

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

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GENDER INEQUALITIES IN SRI LANKA: A CRITICAL ANALYSIS OF WOMEN'S PROPERTY RIGHTS IN THESAVALAMAI

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Introduction

This study examines the discriminatory legal provisions relating to women's property rights under the **Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911 (JMARIO)** in comparison with state obligations under Convention on Elimination of All forms of Discrimination against women and Sustainable Development Goals. Sri Lanka's plural legal system too encompasses certain provisions in its special laws that indicate discriminatory practices against women in respect of property rights. The **JMARIO** (as amended by the Ordinance No 58 of 1947) is an example for this. Section 6 of the ordinance overtly discriminates against women. It mentions that a wife can dispose her separate property only with her husband's written consent. Women governed by *Tesawalamai* are subject to discrimination based on ethnicity and marital status. Access to and ownership of property is vital for ensuring equality and empowerment of women. Article 16(d) of CEDAW and General Recommendation No.35 to CEDAW emphasize the equality of enjoying property rights. Moreover, under 5th sustainable development goal, the government has an obligation to ensure land and property rights of women without any type of discrimination. This paper intends to establish that legislative intervention is necessary for revising the existing statutory provisions, in order to bring it on par with international standards. Such guarantees would enable married women governed by *Tesawalamai* to be treated equally. This research is a qualitative research, mainly based on domestic legislation, case law, academic writings, policies and International standard setting documents.

"International human rights law prohibits discrimination on the basis of sex and includes guarantees for men and women to enjoy their civil, cultural, economic, political and social rights equally"²

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²<http://www.ohchr.org/> accessed 20.03.2020

According to the above statement every human being has equal rights, even though still there are various kinds of discrimination against women worldwide. According to the domestic law in Sri Lanka, some statutes enable subordination of women and discrimination against them. These statutes are disadvantages for women. Women and men are equally entitled for everything, although if someone suffers injustice only because of the sex, we are able to identify them as victims of gender injustice³. In the male dominated world it is almost impossible to achieve equality. I believe no one should be discriminated against due to gender bias.

Since Sri Lanka has a plural legal system there are some provisions indicating gender discriminations based on property rights in some special laws. There are some discriminatory statutory provisions in **Matrimonial Rights and Inheritance Ordinance No. 1 of 1911 (Jaffna)**. This statute affects people who are governed by *Thesewalamei*. Section 6 and section 3 can be identified as gender discriminatory legal provisions. Section 6 of this statute⁴ mention that wife can dispose her separate property only with her husband's written consent.

Even though this property belongs to her as her separate property, she has to obtain her husband's consent.⁵ Therefore, women governed by *Thesewalamei* are subject to discrimination under this law. Hence, they fail to enjoy their right to property.

This statute was enacted during the British colonial era and currently, Sri Lanka is a state party to many international human rights instruments⁶ that seek to guarantee right to equality, even though in relation to property matters women who are governed by *Thesewalamei* are still affected by the above mentioned statute which were enacted more than one hundred years ago.

International Standards in Relation to Women's Rights

In many international legal instruments have tried to achieve the full realization of equal rights for women worldwide, by addressing all forms of civil, cultural, economic, political and social discrimination against women.

Article 2 of the Universal Declaration of Human Rights (hereinafter UDHR) states that every person is entitled to all the rights and freedom without any kind of distinction.⁷

³Anca Gheaus, "Gender Justice", Journal of Ethics & Social Philosophy, Vol 6 No.1(2011 -2012)

⁴ Article 6 of Matrimonial Rights and Inheritance Ordinance No. 1 of 1911 (Jaffna) - "[...]with his written consent in the case of immovable, but not otherwise or by last will without consent.."

⁵ Kamala Nagendra, Matrimonial Property and Gender Inequality – A Study of THESAWALAMAI, A Stamford Lake Publication (2008)

⁶ CEDAW, UDHR, ICESCR, ICCPR and etc.

⁷ Article 2 - UDHR

Moreover,

- Article 2(2) and 3 of International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Article 2(1) and 3 of International Covenant on Civil and Political Rights (ICCPR)

Recognize that every human being should be treated equally without any discrimination based on their sex.

In the property rights Article 17 of UDHR⁸ recognizes the right to property. Even though this Declaration is non-binding in nature, every country has a moral obligation to take necessary measures to implement human rights to the fullest. Furthermore, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which has been signed and ratified by Sri Lankan government, clearly states that state parties should take appropriate measures to abolish existing laws, regulations, customs and practices which cause discrimination against women.⁹ According to this Convention, as a dualistic country Sri Lankan government has enacted the women's charter which is a non-binding legal document and there is a women's right bill still which hasn't become a law.

Furthermore, Article 16 (h) in CEDAW states "the same rights for both spouses in respect of the ownership, acquisition, management, administration, **enjoyment and disposition of property**, whether free of charge or for a valuable consideration." This article also clearly explains about the equality of enjoying the disposition of the property. Moreover, article 12(2)¹⁰ of the Sri Lankan Constitution recognizes that no one shall be discriminated on the ground of sex.

Although, there are a number of mechanisms available for ensuring women's rights, the state is yet to introduce gender neutral laws to prevent women from being discriminated through the application of certain archaic and oppressive personal laws which are incompatible with contemporary human rights instruments. Hence, the women who are governed under

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

⁸Article 17- UDHR

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.

⁹ Article 2 - CEDAW

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

¹⁰ Article 12(2) of the Constitution 1978 – " No citizen shall be discriminated against on the grounds of race, religion, language, cast, sex, political opinion, place of birth or any one of such grounds:"

Thesawalamei still do not have equal opportunity in relation to property rights or land rights¹¹.

Application of the Feminist Legal Theory

Feminist legal theories originated due to women's subordinations with the intention of elimination such discrimination through the changing of the discriminatory existing laws and its approach to gender equality. There are many feminist theories such as Liberal, Socialist, Radical, Marxist, Cultural, Third- world and etc.

The author's opinion is that, before select the most appropriate feminist legal theory to address the above mentioned issue, it is important to briefly discuss about few feminist theories with which have similarities. According to the Marxist feminist legal theory, men and women are created differently and they can be treated in different ways. Also they believe that patriarchal attitudes should be converted in a positive way to achieve equality for addressing the above mentioned differences.

In socialist feminist legal theory analysis discusses both gender and class.¹² "A socialist feminist perspective attempts to reveal the complex and often contradictory ways in which the law operates in particular circumstances to shape and reinforce relations of class and gender"¹³. "Liberal feminism finds its roots in the emergence of liberal political thought with the enlightenment, [...] most would agree that liberalism centers on core ideas of autonomy, of universal rights, of equal citizenship, and of democracy"¹⁴. According to this feminist theory, society holds the wrong belief that women are weaker than men by nature. Furthermore, they ignore the basic differences between men and women, while demanding equal treatment for men and women who are born as same. Therefore, for this paper I prefer to address the above mentioned issue based on the **liberal feminist legal theory**.

Liberal feminists portray that women should enjoy their personal independence and they should have a right to enjoy their own choosing. The main aspects of authority and control in the society continue to rest in the hands of men even after many achievements have been made in respect of gender equality. In today's pluralistic society, most cultures have special laws such as Muslim Law, Kandyan Law and *Thesawalamei* depend on patriarchal attitudes. Hence, in the male dominated world it is very difficult to secure vital positions for women who need to

¹¹<http://www.ohchr.org/> "Using CEDAW to Secure Women's Land and Property Rights: A Practical Guide" accessed on 20/ 03/ 2020

¹² Nicola Lacey, *Feminist Legal Theory and the Rights of Women*, Oxford University Press (2004)

¹³R. Kapur and B Cossman, *Feminist Legal Revisions: Women, Law and Social Change*, New Delhi: Sage Publications,(1994)

¹⁴ Nicola Lacey, *Feminist Legal Theory and the Rights of Women*, Oxford University Press (2004)

achieve equality.

In some cultures women who are less educated and they don't know their rights or whether or not their rights are violated by discriminatory laws. On the other hand, in some cases, women who manage to take positive measures of economic and social changes to develop their individual situation are still subject to cultural domination. The full liberation of women can be achieved by eliminating inequalities of wealth, power and decision making authority.

Furthermore, a branch of liberal feminism named 'Classical Liberal Feminists' aspire to overcome unfair patriarchal gender distinctions by removing all kinds of discriminatory laws from the written sources; thereby enabling equal rights for women and men. Another branch of legal feminism which identify themselves as Welfare Liberal Feminists, expect society to recognize the need of eliminating social and economic legal barriers and respect equal human rights. Also they further analyzed about the past injustices as well.¹⁵

"Liberal feminism has been particularly associated with the ideas of formal equality and of equality opportunity".¹⁶In this paper I prefer to select this theory for justification of proposed reforms because these feminists pursue to remove gender - based distinctions which are accepted by Law. Furthermore, the Liberal feminism theory expects gender neutral law.

In Jaffna, the Matrimonial Rights and Inheritance Ordinance clearly states that women who are governed by *Thesawalmei* should get her husband's written consent to dispose her separate property. Even though she acquired this property before marriage, she should get her husband's consent after marriage. **Chellappa v. Kumarasamy**¹⁷ states that the marital powers of the husband deal with all areas. In **Vijayaratnam v. Rajadurai**¹⁸ and **Naganathar v. Velauthan**¹⁹ it was upheld that the husband could use his marital power to manage and administer his wife's property. According to the theory of liberal feminism, this provision violates the principles of basic equality and property rights of women. Since then, feminist theory deals effectively with gender bias laws.

The ordinance does not show any provision to claim where husband's consent is unreasonable or when it becomes impossible to get from him. Although, in **Ramalingam v. Puthathai**²⁰ held that the wife disposed her property without her husband's consent and it was held that the

¹⁵Rose Wijeysekere, "Feminist Legal Theory" (LLM Lecture, 2016).

¹⁶Nicola Lacey, *Feminist Legal Theory and the Rights of Women*, Oxford University Press (2004)

¹⁷ 1951 NLR 110

¹⁸ 1966 NLR 147

¹⁹ 1953 55 NLR 319

²⁰ 1899 3 NLR 347

transfer was only valid if it was needed for her maintenance.²¹

Why does she need her husband's consent to dispose her property? This unfair legal provision affects her only because of her gender and her subjection to *Thesewalamei*. The same women would have been able to enjoy equal status as men enjoy different status with regard to property rights, had she been governed under the general law.

These Tamil women are discriminated not only because of the sex but also as a result of their marital status, religion, customs culture and etc.²² It is admitted that there is a debate between cultural relativism and universalism (**Cultural Relativism V. Universalism**) of human rights. Nevertheless, it is extremely unfair for women who are unable to take an individual decision relating to her property. Still these women live in a male dominated society.

Reforms for Matrimonial Rights and Inheritance Ordinance (Jaffna)

In the above mentioned Ordinance there are a few legal provisions which require amendments in order to ensure women's rights. This segment of the paper suggests reforms which the author believes to be important in the achievement of equality. Furthermore, measures for the elimination of injustice would be analyzed as well.

The author mainly focuses on section 6 of this ordinance and proposes this provision should be amended for the purpose of achieving equal rights for this statute to be considered as a gender neutral law. Section 6 should be amended as ***“she should be able to dispose her property on her own will and without her husband's consent”***.

According to the international standards, states are obliged to ensure equal rights for both sexes. Article 17 of UDHR²³ recognizes right to property and Article 16 (h) in CEDAW recognizes the right to enjoyment and disposition of property without any discrimination. Furthermore, Sri Lankan Women's Charter recognizes both men and women have equal rights in relation to family matters.²⁴ Article 7 (1) of the women's charter recognizes, ***“The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and dis-position of property”***, even though the state has not taken any step to amend this

²¹ Kamala Nagendra, Matrimonial Property and Gender Inequality – A Study of THESAWALAMAI, A Stamford Lake Publication (2008)

²² Rose Wijeysekere, “Women and Economic, Social and Cultural Rights” (LLM Lecture, 2016).

²³ Article 17- UDHR

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

²⁴ Article 7 (I)-Women's Charter

The State shall work towards taking all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations in particular and shall work towards ensuring, on basis of equality of men and women:-

discriminatory provision yet. Any country has state sovereignty, cultural diversity, legal pluralism and etc. Although, no one can deny individual decisions for creating capacity and freedom.

Moreover, there is another provision which should be amended since it leads to discrimination against women. It is in violation of Article 6 of Matrimonial Rights and Inheritance Ordinance (Jaffna). Section 3(1) states if the women who governed by *Thesewalamei* marries a man who is not governed by *Thesawalamei*, that marriage shall not be subject to *Thesawalamei*. Whereas section 3(2) states that whenever a women who is not governed by *Thesawalamei*, marries a man who is governed by *Thesawalamei*, that marriage shall subject to the *Thesawalamei*. These two provisions amply indicate the extent of application of patriarchal policies for women governed by *Thesawalamei*. Such laws force women to enter a new culture, as well as an alien legal system after her marriage, without any regard to her autonomy and her right of choice.

Liberal feminist theory clearly denies the discriminatory laws and they argue to erase gender - based distinctions recognized by law. They believe law should be gender neutral. This theory thus supports the above analyzed reforms that aspire to guarantee gender equality.

Although, there is another critical issue that should be addressed in a very diplomatic way. In the state reports, the government mentioned that they are not willing to amend personal laws unless the request comes from those who are governed under personal laws²⁵.

The State knows these women are discriminated by special laws²⁶, even though the Sri Lankan government is reluctant to interfere because of cultural patriarchal attitudes the community does not want to change.

The unfortunate situation is that women who governed under *Thesewalamei* say that they also do not want to change these laws because they believe this is their culture²⁷

According to author's point of view, there is a state obligation to take positive legal measures to establish gender equality in all societies. Moreover, all enactments should be gender neutral for the purpose of achieving universal human rights.

Conclusion

There are different legal theories that attempt to ensure equal rights for both sexes through different approaches. In many countries most of women are unable to enjoy equal rights for

²⁵ www.ohchr.org accessed 22.03.2020

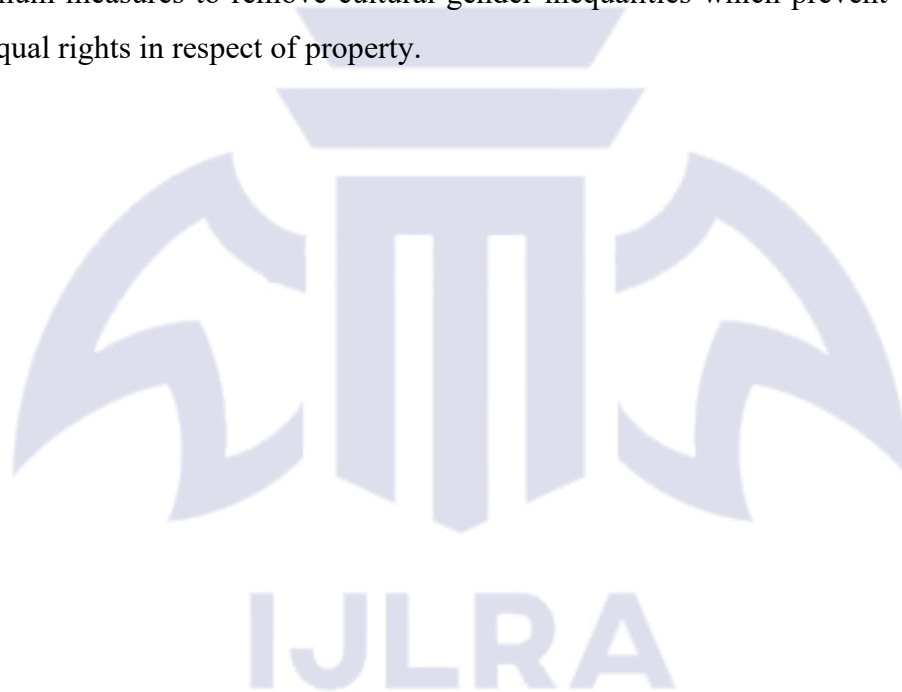
²⁶ Concluding observations of the Committee on the Elimination of Discrimination against Women, forty eight session, 17 January – February 2011

²⁷ Shayamala Gomez, "Concluding observations of the Committee on the Elimination of Discrimination against women" (LLM Lecture, 2016)

using lands and one male family member holds their right.²⁸ All over the world women continue to be discriminated in different ways because still we are living in a male - dominated society. Therefore, it is difficult to change the status quo at expected speed.

Therefore, states should actively interfere to rectify these problems and need to align the laws in accordance with international standards. In the Sri Lankan situation, Matrimonial Rights and Inheritance Ordinance No. 1 of 1911 (Jaffna) is a gender bias statute and there are few legal provisions which should be amended according to the liberal feminist theory.

There should not be any distinctions for women on the basis of sex. Women themselves should have to hold their property right and it is essential to ensure equality in order to improve female empowerment to eliminate poverty for some extent. Hence, the respective government should take maximum measures to remove cultural gender inequalities which prevent women from enjoying equal rights in respect of property.



²⁸<http://www.ohchr.org/> “Using CEDAW to Secure Women’s Land and Property Rights: A Practical Guide” accessed on 20/ 03/ 2020