

Right of Children to Inherit Parents' Intestate Property: A Critical Analysis in Thesawalamai Law

Ranjan Anno Helan Menaka

Department of Private and Comparative Law, Faculty of Law

Background

During the early years of British rule, by the proclamation of 23rd September 1799, the continued operation of the Thesawalamai was guaranteed. In the present context, the Constitution of 1978¹ has guaranteed the continued operation of all existing written and unwritten laws after the enactment of the Constitution. Accordingly, Tamil inhabitants of the Northern Province continue to be governed by the Thesawalamai.

Though Thesawalamai has been influenced by many laws, this research will focus on the influence of Roman Dutch Law and Hindu Law. Two waves of immigrants came to Sri Lanka from India. The first immigrants called Malabar came from Malabar Coast. They followed a matriarchal life system. The second wave of immigrants came from Coromandel Coast and with the advent of Arychakravaty, the Hindu Law was introduced. They followed a patriarchal life system.

The Dutch first codified the customs of Jaffna people and the British codified the Thesawalamai by the Regulation of 1806. In the early days of the British rule the provisions of the Thesawalamai Code was elucidated and supplemented by reference to Hindu Law, but later this policy underwent a change and when customary law was silent, the Roman Dutch law was applied. Since this Code does not provide for all matters in relation to the subject of marriage, the Tamils who are subjected to Thesawalamai are governed by the General Law of marriage in related to certain elements of marriage. However, the Code addresses the issues of matrimonial property. The case law establishes that Tamils governed by the Thesawalamai can contract a valid customary marriage.² Yet the provisions relating to age and prohibited relationships in the General Law cannot be circumvented by such a customary marriage.

The earlier position in Hindu Law was that there was no prohibition against a person having more than one wife. Children born to different wives were treated as legitimate. Only a child born to a concubine was treated as an illegitimate child. There is evidence to suggest that a similar practice prevailed in Jaffna during the Dutch period³.

In the post-Vedic periods, Hinduism rejected the notion of polygamy and it is now considered as immoral. Furthermore, modern laws in relation to family emphasize that spouses must not marry during the subsistence of a valid marriage. Thus, under the Hindu Law and Roman Dutch Law extra marital children are considered as illegitimate children

¹ Article 16 of 1978 Constitution of Sri Lanka

² Chellappa Vs Kumaraswamy (1915) 18 NLR 435 at page 437

³ Murugupillai v Poothathamby 1917 20 NLR at page 204 and section 1 (18) of the Thesawalamai Code

and they have the right to inherit from their mother, but they are deprived of the right to inherit from their father. Thesawalamai Law has also adopted the same approach. Jaffna Matrimonial Right and Inheritance Ordinance reaffirmed the principle of customary law that in the event of parent's intestacy an illegitimate child could only inherit from the mother not from the father.⁴

International Conventions, in particular ICCPR⁵ and UDHR⁶, emphasize the principle of non - discrimination. Sri Lanka has ratified the Child Right Convention (CRC) and the core principle of this Convention is non-discrimination.⁷ However, the state has accepted its commitment to guarantee the rights granted by the Conventions. Furthermore, the Sri Lankan Constitution⁸ states that, any form of discrimination on children must be avoided.

The status of the illegitimate children has been improved by the adaptation of Legitimacy Act No. 3 of 1970 and Maintenance Act No. 37 of 1999. Sri Lankan Courts have also adopted the concept of the best interest of the child as a guiding norm. Despite such positive measures, discrimination in the area of inheritance rights continues to exist in Thesawalamai Law.

Similar developments can be found in Republic of South Africa in the area of child rights.⁹ In the judgment of Zondi v. President of the Republic of South Africa¹⁰ it has been accepted that extra marital children have the same succession rights as a legitimate child. This judgment was delivered with reference to the Article 09 of the European Convention on the Legal Status of Children Born out of Wedlock 1979.

To protect the children born out of void and voidable marriages, section 16(3) of the Hindu Marriage Act¹¹ Amendment No 60 of 1976 and the Indian judgments in Jane Antony wife of Antony v.V.M.SiyathVelloparambil¹² and Neelamma & Others v. Sarojamma & others¹³ recognise the extra marital children's inheritance right to intestate property of self-acquired property of the parents. In Sri Lanka, Kandyan law recognises children's right to intestate inheritance of the acquired property of their father's intestate property with some limitations¹⁴.

⁴ Section 34 of the Jaffna Matrimonial Right and Inheritance Ordinance 1911

⁵ Article 2 of the International Covenant on Civil and Political Rights

⁶ Article 2 of the Universal Declaration of Human Rights

⁷ Article 2 of the Universal Declaration of Human Rights

⁸ Article 27(13) of the 1978 Constitution of Sri Lanka

⁹ Section 28 of the South African Constitution of 1996, and Natural Fathers of children born out of wedlock Act No 86 of 1997

¹⁰ (2002) 2 SA 49

¹¹ No 25 of 1955

¹² (2008) The HC.Keralagave on 25 September

¹³ (2006) 9SCC 612

¹⁴ The Kandyan Law Ordinance No-39 of 1938 Section-15

Methodology

The research is mainly based on the literature review in relation to the Law of Intestate Succession. The research is particularly based on statutes, academic expressions and judicial decisions. The right of the extra marital children to inherit the property of the father in Hindu Law and Modern Roman Dutch Law are studied with a view to suggest recommendations to change intestate inheritance of extra marital children under the Thesawalamai Law.

Outcome

Jaffna Matrimonial rights and Inheritance Ordinance¹⁵ discriminates between marital and extra marital children in the area of inheritance and thereby the extra marital children have been made subject to significant disabilities.

The concept of the inheritance right of marital and extra marital children has changed in both Modern Roman Dutch Law and Hindu Law. However, Thesawalamai Law continues to follow the traditional legal norm. Under the CRC a State has a duty to take measure to prevent discrimination imposed on children and a change in the existing law in the area of inheritance is required to grant the right of inheritance to father's intestate property for extra marital children.

Conclusion and Recommendations

It is a well-known phenomenon that customs and usages should be changed to the extent necessary in order to be in line with the modern legal and social set up. The evolution of traditional norms in relation to Thesawalamai is clearly visible in the way in which the society changed from matriarchal system to patriarchal system. The Dutch altered the Thesawalamai in two ways. They changed it by introducing modifications while codifying the Thesawalamai and also they applied Roman Dutch Law in certain areas. In Jaffna, the majority of the people who are governed by Thesawalamai are Hindus. Accordingly in the present context Thesawalamai could be amended in the area of inheritance right of extra marital children by considering new developments in South Africa and Hindu Law recognizing the extra marital child's inheritance right to parent's acquired property. This will help to avoid discrimination as presently witnessed in this area of law.

References

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¹⁵ No 01 of 1911 Chapter 58