TESAWALAMAI: PROTECTION OF COMMUNITY RIGHTS OR DISCRIMINATION OF WOMEN?

ARE THE RIGHTS OF WOMEN PROTECTED IN A MULTICULTURAL SOCIETY?

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Plural societies concerned about the rights of minority groups in their communities have formulated and implemented multicultural policies. Multicultural policies go beyond mere cultural pluralism where different religions and ethnicities are tolerated, and instead concentrate on ensuring that groups "exist as equals in the public arena."[1] States therefore use multicultural policies to protect minorities and accommodate minority traditions which, entails awarding power to the communities themselves to determine certain issues relating to community life, which will in turn enhance the autonomy of the particular community. Most often the State awards jurisdiction over areas considered private, i.e. marriage, divorce, and other issues which are related to the determination of group membership to enable the group to have power over the construction of collective identity which is thought to be important for group survival.[2]

Legal analysts have illustrated the paradoxical nature of multiculturalism which while empowering certain groups, subordinates certain members of these groups.[3] Accommodation of group/community rights therefore can lead to "multicultural vulnerability", where existing hierarchies in communities lead to the violation of the rights of individuals in a vulnerable position. Further, multiculturalism entrenches the public-private divide through its acknowledgment of the public status of the identity group and disregarding the status of individuals within these identity groups. Multiculturalism therefore focuses on injustices in the public sphere. Yet, it is in the private sphere that most women experience discrimination, as communities continue to define gender roles and regulate the lives of women. As legal analysts have illustrated giving power in areas such as family law to identity groups most often places burden on certain members of the group, namely women. This is the "paradox of multicultural vulnerability."[4]

The manner in which multiculturalism views individuals is also problematic, as it begins by locating them as part of a particular community, which limits their identity to their cultural group. This approach disregards the fact that women have multiple identities, and are not solely defined by their membership of a particular cultural group.[5]

As stated above, States often give communities authority in the area of family law, an area of great importance to identity groups. It is through family law communities regulate the conduct of women, who are viewed by the group as the bearers of cultural values and who through their reproductive activities are mainly responsible for the recreation of the group.[6] This then means their freedom to marry, divorce etc will be limited and controlled by the group to ensure membership boundaries are maintained. Therefore, while minority groups must have access to their culture and be able to preserve their traditions, it is imperative to examine the existing tensions between the efforts to promote the rights of women and multiculturalism's efforts to protect the rights of endangered minority groups.

When we call for legal reform to address discrimination faced by women we should also keep in mind that women from besieged communities who might have been subjected to extensive state controls due to their race, ethnicity, class or a similar factor may take refuge in the private sphere of their ethnic/racial/class communities. Their reluctance to support legal reform that impacts on their particular communities highlights the conflict between individual rights and the rights of the community. While supporting diversity and right of communities to protect their culture we should ensure that the rights of women are respected and they have the right to make decisions that affect their lives and families.

ANALYSIS OF THE LAW

1. The Codification of Tesawalamai

A historical study reveals that in Sri Lanka according to Roman-Dutch law, the property of the woman merged with that of the husband upon marriage and the husband became the administrator of the woman's property. With the enactment of the Matrimonial Rights and Inheritance Ordinance No.15 in 1876, the concept of community of property was abolished and the property of the woman was viewed as her separate property. The Married Woman's Property Ordinance No.18 of 1923 went further and granted women full proprietary and contractual rights, and the woman became a legal personality in her own right. Alongside the abovementioned "General Law" other laws, such as the Tesawalamai, Muslim Law and Kandyan Law, i.e. personal laws which apply only to certain communities, exist in Sri Lanka. These laws too have been influenced by Roman-Dutch principles and endorse in different degrees the Roman concept of *patria potestas*, i.e. the sweeping power of the husband over the family[7].

The customary laws applicable to the Tamils living in the Northern province of the country, were codified during the **Dutch period in the** *Tesawalamai and Matrimonial Rights & Inheritance Ordinance No.1 of 1911* **as amended by** *Ordinance No.58 of 1947*(hereinafter the Ordinance). These laws relate only to issues of property and inheritance and the inhabitants of the Northern province are subject to the General Law in the areas of marriage and divorce. Where maintenance is concerned, the Maintenance Ordinance and Maintenance Acts have been applied to Tamils. The Tesawalamai is also applicable where the maintenance of minor children is concerned, as the rights of the widow in her husband's property are tied to a duty to maintain minor children.[8]

The Sri Lankan courts instead of removing the disabilities suffered by women in regard to property rights by following the trend set by the General Law have instead chosen to restrict the property rights of women governed by Tesawalamai by following Roman-Dutch principles. A discussion of judgments below will clearly illustrate this fact.

2. Applicability

The law states that any person who alleges that Tesawalamai is applicable to him/her must affirmatively establish it.

The scope of applicability of Tesawalamai is set out in Section 2 and clause 3 of the Ordinance. It states as follows:

Tesawalamai applies only to the Malabar inhabitants of the Jaffna Province in respect of their movable and immovable property, wherever situate. A Malabar inhabitant should be:

- a Tamil and
- an inhabitant of the Northern Province – per *Spencer* v. *Rajaratnam*[9]

According to the judgment in the case of *Velupillai* v. *Sivakamipillai*[10], an "inhabitant" is a person who at the relevant time has acquired a permanent residence in the nature of a domicile in the Northern Province. This case also stated that each case must depend on its own facts.

In *Spencer* v. *Rajaratnam* the person whose Jaffna inhabitancy was in question was born in Jaffna but left when he was a few months old. He worked, lived, and died in Colombo and was married to a Colombo Tamil. These facts were held to illustrate that he was a permanent resident of Colombo and not of Jaffna and thereby was not subject to Tesawalamai.[11] Although Tesawalamai is deemed to be a personal law the applicability of the law is determined by ascertaining whether the person is a permanent inhabitant of the province.

Justice Sharvananda in *Sivagnanalingam* v. *Suntheralingham*[12] stated "there is a strong presumption in favour of the continuance of a domicile of origin. The burden of proving a change of domicile from one of origin to one of choice is a heavy one. With regard to the standard of proof necessary to rebut the presumption the judicial conscience must be satisfied by evidence of change. Otherwise the domicile of origin persists." Therefore, the courts begin with the presumption there is continuance of inhabitancy in the place of origin, i.e. the Northern Province. The burden of proving otherwise is heavy and if the applicant does not supply sufficient proof of the change of residence the courts will assume the domicile of origin, i.e. the Northern Province, as the place of residence.

According to the abovementioned statutes if a woman to whom Tesawalamai applies marries a man to whom Tesawalamai does not apply, then she shall not during the subsistence of the marriage be subject to Tesawalamai. However, if a woman to whom Tesawalamai does not apply marries a man to whom Tesawalamai does apply then she is subject to Tesawalamai during the subsistence of the marriage. These are set out in the following sections of the Ordinance:

Section 3 (1)-whenever a woman to whom Tesawalamai applies marries a man to whom Tesawalamai does not apply then she shall **NOT** during the subsistence of the marriage be subject to Tesawalamai.

Section 3 (2)- whenever a woman to whom Tesawalamai does not apply marries a man to whom Tesawalamai does apply then she shall during the subsistence of the marriage be **SUBJECT** to Tesawalamai.

In determining the applicability of Tesawalamai the date of marriage of the parties is the relevant date.

Issue

Within the framework of Tesawalamai, the legal status of the woman is dependent on the legal status of her husband, she is not a legal personality in her own right.

3. Categories of Property

There are different categories of property in Tesawalamai.

Mudusam - Section 15 of the Ordinance - Property devolving on a person by descent at the death of his or her parents or of any other ancestor in the ascending line is called Mudusam (patrimonial inheritance).

Urumai- Section 16 of the Ordinance - Property devolving on a person by descent at the death of a relative other than a parent or an ancestor in the ascending line is called Urumai (non-patrimonial inheritance).

If a person sells Mudusam or Urumai property and buys new property prior to marriage the new property continues to retain its old character, i.e. it is not viewed as property common to the marriage but as Mudusam- sections 6 & 7 of the Ordinance.

Chidenam- The dowry property brought by the wife.

Thediatettam- Section 19 (defined below)

4. Thediathetam

The definition of this category of property has undergone much change and the contradictory interpretation of the meaning of this category of property by the courts has led to much confusion. The traditional meaning of Thediathetam was altered by the Jaffna Matrimonial Rights and Inheritance Ordinance in 1911 and the amendment in 1947.

According to customary, pre-1911 law, Thediathetam was deemed to consist of[13]:

1. the profits derived from the separate properties of the spouses; and
2. all properties acquired by either of the spouses by their exertions during marriage

In 1911 with the enactment of the Jaffna Matrimonial Rights and Inheritance Ordinance No.1, the meaning of Thediathetam was altered and defined as follows:

1. profits acquired for valuable consideration by either spouse during the subsistence of the marriage

Sri Lankan courts interpreted Thediathetam based on the Roman-Dutch concept of community of property where the profits acquired during marriage- (profits arising from the separate estate of either spouse and property acquired using those profits)- were pooled and the property was viewed as the joint property of both spouses. Thediathetam was deemed to be common property to both spouses to which each spouse was equally entitled i.e. they were co-owners. In the case of acquired property, regardless of whether it was bought in the name of the husband or wife, the other spouse inherited a half share of the property at the death of one spouse[14]. In *Aiyadurai* v. *Aiyadurai* it was held that a property purchased by a loan raised jointly by both parties constituted acquired property even though the separate properties of the spouses were mortgaged to raise the loan[15]. Upon the death of a spouse one half of the joint property (thediathetam) was inherited by the surviving spouse and the remaining half vested in the heirs of the deceased[16].

A further amendment to the Ordinance in 1947 altered the meaning of Thediathetam by moving away from the concept of property common to both spouses to the concept of Thediathetam of each spouse, i.e. separate property of each spouse.

Section 19 states that Thediathetam is the separate property of spouses and consists of:

a) property acquired for valuable consideration by either husband or wife during the subsistence of the marriage, such consideration not forming or representing any part of the separate estate of spouses

b) profits arising during the subsistence of the marriage from the property of husband or wife (separate property)

Of the two subsections, the second has not undergone any change while the first section has been subject to much revision. The first subsection can be said to contain 3 elements[17]:

1. It should be a new acquisition
2. It should have been acquired for valuable consideration; and
3. It should have been acquired during the subsistence of the marriage

This means rent and profits arising from the dowry property will not be considered acquired property. If property is bought using money belonging to the separate property of either spouse then the title to the bought property will vest in the name of the spouse whose money was utilised to purchase the property. Each party can only donate or gift his or her half-share of the Thediathetam. Upon the death of one spouse, one half of the thediathetam of the deceased spouse shall devolve on the surviving spouse and the other half on the heirs of the deceased. Property inherited or obtained through donation is not Thediattem.

As stated earlier, the courts have interpreted Thediathetam in contradictory ways, with the judgment in the case of *Manikavasagar* v. *Kandasamy*[18] adding to the confusion. As Goonesekere states, although "this judgment deals with many aspects of Thediathetam, [it] has not clarified the legal position on the main aspects."[19] In this case Chief Justice Sharvananda did not follow the definition of Thediathetam as modified in 1947 but instead viewed it as property common to both spouses, i.e. he chose to follow the definition in use prior to the 1947 amendment which was based on the Roman-Dutch concept of community of property. According to his interpretation the non-acquiring spouse is entitled to a + share of the property, whereas according to the 1947 amendment, property constituting Thediathetam is viewed as separate property that belongs to each spouse and the only right the non-acquiring spouse has, is the deferred right to inherit + share of the separate property of the acquiring spouse, if it has not been disposed of during the lifetime of the acquiring spouse.

The preferred analysis of Thediathetam is found in *Kumaraswamy* v. *Subramaniam*[20]. In this case the question was whether the undivided share in a property bought by the husband in his own name automatically vested in the non-acquiring spouse, the wife. The children of the marriage filed action claiming that as half share

of the property automatically vested in the spouse, i.e. their mother, it devolved on them upon her death. Gratien J ruled that the said property had vested in the wife Rasammah and she was entitled to an undivided half share of the property which in turn passed on to her heirs. He based his ruling on the fact that the property had been purchased before the 1947 amendment and therefore did not fall within the purview of the new law. According to Gratien J, in cases where property was purchased after the 1947 amendment, the property had to be a "new acquisition" to be deemed Thediathetam. This means converted property was not deemed Thediathetam. This reasoning is illustrated in the following extract from the judgment, where Gratien J states as follows:

"The new section 19 (in the 1947 amendment) gives a definition of Thediatetam which restores for the future the more traditional conception of Thediatetam which had been unmistakably, even though carelessly altered by legislative intervention in 1911...Accordingly property which would previously have constituted Thediatetam within the meaning of the principal Ordinance...must if acquired on or after 4th July 1947 be regarded as "separate property". [21]

5. The Power of the Woman to Dispense and Deal with Property

Where the power of the woman to dispense and deal with property is concerned, the courts have chosen to interpret the legislation in a manner that vests considerable power in the husband to deal with the property of the wife. It should be mentioned the General Law views the woman as an individual with powers to deal with her own property.

Although the 1947 amendment to the Ordinance decrees Thediathetam as separate property of the wife, in reality it does not benefit the wife, as in Tesawalamai the husband still has the power to deal with the property of the wife. In Tesawalamai one cannot contract with the woman without including her husband. The husband during the subsistence of the marriage remains the manager of the Thediathetam property. He is regarded as the sole and irrevocable attorney of his wife- it is thought that the wife's persona "is merged with that of the husband's." A married woman is deemed incompetent to deal with her immovable property without the consent of her husband- per ***Chellappah* v. *Kumarasamy*.**[22] The husband also has the right to give the thediathetam of both spouses as dowry to the daughter.

According to **Section 6** the separate property of any married woman consists of:

(a) all movable and immovable property to which she is entitled to at the time of marriage; and

(b) all property which she may acquire or become entitled to by way of gift or inheritance or conversion of any property to which she may have been so entitled or which she may acquire or become entitled to.

Thus all property, movable and immovable, which belongs to a woman at the time of her marriage shall continue to belong to her and form her separate property, i.e. if cash is brought as dowry and it is converted to immovable property (land) then the property so converted will retain the character of the cash with which it is acquired. If the property is sold, the proceeds of the sale belong to her. If a woman is maritally separated she has full control over both movable and immovable property. In the event of death, divorce or separation the husband cannot sell more than half of the thediathetam. During the subsistence of the marriage however, he has the power to deal with his wife's property.

5.1 Immovable Assets

The woman does not have absolute power of disposition of her immovable property but requires the written consent of her husband. The husband's consent is not required for disposition by last will.

If the husband's written consent is not forthcoming, according to **section 8,** the Family Court in the district in which the woman resides or in which the property to be alienated is situated, has the power to dispose of or deal with such property without the husband's written consent, i.e. the Court supplies the consent required by **section 6.** This is done if it is deemed the husband is unreasonably withholding consent or is unable to give consent and the interests of the wife and children of the marriage require that such consent should be dispensed with.

The husband cannot validly give general consent for future disposition as it has been deemed to amount to the release of his *protectorship*, which has been interpreted to be the contrary to the purpose of the provision which aims to "protect" the woman from being cheated of her property[23] Consent therefore must be contemporaneous or anterior, i.e. it must be given at the time of a transaction for the sole purpose of that particular transaction. Consent given after the disposition is not valid[24].

The husband's power does not extend to donation (except as dowry to the daughter) but is limited to sale, mortgage or lease. In the event of the sale of half share of the wife's property, the wife or her heirs cannot bring an action against the bona fide purchaser. Their only remedy is to claim compensation from the husband. If the husband donates more than his half share and the donee sells the property to a bona fide purchaser, as above the only remedy available to the wife is to claim compensation[25].

5.2 Movable Assets

Section 6 gives the woman the power of disposition and dealing.

Issues

1) As the husband has the power to deal with even the woman's immovable separate property, women lack the power to deal with and dispense their property.

2) Due to the conflict, many households in the North are female-headed and in the absence of their husbands women are unable to dispose property. If the husband is missing the woman will not be able to obtain a death certificate and her only option would be to

request the courts to give consent to a property transaction. Here too the woman will face many obstacles:

a) As the court cannot give consent for future disposition of property the woman will have to approach the court every time she wishes to deal with her property which means that she will also have to incur additional costs relating to lawyers fees etc; and where courts are not functioning she will have no remedy

3) The husband's right to sell, mortgage or lease the wife's share of Thediattem could disadvantage the woman economically. Considering the socio-economic status of women and the state of the Sri Lankan legal system, it is unlikely the woman will be able to obtain compensation from a bona fide purchaser if the husband sells the property against her wishes or without her knowledge.

4) Doesn't the right of the husband to give by way of dowry to his daughters the entire Thediathetam property (including the wife's thediathetam property) amount to donation of the wife's property?

6. Inheritance

Section 15 of the Tesawalamai code states that, if hereditary property was diminished during marriage, when one spouse dies and the property is divided, whatsoever hereditary property that was lost must be replaced from the acquired property. If the acquired property is not sufficient then the heirs of the deceased spouse must bear the loss. On the other hand, according to section 16 of the Code, if the property of either spouse is considerably increased, the heirs of either spouse at the death of the spouse are not in a position to claim any compensation for the contribution made by either spouse towards the increase of the property.

Thediathetam - can be disposed of by will or any other means. Section 20 states that on the death of either spouse, one half of Thediathetam, which belongs to the deceased spouse and has not been disposed of by last will or otherwise, shall devolve on the surviving spouse and the other half on the heirs of the deceased spouse. The other half share of the deceased spouse's Thediathetam along with the Mudusam in the case of the man, and Chidenam in the case of the woman, according to section 21 will devolve on the descendents, then ascendants and finally on collaterals. In the event there is no surviving spouse, the half share, which would have been inherited by him/her too devolves on the heirs of the deceased spouse.

As the surviving spouse is a "remote" heir to the balance + share of the deceased spouse's Thediathetam, Sharvananda CJ in the case of *Manikavasaga* v. *Kandasamy* stated that the surviving spouse is not intestate heir of a deceased spouse.[26] Hence, the surviving spouse does not become the automatic heir if the property of the deceased is not disposed by last will. This reasoning has been questioned and shown to be contradictory to the Ordinance according to which the rights of descendents, ascendants and collaterals are subject to the surviving spouse's right to inherit.[27] The Ordinance therefore appears to give priority to the surviving spouse.

The widow holds a life interest in the husband's Mudusam (separate property brought to the marriage), with inheritance rights vesting with the husband's heirs. Each spouse's ancestral property returns to its source i.e. the family of the deceased spouse. Neither spouse succeeds intestate to the other's ancestral property.

Section 3 states that daughters who receive a dowry "must content themselves with the dowry given...and are not at liberty to make any further claim on the estate after the death of their parents, unless there be no more children, in which case the daughters succeed to the whole estate". The Courts have interpreted this provision in a narrow manner, which has resulted in the deprivation of the rights of the daughter to inherit parental property if she has been dowered. Their interpretation has been narrow to the extent that they have declared that if a widowed daughter receives a gift described as a dowry gift, she then loses her right to inherit parental property.

Issue

The inheritance rights of the son have been protected at the expense of the inheritance rights of the daughter.

CONCLUSION

An examination of the law exhibits that women are discriminated in Tesawalamai. Hence, it is evident reform is required to ensure that the rights of women are secured. As the rights of women have to be protected while ensuring the rights of the community are not

violated, the reform process should be a consultative one which includes all stakeholders. Otherwise, it is quite likely the reforms will not gain the support of the community and will be defeated in Parliament. It is therefore imperative the reform process is inclusive and consultative and advances the rights of women while respecting group/community rights.

Notes

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3 Supra n.1., p. 123.
4 Supra n..2, p.3.
5 Supra.n. 1, p. 135.
6 Supra n..2.p.56
7 Goonesekere.S., *Family Law*, Open University , 1987, p.2.
8 Section 38, Matrimonial Rights and Inheritance Act No. 58 of 1947.
9 (1913) 16 NLR 321.
10 (1910) 13 NLR 74.
11 Supra n.9.
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13 Sri Ramanathan, "The Law of Property", *Tesawalamain, The Laws & Customs of the Inhabitants of the Province of Jaffna,* The Nadarajah Press, 1972, p.44.
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15 Ibid, p.47.
16 Ibid.
17 Ibid.
18 [1986] 2 S.L.R. 8
19 Supra n.7.p.65
20 (1954) 56 N.L.R. 44.
21 Ibid. 47.
22 18 N.L.R. 435.
23 Sharvananda.S., " Matrimonial Rights of Tamils Governed by Tesawalamai", *Bar Association Law Journal,* [1993]Vol.V Part I, 44.
24 Ponnupillai v. Cumaravetpillai 65 N.L.R, 241.
25 *Seelachchy* v. *Visuvanathan Chetty* 23 N.L.R, 97.
26 Supra n 13, p. 24.
27 Supra n.7, 93. ■

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GEORGE ORWELL TO RULE BOWLING ACTIONS?

Michael Roberts

Murali in the 1990s

When Murali was no-balled by Darrell Hair on 26th December 1995 and then again by Emerson and McQuillan a week or so later, Dr. Quintus de Zylwa, the BCCSL Representative in Australia, went into action and secured a technical report from Dr, Buddy Reid and organised more medical tests at the Department of Human Movement and Exercise Science at the University of Western Australia and another specialist body in Hong Kong.

I have a copy of Reid's report. Though Buddy is a friend with whom I played cricket in our halcyon days, I must say that for a layman his specialist's report is as clear as, well, the Kalu Ganga [Black River]. As a first step, therefore, let me lean on an analysis of Murali's bowling action three years later (after the Emerson's attempt at the guillotine) provided by Ken Moncrieff in a letter to the newspaper *Australian* on 28 January 1999.

> All the fuss being made over "chucking" in cricket misses the point. This rule was made to prevent a fast bowler gaining the same advantage over the batsman that a pitcher has over the batter in baseball.

An understanding of the bio-mechanics of throwing shows that in a true throwing action, the elbow leads the arm movement followed by elbow extension then wrist and finger flexion as the ball is delivered. By the time elbow extension begins to occur, the palm of the hand is facing the target to gain maximum leverage, and thus greatest advantage.

Rule makers in cricket could consider the above when judging the Sri Lankan's "suspect" action. They might then see that his action does not constitute throwing in the conventional sense at all but is only a part of a complex spin action which his physique and co-ordination have evolved.

How many other spin bowlers have some elbow extension prior to delivery and do gain a "throwing advantage" yet are never called because the elbow extension is only minor and not obvious?

Before the powers that be make a final ruling they should do a thorough bio-mechanical analysis of many slow and