomes meaningless. The question of reversion cannot possibly arise when consideration had already passed.

For *cheedanam* to be a consideration of marriage it must be a gift to the man for contracting the marriage. But in Thesawalamai *cheedanam* then, and dowry now, remains the separate property of the wife. So is dowry under the general law. “The popular notion that dowry is a gift to a man for contracting a marriage with a woman is not supported by the proprietary rights that a married woman continues to retain in her dowry”, says Savitri Goonesckere.⁴⁷³ She makes the point clear by distinguishing dowry from a free will gift to the husband. It is the latter kind made by the bride’s parents that he can take absolutely as his.⁴⁷⁴ In Thesawalamai too *cheedanam* is never given to the man. Tambiah J. means the same thing when he says that all the properties brought by the wife are her dowry at the time of marriage.⁴⁷⁵ The same applies to cash, jewellery or other movables given as dowry, all of which become her

472. 1:3.

473. *The Legal Status of the Female in Sri Lanka on Family Relations* Op. cit. at p.30.

474. *Ibid.*

475. *Murugesu v Subramaniam*, op.cit. at p.534.

separate property.⁴⁷⁶ In so far as it relates to land it is transferred in the name of the woman by a notarial deed. This rule applies generally to all the women in the country. The idea that it is the woman's property is reinforced in Thesawalamai by another provision; that if the husband squandered *cheedanam* property and it is diminished during marriage the loss should be made good to the wife's heirs by the husband from his acquired property, when the wife's property is divided after her death.⁴⁷⁷ It also brings out a fundamental principle of Thesawalamai that ancestral property, which constitutes the major portion of *cheedanam*, should revert to the source from whence it came.

It was seen that *cheedanam* under Thesawalamai has to be distinguished from dowry as generally understood. The word *cheedanam* however is used in both instances in the Tamil language. In whatever form it is received by the woman the realities of the social view point cannot, however, be ignored. The social practice has been to identify *cheedanam* or dowry as a gift to the husband. It is not the brides' parents but the bridegrooms' parents or the bridegrooms themselves who exercise the privilege of determining the amount and the form in which dowry should be given. In such determination educational and professional qualifications of the bridegroom become an important factor. The Sri Lankan situation is no different to that existing in present day India. In a study undertaken to examine Indian students' attitude towards the importance and continuation

476. Savitri Goonesekere *The Legal Status of the Female in Sri Lanka on Family Relations*, op. cit. p.30 .

477. Code, I:15; *Mudalithamby v Sithambarapillai* , Mutukisna, p. 121.

of dowry Prakash Rao and Nandini Rao conclude from the data they collected, that dowry expectation for persons with different educational backgrounds increases as the prestige of the education increases.⁴⁷⁸ The amount of expected salary for a person with a given level of education was closely related to the amount of dowry expected.⁴⁷⁹ From the point of view as to who should exercise control over it too, we see that though admittedly dowry once given becomes the separate property of the wife, for all practical purposes it works out to be a gift to the bridegroom. This is because it is the husband who generally decides as to how best it can be used, managed, or if cash, invested. This exercise of superior power is facilitated by the fact that he is the head of the family and vested with marital powers over the property of the wife.⁴⁸⁰ Exercise of dominant power, overlooking the interests or wishes of the wife, does not appear strange in a patriarchal society in both India and Sri Lanka. It is fair however to expect that, in the interests of the family and in recognition of the active participation or indirect contribution by the wife towards joint consumption of the family, both the husband and wife would consult each other. Whatever the extent to which these aspirations are satisfied amongst men and women governed by other laws, in Thesawalamai legal restraints⁴⁸¹ that have a negative

478. The dowry system . An article published in , Marriage, Family and Women in India. *op. cit* at p.75.

479. *Ibid.*

480. *Ibid*, p. 73. In the above mentioned study research it was revealed that only 5% of the students opined that the wife only should have the ultimate power.

481. *Infra*, Chapter on Spouses Rights and Obligations to Matrimonial Property.

effect on women's powers curtail women's active involvement and positive participation in affairs concerning their own separate properties.

Though as consideration of marriage or a gift proper *cheedanam* is the property of the wife, it is not devoid of value to the husband. In *Kandappa v Charles Appuhamy Jayawardene J.* declared: "The husband derives advantages from the property settled on the wife. He is relieved to some extent from the provisions which he would otherwise have to make for her. If he lives amicably with his wife, her income would contribute to the expenditure of the family which would otherwise fall on him exclusively".⁴⁸² What Jayawardene A.J. held in respect of parties who were Kandyans applies equally well to those governed by Thesawalamai. As to the contention that dowry is the wife's separate property His Lordship declared, "During marriage the question of separate property would hardly arise and the income will be used as a common fund for the benefit of the wife and family, and the property itself will be under the control and management of the husband. The husband will therefore obtain valuable assistance in sustaining the *onera matrimonii* from the dowry property".⁴⁸³ In the Kandyan Law the married woman, unlike her Thesawalamai counterpart, is a *feme sole*. She is not restrained in her proprietary rights by any marital powers of the husband. With all that, if the Kandyan husband can enjoy so much rights and use from the wife's property it should be doubly

482. *Kandappa v Charles Appuhamy* (1926) 27 N.L.R. p.433 at 438.

483. *Ibid.*

so in Thesawalamai, for, in Thesawalami, the Code⁴⁸⁴ as well as the Jaffna Matrimonial Rights and Inheritance Ordinance not only authorize the husband's intervention but also make it mandatory that the wife obtains⁴⁸⁵ his written consent to dispose or deal with her immovable property. It is submitted that most women would not normally resent or grudge the exercise of such powers by the husband as long as there is amicable relationship between the spouses. What the Thesawalamai woman resents is the deprivation of her rights and the predatory nature of the man in insisting on a dowry as a pre condition of marriage. They rightly feel it is exploitation of women based on social and cultural values of a society which believes that women should and need to be married.

It would not be proper to generalize that amongst Jaffna Tamils dowry forms the sole consideration of marriage. The words in the Code that men marry solely for dowry are, as previously commented, most disparaging of women governed by Thesawalamai and reduce them to an unwanted progeny. The statement is demeaning not only to the women but to the men as well. It is an insult to men who have confidence in their capacity to provide for their family. Besides in the existing situation, to most young men who have migrated and who value the earning capacity of the women and their adaptability in foreign countries, dowry is not the prime consideration of marriage. English education, professional qualifications, social standing and adaptability are of greater importance. They weigh more as deciding

484. IV:1

485. Section 6, JMARIO..

factors than dowry. It is not to say that demand for dowry has died a natural death: it is definitely not the sole criterion now.

Cheedanam – a daughter's share in the family inheritance

The objectives of *cheedanam* could be more clearly understood as an advance provision to the daughter of her share in the family inheritance. The practice of giving portions of parental inheritance on the marriage of the woman is nothing new. Maine inquiring into the origins of the succession of daughters to their fathers' estate notes that the practice of giving them portions on their marriage prevailed widely in the ancient world.⁴⁸⁶ Voet also mentions the legitimate portion being given as dowry. De Sampayo J. with reference to *cheedanam* referred to the "gifting of the destined property," inferring that what the daughter got as dowry was an advance payment of what was destined for her. Lyall Grant J. explained the rule further when he associated dowry with forfeiture and declared that, "The admitted principle of the Thesawalamai is that if a daughter is dowered she loses her rights to her parent's inheritance."⁴⁸⁷ The concept is familiar to Kandyan Law too where a daughter married in *Diga* is deemed to have received her share of the inheritance, thereby forfeiting any future claims.⁴⁸⁸

486. *Dissertaions on Early Laws And Customs*, Henry Sumner Maine, (London, 1907) p.108

487. (1929) *Eliyavan v Velan*. 31 N.L.R. 356 at 358. See also Gratien J. in *Thesigar v Ganeshalingam*. (1952) 54 N.L.R. 114.

488. Hayley, *op.cit.* pp. 166, 333, 498.

Savitri Goonesekere explains it further. She states that dowry originated in traditional Sinhalese society as a daughter's share in the family inheritance⁴⁸⁹ and that it was "to prevent the undesirable consequences of paternal *paraveni* passing outside the family that the Diga married daughter's inheritance was converted to cash and jewellery and non-*paraveni* property which she received as a marriage portion".⁴⁹⁰ A noticeable feature in the Kandyan Law regarding forfeiture is that the daughter married in *Diga* does not only forfeit future rights to paternal inheritance, but is also liable to forfeit whatever paternal property she had inherited before marriage on offer of the market value of such property by her brothers or unmarried sisters.⁴⁹¹ This does not happen in Thesamalamai, for only daughters dowered during the lifetime of their parents are liable to forfeit rights to parental inheritance.⁴⁹² Thus if before the daughter's marriage a parent dies she, like her other siblings, becomes entitled to a share. Where she subsequently marries and is given a dowry she does not forfeit her rights to the property that had vested in her on the death of the parent. Thus Basnayake J. held in *Murugesupillai v Muthiah*, that a daughter who was given a dowry on her marriage that took place after the death of her mother did not, by accepting

489. *The Legal Status of the Female in Family Relations in Sri Lanka*, *op.cit.* p. 30.

490. *The Legal Status of the Female in Family Relations in Sri Lanka*, *op.cit.* p.8.

491. Section 12, Kandyan Law Declaration and Amendment Ordinance; Sections 12 (1) and 18 (2) read with 12 (1) of the said Ordinance.

492. 1:3. of the Code provides that "The daughters must content themselves with the dowry given them by the act or doty ola and are not at liberty to make any further claims on the estate after the death of their parents unless there be no more children"

a dowry, lose her right to a share of her deceased mother's *thediathettam*⁴⁹³ as her share of it had by then vested in her by operation of law.

This doctrine of dowry and forfeiture reflects an ancient practice and is embodied in the principle of collation of the Roman Dutch Law. Voet says that, children who have been dowered are held liable to collate for their mother or step-mother after the decease of the father what they have obtained by title of dowry.⁴⁹⁴ He also makes the exception and notes that they need not collate "if they think that they ought to refrain from the paternal inheritance as being ruinous".⁴⁹⁵ It applies in the general law of our country⁴⁹⁶ and was copied into the Thesawalami as well.⁴⁹⁷ It is recognition of the principle that a dowered daughter can be considered as having obtained in advance her share of the inheritance.⁴⁹⁸ The customary law makes no such provision except for the principle of forfeiture in Part I:3 of the Code. It needs to be noted that forfeiture will ensue

493. (1963) 65 N.L.R. p. 87.

494. 23.3.15; See also Maine, *op. cit.*, p. 108-109, where he states that the provision for the daughters on her marriage is an alternative method of providing for her and that the exclusion of the daughter from her inheritance means that she has a right to be portioned as a rule out of the movable property of the family and that she only succeeded when she had not been portioned.

495. *Ibid.*

496. M.R.I.O. Section 35

497. J.M.R.I.O. Section, 33. It provides thus, "Children or grand children by representation desiring to become heirs to the deceased parents are bound to bring into hotchpot or collation all that they have received from their deceased parents above the others by way of dowry or otherwise on the occasion of marriage or to advance them in life....",

498. *Ayate v Tanecooly Raman*, M. p. 115 ; *Tambapillai v Chinnatamby*, *op.cit* ; *Murugesu v Subramaniam*, *op.cit.*

only on proof that the daughter received a dowry. So what is given as a gift pure and simple will not disentitle a woman from her rights to inheritance. Mutukisna cites a case where Judge Price sought opinion of assessors, who declared that what was given to the defendant's late mother in the case was not in the nature of dower, but what was considered at that time as donation, which they considered would not prejudice the defendant's late mother's right to inheritance.⁴⁹⁹ In *Kandappa V Veeragathy* it was proved that the daughter had not received a dowry from her parents on the occasion of her marriage.⁵⁰⁰ She was subsequently gifted some property. Basnayake J held that the deed of gift could not be construed as a *doty ola* so as to disinherit the daughter.⁵⁰¹ Gratien J. did not follow the decision in *Kandappa v Veeragathy*. He stated that it resulted in a narrow interpretation and instead laid down the rule that, "the question whether a subsequent gift by a parent to a married daughter operates and was intended to operate as a donation *simpliciter* or as a postponed fulfillment of the earlier obligation to provide her with her dowry was essentially a question of fact".⁵⁰² In Kandyan Law however, the difference is that a marriage in *Diga* per se entails forfeiture. It is submitted that when a daughter is given a dowry well in advance or very late after marriage, sometimes even after the death of the husband, it is easier to understand the motive behind such a conveyance as a prior or delayed grant of her due portion, rather than as a consideration of marriage.

499. (1834) p. 132.

500. (1951) 53 N.L.R. p. 119

501. *Ibid.*

502. *Thesigar v Ganeshalingam* (1952) 55 N.L.R. p. 14 at p.15.

The concept of collation recognises gender equality as the rights and obligations thereby imposed apply equally to the sons who benefited by some receipts from their parents during their lifetime to advance them in life.

Cheedanam – An expression of filial affection

Amarasinghe J. holds the view that “...easing the burdens of marriage may be a desirable or commendable purpose. However, doing something about it may or may not be an act of pure liberality. If a conveyance of property is made as an incentive to take on the responsibilities of marriage by easing its financial burdens, which the parties may otherwise be unable, or find it difficult to bear, it might perhaps in the light of such explanatory circumstances, be more easily regarded as a *donatio propter nuptias* rather than as a pure gift—an act of mere generosity or liberality”.⁵⁰³ He maintains that when a dowry does not form the consideration in the sense of an inducement, a *quid pro quo*, it becomes a gift pure and simple.⁵⁰⁴ His Lordship was here endorsing the view expressed by Pereira J. in *Ram Menika v Banda Lekam* who declared that, “the proposition is not one of universal application. A dowry may be a spontaneous and free will gift by a parent to the contracting parties. It may even become a surprise to the donees”.⁵⁰⁵ A gift, explains Amarasinghe J. is “a giving or promising of a thing without compulsion or legal obligation

503. *Ranaweera Menike v Rohini Senanayake*, [1992] 2 Sri.L.R. p. 185 at 205.

504. *Ibid.* pp. 206 and 214

505. 15 N.L.R. 407 at 410.

or stipulation for anything in return, freely out of sheer liberality or beneficence”.⁵⁰⁶ *Cheednam* too can be considered on a similar basis. It may serve as a consideration of marriage when given on a promise of marriage or to take the responsibilities of marriage. It can be otherwise too, an act of pure liberality—a *donatio mera*. Thus it is not possible to adduce consideration, in the sense of an inducement, when a parent makes a gift to a young daughter whose marriage was not even contemplated. Thesawalamai, says De Sampayo J., contemplates such early gifts of destined property to a daughter.

By tradition Indian brides were presented gifts in cash and ornaments by rich and royal families as a symbol of love and affection.⁵⁰⁷ These gifts were then voluntary and not an obstacle to marriage.⁵⁰⁸ It was this habit however which subsequently developed into the custom of dowry payments. Paras Divan, speaking of *varadakshina* or presents to the bridegroom on the occasion of marriage, says that it need not be doubted that *varadakshina* was given out of love and filial affection and that it was in recent times that it, along with gifts to the bride, got entangled to take the frightening form of dowry.⁵⁰⁹ The evolution of *cheedanam*, has been on similar lines. It was not always made as an inducement for marriage, or for that matter, marriages amongst the Tamils governed by Thesawalamai are not as a rule on condition that *cheedanam* is given.

506. *Ibid.*, at p 196

507. Prakash Rao and Nandini Rao, *The Dowry System, Marriage, the Family and Women in India*, *op. cit.* p. 61.

508. *Ibid.*

509. *The Dowry Prohibition Law*, *op.cit.* p. 564.

Quite a number of marriages take place amongst Tamils either without any such property transactions or if there were any, they having been made out of love and affection for the daughter. Though the codifiers brought words into the Code denoting that the men married for the dowries and not for the women, they also included in the Code certain practices that were in vogue amongst the people at that time. One such practice was that sometimes the relations too contributed to enlarge the dowry given. This contribution was, without doubt, induced by love and affection because they were made with particular regard for the bride.⁵¹⁰

As security and financial protection for the woman

There can be no doubt that dowry, whether given as consideration of marriage, out of pure filial affection, or as both, had the underlying objective of providing the daughter with some degree of economic security in adverse circumstances.⁵¹¹ The above view of Paras Diwan relates to the Indian situation. Nevertheless it is of general application, for dowry is a provision made in the interests of the wife. Sohon writing of the *dos* and the *donatio propter/ ante nuptias* says that, "it was deemed essential that married women should have property of their own, so that they might not be left un provided for in the event of the marriage

510. I:3

511. Paras Diwan, *The Dowry Prohibition Law, op. cit.*, p. 564 - 565 ; Prakaso Rao and Nandini Rao, *The Dowry System, Marriage, the Family and Women in India, op.cit* p. .61 - 62.

being dissolved”.⁵¹² The *dos* as well as the *donatio propter nuptias* were forms of a married woman’s property. It is similar in Muslim Law as well, The *Mahr* though contributed by the husband and the dowry in whatever form, as *Kaikuli* or *Sridhanam*, become the wife’s property. In Kandyan Law the *diga* married daughter who left the home on marriage was dowried similarly in order to provide for her and save her from poverty and impoverishment.⁵¹³ Radika Coomarasamy is of the opinion that dowry was traditionally given as “a means of economic independence in case of hardship”.⁵¹⁴ Dowry or *cheedanam* under Thesawalamai is not different. There happens to be a close connection between dowry and economic independence of women. Tennent’s views have some relevance here. Writing about Jaffna society in 1850 he says that: “It is a paramount object of ambition with Tamil parents to secure an eligible alliance for their daughters by the assignment of extravagant marriage portions.”⁵¹⁵

These words suggest that he viewed dowry in Jaffna society as a consideration of marriage. But the words that followed brings out the true effect dowry has in the lives of the Jaffna woman. He says, “These consist either of land or of money secured upon land; and as the law of the land recognizes the absolute control of the lady over the property thus conveyed to her sole and separate use, the prevalence

512. *Institutes of Roman Law*, *op. cit.* at p. 473, See also Leage, *Roman Private Law op. cit.* 103.

513. Hayley *Kandyan Law*, *op. cit.* pp. 331 – 332.

514. *The Impact of Tradition, Culture and Religion on Women in South Asia*, p 23 .(I.C.E.S.)

515. J. E. Tennent, “ *Christianity in Ceylon*” (London: 1850) p. 157

of the practice has, by spelling degress, thrown an extraordinary extent of landed property of the country into the hands of females and invested them with a corresponding proportion of authority in its management".⁵¹⁶

To the man and his parents a means of reimbursement or compensation

While to the woman it serves as a means of social security, to the man of the modern era, "it was a means of recovering every *paisa* spent on his education", especially higher education abroad.⁵¹⁷ The picture is of India, but it is submitted that, it is no different among the Tamils of Jaffna. The parents, faced with the troubled security situation coupled with the breakdown of the economic, political and social structure of Jaffna were hard pressed to send their sons abroad. It involved large sums of money. They used whatever meagre savings they had and when that was insufficient pawned, mortgaged or sold their immovable property. The money or property which otherwise would form the dowry of the daughters had to be replenished. The parents too need financial security when the sons are not physically present to give them accommodation, food and clothing. It is not surprising that they seek to improve their resources by obtaining dowries for their sons; Hence the ever increasing demand for dowry. Another feature in this process is the gradual decline in the demand for immovable property as dowry. The demand is increasingly for cash by the young men who have migrated in large numbers to foreign countries.

516. *Ibid.*

517. Paras Diwan, *op. cit.* p. 564 – 565.

Donations or gifts on marriage

Apart from the practice of giving *cheedanam* or dowry we witness, amongst those governed by Thesawalamai, the emergence in recent times of a new social trend of giving, what, in general parlance, is called, “donations”. It appears to have a lot in common with the “*varadakshana*” of the Indian type, which as Gita Gopel says, “is a price paid to the bridegroom’s family in connection with the marriage”⁵¹⁸ The price is usually a fixed amount of cash given to the groom or his family as part of the marriage transaction. Donations are often solicited for use as dowry for the bridegrooms’ sister or as a sort of an advance lump sum deposit for future maintenance of the bridegrooms’ parents in their old age.⁵¹⁹ As an advance deposit for the parents, it appears to be a sort of compensation for the loss of support, which, otherwise the parents could have received from their sons. It can thus be seen as the outcome of a feeling of insecurity by the parents on giving the sons in marriage. The break up of the joint family and the impracticability of the extended family system due to socio-economic factors can be attributed as the main causes. The exigencies of the time which separated most of the sons of Jaffna from their soil and family to foreign destinations made such joint or extended living impossible. Within the country there is a preference shown for nuclear households by both the young and the old. These

518. *Gender and Economic Inequality in India – the Legal Connection* Op. cit p. 69

519.. In view of the obligations imposed by the Protection of the Rights of Elders’ Act, 9 of 2000 the need for donations as a means of maintenance or support is questionable.

are perhaps some of the underlying factors for the creation of this new concept of donation in a society, which from ancient days has given importance to the concept of dowry. It does not however appear to be a development peculiar to Thesawalamai. Recent social trends seem to indicate that in other communities too parents are under pressure to transfer a daughter's dowry to her husband".⁵²⁰ Such transfers bear close similarities to donations. We see such developments in the Indian sub-continent too. Nuclearization of families has caused amongst parents a sense of financial insecurity due to uncertainty of financial support from married sons towards support of parents or younger siblings.⁵²¹ This has taken the form of demands by parents of the groom that a certain sum of money should be given to them as 'recompense' in exchange of the son's income and assets.⁵²²

It needs to be clarified as to whether such gifts are free will gifts to the husband or are in fact dowry gifts under a different nomenclature. It is only if the gifts are not intended for the daughter will they become 'free will gifts' to the husband.⁵²³ Since the transfers are of cash or property, which should rightfully go to the daughters, it is possible to consider them as dowry. In *Karunanayake v Karunanayake*, cash given to the husband was held to be

520. Savitri Goonesekere, *Women and Law*, P. 07, article published in *Status of Women*, a publication of the Ministry of Health and Women's Affairs, March 1993.

521. *India together: Anti dowry Legislation destined to fail* – Manushi, Issue 148, p. 7

522. *Ibid.*

523. *Recovery Of Dowry And Other Property On Dissolution of Marriage*, article in Colombo Law Review, Vol: 3 (Colombo) 1972 at p.10.

the separate property of the wife,⁵²⁴ since the court held that, though by custom it was given to the husband, he was expected to preserve it for the wife. As a free will gift to the husband it becomes his separate property over which the daughter can have no control whatsoever. On the contrary, if identified as a dowry gift, it becomes her separate property.⁵²⁵

Cheedanam or dowry can be defended on the premise that it remains with the wife as her separate property and is of use to the new family. But donation is not. “Whatever may be the objectives of *cheedanam* it serves the purpose of being a contribution to the support of the marriage and is a means of ensuring that the woman is not totally dependent on the man. The donation referred to above is neither. It is nothing more than a commercial transaction in which the parent who makes the highest bid gets the man as the husband for his/her daughter”.⁵²⁶

There is a crying need to stop such practices which result in social abuses and leads to commercialization of marriages. Savitri Goonesekere, who expresses the opinion that it would be incorrect to assume that the giving of dowry in itself diminishes the status of women,⁵²⁷ is however very

524. [1937] 39 N.L.R. 275.

525. Ref; chp; on Spouses Rights and Obligations to Matrimonial Property, under Donations and forfeiture.

526. *Cheedanam and Rights to Parental Inheritance under the Law of Thesawalamai*, article by writer published in The Colombo Law Review, Volume 8, 1995.

527. Savitri Goonesekere says, “as in the case of arranged marriages it would have the reverse effect and enable a woman to “enter her new home with a firm step and (to) face her new relatives with a high head”, *The legal status of the female in the Sri Lankan law on Family relations op.cit.* p. 30.

skeptical of donations and calls for imposition of direct prohibition on such gifts.⁵²⁸ She suggests that it could be done on the ground that the conveyance practice, as well as the judicially developed concepts in land law, makes dowry gifts as transfers for valuable consideration, since they are given as an inducement to contract a marriage. Such an 'inducement', she declares, "should be considered as contrary to public policy since it violates the statutory requirement of obtaining a bride or bridegroom's free consent to marry".⁵²⁹ It is submitted that the same reasoning could be applied to donations as well.

The international bill of rights for women, namely, The Convention on the Elimination of all forms of Discrimination Against Women, imposes the responsibility on the state parties to take all appropriate measures, "To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".⁵³⁰ Sri Lanka has endorsed these international standards and has accepted by ratification the international obligations under the Convention. Our Women's Charter declares that, "The State shall enact legislation to prohibit the transfer of movable or immovable properties to any person other than one's own children in consideration of marriage, except where such

528. *Ibid.*

529. Savitri Goonesekere, *Status of Women in Sri Lanka - Women and the Law*, *op.cit.*, p. 7.

530. Article 5 (a)

transfers are legal under existing religious laws”.⁵³¹ We have thus before us a very positive declaration which enables and obliges the state to bring reforms to our dowry laws which runs counter to such provisions.

An evaluation

The concept of *cheedanam*, which took root in a matriarchal society, was gradually taken out of its original context and replaced by the modern dowry to support the new social pattern created by the introduction of patriarchy on the one hand and principles of Roman Dutch law on the other. The transition was the inevitable result of change in motives, outlook and understanding of *cheedanam*, when what was originally and primarily given to make provision for a new household was transformed to become the consideration of marriage. The phenomenon is not peculiar to Thesawalamai. A similar development is noticeable in the Indian sub continent. “The practice of *Sridhanam* has changed over the years and has been replaced by the concept of dowry: a price paid to the bridegroom’s family in connection with the marriage”, says Gita Gopal.⁵³² In the Indian context it is said that it is the concept of *varadakshina* [gift to the bridegroom] which has taken the form of dowry and has been converted to a commercial transaction.⁵³³ As far as the Tamils of Jaffna are concerned the new practice of ‘donations’, which can be identified as the equivalent to

531. 7 (ii)

532. *Gender and Economic Inequality in India-The legal Connection*, *Op. cit.* at p. 68.

533. P.S. Jaswal and Nistha Jaswal, ‘Anti – dowry legislation in India : An Appraisal’. *Journal Of Indian Law Institute*, Volume 30 : I [1988]

varadakshina, is a very recent development and functions alongside dowry.⁵³⁴ Besides, it is not in regular practice.

Dowry has made marriage an arena for commercial transactions. The 'marriage market transactions' are however very strange and different from normal market rules of buying and selling. In a normal sale transaction it is the buyer who has to pay the purchase price to the seller for the purchase of the goods. In the 'marriage market' it is the woman who is 'given' in marriage: the 'product put up for sale' is the bride. "Without a dowry, a woman cannot be sold" are the words from a Thoppukadu Tamil *Thimilla* woman of Sri Lanka as quoted by Else Skjonsberg.⁵³⁵ Though expressed by a Tamil woman of a particular caste, it is of general application and applies to all women who are subject to the tradition of dowry. But no money is paid to the bride's parents who 'sell' her. On the contrary it is they who dower her, that is give her dowry and perform the '*kanyadana*'. This is what is termed 'dowry marriages'. Ranjana Sheel explains that it is part of the Brahma form of marriage.⁵³⁶ The Indian court in a multitude of cases, as for instance in *Chuni v Suraj*,⁵³⁷ has noted that, unless rebutted by evidence, "the prima facie presumption no doubt is that every marriage under the Hindu Law is according to the Brahma form," and that, "the court did not consider the solemnisation of a marriage in Brahma form if no transaction

534. *Supra*, p. para on Donations.

535. *A Special Caste – Tamil Women Of Sri Lanka*, London:zed, 1982 p. 49.

536. *Institutionalisation and Expansion of Dowry System in Colonial North India*, *Economic and Political Weekly*, July 12, 1997. p.1710.

537. I.L.R , 33 Bom, 433, as quoted by Ranjana Sheel, *op. cit.* p. 1710

of gifts from the bride's side to the other has taken place along with the '*kanyadana*'. The court, in the above case, also declined to accept that a Brahma form of marriage had taken place despite the fact that the rites prescribed for the Brahma form were conducted, on the basis that 'where the person who gives a girl in marriage receives consideration for it, the substance of transaction makes it, according to Hindu Law, not a gift but a 'sale' of the girl. [Note need to be taken of the different interpretation placed on the word 'sale' by the Indian court and the Thoppukkadu Tamil woman of Jaffna.] The money received is what is called bride – price and that is the essential of the *Asura* form."⁵³⁸ So when a Hindu marriage takes place in India it would be considered a Brahma form of marriage if no gift or payment is received by the bride's side in consideration of the marriage. It has to be a one way transaction of gift or dowry from the bride side along with the gift of the daughter. Rules pertaining to Sale of Goods find no place in the 'marriage market'. The practice in Thesawalamai, for the

538. In the Laws of Manu eight forms of marriage are enumerated. Of the eight four were variations of the dowry marriage [of which Brahma form is one] and considered acceptable to the superior ideals of brahmins. The other four forms were based on bride-price, considered inferior and permissible only for the lower castes, the Sudras, who form the majority, being amongst one of them. [Manu III, 39, 41 quoted by Ranjana Sheel, *op. cit.* p. 1709, from Vander Veen 1972:26] Subsequently the Brahma form ceased to be the property of any one class and became admissible for all castes. Note however Sir Henry Maine, *op. cit.* p. 324, where he says that the earliest traces of separate property of women are found in the ancient institution known as the bride-price. So according to him Sridhan had a pre-historic origin as property conferred on the wife by the husband 'at the nuptial fire'. He concludes that the privileges of women were limited by "a sustained general effort of the Brahminical writers". For further reference see detailed discussion on Sridhana, pp.40-46

bride to bring property and / or money on marriage with no counter presentation from the groom in exchange for the bride, makes the marriage and the dowry system under Thesawalamai coterminous with the Brahma form of dowry marriages. Dowry in Thesawalamai is definitely a bride-groom price as against the bride-price of the *Asura* form as discussed above. Contrary to popular way of noting that the girls are 'sold' it appears that it is the men who are in fact the objects of sale. This is made clear from the sentiments expressed in the Code and noted by Tambiah when he states that, "It is by this means that most girls obtain husbands as it is not for the girls but for the property that most men marry".⁵³⁹ Thus it is possible to conclude that the men are 'bought' by such 'means', referring to the giving of dowry. This view is further strengthened by views expressed by some students of the sub-continent during a survey conducted by Prakash Rao and Nandini Rao.⁵⁴⁰ Some students are reported to have said, "They have made marriages like buying and selling cattle". "I am not a beggar". "I feel **sold** to the other party if I accept dowry". "They are **buying** the boy".⁵⁴¹ [emphasis added] Though such views were reported Prakash Rao and Nandini Rao in their conclusion remarked; "Although majority of the students expressed negative attitudes towards the present dowry system, it is difficult to say that attitudes will be translated into reality and that they would settle their marriages without any regard for their parents' wishes".⁵⁴² This appears to be

539. *Laws and Customs of the Tamils of Jaffna op. cit* p.172.

540. *Marriage, The Family And Women In India, op. cit.* 76.

541. *Ibid.*

542. *Ibid.*

the general attitude. Individualistic attitudes may be different. They are however fewer and socially insignificant. This is the reality both in India and Sri Lanka, amongst those governed by Thesawalamai as well as by other laws which directly or otherwise give recognition to this practice. As a principle young boys disapprove of dowry and consider it as an unimportant factor in the marriage settlements but, “when it comes to their marriages they seemed to hold different standards pertaining to the expectations of dowry”.⁵⁴³

Whatever the peculiarities of the ‘marriage market’ and the expressed and unexpressed attitudes of the youth, the fact remains that a man entering matrimony gets not only a dowry but also a woman, who, apart from becoming his wife, plays a multi-faceted role as his house-keeper, as nanny and child minder and very often as tutor too to the children. Mind you, he gets all these services free, and ironically, for which he has been paid a colossal amount in cash and kind. In the modern context, one further important role of the woman has to be added, that of a working woman. Present day youth demand or seek out educated and working girls as their wives. But they, or specifically their parents, do not wish to give up the demand for dowry. We see therefore, that though the sex- behavioural patterns of earlier societies have changed, the attitude of men towards dowry has not. In the interview referred to above, the sentiment was expressed that, “If the wife is educated and an earning member then there is no necessity for

543. *Ibid* . p. 77.

dowry.”⁵⁴⁴ Nevertheless, it was noted that, one third of those youth thought that they would expect a dowry on their marriage even if their future spouses were as educated as they are.⁵⁴⁵ The wide gap between precept and practice in the Indian society is thus very evident. The situation appears not to be different amongst those governed by Thesawalamai except that in some instances some sort of compromise does occur while the process of negotiation is on. Men, or their parents, especially, are prepared to compromise on the amount of dowry, not however on the need to give a dowry.

The man’s position seems envious. But not when he is born with sisters and has to either bear or share the responsibility of dowering the sisters. Early Kandyan Law too witnessed a similar situation where sons performed the obligation in *loco parentis*.⁵⁴⁶ We saw how under the customary law of Jaffna the sons were deprived of their rights by inheritance when it came to dowering of daughters.⁵⁴⁷ The Jaffna Matrimonial Rights and Inheritance Ordinance has rectified the position by providing equal rights of inheritance to both sons and daughters thereby denying to the parents the right by Part I : 9 and I : 11 of the Code to divest the rights entitled by inheritance. But socially accepted practices of family obligations do not die easily. The customary law concept of making the sons too responsible can be seen even to-day in the Jaffna society, though perhaps the rigors of it are no more there. Nevertheless there remains

544. *Marriage, The Family And Women In India*, Op. cit 72.

545. *Ibid* p 76.

546. Hayley, *Op. Cit.* p. 335.

547. Part I:11 of the Code.

the notion that a son, though sometimes even older than the daughters, should not marry when he has a sister ready for marriage. There are quite a number of males who give every cent of their earnings to see the sisters dowered and married. Some are forced to live lives of self-imposed bachelor-hood to get the sisters married or because they are not married. A way out has occasionally been followed by resorting to inter-marriages where in each of the two families there are a son and daughter of marriageable age. It also happens that sometimes the sons were allowed to get married prior to their sisters if they were able to contribute to their sisters' dowry from their own savings or from that of their wives' dowries. It is perhaps to overcome the difficult situation of having to get the wives' consent that the system of free will gifts or 'donations' came into practice.

The social status of the family and the earning capacity of the prospective bridegroom have enabled the parents to hold out their sons for high dowries, while driving parents of daughters to skimp and save to build up dowries and save for them. The mind of a parent with daughters is directed from day one of the birth of a girl to save till she is dowered and given in marriage. Many sacrifices are made to achieve the ever increasing, socially fixed dowry target and in the process essential needs of children like education, health-care etc; are ignored, side lined or made secondary.

The emigration of Tamil youths in large numbers in search of secure places and economically lucrative prospects on payment of exorbitant sums of money to job and travel agents has made the parents draw from whatever resources they have accumulated, which they would otherwise use as dowries for their daughters. If they do not possess the money,

they either sell their properties or fall into debt. These monies have to be recovered so as to reimburse the dowry money so spent and also keep some savings for old age. Thus we see the ever increasing demand for dowries and donations.

The increased money flow into Jaffna from earnings of the youth employed in the Middle East and Western countries has also made dowry to sky-rocket to unprecedented heights. Thus, while a section of society skimps on every cent, there is another section ever willing to give fanciful amounts for a bridegroom professionally qualified and with good future prospects. This has accentuated the difference between dowry haves and have-nots, adding to the number of women remaining unmarried for want of a dowry.

Dowry has also forced or coerced parents to transcend caste affiliations and find grooms from a lower grade of the same caste or even ignore caste affiliations altogether. This change in outlook of crossing age-old boundaries of caste is common to India and Sri Lanka. The parents of the grooms attracted by big fat dowries and parents of the bride with no or not much of a dowry to give have tended to sacrifice their rank in the caste hierarchy. So have parents of the bride with dowries and high up in the social ladder sacrificed caste for educated and qualified men. Besides, men eager to get brides capable of working abroad and able to adapt to a foreign mode of life and work have sometimes ignored caste and even dowry.

One of the primary objectives of *cheedanam* is, as noted, to make provision for the new household. The expectation that such provision should come from the wife's

side is understandable in the early years, when society was in its matriarchal stage. Property then was with the matriarch and inheritance was in the female line. Thus when the daughter set out to form a *tavazhi illam* with her husband she had to be provided for, to start a new house-hold. The sons, having to leave all their earnings during bachelorhood with their parents, could not on marriage bring with them anything of value, except wrought gold and silver ornaments, which they wore on their bodies.⁵⁴⁸ The situation has however changed. Since the enactment of the Jaffna Matrimonial Rights and Inheritance Ordinance in 1911 sons have been emancipated from the customary obligation as section 7 entitles them to hold as their separate property what they had acquired before marriage.⁵⁴⁹ Thus, there is now no arguable basis for insisting or demanding that it is the wife who has to make provision for the new household. With the acceptance of patriarchal concepts, which was further fortified by Hindu Law and Roman Dutch Law influences, man has come to be recognised as the head of the family and therefore should be expected to provide for the new household. Besides in the modern era many a wife is an income earner and very often is expected to be so by the groom and/or his parents. There is thus absolutely no justification to expect only the wife to provide for the new household. It is submitted that, enjoyment of cheedanam property given by the benevolence and generosity of the

548. Code, I:7.

549. See also *infra* chp. on Spouses Rights and Obligations to Matrimonial Property, pp. 331-332 where the definition of thediathettam in section 19 of the Ordinance[before the Amendment] does not include property earned by the sons while living with their parents.

parents would not generally be met with feeling of resentment, insult or injury to feelings.

Increasing dowry demands have drastic social consequences. In the sub-continent it has not stopped with mere domestic violence but has led to numerous brutal and gruesome killings of brides.⁵⁵⁰ Men have been prompted either by their own instincts or of their parents to marry women and subsequently kill them themselves, or manipulate matters so as to make the young brides to commit suicides, in order to to take their dowries and then re-marry to get dowries anew.⁵⁵¹ Bride burning is often made to appear as kitchen accidents. These have been highlighted by several human rights and women's rights activists as the most common form of violence against women in India. Gita Gopal says that as far back as 1986 itself there were 1319 reported cases of bride burning.⁵⁵² Charlotte Bunch, writing on 'Women's rights as Human Rights' says about the Indian situation that, "eight out of ten wives can anticipate some violence either of battery at home, or among the least fortunate, being murdered for a new dowry, or being buried alive".⁵⁵³ Indian women have been subject to torture, terrorism, mutilation and even murder, simply because they are females. Historian Veena Oldenburg, in an essay titled, *Dowry murders in India: A Preliminary examination of*

550. According to UNICEF more than 6000 bride burnings or other deaths were reported in the year 1991. Article *Dowry deaths in India* by Robin Greenhalgh. (Google search - Essortment)

551. Radika Coomarasamy, *The Impact of Tradition, Culture and Religion on Women in South Asia*, (I.C.E.S.). p. 37-38.

552. Gender and Economic Inequality in India - The Legal Connection, *Op. cit.* p. 71.

553. *Women's rights as Human Rights*, *op. cit.* p. 5.

the historical evidence, gives a graphic description of the transformation of the old custom of dowry in a nutshell. She declares that dowry has been perverted, “from a spun safety net twist into a deadly noose”.⁵⁵⁴ Though some dowry related problems do exist in North Sri Lanka they fade in this spectrum of wanton killings reported from India. In assessing the impact of dowry on Jaffna society, it could be said that it has mixed effects. Socially it is condemned as an evil that needs to be eradicated, as it leads to domestic conflicts, demeans women, makes them appear as chattels in the marriage market, causes forced spinsterhood on non-propertied females and impoverishes parents blessed with daughters. Dowry is however the separate property of the women and there can be no doubt that it would in some way help the newly married. Savitri Goonesekere declares that as dowry is clearly envisaged as a woman’s separate property it would be incorrect, “to assume that giving of dowry in itself diminishes the status of a woman”⁵⁵⁵. On the other hand she says that it may have the reverse effect in arranged marriages.⁵⁵⁶ Quoting from a sociological study on a Sinhala village,⁵⁵⁷ she continues that dowry enables a woman to, “enter her new home with a firm step and (to) face her new relatives with a high head”⁵⁵⁸.

554. Amanda Hitchcock, 4 July 2001, World Socialist Web Site.(wsws.org)

555. Savitri Goonesekere, *The Legal Status of the Female in the Sri Lankan Law on Family Relations* ,p. 30.

556. *Ibid.*

557. Bruce Ryan, *Sinhala Village* [1958] p 35; N.Yalman, *Under the bo Tree* [1971] p.96.

558. *The Legal Status of the Female in the Sri Lankan Law on Family Relations*, *op. cit.*, p. 30

The need for social re-thinking and legislative action

With social emancipation and greater economic independence of women, continued adherence to the concept of dowry as consideration of marriage is a social anachronism. Unlike as in India, in Sri Lanka there has not been a storm of public indignation against the practice other than some sporadic publications or debates which do not appear to have gone beyond the stage of academic exercises. Dowry is not despised when made and allowed to be made out of purely filial affection. Neither has it been always inimical to the interests of women. Increase in the numbers of unmarried women is also not always due to want of a dowry. Better educational opportunities coupled with prospects of career development has made matrimony less attractive to some women. There are some others who have devoted themselves to social and religious work and sacrificed matrimony in the process. Nevertheless, even in Sri Lanka dowry has been the cause of forced spinsterhood of many a woman. It does disrupt cordial relationship in family life and promotes violence against women, both mentally and physically. As a social institution it has thus lent itself to abuse in the hands of men and / or their parents by their attitude of being predatory when laying it as a pre-condition of marriage. Men who have female siblings bear the brunt of it.

A social and ideological re-thinking is necessary as regards giving and taking of dowries. Society needs to address itself to the fact that, stereotyped sex roles have become a thing of the past; and accept that a woman's

position in the family, as in society, is by no means secondary. Male values need to change. They need to prove to the society that their prestige lies not in the size of the dowry they receive, but in their ability and self confidence to make a living without depending on the woman's dowry ; to convince their parents that they refuse to be commodities to be 'bought' in the marriage market by the highest bidder; and above all, to show their life- partners that they are confident and capable of taking up the responsibilities of marriage as either head of the family or as equal partners with them. Women and their parents should band themselves together and refuse to give dowry as a pre condition or consideration of marriage or refuse to marry men demanding dowries. Propertied parents need to unselfishly play their part to eradicate the evil and in the process help the less fortunate ones. Till such a revolution in social ideology is brought about it is practically impossible to do away with the system. It is in a way, a calling on the men themselves to confront the negative features of patriarchy and the traditions it fostered under which they had taken shelter all these years. A method by which dowry marriages could be reduced is to wean society away from arranged marriages; a practice that is quite common amongst the Tamils. But that is not to say that in our society the issue of dowry does not arise where the parties find their own life-partners. As discussed, since dowry and donations are inter-related to several other factors, such as provision for the parents in old age, a means of obtaining dowries for the sisters and reimbursement of spent monies,⁵⁵⁹ the problem of dowry

559. Personal notes gathered at various interviews in Jaffna and Colombo.

will not die off unless these related matters are resolved. Attempting to resolve such connected matters, would entail a series of social security measures, like old age pensions and easy access to state loans for educational and varied other purposes at attractive terms of re-payment.

Women who were considered on par with men in the early Vedic years were, by the late Vedic period, gradually reduced to a position of total dependency right through life. Thus Manu, the Hindu philosopher and sage declared, "In childhood a female must be subject to her father, in youth to her husband, when lord is dead to her sons: a woman must never be independent".⁵⁶⁰ Radhika Coomarasamy reproving the sayings of Manu declares, "Manu...has nothing but contempt for women". The position of women changed with historic context and as Altekar says, "The fact, however was that the doctrine of perpetual dependence of women was never seriously subscribed to by Hindu society, though some of its jurists had solemnly initiated it".⁵⁶¹ As regards Jaffna, Hinduism and with it Brahminism had never had a stranglehold over society as it did in India, though patriarchy blended with matriarchy and dowry marriages became the order of the day.

Economic dependency of women is equated to 'negative net worth of a woman'. She is looked upon as a liability. The scenario is however fast changing. Social and economic mobility from village to the town entails increased

560. Manu V, 147 as quoted by Roop L. Chaudhary, *Hindu Women's Rights to Property Op. cit.* p. 3.

561. *The Position of Women in Hindu Civilization*, (2nd edition p.331) quoted by Chaudhary, *A Hindu Women's Right to Property op cit.* p. 4.

cost of living and more and more men find that a working wife is economically advantageous. The income earning capacity of women as a substitute for dowry is thus gaining popularity. In assessing the monetary worth of a woman's employment, as a substitute for dowry, one has to look into the factors that have been inimical to women's progress, especially in gainful occupation. To start with, the opportunity of obtaining the level of education necessary to get satisfactorily employed does not come by for all women. As regards those who are more fortunate and successful in obtaining acceptable qualifications, the traditional biased outlook of society in examining the suitability of women candidates for employment stand in their way. To add to that are the constraints they have to face of having to combine the roles of a working woman and home maker, especially in the absence of support from members of the wider family. This brings into focus the socio-economic policy of the State. Better facilities and increased economic opportunities oriented towards women's employment would definitely facilitate their economic independence and go a long way to make demand for dowry less and less attractive or necessary. In order to facilitate this social development the State should come forth to provide employment oriented education for women, do away with all forms of gender based discrimination in the selection criteria for technical and professional training and encourage training of women in self employment. It has to pay more attention to providing better facilities for pregnant mothers and for children of tender age of working mothers. It is also necessary that working parents are freed from the anxiety of leaving even grown – up children, both males and females alone at home, as they can be vulnerable to sexual and other forms of child

abuse or to harmful practices like drugs and alcohol. It is a social fact, that the lack of such facilities coupled with concern for the well being of their children has forced many mothers to give up very promising and enterprising careers to take care of them.

The demand for dowry, we have seen, is also a manifestation of patriarchy.⁵⁶² As such it becomes necessary to address our minds to the norms of patriarchy which make women subordinate to men. Vidyamali Samarasinghe adduces such subordination to unequal access to better economic opportunities, which is a result of “the lethargic pace of overall economic development”.⁵⁶³ We see therefore, that for social re-thinking to set in, the economic based factors that obstruct such progress have first to be remedied. It is suggested that women who constitute a fair percentage of the voting population of this country get together to make their views heard; the opportune time for this being a pre-election period. The economic well being of the woman must be made an important aspect of the election manifesto of all leading parties. At other times too, women should agitate in order to make working conditions more favourable to them, so that they are not handicapped in their earning capacity by reason of the dual roles they have to play. Further, it would not be a fair assessment of a woman’s economic worth, if the wife’s monetary contribution by way of employment alone is taken into account. The value of her services in the many faceted

562. *Supra*, p. 107;

563. *Gender Inequality in Developing Countries. Women at the Cross Roads op. cit.*

roles she plays in the family should not be allowed to be taken for granted and devalued by the male population.⁵⁶⁴ It has to be valued and added to the income obtained by the wife as a 'supplemental earner'. Economic independence of women would have to be first assured before the call for doing away with dowry can be made socially heard.

Dowry is so firmly entrenched in our society and has become a traditionally accepted custom that a total change is not easy to come by. Its grasp is definitely loosening as a result of the impact of certain contemporary developments, but one cannot be complacent as the covert norms have not appreciably changed and dowry resurrects itself in different forms, just as it has done in the form of 'donations', noticeably amongst the Jaffna Tamils. Publicity is essential to force out into the open many of the silent issues behind dowry. The public, including not only those who are really affected, but also those, who though not affected are convinced of the evils, should be encouraged to come out into the open and frankly discuss the seriousness of the issues. It is by such strategies that society can instill into the minds of those who make the demand, as well as into those ostensibly rich men keen to advertise their wealth and anxious to quote fanciful amounts as dowry, a feeling of shame and repentance. Creation of such social awareness through the media, both electronic and print, is very vital. Seminars and workshops need to go beyond theoretical discussions and paper work. Resolutions and petitions would not by themselves work. It has to be more action related and the calling made for a cross-country response. Women's rights

564. See *supra*, pp. 200 - 202

and human rights activists need to play a more positive and result oriented role. To make a strike through, it is essential that social progress and economic development with women's interest in mind go hand in hand.

It is after preparation of such ground, that legal reforms can prove beneficial. A unique paradox in developing countries is that social progress lags behind the law.⁵⁶⁵ Abolition of dowry by legislation has therefore to be accompanied with fundamental changes in social values and laws relating to ownership of property, to produce meaning results as regards the status of women.⁵⁶⁶ Dowry has become so deep rooted in society that by legislation alone no country can eradicate it. Legislation can help if there is already at work a strong and vibrant social movement. The words of Jawahar Lal Nehru become very pertinent here. He said: "Legislation cannot by itself normally solve deep-rooted social problems. One has to approach them in other way too, but legislation is necessary and essential, so that it may give that push and have that educative factor as well as the legal sanctions behind it which help public opinion which is being formed to be given a certain shape."⁵⁶⁷

Legislative action – total prohibition or reform

It is pertinent to ask the question, as to whether total prohibition or only essential reforms are needed in the context

565. Paras Divan, *The dowry prohibition Law*, p.571, Journal of the Indian Law Institute, Volume 24:4, 1985.

566. See also Savitri Goonesekere, *The Legal Status of the Female in Family Relations*, *op. cit.* p.90.

567. Paras Divan, *op. cit.* p. 571, quoting from Nehru's speech in parliament on the Dowry Prohibition Bill of 1961.

of those governed by Thesawalamai. To analyse prohibition, it might be useful to refer to the Indian experience. India enacted the Dowry Prohibition Act in 1961 in order to curb or do away with the abuses and atrocities associated with dowry. The Act prohibited the giving or taking of dowry and enacted several stringent penal provisions.⁵⁶⁸ If we are to learn from the Indian experience we can do so only if we take note of the peculiarities of the Indian situation as against that of those governed by Thesawalamai. Gita Gopal while showing how legal reforms by way of the well-intentioned Prohibition of Dowry Act have not been effective, concludes that in fact it only resulted in weakening the socially accepted access to property by women by *Sridhan*. (or *Sridhana*)⁵⁶⁹ She explains that, when a woman got married and by tradition a *Sridhan* was given to her, she had by that means access to a share of her family's property. Once legislation by the Hindu Succession Act⁵⁷⁰ gave the woman access to family property through inheritance, the belief was that the practice of *Sridhan* would be redundant, because, what she would otherwise have got by dowry would now be possible by inheritance.⁵⁷¹ The reasoning, she says is technically logical but in reality not, for, "given patriarchal traditions and attitudes, women do not normally inherit property".⁵⁷² She explains and says, that in India, a person has unrestricted testamentary power and there are no

568. Section 4; Note also 304B of the Indian Penal Code.

569. *Gender And Economic Inequality In India : The Legal Connection*, *Op. cit.* at p. 71

570. No: 30 of 1956.

571. Gita Gopal, *op.cit.* p.71

572. *Ibid.*

prohibitions to will family property exclusively to the sons.⁵⁷³ To prove that, she cites *Khusbir Singh v The State* where, “the Delhi High Court did not consider the total disinheritance of the wife and daughter by will in favour of a son by the father as an unfair or unjust disposition of property”, but merely highlighted the fact that the father “could have well thought that he would solemnise the marriage of his daughter during his lifetime and that may have led him to disinherit her”.⁵⁷⁴ As to the prevalence of such practices, she gives the words of the Judge himself who declared that, “it is not unknown of Indian parents to deprive their daughters of any share in their estate”.⁵⁷⁵ Gita Gopal thus makes it clear that prohibition of dowry can, and in fact does, work to the detriment of women’s interests, as it weakens the socially accepted access to property by women.

If legislative action in the context of Jaffna is to be by way of prohibition of dowry, the question is, will it have the same effect on the Jaffna woman. In other words, will it take away or weaken the Jaffna woman’s access to property as it had done to her Indian counterpart. It should be noted that the situation in the Indian context is in contrast to that of Jaffna. The Code provides that, if on the death of the wife the father wishes to re-marry he should leave the young children and the deceased wife’s property with the wife’s mother or her nearest relations and on the children becoming able to marry provide them with a dowry. “This being done and if anything remains of what had been given to the

573. *Ibid.*

574. *Ibid.* p.79; 1990 A.I.R. 59 (Del)

575. *Ibid* at 64.

relations with the children as above stated, and if the sons or sons have acquired a competent age to administer what remains they then take and possess the same...”.⁵⁷⁶ It makes clear that in Thesawalamai priority is given to dowering of daughters, the sons taking only, “if anything remains” after doing so. A similar situation obtains when the father predeceases the mother⁵⁷⁷. The position under the Jaffna Matrimonial Rights and Inheritance Ordinance is different and it was discussed how the Thesawalamai Commission had recommended that the surviving spouse should not have the right to give the deceased spouse’s property to the daughters to the exclusion of the sons, nor should any other member of the family have this right.⁵⁷⁸ As a result, right by inheritance has now taken priority over the right of the parents to give property already inherited by the sons as dowry to the daughters. That is law today.⁵⁷⁹ But age old custom has not died even after the enactment. Coomarasamy noting the importance of dowry during his time says, “Such is the undue importance attached to the grant of dowry to females in Jaffna that sons did not inherit anything from their parents’ property till provision was made for the dowry of the last of the daughters in a family”.⁵⁸⁰ What was said by Coomarasamy in the 1930’s applies even after more than seven decades. Laws may be passed but customs do not die easily. It is still the practice for the sons of Jaffna to give up property inherited by them to dower

576. Patr I:11. See also *supra* p. 6, for fuller discussion.

577. Part I:9

578. Sessional paper 1933. P.5.

579. Section 21 and 22 of the JMRO.

580. *The Hindu Organ*, *op.cit.* 6-7-33.

any unmarried sisters, though with the difference that legally it can be done only with their consent. Difficulty of course arises when the sons are minors, or as majors refuse to give up their inherited property. Here too we must note that family and social pressure often compel adult sons to fulfill their obligation of seeing the sisters married. Further, nothing prevents a parent from giving all his or her property as dowry to the daughters by will.

The position under Thesawalamai is in contrast to the Indian situation. Under Indian law parents have full testamentary powers. But such unrestricted testamentary power, says Gita Gopal, is detrimental to women in the context of the Indian patrilineal and patriarchal society.⁵⁸¹ She cites the case of *Khusbir Singh v The State* to support her stand.⁵⁸² As regards intestate succession though by the Hindu Succession Act women have equal powers to inherit their parent's property, the Act only represents partial reform of women's rights as many discriminatory traditions have been codified.⁵⁸³ The joint family or *coparcenery* represents the typical Indian family.⁵⁸⁴ A *coparcener* is a lineal male descendent and acquires ownership by birth. Women cannot be *coparceners*. Traditionally under the joint family system a Hindu daughter is excluded from succession to the father's

581. *Gender and Economic Inequality in India. The Legal Connection*, *Op. cit.* p. 79

582. (1990) A.I.R. 59 (Del)

583. Gita Gopal, *op. cit.* p.80

584. "Membership of the coparcenery is confined to the male descendent in the male line from a common male ancestor up to four degrees inclusive". J. Duncan M. Derrett, *Introduction to Modern Hindu Law*, (1963 Oxford University Press 1963) p. 249

property if there were sons, son's son or even a widow.⁵⁸⁵ The Hindu Succession Act only partially amended the customary property rules.⁵⁸⁶ Discrimination continues in the Indian context even after amendment of the Act. Gita Gopal shows that while Hindu males own a share of the family rights at birth females can only inherit it.⁵⁸⁷

One can argue that the rule of forfeiture which applies to a dowered daughter of Jaffna⁵⁸⁸ has the effect of taking away her rights to inheritance. This was so under the customary law of Thesawalamai.⁵⁸⁹ But the Ordinance now provides that, "...unless they abandon all right to inherit as heirs *ab intestato* are bound to bring into hotchpot or collation all that they have received from their parents above the others by way of dowry or otherwise on the occasion of their marriage...". The daughter in Thesawalamai is thus not made to sacrifice dowry for her share in the inheritance as her Indian counterpart. On the other hand, she is given the option to keep her dowry and let go her rights to inheritance, or, in the alternative to collate and share in it. It should also be noted that, not only a dowered daughter but even other would be heirs, whether sons or daughters, who have received from their deceased parents above, the others, to advance or establish them in life, have to do so if they desire to share in the inheritance. Besides, the customs in the Thesawalamai appear to be more favourable to women as it provides that, if the parents prosper after the marriage

585. Section 23 Hindu Succession Act No. 30 of 1956.

586. Gita Gopal, *op. cit.* p. 81

587. *Ibid.*

588. Code, I:3; JMARIO Section 33.

589. Code, I:3.

of the daughters they, “are at liberty to induce their parents to increase the *doty* [dowry] which the parents have an undoubted right to do”.⁵⁹⁰ It is true that it cannot be a legally enforceable right. But as a custom recorded in the Code it makes clear the predominant place dowry occupied in the then Jaffna social set up. It is submitted that even today the Jaffna man considers that making provisions for his daughter is of prime importance. He, very rarely lets his sons to inherit his property at the expense of his daughters. During his life time he gives utmost importance to his son’s education and economic well being for the future. The peculiar foundation of the Jaffna society of being basically matriarchal, though with a fine blend of patriarchal principles, continues to hold ground. Thus the basis on which Gita Gopal bases her reasoning against the Indian Act does not seem to hold good in the case of those governed by Thesawalamai. An act to prohibit dowry will not have [as Gita Gopal puts it in the Indian context] the automatic effect of weakening the Jaffna woman’s socially accepted access to property by way of dowry. The concept of matriarchy and dowry are twin concepts which are firmly entrenched in the Jaffna society.

Since the Act had the effect of weakening women’s existing access to property it was suggested by Gita Gopal that complimentary measures to provide women with meaningful access to alternative property should have been included in the Act prohibiting dowry. This was necessary in the Indian context since jointly- owned matrimonial property remains a foreign concept in India. It is not so in the case of the woman governed by Thesawalamai. The

590. Code, I: 5.

concept of *thediathettam* entitles a woman of Jaffna to get her share of the newly acquired marital property, for which, even the general law makes no legal provision.⁵⁹¹

Further, unlike as in the Indian sub continent, dowry problems in Jaffna or for that matter in any other part of Sri Lanka, have not caused serious harassment or torture thereby driving the newly wed woman to commit suicide. The problem in Thesawalamai is mainly due to the changed attitude towards dowry; its popular recognition as consideration of marriage thereby sidelining its original noble objectives. Such a problem arose from adherence to patriarchal and Roman Dutch Law principles. In this respect the concepts of these two systems do not differ significantly. Identifying such root causes of the evil is essential to decide on the course of action that needs to be taken; the choice between total prohibition and necessary reforms. Abolition of dowry on the basis that it becomes redundant, because of the possibility of daughters inheriting parental property as indicated by the Indian case of *Khusbir Singh v The State*, takes away the age-old noble objectives of dowry, namely of providing for the new household. Both men and women entering matrimony will only be too glad to have some provision made for them to commence matrimonial life. Depriving them of such benefits may entail many hardships and perhaps dissuade them from marriage itself. Such a turn of events will certainly not be conducive to the development of the family as a unit in society. It can only lead to the informal living together of men and women and in the process to proliferation of extra – marital children.

591. See chapter on *Thediathettam*, pp. 270-272

Apart from that, the alternative method of letting the daughter get her share of parental property by way of inheritance does not assist the daughter and her new husband at the time of setting up a new household. The prospect of receiving an inheritance is allied with uncertainty due to the freedom of testation recognized by the Wills Ordinance. Surely the parents of the groom would not be happy to have their son enter into a marriage where such uncertainty prevails. It is not to be understood as making out a case for compulsory giving of dowry. What is stressed is that, dowry voluntarily given would be surely welcome. What ought to be done away with is the demanding of dowry, either as consideration of marriage or discreetly in the form of 'donations',⁵⁹² by the grooms and/or their parents.⁵⁹³

In the process of reforming a law or doing away with a custom much caution has to be exercised to see that no new problems are created in the process. If the real problem is not dowry itself, but the attitude towards it then surely it is the ailment that has to be treated. We need to ask ourselves as to whether abolition of dowry will benefit the women for whose cause it is made. One cannot ignore the worthy objectives of dowry as shown earlier. Besides, dowry rather than being detrimental to women will enable her, as noted by Savitri Guneseckere, to hold her head high, when she enters her matrimonial home. Certainly prohibition will not benefit the men either, unless they become the persons

592. Reference para on 'donations', or gifts on marriage, pp. 144-148

593. "Payment of dowry to the bridegroom should be prohibited. Parents of a bride may bestow any endowment on the bride herself". Annexure 1, *Comments on some aspects of the Censor Report* D.P. Kumarasinghe, Director, Human Rights Commission,

imposed with the responsibility to dower. Besides, scarcely would any parent grudge a daughter being settled comfortably to the extent that he can make it possible. It is only when it is forced upon them as a consideration of marriage that they will feel the pinch and suffer to see their daughters live a life of forced spinster-hood. It should also not be forgotten that, as it happened in the Indian context, prohibition or not, those who insist on either giving or taking dowry are going to find ways to do so. Further, in Jaffna, which still retains many characteristics of a matriarchal society, the normal practice is for the married daughter to live with the parents [though with nuclear households and mobility of people in search of jobs the whole pattern has changed considerably] and look after them in their old age. So it is natural for the parents to give their properties to the daughters for whom they have not set up a separate household or who have not moved away on their own. It has an additional advantage in that it makes the children take upon themselves the responsibility of looking after their aged parents, a tendency which is dying very fast and has made the state interfere by bringing legislations to enforce on children such responsibility.⁵⁹⁴

Dowry is a social institution that originated as a custom and was developed by usages. There is no legal obligation imposed either by the Thesawalamai or the general law to give dowry to a woman. To achieve any worthwhile results therefore, action to reform or even abolish it has to come from the society itself. If on the other hand the society is complacent no amount of legislation can eradicate it. A

594. Protection Of The Rights Of Elders Act, No 9 of 2000.

possible method could be to wean off men from the belief that dowry is given as a consideration of marriage. It is this belief that has been the root cause for making dowry an evil practice. When that is achieved, it will automatically result in the disappearance of many spurious notions associated with the concept of consideration. For example, quite a large section of the youth revel in the notion that a big, fat dowry, boosts their prestige and self esteem and enhances their social status and economic worth. When dowry is made less attractive, it will also lead to the realisation that assessing a woman's worth as a life-partner on other grounds is really worthwhile. A woman's educational qualifications, her ability to be an income earner so as to supplement the husband's earnings and her adaptability to any situations locally or abroad would then become important factors for consideration. This change in outlook would make the men realise that money or property obtained on marriage cannot come to their rescue in dire straits as these qualifications of their wives would.

For such a realisation to dawn it is essential that women's economic independence is made a reality. It can be argued that women have been already given such independence, by the several gender-neutral legislations, which recognise equal pay, equal employment opportunities etc. Having such enactments on the statute book is one thing; but having meaningful ones is different. The bulk of the laws are at least overtly not prejudicial to women. The law can technically confer equal rights and opportunities on women but various factors such as reiteration of feudal attitudes and sustaining of patriarchal norms continue to restrain the potential development of women to enable them

to be an equal contending force. Land laws relating to settlement and allocation of state land reflect patriarchal values as they reflect male preferences in such allocation.⁵⁹⁵ This applies to women generally. As regards women governed by Thesawalamai, we have in addition the restrictive powers exercisable by the husband by virtue of his marital powers enshrined in section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance. This provision to-day is the primary obstacle to the Jaffna woman's economic independency.

The Jaffna women have long come out of the secluded and conventional pattern of living they had been accustomed to for quite a long period of time. The civil war has been partly responsible for it. When the youth were in fear of being arrested by the armed forces or conscripted by the militants, it was the females who had to venture out to attend to day to day matters and tackle emergency situations. Educationally too they are well advanced, both academically and professionally. Social attitudes towards seclusion of women have thus undergone dramatic transformation. It is very unfortunate that the law lags behind, in that it continues to bolster patriarchy and feudal attitudes by insisting on the husbands' written consent for the women to dispose even her separate property. Such antiquated norms have only helped to perpetuate the economic subordination of these women and make them dependent on their husbands. To top it all is the traditional superior outlook of men no matter how educated or well employed the women are. This

595. Land Reform Law of 1972; Agrarian Services Act of 1969. See also Savitri Goonesekere, *Status of Women op. cit.*, p. 7-8.

negative attitude towards women is reflected in day to day family life where a working woman has to shoulder the full responsibilities of the home along with that at the work place. Very many men cling vehemently, and very conveniently, to the view that a woman's place is in the home, to be precise in the kitchen, thereby forcing all domestic chores on the woman. Her separate earnings are however welcome and used as supplementary income of the family.

The breakdown of the family support structure with the setting up of nuclear households coupled with work places being away from parental homes, has also contributed to women not being able to be economically independent, as they could otherwise be. Thus even if the law provides for the absorption of women into the normal economic development of the country, the family support structure which has hitherto existed, is not adequate to enable them to take advantage of it. Not many families can afford domestic help, nannies, or day care centers to take care of the children while the mothers are at work. There is another reason which hinders women's economic independence. Equal opportunities can exist in law but not in reality, precisely because many employers have reservations about employing women, not so much because of their efficiency but because of the long maternity leave and other benefits that they have to allow them.

Conclusion

What has to be decided is whether we need a 'biting law', as Paras Divan describes the kind of legislation

necessary in the Indian context,⁵⁹⁶ or only reforms of certain existing laws which will have the cumulative effect of doing away with the evils of dowry experienced by those governed by Thesawalamai, and generally by all Sri Lankans. It needs to be reiterated that legislation in whatever form will depend on the dynamics of social realisation of the evils of dowry on the one hand, and on the other, of the need to make women economically independent. The negative experiences of the Indian Prohibition Act, and the fact that the problems faced by those governed by Thesawalamai are not really identical, make experimenting with prohibition on the Indian model futile. Besides, it is not practically possible to effectively restrict a custom to which a people have been accustomed to for centuries, unless they themselves make a call for it. If nevertheless restricted, it is possible that the people themselves will find ways to circumvent the law. In that process new avenues would be explored. The result can be only counter-productive as with ‘*varadakshinas*’ in India and ‘donations’ in North Sri Lanka.

It is submitted that the alternative method of reform of certain existing laws which have some bearing on dowry^s would give the desired results. In this respect one aspect of the law which requires regularizing is property conveyance on marriage. The existing practice which conceptualizes a dowry gift as a transfer for valuable consideration is the major source of evil in our society. It causes men to be predatory and makes dowry an “inducement” to contract a marriage. As an inducement to enter into a contract of marriage it would be contrary to public policy as it violates

596. The Dowry Prohibition Law, *Op. cit* p.571.

the statutory requirement of obtaining the free consent of the parties to the marriage.⁵⁹⁷ Savitri Goonesekere thus calls for legislative intervention to eliminate such a practice.⁵⁹⁸ It then raises a question as to how a parent, who is concerned about the well being of his daughter's married life or out of pure filial affection, could make a gift of some property to her and her husband to be. The court in *Ranaweera Menike's* case sought to deal with the problem within the frame- work of the existing law. It declared that, what the parties to a transaction name or describe a gift on marriage is not conclusive and it is the donor's intention or primary motive that matters. Kulatunge J. agreeing with Amarasinghe J. declared in very specific language that: "The use of the expression contained in the said deed that the gift was "in consideration of marriage of the donees" is not sufficient to rebut this position and to make it a *donatio propter nuptias* or a dowry deed, which is irrevocable".⁵⁹⁹ The obligation on the part of the parents to give a dowry as reflected in the Code can, at the most, constitute a moral obligation and A.R.B. Amarasinghe J. very categorically declared that he knows of no legal duty on a parent today in Sri Lanka to give a dowry. A moral obligation, His Lordship stated, would not be "valuable consideration".⁶⁰⁰ It would be the same if the gift is made to enable the daughter to shoulder the burdens of marriage for, His Lordship declared, "Easing the burdens of a child's marriage may be a desirable and commendable purpose. However doing something about

597. Savitri Goonesekere, *Status of Women, op. cit.*, at p. 7.

598. *Ibid.*

599. *Ibid.* at p. 222.

600. *Ibid.* at p.204

it, may or may not be an act of pure liberality”.⁶⁰¹ It can be deduced that the court in *Ranaweera Menike*’s case sought to find a solution by placing the burden with the court to determine on the basis of intention as to whether the gift was or was not made in consideration of marriage. The test laid down by the court is to find “whether the donor was moved or induced to give his property simply by the desire to enrich the donee; whether that which influenced his volition was liberality”.⁶⁰² The court, declared Justice Amarasinghe, “....does not permit itself to be misled by the terminology used in the document”.⁶⁰³

Another approach, it is suggested, is to make dowry conveyances as gifts *simpliciter*. Such a gift would then be considered as made on account of liberality and not as consideration of marriage. But gifts *simpliciter* stand the risk of revocability unlike one made for “valuable consideration”. It thus has the effect of uncertainty and the recipient or for that matter anybody standing to benefit by the gift, who is aware that dowry as a gift *simpliciter* can be revoked in specified situations, would not want to take a chance. Besides, feuds between in – laws relating to dowry property, though not serious as in India, are not uncommon amongst those governed by Thesawalamai. To them therefore the possibility of revocability of dowry gifts on grounds of gross ingratitude would appear to make the gift shaky. A notary drawing the deed would also be duty bound to explain the implications of the document he is called upon

601. *Ibid* at p.205

602. *Ibid* at p.197

603. *Ibid* at p.195

to draw as to its revocability and inability to take advantage of priority by registration. The apparent advantages attached to a dowry deed when made for valuable consideration together with the likely preference for such gifts by the parties concerned do not therefore seem to leave the law makers much option for reform in this respect. But one should also not lose sight of the fact that nothing prevents the donor from preserving the power of revocation in a deed of gift. De Sampayo J. in *Ponnamperume v Goonesekere*⁶⁰⁴ opined: "I do not see any principle disentitling a donor to do so. Since a gift is purely voluntary, and it is in the power of the donor to give the property absolutely or a limited interest therein I think it is not contrary to law if he makes a transitory gift, such as a gift to be terminated by his own act". Though he came to the conclusion that the gift in the said case could not be considered as a *donatio propter nuptias* in its true sense, he expressed his opinion thus, "Even it were such a donation, there is no authority for holding that an express power of revocation reserved in the very deed of donation cannot be validly exercised". In a more recent case the Court of Appeal further clarified the position. It declared that though ordinarily a deed of gift is irrevocable, a donor can, if he desires to do so, reserve to himself the right of revocation. In such an event he can by a subsequent deed of revocation and without any reason in a court of law revoke the earlier deed of gift.⁶⁰⁵

604. (1921) 23 N.L.R. 235

605. *Stephen Hettiarachchi and another* (2002) 3 Sri L.R. p. 39

Some changes in notarial practices could however prove helpful. In Sri Lanka, whether given as consideration of marriage or not, dowry is recognized as the separate property of the wife. It is submitted that this fact should be specifically mentioned in all dowry deeds. The objective sought to be achieved is to make those insisting on a dowry realise and understand that demanding it as a consideration of marriage or making it a pre-condition of marriage will not make them the owner, unless the wife wishes it to be so. Besides, when so incorporated, men's misconceptions about dowry as the yard-stick for calculating their money's worth would die off, while however retaining the advantages of a deed for valuable consideration.

The law regarding redistribution of dowry property on dissolution of marriage is another area in which there is an urgent need for legislative reforms, in order to prevent abuse of dowry property and other benefits derived from marriage. In the first instance, a person whose property could be made subject to such re-distribution is confused as to what law the court will apply; the Roman Dutch Law or the relevant provisions of the Civil Procedure Code. This is because of a long string of controversial judicial decisions and pronouncements⁶⁰⁶ and divergent views of eminent writers of law relating to the law that should be applied on redistribution.⁶⁰⁷ Subject to the condition that a guilty wife (spouse) cannot ask for restitution of benefits derived by the husband from the marriage, the application of the Roman Dutch Law seems advantages to the woman governed by

606. *Infra* pp. 303-313 chp. on Spouses rights over matrimonial property.

607. *Infra* pp. 303-315

Thesawalamai as it recognizes her separate property rights and the sacrosanct nature of hereditary property; which largely constitutes dowry.⁶⁰⁸ The application of the provisions of the Civil Procedure Code on the other hand can create an unpalatable situation.⁶⁰⁹ It is suggested that section 10 of the Jaffna Matrimonial Rights and Inheritance Ordinance which provides for settlement of disputes between spouses during marriage in relation to the wife's separate property could be amended and its scope widened to cover re-allocation of property on judicial separation and divorce. In doing so, the reformers need to have regard to the distinct character of the property structure of the Tamils governed by Thesawalamai. It is also pertinent to note here that the legislature created a vacuum when it enacted the Jaffna Matrimonial Rights and Inheritance Ordinance on the model of the Matrimonial Rights and Inheritance Ordinance and subsequently failed to follow it up when it amended the latter and introduced provisions relating to a woman's property rights into the Married Women's Property Ordinance to make the woman governed by the general law a *feme sole*. Since the Married Women's Property Ordinance does not apply to those governed by Thesawalamai, that vacuum has to be filled by either bringing in a separate enactment or by amending the Jaffna Matrimonial Rights and Inheritance Ordinance itself. In whatever form it is done it is submitted that if the law is to reflect the aspirations of the people it has to recognize the sacrosanct nature of the spouses' separate properties.

608. *De Silva v De Silva* (1925) 27 N.L.R. 289

609. *Infra* chapter, Rights of Spouses to Matrimonial Property, pp. 303-315

Since the uncertainty in the law applies generally to all the people, it is also possible to bring the above changes to the existing provisions of the Civil Procedure Code dealing with pre nuptial and ante nuptial settlements. In making changes to the Civil Procedure Code the reformers should note that, when discretion is given to the court to resettle property, it does not lose cognizance of the fact that dowry is the separate property of the wife, a fact recognized in both the Married Women's Property Ordinance and the Jaffna Matrimonial Rights and Inheritance Ordinance. The wife therefore should not be made to lose on divorce what is her separate property, irrespective of whether she is the guilty or innocent spouse. Such a move would help to avoid a recurrence of the unfortunate situation as in the case of *Somawathie v Simon Perera*.⁶¹⁰ She should, on the other hand, be able to get her guilty husband to forfeit whatever benefits he had derived from the marriage in the form of either as a gift *simpliciter* or as a 'donation'. If however, it is the wife who is found guilty, it is but just that she should suffer the loss of whatever benefits she derived by the marriage, but not of property which would legitimately form her separate property, though because of the marriage it had passed into the hands of her husband.

With the amendments to the Civil Procedure Code in 1977 pertaining to divorce and judicial separation, the existing fault based grounds of forfeiture of benefits gives occasion for reform. The amendments make divorce possible on the ground that the marriage has broken down.⁶¹¹ The guilt

610. (1984) 1 Sri L.R. p.78

611. Section 608 (2)

attributed in such a situation is of a lesser degree than it would be when it is matrimonial fault under the Marriage Registration Ordinance.⁶¹² The breakdown could have occurred without fault or guilt of either party as for example when acute incompatibility can be shown. In a system where proposed marriages still hold ground, as in the case of those governed by Thesawalamai, such possibilities are not rare. In such cases, using the same law to order resettlement, restitution or forfeiture is not justifiable. The South African Divorce Act of 1979 can be used as a guide by our reformers,⁶¹³ when drafting amendments to the rules governing forfeiture on breakdown of marriages.

In concluding as to whether total prohibition or reform would serve the interests of the people, it is suggested that the latter strategy is better workable and it appears would be more acceptable by the community. It will not deprive the newly married of some assistance to start married life. Besides, though the advantages attached to a deed made for some consideration make it necessary to incorporate the words 'in consideration of marriage' in the deed, yet the 'sting' of the words demeaning the woman can be removed by specifically providing in the deed itself the truth of the matter, that the dowry given in consideration of marriage is the wife's separate property. In that way while protecting dowry deeds against foreseeable risks of revocation it would be possible to operate them for the objectives originally envisaged by society. When that is achieved it would not be

612. Section 19.

613. *Infra* chapter on Rights of Spouses to Matrimonial Property, pp. 310-311

far-fetched to say that voluntary giving of dowry will help in the retention of marriage as a social institution in an age where its importance is being side lined for new ways of marital living, such as 'living together'. Dowry surely should not be an inducement to marry and without being so it certainly can and will help the couple to have courage of their convictions to enter matrimony as the best way of life and dissuade them from a trial of just living together. It can be expected that in so helping it will enable continued adherence to the high moral standards and ethics to which, we Asians are accustomed and proud of.

Where the people show an apparent preference to incorporate the words, 'consideration of marriage' in a dowry deed and the law too bestows protection on a conveyance made for valuable consideration, as opposed to a gift *simpliciter*, the responsibility falls heavily on the judiciary to be a sort of watchdog of the interests of women and to guard against whatever evils that can befall on them. The people of a country do look upon the judiciary for relief from a law, which results in injustice in its operation. The court can, when it sees that the language in a statute or a document if construed in one way would lead to obvious injustice, take the view that such a result could not have been intended, unless of course such intention was manifest in express words. Following *Ranaweera Menike's* case, it can be expected that a court would not permit itself to be misled by the terminology used in the document in interpreting the words, 'consideration of marriage'. In this case, the court had to deal with the donee's ingratitude, manifested by the assault on the parents, to determine the donor's right to revoke the deed of gift made on the occasion of her

marriage. The issue was whether the gift was a gift *simpliciter* or one 'made in consideration of marriage'; a *donatio propter nuptias*. As regards those governed by Thesawalamai, apart from problems relating to *cheedanam*, animosities tend to arise in relation to 'donations' made on the occasion of marriage. We saw the recent trend in Thesawalamai of an increase in the demand for outright gifts on the occasion of marriage in the form of 'donations', as opposed to *cheedanam*, amongst those governed by Thesawalamai.⁶¹⁴ The difficulties confronting these women governed by Thesawalamai are manifold. As gifts *simpliciter*, they become the property of the husbands and could be lost by the wives on redistribution consequent to dissolution of marriage.⁶¹⁵ The daughters thus tend to lose, on divorce, property which was in actual fact intended by the parents to save them from possible deprivation and impoverishment. The judiciary thus has a heavy responsibility of having to ascertain the real intention of the donors. The change in attitude of the judiciary, as reflected in *Ranaweera Menike's* case, in distinguishing between a gift *simpliciter* and one for valuable consideration, can be expected to give the desired result in this quite varied set up under Thesawalamai. A pragmatic approach by the judiciary, as regards the notion of *cheedanam* as well as of 'donation', will definitely go a very long way in changing the social perception of dowry and its allied form, the 'donations'.

614. *Supra* p. 144

615. Reference para on donations,' p. 135, 313

CHAPTER III

THEDIATHETTAM

Introduction

The previous chapter dealt with *cheedanam* and the wider forces that influenced its origins and development. In order to have a better understanding of *cheedanam*, parallel systems in other jurisdictions, both foreign and indigenous, were analysed. In this chapter we deal with acquired property or “profits during marriage” as the Code defines *thediathettam*. The phrase “profits during marriage” denotes gains from separate properties as well as new acquisitions during marriage in which there is a sharing of fortune by the spouses. A study of the matrimonial property systems of those other jurisdictions, which were analysed alongside *cheedanam*, makes it clear that the system found in Thesawalamai in so far as it relates to property acquired during marriage, is in marked contrast to them. As such, a comparative study was found neither feasible nor necessary. But relevant principles in the Marumakkalthayam law and the Roman Dutch Law are touched upon. The former, because it helps us to understand the concept of

thediathettam in its origin, and the latter, to show how by an accident of history principles of Roman Dutch Law were brought in by the codifiers, law makers and subsequently by the judges by way of analogy. As regards the indigenous laws, the presence of some similarities in the property systems of Thesawalamai and Kandyan Law, specially in relation to spouses' rights, makes reference to the latter quite relevant.

Family law is uniquely a synthesis of law, sociology, ethics, religion and economics.¹ All these aspects merit some discussion in this chapter, which deals with property acquired during marriage. In the process, it is proposed to initially explore the socio-economic context in which *thediathettam* originated and evolved. In doing so, principles determining spouses' rights and entitlements to it are examined. An analysis of *thediathettam* would not be complete without discussing whether its traditional concept as common property of the spouses has been altered to make it take the form of the more modern concept of a separate property regime.

Origin of the concept of *Thediathettam*

The origin of the concept of *thediathettam* can be traced to a society in which the joint family system was in practice and property was held in common. The joint family system established by the original settlers had, as was seen earlier, a matriarchal basis, which, with the second wave of

1. Kevin J. Gray, *Reallocation of Property on Divorce*, (Oxford, 1977) p.1.

colonists from the Coromandel coast came to be modified on patriarchal lines. "The joint family system", says Mayne, "is only one phase of that tendency to hold property in community which it is now proved was the ordinary mode of tenure".² It is also the accepted view of researchers that joint ownership was found in practically every part of the world where men settled down to an agricultural mode of life.³ Both incidences could be considered to have had some existence in early Jaffna too. Coomarasamy in his research has shown that the original settlers of Jaffna, after the arduous pioneer work of converting a dreary waste land into smiling gardens, settled down in communal groups throughout the peninsula.⁴ This type of communal living was characteristic of the style of living of the people of Malabar, from whence these earlier settlers came to Jaffna. Commenting on the joint family system in Malabar, Mayne notes: "It (the joint family) still flourishes in its purest form, not only undivided but indivisible, among the polyandrous castes of Malabar and Canara, over whom Brahminism has never attempted to cast even the hem of the garment".⁵ Mayne's comments in this respect have a direct bearing on the joint family system as it existed in early Jaffna. He declares: "Next to them, (Dravidian races of the South) probably, the strictest survival of the undivided family is found in northern Ceylon, among the Tamil immigrants from the

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2. *A Treatise on Hindu Law and Usage*, (1900, 6th edition) p.06..
 3. *Ibid* ; See also for a fuller discussion, Maine, Henry Sumner, *Dissertations on Early Law And Custom*, (London : John Murray, 1907) 329 – 334.
 4. *The Hindu Organ*, 19-06-33.
 5. *A Treatise on Hindu Law and Heritage*, *op. cit.* p.7

south of India”.⁶ He further notes that this joint family system as it existed in Jaffna had its origins in a matriarchal society introduced by the Malabars.⁷ Coomarasamy agrees with him when he says that the early settlers of Jaffna from Malabar brought with them the customs and usages of the Dravidians in their matriarchal stage.⁸

Logan writing about the Malabar *taward* property says: “every member whether male or female, whether of age or not, has a common interest in the common stock of the *taward*”.⁹ The *taward* or joint family, as it existed in Malabar however, was recognised only in a limited form by the colonists. Coomarasamy very categorically states that the *taward* system of the Malabars was never introduced into Jaffna.¹⁰ He however admits that holding property jointly, but in a limited way, was found by the colonists suitable to the economic conditions of Jaffna, since, unlike Malabar, Jaffna is a locality where “nature smiles grudgingly to the toil and moil of the agriculturists”¹¹ and individuals and families had to struggle for existence. Thus a joint family system on the Malabar model was found too large for sustenance from a common purse.¹² Law is an indicator of socio-economic relations and this is true of those governed by Thesawalamai who found the joint family system with

6. *Ibid.*

7. *Ibid.*

8. *Thesawalame or the customary Law of Jaffna*; ‘*Thesawalame and its origins*’, Articles published in the *Hindu Organ* of 19 – 06 – 1933 and 21-21-33

9. William Logan, *Malabar Manual*, *op. cit* p. 154

10. *The Hindu Organ*. 21-12-33

11. *Ibid.*

12. *Ibid*

limited community of property most suitable for them. The unit that gradually took form in Jaffna resembled more the *tavazhi* system of the Malabars, which consisted of the husband, wife and their children. Coomarasamy shows that the early settlers from Malabar adopted this mode of tenure as the most suitable system to perpetuate their acquired properties in their families for future generations.¹³

We noted earlier that the second wave of colonists was from the Coromandel coast of India. These men who came mainly as chieftains, with their relatives, retinues and attendants settled amongst the colonists. They were people who followed Hindu Law and practiced the father-right type of joint family systems. The matriarch based joint family system of the Malabar colonists that was in existence came under the strong influence of the more mature and well developed father-right type of family system based on Hindu Law with the second wave of colonization of Jaffna. Mayne notes that, it is only when the family system begins to break up that we can trace the influence of Brahminism.¹⁴ During the Portuguese rule the father-right system of succession seems to have taken root in Jaffna. Queyroz mentions of the rights of succession by only male descendents and failing them to the brothers.¹⁵ This goes to show how in Jaffna patriarchal principles were superimposed on a purely matriarchal society. The Code thus

13. *Ibid.*

14. *A Treatise on Hindu Law and Heritage, op. cit.* p. 7.

15. *The Temporal and Spiritual Conquest of Ceylon, Father Fernando De Queyroz Translated by Father S.G. Perera, (Colombo:1930)* p. 53; See also - H.W.Tambiah, *Laws and Customs of the Tamils of Jaffna (Revised ed), op. cit.* p. 21

represents a hybrid of the two socio-legal systems.¹⁶ It is submitted that, Dalton J.'s suggestion "that the law of the Hindu joint family is the source whence it [*thediathettam*] derives any trace of community as such exists",¹⁷ is, without basis. Mayne very convincingly states that the joint family system that existed in Jaffna had its origins in a matriarchal society introduced by the migrants from Malabar, and¹⁸ concludes that, "The customs recorded in Thesawalamai can therefore be taken as very strong evidence of the usages of the Tamil inhabitants of South India two or three centuries ago or when it is certain that those usages could not be traced to Sanskrit writers"¹⁹ Arsaratnam remarks that in Thesawalamai the property rights of the females are greatly emphasised and cites as examples, the rules of females succeeding females and the dowry of the mother passing to the daughter.²⁰ These aspects, he says, distinguishes the practice of the Ceylon Tamils from that of the Tamils of Tamil Nadu.²¹ Tambiah agrees with Mayne that Thesawalamai is a collection of the usages of the Tamils before Brahmanism could make itself felt. He however

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16. Heinz Bechert is of the opinion that the "...Thesawalamai proves to be a hybrid of both legal systems" referring to the mother – right and the father – right legal systems. *Mother Right and succession to the Throne in Malabar and Ceylon*, article published in *The Journal of Historical and Social Studies* – Volume 6, No: 1, 1963, pp. 29 – 30; See also S Arsaratnam, *Tamils of Ceylon*, Chapter 3.
 17. *Iya Mattayer v Kanapathipillai*, (1928) 29 N.L.R 301 atp. 307.
 18. Mayne, *Hindu Law*, *op. cit.* See also Tambiah, *Laws and Customs of the Tamils of Ceylon*, *op. cit.* p.122-123.
 19. *Laws and Customs of the Tamils of Ceylon*, *op. cit.* p.125.
 20. *Ceylon, Tamils of Ceylon*, p.108; See also Coomarasamy, *The Hindu Organ*, 6 -7-1933
 21. *Ceylon, The Tamils of Ceylon*, p. 108

refutes the idea that it was a collection of the usages of the Tamils of South India.²² The customs so developed and recorded in the Thesawalamai Code are clearly indigenous to Jaffna and are not the usages of the Tamils of South India.

Coomarasamy expresses the view that, “The law of acquisition or Thediatettam cannot be traced either to Malabar or Coromandel usage. It is peculiar to Jaffna and is probably the result of Dutch influences”.²³ It is pertinent to note here Bertram C.J.’s observations. He declared: “The institution of community of goods in marriage...was independently developed among the races so distinct and diverse as the Dravidian inhabitants of Malabar coast.”²⁴ His Lordship concludes that he can find nothing to correspond to it in the law of the Hindu joint family.²⁵ Lawrie A.C.J however opines that, as the Malabar inhabitants of the Northern Province are Hindu in religion and race it is natural to find in the customary law some traces of the Hindu joint family.²⁶ But His Lordship declares that they are traces only.²⁷ What can be safely concluded is that *thediathettam* is an independent development which had its origins in a matriarchal society with joint family and

22. *Laws and Customs of the Tamils of Ceylon*, pp. 125-126. It needs to be noted that Tambiah in *Laws and Customs of the Tamils of Jaffna* says that, “the Thesawalamai **originally** was a collection of Dravidian usages.” [Emphasis added] p. 5

23. *The Hindu Organ*, New Year Number, 13-4-1936

24. *Seelachchy v Visuvanathan Chetty*, (1922) 23 N.L.R. p. 97 at 107-108.

25. *Ibid* at 107

26. 3, Balasingam Reports, p. 20 at 21

27. *Ibid*.

community of property and that the Hindu Law and subsequently the Roman Dutch Law, merely developed it.

Characteristics of the community - The customary law position

Community only in “profits during marriage”

The community of property system under Thesawalami is very different from the universal community of property system of the Roman Dutch Law under which, in the absence of a contract to the contrary, marriage created *ipso jure* a community of goods between the parties.²⁸ Wood J.’s statement in a case decided in appeal in 1843 and reported in Mutukisna’s *Thesawaleme* can be taken to be a clear exposition of the type of community of property that was in existence in the early Jaffna society. His Lordship explained: “The English and the Roman Dutch Law certainly recognized a community of goods between man and wife, but the Thesawaleme or country law recognised a distinct and separate interest – the husband in the property inherited from his father, and the wife in her dowry and inheritance; the only property in which both have a mutual interest and is in common is the profits arising from their own exertions during marriage”.²⁹ It appears that this system, with time and usage, became the normal and accepted practice. Bertram C.J.’s comments on the joint family system and

28. Lee, *An Introduction to the Roman Dutch Law* (1946) p. 68 ; K. Balasingam, *Laws of Ceylon* (1933) p. 522.

29. *Walliammae v Sandriaseger Modliar Sooper and others M.* p. 260 at 261

the institution of community of goods in marriage under Thesawalamai further explain the system. He declared: "In its original conception, both in the Thesawalamai and elsewhere, such a form of community was confined to the fruits of the common exertions of the spouses".³⁰ Dalton J. preferred to be clear but concise when he described the system as "a partial community of goods".³¹ It is interesting to analyse as to why in Jaffna the community was restricted from early times only to acquisitions during marriage. It is submitted that the arid climate and the socio-economic conditions of Jaffna might have had a part to play. Both factors necessitated active participation of the women folk too in the economic survival of the family. To put it in modern terminology, production for survival in early Jaffna, as it is now, has been a family enterprise which demands joint participation of the spouses to eke out a living. Further, we have to take note of two important aspects of these settlers way of living while in their early matriarchal stage. Apart from being accustomed to a system of joint family living with community of property, the early settlers were followers of the matrilineal system of succession, in which they found a safer and surer method of preserving their property for the future. These settlers had to therefore combine these two principles in their new place of settlement. Separate property, either as *muthusam* or *cheedanam* was largely constituted of ancestral property. Such property which was handed down from generation to generation was looked upon with a lot of sanctity and was,

30. *Seelachchy v Visuvanathan Chetty*, *op.cit.* at 108; *Singaravelu v. Ponnai*, (1948) 50 N.L.R.280 at 281.

31. *Iya Mattayer v Kanapathipillai*, *op. cit.* p. 307.

as noted, meant to remain in the family. Thus we find recognition in the Code of the two principles that females succeed females (with the subsequent colonization the rule became applicable to males too) and property acquired during marriage being common to both. The limited community of property system that originated and developed in Jaffna is in fact a social - economic acceptance of the spouses' joint efforts; while however recognizing the distinctive character of their separate properties.

The nature of the community created by marriage is nowhere defined in the Thesawalamai. Thus a study of customary law is limited to the scanty provisions in the Code and a few decisions of the court, the reports of which are not fully informative. A few provisions in the Code, which are discussed below, make it clear that the community consisted of only members of the immediate family, i.e. the husband, wife and their children. Into this community was incorporated property acquired by the sons during bachelorhood,³² as it was the practice and custom for the sons to live with their parents before marriage and help in the family enterprise. This custom of joint living of parents and sons³³ at the time of the compilation of the Code, and even to-day, is a reflection of the needs of an agricultural society where the parents and children had to pool their efforts to eke out a living. Property purchased in favour of the sons by their father too was construed by court as

32. Code, Part 1 para 7 and Part 1V para 5

33. Code, 1:7;4:5; *Umatevipillai v Murugesu*, 3 Balasingam Reports, p.120; *Kandar v Sinnachipillai*, (1934) 36 N.L.R. 362.

belonging to the father's estate.³⁴ But the terms 'father's control' and 'parental roof' were construed restrictively. They were considered as synonymous terms, and therefore, property acquired by the unmarried son, with his money and when not living under parental roof, was held to be the son's own property and not a part of the common property of the parents.³⁵ It needs to be also observed that this provision in Thesawalamai is a relic of the joint family system that was in existence under the Marumakkalthayam, as well as under Hindu law, where the earnings of the sons/ brothers went into the common estate. Difference of opinion has been expressed as to whether the community continues after the death of the husband.³⁶ Lawrie A.C.J expressed the view that there was no longer a common estate into which the son's acquisition could be brought into after the father's death.³⁷ This development is a clear expression of how patriarchal principles based on Hindu Law, which claims a divine origin, was able to take advantage of and make headway over the matriarchal system that was in existence; and subsequently establish a society based largely on patriarchal principles. Subsequently the court seems to have taken the view that the community came to an end on the death of either spouse³⁸ or on divorce or separation.

The Code defines *thediathettam* as "profits during marriage" and calls it "acquisitions", thereby distinguishing it from the other two kinds of property in Thesawalamai,

34. M. (1837) 589.

35. *Kandar v Sinnachipillai*, *op. cit*; Code 1:7 ; 4:5.

36. *Umatevipillai v Murugesu* , *op.cit*.

37. *Ibid*.

38. *Singaravelu v Ponnan*, (1948) 50 N.L.R. p. 280

namely *cheedanam* and *muthusam*. Moreover, the definition of the different kinds of property given in juxtaposition in the Code affords an important insight into the nature of the property system of those governed by Thesawalamai. The Code after identifying the separate properties with either the husband or the wife goes on to describe *thediathettam* merely as “profits during marriage”, without stating, as it does in respect of the separate property of the spouses, as to by whom it is brought into marriage or to whom it belongs, thereby indicating that it is common to both the spouses. The provision in Part I:2 of the Code seems further to accentuate the difference in character of *thediathettam*. It says, “...whenever a husband and wife give a daughter or daughters in marriage the dowry is taken indiscriminately, either from the husband’s or wife’s property, or from the acquisition...” Further, the classification which appears in the Code in English does not provide an exhaustive explanation. The original Code of the Dutch says of *thediathettam* thus, “and as such as acquired during marriage is called *Teurdeatatom* or “Acquisitions”. The Tamil version says “இவர்கள் சம்சாரமாயிருக்கிற காலத்தில் தேடப்பட்ட ஆதனம் எல்லாவற்றையும் தேடிய தேட்டமென்றும்”

which when translated becomes “property which they obtained by their efforts while living as husband and wife”. The word “தேடப்பட்ட” [*thedappatta*] connotes efforts put into such acquisitions thereby shutting out properties accruing otherwise. It is thus clear that the community recognized in Thesawalamai is not the universal community of property of the Roman Dutch Law.

***Thediathettam* — a concept of matrimonial partnership**

The concept of *thediathettam*, as noted above, embodies a very strong presumption that the economic efforts of the spouses during marriage are equal. It recognises the concept of matrimonial partnership of which Kevin Gray says: “In terms of the ideal of matrimonial partnership, the norm of equal apportionment should be applied only to the value of those property rights which constitute the economic product of constructive collaboration of husband and wife”.³⁹ In ancient Jaffna an independent working woman of the present day stature was certainly not in existence. But the economy being predominantly agricultural, as it was the chief occupation of the early settlers of the North, women toiled in the fields along with their husbands and sons, as many do even to-day. The principle of matrimonial partnership in Thesawalamai, as brought out by Bertram C.J. in *Seelachchy v Visuvanathan Chetty*⁴⁰ was further accentuated by His Lordship two years later in *Velupillai v Arumugan* where he declared: “Under the Thesawalamai there arises between the husband and wife in all the property acquired during the marriage a partnership by operation of law.”⁴¹ The fruits of common exertions also included acquisitions in which direct physical participation of the wife was not involved, as for instance in trade or business carried on by the husband. Bertram C.J. admitted it, when he applied principles enunciated by Voet⁴²

39. *Reallocation of Property on Divorce, op. cit.* p.108; See also “From Community Property to Separate Property: A Study of the Sri Lankan Property Regime” Sharya de Soysa says: “The Community under the Common Law, then does not represent the fruits of constructive collaboration between husband and wife during marriage, The Colombo Law Review, vol. 6.

40. At p. 108.

41. The Ceylon Law Recorder, p. 61.

42. 23.2.85.

and said that in the modern Tesawalamai, community in acquired property must be taken to include all acquisitions made by the husband in the course of business.⁴³ It is submitted that the concept of *thediathettam* in Thesawalamai as “profits during marriage” is wide enough to include all such acquisitions and makes Bertram C.J.’s conclusion easily comprehensible. Importantly, it is in conformity with modern assessments of the significance of the role of the homemaker and amounts to an acknowledgement of the contributory impact of the ordinary domestic services of the wife upon the accumulation of the husband’s income. The Thesawalamai, in giving an equal share of the acquired property to the wife⁴⁴, regardless of whether any monetary contribution was made by her or not, does reflect values espoused by Kevin Grey about matrimonial partnership and makes clear the adaptability of the customary law concept of *thediathettam* to modern times. It also bears witness to the enhanced social status of the married woman during the early years of the Jaffna civilization, despite it being marred in subsequent years by false concepts and ideologies introduced by laws very much alien to the customs of Thesawalamai.⁴⁵ Community in Thesawalamai did not mean that each spouse had a separate interest in one half of the common property. Property was held jointly, with the husband having controlling influence over it. The spouses became entitled to an equal half on separation *a mens et thoro*,

43. *Seelachchy v Visuvanathan Chetty*, *op. cit.*, p.108, 116; See also *Nagaratnam v Suppiah*, (1967) 74 N.L.R. p. 154 at 156.

44. 1:10, 1:11, 1:15, 4:5.

45. Reference chapter on *Cheedanam*.

divorce and on intestacy.⁴⁶ The Thesawalamai wife's counterpart in Kandyan Law too has an interest in her husband's acquired property, but with a marked difference in that in Kandyan Law the wife becomes entitled to only a life interest on the death of the husband.⁴⁷ In Kandyan Law the wife is also discriminated as against the husband, since, unlike the wife who gets only a life interest a Diga married husband becomes entitled to succeed to the acquired property of the wife if she dies intestate and without children.⁴⁸

Profits from separate property as partnership gains

The “profits during marriage”, is not confined to acquisitions alone. It can come from the separate property of the spouses as well. The Code in Part 4 paragraph 3 provides that, “the proceeds thereof [from presents and gifts received by the spouses from others] acquired during marriage must be added to the acquired property.”⁴⁹ Withers J. making his observations about the provision of the Code states that, gifts of land to either spouse is to be regarded as separate property and “Only the proceeds of the land are to swell the *thediathettam*”⁵⁰ He further clarifies this by saying, “It really comes to this, that according to the Thesawalamai, as interpreted by decisions, the separate

46. Section 20(2) of the Ordinance of 1911 before its amendment; See chapter on Spouses rights to matrimonial property for a fuller discussion.

47. Section 11, Kandyan Law Declaration and Amendment Ordinance No: 39 of 1938.

48. *Ibid*, section 19.

49. Code 4:3.

50. *Jivaratnam v Murugesu*, (1815) 1 N.L.R. P.251 at 254.

property of spouses is that which either party brings to the marriage or acquires during the marriage by inheritance or donation made to him or her particularly, while common property is restricted to the rents, revenue and income of their separate estate, and what is acquired by the exertions of the spouses".⁵¹

The question arose in a case quoted in Mutukisna⁵² whether a bequest of money to the wife, stated in the will as having been made in consideration for long and faithful services rendered by her is, by this provision, her separate property or *thediathettam* and therefore liable to be seized by a judgment creditor of the husband. The District Court held that only profits arising out of the donation, like for instance any interest due on the money, could be considered as acquired property of which the husband would be entitled to half. The Supreme Court however set aside the order of the District Court and held that the money was liable to be drawn by the appellant, the judgment creditor, in part payment of the money entitled to him. The court analysed 4:3 of the Code and acted on the basis that though the Thesawalamai provides only for situations where a gift of land is made to the husband or wife and is silent on gifts of money the same custom which applies to land should apply to money in the absence of any other law or custom to the contrary.⁵³

It is relevant to note here that matrimonial property of the spouses in the customary law consisted largely of the

51. *Ibid.*

52. (1856).M. 325

53. *Ibid* at p. 326

dowry property of the wife. The Jaffna man, in early times, could not have brought much into marriage as, at that stage of social development a man's earnings during bachelorhood went to form the *thedithettam* of his parents;⁵⁴ and it was most unlikely that he brought any hereditary property either, as sons became entitled to property of the parents only if anything remained after dowering the daughters.⁵⁵ Such was the impetus given to dowry, which is not surprising considering the matriarchal based social set-up in which it originated. In the early days the wife too could not have had separate earnings during marriage other than the proceeds which were derived by developing or improving her separate property. These proceeds however could not have been obtained without extensive support and labour of the husband. Hence, profits from separate property during marriage became in Thesawalamai common property of the spouses, entitling each to a half share. Recognition of equal entitlement is acceptance of the fact that it is the wife's property and the husband's enterprise that yielded the "profits during marriage". It is a recognition in Thesawalamai, well in advance of other systems of law, both foreign and indigenous, of matrimonial partnership in not only goods but in services as well.

Statutory Position

Customary rules of Thesawalamai were gradually displaced by express legislation and judicial precedents. A process of conscious development, not in the sense of a

54. Code 1:7, 4:5.

55. Code 1:10, 1:11.

gradual growth as such, but as the occurrence of events or happenings in a continuing situation, is noticeable thereafter. The development, it can be said, took a two fold path. One was in keeping with the finer principles of the customs and sentiments of the people governed by it. The other, more deviatory in its approach, was when rules alien to Thesawalamai came to be applied and made to appear as though they were principles inherent in the Thesawalamai itself. The Legislature by way of reform, and the courts by its powers of interpretation, were instrumental in such deviation from customary principles. The English translation of the Thesawalamai Code appears in the statute book as Regulation No: 18 of 1806. It is however discussed as customary law since the statute merely incorporated the customs. The two subsequent enactments are the Jaffna Matrimonial Rights and Inheritance Ordinance No 1 of 1911 and the amending Ordinance No 58 of 1947.

The Jaffna Matrimonial Rights and Inheritance Ordinance No 1 of 1911 and *thediathettam*

The preamble to the Ordinance states that it is, “An Ordinance to amend the law relating to the matrimonial rights of the Tamils who are now governed by the Thesawalamai”. The first part deals with applicability, the second with matrimonial rights and the third with inheritance. As to what is *thediathettam* under the customary law and what property goes to constitute it were discussed in the previous pages. The Jaffna Matrimonial Rights and Inheritance Ordinance of 1911 amended the concept and contents of *thediathettam* under the customary law when it defined it as follows:—

Section 19. “The following property shall be known as the *thediathettam* of any husband or wife-

- [a] Property acquired for valuable consideration by either husband or wife during the subsistence of the marriage;
- [b] Profits arising during the subsistence of the marriage from the property of any husband or wife”

***Thediathettam* – an extended version**

Thediathettam in customary law did not include the dowry of the wife or the *muthusam* of the husband; it included only what accrued from them. The definition of the expression “*thediathettam*” in section 19 [a] of the Ordinance only required that property should be acquired by either spouse for valuable consideration during marriage. It did not say as to what should or should not constitute the consideration. This enabled the incorporation of a new species of property which could not have been included in *thediathettam* under the customary law⁵⁶ and created controversy, with the court adopting two different approaches in interpreting it. It came up for construction in *Nalliah v Ponnamah*⁵⁷ where the court held that, the savings of the husband from his professional earnings before marriage, which he invested during marriage on promissory

56. *Avitchy Chettiar v Rasamma*, (1933) 35 N.L.R. 313; *Velan Alvan v Ponny* (1939) 41N.L.R. 105; *Ahilandanayaki v Sothinagaratnam*, (1952) 53.N.L.R 385; *Subramanaim v Kadirgaman*, (1969) 72 N.L.R. 289 at 290.

57. (1920)22 N.L.R. p.198

notes and on a mortgage of a house, belonged to him for his separate estate. De Sampayo J. here declared: "It is well settled, I think, that if the money by which acquisitions during marriage can be earmarked or traced back to the *mudusom* of the husband or the wife, the acquisition should not be considered part of the common property, but would partake of the nature of the source from which they sprang."⁵⁸ The judgment of the lower court brings out clearly the principles behind the custom. The District judge, in his well considered judgment, as De Sampyo J. in appeal described it, declared: "...the principle is fair and equitable that the conversion of one property into another does not alter the character of the property converted, but transmits it to the object which takes its place".⁵⁹ His Lordship was very clear when he stated that the mere accident of purchase during marriage does not make the purchase *thediathettam*. He continued, "The real consideration referred to in the section must have been itself *thediathettam* to make the property *thediathettam* as it was before the Ordinance".⁶⁰ Thus the court held that the Ordinance of 1911 merely declared the law relating to *thediathettam*; and did not alter it.

Subsequent cases have however differed from the above decision. *Avitchy Chettiar v Rasamma*⁶¹ is the landmark judgment illustrating the controversy. Garvin J. here declared that he was constrained to settle the issue by the interpretation of the language of the legislature. In doing so, he said, what mattered was whether the property

58. *Ibid* at p.203

59. *Ibid* at p.200.

60. *Ibid*.

61. *Avitchy Chettiar v Rasamma*, (1933) 35 N.L.R.313

concerned was acquired during marriage for valuable consideration by either the husband or wife. If it was so, then, without thought as to from where the consideration came from it had to fall within the definition of *thediathettam*. He was very precise in his expression when he stated that, “whatever the law may have been prior to the enactment of this Ordinance there seems to be no room for any doubt that in respect of the matters specially dealt with by the Ordinance it is the Ordinance that should be decisive”.⁶² This decision of Garvin J. received commendation and adherence in subsequent cases. Gratien J. is reported to have declared: “I am satisfied that *Avitchy Chettiar*’s case did in fact correctly interpret the language of section 19 of the principal Ordinance”.⁶³ He also added: “Indeed, it was in unqualified recognition of the correctness of this decision that Parliament decided in 1947 to substitute a new definition which would restore for the future the more traditional concept of *thediathettam* which had been unmistakably, even though carelessly altered by legislative intervention in 1911”.⁶⁴

In *Velan Alvan v Ponny*,⁶⁵ Keuneman J. was faced with a more complicated situation. The case concerned acquisition of property by one spouse from the other. The wife acquired certain premises from her husband during the subsistence of the marriage, for which she paid as consideration Rs.1,000 of her dowry money. Keuneman J. declared that the words of section 19 before the amendment

62. *Ibid* at p.318.

63. *Ahilandanayaki v Sothinagaratnam*, *op. cit.* at 397

64. *Ibid*.

65. (1939) 41 N.L.R. *op. cit.* p. 10

[hereafter referred to as the old section 19] were very wide and sufficient to cover the case of acquisition of one spouse from another, and therefore held the acquisition to be *thediathettam*. He conceded that it could lead to an anomalous state of affairs, and that it was open to the draftsman to have restricted the language to acquisitions from strangers, which unfortunately he had not done. The resulting position was not merely curious. It caused a lot of injustice to the spouses, especially to the women, and to their heirs. Tambiah points out that married men governed by Thesawalamai sold the dowry properties which were transferred in their wives' names, bought lands with the proceeds and then claimed that they were entitled to a half of it as a result of the definition given to *thediathettam* by the Jaffna Matrimonial Rights and Inheritance Ordinance.⁶⁶ That such abuse was caused is evidenced by the several cases that came before court.⁶⁷ In these cases, the court was called upon to adjudicate on the rights of parties on issues which affected their rights to separate properties, on a basis very much alien to the concept of Thesawalamai. Further under the old section 19, if one spouse sold property to another spouse he/she not only got the purchase price but also a half share of the property he/she had sold. This state of the law resulted in a great deal of public dissatisfaction, especially amongst the parents⁶⁸ and their

66. *Laws and Customs of the Tamils of Jaffna* ; [new edition] p 175.

67. *Avitchy Chettiar v Kasamma*, *op. cit* ; *Velan Alvan v Ponny*, *op. cit.* *Sachchithananthan v Sivaguru*. (1949) 50 N.L.R. 293; *Kandavanam v Nagammah* (1952); 46 C.L.W. p104; *Sellappah v Sinnadurai* (1951) 53 N.L.R. p. 117; *Kathirithamby v Subramaniam*, (1950) 52N.L.R. p. 62; *Theivanapillai v Nalliah*, (1961) 65N.L.R. p. 346; *Subramaniam v Kadirgaman*, (1969) 72 N.L.R. p. 289.

68. H.W.Tambiah, *Laws and Customs of the Tamils of Jaffna*. p.175

agitation led to the appointment of the Thesawalamai Commission in 1925.⁶⁹ The recommendations of the commission and the extent to which they were incorporated into the amended Ordinance are dealt with in subsequent pages.

Community in *thediathettam* – excludes son's earnings

In the above discussion we saw that the old section 19 of the Ordinance added to the category of *thediathettam* a new species of property. The same section, however, took away from its fold property acquired by the unmarried sons while under the parental roof.⁷⁰ Macdonald C.J. was very much inclined to declare the same, even before the enactment in 1911, and would have done so had the counsel led sufficient evidence to show that the provisions in the Code were obsolete.⁷¹ Earnings by sons before marriage cannot now be presumed to be the *thediathettam* of their parents, as section 19, while defining *thediathettam* confines it to property acquired by either the husband or wife during marriage. This new definition has therefore implicitly abrogated 1:7 and 1V : 5 of the Code. Further, section 7 of the Ordinance, before amendment, provides that “Any movable or immovable property to which any husband married after the commencement of this Ordinance may

69. The recommendations of the Commission were published as Sessional Papers 3 of 1930 and 1 of 1933 and the Objects and Reasons of the Bill to amend the Ordinance states that the Bill was intended to give effect to the recommendations of the Commission.

70. 1:7 ; 4 : 5

71. *Kandar v Sinnachipillai*, *op. cit.*

be entitled at the time of his marriage. . . belong to the husband for his separate estate." This change, enabling the men to retain their acquisitions is, it is submitted, just and fair by the men of Jaffna, especially in the context of contemporary society where women are increasingly engaged in gainful occupation and their earnings go to form their separate property. Therefore, to retain the provision that only the sons' earnings, while under parental roof, should go to form the *thediathettam* of the parents is not just, especially when the wealth of the parents are largely, if not totally expended in giving dowries to the daughters.

The Ordinance resulted in a further noteworthy change. Under the earlier law it was not possible for the husband to bring into marriage immovable property which he had acquired before marriage, as his earnings went to form the *thediathettam* of his parents. Therefore, all acquisitions by spouses after marriage were presumed to be *thediathettam*. Such a presumption is not possible under the Ordinance as it is now possible for a man possessed of acquired property to enter marriage. Thus, after the Ordinance, a person who claims a property to be *thediathettam* has to establish by evidence that the consideration itself was some gain in the nature of a new acquisition.⁷² The resulting change and the requirement of having to prove, it is feared, could work to the detriment of the interests of the surviving wife who comes to court to claim her rights in the *thediathettam* of her husband. Though it can be argued that the burden falls indiscriminately on the husband and the wife, whoever happens to be the surviving

72. *Manikkavasagar v Kandasamy*, *op. cit.* at p. 16.

spouse, yet by virtue of the marital powers vested in him by section 6 of the Ordinance the husband is in a more advantageous position. He is placed in charge of the entire matrimonial property as head of the family. The wife, though she is the owner of her separate property, cannot deal with her immovable property without the written consent of the husband. As such when she enters into any transactions her husband is aware of it and knows from where the consideration came for the purchase of the property. The reverse is not true. This enables the surviving husband to prove without any difficulty that the property is the wife's *thediathettam*. Unfortunately, when the husband purchases property during marriage, the wife, unless she has been kept informed, has no means of knowing so and would therefore find it difficult to prove that a husband's property is *thediathettam*.⁷³ When she fails to so establish she loses her entitlement to the *thediathettam* of the husband. She would encounter such difficulties not only on intestacy but also when property is re-allocated on divorce.

Community in *Thediathettam* – JAFFNA MATRIMONIAL RIGHTS AND INHERITANCE ORDINANCE NO 1 OF 1911.

We saw that under the customary law *thediathettam* was considered the common property of the spouses. The Ordinance did not abolish it but defined what *thediathettam* was to be thereafter. The community character was brought out in section 19, which provided that property acquired by **either** the husband or the wife and the profits accruing

73. . *Manikkavasagar v Kandasamy*, *op. cit.*

from their separate properties were *thediathettam*. The same feature is seen in Section 20 which provided as follows;

Section 20[1] Thediathettam of each spouse shall be property common to the two spouses, that is to say, although it is acquired by either spouse and retained in his or her name, both shall be equally entitled thereto.

[2] Subject to the provisions of the Thesawalamai relating to liability to be applied for payment or liquidation of debts contracted by the spouses or either of them on the death intestate of either spouse, one half of this joint property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased; and on the dissolution of marriage or a separation *mensa et thoro*, each spouse shall take for his or her own separate use one half of the joint property as aforesaid.

The community character of *thediathettam* under the Ordinance is manifest by its provision that property acquired by each spouse was common to both of them irrespective of the fact as to who acquired it or in whose name it was held. It further entitled the spouses to an equal share of it. Though the spouses became entitled to one half during marriage it was only on dissolution of marriage by death, divorce or on a separation *mensa et thoro* that they became entitled to separate use of it. It was thus made apparent that the Ordinance did not contemplate a separate use of *thediathettam* by either spouse during the continuance of the marriage.⁷⁴ The Code too makes no mention of separate

74. *Sangarapillai v Devaraja Mudaliyar* (1936) 38. N.I.R. p.1 pp 05-06

use. On the contrary, it associates both the husband and the wife in practically all provisions dealing with *thediathettam*.⁷⁵ The courts however stepped in to fill the gap and did so by reference to principles of Roman Dutch Law. In *Sangarapillai v Devaraja Mudaliar* Macdonell C.J. states: “the **use** [emphasis added] of the property was vested in the husband in accordance with the rules of the common law quoted above and it would seem to follow that this Ordinance No.1 of 1911 has not made any alteration in the law in that respect”.⁷⁶ It needs to be observed that neither the Code nor the repealed section 20, which is declaratory of the customary law, provided for that. It was the courts that entrusted the husband with the sole use of the common property.

In this context sections 6 and 7 of the Ordinance become relevant, for these two sections by the use of the words “except by way of *thediathettam* as herein after defined,” made it clear that the legislature did not propose to bring into the category of the spouses’ separate property, acquisitions by them during marriage. It also becomes necessary to see how various new acquisitions, made in ways which could not have been foreseen at the time the Code was formulated, were accommodated and categorized in Thesawalamai. The laws, both customary and statutory, speak only of acquisitions during marriage without reference to the mode of acquisition. The task of categorisation was therefore placed before the judiciary and the way the court

75. 4:2; 4:5.

76. *Sangarapillai v Devaraja Mudaliyar*, 38 N.I.R. p.1 at pp. 05-06

set about it is also interesting and useful study as the rights of parties are dependent on such categorisation.

Salaries, savings and gratuities

Several queries were raised in court as to whether salaries, savings and gratuities were *thediathettam*. The customary law does not speak of these types of acquisitions apparently because they were not envisaged at that stage of socio-economic development. The Ordinance in sections 6 and 7 provide that any movable or immovable property to which any husband or wife may be entitled at the time of marriage belong to their separate estate. Thus a husband's savings before marriage from his profession were held not as *thediathettam* but as his separate property.⁷⁷ However savings after marriage and investments from such savings were recognized as *thediathettam*. Driberg J, explaining as to why it should fall into the category of *thediathettam* states that, "acquisitions during marriage though with the money of one spouse would ordinarily in some measure be due to the efforts and assistance of the other spouse."⁷⁸ The judgment is recognition of the concept of matrimonial partnership in Thesawalamai in respect of property acquired during marriage. It acknowledges that though savings by the husband during marriage is the financial product of his employment, an unquantifiable domestic effort of the wife too goes into such savings. Hence any acquisitions with such savings would be due to the positive participation of

77. *Nalliah v Ponnammah*, *op. cit.*

78. *Thamotheram v Nagalingam*, (1929) 31 N.L.R. 257 at p. 258

both spouses and should thus be property common to both of them.

It is however not the same with the salaries of a husband. Driberg J. explaining the rationale of his judgment regarding salary observed, “It is just sufficient for his needs and is exhausted in fulfilling the natural and legal obligations he is under of supporting his wife and children”.⁷⁹ His lordship therefore held that, it was not possible to say that the salary earned by the appellant fell under section 19 (1) [a] or [b] in that it was neither an acquisition of property during marriage nor profits from the separate property of the spouses. This view was accepted by Fernando A.J. in *Seethanganiammal v Eliyaperumal*.⁸⁰ Matrimonial property is generally recognised as partnership property. As such all monies, savings, and investments from salaried employment have to be shared by the spouses. Such a generalization is not however possible when considering matrimonial property and spouses’ entitlement under Thesawalamai. This is mainly because, for property to be *thediathettam* it has to fall within the four corners of the definition as provided in the law. Thus Driberg J. decided to apply different rules for salary and savings in the above case. Regarding the issue of categorisation of salaries, Tambiah observes that it is difficult to imagine how the duties and liabilities of the husband in another field of law, could have affected the rules of definition or division in the law of property and goes on to say that, “Factually it seems reasonably clear that immediately the right to a person to

79. *Ibid.* at p. 259.

80. (1936)39 N.L.R. p.86.

his salary vests in him, then *ipso facto* it falls into a certain division of property, and it is subject to the restrictions which the law has imposed on it".⁸¹

The issue in *Seethanganiammal's* case concerned gratuities and the judge held that it was a payment in recognition of the husband's past services and therefore could not be considered as property acquired for valuable consideration. The decision was upheld in *Kasipillai v Theivanapillai*.⁸² It is however submitted that superannuation rights and retirement benefits like gratuities, bonuses, golden handshakes etc, need to be brought under *thediathettam*. Such payments and other employment related monies or terminal benefits received by the other spouse, apart from being made possible by the wife who provided the domestic base for the husband's income earning role, happen to be in many families the only savings possible; the monthly salaries being sufficient only to meet day to day needs. Considered as savings it would not be difficult for the court to accommodate them as *thediathettam*.⁸³ Thus it is a call to our courts for a more liberal and positive approach towards matrimonial property especially in the wake of our legislatures adopting Western ideologies in drafting legislations pertaining to matrimonial property rights and affiliated matters.⁸⁴ Western countries like the U.S.A.

81. *Laws and Customs of the Tamils of Ceylon, op cit.* p. 160.

82. (1958)58 N.L.R. 157

83. *Thamotheram v Nagalingam, op. cit.*

84. The MRIO and the MWPO applicable to those governed by the general law are based on English Law statutes. Several provisions of the JMRIO are a replica of the now repealed provisions of the MRIO.

and even the German Democratic Republic, where a different political ideology and legal jurisdiction exists, recognise not only spouses' savings from salaries but also from other work-related incomes as belonging to both spouses.⁸⁵

Insurance

We saw that Thesawalamai originated as a customary law and was compiled at a time when the people of Jaffna were more or less agriculturists. It was also seen that the concept of *thediathettam* was considered wide enough to incorporate other modes of acquisitions as for example earnings and savings from occupations or professions.⁸⁶ Regular flow of incomes opened new avenues of activities and investments which in turn gave rise to complicated legal issues. One such question related to monies payable on life insurance policies. Before attempting to analyse the approach of the judiciary to such questions it is necessary to look into the provisions of the Ordinance.

Section 11 provides that a husband or wife can effect a policy on his or her own life or the life of his wife or her husband for his or her own separate use. As regards a contract in such policy when made with a married woman the section specifically provides that it shall be valid as if made with an unmarried woman. It also states that the policy and all benefits thereof if expressed on the face of it so effected shall enure accordingly.

85. For fuller discussion see Kevin Gray, *op. cit.* Chapter 4, '*The property of the matrimonial partnership*'.

86. *Nalliah v Ponnamah, op. cit.*; *Thamotheram v Nagalingam op. cit.*

Section 12 provides for the effecting of an insurance policy by a married man on his own life and expressed on the face of it for the benefit of his wife/children or of both. It declares that it “may be deemed a trust for the benefit of his wife for her separate use and of his children or any of them according to the interest so expressed...” It should be noted that section 7 further ensures the trust by providing that the separate properties of the husband shall be subject to and without prejudice to the trusts of any will or settlement affecting them.

The court initially viewed premiums paid on insurance policies as *thediathettam*. In *Ponnamah v Kanagasuriyam*⁸⁷ and *Poothamby v Valupillai*⁸⁸ it was conceded by parties in both courts that the premium paid on an insurance policy should be considered as *thediathettam*. Tambiah, expressing an opinion, gives an illustration which explains that such a conclusion is not only opposed to principle but is inequitable as well.⁸⁹ He did not venture further into it as the matter was not decided by courts but only conceded by the parties concerned. He however stated that the property acquired on a policy of insurance is the money payable under it and not the premium paid.⁹⁰ Sharvananda C.J. disagreed with the view of the law expressed in these two cases⁹¹ that the premium paid on insurance policies is *thediathettam*. and held on the basis that insurance is a

87. (1916)19 N.L.R. p.257

88. (1923) 2 Times of Ceylon Law Report, p. 95

89. *The Laws and Customs of the Tamils of Jaffna*, *op.cit.* at p .178

90. *Ibid*

91. *Ponnamah v Kanagasuriyam*, *op. cit*; *Poothuthamby v Valupillai* 2 Times of Ceylon Law Report, p. 95

matter of contract and the proceeds of the insurance would have to be decided in terms of the policy of insurance.⁹²

The question in *Poothuthamby* case was whether on the death of the spouse of the insuring spouse the heirs became entitled to half the amount of the premium. Ennis J. declared in the negative, holding that “on the death of the wife [the non-insuring spouse] the share to which her estate would have been entitled would have been a share in the surrender value, but in as much as the policy was on the life of the husband the estate could not compel the husband to surrender, neither could it compel him to pay before the policy matured”.⁹³ Thus he held that the right was really a claim in expectancy and not a claim to a definite half of the amount contributed by the husband. He continued to explain that as a claim in expectancy it did not become due until maturity of the policy either by surrender or the lapse of 20 years or by the death of the husband.

After the amendment, the matter came up for decision in *Shanmugalingam v Amirthalingam*.⁹⁴ Basnayake J. held that, since by the Ordinance a married man is free to effect a policy of insurance upon his life for his separate use, the insurance money of the deceased was payable to the administrator to be equally divided between the two sons of his two marriages. He explained that if the policy had become payable in the life-time of the spouses the wife would have had no claim to any part of the money payable on the policy. His Lordship therefore declared that he could not agree

92. *Manikkavasagar v Kandasamy*, (1986) 2 S.L.R. p.8 at pg 18.

93. 2 Times of Ceylon Law Report, p. 95

94. (1948) 41C.L.W. p.59

with the decision of the District Judge⁹⁵ that the half yearly premium payments made by the deceased on account of the policy up to the date of his wife's death was his common savings and therefore his *thediathettam*. He found on the evidence that the deceased had no earnings other than his salary from which the premia had been paid and that the salary of a person under Thesawalamai has been held to be not *thediathettam*.⁹⁶ It is submitted that the District Judge's basis of holding that the premiums paid would be "common savings" agrees with what Driberg J said of salaries and savings from salaries in *Thamotheram's* case, for, when the person made payments from his salary for the premiums he was in actual fact setting aside the money which was remaining after meeting his needs and which was not 'exhausted in fulfilling the natural and legal obligations of his wife and children'.⁹⁷ The amounts so paid as premiums therefore have to be considered as his savings. Further, in the text of *Shanmugalingam's* case, as reported, it is stated that the evidence indicated that his **savings** [emphasis added] were sufficient to pay the premium on the policy and to remit money to be invested in loans. If the payments of premium had in fact been made from savings, [which has been accepted as *thediathettam*] then it is submitted that the basis of Basnayake J.'s reasoning that salary is not *thediathettam* and therefore the proceeds from the policy (for which the premium was paid from salaries) is not *thediathettam*, does not hold ground. Money payable under

95. *Ibid* at p. 60.

96. *Thamotheram v Nagalingam*, (1929) 31N.L.R. p. 257.

97. *Ibid*, at p. 259

the policy for which the premium were paid from savings should become *thediathettam*.

It was seen that under the Ordinance a married man is free to effect a policy of insurance upon his life for his separate use. The effect of the provision appears to be that when he does so and makes payments from his salary, as is usually done, by virtue of the new section 19 of the Ordinance the money becomes his separate *thediathettam*. If the policy becomes payable during the life-time of the spouses the wife will have no claim to any part of the money payable since it is only on intestacy that a surviving wife can become entitled to a half share.⁹⁸ She would not be entitled to a share if the marriage breaks down by divorce or judicial separation.⁹⁹

The decisions discussed above show that the law is neither just nor equitable as regards a married woman governed by Thesawalamai. It is necessary that the law and the courts take note of practical situations and are not guided by strict interpretations that do not reflect reality, for, in actual practice when an insurance policy is effected the spouses consider it not only as a risk relief measure but also as a method of saving. In this context it becomes very relevant to note Kevin Gray's observations about life assurance policies. He says, "life assurance policies represent an important form of family savings and

98. Section 20, JMARIO.

99. It is to be noted that the amended Ordinance does not provide for situations of separation or divorce and the assumption is based on the repealed section. Divorce and separation are dealt with in subsequent paragraphs in Chapter on Spouses Rights and Obligations to Matrimonial Property.

investment”, and that, “It is of paramount importance that they should be included within the property of matrimonial partnership, since otherwise one of the most valuable assets of the marriage may remain immune from distribution when divorce occurs”.¹⁰⁰ Thus, when the husband sets aside a part of his salary for payment of insurance premium it is none other than savings, and, we have observed that courts have recognized savings as the financial product of a salaried spouse’s employment made possible by joint efforts and frugality of the wife. To consider therefore the premium paid or the value received at the end of the insured period as not falling under the category of *thediathettam*, thereby excluding the wife or her heirs from any share in it, is clearly not justice. Kevin Gray shows that matrimonial property regimes of various legal systems of the West regard such property as community assets.¹⁰¹ As examples he cites some states of the U.S.A., the Federal German Republic, and New Zealand.¹⁰²

The decision of Sharvananda C.J. in *Manikkavasagar v Kandasamy and others*¹⁰³ in regard to a wife’s rights to benefits from the life insurance proceeds of her husband merits close attention. In this case, the C.J. declared that, “since insurance is a matter of contract the destination of the proceeds of the insurance will have to be decided in terms of the policy of insurance”.¹⁰⁴ Following

100. Kevin Gray *Reallocation of Property on Divorce*, *op.cit.* pp. 179 - 180

101. *Ibid* p.180.

102. *Ibid.* pp.180 - 181.

103. [1986] 2 Sri L.R. p. 08

104. *Ibid* at p. 18.

on that and on the facts of the case he said, “since the policy did not mature in the life-time of the deceased the monies due on the policy became payable to the heirs of the deceased on the death of the deceased”.¹⁰⁵ Having said so he held that since the monies were paid on death it should form an asset of the estate of the deceased and payable to his heirs. Tambiah observes that, “this view is not tenable since the husband acquired an interest in the insurance policy the moment he starts paying the premia on each occasion”.¹⁰⁶ “Vesting”, he said, “must be differentiated from the moment of payment”.¹⁰⁷ He summarised the full impact of insurance on *thediathettam* both before and after the amendment thus: If a policy is taken before the amendment, he said that the decisions set out earlier could be followed, that is to hold the premium paid as *thediathettam*. On the other hand where premium is paid after the amendment, the property in the insurance policy vests in the spouse who insured in his name and half of whatever monies payable on his death would devolve on the other spouse as an heir, in accordance with the provision of the amended section 20.¹⁰⁸ One matter however should be noted. Such monies from insurance policies can go into the matrimonial partnership only to the extent of payments from partnership funds. It is submitted that when premium on insurance policies are made by spouses they have to be considered as their savings for that is how it would have certainly been

105. *Ibid.*

106. *Laws and Customs of the Tamils of Jaffna, op. cit.* [Revised edition], p. 181

107. *Ibid.*

108. *Ibid.*

intended. As savings, they fall into the category of *thediathettam*. If premium payments become *thediathettam* then the money on maturity too has to be the same, irrespective of the time of its realization.

Two other matters in sections 11 and 12 merit attention. Firstly, section 11 states that the contract of insurance entered into by the wife would be valid as if made with an unmarried woman. We have noted the reprehensible provision of section 6 imposing constraints on the rights of a married woman under Thesawalamai. Section 11 however removes such constraints in relation to contracts of insurance effected by a married woman under Thesawalamai by recognising her as a *feme sole*. It makes one wonder why the Ordinance displays a liberal policy only as regards life insurance policies. Secondly, section 12, which, continues the approach of section 11 releases the insurance policy taken by the husband on his life in favour of his wife or of his wife and children from his control and demands of his creditors. The reason for the release is clear from the words of the section that, it “may be deemed a trust for the benefit of his wife for her separate use and of his children”. If, as discussed, money invested on insurance policies should be considered as savings, and thereby as *thediathettam*, the question arises as to whether it would be liable for debts incurred by the husband. The section however provides that it would not be subject to the control of his creditors clearly because it has to be considered as a trust created for the benefit of the wife, and or of the children over which he could have no control. It is relevant to note that the position was the same under the old sections, which considered *thediathettam* as the joint property of the spouses.

Investments in trade and business, stocks, shares and the like

In analyzing *thediathettam* as matrimonial property the impact of domestic contribution in the partnership activity was viewed from an evolutionary point of view. It was shown that, during the early period of social living in Jaffna, the physical labour of the wife went into the acquisition of property during marriage and therefore the wife was given equal share in such property. Subsequently, the wife's efforts in providing the domestic base necessary for the husband's earnings was recognised and savings from the husband's earnings from salaried employment were considered common to the two spouses. It now remains to advance further and see how matrimonial partnership works in trade and business. In *Seelachchy v Visuvanathan Chetty* Bertram C.J. made the position very clear and declared: "Any property acquired in the course of trade by one of two spouses subject to Thesawalamai in a part of the colony outside its special local sphere becomes *ipso facto* partnership property as part of the community".¹⁰⁹ This view was reinforced in *Nagaratnam v Suppiah*.¹¹⁰ In this case one of the issues raised was the right of a divorced wife to a share of the profits that had accrued from a business which the husband had commenced before the marriage in 1935, i.e. before the amending Ordinance came into force. H.N.G. Fernando J. delivering the judgment held that the wife was entitled under section 20 [2] of the principal

109. *Seelachchy v Visuvanathan Chetty*, *op. cit.* p. 97

110. (1967) 74 N.L.R. p. 54

Ordinance to one half of the unspent profits in the hands of the husband. The decision is an acceptance of the principle of matrimonial partnership, in that it recognized the fact that though the business was commenced before marriage the profits that accrued to that business during marriage were by the joint efforts of the spouses.

The case of *Sooranammah v Amirnathapillai*¹¹¹ went a step further and showed that principles enunciated in *Thesawalamai* are broad enough to take account of new species of properties created by trade and commerce. This case involved 25 shares which were purchased by the husband out of the dowry money of the wife. Subsequently when the company raised its initial capital 45 additional shares were allotted, without payment of any consideration, to the deceased husband as he was the registered holder. The case for the heirs of the husband was that the 45 shares were *thediathettam* as it represented profits arising from the 25 shares of which the wife was the beneficial owner. The court however rejected the view that the 45 shares represented any profits of the company and held that the 45 shares too were impressed with the same trust as the 25 shares and a part of the wife's separate property. Though the 45 shares were held not to be profits arising from the 25 shares, the decision is important in that it shows how such properties as shares in a company could be adopted to principles of *Thesawalamai* and dealt with under that law. It is not unusual for a company to convert accumulated profits which can be distributed as dividends into shares by increasing the capital if the articles of Association of the

111. (1950) 53 N.L.R. p. 334

company permit it. Based on this decision it can be deduced that had the court found the 45 shares as representing such profits the court would have declared them profits that should be shared between the spouses.

These decisions, though few, go to show that Thesawalamai principles can be used and adopted to deal with new kinds of properties that come with commercial development, like shares, stocks etc. As such, the opinion expressed by some that Thesawalamai being a codified law has not been able to evolve with time nor take into account new developments and new types of properties appears unfounded.¹¹² Queries have also been raised as to whether a woman subject to Thesawalamai can instruct her broker to buy or sell shares on her behalf without the consent of the husband. It is submitted that when she has capacity to enter into a contract of insurance she could be considered as possessing similar contractual rights as regards stocks and shares.

The Amendment Ordinance No. 58 of 1947 and the future of community in *thediathettam*

The statutory position and the varied judicial and academic interpretations placed on the amendment are both controversial and interesting. The provisions are so complicated that they have confused the people governed by the law as to whether the property acquired by them is common to the husband and wife or is the separate property of the acquiring spouse alone. It has made the task difficult

112. *Laws and Customs of the Tamils of Jaffna*, [New edition] *op. cit.* Introduction, p.vii

for the notaries who are called upon to transact property acquired during marriage. The laymen however continue to hold that *thediathettam* is property common to the spouses and handle it as such on contracting sales, mortgages or making donations.¹¹³ As a prelude to discussing the controversy, a brief study of the recommendations of the Thesawalamai Commission on which the amendments were largely based becomes necessary.¹¹⁴

The Thesawalamai Commission – its objectives and its recommendations

The Commission was appointed¹¹⁵ consequent to widespread agitation amongst those governed by Thesawalamai after the decision in *Avitchy Chettiar's* case regarding the properties that could constitute *thediathettam*.¹¹⁶ Several questions need to be answered before going into the recommendations and the extent of its accommodation in the amendment of 1947. The first is about the need to appoint such a commission. Tambiah, in his revised edition,¹¹⁷ says that the commission was appointed as a result of public agitation to alter the legislation in order to bring the law in conformity with the principle laid down in *Nalliah v Ponnamah*.¹¹⁸ He goes into details and says,¹¹⁹

113. Personal interviews conducted in Jaffna and Colombo amongst people governed by Thesawalamai; See also Evidence recorded before the Thesawalamai Commission, Jaffna, July 16, 1917, pp. 5-18, Thesawalamai Commission Report, 1920

114. *Sellappah v Sinnadurai and others*, (1951)53 N.L.R. 117 at p. 126.

115. Appointed on January 29, 1925. The report of the Commission was published as Sessional Paper 3 of 1930 and paper 1 of 1933.

116. *Supra* para, "*Thediathettam an extended version*", pp. 206-208

117. *Laws and Customs of the Tamils of Jaffna*, revised ed., *op. cit.* p.175.

118. (1920) 22 N.L.R. 198 ;See also *Manikkavasagar v Kandasamy*, *op. cit.* at p. 13.

119. *Laws and Customs of the Tamils of Jaffna*, at p.175

that it was due to the abuse committed by some of the married men governed by Thesawalamai, when they sold the dowry properties of their wives in whose names the parents had transferred them, bought new properties with the proceeds and thereafter laid claim to half of them as *thediathettam*. It is clear that the objective of appointing the Commission was to restore the old concept of *thediathettam* with which the people were happy as seen by their acceptance of the cases decided on that basis under that law. The second question is, was that objective achieved. In order to find the answers one has to first analyse the recommendations.

The commission recommended thus; “We are agreed that there should be no community in *thediathettam* property, and that all such property should be held and enjoyed as the separate property of the spouse who acquired it, or if it consists of profits, of the spouse from whose profits arose, with the same power of disposal as now exists in the case of separate property. If however the husband or wife dies possessed of or entitled to property which comes within the definition of *tediatetam* property as defined in section 21 of Ordinance no 1 of 1911, a half share of such property should devolve on the surviving spouse”.¹²⁰

The Commissioners made it very specific that there should be no community in *thediathettam* property and that it should be enjoyed as the separate property of the acquiring spouse with the same power of disposal as then existed in the case of separate property. In case of profits they declared

120. Sessional Paper 3 of 1930, p. 3, A committee appointed on a motion of K. Balasingam, a member of the Executive and Legislative Councils had reported same unanimously. See Balasingam K. *The Laws of Ceylon* (London: Sweet & Maxell. Ltd, 1933) p. 489

that it should belong to the spouse from whose property the profits arose. They however recommended that if a husband or wife died possessed of *thediathettam* property, a half share of such property should devolve on the surviving spouse. This alteration in the property regime, they declared, “recognizes the movement in enlarging the property rights of married women”.¹²¹ They went further and made a comparison of the proposed change with the changes that had taken place in England and in our general law as regards women and their property rights. They claimed that the alteration, “At the same time preserves to a considerable extent a right which is based on good reason, for *tediatetam* property usually results from the joint efforts and enterprise of husband and wife”.¹²² As to whether the desired results were achieved, or to be precise, could have been achieved within the altered frame-work, is discussed in subsequent paragraphs.

Strangely enough the recommendations say nothing about the actual purpose of the Commission, which was to correct the anomaly created by *Avitchy Chettiar's* case and to restore the traditional concept of *thediathettam*. Presumably, the omission was intentional since their recommendations were not directed towards restoring the old concept in toto but aimed at a new order, a complete separate property regime in Thesawalamai which includes *thediathettam*. The implementation of the recommendation nevertheless resulted in rectifying the anomalous situation as to what property should constitute *thediathettam*.

121. *Ibid.*

122. *Ibid.*

The Bill to amend the Jaffna Matrimonial Rights and Inheritance Ordinance No 1. of 1911

A clear understanding of the amending Ordinance is possible when the **Objects and Reasons** stated in the Bill brought to amend the Ordinance are analysed.¹²³ Clause one of the Bill very categorically states the object as being to give effect to the recommendations of the Thesawalamai Commissioners which, as noted, was to abolish community of property in *thediathettam* and replace it by separation of property.¹²⁴ The first step towards that objective was the amendment to sections 6 and 7 by clauses 3 and 4 in order to give a clear definition of the separate property of the spouses. In doing so it was intended to remove the ambiguity which led to the decision in the case of *Avitchy Chettiar v Rasamma*. In furtherance of the objective the Bill went further and proposed in clause 5 a “clearer definition of *thediathettam*”.¹²⁵ What the Bill proposed to make “clearer” has, on the contrary, created doubts and controversies both judicially as well as generally amongst those governed by Thesawalamai.

***Thediathettam* – the new definition by the Amending Ordinance No: 58 of 1947**

As a preliminary to the discussion of the new definition of *thediathettam* in section 19 it is necessary to analyse the

123. Ceylon Government Gazette no , 274 Part 11, February 26, 1947.

124. Sessional Paper 111 of 1930 and Paper 1 of 1933.

125. Nagalingam S.P.J. in *Kandavanam v Nagammah*, (1952) 46 C.L.W. at p. 397.

alterations made to sections 6 and 7 of the principal Ordinance. These sections deal with the separate properties of the spouses, but from such separate properties *thediathettam* was expressly excluded in the old sections 6 and 7 by the incorporation of the words, "except by way of *thediathettam* as hereinafter defined." Sections 3 and 4 of the Amending Ordinance have now deleted these words. This deletion is of significance in relation to the new definition of *thediathettam*, for, by specifically excluding *thediathettam* from these two sections the Ordinance, before the amendment of 1947, had shown *thediathettam* as a different species of property which could not be included into sections 6 and 7, under the separate properties of the spouses. The Amendment, however, by removing the words of exclusion brought *thediathettam* within the fold of the separate property of the spouses. The incidences that attach to the separate properties of the spouses by these sections should thereafter be attributed to *thediathettam* as well.

As the next step the amendment repealed and replaced section 19 of the Ordinance, which now states as follows:

"No property other than the following shall be deemed to be the *thediathettam* of a spouse;

- [a] Property acquired by that spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse.
- [b] Profits arising during the subsistence of that marriage from the separate estate of that spouse."

***Thediathettam* with the Amendment—Restoration of the traditional concept or a new definition?**

The community characteristics of *thediathettam* under the customary law and under the Ordinance of 1911 were discussed in the previous pages. It now remains to assess as to how and to what extent the new definition altered the position. After having brought *thediathettam* under sections 6 and 7, thereby incorporating it with other separate properties of the spouses, the amending Ordinance proceeded to re-define *thediathettam* as “*thediathettam* of a spouse” and “of that spouse” in the new section 19. The scheme of the amendment clearly articulates the intention of the legislature to do away with the system of community of property in *thediathettam* and instead introduce a separate property regime. As to whether it has been achieved remains a matter of conjecture because of the varied judicial pronouncements and interpretations based on it. In order to understand them it is necessary to study in comparison the old sections which deal with the separate and common properties of the spouses together with their corresponding amending sections.

Thediathettam was defined in the old section 19 and explained further in 20. Though the words of the old section 19 changed the concept of *thediathettam* in so far as it relates to the consideration that could go into its purchase, it retained its traditional community character. The objective of appointing a Commission was, as noticed, to correct the anomaly and revert to the traditional concept of *thediathettam*. With the inclusion of the words “such consideration not forming or representing any part of the separate estate of the spouses” into the new section 19 the

anomaly was rectified and the objective of the agitation of the people as a result of *Avitchy Chettiar's* case achieved. But the legislature did not stop with that. It proceeded further and re-defined the concept of *thediathettam*. This was done by repealing and replacing sections 19 and 20. Two matters therefore need to be analysed. Firstly, why was *thediathettam* re-defined? Secondly, why was community in *thediathettam* done away with when it was not a matter of public dissatisfaction? The only explanation possible is that it was done to comply with the recommendations of the Commissioners to do away with community of property in *thediathettam*. It is submitted that the objective of rectifying the anomaly could have been effectively achieved by the mere inclusion of the words of exception, "such consideration not forming or representing any part of the separate estate of the spouse" (now incorporated into the section 19) in the section defining *thediathettam* without in any way altering the concept.

It is thus made clear that the legislature's *modus operandi* in correcting the mischief was associated with other alterations which do not have a direct bearing on the correction. The amendment called for, by the decision of *Avitchy Chettiar's* case, required only restoration of the old concept in respect of what constitutes *thediathettam*. Gratien J. accepting *Avitchy Chettiar's* case as correctly interpreting the language of the old section 19 declared, "Indeed, it was in unqualified recognition of the correctness of this decision that Parliament decided in 1947 to substitute a new definition which would restore for the future the more traditional conception of *thediathettam* [emphasis added] which had been unmistakably, even though carelessly,

altered by legislative intervention in 1911.”¹²⁶ From the above emphasized words, it appears that Gratien J. was convinced that what the legislature intended was to bring a new definition which would restore the traditional concept of *thediathettam*. The objective is clear. What had disturbed the traditional concept related only to what constitutes *thediathettam* and not the concept of community of property in *thediathettam*. As explained earlier, the inclusion of the words of exception, would have by itself served the purpose. Therefore, it is submitted, that there was no need to change the entire section 19 so as to give a new meaning to *thediathettam*. More so, there was no corresponding need to repeal and substitute the old section 20, for it dealt with an entirely different subject relating to incidence and devolution of *thediathettam* and had nothing to do with the mischief caused. It could neither be said that the subject the old section dealt with was in any way inconsistent with the customary law as it existed before 1911.

It is therefore a moot question as to whether it could be considered that community in *thediathettam* has been abolished. There was apparently no public agitation calling for any such reforms. There were only the recommendations of the Commissioners which, it is said, were made after deliberations on the replies the Commissioners had received on some fourteen questions they issued to about fifty persons.¹²⁷ Tambiah draws our

126. *Ahilandanayaki v Sothinagaratnam*, *op.cit.* at p. 397.

127. Persons involved were the Assistant Government Agents of Mannar and Mullaithivu, the District Judges, Commissioners of Requests, Maniagars Mudaliyars and Udaiyars of the Northern Province and lawyers and notaries of five and seven years standing respectively.

attention to the metamorphosis that Jaffna society had undergone in the course of time when many people ceased to follow the agricultural pursuits of their forefathers and took to white collared jobs.¹²⁸ He also makes us understand that the Commissioners were influenced by the opinions expressed by witnesses to the effect that, “the recognition of the wife’s half share in the *thediathettam* although it suited an agricultural economy when both the husband and wife toiled and earned their living by the sweat of their brow, was thoroughly unsuited as the wife contributes little or nothing to the acquisition of wealth by the husband”.¹²⁹ Hence, he says, the Commissioners recommended what is now embodied in sections 19 and 20. Tambiah however cites no authority for the above statements and views. Nevertheless it has been accepted that the amendments were as a result of the recommendations of the Commissioners. Certain facts become clear. It is true that the Jaffna man turned to English education and was attracted by white collar jobs. But it is equally true that the economy has remained mainly agricultural and even today women join their husbands and sons in tilling the soil and helping them in other ways. Apart from these, general wifely services are also thereby ignored.¹³⁰ So, to say that the wife’s contribution to the husband’s wealth is little or nothing is not acceptable. It makes a mockery of the high tenets of the customs of the people who had acknowledged ages ago

128. *Tamil Culture, op. cit.* p. 128

129. *Ibid.*

130. *Supra.* p. 200 para, *Thediathettam* - a concept of matrimonial partnership.

that “profits during marriage” should be shared equally by the spouses.¹³¹ What is clear is that patriarchal interests evinced by an elitist few and advocated by the Commissioners were supported and implemented by the legislators. The amendment, in brief, is an assertion of male supremacy designed to undermine the Jaffna woman’s rights and interests.

It is possible to presume that the Commissioners could have thought that the problems of conversion of separate property into *thediathettam* would not arise if there was no common property at all in Thesawalamai. But, doing away with a system that was the custom amongst the people for ages by a stroke of the pen was unwarranted. Section 19 of the Ordinance was interpreted in *Avitchy Chettiar’s* case to include a new species of property which was against tradition and unacceptable to the people and a legitimate call was made to remedy that, which, as shown earlier could have been achieved without in any way disturbing age old traditions. An entirely separate subject relating to the incidence of *thediathettam* and its method of devolution was regulated by the old section 20. An analysis of the decisions of the court do not suggest that the provisions of section 20 have been wrongly construed or considered by Parliament to have been misinterpreted in earlier rulings of the court. There was thus no rational need to introduce in 1947 a completely new principle disturbing the sanctity of traditions, particularly in a context where the courts had on several occasions held or incidentally pronounced that

131. Code part 1:1

section 20 was in no way inconsistent with the customary law as it existed before 1911.¹³² That the Commissioners thought it necessary to introduce separation of property in order to rectify the mischief is not plausible as the cause of the mischief and the effect of the recommendation do not fall in line.

It remains to ask as to whether the Commissioners so recommended in order to espouse the rights of women to their properties, for in their report they have stated: "The alteration we suggest recognizes the movement in enlarging the property rights of women which has taken place in the law of England and in our law".¹³³ The Married Women's Property Act was enacted in 1882 in England and it provided the model for the Sri Lankan statute, the Married Women's Property Ordinance No. 18 of 1923, which removed all the common law impediments experienced by married women in Sri Lanka governed by the general law. Complete separation of property was achieved and the woman under the general law made a *feme-sole*. To say that they were influenced by the revolutionary changes brought about by these newly introduced statutes of the general law, is not convincing for they sought to do nothing as regards the restraint imposed on the women by the old section 8, which

132. Garvin J. in his dissenting judgment in *Seelachchy v Visuvanathan Chetty*, *op. cit.* at p. 122; *Sangarapillai v Devaraja Mudaliyar*, *op. cit.* at p. 09; *Kathirithamby v Subramaniam*, (1950) 52 N.L.R. p. 62; *Kandavanam v Nagammah*, (1952) 46 C.L.W. 67; *Akilandanayaki v Sothinagaratnam*, *op. cit.*, at pp. 397, 398 *Manikkavasagar v Kandasamy*, *op. cit.* at pp. 13-14

133. Report of The Thesawalamai Commission, Sessional Paper III of 1930, p. 3

still remains in the amended ordinance as section 6. The Commission was appointed in 1925, just two years after the enactment of the Married Women's Property Ordinance, and strangely enough the Commissioners who had very eloquently declared that the alterations they suggested, "recognises the movement in enlarging the property rights of married women" never bothered to recommend the removal of the restraints imposed on the Jaffna women.

Separate property system in *thediathettam* by itself could not have been the panacea for all the evils that befell the Jaffna women by the effects of the conversion of separate properties. It is puzzling as to how the Commissioners, living as they did in a community in which women rarely took up employment outside their homes, other than to assist the husbands in the fields or farms, could have thought otherwise. The intention of the Commissioners are obscure as are the provisions of the Amending Ordinance.¹³⁴

How the Judiciary viewed it:

The judiciary was generally of the opinion, that the legislature, in amending the law, restored for the future the traditional concept of *thediathettam*, which it had carelessly altered in 1911.¹³⁵ This is made clear when the court

134. Gratien J. in *Ahilandanayaki v Sothinagaratnam*, *op.cit.* at page 390.

135. Gratien J. in *Ahilandanayaki's*, *op. cit.* at page 397; Nagalingam J. *Kathirithamby v Subramaniam* 52 N.L.R 62 at 67; *Kandavanam v Nagammah* (1952) 46 C.L.W. at pg 112; *Sellappah v Sinnadurai and others*, (1951) 53 N.L.R.117 at 128.

declared that the amendment was to restore the law as expounded in *Nalliah v Ponnamah* and *Seelachchy v Visuvanathan Chetty*; which was undoubtedly a reversion to the old law as to what constitutes *thediathettam*.¹³⁶ If the new section 19 of the amending Ordinance was enacted, as observed by the judiciary, to restore the old concept of *thediathettam*, it would be inconsistent to also hold that the amendments abolished community of property in *thediathettam*. In the wake of the above judicial expressions it is felt both justifiable and desirable to proceed on the basis that the court had full judicial knowledge of the system of community in *thediathettam*; that it is a fundamental and an entrenched customary law principle of Thesawalamai.

Justice Gratien's views in *Ahilandanayaki's* case are both significant and interesting. His Lordship referred to the provisions of the amending Ordinance as having been drafted in a language which created problems and difficulties of interpretations and led to, "irreconcilable but plausible conflicting", submissions by counsels on the amended section 6 of the principal Ordinance.¹³⁷ As regards the new section 20 he said that it did not make any express mention as to the incidence relating to *thediathettam* during marriage. The new section reads as follows :-

20. "On the death of either spouse one half of the *thediatheddam* which belonged to the deceased spouse, and which has not been disposed of by

136. Nagalingam J. in *Kathirithamby's* case (op. cit at p. 67) notes that the new section 19 was enacted to restore the old conception of *thediathettam* and adds that "it undoubtedly does".

137. At p. 390

last will or otherwise, shall devolve on the surviving spouse and the other half shall devolve on the heirs of the deceased spouse”.

To counsel Chelvanayagam’s suggestion in the said case, that the intention of the legislature was to prospectively sweep away the old ideas of community of property under Thesawalamai, His Lordship responded cautiously, but negatively, by declaring that if that had been the intention, “such a revolutionary change could quite easily have been introduced in clear language – as indeed was done when section 7 of the Matrimonial Rights and Inheritance Ordinance [Cap . 47] was enacted in regard to certain other inhabitants of the island”.¹³⁸ He thus called the amendments “defects in draftsmanship” and foresaw that unless these defects were remedied the difficulty of ascertaining the legal incidence and the subsequent devolution of *thediathettam* property under the amending Ordinance “would involve many persons subject to the Thesawalamai in unprofitable litigation”.¹³⁹ As will be discussed subsequently his foresight proved true, as these defects remain.

Gratien J. who was both critical and cautious in his observations about the amendment in *Ahilandanayaki*’s case, however, seems not to have been perturbed about the defects in draftsmanship when he made his pronouncements only two years later in *Kumaraswamy v Subramaniam*.¹⁴⁰

138. *Ibid.* *Ahilandanayaki v Sothinagaratnam*, p. 390 ; See also *Naganathar v Velautham*, (1953) 55 N.L.R. 319 at 320

139. *Ahilandanayaki v Sothinagaratnam op.cit.* at p.390.

140. (1954) 56 N.L.R.44 at page 47

In this case he very categorically expressed his views about the effects of the new section 20. He declared that;

- “[a] if either spouse acquires *thediathettam* property on or after 4th July, 1947, no share in it vests by operation of law in the non-acquiring spouse during the subsistence of the marriage;
- [b] if the acquiring spouse predeceases the non-acquiring spouse without having previously disposed of such property, the new section 20 applies; accordingly, half the property devolves on the survivor and the other on the deceased’s heirs;
- [c] if the non-acquiring spouse, predeceases the acquiring spouse, the *thediathettam* property of the acquiring spouse continues to vest exclusively in the acquiring spouse; the new section 20 has no application because the *thediathettam* of the acquiring spouse never “belonged” to the non-acquiring spouse”.¹⁴¹

The views expressed by Gratien J. are with regard to the effects of section 20 which deals with devolution. Nevertheless, the observations have to be read together with section 19, which defines *thediathettam* as separate property, for, when in [a] above he says that, “if either spouse acquires *thediathettam* on or after 4th July 1947 no share in it vests by operation of law in the non-acquiring spouse during the subsistence of marriage”, he was clearly taking the view

141. *Ibid.*

that the acquisition was that spouse's separate property. The view, that no share vests by operation of law in the other spouse, is a clear departure from the earlier position under the 1911 Ordinance. The earlier position i.e. prior to 1947, as declared by Garvin J. in *Seelachchy v Visuvanathan Chetty*, was that a half share "vested by operation of law equally in his wife".¹⁴² Gratien J.'s assertion about separate property in *thediathettam* is reinforced in paragraph [c] above where he concludes by saying that when the non acquiring spouse predeceases the acquiring spouse the *thediathettam* continues to vest in the acquiring spouse because, "... the *thediathettam* of the acquiring spouse never "belonged" to the non-acquiring spouse".

Though the explanation given by Gratien J. in the above three paragraphs appears quite plausible, it is submitted that it is not without ambiguities. His use of the word, "acquiring spouse" to refer to, "that spouse" mentioned in section 19 (a) could be useful to identify *thediathettam* as separate property. But from the words used in section 20 it is not possible to make the same interpretation, since section 20 refers to, "either spouse," and not, "that spouse". The word "either spouse" cannot be restricted to denote the "acquiring spouse" alone. When taken as referring to the "non acquiring spouse," it would, in section 20, mean that a half share "belonged" to the non acquiring spouse, which on intestacy would devolve in equal shares on the surviving spouse and

142. *Seelachchy v Visuvanathan Chetty op. cit.* at p.122. Though made in a dissenting judgment His Lordship's view has been followed by subsequent courts in *Iya Mattayer v Kanapathipillai, op.cit* and *Annappillai v Eswaralingam, op. cit.*

the heirs. If not so interpreted it is difficult to understand as to how a spouse could become entitled to one half of *thediathettam*. This interpretation would then complicate the theory of separation of property in *thediathettam* as expounded by Gratien J. It would, on the contrary, result in enlarging the property rights of the surviving spouse.¹⁴³ This in turn would mean a return to the community of property concept. Gratien J. however was not in agreement with the theory entertained by some that the surviving non-acquiring spouse's share of *thediathettam* property would be enlarged by the new section 20.¹⁴⁴ Sharvananda C.J. commenting on the proposition of Gratien J. says that it did not represent the law and that Gratien J. had no occasion in that case to examine the amended law with respect to *thediathettam*.¹⁴⁵

Construction of “that spouse”, and “either spouse”

It is submitted that if the draftsman of the Ordinance No. 58 of 1947 had used the words, ‘that spouse’, used in section 19 in section 20 also, so as to read as, “on the death of ‘that spouse’, instead of, ‘on the death of either spouse’, confusions or complications of interpretations would not have arisen. The words would have then referred to the acquiring spouse alone and would have helped to understand the interpretation placed on the section by Gratien J. in *Kumaraswamy v Subramaniam*, where he distinguishes the spouses as the acquiring and the non-acquiring spouse.

143. For further discussion on this point see *infra* pp. 386-388

144. *Kumaraswamy v Subramaniam*, *op. cit.* p. 48

145. *Manikkavasagar v Kandasamy*, *op. cit.* at p. 26.

Commenting on the distinction in language used in the two sections, Sharvananda C.J. in Manikkavasagar's case, considered the words '*thediathettam* of a spouse' in section 19, and "*thediathettam* **belonging** to a deceased spouse" in section 20, as significant. [emphasis added] He stated that, the word "**belonging**" is supportive of the argument that the basic attribute of *thediathettam* of common ownership inheres in the *thediathettam* as defined by section 19.¹⁴⁶ "Belonging", he said, "denotes entitlement", and explained that in Thesawalamai "*thediathettam* of a spouse", as section 19 states, "meant *thediathettam* acquired by the spouse to which by operation of law both spouses become equally entitled half share of it belonging to the acquiring spouse and the other half belonging to the non-acquiring spouse from the moment of acquisition".¹⁴⁷ Therefore, he held that, even though the old section 20 was repealed, the customary law incidence of *thediathettam*, which were referred to in that section, were not abrogated, but, continue to be attached to the *thediattettam* as defined in the new section 19. It appears that by the above explanation, the C.J. attempts to make clear the position, that even under the customary law, when property was acquired by a spouse, it was considered 'the *thediathettam* of that spouse'; the very same language that the new section 19 uses. But the incidence of it was that by the customary law the other spouse became entitled to a half of it on acquisition. That, the C.J. notes, has not been changed by the amendment which speaks of, "*thediathettam* of a spouse"

146. *Ibid*, p.24.

147. *ibid*.

and “*thediathettam* which “belonged” to the deceased spouse”. Thus when the phrase “*thediathettam* of a spouse” involves both the acquiring spouse as well as the other spouse who became entitled on such acquisition, the words “either spouse” has to be taken to mean either the acquiring or non-acquiring spouse. This helps to accept the conclusion arrived at by the C.J. that community subsists in *thediathettam*.

Further when the words, “either spouse” in section 20 are substituted with “that spouse” or, read to mean “that spouse”, the rest of the provisions of section 20 fall in line and makes it easy to understand not only *Manikkavasagar’s* case but also *Arunasalam v Ayadurai*,¹⁴⁸ which was decided prior to *Manikkavasagar’s* case. Both cases have computed the extent of shares in the *thediathettam* belonging to the spouses on the same basis.¹⁴⁹ In *Arunasalam’s* case Sivasubramaniam J. explains the position after the amendment thus: “If the property is purchased in the name of one spouse only, that spouse will hold a half share of the property in trust for the other spouse”.¹⁵⁰ In *Manikkavasagar’s* case Sharvananda C.J. declared, “Even though the property was acquired by one spouse one half of it vested automatically on the other spouse”.¹⁵¹ There is hardly any conceptual difference in the two declarations except that the C.J. is more specific about automatic vesting of the half share. Thus we see,

148. (1967) 70 N.L.R. p. 165.

149. *Manikkavasagar’s* case pg 26.

150. *Arunasalam v Ayadurai*, *op. cit.* at p.167.

151. At p. 24

that in these two judgments, their Lordships were agreed on the continued adherence to the concept of community of property in *thediathettam*.

Explaining the effect of the words on the question of devolution, the C.J. declared, that the amendment provided, “that one half of the *thediathettam* which ‘belonged’ to the deceased spouse shall devolve on the surviving spouse and the other half on the heirs of the deceased spouse”. What can perturb one’s mind is, what did Sivasubramaniam J. mean, when he held that, when property is purchased in the name of one spouse only, that spouse will hold a half share of the property in trust for the other spouse, and then go on to accept that, the amendment repealed the provision that *thediathettam* is property common to both spouses and instead introduced a new concept of *thediathettam* of each spouse. It could be possible that his Lordship was of the view that when a spouse acquires property during the subsistence of the marriage it becomes his *thediathettam* but he/she becomes entitled to only one half and holds the other half in trust for the non-acquiring spouse. The non-acquiring spouse then becomes entitled to a share of the beneficial interest in the property acquired by the other spouse. This then explains section 20 which provides that, “on the death of either spouse one half of the *thediathettam* which **belonged** to the deceased spouse...” will devolve on the surviving spouse and the other on the heirs of the deceased. It also explains the basis of interpretation by Sharvananda C.J. that community in *thediathettam* survives the amendments of 1947. Not agreeing with the *obiter dictum* of Gratien J.¹⁵² the C.J. held on the basis of

152. Kumaraswamy S. Subramaniam, *Community of Property*, p. 25
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construction that in Thesawalamai “a non-acquiring spouse becomes vested with title to half the acquisition from the moment of acquisition and also inherits half of the other half which belonged to the deceased spouse if the latter dies intestate, without having disposed his or her half share”.¹⁵³

The words “belonging” in the new section and “remain” in the old section

The word “belong” denotes what is owned by somebody or somebody’s “entitlement”, as Sharvananda C.J. puts it. Section 20 provides for the devolution of *thediathettam* of “either spouse”. When it is applied to the non-acquiring spouse the questions that need to be answered are, what is the *thediathettam* which “belonged” to him/her, or how it could “belong” when he / she did not acquire it. Surely it has to refer to the share to which he / she became entitled on the acquisition by the other spouse. Does it not then provide for one of the important incidence of *thediathettam* that the non-acquiring spouse becomes entitled to half of the *thediathettam* acquired by the other spouse? By the same analogy does it not follow that the property acquired by the other is common to both the spouses? So then it becomes clear that this word “belonged” by itself brings out the incidence of *thediathettam*, of it being common to the two spouses and both being equally entitled to it. It is submitted therefore that to understand the concept of *thediathettam* as defined in the new section 19

153. *Ibid* p. 26

one has to read it in relation to section 20 and not view the latter section as one dealing only with devolution as was done by several judges and jurists.

Another interpretation is also possible. The word “**belong**” [emphasis added] in the new section 20 can be compared and contrasted with the word “**remain**” [emphasis added] used in the old section 20. While in the new section it is stated that one-half of the *thediathettam* that ‘belonged’ to the deceased spouse ‘devolves’ on the surviving spouse, in the old section it was as, ‘one-half of the joint property shall ‘**remain**’ [emphasis added] the property of the survivor”. It has to be noted that only what ‘belonged’ can ‘remain’. Thus it is clear that under the old law in the event of the death of one spouse the half which belonged to her / him vested in her / his heirs while the other half simply ‘remained’ with the surviving spouse. There was no legal need for it to vest or devolve on the surviving spouse in the capacity of an heir of the surviving spouse. This is made clear in *Chelliah v Kadiravelu* where it was noted that, “A husband is ordinarily not an heir to the estate of his wife; the half of the *thediathettam* which vests in him on the death of his wife does not devolve on him as an heir of his wife. It is a separation of his half of the property acquired during marriage which is regarded as common. The position is similar to the separation of the half share of the survivor of persons married in community of property under the Roman Dutch Law.”¹⁵⁴ If the marriage was dissolved or there was a separation *mensa et thoro* the two

154. (1931) 33 N.L.R.172 at 176

spouses took one half each of the joint property which belonged to them for their separate use.¹⁵⁵

As to whether the position in the new section 20 is different depends on the construction of the words, "...one half of the *thediathettam* which belonged to the deceased spouse...". It is submitted that these words can be so construed as to lead to two different propositions. In the first instance, the words when read as "one half of the *thediathettam*—which belonged to the deceased spouse... would indicate that only one half belonged to the deceased spouse. This then indicates the continuation of the concept of common ownership. It appears that Sivasubramaniam J. and Sharvananda C.J. seem to have based their decisions on the first proposition.¹⁵⁶ Secondly, it can be read as, "one half——of the *thediathettam* which belonged to the deceased spouse", which would on the other hand mean that the entire *thediathettam* belonged to that spouse and reference is made to one half of it. This in brief, amounts to whether the clause "belonged to the deceased spouse" is descriptive of "one half" or of "the *thediathettam*". Gratien J. adhered to the latter proposition when he expressed his opinion in *Kumaraswamy's* case. In so opining he disregarded in *toto* the customary law concept of community in *thediathettam* and in the process even ignored his own words of caution in *Ahilandanayaki's* case.¹⁵⁷ Presumably his Lordship was heavily influenced

155. Repealed section 20 of the JMARIO

156.. In *Arunasalam v Ayadurai*, *op. cit.* and *Manikkavasagar v Kandasamy*, *op. cit.*

157. At p. 390.

by the sweeping changes brought about in England by the English Married Women's Property Acts of 1882 and 1893 and our own Married Women's Property Ordinance of 1923 which was modelled on the English statutes. Both Sivasubramaniam J. and Sharvananda C.J. were acting on the first proposition, when they entitled the surviving spouse to a three quarter share of the *thediathettam* on the death of the other spouse. These two judges, who being Tamils, were more conversant with the customary law and the sentiments of the people of their community, proceeded on well recognized grounds that a half share had "remained" with the surviving spouse and a further half of the deceased's spouse's half share devolved on him/her. It is submitted that in interpreting the words, "one half of the *thediathettam* that belonged to the deceased spouse" in the new section 20, the construction placed on those words by Sivasubramaniam J. and Sharvananda C.J. cannot be ruled out in the absence of a clear expression of the legislature to do away with community of property in *thediathettam*.

The amendment and incidence attaching to *thediathettam*

Lord Diplock, who very categorically opined that, unlike the old, the new section 20 does not deal with the legal incidence other than its devolution upon death of a spouse intestate, nevertheless stated that, "Important amendments to earlier sections 6 and 7, of the Principal Ordinance, however, altered the legal incidence attaching during the lifetime to property which fell within the definition

of *thediathettam*...”.¹⁵⁸ He did not elaborate on it as he thought that it was unnecessary for the purpose of the case before him to consider the alterations in detail.

Chief Justice Sharvananda’s pronouncement is also based on the same premise that, unlike the former section 20, the new section does not deal with any legal incidence of *thediathettam*.¹⁵⁹ But while Lord Diplock was of the view that sections 6 and 7 altered the legal incidence the C.J. preferred to fall back on the customary law on the basis that the common law of Thesawalamai dealing with the incidence of *thediathettam* was not abrogated by the repeal of the provisions in 1947, as the 1911 Ordinance was only declaratory of the customary law. He applied the rule that “the repeal of a statute that was declaratory of the common law does not abolish the common law”¹⁶⁰, and proceeded to hold that, “Since the new section 20 has not referred to or dealt with the incidence of *thediathettam*, the provision of Thesawalamai which postulated that *thediathettam* of each spouse shall be property common to the two spouses, both being equally entitled thereto therefore continues to be operative in spite of the repeal of the old section, as it is not inconsistent with the provisions of the amended Matrimonial Rights and Inheritance Ordinance of Jaffna”¹⁶¹.

158. *Subramaniam v Kadirgaman*, (Privy Council) (1969) 72 NLR, p. 291-292

159. *Manikkavasagar v Kandasamy*, *op. cit.* at p. 23

160. *Crawford – Statutory Construction*, p. 655, as cited in *Manikkavasagar v Kandasamy*, *op. cit.* at p. 23.

161. *Ibid.*

In the context of the C.J.'s assertion that the incidences of *thediathettam* have not been incorporated in the amended sections of the Ordinance the need arises to look into the relevant sections to ascertain the position. Sections 6 and 7 of the amended Ordinance deal with the separate properties of the spouses. The amendment substituted the word "any", with "all" in both the sections in reference to what properties go to constitute the separate properties of the spouses. Thus what read as, "Any movable or immovable property to which any woman... was entitled" was amended to read as, "All movable or immovable property to which any woman ... was entitled ...". Tambiah notes that the change indicates the intention of the legislature to include even *thediathettam* within the definition of separate property.¹⁶² Note should be made of other changes to sections 6 and 7 of the Ordinance as well. The exclusion clause, "except by way of *thediathettam* as hereinafter defined, may become entitled during her marriage" was deleted and the words, "which she may during the subsistence of the marriage acquire or become entitled to by way of gift or inheritance or by conversion of any property to which he may have been so entitled or which she may so acquire or become entitled to" were substituted in section 6. Corresponding changes were made to section 7 in relation to the separate property of the husband.

It is submitted that sections 6 and 7 underwent alterations in keeping with changes to sections 19 and 20. The deletion of the exclusion clause¹⁶³ in sections 6 and 7 in

162. *Laws and Customs of the Tamils of Ceylon. op. cit.* pp. 164 – 165.

163. "....except by way of *thediathettam*"...

1947 resulted in the inclusion of *thediathettam* within the category of the separate property of the spouses. When that was done it followed that the incidence specified in these sections as regards separate properties attach to *thediathettam* too. Sections 6 and 7 now provide that “all” properties to which any woman or husband may be entitled at the time of marriage or which she / he may acquire during the subsistence of the marriage “belong” to the woman / man for her/his separate estate.¹⁶⁴ The phrase “all properties” has therefore to include properties acquired during the subsistence of marriage, in which case the incidence mentioned in the section would likewise attach to such acquired properties too. It is possible that it was in this sense that Lord Diplock opined that the, “amendments to earlier sections 6 and 7 altered the legal incidence attaching during a spouse’s lifetime to property which fell within the new definition of *tediatettam*,...”.¹⁶⁵ The proposition arrived from the above premises enables one to conclude that sections 6 and 7 do spell out the incidence that apply to *thediathettam* during the subsistence of the marriage of the spouses. Nevertheless, it cannot be denied that even if the above proposition holds good *thediathettam* cannot be squarely positioned into, or strictly identified with, the separate properties of the spouses as expounded in these sections. This is because the manner in which the separate properties, that is, properties acquired before marriage, or to which a person becomes entitled by way of inheritance or gift, come into being as a person’s separate property is different from

164. The emphasis in italics is by writer.

165. *Subramaniam v Kadirgaman*, *op.cit.* at p. 292.

how properties acquired during marriage become. This is primarily because of the recognition of the fundamental principle embodied in Thesawalamai that the economic efforts of the spouses during marriage are equal. It thus becomes clear why Nagalingam J. regarded *thediathettam* under the new sections as a “species” of property though forming part of the separate estate of the spouses.¹⁶⁶ The fact that *thediathettam*, though brought under separate properties of the spouses, is a species different from others is further evidenced by the fact that different rules of inheritance apply to it.¹⁶⁷ The rules of inheritance entitling the other spouse to a share definitely brings out the common character of the property, as is explained in the above paragraphs dealing with the interpretation of the word “belong” in section 20.

Another relevant question is, have the amendments to these two sections altered the incidence that *thediathettam* is common to the two spouses and that they are equally entitled to it from the moment of acquisition. Sivasubramaniam J. in *Arunasalam v Ayadurai* declared on the facts of the case that, just because the security for the loan raised to purchase the property was a mortgage of the separate property it would not render the loan so raised the separate property of that spouse. He proceeded and declared, “Nor will the property purchased become the separate property of that spouse”.¹⁶⁸ The decision was on the basis that the loan which was obtained on a mortgage

166. *Kathirithamby v Subramaniam*, *op. cit.*, at p.68.

167. JMARIO, Sections 20, 21 and 22.

168. At p. 167

of a separate property, would not, by virtue of the character of the property mortgaged, become the separate property of the spouse so mortgaging. It was thereby made clear that the consideration by way of the raised loan is itself a sort of a gain in the nature of a new acquisition, as repayment of it involves the efforts of both the spouses. His Lordship thereafter went to declare that the property though purchased in the name of one spouse only, that spouse will hold a half share of the property in trust for the other spouse.¹⁶⁹ After making these pronouncements he declared that the amendment introduced a new concept of *thediathettam* of each spouse. By doing so Sivasubramaniam J. recognized that the amendment resulted in making *thediathettam* the separate property of the acquiring spouse, who however holds a half of it in trust for the other, and on death intestate of that spouse it devolves on the other spouse and the heirs of the deceased spouse in equal shares; this then makes a three-quarter share of the *thediathettam* to devolve on the surviving spouse.

Fundamental alteration without express legislation

Construction of words in the statutory provisions to help derive a conclusion as to whether community of property has been abolished in Thesawalamai boils down to the formidable task of ascertaining the intention of the legislature. The words of Dalton S.P.J. , said in a different context, in a way become relevant here. His Lordship declared:

169. *Ibid.*

“Ordinances which take away rights as regards persons or property must be strictly construed. It is presumed that the legislature does not desire to encroach upon the rights of persons, and if such is its intention, it will be manifestly plain, and beyond reasonable doubt”.¹⁷⁰ A similar view was expressed by Gratien J. in *Ahilandanayaki’s* case when he commented, “If, as Mr. Chelvanayagam suggests, the intention of the legislature was, *even prospectively*, to sweep away in entirety the old ideas of community of property subsisting among persons married since 17th July 1911, under the Thesawalamai, such a revolutionary change could quite easily have been introduced in clearer language ...”¹⁷¹. It is submitted that these words of Dalton S.P.J. and Gratien J. with regard to the 1911 Ordinance are not different in meaning from what Sharvananda C.J. said in *Manikkavasagar’s* case about the Amendments of 1947 and the entitlement of the spouses to *thediathettam*. He declared: “The concept that *thediathettam* of a spouse is property common to both spouses is far too firmly entrenched in the jurisprudence of the Thesawalamai to be jettisoned except by an unequivocal express legislation and not by a side wind”,¹⁷² and using Maxwell’s words that, “...it is in the last degree improbable that the legislature would throw fundamental principles, infringe rights or depart from the general system of law, without expressing its intention with

170. In *Sangarapillai v Devaraja Mudaliyar op. cit.* at p. 10 while deciding the question as to whether the Ordinance of 1911 took away the husband’s rights over *thediathettam*.

171. *Ahilandanayaki v Sothinagaratnam*, at p. 390; Note: He however changed his views subsequently in *Kumaraswamy v Subramaniam. op. cit.* at p.47.

172. *Manikkavasagar v Kandasamy, op. cit.* at p. 25

irresistible clearness".¹⁷³ Sharvananda C.J. therefore concluded that, as regards *thediathettam* the presumption is against radical alteration.¹⁷⁴

The Matrimonial Rights and Inheritance Ordinance and the Married Women's Property Ordinance in relation to the amendment to the Jaffna Matrimonial Rights and Inheritance Ordinance.

In seeking to interpret sections 19 and 20 it would be appropriate to ask as to why the legislature used two different yardsticks in its treatment of its women citizens. The legislature, when it enacted the Jaffna Matrimonial Rights and Inheritance Ordinance in 1911 or subsequently amended it in 1947, failed to enact into it, intentionally or otherwise, a provision similar to section 7 of the Matrimonial Rights and Inheritance Ordinance of 1876, which abolished community of goods between spouses governed by the general law.¹⁷⁵ Section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance was enacted to resemble closely, in words and content, section 8 of the Matrimonial Rights and Inheritance Ordinance. The intention then was to give women governed by Thesawalamai restrictive property rights in their separate properties as were enjoyed by their counterparts in other parts of the country. But the legislature did not incorporate

173. Sharvananda C.J. *Manikkarasagar v Kandasamy* op. cit. , at p. 25, quoting from Maxwell's *Interpretation of statutes*, 12th edition p. 78-79.

174. *Manikkavasagar v Kandasamy*, op. cit. at p.25.

175. "There shall be no community of goods between husband and wife, married after the proclamation of this Ordinance, as a consequence of marriage, either in respect of movable or immovable property"

section 7 of the Matrimonial Rights and Inheritance Ordinance or introduce something similar into the Jaffna Matrimonial Rights and Inheritance Ordinance. On the contrary it enacted sections 19 and 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance and specifically excluded *thediathettam* from sections 6 and 7. By doing so it retained the concept of community of property in *thediathettam*. Thus it is clear that the legislature in 1911 did not intend to abolish community of property in *thediathettam* as it did in the general law. The Legislature in 1923 sought to enlarge the property rights of women governed by the general law and enacted the Married Women's Property Ordinance. This ordinance removed sections 4 to 19 of the Matrimonial Rights and Inheritance Ordinance and made the woman governed by the general law a *feme sole*.¹⁷⁶ Women governed by Thesawalamai along with their Kandyan and Muslim counterparts are however excluded from its applicability.¹⁷⁷ As far as the property rights of the others are concerned the exclusion had no effect since under the Kandyan and Muslim Laws, women were already recognized as *feme sole*. It is the woman governed by Thesawalamai who has been thus discriminated against. The legislature could have, if it had amended section 6 of the Jaffna Matrimonial Rights Inheritance Ordinance too when the Married Women's Property Ordinance was enacted, placed the Jaffna woman on par with others. It failed to make use of that opportunity.

176. Section 5

177. Section 3 (2)

An evaluation

As far reaching consequences regarding rights to inheritance can result from the varied prognosis that is possible on Gratien J.'s *obiter dicta* in Kumaraswamy's case, a critical study of it is necessary. His interpretation of section 20 can result in inequitable distribution of property which would be unfair by the heirs of the non-acquiring spouse, where the spouses are childless. By his theory, where the acquiring spouse predeceases the non-acquiring spouse the latter as well as the heirs of the acquiring spouse become equally entitled to a half share of the *thediathettam* and subsequently on the death of the non-acquiring spouse his or her heirs become entitled to that half as it would have become that spouse's separate property. It is different when the non-acquiring spouse predeceases the acquiring spouse for in such a situation the heirs of the non-acquiring spouse do not get anything as the "*thediathettam* of the acquiring spouse never "belonged" to the non-acquiring spouse".¹⁷⁸ It is submitted that where the non acquiring spouse survives and becomes entitled to a half share it is justifiable and equitable since it recognises the concept that it is matrimonial property and is the result of the economic collaboration of both the husband and wife. When however the non-acquiring spouse predeceases the acquiring spouse, though that spouse is not alive to enjoy the fruits of the combined exertion, depriving the heirs of any share appears to ignore the rationale of the concept that matrimonial property is the joint product of the spouses. It is certainly not equitable that

178. Gratien J. *Kumaraswamy v Subramaniam*, *op. cit.*, at p. 47

a childless acquiring spouse's heirs enjoy the full fruits of the economic collaboration while depriving that of the non-acquiring spouse's of same.

The Privy Council's decision in *Subramaniam v Kadirgaman*¹⁷⁹ is also worthy of analysis. Lord Diplock declared that for the purpose of the case it was unnecessary to consider the alterations brought about by the Amending Ordinance in detail. He nevertheless opined, that though the land in suit was correctly described as *thediathettam* during the period from 1911 to 4th July 1947 it would not fall into the category of *thediathettam* after the Amendment of 1947 as the consideration that went into the purchase formed part of the separate estate of the husband.¹⁸⁰ Thereafter he noted, "Neither in their Lordship's view did the wife's half share in it fall within the new definition because her half share was not acquired by her for valuable consideration nor was it profits arising during the subsistence of marriage".¹⁸¹ The above statement of Lord Diplock seems to convey the meaning that for a property to become a wife's *thediathettam* she should acquire it during marriage for valuable consideration or it should be profits from her separate properties. In short he was conveying the message that after 1947 the *thediathettam* a spouse acquires is his/her *thediathettam* and that there is no more room for the concept of the other spouse acquiring a half share during the subsistence of the marriage. The decision, like Gratien J.'s *obiter* in *Kumaraswamy's* case totally ignores the principle that when property is acquired by either spouse

179. (1969)72 N.L.R. 289.

180. *Ibid.* at p. 292

181. *Ibid.*

during marriage it is due to the economic collaboration of both the spouses.

Views of jurists and legal writers

The views of jurists and legal writers have also to be considered for a clear assessment of the position as to whether *thediathettam* remains common or has become the separate property of the spouses. Tambiah states that, "The effect of the repeal of Section 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap.48) is to place the proprietary rights of spouses over *thediathettam* in the same position as they were before 1911 when this Ordinance came into operation".¹⁸² But in his subsequent publication,¹⁸³ he gives an entirely different point of view. He interprets words from the amended version of sections 6 and 7 as showing an intention of the legislature to include *thediathettam* within the definition of separate property of the spouses.¹⁸⁴ In the same chapter he states that the repeal and substitution of section 20 is indicative of the intention of the legislature to not regard *thediathettam* as joint property. Tambiah poses the question, that if *thediathettam* too becomes separate property by its inclusion into section 6 of the Ordinance, why define *thediathettam* anew and answers

182. Page 59, Appendix VI of his book, *The Laws and Customs of the Tamils of Jaffna*, (Earlier Edition) under the caption, "The scope of Ordinance No. 58 of 1947."

183. In the chapter, "The changing concept of *thediathettam*" attached as Appendix I to his subsequent publication "*The Laws and Customs and the Tamils of Ceylon*" p. 158

184. The substitution of the word "any" into the phrase, "all property" and exclusion of the phrase "except by way of *thediathettam*" found in the 1911 Ordinance. pp 164 - 165

it himself.¹⁸⁵ He gives two reasons. Firstly, that unlike other kinds of separate properties *thediathettam* is liable for any debts contracted by the spouses during marriage and secondly, that it was to make one spouse an heir to the *thediathettam* of the other spouse.¹⁸⁶ The reasons given by Tambiah as to why *thediathettam* needed to be re-defined do not help to strengthen his view that *thediathettam* has now to be considered as the separate property of the spouses. Instead they only accenuate the joint efforts of the spouses and thereby consolidate the community characteristics in *thediathettam*. The principle in Thesawalamai that *thediathettam* is liable for the debts incurred by either spouse during marriage is because the debts had been incurred during marriage to satisfy the common needs of the family and therefore have to met by them from the property common to both. The other reason, that is, to make one spouse an heir to the *theidathettam* of the other spouse also weakens his stand and helps only to assert that *thediathettam* is partnership property that has to be shared by the spouses. Tambiah also admits¹⁸⁷ that “*thediathettam* was defined anew largely to undo the resulting position of Avitchy Chettiar’s case...”. This aspect has been discussed earlier¹⁸⁸ and it was shown that to correct the anomaly reflected in Avitchy Chettar’s case there was no need to re-define *thediathettam*.¹⁸⁹ Tambiah further says that section 20 “is an ill-drafted provision, which is so

185. *Ibid*, p. 165.

186. *Ibid*.

187. *Ibid*. at page 166

188. *Supra*. p. 206-208; 235-236

189. *Ibid*.

ambiguous and difficult to interpret that one would be justified in looking at the objects and reasons of the legislature for enacting the Ordinance, for here it is stated that there should be no community of property between spouses...".¹⁹⁰ Gratien J.¹⁹¹ and Sharvananda C.J.¹⁹², two eminent judges, have indicated their unwillingness to view the amendment as Tambiah suggests.¹⁹³

Several of Tambiah's criticisms about Sharvananda C.J.'s comments in his judgment are incomprehensible.¹⁹⁴ He gives reasons for not agreeing with the C.J.'s decision, some of which, it is submitted do not seem tenable. To take an example, he contradicts the C.J.'s assertion that "the provisions of the customary law as are not inconsistent with the provisions of the Ordinance survive to supplement the law".¹⁹⁵ Tambiah says that the law of *thediathettam* had ceased to be governed by custom when it was codified and subsequently enacted as a statute.¹⁹⁶ This reasoning, it is submitted, is not only untenable but also undermines the effects of section 40, which continues to make customs consistent with the provisions of the Ordinance relevant.¹⁹⁷ He concludes by saying that, "there is not a single decision of our courts which has enunciated that the *thediathettam*

190. *Laws and Customs of the Tamils of Ceylon*, *op. cit.*, p. 170

191. *Ahilandanayaki v Sothinagaratnam*, *op. cit.* at p.390.

192. *Manikavasagar v Kandasamy*, *op.cit.* at p.25.

193. *Supra*, para Fundamental alteration without express legislation, pp. 257-259

194. *Laws and Customs of the Tamils of Jaffna*, Revised edn. at p. 173.

195. *Ibid* at p. 174

196. *Laws and Customs of the Tamils of Jaffna*, Revised ed. p.174

197. Jaffna Matrimonial Rights and Inheritance Ordinance, which provides that, "So much of the provisions of the collection of customary law known as Thesawalamai... as are inconsistent with the provisions of the Ordinance are hereby repealed".

concept is still governed by customary law”. It needs to be noted that his conclusion has ignored the decision of *Arunasalam v Ayadurai*.¹⁹⁸ In this case though the Judge had declared that the amendment introduced a new concept of *thediathettam* of a spouse he had based his decision on the customary concept that the property purchased out of a loan raised jointly by both the spouses was *thediathettam* to which both spouses were equally entitled.¹⁹⁹ Besides, one cannot ignore the thoughts and beliefs of the people. The layman governed by the law still believes that *thediathettam* is common property. If there has not been a single decision by courts about the continued relevancy of customs in Thesawalamai, the reason could be that no issue came before court for a contest between customs and statute, as the statute itself is clear about it in section 40, or such cases have not been reported. Finally Tambiah states that the C.J.’s views in *Manikkavasagar*’s case must be regarded as *obiter* “for the reason that he has held in the case that there was no proof that either Thesawalamai applied to the deceased party or that ...”²⁰⁰. It is submitted that it is an error. On the contrary the C.J. had declared that all parties in the case were persons governed by Thesawalamai.²⁰¹

It is also important to analyse Savitri Goonesekere’s views on the issue. She comments that the confusion created consequent to changes made to the concept of *thediathettam*

198. (1967) 70 N.L.R. p.165

199. *Ibid* at p. 167.

200. *Laws and Customs of the Tamils of Jaffna (revised edition)* p. 176.

201. *Manikkavasagar v Kandasamy op. cit.*, at p. 10.

by the amendment as manifested in several decisions of the court has not been resolved by the judgment in *Manikkavasagar v Kandasamy*.²⁰² She therefore concludes that *thediathettam* is now the separate property of the spouses and that it refers “exclusively to a concept of community which involves merely a deferred right to inherit half the acquiring spouse’s share at death in the event of intestacy”.²⁰³ This view is reiterated in another of Savitri Goonesekere’s work, where she states that, “A limited principle of a deferred community of gains has been introduced, in that the survivor has the right to inherit half the *thediathettam* or acquired property which has not been disposed of by will or otherwise”.²⁰⁴ In similar vein she states that the concept of *thediathettam* in Thesawalamai, which was a pooling of all property of the spouses’ acquired during marriage, was modified by a process of statutory definition and is “referred to-day in legislation as the ‘separate property’ of each spouse”.²⁰⁵ Justice Gratien’s analysis of *thediathettam* as separate property in *Kumaraswamy v Subramaniam* seems to have had a better reception by the author.²⁰⁶ Contrary to Sharvananda C.J.’s decision that despite the amendment the original law of pooling of gains at the moment of acquisition continues to apply, Savitri Goonesekere suggests that by the new statutory definition, the traditional Thesawalamai concept of pooling of gains by

202. Family Law, Block II p. 63. (The Open University of Sri Lanka)

203. *Ibid.*

204. ‘*The Legal Status of the Female in the Sri Lankan Law of Family Relations*’, *op. cit.* p. 33

205. G. C. Mendis Memorial Lecture; “*Asian Values, Equity, and Sri Lankan Family Policy*”, p. 13-14.

206. (1954) 56 N.L.R. at p. 47

operation of law, has given way to the new concept of “deferred community of gains after dissolution of marriage”.²⁰⁷ Thus we see two very strong points of view as to whether *thediathettam* remains common to the spouses or has to be considered as the acquiring spouse’s separate property. The former has received judicial sanction and, until otherwise decided by a larger bench, represents the law.

Conclusion

Holding property in common is characteristic of the joint family system of ancient civilizations of both the east and the west, and persists in many contemporary societies of South East Asia, as for example India, Burma, Thailand, Cambodia, and Vietnam.²⁰⁸ The structure however differs in keeping with economic, social, ethnic and cultural differences. Unlike as in Thesawalamai, in some of these systems, as for instance in Burma, (now Myanmar) while there is more sharing in jointly acquired properties (*Hnapazon*) there is also sharing in other properties brought into marriage (*Payin*) and in properties which accrues to the family by gifts or by succession (*Lettetpwa*).²⁰⁹

Many modern legal systems of the west too have come to accept that matrimonial property is the product of the economic collaboration of both the husband and wife.²¹⁰

207. G.C.Mendis Memorial Lecture; “Asian Values, Equity, and Sri Lankan Family Policy”, pp. 13-14.

208. *Ibid* at p.12.

209. *Law and Customs in Burma and the Burmese Family* by Maung Maung. pp. 90-91.

210. Kevin Gray, *op. cit.* Chapter IV for a detailed discussion; Shirani Ponnambalam, *op. cit.* pp. 139 – 140.

These systems, in striving to provide the spouses with equal access to matrimonial properties have adopted new approaches. One is by resurrecting community of property system in the form of deferred community of gains as was done in East and West Germany.²¹¹ The other is by vesting discretion in the judiciary as in England, Australia and New Zealand, so that property rights of spouses would be taken into consideration notwithstanding that the legal or equitable interests of the spouses are defined.²¹² This method has in fact resulted in a re-appraisal of the legal approach to spouses' property related problems.

The repealed section 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance embodied the rule of equal apportionment of properties acquired by the exertions of the spouses during marriage. This undoubtedly is an equitable approach to re-distribution of matrimonial property. Laws relating to matrimonial property rights in most jurisdictions of the west are being reappraised in the years since 1945 to provide spouses with equal access to economic assets.²¹³ In that process the orthodox concept of 'community of property' has been developed to include novel forms such as 'community or pooling of gains' acquired during marriage.²¹⁴ The community of interest in the property can arise at the point of acquisition or it can be a deferred community of gains; when the rights surface only on dissolution of marriage.²¹⁵ Kevin Gray, in this respect, makes

211. Shirani Ponnambalam, *op. cit.* pp. 139 – 140

212. *Ibid.*

213. Kevin Gray, *op. cit.* pg 22

214. Savitri Goonesekere, 'Asian Values, Equity and a Sri Lankan Family Policy', p.12

215. *Ibid.*

note the emergence of a “new equity” in some areas of matrimonial property.²¹⁶ But the customary laws of the Jaffna Tamils were enriched with such concepts centuries ago. As discussed in the foregoing pages there was no agitation for a change of policy as regards community in *thediathettam*.²¹⁷ Furthermore it is difficult to imagine how the Commissioners, who proudly proclaimed that the reforms recommended by them would enlarge the property rights of women,²¹⁸ could have supposed that doing away with community of property in *thediathettam* or retaining the marital powers of the husband in section 6, could bring about the desired result.

Therefore, the repeal and substitution of the provisions governing the concept of *thediathettam* was neither called for nor did it bring about the desired results. Community in *thediathettam* has not been legally abolished; nor has it erased the equal entitlement concept from the minds of the people governed by it.²¹⁹ It has only confused the thinking of people who make the law and those who administer it. This climate of uncertainty is not conducive to the development of law, and especially of one which is based on the customs of the people it seeks to govern.²²⁰ Reform

216. Kevin Gray, *op. cit.* pg 23.

217. *Supra*, pp. 235-236

218. Sessional Paper III – 1930, Report of the Thesawalamai Commission, 1930, at p. 03; Sharya de Soysa expresses her view thus: “Yet whilst the Thesawalamai embodies the concept of partnership or sharing of assets acquired during the marriage, it is severely flawed when one considers the administration of such property”. Sri Lanka Journal of Social Sciences, 1998-21 (1&2): 83-104, p. 83

219. *Supra*, pp. 234-240. Ref. evidence recorded before the Thesawalamai Commission Jaffna, July 1917, Thesawalamai Commission Report, X - 1920

220. Section 40 of the JMRIO makes customs that are not inconsistent with the provisions of the statute applicable even to day.

is urgently needed and in doing so care should be taken not to repeat the mistakes of other legal systems, or burden the judiciary with the task of having to search for concepts to enable an equitable distribution of property. In the context of Thesawalamai, it is submitted that what is needed is to simply revert to the concept of community as embodied in the repealed sections 19 and 20.

The *obiter dicta* of Gratien J. in *Kumaraswamy's* case²²¹ poses a threat to the concept of community of property in *thediathettam*. It would prove disastrous to the Jaffna woman if some future court takes serious note of Gratien J.'s *obiter* and decides to interpret and adjudicate on the relevant sections on the basis that *thediathettam* is the property of the acquiring spouse alone in which the other spouse has no rights whatsoever during the subsistence of the marriage. As discussed, such an interpretation would cause great injustice to the woman as her positive contributions as partner in the matrimonial partnership, both as home-maker and wage earner would be ignored. This state of affairs calls for urgent reforms. The law makers need to learn from lessons of the past and the difficulties faced by other legal systems in trying to find ways to enforce an equal distribution of family assets. It is urged that the legislators do not wait for a more serious challenge to the traditional concept. "The Victorians", says Sir Lestie Scarman on the subject of '*Law reform and family property*', "believed that by exalting the principle of separate ownership justice could be done to woman... Experience in our developing society has shown that their remedy has

221. At p. 47.

itself become a cause of injustice”.²²² It is the task of the legislators and the judiciary to see that the same does not happen to the Jaffna woman too. It becomes relevant here to quote what Professor Muller-Freienfels had to say. He declared that “all forms of community of property are related to the idea of matrimonial partnership in some way.”²²³ It is submitted that it is the customary law concept of community of property embodied in the repealed section 20 that can accommodate and adjust to modern developments relating to matrimonial partnerships and not the concept of separation of property. The law has to take cognizance of the fact that inter spousal relationships as regards matrimonial property have changed with both spouses increasingly pursuing independent careers and contributing to family consumption. The economic role of the wife which had hitherto been purely domestic has given way to a dual-career role, as wage earner and housewife, and she has to be rewarded for both roles. This was possible when the spouses were made equally entitled to acquired property under Thesawalamai and would continue to be so if the interpretation placed by Sharvanantha C.J. is followed by the judiciary.

It should not be understood that this is an appeal for a return to the universal community of property system that was abolished in 1876 as regards those governed by the General Law or a total repudiation of the separate property regime in that law. It is in brief, a

222. An article published in *The Listener*, 76, (1966) and quoted by Shiranee Ponnambalam, *op. cit.* p 141

223. Quoted by Kevin Grey; *op. cit.* p25.

call on behalf of those governed by Thesawalamai to be assured that they would continue to be governed by the law with which they were comfortable; with some reforms that would remove the restraints imposed on the women as regards their property rights and rights to locus standi in courts.

It is submitted that this is not an impossible call considering what the Legislature did in 1947, following *Avitchy Chettiar's* case, to rectify the mishap to section 19 of the 1911 Ordinance. Dalton S.P.J. said of the 1911 Ordinance thus: "Possibly as has been stated on more than one occasion in cases that have arisen under it, the Ordinance is not altogether a good example of skilful draftsmanship. That may well be due to the fact that it deals with customary law, and is an attempt to improve upon and amend in some respects the collection of customary laws which is itself somewhat vague and indefinite in various aspects".²²⁴ This is true of the Amendment of 1947 as well. In attempting to alter a law, especially one which is custom based, the legislature needs to be cautious and consider the aspirations and sentiments of the people for whom the law is made.

224. *Sangarapillai v Devaraja Mudaliyar*, (1936) 38 N.L.R. p.01 at p.09.

CHAPTER IV

SPOUSES' RIGHTS AND OBLIGATIONS TO MATRIMONIAL PROPERTY

Introduction

The rights and obligations of spouses as regards *muthusam*, *cheedanam* and *thediathettam* are dealt with in this chapter. They were not incorporated in the chapters dealing with the respective properties to avoid repetition, as the rights of the spouses in respect of these properties are rather similar in character. It is in *thediathettam* that some dissimilarities surface, because Thesawalamai recognizes it as a different species of property in which the other spouse becomes entitled to a share. We saw in the chapter on *thediathettam* that the customary law and the Ordinance of 1911, in its unamended form, recognized the spouses' right to a half share at the time of acquisition itself, whilst by the amendment a controversy has arisen between judges and jurists as to whether the right is during marriage and on intestacy or only on intestacy. We also saw that, notwithstanding the controversy relating to the amendment of 1947, *thediathettam* remains the common property of

the spouses as a result of the latest decision of the Supreme Court.¹ It is in this context that the rights of spouses to *thediathettam* property have to be considered. A cumulative analysis of the three types of properties also reveal the discriminatory and prejudiced attitude of the law in determining spouses' rights and the factors responsible for such an approach. This brings us to a discussion of the manner and the extent of Roman Dutch Law infiltration into Thesawalamai.

RIGHTS OVER THE SEPARATE PROPERTIES

A. Rights over *cheedanam*

Rights during the subsistence of the marriage

Ownership, management and control – under the customary law

The Thesawalamai recognizes the property rights and economic independence of the woman to the extent that just as the husband is the owner of his *muthusam* the wife is the owner of her *cheedanam*.² The husband under Thesawalamai was at no time considered the owner of the wife's property. Mr. Wood remarked, "...but the Thesawalamai or country law, clearly recognises a distinct and separate interest; the husband in the property he inherited from his father, and the wife in her dowry and inheritance..."³ Since the husband is not the owner of his

1. *Manikkavasagar v Kandasamy*, [1986] 2. Sri.L.R. p.08.

2. Part I :1; Mutukisna's *Thesawalamai*, p. 257

3. M. p.260

wife's property he cannot alienate, lease or mortgage it.⁴ The District Judge in *Seelachchy v Visuvanathan Chetty* interpreted the words in Part IV:1 of the Code "... but if they live peaceably he may give some part of the wife's dowry away," to mean not that the husband had any such right, but only that it enables a conclusion that "...such consent was given or that the wife had knowledge of the transaction."⁵ It is submitted that the words in the Code, "but if they live peaceably", when read with the interpretation placed on it by the District Judge appears very plausible. Though the wife has control over her property⁶ yet it appears that under customary law the husband was entitled to possess the dowry property and have the "sole management" of it during marriage.⁷ If while being in charge of the wife's property the husband invests the wife's dowry money, and in his name too, he is considered as holding it in trust for her.⁸

Though the wife is recognized as the owner of her property, it is surprising to note that the Code nowhere has provisions which show that she had control over it independently of the husband. This is all the more significant because, the society in Jaffna at its early stages, when the migrants from Malabar settled there, was matriarchal in nature and family property was, generally, what the wife brought into marriage in the form of *cheedanam*.⁹ It was

4. Tambiah, *Laws and Customs of the Tamils of Jaffna*, p. 173

5. (1922) 23 N.L.R. p. 103

6. M. 264 at 265

7. M. 269; See also pp100-101.

8. *Sooranammah v Amirnathapillai*, (1950) 53 N.L.R. p.334 at 335

9. *Supra*, chapter on *Cheedanam* for a fuller discussion.

noted ¹⁰ that, in Thesawalamai the husband was placed in the same position as regards the members of his family, as the *karnavan* of the Marumakkalthayam Law was towards the members of his *taward*.¹¹ In the Marumakkalthayam Law the *karnavan* was entitled to the possession of all the properties of the *taward*, both movable and immovable, and it was he who managed all such properties.¹² The geographical and physical condition of arid Jaffna, where one has to toil hard to eke out a living, would also have paved the way for the exalted position of the husband in Jaffna over the property of the wife. This is not surprising since in ancient Jaffna the wife's *cheedanam* consisted mainly of land and the Jaffna men were largely agriculturists. The wife's properties therefore were under the husband's cultivation and necessarily his management.¹³

The power or right exercised by the husband can be explained on grounds of expediency as well. Unlike as in Malabar, in Jaffna, the *taward* system of the Marumakkalthayam law with the most senior female being the matriarch was never in existence. As noted,¹⁴ the earlier colonists found the *tavazhi illam* more convenient and suitable, and in this new unit set up for the daughter on her

10. Reference chapter on *cheedanam*, pp. 56-64

11. H.W.Tambiah, *Laws and Customs of the Tamils of Ceylon*, p 132-133 ;

12. Sreedhara Variar, K. *Marumakkalthayam and Allied Systems of Law in the Kerala State*. (Published by author) (1969), First edition, p .49; See also *Law and society in Malabar*, by Adrian .C. Mayer who is more specific for he states that the Karnavan had absolute authority over the affairs of the *taward*, save the right to sell the land for which he needed the concurring votes of the *taward* members .

13. Reference chapter on Cheedanam, pp. 104-105

14. *Ibid*

marriage the position and status of the husband as the *karnavan* became exalted. In Malabar itself the transformation had taken place. Marriages which were originally matrilocal, not in the usual sense of sustained residence, but because it was the man who visited the wife, became subsequently, with the formation of *tavazhi illams*, both matrilocal and patrilocal.¹⁵ It is not surprising that in this closely knit family system the husband assumed greater responsibilities and powers. Hindu influence and its corollary patriarchy helped further to give that place of prominence to the husband.

The exalted position of the husband is reflected in the control and powers he exercised over the separate properties of the wife. The Code however, makes no mention of such exercise of powers other than to say in part iv:1 that when the spouses live peaceably, that is to say when they live together, the “wife being subject to the will of her husband, may not give anything away without the consent of her husband.” In all other provisions dealing *with* the exercise of powers over their respective properties both the spouses have been associated.¹⁶ Part IV:1 has been quoted and discussed in a case cited by Mutukishna.¹⁷ In this case the Supreme Court, affirming the decision of the lower court, held that the deed entered into by the wife in relation to her property, but without the consent of the husband, did not bind the husband. The principle that was highlighted was that, since “the wife’s deed was in contravention of the

15. *Ibid*

16. I:1; I:4; I:7; I:8; I:16; IV:2-IV:5; IX:3

17. Case No. 3852, pp. 268-269

marital rights of the husband, it cannot be supported by the Tamil law". Though it spoke about marital rights and the Tamil law, it is important to note that the report of the case requests reference to the appendix to Van Leuven, where it has been laid down that, "the wife being subject to the will of her husband, may not give anything away without consent of her husband". It is stated in the lower court's decision, which was subsequently affirmed in the Supreme Court, that the court was of the opinion that the Roman Dutch Law was the law applicable to the point the court had to determine. This decision and the case report is very significant in relation to an analysis of part IV:1 of the Code. The words of Van Leuven quoted above are identical to the words found in IV:1. It raises the question as to how these words came to be incorporated into the Code. The Dutch Disawe Claas Isaaksz, himself, who codified the Thesawalamai customs, stated: "The above laws and customs of Jaffna were composed by me in consequence of my experience obtained by my long residence and intercourse at the place".¹⁸

It is true that the draft of the customs so codified were presented to twelve 'sensible' Modliars of Jaffna who accepted them as correctly representing the customs. As regards the exalted position of the husband, the Modliars could not have had a difference of opinion, since with the second wave of migrants who adhered to a patriarchal system and were followers of Hinduism, the man had come to acquire a status superior to that of the woman in Jaffna

18. Letter by Claas Isaaksz dated 30th Sunday 1707 and quoted by Tambiah in *The Laws and Customs of the Tamils of Jaffna*, p. 28.

society. As regards the Roman Dutch Law influence, it is possible to presume that Claas Isaaksz coming from Holland was conversant with the law of his country, and by his close association with the people of Jaffna found that the exalted position in which the husband was placed was similar to the position of the husband under Roman Dutch Law. Hence it is not surprising to find the identical words of Van Leuven in Part IV:I of the Code. The possibility that Claas Isaaksz could have so understood the customary law is reinforced by the belief expressed by De Sampayo J. in *Chellappa v Kumarasamy*, where his Lordship, while examining Part IV:I, states “I think that the disability of a married woman is the same under the Tamil customary law as under the General Law prevailing in the island”.¹⁹

It would not be far fetched to state that the influence of Roman Dutch Law had started making inroads into Thesawalamai even before its codification, for, though the Dutch Governors found it convenient and expedient to pursue the policy of administering the customary laws they did so only if they found them clear and reasonable, otherwise they administered according to Dutch law.²⁰ The Code does not give detailed rules with regard to the rights of spouses to the different kinds of properties under Thesawalamai. This state of affairs would have also made

19. *Chellappa v Kumarasamy*, (1915) 18 N.L.R. p.435 at 437.

20. Instructions from the Governor – General, Council of India to the Governor of Ceylon[1656-1665] to which is appended ‘memoirs’ by Anthony P Pavilojen, p117; quoted by Tambiah, *Laws and Customs of the Tamils of Ceylon*, p.25. See also T.Nadaraja, “*The Legal System of Ceylon In Its Historical Setting*” (Netherlands. 1972) p.12

inevitable the application of Roman Dutch Law during the formative years²¹ However, the extent of the reception of the Roman Dutch Law during the Dutch period is a matter of conjecture. It is clear from the various decisions of the courts that it was during the British period of colonial rule that the Roman Dutch Law became entrenched in the legal system of this country. De Sampayo J. found in this provision a general rule of Thesawalamai that because the wife is subject to the will of her husband she cannot alienate her property at all without his consent.²² Gunsekere J. followed the principle adopted by De Sampayo J. when he based his decision on Part 1V:1 of the Code and declared that the provision requiring the consent of the husband is an incidence of the husband's marital power, which is a fundamental concept of the Roman Dutch Law.²³

Under the Ordinance No: I of 1911

Cheedanam under the Ordinance continues to be the separate property of the wife. The Ordinance recognises the wife's right to separate use of her separate property²⁴. She is given powers of management and it is her receipts or those given by her duly authorized agent which would be a good discharge for the rents, issues and profits arising from or in respect of such property.²⁵ If her husband, using his

21. Savitri Goonesekere, *The Legal Status of the Female in Sri Lanka on Family Relations*, p. 32.

22. *Chellappa v Kumarasamy*, (1915) 18, N.L.R. p.435 cited in *Rasammah v Karthigesu*; (1951) 54 N.L.R. p.110 at 112

23. *Vijayaratnam v Rajadurai* (1966) 69 N.L.R. p.145 at 147; For a fuller discussion see *infra* Chapter on *Locus standi* of Women Governed by Thesawalamai.

24. Section 6 ; *Sangarapillai v Devaraja Mudaliyar*, (1936) 38 N.L.R. p.3 at p. 6

25. Section 6, J.M.R.I.O.

powers of administration, issues or accepts receipts it could be taken to mean that he acted as her agent. In a case decided under an identical provision of the Matrimonial Rights and Inheritance Ordinance²⁶ [which was subsequently repealed] it was held that just because the husband had signed the deed of lease to give it validity it did not give him authority to give receipts as it is the wife who is the authorised agent to give receipts.²⁷ The wife's powers of management of her separate property have also given her some standing in a court of law. Weerasooriya J declared that notice to the husband alone to defend and warrant title of the wife's property does not amount to noticing the wife also.²⁸

The right of the wife to deal with or dispose her properties which was made "subject to the will of her husband" under the customary law, was made subject to the written consent of the husband by the statute.²⁹ The section is very specific about it, for it says in very strong language that it has to be with the written consent of the husband "but not otherwise".³⁰ Consent that could be implied, such as prove that the husband was present at the time of the transaction was therefore not sufficient to satisfy the provision. Similarly, subsequent ratification was not accepted as expression of consent as it has to be a condition

26. Section 8, J.M.R. 1.0.

27. *Rosario v Abraham*, (1914) 17 N.L.R. p.357

28. *Durairajah v Mailvaganam*, (1957)59N.L.R. p.540 at p. 543.

29. Section 6, J.M.R.I.O

30. *Ibid*

precedent.³¹ These cases though decided under the general law could be considered as applicable as the words of the sections in the Jaffna Matrimonial Rights and Inheritance Ordinance are identical with those found in the repealed provisions of the Matrimonial Rights and Inheritance Ordinance. The restriction in the customary law, though placed only as regards donations was thus interpreted by courts, on the basis of the marital powers of the husband, as applying to all other dealings as well.³² The principle enunciated by the judiciary was granted statutory recognition when the legislature acting in consonance with the judiciary incorporated it into section 6. The right so extended and provided in Section 6 has often been interpreted by our courts to show that the husband has the power to manage and administer the wife's property by virtue of his marital power.³³ Further the provision that the property of the wife would be liable for the debts of the husband in so far as they were incurred for or in respect of the upkeep, improvement or management of the property has also been interpreted by the judiciary as implying that the husband has significant powers of management and control over the wife's properties.³⁴ It needs to be noted however that the Code while imposing restrictions on the wife did so on the

31. *Marie Cangany v Karuppasamy Cangany* (1906).10 N.L.R. p.78; *Valliammai v Lowe* (1923) 24 N.L.R. p. 481. The principles enunciated in these cases could be applicable though they were decided under the general law.

32. *Chellapa v Kumarasamy. Op. cit ; Rasammah v Karthigesu* , (1951) 54. N.L.R. p. 110 ; Thambiah, *Laws and Customs of the Tamils of Jaffna*, op. cit. p. 120.

33. *Vijayaratnam v Rajadurai*, op.cit. at p.147; *Naganathar v Velauthan*, (1953) 55.N.L.R.p 319; M. 268

34. Savitri Goonesekere, *The Legal Status of the Female in Sri Lanka Law on Family Relations*, p. 34; *Vijayaratnam v Rajadurai* (1966) 69 N.L.R. p.145 at 148 .

husband too, though not to the same extent, in that he was able to dispose of only one tenth of his separate property without the consent of his wife or children. The Ordinance removed even that limited restriction³⁵ while however retaining restrictions on the wife, thereby helping only to accentuate the discriminatory approach of Thesawalamai as regards the spouses' rights to their separate properties.

Marital power and husband's rights over wife's separate property

The concept of marital power under the Roman Dutch Law is associated with the concept of community of property and by way of analogy was made applicable in Thesawalamai to *thediathettam*, which is considered as property common to the spouses. The application of the concept however was not confined in Roman Dutch Law to property held in common. The husband administered not only the joint property but also the wife's property which she had kept out of the community and had authority to even alienate or encumber it as he pleased.³⁶ The same principle was followed by our courts with regard to the matrimonial property of those governed by Thesawalamai, which included the separate property of the spouses. Thambiah J. declared: "The right of the husband to give his consent to the alienation or mortgage of his wife's separate

35. Section 7 J.M.R.I.O.

36. Lee, *An Introduction to Roman Dutch Law* (Fourth edition) Oxford, 1946 p.67; Voet, 23.5.7; Grotius. 1.5.22 See also Macdonel C.J.'s comments about marital powers in *Sangarapillai v Devaraja Mudaliar*, 38 N.L.R. p.1 at p.4.

immovable property is an incidence of his marital power"³⁷ and that though he could not claim to be the owner of his wife's property he was nevertheless vested with marital authority to restrain his wife from alienating her immovable property *inter vivos*.³⁸ As discussed in subsequent pages this appears an unwarranted extension of the concept of marital power which, by itself, finds no justification in its application to the matrimonial property structure under Thesawalamai.³⁹ By the time the Jaffna Matrimonial Rights and Inheritance Ordinance was enacted the practice of applying Roman Dutch Law principles either by way of analogy or to fill a vacuum in the Thesawalamai was already in existence.⁴⁰ Thus the legal position to-day is that, a conveyance by the wife without the consent of her husband would be in derogation of his marital authority and invalid in law.

37. *Vijayaratnam v Rajadurai* (1966) at p.147

38. *Ibid*, at p.148

39. *Infra* paragraph dealing with, The concept of marital power and the husband's position as manager, pp. 343-348 for fuller discussion ; Goonesekere, S. *The Legal Status of the Female in the Sri Lankan Law on Family Relations*, *op.cit.*, at p. 38; Family law, block 2, pg:08.

40. Ref. Memoirs left by A. Pavilioen, Commander of *Jaffnapatnam* to his successor in 1665 wherein he states: "The natives are governed according to the customs if they are clear and reasonable otherwise, according to our laws". T. Nadaraja, *The Legal System of Ceylon In Its Historical Setting*, (E.J.Brill, Leiden, Netherlands, 1972)p. 10, 13; *Puthatampy v Mailvakanam*, (1897) 3 NLR p. 42 ; *Teyvar v Seevagampillai* (1905) 1 Bal. Rep. p.201; *Theagarajah v Paranthothipillai*, (1908) 11 N.L.R. p. 345;

It would not be presumptuous to conclude that the power the husband has in Thesawalamai over the wife's separate property, in that his consent is necessary for any valid transaction, is consequent to the exalted position in which he is placed in the family, originally because to eke out a living male prowess and hard labour was required to till the arid soil, the *cheedanam* property of the wife. This superior position was fortified by principles of the Hindu based patriarchal system of the subsequent colonists and further developed by the colonial Dutch administrators and the judiciary who found it easy and logical to identify such powers with the marital powers of the husband under Roman Dutch Law.⁴¹ This development reached its climax when the legislature gave statutory form to it in section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance. Savitri Goonesekere assessed the situation very aptly when she stated that, "Statutory provisions as well as case law have been used to develop a strong concept of a husband's marital power in controlling and managing his wife's property under Thesawalamai".⁴² As regards his powers of administration however, it is more appropriate to say that though it does reflect patriarchal influence it is also a matter of convenience. The wife's property becomes part of the family property and is left to the husband to administer it along with the rest of the property. This is due primarily to his status as the legal head of the family. The position bestows on him certain legal rights and responsibilities. To use the

41. *Ibid*; *Naganathar v Velautham*, (1953) 55 N.L.R. p. 319 at p. 321; *Vijayaratnam v Rajadurai* (1966) 69 N.L.R. p. 145 at p. 147

42. *Asian Values, Equity and a Sri Lankan Family Policy*, p.14. G.C.Mendis Memorial Lecture, 1996.

language of the section itself,⁴³ he does so as “her duly authorised agent”. It can be expected that the husband has the responsibility to administer it like a *pater familias* as in Roman and Roman Dutch Law and could be made liable for damages.⁴⁴

As noted, the legislature acted in consonance with judicial thinking when it incorporated the concept of marital power into section 6. This is precisely what it had done in 1876 to women governed by the general law.⁴⁵ The strategy followed by courts to apply Roman Dutch Law as the common or residuary law to fill a vacuum in Thesawalamai could be to some extent perhaps justified, as long as the provision existed in the Matrimonial Rights and Inheritance Ordinance. But the provision in this Ordinance was repealed in 1923 by the Married Women's Property Ordinance. The legislature nevertheless failed to make the repeal of the impugned provisions of the Matrimonial Rights and Inheritance Ordinance or the relevant changes by the Married Women's Property Ordinance applicable to women governed by Thesawalamai. Neither did it rectify the injustice when it amended the Jaffna Matrimonial Rights and Inheritance Ordinance in 1947. Section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance was therefore left to remain in the statute book in its original form. Despite its retention, or till such time this anachronistic provision is repealed, it would be still possible to free the Jaffna woman

43. Section 6, JMPIO.

44. Buckland, *op. cit.* p. 107

45. Section 8, MPIO.

from the limitations of the Roman Dutch Law restraining her contractual rights if the *cassus omissus* rule is applied in a liberal manner.⁴⁶ This can be done on the basis that the concept of marital powers no longer forms part of the general law of the country⁴⁷ and as such it does not apply as residuary law. Where the legislature has been apathetic the task falls on the judiciary to rectify the situation it was responsible for creating in the first instance. Kandyan women generally, and Muslim women as regards property are not hampered by the concept of marital power. The makers and administrators of the law are responsible for discriminating against and depriving one group of citizens of the fundamental right to equality embodied in the Constitution⁴⁸ and of their rights guaranteed by the Convention on the Elimination of all forms of Discrimination Against Women⁴⁹ as incorporated in the Sri Lankan Women's Charter.⁵⁰

Though the husband has to consent in writing for the wife to dispose of her property he cannot dispose of the wife's property himself without her consent.⁵¹ The wife who had consented to such a sale however cannot thereafter claim compensation for it.⁵² If the husband manipulates and gets her consent or makes an impression that consent was given and thereafter squanders the property Thesawalamai provides that he must make good the loss with his acquired

46. Savithiri Goonsekere. *The Legal Status of the Female in the Sri Lankan Law on Family Relations* op. cit. at p. 38.

47. *Ibid.*

48. Article 12.

49. Articles 15 and 16 (h)

50. Article 1 (i) (h)

51. Tambiah, *The Laws and Customs of the Tamils of Jaffna*, p 173; M 100.

52. M. p. 96

property.⁵³ The general law provides the wife with civil and criminal remedies against all persons, including her husband for the protection of her separate property.⁵⁴ But criminal proceedings are prohibited when they are living together.⁵⁵ The protection can be however lost if the wife had entered into an agreement or settlement respecting her property.⁵⁶ These provisions however do not apply to women governed by Thesawalamai. The Jaffna Matrimonial Rights and Inheritance Ordinance entitles the wife to apply to the District court to resolve any question or dispute regarding her separate property.⁵⁷ So if the husband in his capacity as administrator mismanages or commits any fraud it is possible for the wife to apply to court by motion in a summary way.⁵⁸ The provision enables a husband prejudiced by any act of the wife or of a third person to similarly apply to court for relief.⁵⁹

Wife's rights where consent is denied

The Code makes no provision for redress where consent is unreasonably denied or when it becomes impossible to get the husband's consent due to unforeseen circumstances such as insanity or where the husband cannot be found etc. But the court in *Ramalingam v Puthathai*⁶⁰

53. Code, I : IV ; M. p. 96

54. Section 18[1], MWPO.

55. *Ibid*, 18[4]

56. *Ibid*, section 25

57. Section 10[1]

58. *Ibid*

59. *Ibid*

60. (1899) 3, N.L.R. p.347 at p. 348

used its discretion and held that the transfer by the wife of her property without her husband's consent was valid since she had done so in order to procure herself maintenance. The court construed it as implied consent. It also justified the transfer on the basis that the need to obtain the consent, according to the Code, applies only when the spouses are living together.⁶¹ Whatever be the basis of construction the decision is important in that it recognises the fact that a court can in its discretion, and considering the facts of a case, take away the rigidity of a law that unjustifiably imposes hardship on any member of the society.

The Ordinance however makes specific provisions for unforeseen situations. It enables the wife to petition the District Court which has jurisdiction in the matter, for an order authorizing her to dispose or deal with such property without the husband's consent when she is deserted by the husband, separated from him by mutual consent, is imprisoned for a period of more than two years, or is insane or an idiot.⁶² Apart from such specific situations the Ordinance makes two general provisions. They are, firstly, where consent is unreasonably withheld, and secondly, where the interest of the wife or children of the marriage require that such consent should be dispensed with. It could be expected that the court, in such situations, will come to the rescue of the women of Jaffna and use its discretion in such a way so as to take away the rigors of the harsh and unwanted provision, especially in consideration of the discriminatory approach of the law towards them, when

61. *Ibid*

62. Section 8 ; *Thangavadivel v Inthiravathy* (1950) 53 N.L.R. p.369

compared to her counterparts in the rest of the country. The remedy the wife has by section 8 is an alternate remedy and does not deprive her of the option of filing a regular action.⁶³ Thus the section empowers the court with the authority to deprive the husband of any rights he may have qua husband over the property of the wife.⁶⁴

The right of the wife to petition court to obtain consent is only in respect of her separate property,⁶⁵ and does not apply to *thediathettam*.⁶⁶ It was held in *Ponnupillai v Kumaravetpillai* that in giving its authorization the court has jurisdiction to grant consent only to a particular transaction actually proposed at the time of the order and that it has no authority to grant the wife a general liberty.⁶⁷ The court was also of the view that a general grant would not be in the good interest of the wife.⁶⁸ It makes sense from the point of view of the objective of the section, which is, as declared in *Ponnupillai's* case, "to give the wife the protection of the court when she cannot have that of her husband".⁶⁹ This section, though it does provide relief to a wife whose property rights are restricted by section 6, has been interpreted by court to show that a wife under Thesawalamai is a person who needs to be protected by either the husband or by the court.⁷⁰ This interpretation by court helps only to demean the status of the woman under

63. *Thangavadivel v Inthiravathy*, *op.cit.*

64. *Vijayaratnam v Rajadurai*, *op.cit.* at p.146

65. *Theivanapillai v Nalliah*, (1961) 65 N.L.R.p. 346 at 347

66. *Ibid*, see also *Avitch Chettiar's* case, *op.cit.*

67. *Ponnupillai v Kumaravetpillai*, (1963) 65 N.L.R. p.241

68. *Ibid.*

69. At p. 251

70. *Ibid*

Thesawalamai rather than ensure her, her rightful place in society as a being who is able to make wise and sensible decisions in respect of her property as much as a man can. If a woman can be left in charge of her deceased husband's property during the minority of the children⁷¹ there is no reason to not trust her ability to handle her own separate property. The judges in *Ponnupillai's* case however had their hands tied. They declared that they could not view the section as enabling the court to give a general authorization, as such a grant "would have changed her status quo immovable, from a married woman to a *feme sole*" which they thought would not be the kind of thing that section 8⁷² had in contemplation.

Husband's interests in the income from wife's property

The customary as well as the statutory law of Thesawalamai recognises the principle that the husband has a concrete interest in the wife's property other than to control and manage it. This can be gathered from customs embodied in the Code which provide that, though presents or gifts of land made to a spouse remained to the side of the husband or wife to whom they were made, the proceeds acquired from them during marriage must be added to the acquired property.⁷³ The principle was incorporated into the statute when it made profits from separate property the *diathettam*

71. Code, Part I : 9; JMPIO, Sections 37, 38

72. Ibid; Section 6 after the amendment of 1947.

73. 1V:3

to be shared by the spouses.⁷⁴ In *Naganathar v Velautham* the wife who was living in separation purported to dispose without the consent of her husband certain shares in a property which she had received as a gift from her father.⁷⁵ The propriety of such action by the wife and the extent of interest the husband had in her separate property came up for analysis in this case. Gratien J declared that apart from the marital right, the husband had a right to share in the income of the property. His Lordship however refrained from regarding the right as a vested right and declared it to be a contingent right, by which the husband became entitled to receive a part of the income of that property if the wife predeceased him.⁷⁶

Right to give dowry

It was the property of the wife that was first used in giving dowry.⁷⁷ The Code in Part 1:1 says that “when a daughter or daughters married they should each receive a dowry. But the Code nowhere empowers the wife to do so without associating the husband when they are living together.”⁷⁸ She obtained sole authority to do so only on death

74. Section 19 JMRO of 1911 and its amendment of 1947.

75. (1953) 55. N.L.R. 319.

76. *Ibid.* at p.321.

77. The Code in Part 1:1 says that “when a daughter or daughters married they should each receive a dowry from their mother’s property”. D.J.Woodhouse in D.C.Jaffna 14401, Upheld in the Supreme Court by Ennis A.C. J. quoted by M. H. Kantawala in “A Thesis on The *Thesawalamai*” (1929) pg 23;

78. 1:2 ; 1:4; 1:5

intestate of the husband.⁷⁹ The same position continued into the Ordinance, however with the difference, that she could by herself gift movables like jewellery and money, but not immovable properties⁸⁰. In contrast, the husband, as father, had the right during coverture, “to grant a dowry of any property belonging to the spouses...”.⁸¹ The difference in position could be accounted for by the husband’s exalted position in the family and the marital powers associated with him. Raghavan says that this empowerment is “a reflection of the powers which the *karnavan* enjoys in a Marumakkalathayam *Taward*”.⁸² In addition, Thesawalamai recognises the husband’s right to take from the deceased wife’s property and dower the children.⁸³ The customs showed no discrimination here as the wife too on husband’s death intestate, enjoyed a similar right.⁸⁴ The issue was however raised in several cases as to whether the rules governing inheritance were not a limitation on this right.⁸⁵ Hutchinson C.J. in *Nagaratnam v Alagaratnam* accepted that on the death of the wife her dowry property vested in her daughters. But he declared that the property was subject

79. *Ibid*

80. Section 6

81. H. W. Tambiah, *Laws and Customs of the Tamils of Jaffna*. *Op.cit* p. 165.

82. H. W. Tambiah, *Tamil Culture in Ceylon*- General Introduction. p. 206.

83. Code 1:11; See also Kantawala, *op.cit.* p. 22 ; *Nagaretnam v Alagaretnam*, (1911) 14 N.L.R. p. 60 at 64. *Chellapa v Kanapathy*, 17 N.L.R. p.294 at 296; *Tambapillai v Chinnatamby* .18 N.L.R. p.348 at 351.

84. Code 1: 9

85. *Nagaratnam v Alagaratnam*;(1911) 14 N.L.R. p. 60 *Tambapillai v Chinnatamby*; *Chellapa v Kanapathy*, 17 N.L.R. p. 294; *Sinnathangachchy v Poopathy*, (1934) 36 N.L.R. p. 103.

to the husband's right to apportion it between them as dowry on their marriage.⁸⁶ The C.J. based his judgment on the law of inheritance in Thesawalamai, that on intestacy of the wife her property remained with the female heirs just as the husband's went to the male heirs. Ennis J. and De Sampayo J. followed the principle of the above case in *Tambapillai v Chinnatamby*.⁸⁷ But De Sampayo J. based his judgment on principles of the Hindu concept of joint family. He declared: "The administration of the entire estate is in the sole control of the parent, who has the power to apportion such part of the deceased parent's property to the daughters in respect of dowry as he or she in his or her discretion thinks proper".⁸⁸ As to rights by inheritance, he declared, "there is no such thing as vested right by inheritance, and that, even if such language is permissible, the children can be divested of that right at the will of the parent".⁸⁹ Kantawala accepting the theory declared, "It is a mistaken notion that on the death of a parent, the children at once inherit the property of the deceased. There is, to this extent, no vesting by law of the shares of inheritance...".⁹⁰ The provision in the Code that the sons take only what remained after the daughters are dowered and that if nothing remained they "must do as well as they can until their father dies",⁹¹ makes it clear that under the customary law rights relating to dowry took precedence

86. (1911) 14 N.L.R. p.60 at p.62

87. 18 N.L.R.p. 348

88. *Ibid.* at p. 351

89. *Ibid* at p. 352

90. *Kantawala, op. cit.* p. p. 22 -23

91. 1:11

over all other rights. This happened even if the sons had to go a-begging.⁹² A second marriage did not take away this right from the father except that he had to hand over the property to the maternal grandparents. He still had the duty to dower the daughters and right to do so from the deceased spouse's property.⁹³ Tambiah did not agree with De Sampayo J's view that under the old Thesawalamai "there is no such thing as vested right by inheritance"⁹⁴. He cited authority to show that even under the old Thesawalamai the property of a deceased spouse vested in his or her heirs⁹⁵ but left the question open by saying that it awaits an authoritative decision.⁹⁶

The controversy was brought before the Thesawalamai Commissioners who, recommended that, "the surviving spouse should not have any right to alter the shares to which children may become entitled by intestate succession; nor should the right be given to any other member of the family where both parents are dead."⁹⁷ The Legal Draftsman commenting on this recommendation said, "The rights urged and recognised in the two cases,⁹⁸ which the Commission desire not to perpetuate, appear to have been destroyed already by section 24 [22] of the Ordinance, which declares that all children take equally per capita."⁹⁹

92. Kantawala, *op. cit.* p. 23

93. *Nagaretnam v Alagaretnam*, *op. cit.* at p. 64

94. *Laws and Customs of the Tamils of Jaffna*, *op. cit.* p. 169.

95. 1863 Leg.Miscel.25; M.414

96. *Ibid*

97. Sessional paper 111 of 1930, p. 4

98. *Nagaretnam v Alagaretnam op. cit* ; *Thambapillai v Chinnathamby*, *op. cit.*

99. Appendix to Sessional paper 111 of 1933.p.6

Explaining further he said, "These are words which, like the whole section itself, have been taken bodily from the Matrimonial Rights and Inheritance Ordinance, 1876. (section 28) They must be taken to mean in their new place what they meant in the place from which they were borrowed; and there can be no doubt that by virtue of this section the children take divided interest in the property of their deceased mother which vests in them at the moment of her death and which, therefore, cannot be interfered with by their surviving father."¹⁰⁰ The Legal Draftsman however gave a second reason as to why further legislation was not necessary. He cited sections 39 and 40 of the Jaffna Matrimonial Rights and Inheritance Ordinance and said that they provide further proof that the common law as is given in clauses 9 and 11 of part I of the Code has been altered. It is submitted that the fears expressed by the Commissioners are not warranted as it is not possible to interpret the provisions of the Ordinance to show a continued adherence to the customary law principle which was supportive of an inherent preference of dowry over rights of inheritance. Garvin S.P.J.'s statement regarding same in *Sinnathangachy's* case to the effect that, "The position under the Thesawalamai is by no means the position which has been created since the new Thesawalamai Ordinance, No. 1 of 1911 was passed"¹⁰¹, though only obiter, is a clear expression of the change.

The Thesawalamai imposed an obligation on the parents, who gave as dowry a piece of land that was already

100. Ceylon Sessional Papers, 1933. Appendix, p. 6.

101. At p. 104.

mortgaged, to redeem it even after the lapse of fifty years, if the daughter could not do so herself.¹⁰² The Prescription Ordinance makes it impossible to do so to-day. The Code also empowers the parents to increase the dowry already given if they (the parents) happen to prosper subsequent to the giving of dowry.¹⁰³ This is left to the discretion of the parents and as long as vested rights are not affected would not create a legal issue.

Rights on separation and divorce under the customary law

We noted the disability of the wife to dispose of her separate property without the consent of the husband during marriage. But Withers J. in *Ramalingam v Puththathai* recognized the right of the wife who is separated to sell her property for the purpose of procuring maintenance for herself.¹⁰⁴ His Lordship took into consideration the facts of the case as noted in the recital of the deed and held that the wife was compelled to sell the land to procure maintenance and this implied her husband's consent.¹⁰⁵ He thus declared that the disability noted in Part IV: 1 of the Code could be taken to apply only when the spouses were living peaceably together thereby implying that it would not so apply when they were living in separation. Gunasekere J. did not follow Withers J. He declared that, since in *Ramalingam's* case it appeared that the wife was "compelled to sell the lands to

102. I:4.

103. I:5.

104. *Ramalingam v Puththathai*, (1899)3 N.L.R. p. 347.

105. *Ibid*, at p.348

procure herself maintenance," it was no authority for the proposition that the husband's consent is not necessary for the validity of a sale by the wife when she is living in separation.¹⁰⁶ It is submitted that in stating so Gunasekera J. had lost sight of, or, wanted to disregard Withers J.'s basis of holding that, "from the context"¹⁰⁷ it appears that the rule applies only when husband and wife are living peaceably together".¹⁰⁸ He thus refuted counsel's argument and declared, "There appears to be no reason for construing the expression "being subject to the will of the husband" to mean "when she is living with her husband and therefore subject to the will of the husband".¹⁰⁹ Thus Gunasekera J. held that the wife had no capacity to transfer her property without the consent of her husband even when living in separation.

It is submitted that the words in part IV:I is capable of the interpretation placed by Withers J. and by counsel in the latter case. The section can be analysed as referring to both situations, namely, when the spouses are living in separation on account of some differences and when they are living peaceably together. The first part of the section, can be identified up to the semicolon ending with the words, "...is not at liberty to give any part of the wife's dowry away" as referring to the first situation. This can be done because the section itself gives reason as to why the husband living separately "is not at liberty to give any part whatsoever

106. *Rasammah v Karthigesu*, (1951)54 N.L.R. p.110 at113.

107. IV:I.

108. *Ramalingam v Puthathai* *Op. cit.* at 348

109. *Rasammah v Karthigesu* *Op. cit.* at p. 113.

of the wife's dowry away", being: "because it is generally seen that the children take the part of the mother", on separation. The reason is understandable; where the children were with the mother the custom of the country saw to it that the husband should not be able to dispose of the wife's property. The second part of the section deals with the situation when the spouses were living peaceably, in which case the husband was permitted to give some part of the wife's dowry away and only one tenth of his hereditary property without the consent of the wife, and nothing more. So if the husband wanted to dispose of the balance nine tenths of his property he had to obtain the wife's consent. It is in this part, which deals with such need for mutual consent that the words; "the wife cannot give anything away without the consent of the husband since she is subject to the will of the husband", appears.

The custom is clear; the wife's need to get the consent of the husband arose only when they were living peaceably together, for she was then subject to the will of the husband. It is submitted that Whithers J.'s judgment appears to be a better construction of the section and one which gives relief to the wife living in separation. This basis could be also understood in the context of section 8 of the Ordinance, which enables a wife to petition the District Court for an order of authorization when living in separation from the husband by mutual consent. Withers J., in the case before him, had to decide the validity of a deed of sale executed by a woman separated from her husband and in difficulties. In the absence of provisions in the customary law, His Lordship took into consideration the exigencies of the situation in which the wife had to sell her property. Therefore he held that

consent of the husband could be implied. It would be not far fetched to presume that the customs could not have been so strict on the separated wife, especially in view of the fact that the customs embodied in the Code have been very protective of the wife's rights and have shown a clear tendency to see that she should not be adversely affected. To cite a few examples from the Code, it obliges the parents of the woman or her brothers to redeem for the daughters / sisters or make good the loss when immovable properties with encumbrances were given as dowries,¹¹⁰ or when they were lost by subsequent law suits.¹¹¹

The Code makes no provisions for a situation of divorce. Two reasons can be given for such silence. The first is based purely on the kind of social life led by the early settlers. It was discussed in the chapter on *cheedanam* as to how polyandry and polygamy together with the practice of concubinage was in vogue in early society in Jaffna. In such a social set up conjugal living was such, that there was considerable vagueness as to when a connection could be regarded as a marriage and when not. Therefore it was difficult to differentiate marital situations as whether two spouses had merely separated, as the Code shows¹¹² or whether they had severed marriage connections to a degree that would be tantamount to divorce like in the present day. The second reason for the absence of any provisions in the Code is due to the influence of Christian dogmas in the

110. I:4

111. I:5

112. Part IV. 1

compilation of the Code.¹¹³ Abandonment of a spouse by the other and improper acts with others' spouses were considered disgraceful and made punishable during the Dutch rule.¹¹⁴ Cases reported during early British rule however provides some evidence that situations of divorce existed.¹¹⁵

Under the Ordinance No: 1 of 1911

Section 8 deals with separation by mutual consent as well as separation *a mensa et thoro*. It provides that where separation is by mutual consent the wife who wishes to dispose of her separate property can petition the District Court in which she resides or in which the property she wishes to dispose of is situated for an order of authorization to sell her property without the husband's consent. Where a court having jurisdiction decrees a separation *a mensa et thoro* however, the consent of the husband is not made necessary and the wife would be able to deal with her property as a *feme sole*.¹¹⁶

The Ordinance of 1911 before it was amended in 1947 made provisions regarding proprietary rights of spouses on divorce. But it pertained only to *thediathettam*. In the absence of provisions in the Jaffna Matrimonial Rights and Inheritance Ordinance and the Code the General Law on divorce has been made applicable to those governed by

113. H.W.Tambiah, *Neethi Murasu* [Sri Lanka Law College , Tamil Mantra publication, 1999, at page 87

114. Order No: 53-one of the 72 orders of the Dutch, M p.699.

115. M. pp 116 and 119.

116. Section 8.

Thesawalamai. The situation in Jaffna now is very different from that which existed at the time of the codification. Society has changed tremendously since then and at present is in the throes of rapid change brought about by the vast exodus and displacement of the people from their homelands. This has given rise to a situation where even amongst the Jaffna Tamils, marriages end as much as by death, as by legal methods *intervivos*.

Rights on re-allocation of property - applicability of the Roman Dutch Law

In the context of quite a different matrimonial property structure in Thesawalamai, a study of how re-allocation of property on divorce can be best achieved, which will accord both with justice as well as with the ideals and values of marriage and property relationships of the spouses governed by Thesawalamai, becomes very necessary. Since the general law of divorce is applicable to those governed by Thesawalamai, re-allocation too has to be governed by the same principles. The general law, as reflected by judicial decisions¹¹⁷ and opinions of academics,¹¹⁸ appears to recognize both the Roman Dutch Law rule of forfeiture of benefits and the provisions of the Civil Procedure Code¹¹⁹ as applicable laws in the matter of adjustment of proprietary rights on divorce. In enacting the said provisions into the Civil Procedure Code, which confer on the court wide

117. *De Silva v De Silva* (1925) 27 N.L.R. p. 289 ; *Fernando v Fernando* (1961) 63 N.L.R. p. 416.

118. *Recovery of dowry and Other Property On a Dissolution of Marriage*, Article published in the Colombo Law Review, (1972) Vol: 3. p. 13.

119. 615 (1) and 618

discretionary powers, the legislature in fact superimposed principles based on English statutes on a Roman Dutch Law infrastructure. The two remedies are mutually exclusive in that the court could elect to exercise its powers either under the Code or be guided by the Roman Dutch Law. Thus a brief study of the principles of Roman Dutch Law on restitution of dowry and forfeiture of benefits derived from marriage together with the statutory provisions is undertaken, with special focus on the scope of their applicability to those governed by Thesawalamai. It needs to be noted that forfeiture has reference only to the benefits derived under the marriage.¹²⁰ It does not extend to the separate property of the offending spouse.¹²¹ Dowry or *dos* in Roman Dutch Law was created as marriage settlements and recognized as the property of the wife. Similarly *cheedanam* or dowry in Thesawalamai has been, from its inception, recognized as the separate property of the wife. As such, re-allocation of *cheedanam* property on judicial separation or divorce need not normally arise as an issue of contention. But, as in the general law, it has been the practice by those governed by Thesawalamai to give on the occasion of marriage gifts in favour of the husband and wife or even to the husband alone. The courts, when confronted with such cases under the common law, analysed the facts to see what the intention of the donor was. Where the intention was found to be to give a dowry¹²² it was regarded as the

120. Balasingam, *op.cit.* p.635.

121. *Ibid.*

122. *Fernando v Fernando* (1961) 63 N.L.R.. 416 ; *Karunanayake v Karunanayake* (1937) 39 N.L.R. p.275

separate property of the wife. Even if they were considered as outright gifts to the husband, since they were made on the occasion of marriage, the common law principle of forfeiture was applied. The Roman Dutch Law averted the enrichment of one spouse at the expense of the marriage he or she had put asunder and applied the principle of forfeiture to whatever benefits that had accrued to the guilty spouse.¹²³ Besides, in Roman Dutch Law the court had no discretion to withhold forfeiture where it was claimed by the innocent spouse. The wife could therefore claim as of right that her guilty husband should forfeit all claims to all benefits that had accrued to him by the marriage either by way of wedding presents, simple gifts etc. The guilty wife under the Roman Dutch Law on the other hand would not lose her dowry as it was her separate property and not a benefit that had accrued to her by the marriage.¹²⁴

Applicability of the statutory provisions

Sections 615 (1) and 618 of the Civil Procedure Code empower the courts to make orders of settlements of property at its discretion and to vary ante nuptial or post nuptial settlements on divorce, judicial separation or nullity of marriage. Controversial judgments have been given by courts as to whether the Roman Dutch Law or the statutory

123. Van Leeuwen .4.24.10 ; Voet, 24.2.9.; H.R.Halo, *The South African Law of husband and wife*, [5th edition. Cape Town 1985) p. 372; *Philips v.Philips* (1882) 5 S.C.C. 36; *Samarasinghe v Samarasinghe* [1989] 2 Sri.L.R. p.180 at 186

124. *Fernando v Fernando*, (1961)63 N.L.R. p. 416; *Karunanayake v Karunanayake*, 39 N.L.R. p.275; *Fernando v Fernando* 63 N.L.R. p.416; *Somawathy v Simon Perera*, [1984] 1 Sri.L.R. p.78;

provisions should apply in the case of those governed by the general law.¹²⁵

Remedy by way of statutory provisions is only discretionary. Unlike as in the common law, the wife cannot claim forfeiture as of right. Further, the statutory provisions do not limit re-allocation to benefits; but includes all properties to which either spouse is entitled and it can be ordered irrespective of finding of guilt. Thus, if the wife happens to be the guilty spouse, she stands the risk of losing even her dowry property for the court can, if it considers it just and necessary, exercise its discretionary powers and make an order for the settlement of her dowry for the benefit of her husband or children.¹²⁶ A move by court to do so could result in ancestral property, as dowry property, being forfeited and falling into the hands of “outsiders” to the family. Like *paraveni* in Kandyan Law, *cheedanam*, which very often constitutes of ancestral property, is regarded sacrosanct by those governed by Thesawalamai. On intestacy, without immediate heirs, it should revert to the source from whence it came¹²⁷. As such, an order to that effect would be very unpalatable to those governed by Thesawalamai. Savitri Goonesekere says it is necessary that such application should be, “subject to the discretion of the court to take into account the scheme of rights on matrimonial property under Thesawalamai”¹²⁸.

125. *Philips v Philips*, (1882) 5 SCC 36 ; *Dondris v Kudatchi* (1902) 7 N.L.R. p.107 ; *De Silva v De Silva* (1925) 27 N.L.R. p.289;

126. Civil Procedure Code Section 618.

127. J.M.R.I.O. sections 23 and 24.

128. *The Legal Status of the Female in Sri Lanka Law on Family Relations*, *op. cit.* 67.

The choice between Roman Dutch Law and statutory provisions to those governed by Thesawalamai

While applying the principles of forfeiture, the courts have tended to treat the two remedies as mutually exclusive; as the rationale underlying the two remedies vary greatly. The result was to make a decision to seek remedy under one system of law to necessarily exclude the other. It is proposed to analyse which of the two remedies would serve the best interests of the woman governed by Thesawalamai.

Application of the Roman Dutch Law principle of forfeiture will enable the wife to retain dowry property on the basis that it is her separate property, regardless of whether she is the guilty or the innocent spouse. Even in circumstances where she, on her own volition or on compulsion, transfers her property to the husband, or where, though not strictly as dowry, but as gifts, wedding presents, donations and the like are given to the husband; and it is difficult to prove them as dowry and thereby as the separate property of the wife, she could, as the innocent spouse, claim recovery of such property on the basis that they are in fact benefits that have accrued to the husband as a result of the marriage he has wrecked. It is just and equitable that the guilty husband should not be allowed to enrich himself from the dowry of the wife. This claim is available to the wife as of right and the court will have no discretion to withhold such forfeiture.¹²⁹ Remedy by way of Roman Dutch Law could have adverse impact on the wife too, particularly

129. Tambiah J. in *Fernando v Fernando*, (1961) 63 N.L.R. p. 416

where she is the offending spouse. The court could order that she forfeits whatever benefits that had accrued to the husband from her by the marriage. Such a possibility is well brought out by the decision in *Somawathy v Simon Perera*.¹³⁰ In this case, prior to the marriage, the parents of the wife gifted to the husband by way of dowry some land and premises. This subsequently formed the matrimonial home of the couple. The marriage was later dissolved on the ground of malicious desertion by the wife. Thereafter when the wife instituted action for recovery of dowry property the District Judge dismissed the action on the basis that she could not claim a re-transfer of the property since she was the guilty spouse. Contention by counsel for the wife on the basis of Roman Dutch Law, that a wife has right to claim restitution of dowry property, was defeated in the Court of Appeal on the basis that the right of the wife was qualified, since she would forfeit the right if the husband obtains a divorce by reason of the misconduct of the wife.¹³¹

We have for discussion on this subject a very enlightened judgment in the unreported case of *Abeyaratne v Wickramaratne*.¹³² In this case, cash and a car given as dowry to the daughter by her parents on her engagement to the defendant husband were subsequently transferred by the wife to the defendant husband, on his request. After the marriage was dissolved the wife claimed her dowry property. The Court of Appeal upheld the decision of the District Judge, that the gift was made by the parents of the wife to

130. (1984) 1 Sri.L.R. p.78

131. *Somawathy v Simon Perera* ,op. cit at p.82; Voet 24.3.19

132. CA (SC) 131/73 F

their daughter and that when it was subsequently transferred to the husband, he became, despite the transfer, only a trustee of the properties. It is submitted that a similar inference of a trust in *Somawathy's* case would have been fair and just by the wife. It would have enabled court to conclude that the property was in fact the wife's dowry, though given to the husband. In such a situation, the wife's dowry being her separate property, the common law rule of forfeiture could not have been made applicable, notwithstanding that the wife was the guilty spouse. The court in *Somawathy's* case failed to take into consideration the fact that the property was clearly gifted to the wife by way of dowry and as such was her separate property. It also failed to ascertain the true intention of the donor parents at the time the gift was made. The result was to eject the wife from the matrimonial home, a property which was in fact a gift by her parents on her marriage, though unfortunately they had gifted it to the husband. When compared to Abeyaratne's case, *Somawathie's* case appears very unfortunate.¹³³ A decision similar to *Somawathy's* case would indeed be very unpalatable to those governed by Thesawalamai, who attribute a predominant position to dowry, which very often and largely constitutes ancestral property. Therefore, to preserve the sanctity of ancestral lands and to safeguard dowry property as separate property, it becomes advantageous to the Jaffna woman to seek remedy under the Roman Dutch Law, provided she is the innocent spouse.

133. See also Shirani Ponnambalam, *op.cit.* p.423

Forfeiture on divorce caused by the breakdown of marriage

To apply the rules of forfeiture under the Roman Dutch Law it becomes necessary for the wife to allocate guilt on the part of the husband. Taking into consideration the fact that a Jaffna woman is governed by the general law on divorce it is also possible for her to obtain divorce without proof of matrimonial fault to the extent required by the Marriage Registration Ordinance.¹³⁴ Apart from the fault based grounds of divorce provided in the Marriage Registration Ordinance the general law, by section 608 (2) (a) of the Civil Procedure Code, permits a decree of separation to be converted to one of divorce after the lapse of two years. In addition, it declares that, notwithstanding that a decree of separation was not obtained, a *de facto* separation for seven years is sufficient to obtain dissolution of marriage. This makes it possible under the general law to obtain divorce on a significantly lesser degree of blameworthy conduct. Thus it becomes necessary to also analyse the implications of forfeiture on divorce due to breakdown of marriage, as against divorce caused by matrimonial fault. The South African law has incorporated the common law rules of forfeiture into the statute. Section 9 (1) (2), Divorce Act of 1979 states that, “when a decree of divorce is granted on the ground of irretrievable breakdown of marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the

134. Section 19, Marriage Registration Ordinance No.19 of 1907

court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order of forfeiture is not made, one party in relation to the other be unduly benefited....”.

Shirani Ponnambalam is of the view that in Sri Lanka too the introduction of a non-fault based ground for divorce by the Civil Procedure Code need not result in the erosion of fault in relation to matters arising as a consequence of divorce.¹³⁵ When divorce is sought on non-fault grounds it means that no matrimonial fault as per the Marriage Registration Ordinance has been committed but an atmosphere where continued co-habitation becomes intolerable or impossible has been created. Such an atmosphere can be due to the actions of one of the spouses or of both. These actions too amount to faults but to a lesser degree. Thus in such situations where one spouse seeks divorce on non fault grounds and can attribute the breakdown to the acts of the other, the courts could exercise the rule of forfeiture and see that the spouse responsible does not walk away with the benefits that had accrued to him/her by the marriage. In exercising the power to order forfeiture the court could, as provided in section 9 (1) of the South African Divorce Act of 1979, take into consideration the circumstances which gave rise to the breakdown of the marriage and the spouse responsible for it. Thus fault would still be relevant though the degree of it will differ.

135. *Law and the Marriage Relationship, op. cit.* p. 427

Wife's right to remedy by way of the Trust Ordinance

It is possible for the wife to have recourse to the Trust Ordinance to obtain restitution of her dowry property on dissolution of marriage.¹³⁶ The fact that such a donation or transfer was not made in writing would not preclude the wife from proving that the husband holds such property in trust; for section 6 of the Trust Ordinance provides that an intention to create may be manifested by words or action.¹³⁷ The provision in our trust law is in agreement with Section 6 of the Indian Dowry Prohibition Act of 1961 which states that, "Any person other than the woman who receives a dowry holds it in trust for the benefit of the woman". The Indian Supreme Court in *Pratibha v Suraj Kumar*¹³⁸ held that the *Sridhan* is the wife's separate property and that if it was placed in the husband's or his relatives' hands they would be deemed to be trustees.¹³⁹ Savitri Goonesekere notes: "Consequently when property is given to a man as dowry, according to the traditional custom among Muslims and some Tamils, the courts tend to view the dowry as the woman's separate property. The man is therefore a trustee accountable at law for what is received".¹⁴⁰ Even where cash or property is given to the husband by way of dowry by the parents of the wife or where the wife herself subsequently transfers her property to the husband¹⁴¹ he is

136. Trust Ordinance, section 83.

137. See also Sharya De Soysa, *Trust and Family Law* The Law Commission, Sri Lanka, Law Bulletin, vol. V. June, 1984

138. 1985 A.I.R.628 (S.C.)

139. *Ibid*, pp. 633-36.

140. *Status of Women* : Published by Ministry of Health and Women's affairs-Colombo, Sri Lanka,(March 1993) p. 07

141. *Abeyaratne v Wickramaratne*, C.A. (SC 131/73 (F))

expected to hold it in trust for the wife. Though the legal title may be in the husband the wife is entitled to the beneficial interest therein.¹⁴² Application of the Trust Ordinance to principles of Thesawalamai is not new to the court. Bertram C.J. in *Seelachchy v Visuvanathan Chetty*¹⁴³ and H.N.G. Fernando J. in *Annapillai v Easwaralingam*¹⁴⁴ discussed the provisions of trusts in relation to *thediathettam*. English cases too have accepted the same principle. Kay J. in *Re Curtis Hawes v Curtis*¹⁴⁵ said, "I think it is perfectly settled, I believe the law is undoubted, that the mere transfer to the name of the husband of property which is undoubtedly the separate estate of the wife, is not *per se* sufficient evidence of a gift to the husband for his own use. That does not destroy the separate estate of the wife. The husband is taken to be, nevertheless, a trustee of that property for the wife". It is submitted that the application of trust principles to the issue of forfeiture on divorce would help solve the issue more equitably and in keeping with the intentions of the donor as well as with the sacrosanct nature of ancestral property.

Donations and forfeiture

"Donations" as a form of wedding present was discussed in the chapter on *cheedanam*.¹⁴⁶ It is very often demanded by the bride-grooms or by their parents as gifts

142. *Samarasinghe v Samarasinghe*, [1990]1Sri.L.R. p.31 at 38

143. *Seelachchy v Visuvanathan Chetty*, *op.cit.* pp. 116-118

144. *Annapillai v Easwaralingam*, *op.cit.* at p.228

145. (1885) 52 Law Times 244, quoted by Shirani Ponnambalam *op. cit.* p. 422

146. *Supra*, pp. 144 - 148

to be made exclusively to the bride-groom. The intention is made clear, that it is wanted simply as a gift, apart from dowry. Viewed strictly from this point of view, it can be argued that, donations becoming free will gifts to the husband¹⁴⁷ cannot form the separate property of the wife that could be recovered. It is however possible to apply to donations the view taken by Derret¹⁴⁸ in relation to the Indian *varadakshina*. Derret declares that such ceremonial presents are in fact bride-groom prices and that it should fall into the definition of dowry within the meaning of the Act.¹⁴⁹ Likewise, in Thesawalamai too, donations becoming bride-groom prices could be assimilated into the category of dowry. When considered as dowry it becomes the wife's separate property, and if held by the husband, he can be deemed to hold it in trust for the wife.¹⁵⁰

There is yet another method of approach. Since they are presents given on the occasion of marriage they definitely are benefits derived from the marriage.¹⁵¹ As such, whether as dowry or as a benefit derived by the husband, the wife should be able to have the property restored to her. These gifts are generally not made in writing. But proof need not pose a problem as the wife or her parents could prove the real nature of the gift by oral evidence.¹⁵²

147. Supra, pp. 141-145 chp; on cheedanam.

148. *Introduction To Modern Hindu Law*, p.146

149. *Ibid.*

150. *Grace de Alwis v Walter de Alwis* (1971) 76 N.L.R. p.444 ; *Samarasinghe v Samarasinghe* [1990] 1 Sri. L.R 31

151. Savitri Goonesckere, *The Legal Status of the Female in the Sri Lankan Law on Family Relations*, p. 63

152. Per Thambiah J in *Fernando v Fernando*. (1961)63 N.L.R. p. 416

It is very disheartening to note that large sums are paid as donations, some times in foreign exchange running into millions, to Tamil boys who have migrated or taken refuge in foreign countries. Unfortunately all marriages do not work happily and many a woman and her family have fallen victims and lost this money. They are not aware of their rights or the legal remedies available to them. Besides, legal action becomes an additional financial strain. Apart from the Roman Dutch Law, the Civil Procedure Code provides the wife with an alternate remedy.¹⁵³ The jurisdiction of the court cannot be ousted by the parties to the marriage, by incorporating an express provision in the settlement that such donations are not returnable, for the wife could still invoke the jurisdiction of the court to vary such settlements.¹⁵⁴ Thus even if the wife cannot claim forfeiture of the donation by the guilty husband if the court happens to take the view that the common law remedy has to be considered abrogated, she could still move the court under the provisions of the Code to vary such settlements in her favour. However, where cash is given to the husband it is probable that he would make deductions for expenses incurred.¹⁵⁵ The wife in such instances would be able to get at least the balance.

An evaluation

In formulating a legal formula for the re-allocation of matrimonial property on divorce with respect to those

153. Section 618.

154. Section 618.

155. *Wijesundera v Bartholomeusz* (1884) 6 S.C.C. p.141

governed by Thesawalamai, the courts definitely face a fundamental problem. The primary question relates to how re-allocation can be best achieved considering the sensitive nature of dowry property. Does the answer lie in the fixed rule of apportionment of the Roman Dutch Law or in the discretionary powers vested with the court? The varied judicial interpretations¹⁵⁶ placed on the grounds of divorce makes it difficult to determine which course of approach would be more beneficial. The principle of forfeiture based on Roman Dutch Law will enable the separate property nature in dowry property to be safeguarded. But it is based on guilt principle, and the landmark judgments make it difficult to predict the next move of the judiciary, as to whether it will continue to adhere to the guilt principle, or, move towards the liberal approach based on breakdown principles advocated very vehemently by Justice Thambiah.¹⁵⁷ When divorce is allowed on grounds of breakdown of marriage and a claim for forfeiture of benefits is made, the court resorting to the Roman Dutch Law principle of forfeiture will encounter difficulties and contradictions as the claim for forfeiture of benefits can be made only against a guilty party. However, when a marriage breaks down it might be difficult to assign fault on one spouse. It will generally be on both. Thus a claim for forfeiture of benefits cannot either be raised or adjudicated upon. Conversely, the provisions regulating reallocation in the Civil Procedure Code is not dependent on the allocation of fault. Besides, unlike the Roman Dutch Law, it is not limited in its application to

156. *Muthurani v Thuraisingham*, [1984] 1 Sri L.R. p.381; *Tennekone v Tennekone* [1986] 1 Sri L.R. p.90.

157. *Ibid.*

benefits derived from the marriage. It covers all properties that the spouses become entitled to during marriage, which would include the wife's dowry property. The question then is, would the statutory provisions provide a more equitable remedy. A reasonable rule of reallocation should not however be indifferent to the question as to how or when the property was acquired. In other words, it should not fail to see whether the property, which is made subject to reallocation, has a causal nexus with the marital relationship. Nathan's comments in section 505, page 317 as quoted by Martensz J. in *Karunanayake's case*¹⁵⁸ in relation to restitution of dowry property appears very appropriate in the search for a satisfactory and acceptable method of restitution of dowry. He says, "It is submitted that if there is to be any restitution whatsoever of *dotal* property, it must proceed upon the supposition that it belongs to the wife, and not to the husband. *Dotal* property is not to be looked upon as a benefit arising out of the marriage, except in so far as, during marriage, the husband has the usufruct of the same; and therefore a decree of forfeiture of benefits, following on divorce, given as against the guilty spouse, should not deprive the wife of her *dotal* property, provided the parties are married out of community". In vivid contrast to Nathan's view is the theory suggested by Shirani Ponnambalam that dowry property should be included in the term "matrimonial asset", not merely because it is obtained as a consequence of marriage but also because its retention and improvement

158. (1937) 39 N.L.R. 275 at p. 280

involves the efforts of both spouses.¹⁵⁹ She is therefore of the view that it will be subject to reallocation according to the statute.¹⁶⁰ This work analyses *cheedanam* on the premise that it is matrimonial property.¹⁶¹ In respect of matrimonial property the Thesawalamai, both in its customary¹⁶² as well as statutory laws,¹⁶³ provides for such an equitable distribution. The statute is very specific in its pronouncement of the customary concept that, entitlement to partnership gains should be equal to the spouses, when it provided that, “Profits arising during the subsistence of the marriage from the separate estate of that spouse” constitutes *thediathettam*.¹⁶⁴ *Cheedanm* under Thesawalamai is drawn generally and mostly from ancestral property. To make it subject to forfeiture under the provisions of the Civil Procedure Code does not sound palatable. It is thus submitted that Nathan’s views, as noted, would find better acceptance since it allows only benefits from dowry property to be subject to forfeiture; especially in view of the fact that, the concept of *thediathettam* in Thesawalamai allows for equitable distribution of profits from separate property and thus it need not again be made subject to forfeiture on divorce.

Rights as widow / widower

The restrictions imposed on a wife¹⁶⁵ become inoperative on widowhood and she assumes rights as a *feme*

159. *Law and the Marriage Relationship. op.cit.* p. 08

160. *Ibid*

161. see Introduction

162. Part IV: 3.

163. Section 19 and 20, JMARIO.

164. JMARIO, section 19 (b)

165. Section 6

sole to control and deal with her property. A widow need not get the consent of the children to deal with her property.¹⁶⁶ It is heartening to note that the customs of the people of Jaffna considered the well being of its aged people. The Code provides that a mother, as a poor widow, may be given a life interest in the dowry of a deceased and issueless daughter by the other daughters to whom the dowry property would have otherwise devolved.¹⁶⁷ The widow however cannot demand this facility as of right. It should be noted that Thesawalamai does not provide such a facility to a father as a widower. It might have been due to the practice in early customary law to draw dowry from only the *cheedanam* of the mother.¹⁶⁸ Thus the customs must have considered it fair enough to give the mother some relief when she was in indigent circumstances; especially when it could be obtained from what was once her separate property. It might have been also due to the fact that by that time of social development the father had assumed the position as head of the family and manager of the family property and customs must have considered him as able to fend for himself. Though this provision of the Code shows disparity in rights of the widow and the widower, yet it recognizes that in circumstances where the husband and wife are each the sole child of their respective parents and they die without issue, the heirs can, out of affection or otherwise, to either parent, as survivor, allow him or her to

166. M. 257.

167. 1: 6

168. Part 1 : 2; It was only subsequently, i.e. during Portuguese times, that dowry was also drawn from the father's separate and the spouses' acquired properties.

possess the inheritance.¹⁶⁹ But the Code warns the heirs to do so in writing to prevent future losses or difficulties.¹⁷⁰ It is a noteworthy feature of the customs of the Tamils of Jaffna that it has been sympathetic and considerate of their elders in their time of need. In the modern day the need to enforce such obligations by the children has necessitated legislative action.¹⁷¹

On the death of a spouse the other is entitled to claim grant of letters of administration.¹⁷² Since the general law governs this aspect provisions in the Civil Procedure Code and principles laid down by courts should apply. It is generally seen that, if contested, a surviving widow's claim is preferred.¹⁷³ But the court can pass over the claim for good reasons.¹⁷⁴ The proviso to section 523 of the Civil Procedure Code now provides that "...the court may for good cause supersede the claim of the widow or widower".¹⁷⁵ A relevant question for consideration is whether the degree of interest as intestate heir or otherwise can affect rights to the claim for letters of administration. As discussed in the following paragraphs a surviving spouse is not considered an intestate heir to the separate property of the other spouse in Thesawalamai.¹⁷⁶ But the provisions in the Code¹⁷⁷ and

169. Part I:15

170. *Ibid*

171. Protection of the Rights of the Elders Act No.9 of 2000.

172. Section 523,CPC ; M. p. 112.

173. M. 623; 626; 643

174. *Sethukavalar v Alvapillai* ,(1934) 36 N.L.R. p. 281 ; *Jamila Umma Jailabdeen* , (1943) 44 N.L.R. p.187

175. Amendment by law No: 20 of 1973

176. See difference of views as regards *Thediathettam*, *infra*, p.p. 402-404

177. 1:9; 1:11

the Jaffna Matrimonial Rights and Inheritance Ordinance¹⁷⁸ definitely help the cause of the surviving spouse in his/her right to claim administration of the other spouse's property. As regards rights of inheritance since one spouse is not considered an heir to the other spouse's separate property¹⁷⁹ it is only where there is no enumerated heir left can the husband / wife become entitled to succeed.¹⁸⁰ Though this provision cannot be termed discriminatory as the wife is placed in the same position, an English Judge in the High Court of Rangoon had this to say of the husband's predicament. He commented on the law of Thesawalamai that, it "was not in keeping with the trend of a progressive society" and visualised the instance of a husband who could live in luxury and comfort on the fruits of his wife's dowry for a brief period and on the death of his wife be thrown on the streets by the wife's heirs.¹⁸¹ It is submitted that the same situation would apply to a wife who was not fortunate enough to be dowered by her parents, or was very unfortunate to have had a husband who had squandered her dowry and left her penniless. The latter instance is a more common occurrence since it can be reasonably supposed that a non- working wife with such a recklessly wasteful husband would have no resources left with her at the end of her marriage, whereas a husband could be

178. Sections 37 and 38

179. Tambiah, Appendix VI, *Laws and Customs of the Tamils of Jaffna*.
op. cit.: *Theagarajah v Paranchothipillai* 11 N.L.R. p.46 ;
Manikkavasagar v Kandasamy, *op. cit.* at p. 24

180. Section 31; *Chelliah v Kadiravelu*, 33 N.L.R. p. 172 at 173

181. C.C.Somasegaram, J.P.U.M., *The Ceylon Law Society Journal*, 1954
-1958.

expected to have been more enterprising or scrupulous enough to guard himself from being “thrown on the streets by the wife’s heirs.”

Husband’s right to possession and life interest-under the customary law

Apart from the rights he has by virtue of his marital powers, the husband has certain rights in respect of the wife’s property qua husband. Under the customary law, as a widower with children, the husband was entitled to “remain in full possession of the estate so long as he does not marry again...”.¹⁸² If however he decided to re-marry and the children were then very young they were generally handed to the mother-in-law or nearest relation.¹⁸³ In such an eventuality the surviving father had also to give over with the children all property brought in marriage by his wife and half of the acquired property.¹⁸⁴ Where the husband did not re-marry, as widower he was entitled to full possession of the wife’s estate¹⁸⁵ but the right was subjected to a condition that a child should be living.¹⁸⁶ As possessor he had the right to enjoy the revenue thereof¹⁸⁷ and the children could not make any claims as long as he lives.¹⁸⁸ The above facts are evidence of how the customs of the land protected the interests of the surviving spouse.

182. Code, 1;11; See M. 225 case no 770 M 226 care No. 5196

183. *Ibid.*

184. *Ibid.*

185. Code, Part 1 : 11; *Chellappa v Arumugam* [1900] 5 Tambiah Rep.145.

186. *Ibid.*

187. *Vijayaratnam v Rajadurai*, *op.cit.* at p. 147.

188. Mutukisna, pp. 218-254.

The extent of the period of enjoyment however, was subject to judicial review. In a case decided as early as 1834 Chief Justice, Sir C Marshall declared, that by the country customs the father could manage the property of the children during their minority, provided he did not marry a second time.¹⁸⁹ In this case the children on attaining puberty demanded their mother's dowry property. The Chief Justice found on the facts that the father was unsuitable and the children to be of a competent age to manage their own property, and decreed in favour of them.¹⁹⁰ The issue came up again in *Swampillai v Soosaipillai*.¹⁹¹ The court declared that all that the father had to do to be entitled for life interest was the same as what the mother had to do when the father predeceased her.¹⁹² Part 1: 9 of the Code was therefore made applicable *mutatis mutandis* to para1:11. The provision in 1:9 that "the son or sons may not demand any thing so long as the mother lives", when applied to the father, disenabled the sons to demand any thing as long as the father was alive.

Re-marriage by the father did not however mean that he had to automatically surrender the wife's property. Though 1:11 of the Code commenced by stating that, on the death of the mother "the father remains in full possession as long as he does not marry again", it is followed by the paragraph which explains that it was what generally

189. M. *Ibid*; *Sinnathamby Carthigesan and brother Alewetty v Yanemooty Cadresin and others*

190. *Ibid*.

191. (1947)49 N.L.R. p. 83

192. *Ibid*

happened. Lascelles C.J. in *Kanapathipillai v Sivakolanthu* was of the opinion that the provision in the Code did not make it an imperative requirement that in all cases where the mother died the guardianship of the children had to be entrusted to the maternal relatives.¹⁹³ Having said so however, his Lordship qualified his statement and said that, without substantial reason the courts should not depart from the general principle laid down in 1:11.¹⁹⁴ Pereira J. added to the view expressed by Lascelles C.J. when he opined that to him it appeared that it was a custom regulated in each individual case more or less by mutual arrangement between the parties and was dependent on the question as to whether the father was a person fit to be entrusted with the children.¹⁹⁵ De Krester J.'s view¹⁹⁶ was to the same effect when he declared that the rule is not of universal application and that the natural grandmother had no absolute right to the custody of the grandchildren where the father contracts a second marriage and is able to maintain them. It appears that it was the general practice only when the children were young. The Code proceeds and states "...in such a case the father is obliged to give ...".¹⁹⁷ If not the case, which is possible, as when the children were not so young and in need to be looked after by the grandmother or when there was no expression of willingness to take the responsibility, then such surrender would not have been

193. 14 N.L.R. 484 at 485

194. *Ibid.*

195. *Theivanapillai v Ponniah*, (1914) 17 N.L.R. p. 437

196. *Annapillai v Saravanamuttu* (1938) 40 N.L.R. p. 1 see also *Ambalavanar v Ponnammam et al* (1941) 42 N.L.R. p. 289 where De Krester J. expresses the same view

197. 1:11

necessary. Thus it is submitted that it is not correct to draw a hard and fast rule as to say that in customary law on the death of the wife the husband had to, as a rule, hand over the children and the wife's property. A case cited in Mutukishna supports the above view. In this case the father intending to re-marry inventorized the property of his deceased wife according to custom. The guardians however after inspecting the inventory expressed their willingness that it should remain under the charge of the father with his child.¹⁹⁸ It is submitted however that by the customary law after re-marriage the husband could not have been entitled to life interest for the code provides that if anything remained after dowering the daughters the father could possess the remainder only till the sons came of competent age and took possession of it.¹⁹⁹

Under the Ordinance

The Ordinance simplified the matter by using the words "parent" and "spouse" thereby leaving no room for thoughts of discrimination.²⁰⁰ But the sections narrowed the period of enjoyment by entitling possession only till such time as the child married or attained majority by either marriage or effluxion of time.²⁰¹ The customary law, in comparison, is more liberal in that there is nothing in those provisions limiting the duration of possession as in sections 37 and 38.²⁰² What happens on re-marriage has not been dealt with by the

198. P. 284, case no:4,811

199. 1:11

200. Section 37 and 38

201. *Ibid.*

202. *Swampillai v Soosaipillai op. cit.* at p. 86

Ordinance. Tambiah refers to section 40 of the Ordinance and notes that these provisions in the Code which are inconsistent with the Jaffna Matrimonial Rights and Inheritance Ordinance should be considered as repealed.²⁰³ Therefore he declares that the Ordinance has changed the law on the subject and now the surviving spouse, though married again, is given a life interest over the property devolving on the minor till the minor marries or attains majority.²⁰⁴

Two other matters need to be analysed. Firstly, the Code is very specific that the surviving parent takes possession subject to the condition that he/she dowers the daughters. That emphasises the importance placed by the customary laws of Thesawalamai on the obligation to dower. The Ordinance however does not impose such an obligation. A plausible reason for such an omission could be the possibility of such a provision interfering with the rights of inheritance provided in section 23. The soundness of such reasoning is made clear by the answer the Legal Draftsman gave to allay the fears of the Commission regarding the need to do away with the rights recognised in *Nagaretnam v Alagaretnam* and *Tambapillai v Chinnatamby*.²⁰⁵ Secondly, as regards the responsibility or obligation to maintain the children of the marriage, the Code merely states that the parent has to “take” the children. The word “take” has to be understood as imposing on the parent the obligation

203. *Law and Customs of the Tamils of Jaffna*, *op. cit.* p. 142. See also *Annapillai v Saravanamuthu* *op. cit.*; *Ambalavanar v Ponnmma* *op. cit.*

204. *Ibid*

205. Ceylon Sessional Papers 1933, Appendix p. 4. – 6

to support. Sinnethamby J. explains thus; "It is to be observed that the mother's right is restricted to *infant* children, subject to the proviso that she "takes" that child, meaning thereby, looks after it and lives with it".²⁰⁶ The Ordinance however is very specific. It states that the surviving spouse who continues in possession "shall be bound to maintain the children...".²⁰⁷ What is clear is that by the customs as well as by statutory law the right to possession of the separate property of the spouse has been coupled with the obligation to maintain the children. Section 40 of the statute is considered as having repealed 1:9 and 1:11 of the Code. However it cannot be said that by such repeal the Ordinance has removed from its ambit the customary law obligation to dower as it is not a provision inconsistent with the Ordinance. What sections 37 and 38 have done is to retain the right of possession of the surviving spouse, [though for the time limited by the section] while taking away the right of the surviving parent to give dowry from property that has vested in the children. Besides, the concept of dowry has been incorporated, even though impliedly, into sections 17 and 33 of the Ordinance. Legally and socially the concept of dowry has not been wiped out.

The nature of the right to possess—rights of a usufructuary

The moment the mother died the property vested in the children²⁰⁸ though possession was with the father.²⁰⁹

206. *Seenivasagam v Subramaniam*, (1960) 65 N.L.R. p.542 at 543

207. Section 38

208. M13

209. M 08- 09

When the property vested in the son he became “the proprietor and the father a usufructuary, or what may be called a tenant by courtesy”.²¹⁰ Thus possession of the property by the father even for 20 years was held not to entitle him to a prescriptive right as it was not adverse and was perfectly consistent with the proprietary rights of the son.

The position under the Ordinance is the same except that the period of occupation is limited to the children attaining majority or getting married.²¹¹ While in possession, if the father made any improvements to the property he is placed in the same position of a usufructuary as regards his rights of possession of the property and enjoyment of the income thereof. It does not entitle him to claim compensation.²¹²

It was seen that the provisions of Thesawalamai regarding custody of children and care of their property have to be considered repealed. It was also conceded that in place the principles of the general law are applicable.²¹³ It should be however noted that the general law would be subject to the specific provisions made in section 37 and 38 of the Ordinance. A question which arises for consideration is whether the father governed by Thesawalamai could exercise the right to appoint a guardian and thereby deprive his wife of the right to possess and manage the minor child's property. Savitri Goonesekere referring to the rights under

210. M 87

211. M. Section 37 and 38.

212. *Arumugasamy Iyer v Muthucumaroo Iyer*, (1967)72 N.L.R. p.136 at 140

213. Savitri Goonesekere, *Sri Lanka Law on Parent and Child*, (1987) p.292.

the Jaffna Matrimonial Rights and Inheritance Ordinance very categorically states that, "These rights are not an incident of parental power but rather encompass an entrenched legal right to possess and enjoy the income from the deceased parent's property even when it devolves on minors".²¹⁴ Thus it would follow that neither the father by virtue of his powers under the Roman Dutch Law nor the court in the exercise of the powers entrusted on it by the general law of safeguarding the minor's proprietary interests could deprive the wife of exercising her rights under the Jaffna Matrimonial Rights and Inheritance Ordinance. The legal right of the wife as the surviving parent to possess and enjoy the minor's property should thus be considered as limiting the father's capacity to appoint a guardian and thereby exclude the mother from so enjoying those rights.²¹⁵ The same would apply to the appointment of a curator by court. Savitri Goonsekere points out that there is a conflict of interest between the customary law which entrusts the parents with the protective role and the general law which entrusts the court with that responsibility.²¹⁶ Since the Ordinance entitles the surviving parent to possession it is submitted that alienation would not be possible and court's consent would have to be obtained for it.

Liability of wife's property for husband's debts

The wife's property cannot be made liable for the deceased husband's debts.²¹⁷ Marshall is of the view that

214. *Ibid.*

215. *Ibid.*

216. *Ibid.*

217. M 136, *Colander v Yravan* ; M.122-123 ; M. 134.

not even the rents and profits from the dowry property are liable to seizure.²¹⁸ But it needs to be noted that under the Code²¹⁹ as well as under the Ordinance of 1911 prior to its amendment, rents and profits from dowry property falls into the category of *thediathettam* and becomes thereby liable to be seized for the debts incurred by the other spouse.²²⁰ The new section 20 however does not say anything about the incidents of *thediathettam*, including its liability for seizure. By the Ordinance, as amended, it is only debts that were incurred by the husband in respect of the wife's property that is recoverable.²²¹ The reverse position, that is where the wife incurs debts in respect of the husband's property in similar circumstances, is not provided for in the Ordinance.

B. Rights over *muthusam*

Muthusam has already been analysed in chapter one. It was noted there that the characteristics of *muthusam* underwent a radical change with the re-grouping of properties by the Ordinance of 1911. As a result, *muthusam* is now not merely "the hereditary property when brought by the husband", as it was in the customary law.²²² It has become, "Property devolving on a person by descent at the death of his or her [emphasis added] parent or of any other

218. Tambiah, *Laws and Customs of the Tamils of Jaffna. op. cit.* p. 173; *Marshall's judgements* p. 1194

219. IV:3.

220. Section 20 (2) of the Ordinance as unamended.

221. Section 6, JMPIO

222. Code I:1

ancestor in the ascending line", otherwise called "patrimonial inheritance".²²³ The rights of spouses to *muthusam* need therefore to be seen under two categories, firstly as the sole separate property of the husband, and secondly as inherited property of either the husband or wife. The first covers the period before 1911 and the latter after it. But, in this chapter dealing with property rights, it is proposed to only analyse the spouses' rights to *muthusam* during the pre 1911 period, that is, when it was considered as the hereditary property brought by the husband into marriage. The rights of spouses to *muthusam*, as their inherited property need not be dealt with in this chapter for two reasons. Firstly, as regards the rights of the husband they are very much the same, before and after 1911; as regards the wife, *muthusam* being her separate property, her rights over it would not be very much different to *cheedanam*, which has already been dealt with. It remains therefore to deal in this chapter with only the rights of the spouses to *muthusam* at the stage when it was considered as the hereditary property brought into marriage by the husband.

Rights during the subsistence of the marriage

A man under Thesawalamai became entitled to hold property as his own only after the death of his parents.²²⁴ This limitation applied only where both parents were alive. Where the father is dead the restriction would not apply as on the death of the father the community came to an end and the son thereafter could not be considered as living

223. Section 25, JMPIO.

224. 1:7; IV:5

unmarried in his father's house and under his control.²²⁵ It was noted that dowry takes precedence over all other property transactions in Thesawalamai. Hence, the sons had very meager possibilities of inheriting property from their parents, as they became entitled to parental property only "if any thing remained" after dowering of the sisters.²²⁶ That too was possible only after the death of the parents.²²⁷ In ancient Jaffna therefore the bachelor sons were under a disability of not being able to acquire property for themselves. To this extent then the customary laws can be considered as having been discriminatory of men as against the women, who, though restricted in their rights over their properties were in a favoured position when it came to obtaining them from their parents as gifts or dowries. This was the position till the enactment of the 1911 Ordinance.²²⁸ The Ordinance altered the position of the sons in two ways. Firstly, the customary rule that they could inherit property of their parents only if anything remained after dowering of the sisters was altered by the provisions relating to inheritance. Rights to inheritance in which children took precedence over others were made subject to only the surviving spouse's rights to a half share of *thediathettam*.²²⁹ It was not made subject to the preference of dowry over inheritance. Secondly, the new definition of *thediathettam*²³⁰ confines it

225. *Umatevipillai v Murugesu*, 3 Bal. reports 119. See also chapter on *muthusam* for a fuller discussion.

226. 1 ; 9 ; 1:11.

227. *Ibid*

228. *Kandar v Sinnachipillai* 36 N.L.R. p.362 at 363

229. Section 20(2), JMRO.

230. Section 19, JMRO ; For a fuller discussion see chapter I on *Muthusam*

to acquisitions by the spouses alone thereby enabling bachelor sons to acquire and own properties for themselves.

The Thesawalamai recognises the husband's separate interest in the *muthusam* property he inherited from his father.²³¹ He has full power to administer his property and this right by the customary laws could be only taken away from him by his sons, if age rendered him incapable of administering it.²³² The sons who took over the property had the obligation to support him, and failure to do so gave the liberty to the father to resume the property.²³³ As regards alienation of *muthusam*, the Thesawalamai does not place any restriction on the man, other than to limit his power of alienation by way of gifts, without the consent of the wife and children, to more than one tenth.²³⁴ This restriction on the husband refers to only donations outside the family. There is nothing in the Thesawalamai which restricted the husband from donating his entire property to his family members, if he wished to do so. The restriction resembles the *legitima portio* or the *legitim* of the Roman Dutch Law.²³⁵ Though the provision is not applicable in the present day context, because of the freedom of testation recognized by the Wills Ordinance,²³⁶ it reflects the customs of the people who were conscious of the importance of the family unit and the need to protect its members from being left destitute. It is

231. *Walliammae v Sandriaseger Modliar Sooper*, M 260.

232. Code 1:8; M579;

233. *Ibid*

234. Part IV:1 of the Code permits the husband to give only one tenth part of his property without the consent of the wife and children

235. Lee, *An Introduction to Roman Dutch Law*, (4th edition) p.368

236. No: 21 of 1844.

significant in the face of wide advocacy of the need to review the concept of family provision and to re-introduce it.²³⁷ It should be also noted that this restriction existed only when the spouses were living in separation. As owner of the *muthusam* the husband had however full power to mortgage or sell the same.²³⁸ The Code makes no provision to say that it is necessary for him to let his wife know of the disposition or get her consent.²³⁹ The right of the husband is contrasted with the inability of the wife who, it is said, “may not give anything without the consent of the husband as she is subject to the will of the husband”.²⁴⁰ The customary law has been discriminatory of the wife in that it permitted the husband to donate at least one tenth of his hereditary property while however disallowing the wife from giving away anything without the husband’s consent.

Right to give dowry

The father as well as the mother was bound by custom to give a reasonable share of their property in dower to their children.²⁴¹ In early law the extent of the husband’s involvement in giving a dowry to his daughter was only as an associate of the wife, since it was from her *cheedanam* that dowry was given.²⁴² His, the husband’s property,

237. Savitri Goonesekere, *The Legal Status of the Female in the Sri Lanka Law on Family Relations*, at p; 92

238. *Seelachchy v Visuvanathan Chetty*, *op.cit.* p.103

239. *Ibid*

240. *Ibid*

241. *M.* p. 151

242. 1:2; 1:4; 1:5. For a fuller discussion see chapter on *cheedanam*, para on right to give dowry.

“always remained with the male heirs...”.²⁴³ The involvement became more direct and, equal so to say, when the above rule underwent changes during the time of the Portuguese, and dowry was taken from the husband’s *muthusam* and *thediathettam* as well. But in so giving his *muthusam* the husband was not entitled to give away all his property to one daughter.²⁴⁴ If however it was so given, a case reported in Mutukisna has held that notwithstanding that the dowry *ola* passed in favour of one daughter, it was possible to take back the dowry so given and be shared by all the daughters in equal shares. It is submitted that, though it could have been possible at a time when customs had a strong hold on society, it is certainly not legally possible in the modern law.

As regards the wife’s rights to dower the daughters from the deceased husband’s separate property, Moncrief A.C.J. in *Murugesu v Vairavan* was not prepared to concede the same right enjoyed by the husband to the wife also.²⁴⁵ He held that though the wife was entrusted with the responsibility to give a dowry to the daughter, she did not have the power to give a divided portion of the husband’s land as dowry. If however she did so, the right of the daughter so dowered to hold a divided portion expired with the life of the mother. Garvin J. however did not agree with Moncrief A.C.J. He declared: “upon the death of the man leaving children and a widow, their mother, his property

243. Code I:1

244. *Werepattiren of Carreoor v Bastianpulle Marco and others*, M. p. 93

245. (1904) 2.Bal.rep. p.143

remains with the mother in whom is **vested**²⁴⁶ the right to apply that property or any part thereof in giving a dowry or dowries to their daughters on marriage”.²⁴⁷ It appears then that both the husband and wife had the same rights on the death of either one of them to take from the other spouse’s property to dower their daughters. Neither spouse can claim such power after the 1911 Ordinance²⁴⁸ since now on the death of a spouse the property vests in the heirs.

Rights of the widow on intestacy - to possess

The rights of the widow to her husband’s separate property are very much similar to that of the widower over his deceased wife’s *cheedanam*, in customary law as well as under the Ordinance.²⁴⁹ She has an interest for life over her husband’s property. This right to possess was coupled with the obligation to maintain the children and dower the daughters from his property. Just as in the case of the husband the time limit for the exercise of such rights has been restricted by the Ordinance. The widow can be expected not to waste the estate of her husband. A case reported by Mutukisna says that if the mother so wastes the estate the sons can, on condition of supporting the mother, take possession of the property.²⁵⁰ Generally however the sons cannot claim their father’s estate during the life time of

246. Emphasis by writer

247. *Sinnathangachy v Poopathy*, (1934) 36 N.L.R. p.103 at 104; Part 1:9 of the Code.

248. *Ibid.* at 104; Section 22 I.M.R.I.O.

249. Code 1:9; Sections 37, 38 J.M.R.I.O.

250. M. 225

their mother.²⁵¹ Just as the husband, the wife has an interest in the separate property of the husband, as the profits there from become *thediathettam*. The difference however is that since the husband has marital rights over her and her property he could prevent her disposing it in order to reap a share of the profits, whereas the wife could not do same as regards his separate property.

Right of widow to letters of administration and obligation to pay debts

On the death of a spouse the other spouse gains priority to administer the deceased's estate.²⁵² Section 523 of the Civil Procedure too makes similar provisions. However, it has been held that the claim of a widow could be passed over by court for good reasons.²⁵³ The smallness of a widow's claim however was not considered as a good or sufficient reason to displace the preference given by law to the wife.²⁵⁴ In a case decided under Kandyan Law, Woodrenton C.J. was in agreement with the above view with respect to a widower, when he observed that a *Binna* married husband in Kandyan Law may not have pecuniary interest in the estate of his wife, but as her husband and the father of her children he should have the opportunity of seeing that his wife's interest is properly dealt with.²⁵⁵ The amendment to section 523 by Law no. 20 of 1977 now provides that the court may for good cause supersede the

251. 1:9; *Vellaiyan v Valliyam*, (1948) N.L.R. p.526.

252. M. p.623 ; 626 ; 644 ; p.650.

253. *Sethukavalar v Alvapillai*, (1934) 36 N.L.R. p. 281.

254. *Jamila Umma v Jailabdeen* (1943) 44 N.L.R. p.187.

255. *Appuhamy v Menike* (1916) 19 N.L.R. p.149.

claim of the widow or widower. It is therefore pertinent to ask as to whether section 523 could be used by court to oust the right of a wife under Thesawalamai, when the husband has not left any acquired property. It has to be remembered that in Thesawalamai the surviving spouse is not an heir to the deceased spouse in relation to separate property of the spouses and it is in respect of the acquired property that she becomes entitled to a share. If the spouses do not have any children born out of the union, the necessity to protect their interests too would not arise as a matter for consideration in giving letters to the surviving spouse. In *Sivagnanalingam v Suntheralingam* ²⁵⁶ the deceased husband's estate did not constitute *thediathettam* and there were no children by the marriage. In addition to the proviso to section 523 these facts were considered by Sharvananda C.J. Thus on the basis that the claim of a widow who had no interest as heir and had no interest of children to protect should be superseded by the claim of the intestate heir, the C.J. held that the petitioner be granted letters of administration.

256. *Sivagnanalingam v Suntheralingam* [1988] 1 Sri.L.R. p. 86 at 98

C. Rights over *thediathettam*

Introduction

A study of the rights and obligations of spouses over *thediathettam* is quite complex by reason of the fact that the matrimonial property system of those governed by Thesawalamai is a combination of features of the two most common types of matrimonial property regimes, namely the community property regime and the separate property regime. The former, in the context of *thediathettam* can be more specifically termed as a system of community of interest. A different interpretation was however placed on the definition of *thediathettam*, as amended in 1947, to show it as the separate property of the acquiring spouse with only deferred property rights gains to the non acquiring spouse in the event of the death intestate of the acquiring spouse.²⁵⁷ But the law to-day, as laid down by courts, continues to recognise it as the common property of the spouses.²⁵⁸

This dual classification of acquired property in Thesawalamai makes it necessary to analyse spouse's rights to *thediathettam* from two perspectives, namely, as the common property of the spouses and as their respective separate properties. It also makes it inevitable to view the rights of spouses to *thediathettam* in the different periods of its development; if one may call it a development process. The first is the period when the law was purely custom

257. Gratien J. in *Kumaraswamy v Subramaniam*, (1954) 56 N.L.R. p.44

258. Sharvanantha CJ. *Manikkavasagar v Kandasamy*. (1986) 2 Sri.L.R. p. 12

based. Though it is necessary in covering this period to focus attention on the Code, which itself took a place in the statute book²⁵⁹ we will be looking at it only as a document that contains the customs in a codified form. The second will be statute based and initially cover the period from the enactment of the 1911 Ordinance to its amendment in 1947. The 1911 Ordinance before its amendment of 1947 is in a way similar to the Code in that the Ordinance can also be called a declaratory law of Thesawalamai,²⁶⁰ for, what the Ordinance did was to put into statute form many of the customs. But its provisions cannot be discussed conveniently under the earlier period as it is also “An Ordinance to **amend** [emphasis added] the law relating to the matrimonial rights of the Tamils who are now governed by Thesawalamai with regard to property and law of inheritance”. The second phase of the statutory period would cover the period from the Amendment Ordinance No. 58 of 1947 to date.

In amending the law, the Ordinance in 1911 re-defined *thediathettam* which resulted in changing the fundamental concept underlying matrimonial property in Thesawalamai, thereby entailing serious legal complications. This therefore necessitates separate discussion. The complexity in examining the proprietary rights of spouses in relation to *thediathettam* can also be attributed to the judiciary who were confronted with a law which was custom based and

259. The Thesawalamai Regulation No. 18 of 1806.

260. Ennis J. in *Chellappah v Valliammah*, (1923) 1 Times of Ceylon Report, p. 274 noted that “The Ordinance No: 1 of 1911, which has been taken, generally speaking, as the codification of the customs existing prior to the enactment of the Ordinance....”, at pp.276-277.

with which they were not familiar. It is not surprising that Hutchinson C.J. found the Thesawalamai "far from clear",²⁶¹ while Pereira J., quoting Tennyson's words, which were used with reference to another set of laws, called the Code, a "wilderness of single instances" and as an "ill arranged and ill-expressed mass of law and custom".²⁶² It is clear that the judiciary found customary law either too vague or meager to comprehend. This resulted in drawing very liberally, and in many instances unnecessarily, from Roman Dutch Law principles to explain a customary law principle or to fill a *cassus omissus*. What remains of Thesawalamai today as a result is a curious mixture of Roman Dutch Law and statute law with only marginal reference to the provisions of the Code.²⁶³ This feature is more apparent in *thediathettam* than in *cheedanam* or *muthusam*, because, the community of property in *thediathettam* was found to be analogous to community of property under the Roman Dutch Law.

Rights during the subsistence of the marriage

Management and control

The Jaffna Matrimonial Rights and Inheritance Ordinance in providing for the rights of spouses married before the Ordinance says that, **unless otherwise expressly provided for**, they shall be governed by **such law** [emphasis added] as would have been applicable to

261. *Nagaretnam v Alagaretnam*, (1911)14 N.L.R. p.60 at p.61.

262. *Chellappa v Kanapathy*, 17 N.L.R p.294.at p.295.

263. *Introduction to the laws of Sri Lanka*, Block-2, p.72. Open University of Sri Lanka

them had this Ordinance not been passed.²⁶⁵ The reference is to the law that was in existence before the enactment. Balasingam seems to give an explanation to the words, “such law,” noted in somewhat a cryptic manner in the section. He states that, “matrimonial rights of spouses when not defined by express provision or necessary implication by the Thesawalamai Code was governed by the common law of the island, the Roman Dutch Law.”²⁶⁶ It is surprising that reference is made to the Roman Dutch Law and not to the customs or the Hindu Law. However, Mutukisna in several cases and several writers on Thesawalamai, like Tambiah, Kantawala, and Sri Ramanathan make mention of the influence of Hindu Law in Thesawalamai. Even the system of joint family living identified in Thesawalamai and discussed in this work shows the influence of Hindu law and not of Dutch Law as the judiciary projected it to be.²⁶⁷

The rights of spouses under the old Thesawalamai are based on the premise that property in general belongs to the family. The father as head of the family had the right to administer the family property. Though Thesawalamai recognises the distinct and separate interest of the spouses in their separate properties and mutual interest in the common property,²⁶⁸ for purposes of administration all properties were under the husband’s control. The husband’s rise to importance and his exalted position in the family were discussed in earlier chapters. It was also noted that with

265. Section 4

266. *Laws of persons* (1933) vol:11, p.555.

267. *Supra*, Chp on cheedanam, pp. 89, 109, 193-194

268. M. 260.

the second wave of colonists who were Hindus by religion, the influence of patriarchal principles was felt in Jaffna society. The agricultural economy helped further to stabilize the husband's position. It is against this backdrop that the powers exercised by the husband as a *pater familias* has to be viewed, though the judiciary generally found it convenient to understand and interpret the customs from the angle of the Roman Dutch Law.

The concept of marital power and the husband's position as manager

The husband as the head of the family automatically functioned as the manager of the family property. The Code however does not specifically place the husband in the position of manager. The provisions generally associate both the spouses in dealings concerning property. There is however one provision, i.e. part IV:1, which is suggestive of the husband's superior position in the family. Even this provision deals only with the spouses' right to donate and that too only to donate their separate property and not their acquired property. It needs to be stressed that it was the courts that were to a great extent instrumental in projecting the position of the husband as the manager of the family property. Bertram C.J. in *Seelatchy v Viswanathan Chetty* declared, "It is an essential feature of the community in almost all its forms that the husband should be the manager of the common property" and very categorically stated, "...there is no question that it is so in Thesawalamai."²⁶⁹

269. *Op. cit* at p.108; See also Garvin A.J. in *Seelatchy v Visuvanathan Chetty* (1922) 23 N.L.R. 97 at p. 122 ; McDonnell C.J. in *Sangarapillai v Devaraja Mudaliyar* , (1936)38 N.L.R. p.1 at p.10.

Garvin J. disagreed with Bertram C.J. as to the right of the husband to donate the entire *thediathettam* and the wife's relief when he did so, but was in agreement with him as regards the position of the husband as the manager of the common property. He declared, "Under the Roman Dutch Law as part of the marital powers committed to the husband was the right to control and dispose of property belonging to the community".²⁷⁰ Relating it to Thesawalamai he declared, "It has been held by this court that the husband may under the Thesawalamai dispose of common property by way of sale".²⁷¹

The courts in so projecting the position of the husband by using principles of Roman Dutch Law were not expressing a view which was against the traditions of the people governed by Thesawalamai. What was different was the basis on which the superior power of the husband was rested. This is because even in early Jaffna society it was the male member of the family who, as in Malabar, his former place of residence, managed family property. There was however a difference. In Malabar, a senior male member, often the mother's brother, designated as the *karnavan*, functioned as the manager of the *taward* of the Marumakkalthayam Law or the *kudi* of the Mukkuwa Law. What was established in Jaffna however was, not the *taward* but the *tavazhi* system.²⁷² This *tavazhi* was created for the daughter by the father when she got married. The *tavazhi* system that was created in Jaffna was different to

270. *Seelachchy v Visuvanathan Chetty op. cit* at p. 122; See also *Marriage Breakdown and the Duty Of Support*, where with respect to marriages in community, Sharya De Soysa states that, "the husband by virtue of the marital power has control over the entire assets of the community...." pp. 79-80

271. *Ibid.* Digitized by Noolaham Foundation.

272. *Supra*, Chapter on *Cheedanam*, pp. 79-80

its counterpart in Malabar. It was not an extension or a branch of the *taward* of the Marumakkalthayam law. In that country the sub-units were made necessary for many reasons.²⁷³ The main reason was that when the *taward* itself became too large and unwieldy it had to be sub-divided. In Jaffna the circumstances were different. As already discussed, the *taward* was never introduced into Jaffna. The early settlers, considering that the arid climatic condition of their new place of settlement was very different from the cool mountainous hill tops of Malabar, found the smaller units headed by the husband more suitable. It is therefore not surprising that this unit, the *tavazhi*, was headed by the daughter's husband just as the *karnavan* functioned in Malabar under the Marumakkalthayam Law.²⁷⁴ It can be summed up by saying that the climatic condition of Jaffna combined with its agricultural economy made it inevitable that the man, endowed with superior physical prowess, had to take upon himself the burdensome responsibility. It can be said that the subsequent introduction of Hindu Law and its concept of patriarchy provided the necessary ideology to base it.

The courts in granting to the husband the status of manager were therefore not creating a new concept. But they acted irrationally when they considered the position of the husband as analogous to that of his counterpart under the Roman Dutch Law and bestowed on him powers that a husband enjoyed under that law. They lost sight of the fact

273. Ref: chapter on *Cheedanam*, pp. 80-83

274. Sreedharavariar, *op. cit.* at pp. 5 and 38 ; Tambiah, *Laws and Customs of the Tamils of Jaffna*, *op. cit.* p.14;

that the community in Thesawalamai, which clearly recognises a distinct and separate interest of the spouses in their separate properties²⁷⁵ is quite different from other types of community where property is held jointly, especially from that of the Roman Dutch Law. Burnside C.J. noted the difference when he observed, “The principle that man and wife are to be regarded as separate individuals with regard to property does not extend to acquired property during the existence of the marriage...”²⁷⁶ If only the difference in the two systems had been taken note of, it would not have been necessary for the courts to bring in the Roman Dutch Law concept of the marital powers of the husband and restrict the wife’s rights to her separate property.²⁷⁷

Tambiah notes that during the time of the Aryachakravarty the Hindu Law was administered as a residuary law as it was a mature and well developed form of law.²⁷⁸ He also cites the report of Sir Alexander Johnstone wherein it has been stated that the people of Jaffna were governed by their customary laws but where the customs did not provide for a certain matter the Hindu Law was applied.²⁷⁹ Nadaraja notes that in the early years of British rule Hindu Law was used to elucidate and supplement the provisions of the Code and that later the tendency to apply

275. M.260; See also *Rights of Spouses within the marriage Relationship* by Sharya de Soysa, Comparative and International Law Journal of Southern Africa July, 1986.

276. *Katharavaloe v Menatchipille* (1892) Ceylon Law Reports, vol; II, p.132.

277. Code, IV:1; section 6, JMRO.

278. *Laws and Customs of the Tamils of Jaffna*, op. cit. p. 22

279. Ibid, see also Mutukisna cites several cases where reference has been made to Hindu Law

Hindu Law was discouraged by courts.²⁸⁰ In the foot notes to the English translation of the Thesawalamai, as collected by Claas Izaacs, references to text books on Hindu law are given. Tambiah explains that these references only show that similar principles as noted in the collection were found in Hindu Law and that the person responsible for the annotation had thought that they were from Hindu Law.²⁸¹ He concludes that the principles in the Thesawalamai which are similar to Hindu Law came through Dravidian usages, when Hindu law and Aryan civilisation came into contact with the Dravidian usages.²⁸² According to Tambiah, Thesawalamai has its origins in the Dravidian usages²⁸³ and though some Hindu law influence is felt, as regards property rights and relations, neither patriarchy nor Brahminism has had a stronghold on the Jaffna community.²⁸⁴ It is thus quite clear that the recognition by the courts of the superior powers of the husband and his control over the wife's property in the modern law of Thesawalamai²⁸⁵ has much more to do with Roman Dutch Law than with patriarchy. It can be however said that ideas

280. *The Legal System of Ceylon In Its Historical Setting* (Leiden, Netherlands, E. J. Brill, 1972) p. 187, fnn. 125-127

281. *Laws and Customs of the Tamils of Ceylon. op. cit.* p. 126

282. *Ibid.*, at p. 127.

283. *Laws and Customs of the Tamils of Jaffna op. cit.* p.5 ; He also cites Mayne in support. Mayne's *Hindu Law*. (7th edition) *op. cit.* p.50.

284. Tambiah, *Laws and Customs of the Tamils of Ceylon, op. cit.* p.125-127.; Hindu law was not applied to Tamils of Ceylon as a personal law as Mulim law was applied to Muslims. It applies to Ceylon Hindus "only to the extent to which it has been recognized by the legislature or by custom in Ceylon". This means that Hindu Law is restricted to the religious charitable endowments and trusts. Nadaraja, *Legal system of Ceylon In Its Territorial Setting, op. cit.* p. 188

285. *Introduction to the Laws of Sri Lanka*, OUSL, Block 2 – p. 72

of patriarchy did facilitate the acceptance and enabled the easy application of the Roman Dutch Law concept.

Husband's right or power to sell, mortgage or lease and the wife's incapacity

It is against this backdrop that the husband's right to sell, mortgage or lease *thediathettam* has to be considered. The Code which associates the wife with the husband in property transactions entered by the husband by way of dowry gifts or donations etc. does not state anything about the spouses' right to dispose acquired property. The courts however drew an analogy between the concept of community of interest in *thediathettam* in Thesawalamai and community of property system in Roman Dutch Law and found it convenient to apply the concept of marital powers of the husband of the Roman Dutch Law to explain the powers enjoyed by the husband under Thesawalamai in respect of *thediathettam*. The common nature of the property has been the basis for the court to so empower the husband.²⁸⁶ Dalton J. while dealing with the same aspect reiterated the judicially accepted view that the husband in the exercise of his power of management could freely sell the common property.²⁸⁷ Macdonnell C.J. went further and cited Dutch authorities to explain the husband's status. His Lordship said, "This is in accordance with the Common Law, Grotius, Introduction, bk.I.,c.5s.21, "In this country

286. Burnside CJ in *Kathiravaloe v Menatchipille* C.L.R. Vol ; 2 p. 132 ; See also Bertram CJ in *Seelachchy v Visuwanathan Chetty op. cit.*

287. *Muthupillai v Vallipuram* , 8 Records 55 and 84 ; *Iya Matteyer v Kanapathepillai, op. cit.* at p. 309;

the guardianship of the husband over the wife's property is very extensive"; section 22, "By virtue of this guardianship the husband appears for his wife in court. He alienates and encumbers her property, even that which she has kept out of the community without requiring her consent"; and 1 Van Leeuwen, c.6.s.7, "Everything so far as the wife is concerned must and can be done by her husband who in law acts for his wife and encumbers and alienates her property...without first requiring her consent thereto". Our courts seem always to have accepted this interpretation of the *tediatetam* thereby applying the Common law".²⁸⁸ It is thus very clear that the courts went on the basis of the Roman Dutch Law concept of marital power to empower the husband under Thesawalamai to sell or mortgage the entire *thediathettam* property, without having to associate the wife either by requiring her consent or making her a party to the transaction. Macdonnell C.J. justified the court's approach by declaring that the Malabar law does not prevent a husband from mortgaging the acquired property, whether with or without the consent of the wife.²⁸⁹ The decision by Macdonnell C.J. was followed by subsequent courts.²⁹⁰

Apart from making the husband the manager of the common property, the courts, acting on the same basis, also depicted him as "the sole and irremovable attorney of the wife" when he exercised the right to sell the entire

288. *Sangarapillai v Devaraja Mudaliyar*, op. cit. at p. 4.

289. P. 124. See also Bertram C.J. in *Seelachchy v Visuvanathan Chetty* op. cit., p.108; *Ambalavanar v Kurunathan*, (1935)37 N.L.R. p.286.

290. *Ambalavanar v Kurunathan*, op. cit; *Tambiah v Sangarajah* (1937) 39 N.L.R. p.61.

thediathettam.²⁹¹ Acquiescing with Macdonnell C.J., Tambiah J. in *Vijayaratnam v Rajadurai* declared, “The marital power of the husband to alienate or mortgage the *thediathettam* property of his wife is referable to the husband’s status as attorney of the wife”.²⁹² Based on the assumption that the husband has legal title to *thediathettam* property Macdonnell C.J. bestowed on him the status of the attorney. H.N.G. Fernando, J. however repudiated the theory put forth by Macdonnell C.J. and made clear the status of the husband as attorney. He said, “The purpose of a power of an attorney to sell is to confer a power of sale upon a person *who has not the legal title*, so that the status of an attorney is quite inconsistent with an owner”.²⁹³ The conferring of a status of attorney only helps to reinforce the standpoint that the husband’s power to sell arises as manager of the common property and not because he holds the legal title to the wife’s share. The assignment of such superior position however found recognition in an unbroken line of decisions to the effect that the husband could sell or mortgage the entire *thediathettam* property.²⁹⁴ The wife under the customary law who had no right to dispose her separate property without the consent of the husband had no control over her share of *thediathettam* as well, as the husband

291. *Sangarapillai v Devaraja Mudaliyar*, *op. cit.* at p. 7. See also *Kumaraswamy v Subramaniam*, (1954) 56 N.L.R. p. 44 at p. 46.

292. *Vijayaratnam v Rajadurai* (1966) 69 N.L.R. at 147; see also Gratien J. in *Kumarasamy v Subramaniam*, *op. cit.* at p.46

293. *Annapillai v Easwaralingam*, (1960) 62 N.L.R. p.224 at 229

294. *Seelachchy v Visuvanathan Chetty*. *Op. cit* ; *Ambalavanar v Kurunathan*, (1935) 37 N.L.R. p.286; *Tambiah v Sangarajah*, (1937) 39 N.L.R. p. 61 ;

alone as manager had the right to sell or mortgage it.²⁹⁵ Thus as regards *thediathettam* the wife was in a far worse position, for, unlike in the case of her separate property where she had to give her consent if the husband ventures to sell it, in respect of *thediathettam* she did not have even that right. This is because, as Macdonnell C.J. puts it, "For those purposes the husband is the *persona* to whom alone the law looks".²⁹⁶ Dalton S.P.J. agreed with the C.J. when he said that, the husband as manager of the common property has full power in himself to sell and mortgage *thediathettam* without the consent of the wife.²⁹⁷ The wife need not be even made a party to a hypothecary action against the husband on a mortgage effected by him.²⁹⁸ But if the mortgagee put the bond in suit after the death of the wife her heirs would have to be made a party to the action in order to make their interests in the property bound by the hypothecary decree.²⁹⁹ Furthermore, section 8 does not cover *thediathettam*. Thus the relief that the statute gives the wife who is in difficulties and who is unreasonably obstructed by the husband to deal with her separate property,³⁰⁰ is not available to her in respect of her share of *thediathettam*.³⁰¹ It is submitted that this position will have to be reviewed with the inclusion of *thediathettam* into

295. *Theivanapillai v Nalliah*, (1961)65 N.L.R. p.346 at 347; See also *Sangarapillai v Devaraja Mudaliyar*, *op. cit.*

296. *Sangarapillai v Devaraja Mudaliyar*, *op. cit.* at p. 07.

297. *Ibid*, at p. 09. See also *Ambalavanar v Kurunathan*, *op. cit.* at p. 288.

298. *Sangarapillai v Devaraja Mudaliyar*, *op. cit.*; *Tambiah v Sangarajah*, *op. cit.* at p. 62.

299. *Tambiah v Sangarajah*, *op. cit.*

300. JMRIO, sections 8 and 10

301. *Ibid*.

section 6 by the amendment of 1947. As the separate property of the acquiring spouse the wife should be able to seek sanction from court to dispose her share of *thediathettam* if the husband's consent is unjustifiably withheld.

By the Ordinance of 1911. [Before its amendment]

The Ordinance excluded *thediathettam* from the separate property of the spouses.³⁰² As such the husband had no statutory right to dispose or deal with *thediathettam* as he had over his separate properties.³⁰³ Section 20 (1) is specific that separate use of *thediathettam* can be had by the spouses only on dissolution of marriage by death or divorce. Further subsection (2) makes it subject only to liability for payments of debts of either spouse. It does not make it subject to the husband's power of sale or any other form of disposal. The status and power bestowed on the husband by courts on the basis of Roman Dutch Law principles was analysed in the foregone pages.³⁰⁴ The legislature did not interfere with the stand taken by the courts. Nor did it make any amendments in favour of the wife. To the contrary it impliedly incorporated the concept of marital power into section 6. Thus Macdonnell C.J. declared in very specific terms: "I can find nothing in the Ordinance inconsistent with the law in force prior to the Ordinance, so far as it gave the husband full management

302. JMARIO, Sections 6 and 7.

303. J.M.R.I.O. Section 7.

304. *Sangarapillai v Devaraja Mudaliyar*, *op. cit.* at p. 10.

and control of the *thediathettam*, including power to sell and mortgage it.”³⁰⁵ The Ordinance not only gave statutory recognition to the restrictions placed by the Code on the wife to donate her property³⁰⁶ by incorporating it into section 6 but it went further and extended the restrictions placed by the Code to all transactions by the wife. “The Legislature”, said Macdonnell C.J., “far from abrogating the concept of marital powers of the Common Law deliberately refrained from interfering with it”.³⁰⁷ Thus application of the Roman Dutch Law concept of marital powers continued even after the coming into operation of the statute. Therefore the husband alone was entitled *jure mariti* not only to manage but also to sell or mortgage the entire *thediathettam* for which the consent of the wife was not necessary.³⁰⁸ Where however the community came to an end by death or divorce he had the right to deal with only his half share.

As manager of the family property the husband could make use of the common property for the benefit of the family. Sections 6 and 20 did not take away or deny such use. On the contrary, the husband’s status as manager seems to have been recognised by giving him powers of administration and management over the wife’s property. This factor too could have encouraged the courts to continue to apply the concept of marital powers of the Roman Dutch

305. *Ibid.* In *Ambalavanar v Kurunathan*, *op. cit.* at 288 the court recognized the husband’s right to mortgage *thediathettam* property even without the consent of the wife.

306. Code, 1V:1

307. *Sangarapillai v Devaraja Mudaliyar*, *op. cit.*

308. *Seelachchy v Visuvanathan Chetty*, *op. cit.* at p.108 ; *Theivanapillai v Nalliah* *op. cit.* at 347 ; *Singaravelu v Ponnai*, (1948) 50 N.I.L.R. p.280 at 282

Law. Such application had the result of empowering him to sell the entire *thediathettam* even without the consent of the wife. The result was very detrimental to the wife and the objective of having property in common ownership was lost in the process. Some of the cases that came before the courts have positively shown that the absolute authority given to the husband could be used to defraud the wife and her heirs. For instance in *Iya Mattayer v Kanapathipillai*³⁰⁹ the husband had made a purported sale of the entire *thediathettam* to his brother just two days prior to the death of his wife. It was found by court that the sale was executed fraudulently and without consideration. It becomes very pertinent to point out in this context that our courts, which adopted by way of analogy the concept of Roman Dutch Law, failed to take into consideration the fact that under Roman Dutch Law a wife who was prejudiced by the action of the husband had the protection of the law under that system. Lee very aptly commented thus: "A married woman, may be utterly ruined by her husband's extravagance, but the remedy is in her own hands, viz. to ask the court to interdict the husband from the administration of the estate".³¹⁰ This right however was not made available to the woman governed by Thesawalamai, either by the Legislature or by the courts, though identical principles of Roman Dutch Law were made relevant. The Ordinance provides some relief only in respect of separate property.³¹¹

309. *Iya Mattayer v Kanapathipillai*, *op.cit.*

310. *An Introduction to Roman Dutch Law*, *op. cit.*, (4th edition.) p.71.

311. Sections 8 and 10, See also *Theivanapillai's* case, *supra*.

Apart from such possibilities the marital power of the husband works in a manner which is unjust and inequitable in the present social context where more and more women are taking up employment outside the domestic area. When the wives use their earnings to meet day to day domestic expenses or for the common use of the family as for example to pay housing loan instalments, they enable their husbands to save and purchase properties. Such purchases would fall into the category of *thediathettam*. But if the husband exercises his marital power and sells them to serve his personal needs, for example, to meet his extravagant life-style and spending sprees, it would be very unjust by the wife for she would not be able to derive any benefit from it. The objective of having acquisitions during marriage as common property too would be lost. It would be only speculative, but nevertheless risky, to seriously have faith in the presumption that the proceeds from sales or mortgages would always be in the interest of the family, as suggested by counsel in *Seelachchy's* case.³¹²

It is an irony that this vestige of the Roman Dutch Law which was swept away by the Matrimonial Rights and Inheritance Ordinance and the Married Women's Property Ordinance in respect of those governed by the general law is applied as regards women governed by Thesawalamai. To the women governed by the general law Roman Dutch Law applies as the common law. But to their counterparts under Thesawalamai it is not so, for they have their own customary laws. If at all it has to be applied it

312. *Seelachchy v Visuvanathan Chetty*, *op.cit.* p.105.

comes in only as residuary law. The remoteness of applicability is evident from the judicially accepted principle that Roman Dutch Law could be applied not necessarily when there is no express provision in the Thesawalamai but more appropriately when there is not even a relevant principle that could be deduced from the existing provisions.³¹³ Other than seeing such indiscriminate and obtrusive application of Roman Dutch Law as an act of male chauvinism and lethargy of the legislators, it is definitely not possible to identify any special reason as to why it should have been retained and strengthened as regards the Thesawalamai women, leave alone applied in the first instance. What the legislature did was to merely copy the provisions of section 8 of the Matrimonial Rights and Inheritance Ordinance into the Jaffna Matrimonial Rights and Inheritance Ordinance and leave it to remain there, even though it repealed it in 1923 from the Matrimonial Rights and Inheritance Ordinance itself.

The statutory definition of *thediathettam* by the Ordinance of 1911 and the judicial interpretation placed on it further complicated matters for the wife.³¹⁴ Besides enabling the husband to obtain a share of the wife's separate property when it was used as consideration to purchase *thediathettam* property during marriage it also enabled him to dispose such property even without her consent.

The wife who had no rights of selling or mortgaging *thediathettam* during the subsistence of the marriage has

313. *Theagarajah v Paranchotipillai*, (1908) 11 N.L.R. p.46 ; *Chanmugam v Kandiah*, 23 N.L.R. p.221.

314. For a fuller discussion see chapter on *Thediathettam*

however been given the right, as the surviving spouse, to sell the deceased husband's *thediathettam* property to settle his debts.³¹⁵ The court held that since there were no statutory provisions or decisions of the court dealing with the situation the Roman Dutch Law was applicable³¹⁶ and based on that principle recognised the right of the wife to sell *thediathettam* to meet the debts of the deceased husband. It was also decided that notice to warrant and defend title must be given to the wife separately in order to hold the wife liable for a sale contracted by the husband and the wife.³¹⁷

The Ordinance as amended in 1947

The husband's marital powers in Thesawalamai are based on the concept of community of property in *thediathettam*. As to whether after the amendment he could continue to exercise the same degree of marital powers over *thediathettam* as manager and attorney of the wife, is a matter of conjecture, as neither section 19 nor 20 speaks of *thediathettam* as the common property of the spouses as did the repealed sections. On the contrary *thediathettam* has been now included in sections 6 and 7 by the removal of the exclusion clause, "except by way of *thediathettam*", from these sections. The result is its inclusion into the other separate properties of the spouses. The rights of spouses to *thediathettam* will thus depend on the future stand courts prefer to adopt, that is, whether they would continue to hold

315. *Saravanamuttu v Nadarajah*, 57 N.L.R. p. 332.

316. *Ibid.*

317. *Durairajah v Mailvaganam, op. cit.* 59 N.L.R. p.540

thediathettam as the joint property of the spouses or prefer to consider it as their separate properties. As it is, the Supreme Court, by its latest decision³¹⁸ on this aspect, has held that the concept of *thediathettam* as property common to the two spouses is firmly entrenched in the jurisprudence of the law of Thesawalamai and cannot be jettisoned “by a side wind”; other than by “unequivocal express legislation”. It thus becomes clear that rights of spouses to *thediathettam* have to be considered in that perspective. The assumption also follows that the right enjoyed by the husband to sell the entire *thediathettam*, as recognised by courts under the Code and subsequently under the Ordinance of 1911, could continue under the amended Ordinance as well. As against this view we have Tambiah’s opinion expressed in very strong language that, “All these propositions governing *thediathettam* have been swept away by the Amending Ordinance, since if the wife acquired such property the title is in her and in the absence of any statutory provision empowering the husband to transfer property over which he has no title, except with the concurrence of the wife who is also made a party, he cannot sell, mortgage, lease or even donate such property during coverture or even will “his” property [“this”] since it is not his own”.³¹⁹ It is submitted that such an expression in no uncertain terms is difficult to comprehend, in view of the rule laid down by our courts time and again that a clear enactment would be

318. *Manikkavasagar v. Kandasamy*, *op. cit.*

319. P. 176. (Revised edition)

necessary to abrogate a fundamental principle established by custom and followed by courts.³²⁰

If considered as Separate property

The very strong, but contradictory views expressed by judges and jurists alike as to whether *thediathettam* is common or separate property³²¹ do not make it easy to anticipate what the position would be regarding the husband's power to sell, mortgage or lease *thediathettam*. One premise of hypothesis would be on the basis that there can be no rights in common over the property during marriage and rights surface only on intestacy.³²² If so, as separate property, the husband would have the right to dispose of only the *thediathettam* acquired by him. He would not be able to dispose of the wife's *thediathettam* since it would be her separate property just as her *cheedanam* and *muthusam* are.

The point is whether the husband cannot continue to sell the wife's *thediathettam* by the exercise of his marital power as he did of her share when considered as common property. Weerasooriya J. in *Durairajah v Mylvaganam* declared, "On the view expressed by Gratien J (in *Kumarasamy v Subramaniam*) it would seem doubtful whether the decision in *Sangarapillai v Devarajah Mudaliyar* and earlier decisions relating to the husband's

320. *Sangarapillai v Devaraja Mudaliyar*, *op. cit.* ; *Ahilandanayaki v Sothinagaratnam*, (1952) 53 N.L.R. p.385 ; *Manikkavasagar v Kandasamy*, *op. cit.*

321. Reference chapter on *Thediathettam*, pp. 234-258

322. Amended section 20, JMPIO.

marital power over the *tediatetam* of his wife apply in so far as such property had been acquired after the amending Ordinance No. 58 of 1947 came into operation".³²³ The opinion expressed by Weerasooriya J. is only of legal importance as *obiter dictum* since the land in question in that case was not considered *thediathettam*. It is submitted that marital powers over same would continue to be applicable, though not to the same degree as when considered as the common property of the spouses. As separate property, just as in respect to the wife's *cheedanam* and *muthusam*, he would not be able to dispose of the wife's *thediathettam*, but still he would be able to restrict her rights to sell and mortgage or otherwise dispose it. This he would be able to do by the powers bestowed on him by section 6 which indeed is a sure reflection of his marital authority over the wife's property. Thus, if the wife alienates her *thediathettam* without the husband's consent, he could object to the alienation on the ground that the act was done in derogation of his marital authority recognised by section 6.

The husband could also claim that the act of the wife was detrimental to his right to a share of the income or profits as well as to a share of the property itself on her death intestate. In this connection Gratien J held in *Naganathar v Velautham*³²⁴ that a husband should be able to ask for relief from court in the form of a declaratory decree in *Quia timet* proceedings, when such a decree would accomplish the ends of precautionary justice for the protection of such future rights. The case dealt with the

323. *Durairajah v Mylvaganam*, *op. cit.* at p.542

324. *Naganathar v Velautham*, *op. cit.* at pp.320-321

wife's separate property. It is submitted that the remedy should be available to the wife too when the property she acquires becomes her separate *thediathettam*. Since the wife too possesses similar interests over the husband's *thediathettam* the law should allow the wife too a similar claim. But, unlike the customs, the law in its statutory form is very generous to the husband while depriving the wife of equal access to the law to seek remedies. This is so because, if the husband sells or otherwise alienates his share or his *thediathettam*, the wife will not have a similar right to restrict him or seek remedy by herself in a court of law because of her lack of *locus standi*. It is submitted that the age old customs of the Tamils of Jaffna demonstrated a willingness to recognise the concept of matrimonial partnership in property acquired by the constructive collaboration of the spouses. The Code, in practically all the provisions dealing with acquired property, refers to not only a half share of a spouse but also associates both the spouses in all its dealings whether concerning dowering of daughters³²⁵ or donations.³²⁶ It is submitted that the customs of Jaffna would have definitely developed as a law in keeping with modern trends in matrimonial property relationship had the judiciary not taken it centuries back to the Roman ages by applying to it principles of the Roman Dutch Law.

325. Part I:1 and I; 2

326. IV: 2 and IV:3 and IV:5

Right to donate

By the Code

The husband's right to donate *thediathettam* however is not governed by the same principles. As owner of a share of it his right was never disputed. But as to whether he could donate the entire *thediathettam*, that is, inclusive of his wife's share, has often been a subject of litigation. It is necessary to analyse the provisions of the Code to have an insight into the customary position. The relevant sections for the present discussion are sections IV:1, IV:2, and IV:5. Part IV:1 relates to donations of separate properties but could be said as embodying a general principle applicable to donation. The District Judge in *Seelachchy v Visuvanathan Chetty* remarked that, following the spirit of the provision the principle could be extended to acquired property as well.³²⁷ Part IV:2 authorises donation "of something from the property acquired during marriage", but by both the husband and wife. It neither states how much the "something" is, nor as to whether consent of the other spouse is necessary. Part IV:5 is closer to the point since it speaks of donation by the husband of acquired property, but without the knowledge of the wife, and goes on to state that in such a situation, after the death of both the spouses "on the division of the estate the relations of the wife must receive beforehand a portion equal to that which was given away by the husband to his relations when he was alive". It is submitted that this provision endorses the judicially accepted

327. *Seelachchy v Visuvanathan Chetty*, *op. cit.*, at p.103.

principle propounded in *Parasatty Ammah's* case and subsequently followed, that the husband's power to donate is restricted to his share of the *thediathettam*. There cannot otherwise be found an explanation as to why the relatives of the wife should receive an equivalent share on the division of the estate. In analyzing this provision the limitation of its application should be kept in mind. It is only the husband's ability to donate that is considered implying the disability of the wife to do so. Further it is in respect of donation of acquired property by parents who have no children. As such if there are children by the marriage it could be presumed that he is denied the right to donate any share of the acquired property. The donation referred to is to the heirs of the husband that is to those who would have otherwise succeeded to the husband's half share on intestacy. The principle that can be gathered is that the customs saw to it that donation of property, whether separate or acquired, was not done to the detriment of children and failing them to the heirs.

We saw that the courts, almost undisputedly, recognised the husband as the sole and irremovable attorney of the wife with power to sell and mortgage *thediathettam*. We also saw that the right was by virtue of his marital powers associated with community of property. It gives rise to some thoughts as to whether it would be far fetched to see the restriction on donation imposed on the husband by IV:5 as yet another inclusion by the codifiers of Roman Dutch Law principles, especially in view of what Bertram C.J. had to say about it in *Seelachchy's* case. He said "...It would appear to be quite in accordance with the spirit of the principle of "community of goods" that donations should

be treated on a special footing.”³²⁸ By his statement he made crystal clear the basis on which he accepted the restriction enunciated in *Parasathy Ammah*’s case. Though Creasy J. in *Parasathy Ammah*’s³²⁹ case declared the basis to be the Tamil customary law, Bertram C.J. on the contrary found the explanation to it in the Roman Dutch Law.³³⁰ He said, citing Voet as authority, “Thus in the Roman Dutch Law, if the husband makes donations of such a character and of such an amount that an intention to defraud the wife may be presumed, these donations are liable to be impugned”.³³¹ Garvin J. as well as Dalton J. too did not overrule the possibility of Roman Dutch Law influence. Garvin J. stated that though there appeared to be no authority which explicitly declared the community subsisting between the spouses subject to the Thesawalamai to be, as regards vesting of title, identical with that of the Roman Dutch Law yet there were indications that the position was never doubted.³³² Dalton J. was however more positive. He said that, having regard to the auspices under which the Code was composed, “it is difficult to think that the provisions of Roman Dutch Law did not exercise some influence, and that the idea of a partial community of goods, as in the case of *tediatetam*, may not have been strengthened if not derived from the Common law of the Dutch Government.”³³³ Justice Canekeratne was even more positive when he declared that, “...there can be no doubt that the rules found in the

328. *Seelachchy v Visuvanathan Chetty*, *op. cit.* at p. 109

329. *Parasathy Ammah v Setupulle*, (1872) 3 N.L.R. p. 271 at p. 272.

330. *Seelachchy v Visuvanathan Chetty*; *op. cit.* p.109.

331. *Seelachchy v Visuvanathan Chetty*, *op. cit.* at p. 109, Voet. 23,2,54

332. *Seelachchy v Visuvanathan Chetty*, *op. cit.* at p. 121

333. *Iya Mattayer v Kanapathipillai*, (1928) 29 N.L.R. p.301 at p 307

compilation by the Dutch Dissawe had been influenced by principles of the Roman Dutch Law and in the course of nearly half a century the forms and principles of Dutch jurisprudence became gradually introduced".³³⁴ The comment, though made in a case relating to pre-emption, is a clear explanation of the extent to which Roman Dutch Law concepts had been surreptitiously accommodated into the Code.

The possibility of it not having been a fully fashioned custom, but one discreetly introduced by the Dutch, to perhaps make the customs more comprehensible to them, is further strengthened by the fact that the section says only of donation in the event the spouses die without children. What happens if there are children is inadvertently or perhaps conveniently left out by the codifiers. What can be gathered from the spirit of the restriction in IV: 1 is that, when there are children the rights of the parents to donate are restricted. Such a conclusion is logical since IV:2 says that if the issueless spouses wished to give away some of their goods [referring to inherited property] they cannot do so without the consent of the mutual relations and if the relations do not consent "they may not give away *any more* [emphasis added] of their hereditary property and dowry". Where there are no children the relations acquire an interest in the inherited properties by way of inheritance, for the Code in Part I:15 says that when the husband or wife dies without children, "They [the heirs] must cause the survivor to return what was brought in marriage by the deceased,

334. *Sabapathyplai v Sinnatamby*, (1948) 53 N.L.R. p.367

and also the half of the acquired property, they being justly entitled thereto...” Hence it is not surprising that the customs insisted on the requirement of their consent. Considering the fact that the customs had made consent of relations necessary, where issueless spouses wished to donate their separate properties, it is quite in order to conclude that where children were left the customs must have been the same or even stricter on the parent’s right to donate acquired property to anyone outside the family; as it would deprive the children of their legitimate right to inheritance. The conclusion is in keeping with the custom embodied in Part IV:1 which, in similar circumstances, restricts donations of inherited property. It needs to be also noted that under the customary law of Thesawalamai earnings of sons while as bachelors and under parental roof went into the community of their parents. In such a context it certainly does not make sense to presume that the custom would have permitted the father to enrich his relatives by donating *thediathettam* property at the expense of his children’s earnings.

By the Judiciary

Parasathy Ammah v Setupulle is the earliest case dealing with the husband’s right to donate. This judgment has served as the sheet anchor for subsequent decisions of court. Creasy C.J. here held that, “...by the customary law the donor [husband] could only dispose of half his property”.³³⁵ The C.J. did not explain the law or give reasons for his decision. The report of the case also does

335. (1872) 3 N.L.R. p.271 at 272.

not state what arguments were put forth by counsels which could help to get at the basis of his Lordship's decision. This led Bertram C.J. to remark that, "The explanation of this distinction between donations and other forms of alienation must remain uncertain."³³⁶ It also led to speculative arguments being put forth by counsels in courts with the judiciary too expressing varied opinions. In *Seelachchy v Visuvanathan Chetty* counsel's argument was based on the assumption that in the case of sales or mortgages the proceeds were expended in the interests of the community whereas in the case of donation it meant a permanent reduction of the assets of the community.³³⁷ Bertram C.J. accepted that the argument could be possibly true and declared the decision of Creasy J. as "correctly stating the law". Nevertheless he proceeded to determine the husband's power to donate on the basis of his position and authority as manager of the common property.³³⁸ Bertram C.J.'s judgment shows that he never repudiated the stand taken by Creasy C. J. that there was such a limitation on the husband's power to donate; but he laid more emphasis on the concept of community and the husband's position as absolute manager of it. He seems to have considered the limitation as not making the husband incompetent to donate the whole of the acquired property but only as simply limiting him.³³⁹ He also viewed an exercise in excess of such limitation as not making the donation void

336. *Seelachchy v Visuvanathan Chetty*, *op. cit.* at p. 109.

337. *Ibid.*

338. *Ibid.* pp. 109-110

339. *Ibid.*

but only as a cause giving rise to remedy by way of compensation.³⁴⁰

De Sampayo J. in *Seelachchy v Visuvanathan Chetty*, while acknowledging counsel's suggestion as ingenious and possibly plausible however declared the reasoning as not sound.³⁴¹ He did not accept the fifty year old judgment of *Parasathy Ammah* as really an authority on the issue. He declared that the judgment neither gave any reason for so interpreting the customary law nor did it make any reference to the Thesawalamai or to any previous decision. He further added that there was no appearance for the respondent and as such one was left without any guidance as to what argument of counsel for the appellant might have prevailed with the court. His Lordship concluded: "Nor can I read the pronouncement as a definite decision that the husband cannot donate, as distinguished from selling or mortgaging more than half of any acquired property".³⁴² He commented on the judgment as a cryptic way of deciding an important point of law.³⁴³ Besides, he took the words, "dispose of", from the judgment and interpreted it to mean, not dispose of by way of donation, but "dispose of" generally and stated that the, "The opinion expressed was as consistent with holding that a husband cannot dispose of more than half in any way whatever, whether by sale, mortgage, or gift..."³⁴⁴ He nevertheless held that a husband under Thesawalamai may make a donation of the entirety of

340. *Ibid*

341. *Ibid.* p. 119.

342. *Ibid.*, at p. 120.

343. *Ibid.*

344. *Ibid.*

thediathettam just as much as he may sell or mortgage the same.³⁴⁵ Though De Sampayo J. did not subsequently adhere to the same view in *Tankamuthu v Kanapathipillai*, where, it could be said that he implicitly accepted the limitation of the husband's power to donate only his own half share,³⁴⁶ yet his judgment in *Seelachchy's* case is thought provoking. It raises the question as to what could have been the rationale behind the long string of judgments which imposed restriction on donations alone. It also makes one ponder as to whether the custom would not have been that the husband could not dispose of in any way *thediathettam* and it was the introduction of Roman Dutch Law principles³⁴⁷ that led the courts to decide in the way they did. But again it should be noted that Bertram C.J. himself was not very sure as to the extent of powers the husband had to deal with the common property. He therefore conceded that the question was not fully examined and should wait further elucidation in some future case.³⁴⁸ He was faced in that case with the rights of a *bona fide* purchaser for value and concentrated his judgment on that issue.

Courts therefore followed and applied the principle enunciated in *Parasathy Amma's* case that the husband can donate only his share of the acquired property. The reason for such restriction in respect of only *thediathettam* however

345. *Ibid.*

346. (1923) 25 N.L.R. 153 ; See also HNG Fernando J in *Annapillai v Easwaralingam*, (1960) 62 N.L.R. p.224 at p. 226 about his comments on De Sampayo J's judgment in *Tankamuthu v Kanapathipillai*. (1923) 25 N.L.R. p.153.

347. *Seelachchy v Visuvanathan Chetty op. cit.* p. 109.

348. *Ibid.*, at p. 111.

was not given, even by subsequent judgments, other than to say that it was the age long customary law of Thesawalamai. Schneider A.J. faced with the same issue in *Sambasivam v Manicam*³⁴⁹ followed Creasy J. and had only this to say. Referring to the decision of *Parasathy Ammah's* case he said: "I am bound by it. It lays down as it were settled law that a husband can dispose of only half the property acquired during marriage. I can find no case where the law as stated there has been disputed, although the decision has stood for nearly fifty years".³⁵⁰ Garvin J. in his dissenting judgment in *Seelachchy's* case declared that there were indications that it was never doubted that there was a community subsisting between spouses subject to Thesawalamai.³⁵¹ Based on that premise, he, like Bertram C.J., drew an analogy with Roman Dutch Law and went to hold that, "Under the Roman Dutch Law as part of the marital powers committed to the husband was the right to control and dispose of property belonging to the community".³⁵² Having held so however he found a limitation of such rights by the authority of *Parasathy Ammah's* case and held that the husband could not by his marital authority divest the wife of the share that had vested in her.³⁵³ Based on the same principle Porter J. held that if the purchased property is only in the wife's name the husband still had the right to dispose it, but only his half.³⁵⁴

349. *Sambasivam v Manikkam*, (1921)23 N.L.R. p.257

350. *Ibid* at 260.

351. *Seelachchy v Visuvanathan Chetty*, *op. cit.* at p. 121

352. *Ibid*, at p. 122.

353. *Ibid*.

354. *Ponnachchy v Vallipuram*, (1923) 25 N.L.R. p.151.

Dalton J. after discussing several judgments³⁵⁵ finally concluded, "that if the husband has not the power to dispose of more than one-half by way of gift, the wife is entitled to contend that she has not been divested of title to a half-share by her husband's deed of gift".³⁵⁶ Thereby he upheld the trial Judge's conclusion that the husband had no right to donate more than a half of the property in issue.³⁵⁷ The basis for such a conclusion was the recognition of the correctness of the law laid down in *Parasathy Ammah's* case as evidenced by its acceptance even after fifty years.³⁵⁸ A further thirty-two years only reinforced the law, when H.N.G. Fernando J., after discussing previous judgments on the subject declared, "I am satisfied, therefore, that there is no longer any basis, in the decisions of this court, for the view that a husband can under the Thesawalamai validly dispose by donation, his wife's share of the *thediathettam*, if the acquisition took place before the date of operation of the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947".³⁵⁹

By the Amendment

It becomes necessary to examine whether the amendment of 1947 changed the position. H.N.G. Fernando J, though very categorical in his statement that the husband

355. *Parasathy Ammah v Setupulle*, *op. cit.*; *Sambasivam v Manikkam* (1921) 23 N.L.R. p.257; *Seelachchy v Visuvanathan Chetty*; *op. cit.*; *Ponnachchy v Vallipuram*; *op. cit.*

356. *Iya mattayer v Kanapathipillai*, *op. cit.*

357. *Ibid.*

358. *Sambasivam v Manikkam*, *op. cit.*

359. *Annapillai v Easwaralingam*, (1960) 62 N.L.R. p. 224 at 226

cannot donate his wife's half share of the *tediatetam*, qualified it by stating that, it will be so if the acquisition took place before the amendment.³⁶⁰ Though the statement is suggestive of a change, his Lordship did not make a pronouncement regarding it, as the matter did not arise for consideration in the case. He merely stated that the answer was provided by way of *obiter dictum* in the judgment of Gratien J.³⁶¹ The relevant part of the dicta referred to says, that by the new section, "if either spouse acquires *tediatetam* property on or after 4th July, 1947, no share in it vests by operation of law in the non-acquiring spouse during the subsistence of the marriage".³⁶² Such a proposition takes away the earlier ruling by courts that a half share of acquired property vested in the non-acquiring spouse,³⁶³ and is based on the premise that the property acquired is the separate property of the acquiring spouse. The answer then, as indicated by H.N.G. Fernando J. would be that as his separate property the husband should be able to donate the entirety of the *thediathettam* he had acquired. But Gratien J.'s opinion has not been followed by courts to this day. Siva Supramaniam J. in *Arunasalam v Aiyadurai* did accept that the amendment introduced a new concept of *thediathettam* of each spouse.³⁶⁴ But he followed it up by entitling the spouses to a half-share each during marriage and on death intestate of one spouse to a further half share

360. *Ibid.* at p. 226.

361. *Ibid.*

362. *Kumaraswamy v Subramaniam op.cit.* at p. 47.

363. *Seelachchy v Visuvanathan Chetty op. cit.*; *Iya matteyer v Kanapathipillai, op. cit.*; *Seenivasagam v Vitilingam*, (1944) 45 N.L.R. p. 409 ; *Annappillai v Easwaralingam, op. cit.*

364. (1967) 70 N.L.R. p. 165 at 167

from the deceased spouse's half share.³⁶⁵ Sharvananda C.J. preferred to follow Siva Subramaniam J. He declared: "That part of the customary law of Thesawalamai dealing with the incidents of *thediathettam* are not affected by the repeal of the old section 20".³⁶⁶ It thus follows that by the judgment that stands as of to-day the principle underlying the law is that the husband who purchases property during marriage can donate only his share.

Remedy available to the wife

Right to compensation

The provisions of the Code give only some indications about the kind of remedy available. Part IV:5 deals with a situation where a husband, who has no children, donates a part of the acquired property to his heirs without the knowledge of his wife and thereafter both of them die. It says "...in such case on the division of the estate the relations of the wife must receive beforehand a part equal to that which was given by the husband to his relations when he was alive". The Code thus did not make unauthorised donations by the husband void. It allows relief by compensation. What needs to be emphasised is that the relief is not available to the wife during her lifetime. It only enables her relatives to claim compensation after the death of both the spouses.

365. *Ibid*

366. *Manikkavasagar v Kandasamy op. cit.*, at p. 24.

By the judiciary

The remedy granted to the wife by the judiciary however has alternated between a right to mere compensation and a more compelling right, the right to vindicate her share. The remedy by way of compensation is on the basis that the donation is not *ipso facto* void. Bertram C.J. cited IV: 5 of the Code to show that compensation was the remedy available to the wife and that the donation was not void.³⁶⁷ His Lordship also brought in Roman Dutch Law principles to support his stand.³⁶⁸ By Roman Dutch Law, if the husband donates property in fraud of the community, the wife's remedy is to compensation only on the dissolution of marriage. The Roman Dutch Law also recognises the right of the wife to bring an *actio quasi-Pauliana* to set aside the gift, but that is available only if there were no funds to compensate the wife. Bertram C.J. supported the application of Roman Dutch Law remedy on the basis that in the absence of provision in the Thesawalamai it can be applied by way of analogy. It is submitted that where the Thesawalamai has no express provision Roman Dutch Law need not necessarily be applied. In *Chanmugam v Kandiah* the principle was enunciated that if some general principle applicable to the issue can be deduced from the Code's provisions it is the general principle and not the Roman Dutch Law that should be applied.³⁶⁹ If this principle had been adhered to by the court in *Seelachchy's* case it could have acted under Part IV: 5 or

367. *Seelachchy v Visuvanathan Chetty*, *op. cit.* p. 111

368. *Ibid*; Voet, 23.2.54.

369. *Chanmugam et al. v Kandiah et al.* (1921) 23 NLR 221.

drawn a general principle from it instead of directly drawing from Roman Dutch Law. It appears however that the courts have generally not been bothered to see if such principles could be drawn. They preferred to resort to the convenient method of applying the law with which they were familiar. De Sampayo J. had occasion in *Tankamuthu v Kanapathipillai*³⁷⁰ to decide on the same issue as to whether the wife, whose husband had donated the entire *thediathettam*, could bring an action for declaration of title to one-half of the lands. His Lordship did not take into consideration the different factual situations of *Seelachchy's* case from *Tankamuthu's* case with which he was dealing. In the latter case the issue of a *bona fide* purchaser did not arise at all. But the judge declared that the difference in circumstance did not alter the general principle that was laid down by Bertram C.J.³⁷¹ and dismissed the wife's action.

Right to vindicate

The recognition of the alternate remedy of a *rei vindicatio* action was however earlier in point of time. More than fifty years before *Seelachchy's* case was decided, Creasy C.J. held in *Parasathy Ammah v Setupillai* that by the Tamil customary law the wife was entitled to claim her half-share of the acquired property which the husband had donated to his concubine.³⁷² Though the Chief Justice gave no reasons for his conclusion the correctness of the law on this point has stood the test of several judicial decisions to

370. 25 N.L.R. p.153

371. *Ibid* at p. 155

372. *Prasathy Ammah v Setupulle*, *Op. cit.* at p. 272

this date. The earliest to follow was *Sambasivam v Manikkam*³⁷³ and Schneider J. had no hesitation in declaring that he was bound by it as much as he was convinced of the correctness of the judgment. He said: "It lays down as if it were all settled law that a husband can dispose of only half the property acquired during marriage. I can find no case where the law as stated there has been disputed, although the decision has stood for nearly fifty years".³⁷⁴ Though in *Seelachchy's* case Bertram C.J. decided on compensation as the remedy left to the wife it is of great importance to note that he did so on the facts of that case. His Lordship did not override the possibility that in the local realm of Thesawalamai such an alienation could have been *ipso facto* void enabling an action for *rei vindicatio* by the wife to recover her share.³⁷⁵ Furthermore he admitted that the issue as to whether the wife's remedy was only by way of compensation was not fully examined in the case and reserved the point for future consideration by courts.³⁷⁶ It is very regretful that in the said case De Sampayo J. failed to take note of the Chief Justice's point of view when he declared that the difference in circumstance of the involvement of a *bona fide* purchaser did not alter the general principle as laid down by the Chief Justice. Garvin A.J. however dissented with Bertram C.J. as to the remedy available to the wife.³⁷⁷ He preferred to follow *Parasathy*

373. (1921) 23 N.L.R. p.257.

374. Pp 260-261.

375. *Seelachchy v Visuvanathan Chetty op. cit.* p. 111

376. *Ibid.*

377. *Ibid* at p.122.

Ammah's case and held that the wife had the right to vindicate her half share.³⁷⁸

Parasathy Ammah's case was decided on principles of the Tamil customary law, as Creasy A.C.J. puts it. It was decided long before the 1911 Ordinance was enacted. When Bertram C.J. and others decided *Seelachchy's* case in 1923 the Ordinance had come into operation but it did not govern the deed of donation which was made in 1906 in *Seelachchy's* case. The C.J. did not therefore take the provisions of the Ordinance into consideration. Garvin A.J. nevertheless used the section 20 of the Ordinance, but only to explain the entitlement of the spouses to acquired property.³⁷⁹ This section declared as follows: "The *tediatetam* of each spouse shall be property common to the two spouses, that is to say, although it is acquired by either spouse and retained in his or her name both shall be equally entitled thereto". Commenting on this section, Garvin A.J. opined: "This is an explicit declaration of the law in the sense in which it was, so far as I am able to judge, always understood".³⁸⁰ Since he was not basing his judgment on the Ordinance but only using it to explain the customary law on the point, which he was entitled to do as the

378. *Ibid.*, at p.122.

379. *Ibid.*

380. *Ibid.*

Ordinance of 1911 is declaratory of the customs,³⁸¹ he declared that if that view of the law is correct the premises vested by operation of law equally on the wife.³⁸² Thus he held that the wife was entitled to contend that she was not legally divested of her title to a half share of the premises gifted by the husband because, by the express authority of *Parasathy Ammah's* case, the husband could only dispose of by way of gift half the property.³⁸³

Garvin A.J.'s judgment, though well-based, was a dissenting one. In *Iya Mattayer v Kanapathipillai*³⁸⁴ Dalton J. had the task upon him to decide on the right of the heirs to a declaration of title to a half share of the acquired property of the wife and his Lordship found that to do so he had first to decide on the law left by Bertram C.J. to be elucidated by future courts.³⁸⁵ After due consideration of the provisions of the Code and several decisions of courts he agreed with the conclusion arrived at by Garvin J. in *Seelachchy* case.³⁸⁶ Garvin J.'s pronouncement was not on the provisions of the Ordinance as such, though his conclusion was drawn based on its provisions on the accepted premise that the Ordinance

381. In *Chellappah v Valliammah*, *op. cit.* Ennis J. noted that "The Ordinance No: 1 of 1911, which has been taken, generally speaking, as the codification of the customs existing prior to the enactment of the Ordinance....". at pp.276-277. See also *Manikkavasagar v Kandasamy*, *op. cit.* where Sharvananda CJ. at p. 21, states thus "as regards *thediathettam* being common property of the spouses, ".....section 20 does not enact any new law. It re-states the law relating to *thediathettam*. It does not effect any alteration or amendment respecting the nature of *thediathettam*."

382. *Seelachchy v Visuvanathan Chetty*, *op. cit.* p. 122

383. *Ibid.*

384. 29 N.L.R. p. 301

385. *Ibid.*

386. *Iya Mattayer v Kanapathipillai*, *op. cit.*

was declaratory of the customs³⁸⁷. (as the Ordinance did not apply to the facts of the case he had to decide) Dalton J. therefore declared that, "If there was any doubt about this prior to 1911, it seems to me that this was made clear by the Ordinance of that year to which I have referred".³⁸⁸ He thus held that the wife's heirs were entitled to the declaration they sought, that is, to a right to a half share. Thus though the pre- Ordinance position raised doubts as to the basis of the right of the wife to vindicate her half- share the position after 1911 appears to be settled law.

Application of trust principles to *thediathettam* and rights/remedies available to a wife as against a *bona fide* purchaser

The judiciary was faced with yet another issue in relation to the remedy left to the wife. The problem was whether the right acquired by the wife to vindicate her share was subject to the rights of a *bona fide* purchaser from the donee of the husband. Bertram C.J. decided positively.³⁸⁹ The basis of his decision was on the premise that when the husband acquired the property he did so in consequence of his marriage contract and subject to a constructive trust in favour of his wife. That trust entitled the wife to sue him for a formal conveyance of her interest.³⁹⁰ If the husband

387. *Supra* note 381 ; See also *Sanagrapillai v Devaraja Mudaliyar*, *op. cit.* at p. 9 where Dalton S.P.J. (referring to section 20 (2) of the 1911 Ordinance before amendment) states that " There appears to be no change from the old law in the statement, and apparently it is a restatement of the Thesawalamai in the new Ordinance...".

388. *Sangarapillai v Devaraja Mudaliyar*, *op. cit.*

389. *Seelachchy v Visuvanathan Chetty*, *op. cit.* at p. 116

390. *Ibid*

in breach of this constructive trust gifted the property, the wife's right to vindicate her share could not prejudice any *bona fide* purchaser claiming from the donee of her husband.³⁹¹ The above principle enunciated by Bertram C.J. as regards the rights of the wife as against a *bona fide* purchaser was followed by Hearne J. in *Seenivasagam v Vythilingam*.³⁹² But Hearne J. drew a difference in position when the property was retained in the hands of the donee and when the donee had sold it to a *bona fide* purchaser. In the former instance he held that the wife would be entitled to assert her claim to her half share against the husband's donee while in the latter instance her only remedy would be to a claim for compensation as the *bona fide* purchaser acquired good title.³⁹³

The right of the wife to vindicate her share of the acquired property if the purchaser happened to be a *bona fide* purchaser is however not lost in Thesawalamai. Though several cases discussed above, with Bertram C.J. in the lead, did come to that conclusion leaving the wife with compensation as the only remedy available, the judgment of H.N.G. Fernando J. in *Annappillai v Easwaralingam*³⁹⁴ could be regarded as having changed the law for the future. His Lordship did not favour the concept of applying principles of trust to explain the basis of the non acquiring spouse's right to a share of the acquired property and declared that he was entitled to reconsider the view taken

391. *Ibid*

392. (1944)45 N.L.R. p.409.

393. *Ibid* at p.411.

394. (1969) 62 N.L.R. 225

by Betram C.J. as subsequent courts have not followed it. He nevertheless analysed the position of the husband as a trustee so as to explain as to why he sought to review it. He made clear that, "In the case of *thediathettam* the husband has, like a trustee usually has, unqualified power to convey the legal title by sale. But he has not the power to donate anything more than a half share of *thediathettam* property".³⁹⁵ It was so, because by the Tamil customary law he did not have the power to donate his wife's share. In other words it amounts to saying that a husband governed by Thesawalamai, if placed in the position of a trustee of his wife's share, cannot exercise the right to donate the entirety of the *thediathettam*, purely because, as a husband governed by Thesawalamai he did not have that right.³⁹⁶ When the law by which he is governed does not confer that authority it follows that as trustee too he would not have the authority to do so.³⁹⁷ He thus made clear that the power the husband has to sell was not by virtue of his position as a trustee but by his position as manager of the common property. Thereupon he asserted that, "This concept of community of property, where the husband as the manager and head of the community has the power to sell his wife's interests, cannot in any way be equated to that of a trust, where the title is vested solely in a trustee subject to obligations existing in favour of the other persons."³⁹⁸ This now brings us to the connected question as to whether the wife's right to vindicate would be affected where the donated

395. *Ibid* at p. 228

396. *Ibid*

397. *Ibid*.

398. *Ibid* at p. 229.

half share had passed into the hands of a *bona fide* purchaser. In relation to the issue H.N.G Fernando J. noted: “But, if as I hold, the alienee cannot claim the benefit which the trust law affords to a *bona fide* purchaser without notice of a trust, that difference does not affect the wife’s right to vindicate her share”.³⁹⁹ It appears therefore that the wife now should be able to vindicate her share even as against a *bona fide* purchaser.

Secondly, H.N.G Fernando J. analysed the husband’s power from the stand-point of his being the “sole and irremovable attorney of the wife” as designated in several decisions of the court.⁴⁰⁰ He explained that if as an attorney of the wife the husband sells or mortgages *thediathettam* property he does so by virtue of the power conferred on him by a power of attorney⁴⁰¹ and not by any right of dominium over the wife’s share; for it has been acknowledged by courts that a half share vested in the wife.⁴⁰² Based on the authoritative decision of H.N.G. Fernando J. it is safe to conclude that the law as laid down by courts to-day is that the husband cannot validly donate the wife’s share either as owner, trustee or as her attorney.

399. At p.230

400. *Sangarapillai v Devaraja Mudaliyar op. cit.* ; *Kumaraswamy v Subramaniam, op. cit.*

401. *Annapillai v Easwaralingam, op. cit.* at p.229.

402. *Ibid.*

Spouses' entitlement to *thediathettam*

By the Code

It was shown that the concept of *thediathettam* embodies a very strong presumption that the economic efforts of the spouses during marriage are equal.⁴⁰³ It is certainly not surprising that the customs recognised the combined efforts of the spouses and entitled them to an equal share in properties so acquired and in profits obtained from such joint properties. The Code does not specifically provide for the equal entitlement of the spouses. But several sections are indicative of such equal rights. Wherever reference is made to disposing of acquired property by one spouse or both, whether as *cheedanam* or gifts, or to division of acquired properties, the provisions refer to disposal of the spouses' one half of the properties⁴⁰⁴ suggesting equal entitlement of the spouses. Wood J. clearly stated that the spouses have mutual interest in profits arising from the separate properties or in acquisitions by their own exertions during marriage.⁴⁰⁵

By the Ordinance of 1911. [prior to its amendment]

Sections 19 and 20 embody these characteristics of partnership and co-proprietorship in *thediathettam*. Section 20(1) which provides for the entitlement of the spouses lays

403. See *supra*, pp. 200 - 264;

404. I:1,I:2,I:10,I:11,I:15,I:17, IV:2,IV:3,IV:5, See also M. p. 70; M. 130;

405. M. p. 260.

down that, “The *tediatettam* of each spouse shall be property common to the two spouses, that is to say, although it is acquired by either spouse and retained in his or her name, both shall be equally entitled thereto”. With reference to the above section Bertram C.J. in *Velupillai v Arumugan* declared, “Under the Thesawalamai there arises between husband and wife in all property acquired during marriage a partnership by operation of law. All such property from the moment of its acquisition, is the common property of the two spouses”.⁴⁰⁶ As common property the spouses became entitled to it in equal shares irrespective of which spouse purchased it or in whose name it was purchased.⁴⁰⁷ The effect of the sub-section was therefore to vest in the non-acquiring spouse from the moment of acquisition an undivided half-share.⁴⁰⁸ Since the section brought profits from the separate property of the spouses within the definition of *thediathettam* each spouse became entitled to a half share of such profits too.⁴⁰⁹ Such vesting of title on acquisition however was not inconsistent with the power the husband had to sell or mortgage *thediathettam* by virtue of his marital powers.⁴¹⁰ The entitlement also made the non

406. (1924) C.L.R. Volume VI p.61

407. Ibid ; See also *Seelachchy v Visuvanathan Chetty*, *op.cit.* ; *Ponnachchy v Vallipuram*, (1923) 25. N.L.R.151; *Iya Mattayer v Kanapathipillai*, *op. cit.*

408. *Ponnachchy v Vallipuram op. cit.* at p. 153 ; *Murugesu v Kasinather*, (1923) 25 N.L.R. p. 201.; *Garvin J. Seelachchy's case*, *op. cit.* at p.122 ; *Iya mattayer's case. op. cit.* at p.309 ; *Annapillai v Easwaralingam, op. cit.* at 229 ; *Subramaniam v Kadirgaman*, (1969) 72 NLR 289 at291.

409. *Nagaratnam v Suppiah*, (1967) 74 N.L.R. p.54 at 56.

410. *Kannammah v Sanmugalingam*, (1954) 55 N.L.R. p. 260 at 261; *Sangarapillai v Devaraja Mudaliyar, op. cit* at p.10

acquiring spouse a co-owner in the land purchased by the other spouse.⁴¹¹

Though it is common ground that a half share vested in the non-acquiring spouse on acquisition it did not mean that each spouse had separate interest in one-half of the common property.⁴¹² As the section denotes, separate use was possible only on separation *a mensa et thoro* or dissolution of marriage by death or divorce.⁴¹³ Though it appears from the language of the section that the wife was not discriminated against, as the Ordinance says that separate use of it by "each spouse" can be had only on dissolution or separation *a mensa et thoro*, it is clear that the term each spouse has practical limitations when related to the wife. This is because of the husband's status as manager and the extensive marital powers enjoyed by him alone in the community. In the exercise of such powers the husband, though restricted from donating, had nevertheless the authority to sell, mortgage, lease or otherwise deal with the entire property. The wife on her part could not dispose of even her share. She could not do so even in desperate situations as the benefit of section 8 of the Ordinance was not available to her in respect of *thediathettam*. Section 8 empowered the court to give approval to the disposal of only property that fell under section 6 of the Ordinance. *Thediathettam* was then not covered by that section.⁴¹⁴

411. *Ponnammah v Kanagasuriam*, (1916)19 N.L.R. p.257 at 259 ; *Annapillai v Easwaralingam*, *op. cit.* at 229 and 232;

412. Section 20 (2) ; *Sangarapillai v Devaraja Mudaliyar*, *op. cit.* at p. 5;

413. *Sangarapillai v Devaraja Mudaliyar*, *op. cit.* at p. 5;

414. *Theivanapillai v Nalliah*, *op. cit.* at p.347

The limitations on the wife were such that Bertram C.J. remarked, “So extensive indeed are his rights that it has been suggested that they have practically the effect of reducing the wife’s right from that of co - proprietorship to a mere right in expectancy”.⁴¹⁵

By the Amended Ordinance

As regards the position after the amendment, except for the decisions of Siva Supramaniam J. in *Arunasalam v Iyadurai* and Sharvananda C.J. in *Manikkavasagar v Kandasamy* courts have either only pointed out a difference in position between the old and the new sections,⁴¹⁶ or raised the question and left it unanswered as not pertaining to the issue involved in the case.⁴¹⁷ There are however a few *obiter dicta* as for example by Gratien J. in *Kumaraswamy v Subramaniam*⁴¹⁸ and Lord Diplock in *Subramaniam v Kadirgaman*.⁴¹⁹ The opinions expressed in the latter two decisions merit analysis. Gratien J. expresses the opinion that after 1947 the non acquiring spouse would not, during the subsistence of marriage, become entitled to any share of the property acquired by the other. It is only as the surviving spouse that he/she would become entitled to a half share and that too only if the acquiring spouse had not previously disposed of it by will or otherwise.⁴²⁰ Though

415. *Seelachchy v Visuvanathan Chetty*, *op. cit.* at p. 110

416. *Ahilandanayaki v Sothinagaratnam*, *op. cit.* p. 385

417. *Naganathar v Velautham*, *op. cit.* at 321; *Annapillai v Easwaralingam*, *op. cit.* at p.226 and at 232

418. *Kumaraswamy v Subramaniam*, *op. cit.* p..

419. (1969) 72 N.L.R. p.289.

420. *Kumaraswamy v Subramaniam*, *op. cit.* at p. 47

Lord Diplock⁴²¹ approved Gratien J.'s decision on the issue of the retrospective effect of the new sections he did not proceed further to make a clear statement as to the entitlement of the spouses under the new sections as Gratien J. had done. He, in fact, acted with restraint when commenting on the effects of the alterations and stated that, "important amendments to earlier sections 6 and 7, of the principal Ordinance altered the legal incidents attaching during a spouse's lifetime to property which fell within the new definition of *thediathettam*".⁴²² Other than stating so, the Privy Council too, as most of our courts preferred to do, thought it unnecessary in the context of the case it was dealing to consider the effects of the altered sections. The statement however is significant in that it admits that with the amendment *thediathettam* has been included into sections 6 and 7; the provisions of which entitle both spouses to separate use of their respective shares in *thediathettam* during the subsistence of the marriage, [whether as common or separate property of the spouses] subject of course to the requirement that the wife would have to obtain the written consent of her husband if she wants to dispose or deal with her property *inter vivos*. The decision in *Kathirithamby v Subramaniam*⁴²³ however is quite different. Nagalingam J. in the said case declared that when the non acquiring spouse predeceased the acquiring spouse there was no share which belonged to the deceased spouse to devolve on the surviving spouse or the heirs. The case however was

421. *Subramaniam v Kadirgaman*, *op. cit.*

422. *Ibid.* pp 291 -292.

423. (1950)52 N.L.R. p. 62.

subsequently over ruled for a different reason.⁴²⁴ Nevertheless it is interesting to note that Nagalingam J.'s view is not very much different to what Gratien J. had to say in *Kumaraswamy v Subramaniam* as regards entitlement of spouses to *thediathettam*.

The two cases *Arunasalam v Iyadurai*⁴²⁵ and *Manikkavasagar v Kandasamy*⁴²⁶ merit detail discussion as they appear to be the two most relevant cases decided after the amendment came into operation. The question of entitlement of the spouses as well as the extent of the rights to it swirls round the question as to whether *thediathettam* now is common or separate property of the spouses.⁴²⁷ The controversy is featured in the judgments noted above. In *Arunasalam v Iyadurai* Siva Supramaniam J.⁴²⁸ declared that the amendment effected a vital change when it repealed the provision that *thediathettam* was property common to the two spouses and introduced instead a new concept of the *thediathettam* of each spouse. After accepting the change he entitled the surviving spouse to a half of the *thediathettam* which "belonged" to the deceased spouse and declared that the *thediathettam* which belonged to the surviving spouse remained unaffected.

The conclusion that could be derived from Siva Supramaniam J.'s judgment is that, though his Lordship declared that, "Ordinance No. 58 of 1947, however effected a vital change when it repealed the provision that

424. *Ahilandanayakie v Sothinagaratnam*, *op.cit.*.

425. *op. cit.* 70 N.L.R. p. 165.

426. *op. cit.*

427. For a fuller discussion see chapter on *thediathettam* pp. 234-245

428. *Arunasalam v Iiyadurai op. cit.* at p.167.

thediathettam was property common to the two spouses and that on death of either spouse one-half remained with the survivor and the other half vested in the heirs of the deceased and introduced a new concept of the *thediathettam* of each spouse..." he nevertheless based his decision on the concept of matrimonial partnership in acquisitions during marriage. Thus he entitled each spouse to a half share of *thediathettam* irrespective of whether he/she is the acquiring spouse or the non-acquiring spouse, and in accordance to the amended section 20 to a further half share on death intestate of the other spouse. Sharvananda C.J. too entitled the surviving spouse to a half share on acquisition and to a further half of the half share which "belonged" to the deceased spouse on his demise. But he is very emphatic that the concept of *thediathettam* as common property has not been extinguished and is more explicit when he explains the ground of entitlement during marriage and on death intestate. He declared that, "...the provision of Thesawalamai which postulated that *thediathettam* of each spouse shall be property common to the two spouses, both being equally entitled thereto shall therefore continue to be operative in spite of the repeal of the old section, as it is not inconsistent with the provisions of the amended Matrimonial Rights and Inheritance Ordinance of Jaffna".⁴²⁹ He uses the presumption against radical alteration of the law and the principle that concepts firmly entrenched in a jurisprudence cannot be jettisoned

429. *Manikkavasagar v Kandasamy*, *op. cit.* at p. 23.

by a side wind to hold that community in *thediathettam* has not been abrogated.⁴³⁰

Rights of spouses on *de facto* separation

Rights of spouses on voluntary or mutual separation in respect of separate property is covered by Part IV:1 of the Code. However in keeping with the strategy adopted by courts,⁴³¹ some general principles could be deduced from the provision which could be applied to *thediathettam* as well. It was noted that Thesawalamai recognises the husband and wife as separate individuals in relation to their separate properties but does not do so with respect to acquired property which is held in common by the spouses. Part IV:1 imposes restrictions on spouses in the disposal of their respective separate properties while living separately by mutual consent. It could be presumed that if Thesawalamai had imposed restrictions on spouses living in separation in respect of their rights to dispose of their separate properties, (which is kept out of the community) it would have done, more so, in relation to *thediathettam* which was held in common by the spouses. It needs to be refreshed that the Code is not a comprehensive codification of all the customs now called Thesawalamai. Further, the imposition of restrictions by the Code on both the spouses as to their rights to dispose their separate properties, while living separately, amounts to a recognition of the continuance of mutual proprietary relations of community of goods between spouses, even though living separately. Such an assumption

430. *Ibid.at.* p. 25.

431. *Supra* p. 284

does not appear farfetched when the incidents in the repealed section 20(2) relating to divorce and separation are considered. This section, as other provisions of the Ordinance of 1911, has been accepted as declaring the customary law.⁴³² It provides that community subsists as long as the spouses are alive and till such time the marriage comes to an end by death, divorce or separation *a mensa et thoro*. Hence Tambiah submits "...if there is only voluntary separation and there is no separation *a mensa et thoro* by a decree of competent court, the community still subsists in view of the express provisions[19 and 20(2)] already cited".⁴³³ When community exists it automatically follows that the wife becomes entitled to a half share of the acquired property and the husband's marital powers in relation to the common property too continue. We have however a case cited in Mutukisna's *Thesawalamae*⁴³⁴ and the case of *Chellappa and another v Valliamma and another*⁴³⁵ which have held that property acquired by one spouse after the separation is not common property. *Chellappa's* case also held that such acquisition becoming separate property the husband had the right to deal by way of donation with the entirety of it. These early cases were cited with approval by De Silva J. in *Velupillai v Manonmany* where he declared: "I think the principle laid down in these two cases

432. *Supra*, p. See also Ennis J in *Chellappah v Valliammah*, noted that "The Ordinance No: 1 of 1911, which has been taken, generally speaking, as the codification of the customs existing prior to the enactment of the Ordinance...." *op. cit.* p.276 - 277.

433. *Laws and Customs of the Tamils of Jaffna*, *op. cit.* p. 190.

434. *Nagatta v Nagappen* p.181;

435. (1923) 1 Times of Ceylon report, p.274

is based on the spirit of Thesawalamai”.⁴³⁶ The “spirit of Thesawalamai” was however not elucidated, leaving one to presume that the court must have come to the conclusion that due to the separation the marriage did not subsist for the property to be considered as property common to the spouses.

We have also the decision of *Kandappa v Arulpavanam*,⁴³⁷ where the spouses had entered into a deed of separation which provided for the separation of the proprietary interests of the spouses. Macdonell C.J. here considered the separation as separation *a mensa et thoro* and came to the conclusion that, where there is a deed of separation the deed is binding between the parties and that the wife could not, contrary to its express terms, benefit from any property acquired by the husband subsequent to the deed. He reasoned on the basis that 20(2) taken together with 20(1) “seems to say that the marriage will no longer “subsist”, for the purpose of that community of property known as *tediatetam*, in either of two events, dissolution of marriage or separation”.⁴³⁸ According to Tambiah the effect of the judgment of *Kandappa*’s case is that, where there is a deed of separation and the deed provides for the separation of proprietary rights then the spouses are bound by it.⁴³⁹ To the contrary if the deed of separation does not so provide for separation of property or, more conclusively, where the parties had merely separated without any such agreement,

436. (1951)53 N.L.R. p.247 at p. 250.

437. (1932)35 N.L.R. p.107.

438. at p. 107.

439. *Laws and Customs of the Tamils of Jaffna*, op. cit. p192.

then the decision does not become applicable.⁴⁴⁰ Community, in these latter two circumstances, would then continue to subsist. Based on such reasoning Tambiah concluded that the older decisions, referring to *Nagawatte and Valliammah*, are no more good in law.⁴⁴¹ His reasoning seems to bear weight in view of what Lee had to say in similar circumstances. He speaks of separation in terms of a consent paper to which the spouses are parties and says, "The better view seems to be that an extra judicial agreement to live apart has no legal effect, unless, perhaps, to exclude an action for restitution of conjugal rights..."⁴⁴² He also notes that such an agreement has effect only inter parties until it is absorbed in a decree of judicial separation and that it does not affect the rights of creditors. Lee's expression helps to strengthen Tambiah's views on the same matter that, by itself, voluntary separation will not bring community or the husband's powers to an end. Neither would it deprive the non acquiring spouse to a share of the property acquired during such separation.

On judicial separation and divorce

Judicial separation and divorce are discussed together as the effects are more or less the same. The Thesawalamai is silent on the subject of separation *a mensa et thoro* and divorce, as it is on marriage. One of the two case cited by Mutukisna⁴⁴³ does not give any evidence as to the law

440. *Ibid.*

441. *Ibid.*

442. Lee, *An Introduction to Roman Dutch Law*, *op. cit.* p.93.

443. Lee, *An Introduction to Roman Dutch Law*, *M.* p.191.

applied. The other refers to parties who were Brahmins and merely states that "... the parties by our religion cannot be divorced; this of course, is confined to Brahmins".⁴⁴⁴ Judicial separation or divorce as presently understood could not be expected as having been widely prevalent under early law but from the two cases cited it is presumable that situations of such nature did exist. The Ordinance of 1911, acknowledged as declaratory of the customary laws, covers situations of judicial separation and divorce. It could be that the legislature in 1911 saw the need to do so in the social framework in which Jaffna was then. It must also be noted that by then the Marriage Registration Ordinance⁴⁴⁵ and the Civil Procedure Code,⁴⁴⁶ which are statutes applicable to persons governed by Thesawalamai had come into being. These legislations provide for judicial separation and divorce.

By the provisions of the Ordinance, before it was amended in 1947, on divorce or separation a *mensa et thoro* the wife became entitled to pray for a division of property and take for her own separate use one half of the joint property.⁴⁴⁷ The effect of a decree of separation or divorce was to release one half of the *thediathettam* to the other spouse to which he/she had become entitled by sub-section (2) of section 20. Community in *thediathettam* thereby was brought to an end and the hitherto undivided share was set free thereby entitling the other spouse to separate use of

444. M. p.203 at 204.

445. N.19 of 1907

446. No. 2 of 1989.

447. Section 20(2); *Murugesu v Kasinader, op. cit.* ; *Singaravelu v Ponnai, op. cit.* at p.282.

it.⁴⁴⁸ The status of a separated wife is also governed by section 8 of the Ordinance. The proviso to the section makes consent of the husband unnecessary for the wife to deal with her separate property. She would thus pass from the subservient position of *feme covert* and acquire the status of a *feme sole*, just as in the case of a woman governed by the general law.⁴⁴⁹ The amended section 20 does not deal with the entitlement of the spouses to *thediathettam* on either judicial separation or divorce. With the inclusion of *thediathettam* into section 6 it should be possible to make the proviso to section 8 applicable to a judicially separated wife and entitle her to rights enjoyed as a *feme sole* with respect to her share of *thediathettam*. Such a supposition would rest on whether the court would continue to abide by the judgment in *Manikkavasagar v Kandasamy*.

The marital power of the husband exists only during coverture. By divorce or judicial separation the community comes to an end and the wife's share is automatically set free from the bond of community and from powers of management which the husband had previously enjoyed under the Thesawalamai.⁴⁵⁰ Thus when the decree *nisi* is made absolute the husband ceases to be the "irremovable attorney" of his former wife⁴⁵¹ and therefore loses his status to sell, mortgage or alienate the wife's share of *thediathettam*. The position after the amendment however is not clear as the amendments say nothing about entitlement

448. *Sangarapillai v Devaraja Mudaliyar*, *op. cit.* at p.6 ; *Ahilandanayaki v Sothinagaratnam*, *op. cit.* at 389

449. Civil Procedure Code section 609.

450. *Ahilandanayaki v Sothinagaratnam*, *op. cit.* at p.389.

451. *Rajaratnam v Chinnakone*, 71 N.L.R. p.241.

of spouses to *thediathettam* on either separation or divorce.⁴⁵² In the absence of any provision it remains a matter of conjecture as to how the law would take its course. It is submitted that on the rationale of *Manikkavasagar v Kandasamy* the repealed section 20 (2) could be made applicable on the basis that there is a lacuna in the law as the new sections do not provide for the incidences of *thediathettam* or for situations of divorce or separation *a mensa et thoro*.⁴⁵³ Such an approach would be just and equitable as it would enable a spouse to get her share of the *thediathettam* on divorce. It would be also in keeping with the fundamental principle of Thesawalamai that property acquired by the spouses is due to their joint efforts.

Rights on intestacy

Spouses' rights on intestacy have to be analysed on the basis of the two-fold classification of *thediathettam*. It was noted that by the old section 20 the surviving spouse who had become entitled to a half share on acquisition of *thediathettam* by the other spouse⁴⁵⁴ took for her or his separate use that share on death intestate of the other spouse.⁴⁵⁵ The section uses the word "remain" to note that a half share that had been due from the time of purchase will continue to be with the non acquiring spouse, thereby

452. In *Ahilandanayaki v Sothinagaratnam*, *op. cit.* at p.387 Nagalingam J. remarked that the new sections are applicable to the estates of deceased persons only and not to the rights of spouses whose marriage ties were dissolved by a decree *et thoro*.

453. For a fuller discussion on the basis of this rationale see page 253 in the chapter on *thediathettam*.

454. Section 20(1)

455. Section 20(2)

denoting that the half share already belonged to that spouse. So what really happened on death of the other spouse was to entitle the surviving spouse to separate use of that share of *thediathettam* which belonged to her/him, but had remained during the subsistence of the marriage as “property common to the two spouses”.⁴⁵⁶

The amended section 20 states that “On the death of either spouse one-half of the *thediathettam* which “belonged” to the deceased spouse and has not been disposed of by last will or otherwise, shall devolve on the other spouse...”. The amended section uses the word “belonged”, which could be taken to denote what was noted as “remain” by the repealed section. The question that arose was based on two possible premises i.e. whether it is only on death of one spouse that the other spouse becomes entitled to half of it, or, whether he/she was already entitled to a half share on acquisition by that spouse, and that on death intestate of that other spouse the surviving spouse became entitled to a half of what “belonged” to the deceased spouse. Siva Supramaniam J. accepting that the amendment introduced a new concept of *thediathettam* of each spouse nevertheless held that, by the provisions of the new section that “one-half of the *thediathettam* which belonged to the deceased spouse shall devolve on the surviving spouse and the other half on the heirs of the deceased spouse. The *thediathettam* which belonged to the surviving spouse remained unaffected by the death of the other spouse”.⁴⁵⁷ On this basis he computed the total share devolving on the

456. Section 20. (old section)

457. *Arunasalam v Aiyadurai*, *op. cit.* at p. 167.

surviving spouse as three- quarter. It is clear that the judgment was based on the second premise. Sharvananda C.J. following the same premise came to a similar conclusion. The two judgments appear to have been based on the interpretation of the language used to denote the shares due to the spouses, during the subsistence of the marriage and on death intestate of the other spouse. If the words in the section “one half of the *thediathettam*” is taken to refer to the half which “belonged” to the deceased spouse on acquisition then the C.J.’s decision holds good ground. The amount due to the surviving spouse then would total to a three quarter share leaving a mere quarter to the heirs. To the contrary if the words are taken to note one half, “of the *thediathettam* that belonged to the deceased spouse...” (meaning the entire *thediathettam* belonged to the deceased spouse) which would devolve, then it has to be taken to mean that the *thediathettam* belonged in *toto* to the deceased spouse and on his/her death the surviving spouse became entitled to one half and the heirs to the other. The situation could be summed up as posing a question as to whether the amendment changed the concept of *thediathettam* or not. The answer to the question was given by Sharvananda C.J. based on the presumption against radical alteration. His Lordship declared, “The concept that *thediathettam* of a spouse is property common to both spouses is far too firmly entrenched in the jurisprudence of the law of Thesawalamai to be jettisoned except by unequivocal express legislation and not by a side wind”.⁴⁵⁸ Earlier in point of time and

458. *Manikkavasagar v Kandasamy*. Op. cit. at p.25 Refer Chapter on *thediathettam* pp. 257-259 for a fuller discussion.

contrary to Sharvananda C.J.'s judgment is Gratien J.'s obiter that, "property which would have previously constituted *tediatetam* within the meaning of the principal Ordinance in accordance with the ruling in Avitchy Chettiar's case must, *if acquired on or after 4th July, 1947, be regarded as "separate property"*. He also desired to be placed on record that he was not disposed to accepting the theory of the surviving spouse getting an additional quarter share⁴⁵⁹ and explained that he found no indication in the language of the amending Ordinance of any intention to enlarge the rights or expectations of a non-acquiring spouse. But it needs to be noted that Gratien J. in the earlier part of the same paragraph, quoting *Akilandanayakie's* case, states that, "the new section 19 gives a definition of *tediatetam* "which *restores for the future* the more **traditional conception of *tediatetam*** [emphasis added] which had unmistakably, even though carelessly, altered by legislative intervention in 1911." It is submitted that the traditional concept of *thediathettam*, as shown in the Code and the principal Ordinance, is that it is property common to both the spouses. As such it is to this position that restoration can be envisaged. It is humbly submitted that Gratien J.'s statement is thus confusing and incongruous.

With the increasing tendency to establish nuclear households as the unit of family living, the matrimonial home or the dwelling house has been, generally or very often, an acquisition by joint efforts and has been recognized in most jurisdictions as the most important, if not, the primary family

459. *Kumaraswamy v Subramaniam*, *Op. cit.* at p. 48

asset. In Thesawalamai, as partnership property, it falls into the category of *thediathettam*; and we saw how, both under the customary law as well as the statutory law, the principles of spouses' equal entitlement during the subsistence of marriage and equal apportionment on intestacy are applied to it. The degree, to which legal recognition is given to the wife's intangible domestic contributions, in the assessment of entitlement to matrimonial property as partnership property, constitutes one very significant test of the level of advancement of the social ethics of that society. In this, the customary laws of the Tamils of Jaffna have set precedents far ahead of social and economic developments, which are worthy of emulation by many countries of the East as well as the West.

The modern law of some foreign jurisdictions has gone one step further by even recognizing rights of spouses who have only a de facto relationship to the deceased spouse. The Property (Relationships) Act 1984 No. 147 [including amendments up to 2002] and the Wills, Probate and Administration Act No. 13 of 1898 [as amended up to 2004] of New South Wales, Australia are good examples. The first Act, defines de facto relationship as a relationship between two adult persons, who live together as a couple, and who are not married to one another or related by family.⁴⁶⁰ It also lays down matters in detail that would be taken into consideration in determining whether two persons are in de facto relationships.⁴⁶¹ The second Act provides that, notwithstanding the fact that the intestate leaves a

460. Section 4 of the Property (Relationships) Act

461. Section 4 (2)

spouse but no issue or leaves a spouse and issue, but, "where the de facto spouse was the de facto spouse of the intestate for a continuous period of not less than 2 years prior to the death of the intestate and the intestate did not, during the whole or any part of that period, live with the person to whom the intestate was married," such part of the estate of the intestate as is required to be held in trust for the spouse of the intestate shall be held in trust for the de facto spouse.⁴⁶² The recognition of the rights of a de facto spouse in the context of the law in New South Wales is noteworthy. Where the intestate has no spouse living, the Act gives priority, to the rights of a de facto spouse so living for a continuous period of 2 years with the intestate, over the rights of any issue born to the spouse of the intestate.⁴⁶³ The rights of a de facto spouse is also recognized in the Will, Probate and Administration Act with respect to the shared home⁴⁶⁴ of the spouses. In that respect it enacts that a reference in subsection (1) of 61 D to the spouse of an intestate is, where the intestate dies leaving a spouse and a de facto spouse, a reference to the spouse or de facto spouse.⁴⁶⁵

462. Section 61 B (3A) read with section 61 B (2) and (3).

463. Section (3B) (a) of the Wills, Probate and Administration Act.

464. 61 A (2) shared home in relation to an intestate's estate, means a dwelling-house in which the intestate held an interest in respect of which the surviving spouse or de facto spouse of the intestate for whom part of the estate of the intestate is required to be held in trust under section 61B (3),(3A) or (3B) is entitled to exercise the right conferred by section 61D

465. *Ibid.*

Is the surviving spouse an heir to the deceased spouse?

It was noted above that, irrespective of the extent of entitlement, the repealed as well as the new section 20 entitled the surviving spouse to a share of the *thediathettam*. Does such a right enable the surviving spouse to be named an heir to the deceased spouse as regards *thediathettam*? Drieberg J. in *Chelliah v Kadiravelu* made clear [under the old section] that the surviving spouse is ordinarily not an heir to the estate of his wife.⁴⁶⁶ The word **ordinarily** (emphasis added) is used by His Lordship because the surviving spouse under the Ordinance can succeed to the deceased spouse in the last resort, that is, in the event of all others failing.⁴⁶⁷ As to whether the person in whom a half share vests on acquisition could not be called an heir, he declared, “the half of the *thediathettam* which vests in him on the death of his wife does not devolve on him as an heir of his wife. It is a separation of his half of the property acquired during his marriage which is regarded as common.” As was the general trend followed by the judiciary, Drieberg J. took guidance from the Roman Dutch Law and explained that it was similar to the separation of the half share of the survivor of persons married in community of property under the Roman Dutch Law. It makes clear that under the old section 20 when the surviving spouse took for her separate use his / her half share he / she did not do so as the heir of the deceased.

466. (1931) 37 N.L.R. p.172 at 175

467. Section 31, JMARIO.

It is submitted that the position under the new section 20 is not the same. This section, unlike the earlier section, does not deal with the incidents of *thediathettam* but deals only with devolution on death intestate. It says "...one half of the *thediathettam* which belonged to the deceased spouse and has not been disposed of by last will or otherwise shall *devolve* [emphasis added] on the other spouse and the other half shall devolve on the heirs of the deceased spouse". The emphasis on the word is important, since Sharvananda C.J. uses the word, to distinguish the status of the surviving spouse from the heirs of the deceased spouse. He declared that, "Neither under the Thesawalamai nor under the Jaffna Matrimonial and Inheritance ordinance No. 1 of 1911 is the surviving spouse an intestate heir of the deceased spouse".⁴⁶⁸ He goes further and substantiates his point by stating that the amending Ordinance, though it uses the language "**devolve**" in respect to the surviving spouse, it "purposefully avoids describing that spouse as an heir of the deceased spouse".⁴⁶⁹ It needs to be noted that his Lordship however was not of the same view in the latter part of his judgment wherein he states: "Under the law of Thesawalamai the surviving spouse was not an intestate heir of the deceased spouse. The new section 20 represents a departure in this respect from the customary law of Thesawalamai. It expressly provides that one half of the *thediathettam* belonging to the deceased spouse "**shall devolve**" [emphasis added] on the surviving spouse".⁴⁷⁰

468. He reiterates his view in *Sivagnanalingam v Suntheralingam*, [1988]1 Sri.L.R. p.86 at 97.

469. *Manikkavasagar v Kandasamy*, *op. cit.* p.18.

470. *Ibid.*, at p. 24.

From the above quoted words it is possible to make an inference that his Lordship was of the view that under the amendment the surviving spouse falls into the category of an heir of the deceased spouse. It is relevant to note that it is the latter view that Sharvananda C.J. expresses in an article written subsequently by him.⁴⁷¹ It is submitted that it is the word ‘devolve’ that is used in section 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance to refer to the rights of children as heirs and therefore much significance cannot be attached to the fact that the Ordinance does not specifically declare the surviving spouse as an heir and only uses the word devolve to show the surviving spouse’s rights. The contrast in the repealed section 20 is noticeable. It provides that, “and the other half shall **“vest”** in the heirs of the deceased”. [emphasis added] Tambiah, referring to the right of the surviving spouse on death intestate of the other, shows clearly that under the customary law of Thesawalamai the surviving spouse was never regarded as an heir to the deceased spouse. But he contrasts the position under the customary law of Thesawalamai with that under the present section 20 and declares that, “the effect of section 6 of Ordinance No. 58 of 1947⁴⁷² is to make one spouse an heir to one half of the *thediathettam* belonging to the deceased spouse”.⁴⁷³

471. *Law Journal* 1993, Vol. V, Part 1. Magazine published by the Bar Association of Sri Lanka.

472. Section 20 of the Ordinance as amended.

473. *Laws and Customs of the Tamils of Jaffna*, *op. cit.* Appendix VI.

Disposition by Wills

The marital power of the husband does not extend to testamentary disposals. He can dispose of only his share of the *thediathettam*.⁴⁷⁴ Different considerations apply after the amendment. Section 6 of the Ordinance which specifies the wife's separate properties now includes *thediathettam* as well. A wife can now dispose of her *thediathettam* by a will, whether it be her half of her sole acquisition or only a half share of the husband's acquisition. On the face of it, it reflects equality of opportunity. But taking into consideration the economic dependence of a woman on her husband, mainly because of the dual roles she has to play in the family, her opportunities are comparatively circumscribed. Section 20 too is relevant here. It is only what remains of *thediathettam* after disposal by last will or otherwise that devolves on the surviving spouse and the heirs of the deceased. Thus a will takes priority over rights on intestacy. It enables one spouse, which invariably happens to be the husband because of his superior prowess and economic opportunities, to deprive the other of a share in the *thediathettam*. This danger is more real under a separate property regime. In *re Sithambarapillai*, the husband left by will the entirety of *thediathettam* to his natural / adopted son. But as the case was decided before the amendment, when *thediathettam* remained the common property of the spouses, the wife was able to assert her right to her half share. Whether she could do so even now is dependent on whether the court would view *thediathettam* as separate

474. In *re Sithambarapillai*, 21 N.L.R. p.337

or common property. What Gita Gopal says of the Indian situation is very relevant to such possible dangers facing the woman governed by Thesawalamai. She says, “Although there is no *prima facie* discrimination such unrestricted testamentary power is detrimental to woman in a patrilineal and patriarchal society”.⁴⁷⁵

Conclusion

Conflicting judicial decisions and juristic pronouncements as to whether *thediathettam* is now the separate property of the acquiring spouse or remains the joint property of both spouses made analysis of both views inevitable. In the core of the concept of *thediathettam* is crystallized a recognition that both spouses, irrespective of their roles in the family, make a positive contribution towards the acquisition of matrimonial property. Thus Thesawalamai, by its concept of spouses’ equal entitlement to *thediathettam*, has, from the very inception itself repudiated the theory that the domestic chores and duties performed by the wife as home-maker are intrinsically of less worth than the income-earning activity of the husband. Reform of the law to remove the confusion as to whether *thediathettam* now is the common or the separate property of the spouses has been espoused both publicly and judicially. Significantly, the need has been acknowledged widely and pleaded eloquently by women activists. But it is not known as to whether any serious or result oriented effort has so

475. “Gender and Economic Inequality in India: The legal connection”, Boston College Third World Law Journal, Vol: X111(Winter 1993) No: 1,

far been undertaken. It is suggested that when the provision of the law relating to the definition of *thediathettam* is amended, the incidents relating to it too should be incorporated. Such a reform will serve the dual purpose of the need to define *thediathettam* as well as to specify the rights of spouses to it. In keeping with the recommendation advocated in this work, that the concept of partnership in acquired property be retained, the rights of spouses, *inter vivos* as well as on intestacy have to be specified. An equal share of matrimonial property, apart from being just and equitable, will enable women to break traditional gender based barriers and encourage even rural women to gainfully make use of available productive resources.

Entitlement to an equal share of acquired property has been a feature of Thesawalami. What is required now is, to entitle the woman to separate use of it even during the subsistence of marriage and to also remove the constraints on her to deal with her separate properties. The obstacle in the way has been the marital powers exercisable by the husband both over the wife's separate and her share of the joint property. A wife under Thesawalamai also lacks *locus standi*. The reformers need to take note of the fact that anachronistic provisions based on the marital powers of the husband have to be abrogated. In place, a formula which will entail no discrimination between husband and wife in their rights over their separate as well as joint properties, and which will effectively incorporate the participation of both spouses in the administration and control of the partnership property as equal partners has to be formulated. Closer attention needs to be given to the precise structure of this formula. When marital powers of the husband are

made defunct, both spouses would automatically become equally responsible. But administration of the partnership property would necessitate more elaborate arrangements. The provisions of the South African Matrimonial Property Act (1984) with regard to marriages contracted after 1984, both in and out of community, provide useful guidelines. The Act provides for the abolition of marital power of the husband over the person and property of his wife⁴⁷⁶ and leaves no room for judicial speculation or interpretation by specifically stating the effects of such abolition. It enacts that "...the effect of the abolition of the marital power is to do away with the restrictions which the marital power places on the capacity of a wife to contract and litigate".⁴⁷⁷ The law relating to the position of the husband as head of the family and the law relating to domicile and guardianship however remains unaffected.⁴⁷⁸ The provisions in Chapter 111 of the Act which deals with marriages in community could be used in formulating the powers of the spouses under Thesawalamai in relation to *thediathettam* as common property. Section 14 of the Act gives same powers to spouses "with regard to disposal of the assets of the joint estate, the contracting of debts which lie against the estate and the management of the joint estate." Section 15 details them out quite comprehensively. The way the common man governed by Thesawalamai takes the law to be was also analysed in this chapter and it is important and relevant in the reform process. They reflect the people's thinking which has to be

476. Section 11, Matrimonial property Act 88 of 1984.

477. *Ibid* ; Section 12.

478. *Ibid*; Section 13.

taken notice of if reforms should have meaningful effects on their lives. Whatever reforms are brought they need to reflect the aspirations of the modern Jaffna woman. The man's interests are not neglected in this society which remains largely patriarchal.

CHAPTER V

LOCUS STANDI IN JUDICIO OF A MARRIED WOMAN GOVERNED BY THESAWALAMAI

Introduction

It is proposed in this chapter to analyse the legal status of a married woman governed by Thesawalamai in relation to her matrimonial property. Since her other rights, duties and obligations regarding same, were analysed in the foregone chapters it is sought to confine this chapter to her standing in court, termed generally as *locus standi in judicio*. The Code makes no provisions regarding it. This has often prompted the courts to find the easy way out, that is, to apply a law with which they were familiar. Thus we see the application of Roman Dutch Law in order to determine the *locus standi* of the woman. But it is noticeable that a few judges, especially in the first half of the nineteenth century, had resorted to the method, which was quite often adopted in the early stages of colonial judicial administration, of finding what the custom of the Tamils were and applying them wherever appropriate. It is proposed to deal with these cases too, especially to show how application of concepts very much alien to Thesawalamai could have been avoided.

In that process it is made clear that even if such application as regards *thediathettam* can to some extent be justified it cannot be so with regard to the separate property of the woman. Such insidious and indiscriminate application of Roman Dutch Law by the judiciary led to the undermining and displacement of the more liberal values of the customary law, which in turn resulted in demeaning and degrading the woman governed by Thesawalamai. It relegated her to a subservient position in the family, of which she was originally the matriarch, lowered her social standing as a person who had to walk in the shadow of the husband and incapacitated her legally.

Wife's *locus standi* in relation to her separate property

Suits between spouses

In *Wallinachy v Cadergamer*, an early case decided in 1844,¹ the court decided that a wife cannot maintain an action against the husband to recover her dowry property until she has obtained a divorce, though she can sue him for maintenance. Generally however, under the early customary law, the courts seem to have acted on the principle, "That as the law [referring to Thesawalamai] admits that there is separation of interest and property between husband and wife the law must provide an adequate remedy for either party whose rights may be infringed by the other".² In the

1. Mutukisna, (1844) p.263.

2. Marshall's Reports, (L.B.21 28. October 1834) p.160-161

above quoted case, reported in Marshall's Reports,³ the wife, after having obtained judgment in her favour in an action she had instituted against her husband for the recovery of a sum of money, being the profits of certain property which had been settled on her by her parents, took out execution against her husband's property and against him in person. The Supreme Court opined that, the wife's parents or her relatives, if the parents were dead, should have been the proper persons to have instituted the action; if not, that it would have been less anomalous had they been made joint plaintiffs. Nevertheless, it held that, "even as the case stood, however, execution against the property of the husband, as defendant, might legally issue when that proceeding was necessary to secure the wife's separate property..."⁴ The court however refused to give its sanction to execution against the person of the husband, as it seemed inconsistent with the very essence of the marriage state, in as much as it was directly opposed to the relative rights and duties of the parties. Thereupon it directed the District Court to take the opinion of the people since the subject of marriage among the natives, especially of the Northern Province, depended on custom. L.H. De Alwis J. in *Ibrahim v Annamma*,⁵ notes that, the action filed by the wife against her husband in the case reported in Marshall's Reports, could have been maintained under the Roman Dutch Law on the basis of the third exception to the general rule, that a woman has no independent personal *standi in judicio* rather than on the

3. *Ibid*

4. *Ibid.*

5. [1982] 2 Sri L. R. p. 633

ground that she was possessed of separate property;⁶ the third exception being in a suit by the wife against the husband.⁷ The above comment by the learned Judge shows the court's eagerness to follow principles of Roman Dutch Law, disregarding of, or in preference to, principles that could be gathered from the customs of the people. Marshall records another case where a similar point was discussed and a bench of three judges took the view that an action could be instituted by the wife against the husband. The judgment however does not give reasons.⁸ The right of the wife to sue her husband recognized in the above two cases was further recognized in *Sivakamy v Nagan*.⁹ A similar opinion was expressed by Wendt J. in *Kantamma v Kanapathipillai*¹⁰ when he held that there is nothing in Thesawalamai which deprived the wife of her right to enforce an *otty* inherited by her from her mother. The husband was the second defendant in the case. "On the contrary," he added, "the Thesawalamai regards a wife's inherited property as being, like her dowry, her separate property"¹¹ He cited with approval the case reported in Mutukisna's *Thesawalamai*.¹²

6. *Ibid* at p. 641.

7. Kotze J. in *Van Eeden v Kirstein* (1800) as cited by Lee at p. 426 in Appendix D, *An Introduction to Roman Dutch Law* to his work and quoted in *Ibrahim v Annamma*, *op. cit* at p. 638

8. Marshall's Reports, p. 219, Tambiah, *Laws and Customs of the Tamils of Jaffna*, *op. cit.* p. 131

9. *Ramanathan Reports*, 1863-1868; (1881) p. 158

10. (1906) 8 N.L.R. p.337

11. *Kantamma V Kanapathipilley et al* (1906) 8 N.L.R. p. 337 at p. 338.

12. M. p. 261.

By the wife against third parties

The early courts have also recognized the woman's right to sue alone even third parties. Mutukisna cites a case decided in 1843 where Wood J. refused to accept the plea made by the defendant that the plaintiff wife had no right to bring the action in her own name without making the husband a joint plaintiff, and to have made him a defendant.¹³ The refusal to accept the plea was on the basis, that unlike as in the English and Roman Dutch Law, which recognize a community of goods between man and wife, "the Thesawalamai or Country Law clearly recognizes a distinct and separate interest, - the husband in the property inherited from his father, and the wife in her dowry and inheritance...".¹⁴ Therefore he held that the wife was entitled to sue by herself, without making the husband a joint plaintiff.

An issue that came before court was whether the husband can sue on behalf of the wife in respect of her separate property, without making her a party to the action. In *Viswalingam for himself and on behalf of his wife Katiratchipelle v Sabapathy*¹⁵ the plaintiff husband sued for himself and on behalf of his wife for the recovery of a mortgage bond involving his and his wife's inherited property. The defendants in answer replied that the wife should have been joined as a party. Clarence J. held, "Having in view the difference between the position of a wife under the

13. *Ibid*

14. M. 261

15. Ramanathan Reports (1872 – 1876) p. 249

Thesawalamai and under the Roman Dutch Law in regard to her inherited property, the Supreme Court thinks the District Judge was right in holding that the plaintiff's wife in this case should be joined as a party".¹⁶ It is clear that Clarence J. was in agreement with the earlier decisions when he recognized the difference in position of the wife under the Roman Dutch Law and Thesawalamai. In Roman Dutch Law, subject to certain exceptions,¹⁷ marriage creates *ipso jure* a community of goods between the parties, termed *communio bonorum*¹⁸. Besides on marriage a woman becomes a minor¹⁹ and subject to the marital powers of the husband which involves his power over her person and her property. She has no capacity to conduct civil proceedings unassisted, whether as plaintiff or as defendant.²⁰ His Lordship, in recognition of the difference in the two matrimonial property systems and the relative positions of the spouses in relation to such properties, came to the conclusion that the wife under Thesawalamai should be joined as a party and that it was legally not sufficient for the husband to plead on her behalf in order to bind her interest²¹. The recognition of the wife's separate interest in her inherited property thus gave her a legal status independent of her husband. This decision is very important in assessing the attitude of the judiciary to the application of Roman Dutch

16. *Ibid.* , p. 250.

17. Lee, *op. cit.* p.70

18. Voet, 23.4.1; Lee, *op. cit.*, p.68.

19. Voet, 1.7.13.; 23.2.23. ~

20. H.R. Halo, *The South African Law of Husband and Wife op. cit.* (fifth edition) p. 232

21. *Viswalingam v Sabapathy, op. cit.* at p.250

law principles.²² It makes clear that the early courts did not rush to Roman Dutch Law principles to sort out problems relating to Thesawalamai. They showed that they were more inclined to take note of the difference in situations prevalent in the two systems.

Wife's liability to be sued

When action was filed against the wife however, the court held that a wife cannot be sued alone without her husband being joined²³. The text of the decision, as reported by Mutukisna, is very scanty and no reasons are given for the conclusion. Tambiah comments that it is not clear as to whether the early judges were following any peculiar customary rule in this matter or were adopting the Roman Dutch Law.²⁴ He declared that if it is a statement based on Roman Dutch Law it is too wide, since Roman Dutch Law recognized many exceptions to this general rule. In Roman Dutch Law, where the wife owns separate property she may sue or be sued in relation to such property if it is excluded from the community and from the husband's marital powers.²⁵ In Thesawalamai too the wife owns separate property which does not come under partnership property, but as to whether prior to the Ordinance of 1911 it was under the influence of the marital powers of the husband

22. *Ibrahim v Annamma*, [1982] 2. Sri L.R. p. 633 at p. 641.

23. *Podate, widow of Kander v Variar Venasitamby and others*, M. p. 260; See also *Sinnapodien V Sinnapulle, widow of Cander and others*, M. p. 263.

24. *Laws and Customs of the Tamils of Jaffna*, *op. cit.* p.130

25. *Halo*, *op. cit.* pp . 235 and 241.

depends on the construction of Part 1:IV of the Code.²⁶ The early courts acting on the basis that the Thesawalamai woman was subject to the marital powers of the husband, even in respect of her separate property, held that, "the disability of a married woman is the same under the Tamil customary law as under the General Law prevailing in the island".²⁷ It is very unfortunate that these courts, which recognised separation of interest and property between spouses in Thesawalamai and authorized the wife to sue alone in respect of her separate property, nevertheless did not follow the same principle when she was sued. But in *Durairajah v Mailvaganam*²⁸ it was held that where the husband and wife governed by Thesawalamai sell immovable property belonging to the wife, notice to warrant and defend title must be given to the wife separately, if she is to be held liable. In such an instance the court has recognized the wife's individual judicial standing in respect of her separate property.

With the Ordinance of 1911

Though there are no express provisions in the Jaffna Matrimonial Rights and Inheritance Ordinance pertaining to *locus standi*, it is possible to discern some aspects of the wife's standing in court from certain provisions²⁹ dealing with the wife's property rights. The statute avails the wife

26. For fuller discussion see Chapter on Rights and Obligations of Spouses to Matrimonial Property, p. 343

27. De Sampayo J. in *Chellappa v Kumarasamy*, 18 N.L.R. 435. at 437;

28. (1957) 59 N.L.R. p. 540

29. Sections 8 and 10.

of the right to deal with her property even without the consent of the husband so as to wade through difficult circumstances.³⁰ She could petition the District Court seeking order authorizing her to dispose or deal with her property “if she is deserted by the husband or separated from the husband by mutual consent, or he shall have lain in prison under a sentence or order of any competent court for a period exceeding two years, or if he shall be a person of unsound mind or idiot, or his place of abode shall be unknown, or if his consent is unreasonably withheld, or the interest of the wife or children of the marriage require that such consent should be dispensed with”³¹. It needs to be noted that in Roman Dutch Law too the court may supply the requisite authority if his consent is unreasonably withheld by the husband, or it could not be obtained in consequence of his absence or insanity or of the separation of the spouses.³² When the wife obtains such permission it would be only in respect of that transaction that she could act.³³

In cases of disputes between spouses, relative to any separate property, the statute provides the spouses with the necessary standing in court. Thereby the wife is given the right to apply by motion in a summary way to the District Court of the district in which either of them resides.³⁴ Thereupon the District Judge may make such order or direct

30. Section 8.

31. *Ibid.*

32. Voet, 1.5.16: 23.2.42: Balasingam, *Law of Persons*, (1933) Vol: II, p. 497

33. *Ponnupillai v Kumaravetpilla*(1963), 65 N.L.R. p. 241. See also chapter on Spouses Rights and Obligations to Matrimonial Property, pp. 289-292

34. JMPIO, section 10.

such inquiry as he thinks necessary.³⁵ But the relief is available only as long as the marriage subsists and she holds the position of wife. In *Thangavadiel v Inthiravathy* the action was instituted by the wife against the husband for the return of certain jewellery, but, while the inquiry into the matter was proceeding a decree absolute was entered dissolving the marriage between the spouses.³⁶ The court held that since the plaintiff had ceased to be the wife of the defendant pending the inquiry she lost her status to continue the proceedings.³⁷ It also held that there is no provision in the Civil Procedure Code which would justify the wife continuing the proceeding once she has lost her status as wife.³⁸ The case is important in that it showed that the wife was not without an alternative remedy. It declared that it is possible for the wife (as well as for the husband) to use the option of filing a regular action under the Civil Procedure Code without having recourse to the Jaffna Matrimonial Rights and Inheritance Ordinance.³⁹ The word "may" in section 10 was interpreted by court as indicating the intention of the legislature to not deprive the spouses of the option of filing a regular action to recover their separate properties.⁴⁰ It therefore dismissed the wife's action but without prejudice to her right to proceed against the husband by civil action⁴¹.

35. *Ibid.*

36. (1950) 53 N.L.R., p.369.

37. *Ibid.*

38. *Ibid.*

39. *Ibid.*

40. *Ibid.*

41. *Ibid.*

The position and powers of the husband, as manager and agent of the wife with respect to her separate property, has also been considered by court in relation to the issue of the *locus standi* of the wife. In *Durairajah v Mailvaganam*⁴² the husband and wife had sold immovable property belonging to the wife and notice to warrant and defend title was issued to the husband alone. The issue was whether that notice could be construed as notice to the wife as well. The vendee took up the position that, since the defendants are governed by Thesawalamai, the husband is the manager of the second defendant's (the wife's) property and therefore notice to the husband alone was sufficient. Weerasooriya J. referred to section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance and declared that, the terms of the section make it clear, "that in the case of immovable property forming the wife's separate estate she has full powers of managing it or of leasing or mortgaging it independently of her husband **whose written consent is necessary only for a transfer of it**".⁴³ [Emphasis added] Based on that pronouncement His Lordship held that notice to the husband as the first defendant to warrant and defend title is not notice to the wife, the second defendant. Since the wife, who has always been recognized as the undisputed owner of her separate property, is by the statute made the sole manager of it as well, the decision that notice to the husband to defend and warrant title of the separate property of the wife is not a notice to the wife holds good in law. It follows therefore that after the enactment of the Jaffna

42. (1957) 59 N.L.R.p. 540.

43. *Ibid.*, at p. 543.

Matrimonial Rights and Inheritance Ordinance the recognition in law of her status as manager of her separate property has given the wife some position in respect of her *locus standi* as well, though it remains that she still cannot sue or be sued alone. Justice Weerasooriya's pronouncement that "the husband's consent is necessary **only for a transfer of it**" makes necessary an analysis of the relevant words of section 6. It says that the wife shall have "full power of disposing and dealing with such property by any lawful act *inter vivos* without the consent of the husband in the case of movables, or with the written consent in the case of immovables, but not otherwise, as if she were unmarried". It is therefore humbly submitted that His Lordship's assessment falls within the terms of the enactment only partially and the word "dealing" in the section covers also the wife's right to lease and mortgage, but subject to the written consent of the husband. It is however correct that with the enactment she has been made the sole manager of her separate property with her receipts alone or that of her duly authorized agent being a good discharge for the rents, issues and profits arising from or in respect of such property. The above analysis that her right to deal is subject to the power of the husband to consent cannot however disturb the judgment.

The Ordinance, application of Roman Dutch Law and the judiciary

By the time the Ordinance was enacted Roman Dutch Law had exerted such a binding influence on Thesawalamai that the matrimonial property rights of women came generally to be determined in accordance with Roman Dutch

Law principles. The position was made clear by Swan J. in *Piragasam v Mariamma*. He declared, “It is common ground that a married woman governed by Thesawalamai cannot sue alone. She must be either assisted by the husband or obtain the sanction of the court to sue alone”.⁴⁴ When his Lordship declared that it is “common ground” it makes clear that the court by the time the Jaffna Matrimonial Rights and Inheritance Ordinance was enacted had clearly deviated from the stand taken by the earlier courts of deciding on principles of customary law and had resolved to accept the Roman Dutch Law stand on *locus standi* as applicable to women governed by Thesawalamai.

To have a clear perspective of the stand taken by the courts, it becomes relevant to briefly examine the rules pertaining to *locus standi* in the Roman Dutch Law. Under Roman Dutch Law the general rule is that, in the absence of an ante nuptial contract providing otherwise, the husband acquires marital powers over his wife.⁴⁵ As such, all actions in relation to matrimonial property have to be brought by or against the husband⁴⁶. Subject to specified exceptions,⁴⁷ a married woman who is subject to the husband’s marital power has no *locus standi in judicio*.⁴⁸ She cannot conduct legal proceedings as a plaintiff or defendant without being assisted by her husband.⁴⁹ The husband functions in a dual

44. (1952) 55 N.L.R. p. 114 at p. 115

45. Grotius, 1.4.6 ; 1.5.19, 20 ; Voet, 1.7.13 ; 23.2.23,41; Halo, *op. cit.* p. 189

46. Voet, 23.2.41

47. Halo, *op. cit.*, p. 235

48. Halo, *op. cit.* p. 232..

49. *Ibid.*

capacity in relation to the person and property of the wife. If actions have to be taken in respect of the joint estate, as its administrator, he alone has authority. With respect to actions against the wife personally, they should also be instituted against him in his capacity as her guardian.⁵⁰ Separate actions by or against the wife are null and void. She can appear in court only if authorized by the husband.⁵¹ If she had appeared without his consent but the husband had subsequently authorized it the appearance was validated. The position of a woman under Roman Dutch Law is described by Lee thus: "Though she may have been of full age before marriage, on marriage she is deemed to be a minor under the guardianship of the husband. Like a minor she has, in general, no independent personal *standi in judicio*. She cannot institute or defend an action in her own name. Whether as a plaintiff or defendant she must proceed by or with the assistance of her husband".⁵² Kotze J explains the general rule of a woman's incapacity and the exceptions from it in *Van Eeden v Kirstein*.⁵³ He says that the general rule is that a married woman becoming a minor on marriage has no *persona standi in judicio* and therefore in law she must proceed by, or with the assistance of her husband. He goes on and explains that to it three exceptions have been admitted. First is as regards a woman carrying on a public

50. *Ibid.*

51. V.D.L.1.3.7.

52. *An Introduction to Roman Dutch Law*, 5th edition, p. 63; Van Leeuwen, *Commentaries on Roman Dutch Law*, 2nd edition, 1:6:7. See also L.H.de Alwis J. in *Ibrahim V Annamma*, [1982] 2 Sri L.R. 633 at p. 638.

53. As cited by Lee, *op. cit.* in Appendix D, p.421.

trade. All transactions connected with such trade are exempt. Second is where she is married by ante nuptial contract and has reserved to herself the free administration of her separate property. Third is in a suit by the wife against her husband.⁵⁴

Sections 6 and 36 of the Jaffna Matrimonial Rights and Inheritance Ordinance have provided easy conduits, so to say, to channel Roman Dutch Law into Thesawalamai. Section 6 gives the wife separate use of her separate property but with a limitation that she has to obtain the husband's written consent to dispose and deal with it. By making written consent of the husband mandatory for any dealings by the wife *inter vivos* as regards her immovable property the section has deprived the wife of an independent *locus standi* in court. This provision is in reality a statutory endorsement of the applicability of the Roman Dutch Law concept of marital powers to matrimonial property rights related issues of spouses governed by Thesawalamai. Macdonell C.J. opines that the Legislature had in mind the application of marital powers to issues affecting matrimonial property rights of those governed by Thesawalamai and deliberately refrained from interfering with it.⁵⁵ This marital power is a species of guardianship⁵⁶ and Macdonell C.J. cites Grotius to explain the link that guardianship of the husband has to the lack of *locus standi* by the wife.⁵⁷ Grotius declared: "By virtue of this guardianship the husband appears

54. Voet, 23.2.42.

55. *Sangarapillai v Devaraja Mudaliyar*, *op. cit.* at p. 4.

56. Halo, *op. cit.* p.194.

57. *Sangarapillai v Devaraja Mudaliyar*, *op. cit.* at p. 4.

for his wife in court. He alienates and encumbers her property even that which she has kept out of the community, at his pleasure and without requiring her consent".⁵⁸ He also cites from Van Leeuwen, c. 6. s.7, which says, "Everything so far as the wife is concerned must and can be done by her husband who in law acts for his wife and encumbers and alienates her property...without first requiring her consent thereto".⁵⁹

Likewise L.H. de Alwis J. has based his judgment in *Ibrahim's* case solely on Roman Dutch Law principles. In the process of such analysis the latter Judge has commented on the decision reported in Marshall's judgment where the court in determining the question of *locus standi* had taken cognizance of the customary law position of the separate interest of the parties in their properties. De Alwis J. opined: "In my respectful view, the action filed by the wife against her husband was maintainable under Roman Dutch Law, on the basis of the third exception to the general rule, rather than on the ground that she was possessed of separate property".⁶⁰ The difference in attitude of the judiciary is clear in the different attitudes followed by Clarence J. in *Viswalingam's* case⁶¹ and L.H.de Alwis J. in *Ibrahim v Annamma*. In the former case the court took note of the difference in the property systems of the two jurisdictions and considered the customs of the people. In the latter

58. As cited by Macdonell C.J. in *Sangarapillai v Devaraja Mudaliyar*, *op. cit.* at p. 4

59. *Ibid.*

60. Marshall's Judgments, p. 63 - 64

61. Marshall's Judgments, (1872-1876) Ram. Report, p. 249

instance the court sought to comment on a case⁶² that had been decided on principles of Thesawalamai to advocate relevancy of a Roman Dutch Law principle to that case. Such undue emphasis on Roman Dutch Law led to the indiscriminate application of its principles to cases governed by Thesawalamai. It is most respectfully submitted that the basis and the procedure followed by the Supreme Court in the case reported in Marshall's Judgments is definitely more acceptable as it is in keeping with the laws and customs of the people and in conformity with the pledge made by the colonial rulers to follow to the extent possible the customs and laws of the land. It is on record that the Dutch rulers applied their laws when they found the customs difficult to comprehend.⁶³

The principle therefore seems to have been generally accepted that a wife governed by Thesawalamai cannot conduct civil proceedings, either as plaintiff or defendant, without being assisted by the husband. Where however such assistance is withheld unreasonably, the wife under the Roman Dutch Law has the remedy of applying to court, termed *venia agenda*, that is leave to bring or defend the action herself unassisted.⁶⁴ In the context of Thesawalamai, Swan J. in *Piragasam v Mariamma* accepted that a married woman governed by Thesawalamai cannot sue alone and

62. Marshall's judgments p. 160

63. Memoirs of Anthony Pavilojen, 19 – 9 1965; Instructions from the Governor- General, Council of India to the Governor of Ceylon.(1656 – 1665) to which is appended ' memoirs' by Anthony Pavilojen, p. 117 as quoted by Tambiah, *Laws and customs of the Tamils of Ceylon*, *Op. cit.* p. 25.

64. Voet 5.1.14,16; 2. 4.34. ; Halo, *The South African Law of husband and wife* (fifth edition) p.233.

that she must be either assisted by the husband or obtain the sanction of court to sue alone.⁶⁵ It was also held that the application for sanction of court to sue alone has to be done with the presentation of the plaint itself.⁶⁶ But the same Judge held that institution and maintainability of an action are two different things, and that, though when the action was instituted the wife had no legal right to sue alone since the permission was given after fourteen days, yet once the court dispensed with the presence of the husband her act in suing alone was validated as from the date the plaint was filed.⁶⁷ A slightly different situation arose in *Candappa v Sivanathan*⁶⁸. In this case the plaint filed by the wife was held to have been not lawfully instituted as the wife was neither assisted by the husband when she instituted the action nor had she obtained leave of court to appear without such assistance. When however the wife subsequently sought to amend the plaint the District Court had allowed it, but the matter was contested in appeal where the application was rejected on the basis that it was to amend a plaint which was not lawfully instituted. The plaintiff had neither obtained prior permission nor sought to do so when subsequently she made the application to amend it, in which case the invalid institution could have been validated by such permission, even subsequently granted. A similar situation arose in the more recent case of *Easwary v Sivanathan* and others.⁶⁹ The Court of Appeal differentiated the circumstances of

65. *Op cit.*, at p. 115. Also see *Ibrahim v Annamma*, [1982] 2 Sri R. L.R. 633 at p. 637

66. *Ibid* at 115.

67. *Ibid*.

68. CALA 206/92 – CA 712/92 CAM 28.5.93

69. [2003] 3 Sri L. R. 211

the case from *Ibrahim v Annamma* and *Candappa v Sivanathan* and on the basis that no prejudice would be caused to the petitioner allowed the plaintiff to amend the plaint.⁷⁰

As regards applicability of the Roman Dutch Law concept of the marital powers of the husband to Thesawalamai, Macdonell C.J. in *Sangarapillai v Devaraja Mudaliyar* remarks of the intention of the Legislature thus: "...far from it being clear from the Ordinance No: 1 of 1911 that this marital power has been excluded, several things in the Ordinance seem to show that the legislators had this marital power in their minds and deliberately refrained from interfering with it".⁷¹ In this context it is relevant to look into Section 36 of the Ordinance too. The section provides that, "In all questions pertaining to the distribution of property of an intestate where this Ordinance is silent, the provisions of the Matrimonial Rights and Inheritance Ordinance, and such laws as apply to the inhabitants of the Western Province shall apply". One such principle of law applicable to the inhabitants of the Western Province is that in instances of *cassus omissus* the Roman Dutch Law is applicable. Section 36 therefore, by articulating a policy of authorizing the courts to refer to the Roman Dutch Law on the basis of the rule by *cassus omissus*, resulted in a marked change in judicial approach to issues regarding rights of spouses governed by Thesawalamai to their matrimonial property. It needs to be noted however that the section provides for the application

70. Ibid at p. 213

71. At p.06.

of such laws only when *cassus ommissus* is regarding inheritance. But courts have not restricted the application of Roman Dutch Law principles to only matters relating to inheritance. Where *locus standi* became the issue subsequent courts, especially after the enactment of the Jaffna Matrimonial Rights and Inheritance Ordinance, have on the whole applied Roman Dutch Law to Thesawalamai.⁷² As Thesawalamai recognizes the separate property of the spouses it is difficult to remonstrate the correctness of applying, without distinction, the Roman Dutch Law concepts of community of property or marital power to the matrimonial property system under Thesawalamai.

Tambiah expresses the view that since Thesawalamai does not contain any precise provisions in regard to the married woman's capacity to litigate one should apply the Roman Dutch Law to determine it.⁷³ While it is clear that the earlier decisions expressly show eagerness on the part of the courts to fall in line with principles of the customary law in giving a judicial standing for the woman governed by Thesawalamai, Tambiah comments that it is not clear from the decisions as to whether the law of Thesawalamai contained any special rule as to the *locus standi* of the woman.⁷⁴ His statement devalues the importance of the early cases decided on basic customary law principles. These early cases recognized the separate interest of the

72. *Piragasam v Mariamma*, (1952) 55 N.L.R. p. 114 ; *Ibrahim v Annamma*, [1982] 2 Sri LR, 633; Unreported case, C.A. No: 712/92- Rev. Decided on 28.5.1993 and reported in Bar Association of Sri Lanka News Letter of November 1993.

73. *Laws and Customs of the Tamils of Jaffna*, *op. cit.* p. 130.

74. *Ibid.*

spouses in their separate properties in determining the woman's standing in court.⁷⁵ But Tambiah calls them as decisions made by courts on rules adopted on grounds of expediency. He also expresses the view that it is not clear as to whether the courts were following any peculiar customary rule or adopting the Roman Dutch Law when they held that the wife governed by Thesawalamai cannot be sued alone without being joined. As explained above, it is submitted that the courts during the early period of British colonial rule did have a clear impression of the customs of the land and did not rush to apply Roman Dutch Law principles, though it is not to say that Roman Dutch Law was not in the back of their minds.

The incapacity of women under the Roman Dutch Law is not very different to that which is depicted in the texts of Hindu Law. Manu in Chapter IX declared: Her father protects her in childhood, her husband protects her in youth and her sons protect her in old age; a woman is never fit for independence".⁷⁶ Yajnavalkya, another Hindu sage of importance, expresses a similar view that the wife has to be protected by the husband.⁷⁷ We saw that, unlike as in India, the intensity of Hindu and Brahminical influence on those governed by Thesawalamai was minimal.⁷⁸ The Hindu joint family system as it exists in India was not introduced

75. *Marshall's judgments, op. cit.* pp 160 – 161 ; p. 219 ; *Sivakamy v Nagan*, Ramanathan Reports *op. cit.* ; *Kantamma v Kanapathipillai op. cit.*

76. Manu IX, 3, as quoted by Roop L. Chaudhary in *Hindu women's right to property, op. cit.* p.3.

77. *Institutes of Yajnavalkya*, I,V, 85, as quoted by Chaudhary , *op. cit.* at p. 3.

78. *Supra*, Chapter on *Cheedanam*, p. 106

into Jaffna but, as discussed in the foregone chapters, vivid imprints of patriarchal norms are present in the provisions of the Code. As such it becomes relevant to draw some thoughts as to whether the adoption by our courts of the Roman Dutch Law concept of the marital powers of the husband is nothing but a modified version or expression of the patriarchal instincts of man over woman. It is submitted that it is only a matter of source and the point of difference is that our courts sought to draw from the Roman Dutch Law and not the Hindu Law. Patriarchy of the Hindu Law and marital powers of the husband of the Roman Dutch Law perpetuate the same ideals, the superiority of man over women. It is self evident that if the superior position of the husband had not been an accepted norm in the Jaffna social structure it would not have been possible for the courts to base their decisions on the Roman Dutch Law concept of marital powers. What can be clearly seen is that the ground work for the introduction and perpetuation of the Roman Dutch Law concept had been already prepared with the colonization from the Coromandel coast and it was left to the courts to only build up on it. The judges who sat on judgments did precisely that for they themselves were brought up in a patriarchal culture either of the West or the East. Except for a few liberal minded judges, the judiciary which was dominated by such men did not venture beyond to look at issues relating to matrimonial property on an egalitarian basis.

Locus standi as regards thediathettam

Suits between spouses

The courts that recognized the separate interest of the wife in her separate property when deciding the wife's standing in court did not follow the same principle with regard to *thediathettam* in which both spouses have an interest and is in common.⁷⁹ In an early decision cited by Mutukisna, where the acquired property concerned an *otty* mortgage, the wife sued the husband and the other *otty* holders to recover her share of the *otty* money. The court held that the wife could not maintain such an action.⁸⁰ The case account is very brief and does not give reasons for the decision except to say that the wife, who at the time of the action was separated from her husband, could not make a claim during the life time of the husband.⁸¹ The principle behind the decision is however brought out by H.N.G. Fernando J. in *Annapillai v Easwaralingam*.⁸² His Lordship observed that the said decision is in accord with the principle that the husband as manager has the sole right to invest *thediathettam* moneys. He also explained that by virtue of that position the husband had the sole right to decide whether to sue and when to sue for recovery. As regards

79. *Walliamme v Sandriseger Modliar Sooper's case*, supra, at p. 261. See also *Katharuvaloe v Menatchipille* The Ceylon Law Reports (1892) Vol: 2, p.132 where Burnside C.J. declared that, "The principle that man and wife are to be regarded as separate individuals with regard to property does not extend to acquired property during the existence of marriage".

80. M. 264.

81. *Ibid.*

82. (1960) 62 N.L.R.224 at 231.

the husband's right to sue however Mutukisna cites a case where the husband successfully sued his wife for a declaration that he was jointly entitled with the wife to a half share of the property purchased by the wife solely in her name.⁸³

Between spouses and third parties

As regards her separate property it was shown that the wife cannot be sued alone. The court followed the same stance in respect of *thediathettam*. In *Katharuvaloe v Menatchipille*⁸⁴ the court was called upon to decide the right of a third party to sue the wife to make her share of *thediathettam* liable for the debts incurred by the husband during marriage. The plaintiff, the judgment creditor, in a previous action had obtained writ to seize several parcels of land which formed the acquired property of the spouses. The wife, the defendant in the case, objected claiming a half-share which was allowed by the District Judge. The plaintiff thereafter brought action under section 247 of the Civil Procedure Code to have the acquired property of the spouses declared liable to be sold in execution in satisfaction of the judgment obtained by him against the husband. The defendant, who had then obtained a decree of divorce *a mensa et thoro*, filed answer claiming a half share. Apart from analyzing the issue of the wife's right to a separate estate in *thediathettam* and its liability for debts incurred during marriage the court queried as to why the defendant

83. M. 258 – 259. See also *Annapillai V Easwaralingam*. *Op. cit.* at 231

84. (1892) The Ceylon Law Reports, Volume II, p. 132.

in the case was sued alone and went on to state that, “Her husband ought to have joined her in the claim and been joined in this action, and that in itself would indicate that she had no *locus standi* in respect of a separate share in the land”.⁸⁵ The case makes clear that unlike as in the case of the wife’s separate property in relation to *thediathettam* different rules apply as to her *locus standi* in respect of her share. She has to be joined with her husband if she is to be sued when *thediathettam* is the subject before court. What is also deducible is that the wife has no *locus standi* as regards her separate share when the property falls into *thediathettam*.

The issue as to whether a married woman governed by the Thesawalamai could bring an action without joining her husband as plaintiff came up again in *Ibrahim v Annamma*.⁸⁶ The court held that the husband being alive and without any proof that the marriage had been dissolved the action filed by the wife without joining the husband as plaintiff is wrongly constituted and cannot be contained.⁸⁷ L.H.De Alwis J based his judgment on principles of Roman Dutch Law, which he analyses very briefly but sufficient enough to show that the Roman Dutch Law principles relating to *locus standi* apply to women governed by Thesawalamai. Incidentally and interestingly the case shows a further method by which actions instituted and prosecuted by women, who otherwise do not have legal capacity, could be recognized as valid. Justice L.H. de Alwis cites

85. *Ibid*, at p.133.

86. [1982] 2 Sri.L.R. p.634.

87. *Ibid* at p.643.

Voet.V:I:19, which states that, “In those cases however in which it is wrong for a woman to appear in a judicial proceeding without her husband’s authority, if all the same she has appeared contrary to the prohibition of law and has come off the winner, the judgment delivered to her benefit will be valid. This is so both on analogy of a judgment given for a minor who lacks a curator, and in virtue of the ratification which a husband can at all times effect”.⁸⁸ The passage in Voet refers to actions instituted and prosecuted by a woman without her husband’s authority; this would be contrary to law. If however no objection was taken, and she succeeded in her prosecution and became the winner, then according to Voet, the judgment delivered to her benefit would be valid. L.H. de Alwis J. however found the situation in *Ibrahim’s* case a little different. He shows that in *Ibrahim’s* case objection was taken to the institution and maintainability of the action by the respondent, but was not heeded by the plaintiff wife, who had persisted in continuing the action, and finally succeeded in obtaining judgment in her favour. He however held that the passage in Voet was not available to the wife, as the possibility of ratification by the husband, as required in Voet, was out of the question as the husband was not living with her. He therefore declared that the action filed by the wife was wrongly constituted and could not be maintained. L.H.de Alwis J. has nevertheless indicated in his judgment a method of relief to a woman, who, though lacking *locus standi*, proceeds and successfully obtains judgment in her favour. But His Lordship was not prepared to go by a solution he himself

88. At p. 642

showed as possible. Instead, he concluded on a presumption arrived by him that since the husband was living in separation, ratification by him would not be forthcoming and therefore the action by the wife cannot be maintained as it was wrongfully constituted. It is submitted that the judgment reflects court's hesitancy to change its stance or approach the matter more liberally.

Rodrigo J. however dissented and declared that it is not necessary for a Thesawalamai woman to appear by her husband. It is submitted that it is a very forthright declaration in that it refuses to see the relevancy of applying Roman Dutch Law principles to Thesawalamai. Besides he also pointed out that the wife had nevertheless obtained judgment without the husband's help. It could be understood that by stating so he was in fact implying that if the wife had successfully prosecuted and obtained judgment there is neither reason nor logic in not recognizing the *locus standi* she had already enjoyed; a principle enunciated by Voet himself, as quoted above. It is common ground that neither the customary laws, as codified, nor the statutes provide for a woman governed by Thesawalamai to sue or be sued alone and here in *Ibrahim's* case is a woman, who, despite the obstacles brought in by the courts by way of the Roman Dutch Law had been successful in circumventing it.

Community, marital powers and *locus standi* in relation to *thediathettam*

The general approach of our courts as regards the *locus standi* of the woman governed by Thesawalamai in relation to *thediathettam* property is based on the concept of community of property and its corollary, the marital powers of the husband. It was shown that the court's

recognition of the husband's position as manager of *thediathettam* property is based on the concept of marital powers. In so far as it relates to locus *standi* Shirani Ponnambalam states: "A married woman's inability to sue or be sued in legal proceedings, except when assisted by her husband was an aspect of the personal disability suffered by her as a consequence of the husband's marital power."⁸⁹ Though the statement was with respect to women governed by the General Law prior to 1876, it well explains the present position of the woman governed by Thesawalamai with regard to her husband's marital powers and her lack of *locus standi* in judicial proceedings.

H.N.G. Fernando J. commenting on a case noted in Mutukisna's *Thesawaleme*⁹⁰ says, the decision that the wife could not maintain the action against the husband and others to recover her share of the *otty* money, "is in accord with the principle that the husband as manager has the sole right to invest, *tediatetam* moneys, and, therefore has the sole right to decide whether and when to sue for recovery".⁹¹ The incorporation of the concept of marital powers into section 6 further accentuated the status of the husband. It was in recognition of the powers enjoyed by the husband over the common property that made Macdonell C.J. to declared in *Sangarapillai v Devaraja Mudaliyar*⁹² that it was not necessary to make the wife a party to the action on the mortgage bond, to make her interest in it bound by the

89. *Law and the Marriage Relationship*, (Colombo. 1982) 2nd ed. p.90

90. At page 264

91. *Annapillai v Easwaralingam*, *op. cit.* at p. 231.

92. At p. 11.

decree of the court.⁹³ H.N.G.Fernando C.J. sums up the spouse's position as regards *thediathettam* in these words. He says, "These cases only serve to establish the proposition that the husband is the proper person to sue or be sued when he makes *authorized* investments of, or he executes *authorized* encumbrances over, acquired property."⁹⁴ The present position as regards *thediathettam* appears to be, that as long as it is recognized as the common property of the spouses [which is the position by the decision in *Manikkavasagar's* case] and marital powers are not excluded, the wife can neither go to court to safeguard her rights nor can she escape liability even if not made a party to the suit. It amounts to saying that the wife has no independent *locus standi* when the property subject to litigation is *thediathettam*, since her persona is merged with that of her husband.

An evaluation

Prior to drawing any conclusion two questions need to be answered. Firstly, is the wife's lack of *locus standi* due to the applicability of the marital powers of the husband in relation to *thediathettam* appropriate in the existing legal frame work of Thesawalamai and it should stay? Secondly, in the alternative, is a different approach which could facilitate the adoption of an egalitarian attitude to the rights of women governed by Thesawalamai, within the parameters of the Jaffna Matrimonial Rights and Inheritance

93. See also *Tambiah v Sangarajah*, (Decided on 24th June 1937) Law Recorder Reports, Volume XVII. p 70.; *Savarimuttu v Annammah*, (1937) XVII Law Recorder Reports, p. 19

94. *Annappillai v Easwaralingam*, *op. cit.*, at p. 231.

Ordinance feasible? Before the amendment of 1947 it was the old section 20 which identified the incidents attaching to *thediathettam*, and section 6 then had nothing to do with it, as *thediathettam* was excluded by the exclusion clause, "except by way of *thediathettam*". Further, the only liability to which *thediathettam* was subjected to by the old section 20 was to make it liable to payment of debts contracted by the spouses. The section did not make it subject to any other conditions as for instance to the marital powers of the husband. If, as suggested by Macdonell C.J., the legislature intended the incorporation of the marital powers of the husband into the Jaffna Matrimonial Rights and Inheritance Ordinance, then the appropriate section where it should have been done is in the repealed section 20, for it is here that the incidents relating to *thediathettam* as common property were stated. Instead, the powers the husband could exercise over the wife's property are incorporated in section 6, which before 1947 did not include *thediathettam*. It thus makes it difficult to substantiate Macdonell C.J.'s assertion that the legislature intended the incorporation of marital powers into the statute. Noticeably, the incidence relating to *thediathettam* in the repealed section 20 does not exhibit the husband as a person possessing marital powers, which could place him on a position higher than that of the wife. Conversely, it places him on par with his wife as regards rights, entitlements and liabilities relating to *thediathettam*.

As to whether the amendment of 1947 has altered the situation depends on whether one accepts that community of property in *thediathettam* has been statutorily done away with. It is a matter of conjecture due to conflicting and controversial views espoused by judges and jurists alike,

especially in view of the latest judgment of *Manikkavasagar v Kandasamy*. It is submitted that, if it can be affirmatively established that community in *thediathettam* has been done away with and instead a separate property regime has been fully incorporated into the matrimonial property system of Thesawalamai, then the continued adoption of the marital powers of the husband, which as discussed is a corollary of community of property, becomes baseless and irrelevant. Besides, with the amendment, *thediathettam* has been brought into section 6 and the constraints imposed on the wife to dispose or deal with her separate property now become statutorily applicable to *thediathettam* too. It is submitted that with the inclusion of *thediathettam* into section 6 the judiciary's task is made easier, for it need not now stretch principles of Roman Dutch Law to make the powers the husband has over the separate property of the wife applicable to *thediathettam* as well. The section now stipulates the powers exercisable by the husband over the property of the wife, whether separate or common.

The statute, by the provisions of section 6, restricts the wife's rights to enter into contracts in relation to her separate immovable property as well as *thediathettam*. If *thediathettam* is recognized as the separate property of the acquiring spouse, it can be argued that the base on which the judiciary built up the wife's lack of *locus standi* to *thediathettam* is now lost. This is because without community marital power loses its base and would have no relevancy. Further, section 6 restricts the contractual capacity of the wife. It does not speak of her legal capacity. "Capacity to make a contract and capacity to appear in

courts are two different matters and are not necessarily coincident in any one person”⁹⁵. If the wife enters into a contract on her own regarding her immovable property that contract is invalid by section 6. Then apparently neither can she sue nor can anyone sue her on that invalid contract. So no question of *locus standi* can arise. If however she does so with the required consent of the husband, then of course the contract would be a valid one. The question then is, can she sue or be sued alone? The Ordinance does not provide for it. Section 36 authorizes the application of the provisions of the Matrimonial Rights and Inheritance Ordinance and such laws as apply to the Tamil inhabitants of the Western Province in case of a *cassus omissus*. But the provisions of the Matrimonial Rights and Inheritance Ordinance as well as the Married Women’s Property Ordinance cannot be applied as these Ordinances exclude their application to those governed by Thesawalamai⁹⁶. Section 36 also says “and such laws as apply to the Tamil inhabitants of the Western Province”, which would include Roman Dutch Law. The application of Roman Dutch Law to determine *locus standi* could have been justified if the section had not restricted the matters referred in section 36 to questions relating to distribution of property of an intestate. It thus becomes necessary to look for the best approach possible which would not go contrary to established customs and statutory law. It is submitted that one need not look very far, for, our judiciary has especially during the pre - Ordinance period, taken the most appropriate stand. The judge, in the

95. Hahlo, *op. cit.*, p.240.

96. Section 2; Section 3 (2).

case cited in Marshall's judgment, in very strong and clear language proclaimed, "That as the law admits of absolute and distinct separation of interest and property between husband and wife, the law must provide an adequate remedy for either party, whose rights may be infringed by the other".⁹⁷ Though then the Judge referred to property other than *thediathettam* and to suits between husband and wife, it is submitted that after the amendment it should equally apply to *thediathettam* and to suits between the wife and third parties too. That such a proposition reached on the premises demonstrated above will neither be far fetched nor preposterous can be substantiated by Hahlo's statement that "if it (wife's property) is excluded from his marital power, only the wife may sue or be sued, and she does not require his assistance."⁹⁸ It is submitted that the principle *ubi jus ibi remedium* propagated by H.N.G.Fernando C.J. in *Annapllai v Easwaralingam*⁹⁹ also helps to propound a theory that the wife should be able to sue on her own. It has to be noted that H.N.G. Fernando C.J. however had his hands tied¹⁰⁰ and had to take the stand that if the husband, who should act as plaintiff refuses or neglects to do so, he has to be made a defendant. When the constrictions of the Roman Dutch Law on Theswalamai are ignored there is nothing in law to prevent the wife to sue on her own or be

97. *Marshall's Reports* (L.B. 21. 28 October 1834) pp 160-161. Reference also *Sivakamy v Nagan*, *Ramanathan Reports* p.158 (1881) 1863 – 1885 which refers to this case.

98. *Op. cit.* p.241.

99. *Op. cit.* at p.232

100. Because of the time frame stipulated by section 9 of the Pre-emption Ordinance to bring an action for emption, Reference *infra* p. 449 for fuller discussion

sued similarly. It is difficult to understand as to why a wife should be incapacitated from going to courts to safeguard her interests and rights if she is considered in law as a person capable to manage the property that devolves on her minor children on the death intestate of their father, her husband.¹⁰¹

Section 8 of the Jaffna Matrimonial Rights and Inheritance Ordinance enables the wife to apply to the District Court to obtain its permission when her husband's consent required by section 6 to dispose of or deal with her property was not forthcoming or could not be obtained. Section 8 says, "If in any case in which the consent of a husband is required by this Ordinance for the valid disposition of or dealing with any property by the wife...". It is to be noted that the section only says "disposition of or dealing with *any property by the wife*." [Emphasis added] It does not say *any property of* the wife. But before the Amendment of 1947 *thediathettam* was specifically excluded in section 6 by means of the exclusion clause. In *Theivanapillai v Nalliah* the wife who was living in separation from her husband, made application under section 8 to sell property acquired by her during marriage in order to prevent forced sale of it by decree of court. The decree was made on a mortgage bond entered into by both spouses during marriage. The court held that section 8 confers special jurisdiction on the District Court to authorize a wife to dispose of only her separate property without her husband's consent and since the property concerned in the case fell into the category of *thediathettam* the husband

101. JMARIO Section 37.

alone, as manager, would have the right to sell or mortgage it. The case cited as authority was *Sangarapillai v. Devaraja Mudaliyar et al*¹⁰² which makes it clear that the decision was based on principles of Roman Dutch Law. Section 8 is a follow up to section 6 and thus before 1947 when section 6 excluded *thediathettam* from its fold the wife could not seek court's assistance to dispose or deal with her share of *thediathettam* property. It could be presumed then, that, with the repeal of the exclusion clause, she should be able to do so now after the amendment of 1947.

As regards her right to seek legal remedy to protect her separate property all hope is not lost to the wife in Thesawalamai. If any question or dispute shall arise between the spouses relative to any property of the wife the Ordinance in section 10 provides for either party to apply to the court by motion in a summary way. Though the remedy is common to both spouses it is the wife who stands to benefit by it most, as, the husband with his marital powers over the property of the wife is already in the commanding position. It is confusing as to why the legislature provided a method of dispute resolution between spouses only as regards separate property whereas it is generally in respect of property held in common that there are greater possibilities of disputes to arise. It is therefore recommended that relief and remedy provided by section 10 should be made available in respect of both the separate as well as the common property of the spouses. The need however would not arise, if by the amendment of 1947, *thediathettam* is taken to

102. *Theivanapillai v Nalliah*, (1961) 65 N.L.R. 346 at 347.

mean the acquiring spouse's separate property. When so considered as separate property of the acquiring spouse, the application of the concept of marital powers too cannot be justified, as it was the concept of community of property which served as the vehicle to introduce the Roman Dutch Law concept of marital powers into Thesawalamai. The change would also have an important bearing on the *locus standi* of the woman.

It was seen that in Thesawalamai, as interpreted by the courts, the husband has, during the subsistence of the marriage, power to alienate and mortgage the *thediathettam* property, quite apart from the consent of the wife. The wife's right to go to courts, independent of her husband, was not recognized on the basis that her persona was considered to have been merged with that of the husband;¹⁰³ who the law recognized as the, "sole and irremovable attorney of the wife."¹⁰⁴ But the limitation on the husband's power to donate the entirety of *thediathettam*, and the rights of the wife when he exceeds such limitation, have contributed to the court's recognition of the wife's standing in court. The wife was allowed to come before court and seek remedy against the husband himself or against a third party. As to whether the remedy was to a mere compensation or a more concrete right to vindicate her share was fully discussed in the chapters on *Thediathettam* and the Spouses' Rights and Obligations to Matrimonial Property. In the course of such analysis it was shown that the right either to seek compensation¹⁰⁵ or

103. *Sangarapillai v Devaraja Mudaliyar*, *op. cit.* at p. 7.

104. *Annapillai v Easwaralingam*, *op. cit.*

105. *Seelachchy v Visuvanathan Chetty*; *Tankamuthu v Kanapathipillai*, *op. cit.*

to vindicate ¹⁰⁶ her share was available to her only on dissolution of marriage. It was also shown that the right was not to mere compensation but to a more solid one, the right to vindicate her share.¹⁰⁷ To make use of the rights however, the wife has to wait till the dissolution of marriage either by divorce or death of her husband. This raises the question as to whether the wife has no remedy at all during the subsistence of marriage. Based on Dalton J.'s judgment in *Iya Mattayer v Kanapathipillai* H.N.G.Fernando J. explains the legal position of the wife in such a situation. He says: "We see that although the husband had purported to alienate full title before his wife's death, the wife's heir was held entitled to vindicate a half share after her death. This could only be on the basis, firstly that the wife was entitled to the half – share at the time of her death, and secondly, that immediately prior to her death she had the right to vindicate that share in an action against the donee: unless she had enjoyed both these rights, the right of vindication could not have been transmitted to her heir."¹⁰⁸ The position thus appears to be that, though during marriage the wife does not have a right to go to court requesting a declaration of title as against the husband, since the spouses' rights to *thediathettam* is to an undivided half with right to separate use only on dissolution of marriage, she is in fact entitled to

106. *Parasatty Ammah v Setupulle*, *op. cit.* ; *Sambasivam v Manikkam*, *op. cit.* ; *Garvin J's dissenting judgment in Seelachchy's case*; *Iya Mattayer V Kanapathipillai* *op. cit.*; *Annapillai V Easwaralingam* *op. cit.*

107. *Parasathy Ammah v Setupulle*, (1872) 3 N.L.R. 271 ; *Sambasivam v Manikkam* (1921) 23 N.L.R. 257 ; *Iya Mattayer v Kanapathipillai*, (1928) 29 N.L.R. 301 ; *Annapillai v Easwaralingam*, (1960) 62 N.L.R. 224.

108. At p. 230.

a right to vindicate her share as against the donee or for that matter against a third party.

A very pertinent question that flows from the above discussion is whether she can sue a third party without joining her husband. It is interesting to note that, the courts, which complicated matters for the women governed by Thesawalamai by bringing in the marital powers of the husband, also came forward to resolve matters in their favour. It applied varied concepts to tone down the rigidity of the application of Roman Dutch Law concept of lack of judicial standing to the woman governed by Thesawalamai; as it did in *Annapillai v Easwaralingam*.¹⁰⁹ Once the court recognized the right of the wife to a declaration of title in her favour in respect of her share in *theidthettam* it found it easy to proceed further and empower her with regard to her lack of *locus standi*. In the attempt to resolve the question, as to whether she can sue a third party without joining her husband, it found that it could be done by adopting two methods. The first is, by the application of a more general rule, as was undertaken by H.N.G. Fernando J in *Annapillai's* case. The second is, by resorting to principles of the Roman Dutch Law itself as suggested, though not resorted to, by H.L.de Alwis J. in the more recent case of *Ibrahim v Annamma's*.¹¹⁰ As regards the first method, H.N.G.Fernando J. declared: "It being clear law that a husband cannot validly donate the wife's half- share of the *thediathettam*, it would be unreasonable to suppose that a wife, although a co-owner with a person to whom the

109. 62 N.L.R. p. 230

110. [1982] 2 Sri L.R. p. 633.

husband purports to transfer the entirety of the property, is powerless to assert her right either by way of vindication or pre-emption, if the husband chooses to remain inactive”.¹¹¹ It is important to note that H.N.G Fernando J. recognised the position of the wife in relation to the donee of the husband as a co-owner, and based on that he proceeded to determine her rights. The basis of his determination, he says, is based on a “well known practice that a party who should join as a plaintiff, but refuses to do so, may instead be joined as a defendant”¹¹². His Lordship applied the *ubi jus ibi remedium* principle, which means; where there is a legally recognized right there is also a remedy. The fact that there is no provision in Thesawalamai which denies such a right or is contrary to it appears to have facilitated his determination. It needs to be added that the Roman Dutch Law itself provides a remedy by stipulating that if the husband maliciously refuses to defend an action on behalf of his wife she could by herself appear in court.¹¹³

The second method above noted is based on the Roman Dutch Law remedy suggested by H.L. de Alwis J, which is, to sue the husband under the third exception to the Roman Dutch Law rule, that a married woman cannot sue alone in law.¹¹⁴ If, as suggested by H.L.de Alwis J. that the wife in *Annapillai v Easwaralingam* could have resorted to the remedy by way of the third exception, on the basis that the husband by his wrongful act of donating her share had made

111. *Annapillai v Easwaralingam op. cit.* at p. 232

112. *Ibid.* at p. 232.

113. Voet 5.1.18 ; Balasingam, *op. cit.* p. 496.

114. Lee, *op. cit.* p. 426 ; Van Leeuwen *Commentaries on Roman Dutch Law*, 2nd edition 1.1.VI.7.

himself liable to be sued by her, all what she could have obtained would have been a declaration of title to her share. The need in *Annapillai's* case was not merely that. The wife, who was undisputedly entitled to a half-share in the property donated by the husband, wanted to assert her position as co – owner with the donee, who she argued, should have given notice to her of the prospective sale of the co-owned property;¹¹⁵ and for default of such notice, to a right to pre-empt¹¹⁶. The court accepted that it was settled law that the husband cannot donate more than his half-share and went on the basis that the husband had donated only his half and as such the wife was in the position of a co-owner. This right to pre - empt was exercisable against the donee of the husband and not against the husband. To maintain an action against the third party she had to be assisted by the husband. All this had to be done within the time frame prescribed by section 9 of the Pre-emption Ordinance. It was in that situation the court declared that if the husband who should join as a plaintiff chooses to remain inactive, that he may be joined as the defendant. This is perhaps what prompted H.N.G. Fernando J. to resort to the *ubi jus ibi remedium* principle, so as to entitle the wife in her own right to maintain an action for pre-emption. He summed up the necessity of resorting to the principle thus: “It being clear that a husband cannot validly donate the wife’s half-share of the *thediathettam*, it would be unreasonable to suppose that a wife, although a co-owner with a person to whom the husband purports to transfer the entirety of the

115. Section 5 of the Thesawalamai Pre – emption Ordinance No. 59 of 1947

116. *Ibid*, section 6

property, is powerless to assert her right either by way of vindication or pre-emption, if the husband chooses to remain inactive”.¹¹⁷ Therefore His Lordship held that the action, filed by the wife as plaintiff and with the husband as a defendant, was properly instituted.

If the judiciary had continued the lead given by H.N.G Fernando J. in giving a liberal interpretation of the principles relating to the *locus standi* of women governed by Thesawalamai it would have enabled the Jaffna woman to have easy access to justice, especially at this period of time where families are dispersed and women are often unaware of the whereabouts of their husbands. H.L.de Alwis J. however was not prepared to follow the innovative and courageous step taken by H.N.G Fernando J. He went back to the theory of the rule by *cassus ommissus* and even after suggesting new ways of empowerment¹¹⁸ of the Jaffna woman finally decided that the action filed by the wife on her own without joining her husband was wrongly constituted and could not be maintained. Abdul Cader J. agreed with H.L.de Alwis J. but was prepared to admit that the dictum of H.N.G Fernando C.J. was applicable to limited situations similar to what existed in *Annapillai's* case, where the husband had acted adverse to the interests of the wife by donating her share of the *thediathettam* without her consent and the wife had to act within the time frame prescribed by the Pre-emption Ordinance to assert her right. The way out for her therefore was to make the husband a defendant. *Ibrahim v Annamma* was, without circumspection, followed

117. *Annapillai v Easwaralingam*, *op. cit.* at p. 232

118. *Ibrahim v Annamma*, [1982] 2 Sri L. R..633 at p. 641

in *Candappa v Sivanathan*.¹¹⁹ The judge in this case quoted with approval H.L.de Alwis J's statement that, "It is now settled law that a married woman subject to Thesawalamai would be governed by Roman Dutch Law would have no *persona standi in judicio* and would not be able and cannot institute or defend an action in her own name unless she is assisted by her husband or by first obtaining leave of court to do so".¹²⁰ He refused to take into consideration the ways of relief provided by the Roman Dutch Law itself on which he himself had based his judgment. Here was a husband who had acted adverse to the interests of the wife and subsequently preferred to remain inactive when her rights were infringed. The Roman Dutch Law itself provides that the wife could in such a situation appear herself.¹²¹ It also provides that "where the wife's interests are adverse to those of her husband and the husband declines to associate with her in defending the action she might give a proxy alone".¹²² The Roman Dutch Law also enables the wife who is or would be prejudiced by the conduct of the husband to apply to court for a division of the joint estate, termed *Boedelscheiding or separatio bonorum*. This right is now embodied in section 20 of the South African Matrimonial Property Act of 1984 and made applicable to the old as well as to the new community. Apart from the statutory right, common law limitations are exercisable by the wife against abuse of marital power by the husband. It is submitted that

119. CALA 206/92 – CA 712/92 CAM 28.5.93; BASL News Letter November 1993, p. 5.

120. *Ibid*

121. Voet 5.1.18

122. Balasingam, *op. cit.*, p.497 quoting *Manuel v Anohamy*, 1 Tamb. P. 2

our courts, which have been consistently following Roman Dutch Law in determining the *locus standi* of the wife have adopted a very lethargic attitude to the matrimonial property rights of the woman governed by Thesawalamai. It is very regrettable that the courts failed to apply the remedies available in the very law the judiciary was accustomed to apply to bring in the rule of *casus omisus*.¹²³ Thereby the court deprived these women of the remedies that could have provided some solace to them in safeguarding their personal and property rights.

The discussion does not appear complete without mention of the stand taken by the Tamil Elam judiciary. It is not the purpose of this analysis to judge its validity. What is proposed to be shown is the position that prevails under this administration. Rita Sebastian, a well known journalist, in an article which appeared in the Sunday Times of September 25th 1994 says thus, “The law of Thesawalamai has been changed so as to abolish the subjugation of women. In Tamil Elam the woman is an independent person, who can sue and be sued, can sell or donate her private property, unlike earlier where she had to have the written consent of the husband”. It is not surprising that the revolutionary movement of freedom fighters of Tamil Elam brought about

123. The exceptions declared by Kotze J. in *Van Eden v Kirstein* (1880) p. 184 as noted by Lee, *op. cit.* p. 426 ; See also discussion in this chapter pp. 415-416 and 428-429; Lee, *op. cit.* p. 427 says, “ If the husband has deserted his wife and disappeared from the jurisdiction, it may be that she can sue and be sued in her own name without leave of the court” and cites *Kunne v Beer* [1916] C.P.D. 667; The wife may apply to court for *venia agenda* (permission to sue or be sued); She can ask the court to interdict the husband from the administration of the estate. (*Boescheiding*) Lee. *Op. cit* p. 71

an equally revolutionary change in the legal status of the woman governed by Thesawalamai.

Conclusion

The early decisions of our courts reveal a commitment to follow the customs of the land. Subsequent decisions however, have harped on Roman Dutch Law axioms of the legal incapacity of a woman as regards her standing in court. The marital powers of the husband under the Roman Dutch Law, which are primarily instrumental in depriving the woman of her *locus standi*, are in the context of Sri Lanka, as of other South East Asian countries, another version of patriarchal values. These values, as shown in the previous chapters, were accommodated by the codifiers into the Thesawalamai Code and propagated by the judiciary as customs of the people.¹²⁴ The result was, the devaluation of the Jaffna woman's social stature and legal capacity.

The substantive as well as the procedural laws governing matrimonial property relations in Sri Lanka are diversified. This aspect of our system of law is a reflection of our pluralistic society. The distinction that exists in the status of women governed by these various personal laws based on religious and ethnic differences bring out glaringly the discriminative attitude of the country's law to a section

124. Canekeratne J. in *Sabapathypillai v Sinnatamby*, (1948) 50 N.L.R. p.367 declared "...there can be no doubt that the rules found in the compilation by the Dutch Dissawe had been influenced by the principles of the Roman Dutch Law and in the course of nearly half a century the forms and principles of Dutch Jurisprudence became gradually introduced."

of its women citizens. The married woman of Jaffna is made dependent on her husband due to her lack of *locus standi*. It goes without saying that this is discrimination and violation of the fundamental right to gender equality entrenched in the Constitution.¹²⁵ It is also discrimination and violation of the same fundamental right to equality when their status is compared with their counterparts in other communities.¹²⁶ Ethnic and religious pluralism may be used to justify State's hesitancy to replace the plural family laws with a uniform code but it certainly cannot justify continued adherence to laws which discriminate between persons governed by a particular law or between persons in identical categories governed by their respective personal laws. Apart from the lethargic behavior articulated by the legislative and executive organs of the state in bringing about the much needed reforms to the Jaffna Matrimonial Rights and Inheritance Ordinance, lack of pragmatism displayed by the judiciary is lamentable. When no redress is forthcoming from the legislature, or till such time amendment of such laws is brought about, the judiciary, as champions of social justice, has a part to play. Instead of obstinately persisting with theories based on Roman Dutch Law it should come forward to find ways of empowering the woman governed by Thesawalamai with full legal capacity. As discussed in this chapter H.N.G. Fernando J. in *Annapillai v Easwaralingam* has shown that it is not a formidable task to overcome.

125. Article 12 (2)

126. Article 12 (1)

CONCLUSION

This study has surfaced the main problematic areas of discrimination in the matrimonial property relations of spouses governed by Thesawalamai. In that process the principal factors that had a perverse impact on evolving and sustaining gender equality were identified. While areas of gender discrimination were highlighted, with special emphasis on women's rights, it was also shown that Thesawalamai regarded women as a protected species. This feature was evidenced by the priority given to the custom to provide the daughter with a dowry; even if it meant that the son's inherent right to inheritance had to be sacrificed. Though the 1911 Ordinance by its rules of inheritance rectified the imbalance, the social obligation to dower generally makes such sacrifices by the sons of Jaffna inevitable even to-day. The Thesawalamai woman thus generally gets more than a fair share of parental property. This aspect of Thesawalamai can create an impression that the Jaffna woman is placed in a more favourable position. But it would only be a partially correct assessment, for, her status even in the new millennium falls in line with the theory

of Manu, the Brahmin law giver of the late Vedic period, that “a woman is not fit for independence”¹ This is, as discussed elaborately in the book, because of her incapacity to enter into contracts in relation to her immovable property or appear in court independent of her husband. It was also shown how this antiquated conception of a married woman, introduced in the form of patriarchy with the second wave of largely Hindu settlers from the Coromandel coast of India and subsequently cemented by the Dutch colonizers in the form of marital powers of the husband, came to shape and influence legislative action and judicial decisions. One aspect which is emphasized in this study is that, in Thesawalamai, unlike in most other property systems, **the disparity, in so far as it relates to women, lies not in unequal distribution of family property or in the right to be entitled to such property, but to be precise, is in relation to rights over it. [emphasis added]** The ideal to aspire therefore is to equalize the rights of the two genders in their rights over such property.

The Dutch and subsequently the British colonial policy of patronizing the customary laws have to great extent perpetuated pluralism in the laws of Sri Lanka. But apart from the Muslim Law, Kandyan Law and Thesawalamai are administered by the common courts of the country. There are no special judicial bodies to administer the Kandyan Law or the Thesawalamai; like the Quazi courts which administer Muslim Law. It was analyzed in this work how in the common courts the judges of the colonial and post

1. Roop L. Chaudhary, *Hindu Women's Right to property*, p 3.

colonial era applied western legal values not only to those governed by the general law but also to those governed by the personal laws. As propounded by some scholars, it may be true that administration of the non-Muslim laws by common courts of the country helped to build a substratum of uniformly applicable principles for the country. But that uniformity and application of the more egalitarian laws of the General Law in the common courts did not help the cause of women governed by Thesawalamai. The process of barring these women of their rights started right from the time of codification, ironically the step taken to protect and preserve the customary laws of Thesawalamai, and flowed into the other milestone in the history of Thesawalamai, of statutorily declaring them.² Codification overshadowed the customs of the Jaffna Tamils that were based on a matriarchal form of society. The Code is crude and primitive in its compilation and is best described in the words of Pereira J. as "... a wilderness of single instances" and as "...an ill-arranged and ill-expressed mass of law..."³. Further, the codifiers did not make a comprehensive collection of all the customary laws of the Tamils.⁴ Many of the provisions found in the Code are in fact versions as understood by the codifiers and do not reflect the customs of the land. The judiciary has expressed doubts as to the veracity of the compilation.⁵

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2. Section 6, Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.
 3. *Chellappa v Kumarasamy*. Op. cit at 295. Hutchinson CJ too in *Nagaretnam v Alagaretnam* op. cit at 61 finds the Code as far from clear.
 4. *Murugesu v Subramaniam* op. cit at 541
 5. Dalton J. *Iya Matteyer v Kanapathipillai*, Op. cit at p. 307

The codifiers by bringing into the Thesawalamai Code the requirement of the husband's consent, and the legislature firstly, by incorporating the concept of marital powers into the Jaffna Matrimonial Rights and Inheritance Ordinance and secondly by excluding the application of the Married Women's Property Ordinance to the women governed by Thesawalamai, designedly denied the Jaffna women the status of a *feme sole*; a position presently enjoyed by her counterparts governed by the general law. Discrimination was thus fostered not only relative to the opposite genders within a community but also within the same gender of different communities of a country.

Regrettably, the judiciary too did not come to their rescue. It did just the opposite. Regardless of the differences in the property systems of Thesawalamai and the Roman Dutch Law, it inspired into the concept of *thediathettam* the theory of community of property of the Roman Dutch law along with its corollary the marital powers of the husband; and followed it by filling gaps in the customary law with Roman Dutch law principles; on the basis of the rule of *casus omnisus*. While examining gender inequities in the matrimonial property structure it was emphasised that it is the concept of marital powers which is primarily responsible for depriving the women of Jaffna of their rights to property and independent standing in court. The judiciary has thus to take a fair share of the blame for inculcating gender discriminatory norms into Thesawalamai. It would not be far fetched to come to the conclusion that this stand taken by the judiciary was greatly instrumental in

incorporating the concept of marital powers into the Jaffna Matrimonial Rights and Inheritance Ordinance.⁶

The Constitution, as the basis of all laws, and the Women's Charter, as a policy declaration, were used in this work as yardsticks to measure and display the degree of discrimination shown to a section of the country's people. The Constitution provides that all persons are equal before the law and specifically guarantees the right to gender equality⁷. This provision is followed by the Directive Principles of State Policy which sets guide lines to the organs of government for the establishment of a just and free society.⁸ Towards achieving that goal it declares, among other things, that "The State shall recognize and protect the family as the basic unit of society".⁹ The Women's Charter goes a step further and declares in its preamble that, "Whereas the Constitution provides for affirmative legislative and administrative intervention to eliminate gender inequalities".... "The State shall in all fields, in the political, social, economic and cultural fields, take all appropriate measures, including the promulgation of legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedom on a basis of equality with men"¹⁰ It is thus explicit that the Constitution, and the Women's Charter falling in line with the International

6. Section 6, which requires the wife to obtain written consent of the husband to deal with her immovable property.

7. Article 12.

8. Chapter VI.

9. Article 27 (12)

10. Women's Charter, Article 1; See also, *Woman and the Civil Law: An Agenda for Reform*, Sharya Scharanguivel, The Law Commission of Sri Lanka, *Commemorative Journal*, 2003 - pp. 90-91

Convention on all Forms of Discrimination against Women, place a commitment on the State to bring existing laws in line with the standards of gender equity.

To put into action the pledge, the State has to put an end to continued adherence to outmoded concepts of marital roles in respect of rights over immovable properties. Unlike in most patrilineal communities, as for example in India, in the originally matrilineal society of Jaffna men were not hostile to endowing women either by way of dowries or inheritance.¹¹ As owners of their separate properties the women governed by Thesawalamai are on par with the rest of their counterparts in other communities and as partners or sharers in respect of acquired properties, one step higher on the ladder.¹² But in Thesawalamai owning, and exercising rights as an owner in respect of these properties, happens to be two different aspects. Part IV:1 of the Code and section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance are embodiments of marital powers of the husband which obstruct these women in the actual enjoyment of their properties. These antiquated provisions that should have been abrogated by the legislature as far back as 1923¹³, failing that at least in 1947¹⁴ are allowed to remain in the statue book to date. The need to repeal the impugned provisions is stressed in this work. When that is achieved

11. Reference Chapters on *Cheedanam* and Spouses Rights to Matrimonial property. Forfeiture of rights to inheritance applied only to daughters who were dowered.

12. Reference chapters on *Thediathettam* for fuller discussion of their share, whether half or three quarter, and whether as subsisting or differed right.

13. When the MWPO was enacted.

14. When the Amendment to the JMRIO was made.

the pathway used by the judiciary to channel into Thesawalamai, the Roman Dutch Law concept of marital powers of the husband, the provision which lies at the very bottom of the Jaffna woman's incapacity, would automatically become defunct. It was also seen that the exercise of marital powers by the husband resulted in virtually excluding these women from property management. The history of these women's struggle for property rights, as evidenced by judicial decisions, holds the lessons for posterity; that advantages of land ownership cannot be derived by women when they continue to be excluded from managerial control and jural authority. Retention of the concept of marital power sadly represents the legislature's failure in its commitment under the Constitution and the Women's Charter to bring existing laws in line with standards of gender equality.

Apart from emphasizing the need to eliminate marital powers, a need which is common to all the different categories of properties under Thesawalamai, specific policy and structural reforms especially with regard to *cheedanam* and *thediathettam* are suggested. Taking into consideration the Indian experiences with regard to prohibition of *sridhana*,¹⁵ the same with regard to *cheedanam* or dowry generally is not recommended, but, the need for social re-thinking and legislative action is accentuated.¹⁶ Regularization in matters relating to property conveyance

15. *Supra*, Chapter 111, A. Dowry in General, pp. 46 - 54

16. Vide chapter 111 *Cheedanam*, para ' The need for social re- thinking and legislative action ' and ' Legislative action-total prohibition or reform.

on marriage¹⁷ and changes in notarial practice¹⁸ are suggested as methods that could help to remove the “sting” of the words that ‘dowry is a consideration of marriage’, while however retaining the beneficial and noble effects of providing for the daughter on marriage. It is also pointed out that, to safeguard the property interests of women and prevent abuse of dowry property, the law regarding redistribution of dowry property on separation or divorce needs to be amended.¹⁹ It is hoped that these propositions for reform would help to set right the power equations that exist in gender relations in Thesawalamai.

As regards *thediathettam*, apart from emphasizing the disastrous effects on women’s property rights by the application of the concept of marital powers of the husband, the chapter focuses on the benefits of retention of the concept of community of property in *thediathettam*. A comprehensive discussion of the judgment by Sharvananda C.J. in *Manikkavasagar v Kandasamy viv a vis* the *obiter dicta* by Gratien J. in *Kumaraswamy v Subramaniam* was undertaken to show that there is an essential need to amend the law. It is submitted that both cases are not incorrectly decided. The *obiter dicta* in the latter case could be considered as correctly said on a technical basis, but wrong in principle while the former stands up as very sound on principle though perhaps shaky on technical grounds. The Chief Justice’s judgment can be supported as a judicial means of safeguarding the interests

17. Vide chapter on *cheedanam*- Conclusion

18. *Ibid*

19. *Ibid*.

of the society by upholding a healthy principle that needs to be emulated in matrimonial property law. The suggested strategy of retention by reform as regards *thediathettam* should aim at making the two criteria meet happily, whereby, both tests of technicality and principles could agree. Where however the legislature still fails, a technically sound judgment will have to be held up as an example of what a judge should not do. This can arise in the matter of construing the amended section 19 of the Jaffna Matrimonial Rights and Inheritance Ordinance, which calls for literal construction. Nevertheless it is possible for the judiciary to feel, as it did in *Manikkavasagar's* case that in the wider interests of the public it should be construed conservatively. It is true that it is not for the judiciary to repair Parliament's deliberate errors; nevertheless it is also true that Parliament has left the details of judicial administration to the judges' discretion. In such circumstances judicial legislation becomes allowable. Constructive juridical thinking thus comes to the rescue of society where natural justice is jeopardized. This situation of uncertainty in the law which creates the need for judicial legislation in the law has to be rectified by the legislature without delay. The chapter brings out the empirical truth that replacement of the concept of community of property with a separate property regime would not bring justice to women. What is stressed is the need for matrimonial partnership in property acquired during marriage. The customary law embedded the concept but was made to work to the detriment of these women by the careless and unwarranted application of the concept of marital powers of the husband.

It is important to ascertain the reasons for the State's inaction in order to find ways and means to get the vital necessary reforms into motion. The fact that the legislature is predominantly male cannot be considered as a factor, for, to prove that, there should have been some initiatives for reforms which came to Parliament and failed to get through. The issue of repeal or amendment of existing personal law vis a vis the Constitution by reason of Article 16(1)²⁰ too does not seem to cause concern in so far as reform of the impugned provisions of Thesawalamai is concerned. This is substantiated by the fact that no barriers were placed or constraints exhibited when issues of reform as regards non-Muslim personal laws came up during the attempt made by the Personal Laws Committee in 1986 to reform laws on family relations.²¹ On the contrary, male temperament since the Thesawalamai Commission sat in 1930 has changed dramatically for the betterment of women. Economic necessity has made the Tamil male population to slowly move away from the rigidities of patriarchal way of thinking. Employment away from villages and homes has made more men dependent on women's earnings to supplement their income in order to catch up with the ever soaring cost of living. Social and cultural changes, with more and more women taking seriously to higher education and employment, have also necessitated changes in traditional roles of men and women. Therefore, the constitutional protection given to "existing laws" cannot hold ground as

20. Vide Introduction pp 1-2.

21. Savitri Goonesekere, *Realizing Gender Equity Through Law* (Cenwor Publication) p. 32.

an excuse for State's inaction to amend laws of Thesawalamai discriminatory of women.

The issue of gender discrimination could have been taken up by the several institutions and bodies in the country that are concerned with women's rights and welfare. We have the Women's Bureau and the National Committee on Women which come under the Ministry of Women's Affairs. There is also a special Ministry for Legal reforms functioning under the Ministry of Justice. In addition there is the Law Commission. Several non-governmental organizations and gender oriented progressive groups are also involved in work relating to women's welfare. These institutions and bodies have conducted series of seminars, workshops and legal literacy programmes relating to women. Several reports too were filed. Research papers by academics and women activists too have been published. Despite the proliferation of institutions and bodies and a lot of rhetoric of the need for reform in women's affairs nothing worthwhile has been achieved. The only remarkable change was to make some acts against women criminal offences under the Penal Code. The antiquated laws concerning the Jaffna woman are left to remain in the statute book. The failure of these institutions and bodies to effectively have dialogue with the affected women, to co-ordinate and liaise between these bodies; and they with the respective government agencies are all factors which have contributed to the State's failure to use the legislative process to put the law in place with respect to women's issues generally, and specially with regard to women governed by Thesawalamai.

The State or its agencies should not be solely blamed for having been inert. It needs to be pointed out that the

women affected by such discriminatory provisions are lying dormant and have not come forth into the open or articulated forcefully enough, either publicly or otherwise, to lobby for their cause. They need to wake up from their slumber and apathy towards their own demeaning status. The lack of interest or enthusiasm can also be attributed to the failure, either by persons or organizations interested in women's rights, to organize community interest by way of initially localized and subsequently country wide campaigns to enhance women's legal knowledge and literacy. In all this, the role of collective action is primary. Thus, a fervent call is made to the women so affected to organize themselves so as to bring into public the discriminatory aspects of the law that governs them. A similar call is made to the several bodies and organizations interested in women's rights, who have been more service oriented and have focused on workshops and seminars, to be more issue oriented in order to achieve these aspirations. An issue oriented approach is more likely to meet with success rather than a common approach involving a multiplicity of issues of different communities. The efforts of the Committee on Personal Laws failed in respect of reforms to other personal laws too because a section of the Muslim community lobbied against some of the proposals with regard to the Muslims.

There is much to be done to bring the laws of our country in line with international and our own Constitutional standards. Where the Legislature remains inactive, heavy responsibility lies with the judiciary to see that the law does not mete out injustice. The attitude of the judiciary has undergone a total transformation with the introduction of fundamental rights jurisdiction under the Constitution. Judicial

activism is noticeable in several of the Supreme Court's decisions especially on fundamental rights cases and in the decisions of the Court of Appeal on writ petitions. Furthermore, the apex courts while interpreting Constitutional provisions of Sri Lanka have, on several occasions, made references to international standards set in conventions and treaties, even though they do not apply unless they are incorporated into the national law. In this trend of judicial thinking, and where the much needed reforms are not forthcoming, it can be hoped that the judiciary would have in mind international and constitutional standards of gender equality in interpreting the law where the rights of women governed by Thesawalamai are concerned.

The customary laws of Thesawalamai are embodiments of people's aspirations and intuitions which are refined after centuries of hard experience. It is true that the Code is not the best form of compilation. The wording is crude and several provisions cannot stand up to rational examination. Some are, as noted, only versions as understood by the codifiers. Despite such flaws there are many customs included in the Code, and those that are not, which are still being followed as customs by the people. They are believed because such beliefs express the real attitudes, inherited leanings and group-aspirations to which these people have been committed for centuries. Two main customs elaborately discussed in this book are, providing the daughter on marriage and sharing of gains during marriage. It has been shown that these are certainly not out-moded concepts that ought to be removed. Thus despite being obsolete in many ways the Thesawalamai is very much alive and continues to remain a system of practical

law amongst the community it governs. The ideal method would be to sift the customs embodied in the Code and find out what genuine tradition and living custom was reflected in them. Retention by reform is suggested throughout this work as the best method of approach as regards Thesawalamai. It is a practical need and not one induced by mere sentimental antiquarianism.

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Ms. Nagendra has delved deep into the subject of matrimonial properties and inequality of sexes armed with proper understanding of these differences in values, in social norms and perspectives. This recent publication dealing with certain aspects of Thesawalamai is logically designed, cogently discussed and makes good and interesting reading. It is a worthwhile adornment to the libraries of both lawyers and others.

Justice .V.Wigneswaran

Reading this book is a wonderful experience indeed. Although we hear now and then of the birth of a star in some part of the universe, it is rarely that we ourselves can experience the light of a star just born. We are therefore fortunate that we can simulate that experience through Mrs. Nagendra's maiden publication, which sheds so much light on thorny aspects of Thesawalamai on matrimonial property from the perspective of the woman in the backdrop of the complex fabric of customary law.

Justice Saleem Marsoof, PC
Judge of the Supreme Court of Sri Lanka

Essentially, this book is a study of matrimonial property viewed from the perspective of gender equality in relation to one of the legal systems prevailing in Sri Lanka, namely Thesawalamai. Yet the themes explored and the conclusions that the writer comes to results in the work becoming far more universal in nature. The writer Mrs. Kamala Nagendra must be commended for this in-depth analysis of matrimonial property in Thesawalamai in a historical and comparative perspective. Clearly, this book is a valuable contribution to Sri Lankan legal literature.

Professor Sharya Scharenguival

