

TRANSFORMATION OF THE FAMILY, AN AGENDA FOR REFORM: THE SRI LANKAN EXPERIENCE

SHARYA DE SOYSA

It is the basic contention of this paper that there has been a transformation of the Sri Lankan family and family ideology which is not reflected in the laws relating to the family. Consequently the law has ceased to be effective in buttressing the 'new' Sri Lankan family that has come into being or resolving the conflicts which arise within the 'new' family.

Features of the Sri Lankan Family

The Sri Lankan family is generally not a family in which the husband is the 'sole' breadwinner and the wife essentially a 'home maker'. What appears to be well documented is that generally in the Sri Lankan family the wife is compelled to be economically active except perhaps in the upper income groups and the socially backward groups¹. In the agricultural sector and in particular in rice production, the woman's role is well established and indeed historical sources document that this has been so even in pre-colonial times². A more recent development is the active economic participation of women in both the formal and informal sectors of the economy.

Another feature of the Sri Lankan family is that child rearing is not essentially viewed as being confined to the mother. Culturally it appears to be acceptable to delegate maternal responsibility to members of the extended family and childminders³. This in a sense frees the woman for economic activity although the dual role that she is expected to perform and the attendant strains must not be underestimated⁴.

Less well documented is the aspect of decision making in the family. Given that women in the country have equal opportunities of education⁵ and given that they form an integral part of the labour force⁶ it would be fair to surmise that they do participate in decisions affecting the family. Their decision making capacity is probably more pronounced in matters concerning children than property matters but here again

the source of the property is probably relevant. The husband's ancestral property would be the 'preserve' of the husband. This is buttressed by concepts in two of the indigenous laws which proceed on the premise that the wife acquires no shares in the ancestral property of her husband⁷. Exceptionally when there are no heirs she may be entitled to his ancestral property^{7a}.

Dowry property on the other hand is probably less the preserve of the husband. Whilst the husband has been seen as the trustee of such property under the *Thesawalamai* thereby restricting the wife's capacity to deal with such property⁸ in the General Law, and the Kandyan law there are no such restrictions. A woman under these systems has complete control over her property, including her dowry property except in a case where the property has been donated to the husband. There is however, perhaps in this area a lack of awareness on the part of married women, of their rights. A question that needs to be addressed however, is whether the separate property regimes of the General Law and the Kandyan Law which enable either spouse to deal with their property without reference to the other spouse accords with Sri Lankan family behavioural patterns. Would a system that recognises a concept of joint decision making as regards those assets which would be categorised as '*family assets*' be more appropriate?

A feature of Sri Lankan family life inadequately catered for in the legal provisions is that the family in Sri Lanka is not necessarily an unit consisting of the husband wife and children of the marriage. Rigid divorce laws and prolonged civil war have resulted in incomplete family units. The percentage of legally separated as opposed to divorced persons in the 1981 census was high, representing 9.1 of every thousand married males and 12.1 of every thousand females⁹. Viewed in a western context these figures may not be significant but given that the corresponding divorce figures were 11.5 and 17.7 respectively the separation figures are significant. Prolonged civil war in the country has given rise to single parent families. Government statistics in 1993 indicated 563,029 displaced persons¹⁰. The indications are, that among the displaced, single parent families are overwhelmingly headed by women. The legal system as we shall see, does not provide the necessary

framework for them to easily step into the role of guardian nor does it facilitate the traditional customary practices relating to assumption of family responsibility to come into effect¹¹. Complicated administrative procedures are often an aspect of receiving the necessary state benefits and these women have had difficulty in complying with these procedures.

In relation to the female headed household in contexts other than displacement caused by civil war, there are indications that quite apart from the fact of being economically disadvantaged other elements of deprivation follow. The effects on children and the whole process of child care, the lack of paternal care and discipline, the psychological effects of the loss of a partner and the necessary adjustment to a social environment which bestows powers and authority to a male household head have been documented¹². Additionally she is faced with a legal system that sees the husband as the natural and legal guardian of the children. In the context of a unit that has not been legally dissolved by death or divorce that premise remains intact. By contrast, in the non-legal family, her role as the natural and legal guardian of her children is well entrenched in the legal system, particularly in the General Law¹³.

Given these features of the Sri Lankan family, we will now look at the existing legal framework.

Support

An examination of the principles relating to support in the General Law and the Special Laws reveals that the husband is seen as having the primary obligation of support. In the General Law this appears to be contrary to Roman Dutch Law principles which recognise that the duty of support between spouses is reciprocal and endures throughout the marriage¹⁴. It also offends an equally well established principle of the Roman Dutch Law which sees the parental obligation as a joint one which is distributable between them according to their means¹⁵. The Sri Lankan statutory provisions cast a primary obligation of support on the husband^{15a}. The wife's obligation to support her husband and children arises only in exceptional circumstances¹⁶. Thus, the relevant

statute provides that a wife's obligation arises only where the husband is 'unable to maintain himself' and conditional upon her having separate property¹⁷. Her obligation to her children is also conditional upon her having separate property adequate for the purpose and only to the extent that a widow is by law obliged to maintain her children¹⁸. These provisions moreover have hardly ever been invoked leading us to conclude that it is the husband's obligation that is seen as primary and the wife's as a secondary obligation.

The principles relating to support in customary laws with the exception of the Muslim Law have for the large part been superseded by the General Law. In the customary Kandyan law, the obligation of support varied with the form of the marriage. In the *diga* marriage the wife became part of the husband's household and the burden of supporting the marriage fell on the husband's household. In the *binna* marriage the husband became part of the wife's household and the obligation of supporting the household was on the wife's household. A *diga* marriage, it would seem, took place when there was a plurality of daughters in a household¹⁹ and a *binna* marriage where there were few or no sons²⁰. In essence then, the form of marriage determined the obligation of support. The choice of the form of marriage moreover was clearly influenced by financial considerations. Thus, in a *diga* marriage the husband and the family were economically strong and therefore obliged to support the marriage. In the *binna* marriage by contrast, it was the wife's family who were economically strong and it was they who supported the marriage.

The tendency in modern law is to extend the provisions of the Maintenance Ordinance to Kandyans²¹. Since the Ordinance imposes an obligation on 'a husband having sufficient means' there is no basis for differentiating between *binna* married husbands and *diga* married husbands. The test that is adopted is purely and simply whether the husband has 'means'. Means moreover has been construed widely to include capital, income and earning capacity²².

The trend that emerges in relation to the Muslim Law stands in contrast to the position under the Kandyan Law. Whilst there was a tendency in the courts in the sixties to hold that Muslims could seek

relief either under the General Law or under the Muslim law²³ the present position is that it is the principles of Muslim law which govern support. Muslim Law clearly imposes a duty upon husbands to support^{23a} their wives²⁴ and children²⁵. This duty is viewed as '*a religious and spiritual duty*' ordained by God. There is no principle in Muslim Law which casts a similar duty on a wife or mother²⁶.

In relation to the Tamils governed by the *Thesawalamai* the customary laws relating to maintenance have lost their significance and have been superseded by the General Law²⁷. Thus, the premise that the husband's duty of support is primary, pervades the whole legal system, contrary to international law conventions which are based on concepts of gender equality and joint parental responsibility²⁸.

Decision Making

In Roman Dutch Law it is the husband who has a decisive say in all matters relating to the common life of the spouses²⁹ and it is he who determines where the parties ought to live and in what style³⁰. It is well accepted now that these decisions ought to be reasonable³¹ but there is running through the General Law, a continued recognition of the principle that the husband has a decisive say in matters relating to the common life of the spouses^{31a}. This runs counter to accepted international standards which require the State to take measures to eliminate discrimination against women in all matters relating to marriage and family relations³². It also offends the widely accepted premise today that marriage is a partnership of equals³³ :

(a) *Decisions in relation to property*

The Roman Dutch Law concept of marital power gave the husband considerable administrative control over community assets³⁴. Even where community of property had been excluded by *ante nuptial* contract the husband by virtue of the marital power administered the wife's separate property unless the marital power had also been excluded either expressly or impliedly³⁵. This position no longer obtains in Sri Lanka or South Africa. In Sri Lanka dramatic changes were effected in

the General Law. Married women have acquired unfettered rights over their property. Those aspects of the marital power which operated as a restraint on acquiring, holding and disposing of property have been repealed³⁶. In theory, a married woman in Sri Lanka is now capable of acquiring, holding or disposing of her separate property as if she were a single woman or a *femme sole*. Yet it is questionable whether the separate property regime of the General Law safeguards the married woman in all instances. The law undoubtedly protects a married woman who has uninterruptedly pursued her career or her income generating activities throughout her married life. By contrast, where a woman has given up a productive role to look after the home or where she has engaged in part time work, the separate property regime of the General Law does not protect her sufficiently. Like in other separate property regimes it is the '*solid tug of money*' which determines property entitlements. The woman who has performed a role other than an economic role is left unprotected since the regime only protects a married woman who has acquired property. The community property regimes by contrast protect women who have performed a non-economic role. Optional property regimes like those brought about in South Africa by 1984 by the Matrimonial Property Act³⁷ should be explored. South Africa in effect has three separate property regimes which may apply to a marriage. The community property system, the accrual system and the separate property system. Where community of property and community of profit and loss are excluded by ante nuptial contract, such a marriage is subject to an accrual system except where that too has been expressly excluded by ante nuptial contract³⁸. The community property regime that now applies in South Africa is a far cry from the Roman Dutch Law community. Both spouses are vested with equal powers of administration of the joint estate³⁹. Some decisions can only be taken with the written consent of the other spouse⁴⁰. Others require consent, but not necessarily written consent⁴¹.

The accrual system combines the marriage out of community and the marriage in community. During the marriage each spouse retains his or her own separate property and administers such property free from any restraints from the other spouse. On dissolution of the marriage however, the total accrual is divided equally between them.

This ensures that the spouse with the smaller accrual acquires a claim against the other spouse or his or her estate for an amount equal to half the difference between the accrual of their respective estates⁴². Spouses in South Africa may however, expressly exclude both the community property regime and the accrual system and opt for a separate property regime.

In the Kandyan Law too, like in the General Law, there is no community of property as a consequence of marriage. Consequently the wife can acquire, hold and deal with property independently of her husband⁴³. It follows that she can mortgage and encumber the property at will⁴⁴.

In Muslim Law too the married woman continues to be able to deal with her property as a *femme sole*. In 1857 and 1859 the Supreme Court of Ceylon as it then was, held that a Muslim husband acquired no rights over his wife's property⁴⁵. The concept of the marital power of the husband and community of property is therefore unknown to the Muslim Law.

The only matrimonial property regime which has an entrenched concept of community is the *Thesawalamai* which applies to those Tamils who can be classified as '*Malabar Inhabitants of the Province of Jaffna*'. The phrase has been the subject of much judicial interpretation and is beyond the scope of this work⁴⁶.

What is significant from our point of view is that one half of the *thediatheddam*⁴⁷ or acquired property of a spouse devolves on the surviving spouse on death. Acquired property is strictly defined⁴⁸ and entitlement is restricted to those situations where the property has not been disposed of by last will⁴⁹. One school of thought however holds that one half of the *thediatheddam* vests immediately in the non-acquiring spouse and what may be disposed of by will is only the other half⁵⁰. 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.

Whilst the statute law governing the *thediatheddam* tries to introduce a concept somewhat similar to the accrual system of South Africa by combining the separate and community property regimes, it does not entirely do away with the husband's superior powers of administration. Thus, a woman governed by the *Thesawalamai* continues to require the husband's consent to dispose or deal with her immovable property⁵¹. As far as the *thediatheddam* is concerned although the statute appears to embody the concept of separate administration by husband and wife of their own acquired property⁵² the courts have been inclined to hold that administration lies in the husband^{52a}. In the capacity as administrator of the *thediatheddam* he has the power to sell, mortgage and lease⁵³. The only restriction known to the law appear to be that of not being able to donate the whole of the acquired property⁵⁴. Yet here too there appears to be conflicting views. Some courts have inclined to the view that the husband continues to have the powers to donate the whole of his acquired property and the wife's remedies lie in the law of trust⁵⁵.

It is clear that a woman governed by the *Thesawalamai* has less decision making powers in relation to her property than her counterparts governed by the General Law, the Kandyan Law and the Muslim Law. Yet unlike her counterparts, she continues to have a vested interest in the acquired property of her husband. In a situation where she is the economically dominant partner he acquires a vested interest in her acquired property.

(b) *Decisions in relation to the children of the marriage*

The General Law with its Roman Dutch Law roots, vests the father with considerable decision making powers in relation to the children of the marriage. In the sphere of custody, care and control, the Roman Dutch Law recognised a preferential right in the husband. It is well established that this right can be interfered with in the interests of the child. Although initially the courts were reluctant to interfere with the preferential right of the father, with the entrenchment of the best interests standard, the current trend in Sri Lanka is to make his *prima facie* right subordinate to the interests of the child⁵⁶. What is significant however, is that the law is based on the premise that it is

the father who must take all the routine decisions in relation to the care, custody and control of the child during the marriage. Included within these decision making powers are those decisions relating to the education of the child, both secular and religious, medical decisions, decisions relating to whom the child may associate with, etc. Other decisions vested in the father under the General Law are those of administering the property of the children. This involves the physical custody of the property and its routine management. Investing surplus income once again is the function of the father. Clearly he must exercise due diligence and the powers of administration do not extend to alienation or mortgages of his minor child's property⁵⁷. Yet we have in this area of the law another example of decision making being vested in the father. Whilst he must act *bona fide* and in the interest of the child it is he to whom the law entrusts the task of decision making.

Under the Sri Lankan General Law until recently, it was the father who was empowered to consent to the marriage of his minor child who was above the prohibited age of marriage but below the age of majority. If he was dead, legally incapacitated or unable to make known his will, then only was the mother permitted to consent to the marriage of her minor child⁵⁸. This pernicious provision has lost significance with the prohibited age of marriage being increased to the age of eighteen⁵⁹. Yet the provision remains in the statute book, a grim reminder of the fact that the General Law sees the father as the person who ought to make all the important decisions relating to the minor children. Another aspect of the father's decision making is that of representing the child in court. In Roman Dutch Law the father instituted and defended proceedings in a representative capacity on behalf of the minor^{59a}. The Sri Lankan Law is now contained in the Civil Procedure Code⁶⁰. The Code provides that every action by a minor shall be instituted in the name of an adult person who shall be designated the next friend of the minor⁶¹. In terms of the law any person of sound mind and full age may be appointed '*next friend*' provided that his interest is not adverse to that of the minor and provided that he is not a defendant in the action⁶². In practice the courts will invariably appoint the father the '*next friend*' if he makes an application to the court. By contrast the statutory provisions do not enable the mother of

the minor to be appointed '*next friend*' since there is a prohibition against a married woman being appointed '*next friend*' of the minor⁶³. Here too, then the General Law proceeds on the premise that it is the father who is the decision maker when it comes to all important matters relating to the child.

A similar tendency namely, that of vesting all important decisions making powers *vis a vis* the children in the father is discernible in the Special Laws. As far as custody is concerned, the Sri Lankan Courts have expressed the view that where there is an absence of developed legal principles that the General Law would apply. Consequently, in the absence of clear identifiable principles in the *Thesawalamai* and Kandyan Law, the principles of the General Law have been applied to Kandyan and Tamils governed by the *Thesawalamai*⁶⁴. By contrast, in the Muslim law there are clearly discernible principles relating to custody. The Courts therefore, have consistently applied Muslim law principles in custody disputes. The Muslim law in contrast to the General Law recognises a maternal preferential rule in relation to very young children. This extends to the maternal relatives. In the case of a female child of the Shafi sect, the custody remains with the mother until puberty⁶⁵. In applying these rules however, the Sri Lankan courts have been acutely conscious of the fact that the overriding consideration in custody applications is the welfare of the child⁶⁶. Furthermore it is clear that these principles of the Muslim law relate to the bare physical custody of the child. Decision making remains for the large part with the father. Thus it is the father who has a right to determine the religious upbringing of the child irrespective of whether he is the custodian parent or not⁶⁷.

Prevalent in the Kandyan law is the idea that the father is the natural guardian of his children. Surprisingly one finds that this extends to even a *binna* married father⁶⁸. As far as the *Thesawalamai* is concerned, all incidents of guardianship apart from the issue whether a father loses guardianship over his children on remarriage are governed by the General Law⁶⁹. Thus in both systems, administration of property and litigating on behalf of the children will be the father's prerogative. Both the Kandyan Law and the *Thesawalamai* however, see the widow

as succeeding the husband as guardian in the event of his death. Under the *Thesawalamai* she becomes the manageress of the property and certain obligations, in particular that of providing a dowry for her daughter is cast upon her⁷⁰. Similarly in Kandyan Law the widow becomes the guardian of the property and is vested with full rights of management of the property. By virtue of her powers of management she has the right to sell or mortgage the husband's *paraveni* (ancestral property) during the minority of the children for the purpose of paying off his debts. It would appear moreover that she is not required to obtain letters of curatorship from the court to effect such a sale⁷¹. In the General Law by contrast there is a line of judicial authority suggesting that the mother must obtain a certificate of curatorship from the court before she can deal with the minor's property⁷². Her counterparts governed by the *Thesavalamai* and the Kandyan law therefore appears to be in a more favourable position. Whether this favourable position could be subverted by the appointment of a guardian, deserves some consideration. Under the General law, the father can by exercising the right of appointing a guardian exclude the mother from management of her children's property⁷³. It would appear that the father's superior right to appoint a guardian, an aspect of the General Law has crept into the customary law. There appears to be some recognition of this right in the statutes relating to marriage⁷⁴. It would seem however, that the right cannot be extended in such a manner as to thwart well established customary principles, e.g. the widow's right to administer property on the death of the husband.

Consenting to the marriage of a minor has lost significance in relation to marriages governed by the Kandyan Law, consequent to the prohibited age of marriage being enhanced⁷⁵. Here too, like in the General Law prior to the recent amendment, it was the father who was empowered to consent to the marriage of a minor. In the event of his being dead or under legal incapacity or being unable to give or refuse consent by his absence from the country, the mother was empowered to consent⁷⁶. The statutory provision is clearly based on the premise that it is the father who must primarily make the decisions relating to his minor children. This theme is found even more vividly in the Muslim Law. The concept of marriage guardianship is an important aspect of

the Muslim Law. In relation to a female of the Shafi sect, the consent of the marriage guardian to the marriage is vital⁷⁷. It is the father who is legally empowered to act as marriage guardian. The mother furthermore appears to rank very low in the order of persons who may succeed the father as a marriage guardian⁷⁸. This system of law also considers the father the legal guardian of his minor child's property. In the event of his death or incapacity moreover he is succeeded not by the mother of the child but by certain other male relatives. In the absence of any legal guardian she may be appointed guardian of her minor children's property⁷⁹.

Both the General Law and the Special Laws then do not afford the married woman any decision making role *vis a vis* her children subject to a few exceptions in the event of a husband's death. It is my contention that this is not in accordance with family behavioural patterns. It is premised upon the entirely unacceptable premise that women are unfit or unqualified to take part in decisions relating to their children and that their only role is that of physically nurturing their children. It is furthermore contrary to well accepted international standards which aim at equality in the marriage relationship.

The Single Parent Family

My last submission is that the law is ineffective in buttressing the 'single parent' or 'one parent family'. My concern is not only about the single parent family in the context of a non-legal family unit but also the single parent of an incomplete family unit. The incomplete family unit may have come into being as a consequence of the prolonged war in the country or from a non-war related situation namely that the unit has simply broken down but not been legally dissolved. The latter is often a consequence of rigid divorce laws.

As far as the non-legal unit is concerned, the General Law recognises that the mother is the natural guardian of her extra marital child. The law vests in her all the rights and responsibilities that it vests in the father of the legitimate child⁸⁰. My criticism of the General Law is that it does not in any way attempt to recognise or buttress the

relationship between the father and his extra-marital child. The obligation of support is recognised⁸¹ but little else. There was an attempt in the South African courts to recognise that the father had an inherent right of access to his extra-marital child⁸². But that too failed⁸³. Consequently the only nexus that is recognised by the General Law is that between the mother and her extra-marital child.

In the Special Laws one sees a healthier body of principles in the Kandyan Law. The Kandyan Law is characterised by a more liberal attitude to the non legal unit⁸⁴. Quite apart from the duty of support owed to the extra-marital child⁸⁵ the Kandyan Law recognised that the extra-marital child had a right to share the acquired property of the father with the legitimate children⁸⁶. The Muslim Law, in contrast to the Kandyan Law does not recognise a nexus between the father and his extra-marital child. Indeed unlike in the General Law the nexus between the mother and her extra-marital child is also not recognised except in the Hanafi school⁸⁷. In the absence of clear identifiable principles in the *Thesawalamai* the General Law applies to Tamils governed by the *Thesawalamai*.

Article 18 of the Convention on the Rights of the Child stresses that both parents have common responsibilities for the upbringing and development of the child. The responsibility in my view, arises irrespective of whether the parents are married to each other or not. The concept of joint responsibility however does not form a part of our law except perhaps in a limited sense in the Kandyan Law.

The single parent of a legal but incomplete unit, if that unit is headed by the mother, faces a great deal of hardship. Irrespective of the circumstances and almost oblivious to the fact that the natural guardian is not in fact a part of the unit, the law proceeds on the premise that the father is the natural guardian of the children and the decision maker. In every situation the mother would need to access the court to dispense with her husband's consent. Her ability to administer the property would depend on a successful application to court in terms of the Civil Procedure Code to be appointed curator of the minor's property⁸⁸. Her ability to consent to the marriage of her minor child

would depend on the court finding that the father is legally incapacitated or unable to make known his will⁸⁹. Her ability to represent the child in court is probably circumscribed in view of the express prohibition in the Civil Procedure Code⁹⁰. These then are a few selected hurdles that the mother as the head of the incomplete legal unit will face. One area where the legal system has responded to the widely prevalent phenomenon of the 'missing' or 'disappeared' husband or father is the section dealing with the presumption of death. The section in the principal ordinance provided that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive shifts to the person who affirms it⁹¹. In 1988 the section was amended to permit the drawing of the inference in one year⁹².

Unlike in a system that vests joint parental responsibility in both the father and the mother and thereby permits the parent discharging the parental obligations to do so without any legal impediments our law in fact in view of the predominant position that it vests in the father, deters the mother from assuming and discharging her obligations to her children in a situation where her husband is either not discharging those duties or in a situation where his whereabouts are not known.

My plea then is a simple one - that of recognising joint parental responsibilities and in particular joint decision making in a country with a highly literate and educated population in which women have been economically active and participated in the life of the community for many decades.

References and Notes

¹ Jayawardene, Kumari (1976) Women and Employment *Economic Review* p 14, Goonesekera, Savitri 'Status of Women in the Family Law of Sri Lanka' In : *Women at the Cross-Roads* Sirima Kiribamune & Vidyamali Samarasinghe ICES 1990 p.171.

² Knox, Robert (1996). *An Historical Relation of Ceylon* Tissara Prakashakayo pp 19-20.

³ Dias, Malsiri (1990), 'Marriage, Motherhood and Employment' In: *Women at the Cross-roads*. See note 1.

⁴ *Ibid.* See particularly at p.227

⁵ School education which stood at 1.2 million in 1948 quadrupled to 4.3 million in 1996. The number of government schools more than trebled to 10,200 in 1996 from 3091 in 1948. The school enrolment rate has increased from 66 per cent to 90 per cent between 1950-1996. Source: *Economic progress of Independent Sri Lanka 1948-1998* pp 66-69. In 1942 only 10.1% of University students were women, by 1950 the percentage had increased to 20%. By 1967 the proportion of women gaining admission to the Universities had reached a peak of 47%. In 1977 the proportion of women gaining admission to Universities had declined to 38.7%. Swarna Jayaweera identifies the reasons for the decline as:

- a) establishment of the male dominant University for technological studies,
 - b) the low proportion of women entrants to professional science based courses,
 - c) the development of management and commerce studies and the low proportion of women gaining admission to these courses.
- Source : Swarna Jayaweera (1981) Access to University Education - The Social Composition of the University Entrants **University of Colombo Review* Vol 1 no 4 p 10.

⁶ For detailed statistics see *Economic Progress of Independent Sri Lanka op. cit.* p.35

⁷ For the Kandyan Law see Hayley F.A. (1923). *The Laws and Customs of the Sinhalese*. (H.W.Cave) 346-358 For the *Thesawalamai* see H.W. Tambiah (1958) *Laws and Customs of the Tamils of Jaffna* (The Times of Ceylon)219,255. See also *Sivananalingam v Suntheralingam Sri L R 1988 (1) 97*.

- ^{7a} Hayley *op.cit.* 347. Tambiah, *op cit* 225
- ⁸ See Tambiah, H.W. *op cit.* 173-174. See also Sri Ramanathan, T. *Thesawalamai The Laws and Customs of the Inhabitants of the Province of Jaffna* p 43.
- ⁹ Statistical Pocket Book of the Democratic Socialist Republic of Sri Lanka Dept of Census and Statistics 1993 p 18-19
- ¹⁰ Extracted from Report of the Representative of the Secretary General, Mr. Francis Deng 25th January 1994 Commission on Human Rights 50th session Agenda item 11(a).
- ¹¹ Goonesekera, Savitri (1998) *Children, Law and Justice, A South Asian Perspective* Sage Publication: New Delhi 101-102 where she comments on this strong sense of family responsibility in Asian systems.
- ¹² Perera, Myrtle (1989) Study of female - headed households Marga Institute for Women's Bureau and Ministry of Womens Affairs Sri Lanka. See also Perera, Myrtle "Female Headed Households - A Special Poverty Group" in: *Women Poverty and Family Survival CENWOR* (1991)
- ¹³ This principle is a fundamental premise of the Roman Dutch Law. See *Ex parte Van Dam* 1973 (2) SA 182(W)
- ¹⁴ Voet 25. 3. 8 *Union Government v Warneke* 1911 A D 657. *Farrel v Hankey* 1921 T P D 590 & 595-96.
- ¹⁵ Voet 25. 3. 6.
- ^{15a} See Maintenance Ordinance No.19 of 1889 Section 2. Compare this obligation with the wife's obligation arising under the Married Women's Property Ordinance No. 18 of 1923.
- ¹⁶ Married Womens Property Ordinance No.18 of 1923, Section 26-27.
- ¹⁷ *Ibid* section 26.

¹⁸ *Ibid* Section 27

¹⁹ Modder, Frank. *The Principles of Kandyan Law* Stevens and Haynes (1914). Comment on Section 127

²⁰ *Ibid*. Comment on Section 128.

²¹ *Rang Menika v Punchibanda* [1843-1855] Ramanathan Reports 61, *Menika v Siyathuwa* (1940) 42 *NLR* 53. Note however that the Married Womens Property Ordinance No. 18 of 1923 clearly states that it does not apply to Kandyans. See section 3(2). Also see note 27. The non- applicability of the Married Womens Property Ordinance to Kandyans leaves a *lacuna* as far as the wife's support obligations to her husband and children are concerned.

²² Sivapakiam (1934) 36 *NLR* 295, *Rasamany v Subramaniam* (1948) 50 *NLR* 84

²³ *Abdul Gaffoor v Mrs Joan Cuttilan* (1959) 61 *NLR* 88

^{23a} *Ismail v Muthu Marliya* (1963) 65 *NLR* 431, *Ummul Marzoona v Samad* (1977) 79 *NLR* 209

²⁴ Quran The Cow 2:236

²⁵ Jaldeen, M. S. (1990). *The Muslim law of Marriage Divorce and Maintenance in Sri Lanka* p. 91

²⁶ *Ibid*

²⁷ See Tambiah *op. cit.* note 7 at p 117. However whilst the Maintenance Ordinance applies to Tamils the Married Womens Property Ordinance No.18 of 1923 in section 3(2) clearly states that it does not apply to Tamils. Thus, there is no statutory basis for imposing even the limited obligation of support visualised in sections 26 and 27 of the Ordinance.

²⁸ See Article 16, Convention on the Elimination of all Forms of Discrimination Against Women. See also Article 18, Convention on the Rights of the Child.

²⁹ In Re *Miller* [1859] Searle 227.

³⁰ *Reloomel v Ramsay* [1920] T.P.D. 371 at 374.

³¹ See Hahlo, H.R. *The South African Law of Husband and Wife* (4th ed.) pp 108 and 152, P.Q.R. Boberg *The Law of Persons and the Family* 183.

^{31a} Note that the marital power has been abolished by statute in South Africa by Matrimonial Act No.88 of 1984, Section 11 & 12. This aspect of the marital power was originally retained in South African Law see section 13 See also section 12 cited above which states that the effect of the abolition is to do away with the restrictions on the capacity of the wife to contract and litigate subject to the provisions of the Act. Now see Matrimonial Properly Act as amended by General Law fourth amendment Act no 120 of 1993 which repeals Section 13 of the South African Maintenance Act No 88 of 1984.

³² Article 16, Convention on the Elimination of All Forms of Discrimination Against Women.

³³ Gray Kevin G. (1977) *Reallocation of Property on Divorce* Professional Books (1977).

³⁴ Grotius 3.21.10, Voet 23.2.53, Vander Keessel 1.5. 19-21. *Ex parte Hoekstra* 1923 OPD 92, *Oberholzer* 1947 (3) SA 294 (O) *Wolfaardt v Symington* and *De kok* 1968 (3) SA 332, *Van Schalkwyk v Folscher* 1974 (4) SA 967 (O) *Silva v Ondaatjee* 1 SCR 19 *Sithy v Juanis* 1 Lorenz 176.

³⁵ Hahlo *op.cit.* 153.

³⁶ Married Womens Property Act no 18 of 1923, Section 5.

³⁷ No 88 of 1984.

³⁸ *Ibid* section 2.

³⁹ *Ibid* section 15

⁴⁰ *Ibid* section 15(2)

⁴¹ *Ibid* section 15(3)

⁴² *Ibid* section 3(2)

⁴³ D.C. Matale (1847) 2 Austin 109, *Leg Mis.* (1847) 432.

⁴⁴ Modder *op cit* p. 155

⁴⁵ *Meera Kandoe v Saroewa Seka Oemma* 1857 2 Lorenz 108, *Seca Marcar v Allq Pitcha* (1859) 3 Lorenz 208.

⁴⁶ See Tambiah, H.W. *The Laws and Customs of the Tamils of Jaffna* Ch IV which deals with applicability of the *Thesawalamai*.

⁴⁷ Also spelt '*thediatettam*'

⁴⁸ Matrimonial Rights and Inheritance Ordinance (Jaffna) No 1 of 1911 (as amendment) section 19.

⁴⁹ *Idem*

⁵⁰ *Manikkavasagar v Kandasamy and Others* 1986(2) SLR 8.

⁵¹ *Supra* . Matrimonial Rights and Inheritances Ordinance (Jaffna) section 6.

⁵² *Ibid* section 6 of 7.

^{52a} *Manikkavasagar v Kandasamy and others* (1986) 2 SLR 853 See

⁵³ See e.g. *Muttupillai v Vallipuram* 8 *Ceylon Law Recorder* 55 and 84. *Sangarapillai v Devaraja Mudaliyar* (1936) *NLR* 38 1. *Seelachy v Visuvanathan Chetty* (1922) *NLR* 23 97.

⁵⁴ *Parasaty Ammah v Setupillai* (1872) *NLR* 3 271. *Sampasivam v Mannikam* (1921) *NLR* 23 257.

⁵⁵ *Seelachy v Visuvanathan Chetty* (1922) *NLR* 23 97.

⁵⁶ *Kamalawathie v De Silva* (1961) *NLR* 64 212, *Weragoda* (1961) 59 *CLW* 49, *Fernando* (1968) 70 *NLR* 532, *Rajaluxmi v Sivananda Aiyer* (1972) 76 *NLR*, *Karunawathie v Wijesuriya* [1980] 2 *SLR* 14.

⁵⁷ *Mustapha Lebbe v Martinus* (1903) *NLR* 6 385, *Girigorishamy v Lebbe Marikkar* (1928) *NLR* 30 209, *Gunasekera v Albert* (1959) 62 *NLR* 209

⁵⁸ Marriage Registration Ordinance no 19 of 1907, Section 22.

⁵⁹ Marriage Registration (Amendment) Act no 12 of 1995, Section 15.

^{59a} Grotiius 1.6.1, 1.7.8, and 1.8.4. Van der Keessel Th.127

⁶⁰ No 2 of 1889 (as amended)

⁶¹ *Ibid* section 476.

⁶² *Ibid* section 481(1)

⁶³ *Ibid* section 495

⁶⁴ *Goonesekera, Savitri* (1987) *Sri Lanka law on Parent and Child* Gunasena p 238

⁶⁵ For these principles see *Wappu Marikar v Ummaniumma* 1911 1 *MMDR* 52 *Hadji Marikar v Ahmadu Lebbe* (1862) 1 *MMDR* 9. *In the matter of a male child of M.S.U.Lebbe Marikar* (1843) 1 *MMDR* 5 *Mohideen v Sithy Katheja* (1957) *NLR* 59 510.

⁶⁶ See *Mohamedu Cassim v Cassie Lebbe* (1927) Vol 1 *MMDR* 102 per Lyatt Grant J at p 104 where he emphatically asserts this point of view.

⁶⁷ Goonesekera, Savitri *op cit* p.306

⁶⁸ Tambiah, H.W. *Sinhala Laws and Customs* Lake House Investments (1968) p 152

⁶⁹ Tambiah, H.W. *The Laws and Customs of the Tamils of Jaffna* pp147- 48

⁷⁰ *Ibid* 220-223

⁷¹ Tambiah, H.W. *Sinhala Laws and Customs op cit*.p. 145-46 citing *Punchirala v Banda* (1948) *NLR* 50 488 and the cases cited therein.

⁷² See *Gunasekera Hamini v Don Baron* (1908) 5 *NLR* 273, *Lebbe v Christie* (1915) *NLR* 18 363. *Croos v Vincent* (1920) *NLR* 22 151 *contra Idroos Sathhuk v Sithie Leyaudeen* (1950) *NLR* 51 509. *Kandiah v Saraswathie* (1954) *NLR* 54 137.

⁷³ Goonesekera, Savitri *op cit* p 301

⁷⁴ See Kandyen Marriage and Divorce Act No. 44 of 1952 section 8(2) (c) and Marriage Registration Ordinance No. 19 of 1907 section 22 (1) which applies also to those governed by the *Thesawalamai*.

⁷⁵ Kandyen Marriage and Divorce (Amendment) Act no 19 of 1995.

⁷⁶ *Supra* Kandyen Marriage and Divorce Act section 8(2).

⁷⁷ Muslim Marriage and Divorce Act no 13 of 1951 section 25(1)(a).

⁷⁸ Savitri Goonesekera *op cit* 314

⁷⁹ *Ibid* 293

- ⁸⁰ See *Exparte Van Dam* 1973(2) SA 182(W)
- ⁸¹ See Maintenance Ordinance no 19 of 1889, section 2.
- ⁸² *Van Erk v Homer* 1992(2) SA 636(W)
- ⁸³ *S v S* 1993(2) SA 200(W), *B v S* 1993(2) SA 211(W)
- ⁸⁴ Goonesekera, Savitri *Parent and child op. cit* 153
- ⁸⁵ Armour, John Grammer of the Kandyan Law J.M.Perera (ed) (1861) p.34.
- ⁸⁶ Sawyer, S. Digest of the Kandyan Law (1860) pp 7-8. Armour *op cit* p.8 and 34 See also *Rankiri v Ukku* (1907) 10 NLR 129, *Ranhamy v Menik Ethana* (1907) 10 NLR 157.
- ⁸⁷ Goonesekera, Savitri *Parent and child op. cit* 105.
- ⁸⁸ Section 582 Civil Procedure Code no.2 of 1889.
- ⁸⁹ See Marriage Registration Ordinance no.19 of 1907, section 22. See also text at note 58.
- ⁹⁰ Section 495
- ⁹¹ Evidence Ordinance No.14 of 1895 section 108.
- ⁹² Evidence Amendment Act No 10 of 1988, section 2.