

Influence of Hindu Law and Marumakattayam Law on the Laws and Customs of the Tamils of Jaffna

The Law applicable to “The Malabar inhabitants of the Province of Jaffna” is the law of Thesawalamai. Prior to the codification of the customary law applicable to the Tamils of Jaffna by the Dutch the law of Thesawalamai was the customary law applicable to the inhabitants of the Jaffna District. It is the view of Dr. H. W. Tambiah Q.C., that the law of Thesawalamai, prevailed in the North of Ceylon, as Sri Lanka was known earlier, for several centuries ever since Jaffna District was colonized by the Tamils who migrated from different districts of South India¹.

Traditional historical accounts speak of two waves of immigration from India to Jaffna. The first wave of the Tamil immigrants came from the Malabar District. The customs and usage of Malabars were derived from the law of Marumakattayam, which constitutes the main basis of the Thesawalamai. Marumakattayam Law was administered to the members of a matrilineal system of society. The second wave of colonist came from the Coromandel Coast where a patrilineal system of law prevailed. They brought with them their own customs and usages, which modified and altered to some extent the existing legal system, set up by the Malabar inhabitants. Therefore we find in Thesawalamai a blend of both principles governing patriarchal as well as matriarchal systems of society². In *Murugesu vs Subramaniam*³ it was pointed out that “in the Thesawalamai we have a curious blend of the rules peculiar to the matriarchal and the patriarchal systems of the customary law of South India i.e. the Marumakkattayam system of inheritance (*tayam*, in Malayalam and Tamil), under which the sister’s sons (*marumakkal*, Malayalam and Tamil) inherited the sister’s property, the system that prevailed amongst those who came to Ceylon from Malabar or the western coast of South India, and the different system of inheritance that prevailed amongst the settlers who came from the Coromandel or Eastern coast⁴.

Among the bodies of law which “subsisted under the ancient Government of the United Provinces” and continued to have legal force under the British by virtue of Governor North Proclamation of 23rd September 1799 was the law of Thesawalamai or the Customs of the Malabar Inhabitants of the Province of Jaffna which was specifically given legal recognition by regulation No. 18 of 1806. In the course of time Courts held that Thesawalamai did not apply to Trincomalee and Batticaloa⁵. It has been further held that Thesawalamai applied to the Tamils (whether their ancestors had come from the District of Malabar

¹Tambiah Law and Customs of the Tamils of Jaffna 2nd ed p. 2

² L. J.M.Cooray an Introduction to the legal system of Sri Lanka 2nd ed p.140; Tambiah opcit 11 & 12

³ (1967) 69 N.L.R. at p.540

⁴Nadaraja opcit p.120 n.119

⁵ Wellapulla vs Sitabelm (1875) Ramanathan Rep. 1872 – 6 114

stricto or elsewhere) who had acquired a Ceylon Domicile and a permanent home in the Northern Province⁶.

The Code of Thesawalamai has been described as “an ill-arranged and ill-expressed mass of law and custom”⁷. Parts of the Code have become obsolete and others have been repealed and superseded by legislation⁸ and the Thesawalamai Preemptions Ordinance No. 59 of 1947. In the early days of the British rule the provision of the Thesawalamai Code was elucidated and supplemented by reference to Hindu Law but subsequently the Courts discouraged this practice and in the absence of Thesawalamai of any express provision or any provision from which a principle could be deducted the residual law of Ceylon which is the Roman Dutch Law was applicable. The Hindu Law is applicable in its contemporary form as a personal law in several Asian and African Countries but is not applied to the Hindus of Ceylon⁹. However it may be referred to in order to determine the rights and capacities of non Ceylonese Hindus when these or their successor in title litigate in an appropriate matter before a Court in Ceylon¹⁰. The liability to pay estate duty in respect of the estate in Ceylon of a member of a Hindu joint family domiciled in India was determined in accordance with principles of Hindu Law. Thus Hindu Law is still relevant where questions relating to non-Ceylonese Hindus come before the Courts in Sri Lanka but has ceased to supplement the law of Thesawalamai. In practice this means Hindu Law is restricted to the sphere of religious and charitable endowments and trusts¹¹. Before the enactment of the Trust Ordinance No. 9 of 1917 Hindu Law and Customs was referred to in connection with various questions relating to rights and duties of managers of Hindu Temples and the administration of temporalities of such institutions.¹² It may be relevant to mention one difference between the Hindu Law of India and that of Ceylon. In India the deity whose image in a temple is a visible manifestation of God is treated as a “juristic person”, an entity capable of receiving gifts and owning property¹³. In Ceylon on the other hand a deity or “a Temple is not a juristic person and is therefore incapable of holding property”¹⁴.

⁶T Nadaraja The Legal System of Ceylon in its Historical setting p.187

⁷ Chellappa vs Kanapathy (1914) 17 N.L.R. at p.295

⁸ Nadaraja opcit p.209; Jaffna Matrimonial Rights and Inheritance Amendment Ordinance No. 1 of 1911 as amended by Act No. 58 of 1947

⁹J D M Derrett an introduction to legal systems p. 80

¹⁰ In Attorney General vs Arunachalam Chettiar (1957) 59 N.L.R. 49 (P.C.) and Attorney-at-Law vs Valiyammai Artchi (1952) 53 N.L.R. 505 (P.C.)

¹¹ Nadaraja Opcit p.188

¹² Ramanathan vs Kurukkal (1911) 15 N.L.R. 216 and Nanitamby vs Vaytilingam (1917) 20 N.L.R. 33

¹³ Kumarasamy Kurrukal vs Karthigesu Kurrukal (1923) 26 N.L.R. 36 J.D.M Derrett, Religion Law and the State of India (1968) pp. 484 etseq

¹⁴Nadaraj opcit p.216 N. 153 Murugesoe vs Chelliah (1954) 57 N.L.R. at p. 468

Influence of Hindu Law ¹⁵

Mayne¹⁶ states “the customs recorded in the Thesawalamai can therefore be taken as very strong evidence of the usages of the Tamil inhabitants of the South of India two or three centuries ago or when it is certain that those usages could not be traced to Sanskrit writers.” Tambiah does not agree with the views of Mayne and states “while agreeing with Mayne that the Thesawalamai is a collection of the usages of the Tamils before Brahminism could make itself felt, we do not agree with him that it was a collection of the usages of the Tamils of South India two or three centuries ago.¹⁷ Mayne states,¹⁸ “we know that the influence of Brahmans or even Aryans of the Dravidian races of the South has been the very slightest, at all events, until the English officials introduced their Brahmin advisers”. Sir Alexander Johnston after his first visit to Jaffna states that there is evidence that the Hindu Law supplemented the Law of Thesawalamai. He says “the Tamils some of whom are Christians but most of whom are worshippers either of Vishnu or Shiva (independently of the Dharma Sastra, the source of all Hindu Law, the Viguyan Ishuar a tract of great authority in the South of India and Videya Vanga a commentary of the text of Parasara, a work of equal authority in the Mysore country have a customary code of their own called Thesawalamai which although provides for many cases, leaves others to be decided according to the general principles of Hindu Law as evidenced by the three works to which I have just eluded. If these works were used during the Dutch period, Tambiah states that there should be some reference made by Class Izaacs or in the memoirs of Dutch Governors. However the Dutch Governors memoirs states when the customary law was silent Roman Dutch Law applied¹⁹. Although Hindu Law had very little influence in Thesawalamai it cannot be said it had no influence at all. There are traces of Hindu Law in the principles of the Law of Theswalamai

With the immigration of Tamils from the Coromandel Coast the advent of Aryachkravaty a number usages of the Tamils of the Coromandel Coast were introduced. Under the earlier law females succeeded females. When marriage unions became permanent and when the structure of society came to be based on the patriarchal system the corresponding rule was recognized that males succeeded males. Thus the devolution of *muthusam* (paternal inheritance) was on the sons, and the devolution of the *chidenam* (dowry) was on the females. Similarly when one's brother dies interstate, his property devolved on his brothers to the exclusion of his sisters on the basis that in a patriarchal family each brother formed a family unit but all brothers are agnates, when one of them dies his property devolved upon his agnates, his only relations²⁰. With the

¹⁵Thambiah Opcit p.19

¹⁶ Hindu Law 10th ed p. 48 cited by H W Tamabiah Laws and Customs of the Tamils of Ceylon (1954) p.125

¹⁷ Tambiah Laws and Customs of Tamils of Ceylon p. 126

¹⁸ Hindu Law 7th ed p. 50 states

¹⁹ Tambiah opcit p.127

²⁰ Tambiah Opcit p. 19

establishment of the patriarchal system of society some principles of the Hindu joint family system was also recognized. Thus the provision of Thesawalamai rule "so long as the parents live, the sons may not claim anything whatsoever, on the contrary, they are bound to bring into the common estate (and there to let remain) all that they have gained or earned, during the whole time of their bachelorship excepting wrought gold and silver ornaments of their ladies, which have been worn by them and which have been either acquired by themselves or given to them by their parents, and that until the parents die, even if the sons have married and quitted the paternal roof, is taken from the Hindu law and expresses one of the fundamental rules of the Hindu joint family system²¹. Further the rule that if due to age if parents are incapable of administering their acquired property the sons could divide the same and in such a case it is the duty of the sons to support their parents and the sons were also bound to pay the debts of the father. These principles were taken from Hindu Law²². Under the Law of Thesawalamai if the husband and wife have no children and therefore desirous to give away some of their goods to their nephews and nieces or others it cannot be done without the consent of the mutual relations and if they will not consent, they may not give away any more of their hereditary property and dowry. Similar provision is also found in the Hindu Law.²³

The rule that after the father's death the mother is recognized as the head of the family until she marries again, when she passes into the agnatic family of the second husband is also traceable to the principles Hindu Law. Further more the provision that if a pawnee uses the goods pawned then he forfeits his interest from Hindu Law. The provision is that "if two persons jointly borrow a sum of money from another and bind themselves generally, then the lender can demand the money from the person he meets first", is a provision of Hindu law applicable to joint and several bonds.

Marumakattayam Law and Law of Thesawalamai

Marumakattayam Law is a body of customs and usages which has received judicial recognition in India and prevails among casts which form a considerable section of the people inhabiting the West Coast of South India viz States of Travencore and Cochin and the Districts of Malabar and South Canara which formed the ancient Kingdom of Kreal²⁴. Moore states that the Malabar and the customs of the Mukkuwas or Fisherman of the Coast were that of the indigenous people of Malabar²⁵.

²¹ Tambiah Opcit p. 20 Colebrooke Hindu Law Vol. III p.27

²² Tambiah idid

²³ Tambiah Laws and Customs of the Tamils of Ceylon p. 123

²⁴ Mayne 10th Ed p. 307 cited by Tambiah laws and Customs of the Tamils of Jaffna p.129

²⁵ Lewis Moore Malabar Law and Customs p.7

Under the Marumakattayam Law the unit of the family is *tarwad*. The *tarwad* consisted of all the descendents of the female line by one common female ancestor. Among the members there was community of property. The *Karnavar* who is the senior male in the *tarwad* functioned as the manager. He was vested with the property of the *tarwad* but not as absolute owner but as agent and representative of *tarwad*. The *Karnavar* in Marumakattayam law although he was powerful did not have all the powers of the *paterfamilias* in Roman law.

In both Marumakattayam Law and Thesawalamai Law there is a fundamental difference between ancestral property and acquired property. Under the Thesawalamai the husband is placed in the same position as *Karnavar* of the Marumakattayam Law in relation to the members of his *tarwad*. In Thesawalamai the husband had powers not only to manage the acquired property and his own *mudusam* but also the dowry. Under Thesawalamai rules on the death of ones wife the property of his former wife and $\frac{1}{2}$ of *thediathettiam* and the custody of children had to be handed over to the grandmother. The rule in Thesawalamai that if a person wishes to gift property he could only do so to his nephews and nieces is based on the fact that in a *matriarchal* system the true heirs were the children of the sister and not his own children. The rule in Thesawalamai that on the death of a dowered sister, without issue her property went to the other dowered sisters is an adaptation the rule of the Marumakattayam Law that if one *tarwad* becomes extinct the property belonging to such a *tarwad* was inherited by the other *tarwad* that branched off from the parent *tarwad*. The dowry system that prevailed in Jaffna society and the incident of *chedannam* peculiar to Thesawalamai are traceable to a system of usages o prevalent among the first colonist who organized on *matriarchal* lines.

The form of the usufructuary mortgage known has *otti* as its counter part by the same name in Marumakattayam Law. The law of pre-emption known to Thesawalamai as stated by Tambiah is a survival of the original Marumakattayam Law brought by early colonist.

Furthermore the leasehold known to the Thesawalamai appears to have its counterpart in Marumakattayam Law. The Thesawalamai Code states that in the absence of agreement, where plants are supplied by the planter, the landlord gets $\frac{2}{3}$ and the tenant $\frac{1}{3}$ of the net produce. This form of lease is known as *virumpattam* Marumakattayam Law.

In the law relating to marriage, several ceremonies practiced by those governed by Thesawalamai and that of Marumakattayam Law has considerable similarities. The *talikattu kalayanam* and the loose form of marriage known as *sambantham* are similar to Marumakattayam Law. The law of adoption in respect of the two systems of law is almost identical. The law of guardianship in Thesawalamai is

also derived from the practices, which obtained among people who had a matriarchal system of society²⁶.

Tambiah therefore concludes that there is a close resemblance between the Marumakattayam Law and the Mukkuwa Law and the Law of Thesawalamai of Sri Lanka. The basic principles of these systems of law are so similar that one is forced to come to the conclusion that these laws are derived from the customary law prevalent among the ancient Dravidians. Thesawalamai therefore appears to have as its origin in the law brought by early Malbar immigrants to Jaffna and an offshoot of the old Marumakattayam Law.

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²⁶ Tambiah Laws and Customs of Tamils in Ceylon p. 132 -135 and Tambiah Laws and Customs of Tamils in Jaffna 2nd ed p. 11 – 19