

Challenges to property rights of women under the Sri Lankan legal perspective

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Abstract— According to the prevailing patriarchal system in Sri Lanka, traditionally the male is designed as the head of the house hold regardless of whether he is the primary source of economic support or not. Females in families are marginalized. Now women have become economic actors in society and they have a new role to play to enhance family income in the face of economic hardship. Convention on Elimination of the All Forms of Discrimination against Women was ratified by the majority of the world's nations. One of the basic objects of this treaty is equality on women and men. Despite many successes in empowering women, numerous issues still exist in all areas. Non-recognition of women's property rights have been identified as a major challenge for women's rights. In Sri Lanka 30% of women own property and 90% rural house -holds in the North-East are female households.

The research is mainly based on the literature review in relation to women's property rights under the General Law statutes of Sri Lanka. This research is particularly based on the 1978 Constitution of Sri Lanka, International Convention on Elimination of the All Forms of Discrimination against Women, statutes and academic expressions. Indian Constitution and the South African laws are cited to make recommendations to the challenges faced by women.

Women have improved their role in society, but still the laws discriminate women with regard to property rights of women and marginalizing their role persist. Also women have been disadvantaged by centuries of customs, tradition and social practices and to ratify these discriminatory practices will take more than changing women's legal rights. Law is limited in its ability to effect social changes. Awareness should arise among law makers to protect women's legal rights, amend the present laws and prevent future laws which discriminate women's property.

Keywords— Patriarchal system, Economic actors, Female household

I. INTRODUCTION

30 years' War in Sri Lanka directly and indirectly shaping women's role in families and societies, post war has opened new opportunities for women to overcome traditional conservatism to achieve greater mobility and to participate in the public sphere. A major global women's right treaty Convention on Elimination of the All Forms

of Discrimination against Women was ratified by the majority of the world's nations a few decades ago. One of the basic objects of this treaty is equality on women and men¹. Despite many successes in empowering women, numerous issues still exist in all areas. Non-recognition of women's property rights have been identified as a major challenge for women's rights. In Sri Lanka 30% of women own property and 90% rural households in the North-East are female households².

II. METHODOLOGY

The research is mainly based on the literature review in relation to women's property rights under the General Law and customary Law statutes of Sri Lanka. This research is particularly based on the 1978 Constitution of Sri Lanka, International Convention on Elimination of the All Forms of Discrimination against Women (Hereafter referred as CEDAW), statutes and academic expressions. Indian Constitution and the South African laws are cited to make recommendations to the challenges faced by women.

III. RESULTS AND DISCUSSION

Sri Lanka has ratified International Convention on the Elimination of All Forms of Discrimination against Women in 1981 and in 1993 Sri Lanka adopted the women's charter. The draft Bill of 2004 on Women's Rights (Sri Lanka) provides for the enforcement of "The protection, promotion and advancement of women's rights in accordance with the framework of the women's charter of Sri Lanka as set out in the schedule to the Act and international treaties relating to women's right to which Sri Lanka is party" as one of the objectivities.³ Article 3 of United Nations General Assembly recommendation recognized economic right of women⁴. In particular, the Global Platform for Action of the World Conference on Women held in Beijing in 1995 acknowledged women's right to inheritance and ownership of land and property.

¹ Article 2 of CEDAW

² Indika Bulankulame, "Property Ownership and Inheritance Rights of Women for Social Protection—The South Asia Experience". Synthesis Report of three studies, (2006) International Centre for Research on Women) at 74-6.

³ Section 2 (12)

⁴ UN General Assembly recommendation 48/104 Declaration on the Elimination of violence against women Article 3 Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

UNCHS and the Government of Sweden convened an International Workshop held in Gävle, Sweden in October 1995 on the implications of the issue on human settlements development. Subsequently, the Habitat Agenda adopted by the Habitat II Conference held in Istanbul in 1996 provided a plan of action regarding the rights of women in human settlements development. In 1997, the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities passed a resolution on "Women and the Right to Adequate Housing and to Land/Property". Article 12(2) of the 1978 Constitution of Sri Lanka guaranteed equality of opportunities to citizen without being subject to any disability on the ground of sex.

During the early years of British rule, by the proclamation of 23rd September 1799, the continued operation of the customary laws was guaranteed. In the present context, the Constitution of 1978⁵ has guaranteed all existing written and unwritten laws continued operation after the enactment of the Constitution.

According to the prevailing patriarchal system in Sri Lanka, traditionally the male is designed as the head of the house hold regardless of whether he is the primary source of economic support or not. Females in families are marginalized. The Matrimonial Rights and Inheritance Ordinance⁶ wife is entitled to inherit one half share of the descendant's property. The Matrimonial Rights and Inheritance (Jaffna) Ordinance⁷, the widow of a person who has been legally married to the dead person at the time of his marriage is entitled to a specified portion of the dead person's property. While the Matrimonial Rights and Inheritance Ordinance grants a widow ½ of the entire property of her dead husband⁸.

Under *Tesawalam* a woman can own property individually, is entitled to patrimonial and non-patrimonial inheritance, can acquire property during marriage and can keep the dowry she received. Control of her property, however, is in the hands of her guardian, and as the guardianship of a woman passes from the father to the husband, the husband maintains control of her property. The woman cannot invest in the property, mortgage, lease, or sell it without the prior permission of her husband⁹. A woman cannot enter into contracts without his consent and women are treated as 'minors' in the Courts of Law. Thus effective control rests with the husband.

Jaffna Matrimonial Rights and Inheritance Ordinance, as interpreted by the judiciary¹⁰, permit a widow ¾ of the

entire *Thediathettam* property (property acquired during the marriage).¹¹ In this occasions proof of marriage is a pre-requisite to claim these rights and in the majority of cases where the marriage is by registration, the best evidence to prove marriage is the certificate of registration. Proof of marriage is also necessary to claim maintenance from a dead husband's property, insurance benefits or other sources.

Under the law of Thesawalamai Matrimonial Rights & Inheritance Ordinance No.1 of 1911 as amended by Ordinance No.58 of 1947. According to Thesawalamai, the woman does not have absolute power of disposition of her immovable property but requires written consent from her husband. If the husband's written consent is not forthcoming, Section 8 allows the District Court in which the woman resides or in which the property to be alienated is situated, to dispose of or deal with the property without the husband's written consent, i.e. the Court supplies the consent required by law. This is done if it is deemed that 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 is deemed that it would amount to the release of his *protector ship*, the purpose of the provision

According to Ministry of Child Development and Women's Affairs, 'about 89 000 females were widowed due to the war¹² and had no means of income to support them and their family. Out of this, 40 000 are in the North and 49 000 are in the East. Now women are economic actors, and important ones in this post conflict reconstruction period

and also may lead to women becoming overburdened. Because during the war period People have lost lives, property and also documentary evidence of entitlements and relationships as a result of war. To understand the role that women should play in post conflict situation is largely situated in the roles they played before and during the conflict. Internal conflicts and wars have led to displacement and destruction of property and livelihoods, which place women in an ever more vulnerable position. Now women have become economic actors in society and they have a new role to play to enhance family income in the face of economic hardship.

In the post conflict reconstructions I think women must be involved, because they have important and necessary roles to play in all the phases of post conflict reconstruction. Arm conflict affected the women and men differently. A large

⁵ Article 16 of 1978 Constitution of Sri Lanka

⁶ Matrimonial Rights and Inheritance Ordinance No.15 of 1876

⁷ Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 01 of 1911

⁸ S.22 of the Matrimonial Rights and Inheritance Ordinance

⁹ Section 06

¹⁰ See S. 20 of the Matrimonial Rights and Inheritance (Jaffna) Ordinance and its interpretation in *Manikkavasagar v. Kandasamy* 1986(2) SLR 8

¹¹ See ss. 19, 20 of the Ordinance. Details of matrimonial property rights are not discussed here due to word constraints.

¹² Daily Mirror on 30.09.2010 Even though the news paper report says 'widowed due to the war' the statistics refer only to the widows of the North and the East. It needs to be mentioned here that thousands of Sri Lankan women were widowed as a direct result of the war.

number of conflict affected women have no independent means of income as they have relied economically on male family members. Therefore, following the death, disappearance or detention or permanent or temporary disability of the male family member, these women have been deprived of their sole means of income and are struggling to meet their daily basic household needs. As a result women are generally responsible for running the house – holds. Armed conflict creates large number of households headed by women. Women are made vulnerable by the lack of documentation, inability to prove ownership, inability to dispose of land in the absence of their husband's death certificate and the non-recognition by officials of women's altered status. Proof of marriage is necessary to establish legal relationships and benefits such as inheritance rights to property, legitimacy of children. According to the existing laws of Sri Lanka, marriage can be proved by documentary evidence of registration of marriage and/or of performance of recognized customary rites. But it needs to be realized that the major cause for the loss of their documents had been beyond their control. Therefore, it is more than unreasonable to deny them their legal rights for reasons they could not control. Such denial of legal entitlements and benefits due to lack of documentary evidence could be identified as gross violations of economic and social rights, and in need of urgent rectification. The CEDAW Committee too, in its forty fourth sessions, recognized the importance of taking temporary special measures 'targeting women for livelihood initiatives to enhance their self-reliance and integration prospects, especially in households headed by females.

According to the Islamic law male has the duty look after his family therefore in inheritance male has the preferential right to inherit two third of the property and female can only inherit 1/3 of the property. In Sri Lanka under the Muslim Intestate Succession Ordinance¹³ provides Women

(as wives, daughters, sisters, and grandmothers) inherit but not equally to their male counterpart.

Under the Kandyan inheritance laws distinguish between diga and binna marriages. In a binna marriage if the bride's father dies, she receives an equal share of the father's ancestral (paraveni) property together with her brothers, unmarried sisters and other sisters in binna marriages. In a diga marriage, if the bride's father dies, she does not receive any share of his ancestral property. The Kandyan Law also has a similar problem. The surviving spouse is not an heir to the intestate property of her deceased husband under that law and she has a life interest in the paraveni and acquired property of her deceased husband¹⁴. She has a life interest in the paraveni property only if the acquired

property is not sufficient. Therefore the Debt Conciliation Ordinance Debt Conciliation Ordinance needs to be amended to allow a representative or agent of the debtor to make application to DCO whether the original debtor is missing or dead.

Globally, there has been an increased focus on land rights. Landless threaten the enjoyment of a number of fundamental Rights. In conflict and post-conflict situations, numbers of women-headed households often increase sharply as many men have either been killed or are absent. But wives of disappeared may not eligible for state and other benefits as their husbands are not legally recognized as dead. Land rights are important in the post-conflict situation where large numbers of women have sole or primary responsibility for income generation through cultivation of land or work as agricultural labourers. Land issues are the core of most disputes and surfaced with return of internally displaced persons to their places of origin. Access to land is important for development and poverty reduction, also access to land is necessary for access to several economic, social and cultural rights and gateway for many civil and political rights. Right to land is not codified in international Human rights. However, property includes land. Article 17 of the Universal Declaration of Human Rights provides

(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.*

Since this is not legally binding it was adopted for the purpose of drafting the meaning of the words fundamental freedom and human rights appearing in the United Nation charter which is binding only member states. The Bill of Human Rights consists of International Covenant on Economic, Social, Cultural Rights and International Covenant on Civil and Political Rights. Article 2 ICESCR required state to guarantee the right enunciated in the present covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, Political or other opinion, national or social origin, property, birth or other status. Article 11 of the ICESCR makes only one indirect reference to land when it encourages states parties to develop or reform "*agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.*" Article 26 of the ICCPR prohibits discrimination on the ground of property. Right to land have been developed in two key areas of International human rights law the right of indigenous people¹⁵ and the right of women. Article 16 (1) (h) and Article 14 (2) (g) of CEDAW has recognized women to be treated equally in land and agrarian reform, as well as in land resettlement

¹³ No. 10 of 1931

¹⁴ Section 11 (1) (a) of Kandyan Law Ordinance 39 of 1938

¹⁵ Convention 169 on Indigenous and Tribal people, which has been adopted by the International Organization. <http://www.ilo.org/ilo/ex/cgi-lex/convide.p?169>

schemes. Article 15 (2) of the CEDAW required state to provide opportunities to administrate property.

According to the 1935 Land Development Ordinance No 19, state agricultural land is given by State issued permits to Sri Lanka citizen but its implementation has favoured males. Spouse will always succeed to the land if they lose the land on re-marriage. In such a case land goes to the person nominated as successor given in the Third Schedule to the Ordinance. According to Section 72 of LDO it is decreed that in the absence of a nomination of a succession, the land is alienated under the Ordinance. Inheritance devolves in the male line, thus there is clear gender discrimination in the succession to the land.

The purpose of the Land Grant (Special Provision) Act No 43 of 1979 is to provide for the vesting in the state land which is vested in the land reform commission under the land reform law and to enable the state to transfer such lands to the landless free of charge. Which is a post 1978 statute has been enacted contrary to the provision of Article 12(1) and (4). Whether is no- nominated successor the nominated successor or the nominated successor indeed ownership devolves in terms of section 10 of the Act citizen. The LDO is gender neutral but its implementation has favoured male as it contains devolutionable identical to the found in the Land Development Ordinance.

Debt Conciliation Ordinance No 39 of 1941 as Amended Registration of Death (Temporary Provisions Act No 17 of 2005) and The Tsunami (Special Provisions) Act No 18 of 2008 is an another statute which discriminate women. Under the General Law the surviving spouse is recognized as an heir to the intestate property of the deceased spouse. "Debtor" for the purpose of DCO includes the heir of the person originally taking debt. However, the surviving spouse of the original debtor may not be considered as an heir under the Thesawalamai and Kandyan Law. Under Thesawalamai Law the surviving spouse of the original debtor may not be considered as an heir, therefore the surviving spouse does not succeed to the intestate right of the deceased spouse and inherits only half of the *Thadiathettam* property which is a common property. Consequently a surviving spouse governed by Thesawalamai does not become an heir to the separate property of the spouse.

Under the CEDAW direct or indirect discrimination against women, whether committed by the state or non -state entity, is prohibited. Therefore, the state has a duty to take measures to prevent such discrimination. Despite many successes in empowering women, numerous issues still exist in all areas of life, ranging from the cultural, political to the economic. For example, women often work more than men, yet are paid less; gender discrimination affects girls and women throughout their lifetime; and women and girls are often are the ones that suffer the most

poverty. The increase of divorce and separation, female headed households and single parent households all indicate the pressure on females, to engage in economic activities to maintain the family unit. A recent opinion of the Supreme Court on a reference on the ICCPR Act (2007) endorsed the conservatism of the State. The Chief Justice stated in the Supreme Court that amendment of personal laws was a "sensitive" matter and that amendment could only take place on the basis of internal review within the communities governed by these personal laws.

Therefore, I would like to make recommendations as follows. Some legal reforms may be more readily acceptance to women and men than In Sri Lanka the House hold head is generally considered to be male and female in families are marginalized. It is true that legal change alone is insufficient to ensure women's inheritance rights in face of customary laws, a strong legal foundation can be an important and necessary first step. The head of the house hold concept in Sri Lanka is a sociologically complex issue. While no law decrees that the head of the household should be a man, there is a common understanding among administrators, as well as communities that a woman becomes a head of house hold largely in the physical absence of the man. In South Africa the term household has been taken out of the land reform legislation and replaced with the term eligible individual¹⁶. Such legislation will abolish the house hold concept and will ensure women's property right.

As I already mention the General Law of Sri Lanka women entitled to an equal share of intestate property, even though there is discrimination based on sex and this is a challenge to women's role in society. Also Article 121 of the Constitution permits citizen to invoke jurisdiction of the Supreme Court of Sri Lanka to inquire into or pronounce on the constitution of bills which contain gender discriminatory provisions. Under Article 123 the court is empowered to decide such provisions as unconstitutional and require them to be passed by parliament by a two third majority and approved by people at a referendum. However, at times provisions contained in the unconstitutional bills go unchallenged given the short period of one week within which bills must be challenged in court after being placed on the order paper of parliament, for example - Land Grand (Special Provision). LDO survives on account of Article 16(1) of the Constitution and a similar land Grand (Special Provision) was passed with the 2/3 majority in parliament in post 1978. Both laws continue to be repugnant to international norms and convention such as CEDAW and UDHR, as well as domestic Constitution imperative. Also this is a challenge to women in the globalized world. Article 13(1) of the Indian Constitution which empowers the court to declare that all laws in force before the constitution is void if they conflict with the fundamental rights embodied

¹⁶ Women's right to Land Housing and property in post conflict situation and during reconstruction – A Global Overview page 52 (38 – 53)

in the Constitution. Indian Court is empowered to perform judicial review of legislation.

In case of *Madhukishwar & Others Vs State of Bihar & Others* 1996 5SCC 125, the local statute Chotanagapurtenacy Act 1908 was challenged on the basis of discriminatory provisions regarding succession right to property favouring males and violation of fundamental rights recognized by the constitution of India. The court also held that the state had an obligation to give effect to provisions of CEDAW which prohibits discrimination of women, recognizes the principle of equality of right and requires respect for human dignity. Article 15 of the constitution of India prohibits discrimination on the grounds sex among other grounds, while Article 14 protects the right to equality before the law. Constitution of Sri Lanka does not recognize property right as a fundamental right, even though Article 12(2) of the constitution protects non - discrimination. Therefore, the judiciary has a role to play in ensuring property rights of women.

IV. CONCLUSION

Women have improved their role in society, but still the laws discriminate women with regard to property rights of women and marginalizing their role persist. Also women have been disadvantaged by centuries of customs, tradition and social practices and to ratify these discriminatory practices will take more than changing women's legal rights. Law is limited in its ability to effect social changes. Awareness should arise among law makers to protect women's legal rights, amend the present laws and prevent future laws which discriminate women's property.

Laws and policies cannot alone eliminate discrimination against women; additionally the initial step awareness among women is necessary and urgent. Lack of awareness

among women about their property rights and how they can be effectuated is a major problem. Any planned intervention must include significant efforts to solicit information from women about the right that they want for themselves, their daughters, their children and their future with regard to safety, protection and survival. The Aga Khan Foundation in Bangladesh works directly with locally elected female officials to improve their knowledge of factors which prevent women from realizing their property rights. Ensuring that women have equitable right to land acknowledge their worth, helps to break down perception relating to inequalities within households and communities and reduces their dependency on men for survival.

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