



GENDER INEQUALITY, LAND RIGHTS AND SOCIO-ECONOMIC TRANSFORMATION:

HISTORICAL STUDIES AND THEORETICAL ANALYSIS OF WOMEN'S RIGHT TO LAND UNDER THE LAW OF THESAWALAMAI.

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Abstract

Land is considered as a means not only to generate an income, but also to empower women and minimize their dependency. However, there is a disparity in ownership of property due to the pluralistic nature of a legal system that prioritizes discriminatory customary and religious laws. In this context, this paper focuses on the *Thesawalamai* law, one of the customary laws of Sri Lanka that deprives and discriminates the married women of their right to land. The disinclination to repeal the discriminatory provisions was sustained on the ground that the repeal or revision of such provisions would be very sensitive as they were derived from the inherent customary practice of the Tamils in North and are constitutionally guaranteed. Based on a mixed method analysis, this paper revisits the history and claim that the marital power of husbands which is being instrumental in discriminating the married women, was not an inherent customary practice of the early settlers, rather brought by the subsequent patriarchal peasants and legitimized by colonial legislations and judicial pronouncements. It further analyses the impact of the discriminatory provisions on the transformation of women's roles, particularly in the post-armed conflict context through a survey, before suggesting the possible means to engendering the *Thesawalamai*.

Key words: gender inequality; right to land; *Thesawalamai*; socio-economic transformation; post-armed conflict

Introduction

Since land is considered not only a source for generating an income, but also a tool to establish power, security, status and recognition (Wijeyesekera, 2017), the right to land must equally be guaranteed to everyone. However, women are often being prevented from accessing, controlling and enjoying land rights due to inadequate legal standards and ineffective implementation of land rights; socially recognized stereotyped roles and patriarchal ideologies; and the omnipotence given for the discriminatory customary and religious laws. The gender disparity in relation to land is linked on the assumption that men as heads of households control and manage land, since women are incapable of managing land effectively; or otherwise proving that land given to women would be lost to another family upon marriage, divorce or death; or that they are always dependent on their male members who will provide financial security or *vice versa* (UN Women, 2013). It is more crucial for South Asian women who have either individually or collectively contributed to the economic production for the nation at large, through agriculture. Although there is a shift in approach for the advancement of women's rights from economic development and population policies to empowerment and autonomy (Goonesekera, 1999), many countries around the world retain gender discriminatory land legislations and customary practices. Wijeyesekera (2017) differentiates the denial of women's land rights in two aspects: the laws that deny women the right to own land; and those that deny women the right to command over their own land.

In this context, this paper focuses on the *Thesawalamai* law, one of the customary laws of Sri Lanka, which deprives married women the right to command over their land. This is primarily due to the incorporation of the patriarchal ideology of marital power that the husband gained by virtue of a marriage. As Wijeyesekera (2017) relates, the gender discrimination in relation to land rights of *Thesawalamai* governed married women can be seen both vertically and horizontally: the former refers to the discrimination between men and women, and the latter refers to discrimination against women based on their marital status or social origin.¹ The discriminatory customary laws are legalized by the Constitution which declares that in spite of the constitutional guarantee on the right to equality and equal protection before the law² and non-discrimination,³ any written or unwritten law that contradicts the fundamental rights provisions would have been considered as

1 Since discrimination is based on marital status, the provisions of the *Thesawalamai* law do not affect the women who are unmarried, divorced, or widowed. On the other hand, marital power is retained only by the *Thesawalamai* law, and the married women governed by General law, Kandyan law, or Muslim law are not subject to any such restrictions as *Thesawalamai* governed married women are.

2 The Constitution, Sri Lanka, 1978, Art.12

3 Ibid, Art.12(2)

being a valid law.⁴ It is further fortified by the constitutional arrangements that provide that the Chapter on fundamental rights that has no retrospective effect and there is no provision for judicial review of past legislations, any discriminatory law that existed at the time of adoption of Constitution cannot be challenged on the ground that it is contradicted with the fundamental rights as embodied in the Constitution of 1978.

Hence, following a brief introduction to the law of *Thesawalamai* and to the concept of marital power, this paper historically studies the incorporation of marital power into *Thesawalamai* and theoretically analyzes its implications through a transformative lens before suggesting possible reforms for engendering land rights under the *Thesawalamai* law.

The law of *Thesawalamai*: is it a codification of local customs?

The term “*Thesawalamai*” in Tamil means the custom of the region i.e. the Northern Province of Sri Lanka. It governs the inhabitants⁵ of the Northern Province. The origin of the *Thesawalamai* can be traced back to the customs and practices of two waves of immigrants from India who colonized Jaffna (L.J.M.Coaray, 2009). The first wave came from Malabar district in which the family structure was based on matriarchy. The second immigration was with the advent of *Arya Chakravarthy* from the Coromandel Coast and the family structure of the people was based on patriarchy. Thus, Jaffna which witnessed two major waves of immigration accommodated a fusion of both matriarchal and patriarchal systems of society (Nagendra, 2008).

When Ceylon was colonized by early foreign rulers, the customary practices of *Thesawalamai* were applied without any attempt at codification. The codification of such customary practices took place during Dutch colonization by Lieutenant Class Isaacs who collected and codified the *Thesawalamai* in a document known as the *Thesawalamai Code* of 1707 (L.J.M.Coaray, 2009). Hence, the *Thesawalamai* codified by the Dutch, was not the original *Thesawalamai*,⁶ rather, a codification

4 Ibid, Art. 16(1) declares that all existing laws whether written or unwritten are valid and operative notwithstanding any inconsistency with the provisions in the fundamental rights chapter.

5 The *Thesawalamai* was originally intended by the Dutch to govern the ‘Malabar Inhabitants’ in the districts of Jaffna, Mannar, Mullaitivu, Kilinochchi and Trincomalee. Later Trincomalee was excluded from the purview of *Thesawalamai* due to the application of Mukkuwa Law. Presently, *Thesawalamai* governs the inhabitants of the Northern Province. See (H.W.Thambiah, 2004).

6 When the *Thesawalamai Code* was translated into Tamil by John Pirus, Class Isaacs forwarded the translated copies to twelve Mudaliars who had confirmed the contents of the codification without any revision as they were pressed to look upon the matter on payment of the fee by the masters for up keeping the misbehaved slaves. See H.W THAMBIAH, (ed.2004).

of the traditional customs as were observed during a specific period and recorded with an ‘outsider’s’ perspective (H.W.Thambiah, 2004; L.J.M.Cooray, 2009; Nagendra, 2008; Guruparan, 2016).

The *Thesawalamai* Code was officially recognized only in 1806 by the British, the subsequent colonizers to the Dutch. Since the Regulation No.18 of 1806 was a mere reproduction of the *Thesawalamai* Code, then Chief Justice of Ceylon Sir Alexander Johnston was dissatisfied and he commissioned for a fresh translation. As a result, in 1911, Jaffna Matrimonial Rights and Inheritance Ordinance (JMARIO) was legislated to repeal many provisions of the Regulation of 1806 as they were inconsistent to the colonial rules and policies. The JMARIO 1911 was subsequently amended by Ordinance No 58 of 1947. At present, the application of the law of *Thesawalamai* is limited to matrimonial and inheritance rights and preemption. Hence, this paper is limited to matrimonial and inheritance rights in relation to land in which though both husband and wife are equally entitled to a share in property acquired during the marriage, by virtue of marital power, the married woman is deprived of her right to deal with and dispose of, her immovable properties including her share in the acquired property and has no *locus standi in judicio*⁷ unless accompanied by her husband.

The marital power: a means to recognize socio-economic status

Marital Power is an authority that is given to a spouse through marriage to control the family’s affairs. “Traditionally, the husbands have exercised greater control in marriage, and this power has been linked to the income and status that a man has provided as the breadwinner” (Tichenor, 1999). Since money is considered as the key source of power, the person who has more earnings than the other is given the power to control within the family. Until the advent of agrarian societies, the status of women was known to be relatively high since both males and females engaged equally in the process of economic production (Samarasinghe, 1990).

However, the patriarchal ideologies in the subsequent peasant society valued more the role of males who had natural muscle power to plough the fields. The gaining of power by the males to control the land and other economic resources was not only attributed to the biological factor, but also strengthened by cultural ideologies, religious beliefs and most importantly, the shift from communal to private property (Samarasinghe, 1990). Moreover, since women were excluded from the agricultural activities and their status was transformed to depend on male members, men gained power over their family members, land and property.

The agrarian society placed the land as a core factor of the marriage. On marriages, although, the land is given as dowry by the wife’s family or the wife herself to assist the husband in bearing the expenses of the conjugal household

7 It means status of standing before a court of law

(Nagendra, 2008), the effective control of the land remained in the hands of a husband. Thus, the patriarchal control of the husband within the family has not only affected the women's participation in the economic production but also their right in the decision-making process in both private and public spheres.

Historical underpinnings and theoretical analysis of the gendered land rights in *Thesawalamai* law.

It is agreed among the scholars that the origin of the *Thesawalamai* can be traced back to Malabar laws and customs as the Malabar were the first immigrants who settled earlier in Jaffna (L.J.M.Cooray, 2009; Tambiah, 2004; Nagendra, 2008). The matriarchal family pattern that existed among the Malabar community was rooted among the Jaffna people and constitutes the main basis of the *Thesawalamai*. Hence, the following section analyses when and how the customary practices of early settlers became gendered and incorporated into *Thesawalamai* law and why they were sustained over a period of time.

The maternal power to control the joint family property of early settlers.

The family unit among Malabar was called *tarawad* or 'joint family' in which the lineage is traced either through mother to daughter⁸ or through maternal uncle to his nephew and nieces⁹ or a mixture of both. The collective economic, social identity and solidarity of the family was revolved on an eldest matriarchal uncle called *Karanavan* (Susan Thomas, 2001). He had absolute and unquestionable power to possess and manage the *tarwad* property and receive an income¹⁰ as long as he acted on *bona fide* (Vasantha Kumari C., 2003). His power was derived not by marriage rather by birth and matrilocal residence. Yet, compared to Romans '*paterfamilias*'¹¹ his power in alienating the *tarwad* land was limited as he was required to obtain the consent of the *Anandaravan* or other members in the *tarwad*.¹²

Although the power of administration of family members and management

8 The matriarchal communities in South and South-East Asia such as certain states in India, the inheritance lineage is traced through mother and the land is passed from mother to daughter. See (Agarwal B., 1994).

9 This type of inheritance practice is known as "*marumakkathayam*" that is peculiar to Malabar. See (Vasantha Kumari C., 2003).

10 Report of The Malabar Marriage Commission (1891) p.27

11 The Roman law recognized only the paternal power (*patria potestas*)-the power of the oldest male ascendant, commonly the father or grandfather who is known as *paterfamilias* and had the power to control all the members of his family. In a marriage contracted under *manus*, one of the two forms of marriage recognized under Roman law, a wife who became subject to her husband's control and became a member of his family with the legal status of a daughter, was known as *materfamilias*. See (Joseph F. English 1961); (R.W. Lee 1956, 4th Ed.).

12 The term *Anandaravan* meant sister's son or nephew who is the heir of *Karanavan* and succeed to head the *tarwad* upon the demise of his uncle. See supra note

of *tarwad* land was vested in the hands of the *Karanavan*, it does not preclude a woman from holding his post in the name of *Karnawathi* in the absence of any male member.¹³ Although the system of Malabar *tarward* closely corresponded to Romans *gens*, the inheritance system of the former traced its descent from common ancestress while the latter traced from common ancestor (William Logan, 1887). The Malabar women had, to a certain extent, independence and security which were rarely available to the women at that time. Even after marriage, a married woman could visit her ancestral home and was equally entitled to receive a share of the harvest as their brothers and unmarried sisters received. The women were given more security during their widowhood or upon divorce as they could permanently reside in their maternal *tarwad* in which they had a strong claim; they could take over the management of the household if they were older; and were free to remarry if they were younger (Agarwal. B., 1994). From 19th century onwards, (a) the increase in number of members of *tarwad*, (b) willingness to form nuclear family due to the change of life patterns, (c) change of residence by men, and (d) difficulties of holding joint possessions lead to the creation of a number of *tavazhis*- branches of *tarwad* (H.W. Thambiah, 2004; Nagendra, 2008; Agarwal, 1994).

Since the agricultural and economic conditions of Jaffna are very less favourable, the early settlers of Malabar found it difficult to form a community or group of families. Instead, they split into individual families not exceeding two or three generations (V. Coomarasamy 1933, H.W. Thambiah, 2004). Coomarasamy (1933) is not certain on the point whether the *taward* and *Karanavan* systems of tenure were ever introduced or used in Jaffna though he is strong in saying that the customary practices of holding the property in community¹⁴ and tying down of the property to the females¹⁵ and not to the males were prevailed among the early settlers of Jaffna. Yet, Tambiah (2004), and Nagendra (2008) agreed with Coomarasamy (1933) on the point that the origin of a dowry system in Thesawalamai was derived from the customary tenure of *tavazhi illam* as recognized by *Marumakkathayam* law which the early settlers of Malabar had brought with them to Jaffna. Accordingly, upon marriage, a daughter of the early settlers, who was provided with a separate house or a distinct share in the parental house or any landed property or movables, started to branch off of her parents' *tarwad* into a *tavazhi illam* with her husband as *its karanavan* (*emphasis added*) (V. Coomarasamy, 1933). Nagendra (2004) claims that the most senior female being matriarch as in Malabar *tarwad* system never existed in Jaffna as she noted that the geographical and physical conditions of Jaffna suitable for agriculture, paved a way for a husband or father to assume an exalted position over the *tavazhi illam*. Yet, this research underscores that since most of the settlers from Malabar

13 Section 3 (c) of the Marumakkathayam Act of 1932

14 *Thesawalamai Code*, 1806, Part I;3

15 *Ibid*, Part I, para 5

were employed either as warriors or traders, the senior women would have been given opportunities to manage the *tavazhi illam* when their husbands were engaging with their professions as they did in Malabar.

The exalted position of husband as recognized among subsequent settlers.

With the arrival of the second group of colonizers from the East Coast, called by the Dutch as Coromandel Coast, who were Hindus by religion and agrarians by profession, the patriarchal system of society was firmly rooted among the Tamils in Jaffna. In a patriarchal family, the father or eldest male as the head of the family, holds significant powers and rights compared to women. In a patrilineal form of inheritance, land is inherited from father to son and in the absence of a son, his brother, nephew, or any other male relative traceable by blood often inherits his property. Daughters do not inherit from their father even if they are in the same lineage, to avoid the ancestral properties to be inherited by outsiders.¹⁶ By the subsequent settlers, a happy compromise was gradually effected for the existence of both matriarchal and patriarchal family systems and the combination of Hindu law and the *Marumakkathayam* law. It was further evident from the letters written by Sir Alexander Johnston C.J. to Gov. Brownrigg in 1814 that the principles of Hindu law as provided by Dharma-Shastra resorted to resolve matters to which the *Thesawalamai* did not provide answers (T.Nadarajah, 1972).

However, the joint family system that existed prior to their colonization was not totally affected¹⁷ (V.Coomarasamy, 1933; H.W. Thambiah 2004; K.Nagendra 2008), rather the rigors of the custom and usage of early settlers of Malabar in matters of inheritance that were tying down of property to females, were modified to include males as a medium in inheriting the property of a male. Thus, a fusion of both matrilineal rule of female succeeded female, daughter succeeded mother,¹⁸ and dowried sister succeeded another dowried sister who died issueless to the exclusion of her brother¹⁹ and patrilineal rule of males succeeded males, sons succeeded fathers,²⁰ and brother succeeded issueless brother to the exclusion of his sisters,²¹ was developed²² in respect of two kinds of property: *cheedanam* and *modusom* respectively, of which the former derived from *Marumakkathayam* law

16 The patriarchal cultural norm rationale out that upon the marriage, the women are taken to their husbands' family and if they are entitled to inherit the paternal properties, that would be controlled and owned by husband's family

17 Supra Note 14, Part I;3

18 Ibid, Part I, para 5

19 Ibid, Para.6

20 Ibid, Part I:1

21 Ibid, para 7

22 Ibid, Part I, para 1

and the later from Hindu law. As Nagendra (2008) emphasized, two of the main reasons for the failure of patriarchy to prevail over the matriarchal system in Jaffna were the inability of the Brahmanism to succeed over *Vellalas* who remained key caste and the subjection of Saivasim and not Brahminical Hinduism.

Yet, the socio-economic condition of Jaffna, that was auspicious to patriarchal peasants, fostered male supremacy in the family which was common even in the Marumakkathayam of Malabar. However, what the significant change brought by the Brahmanic Hindus was conferring of the supremacy in the hands of husbands who thereby had unrestricted powers by virtue of a marriage. Nagendra (2008) compares his position with *Karanavan* in respect of his *tarwad* members and property. It would be correct to say that his power to dower his daughter, upon her marriage, the dowry property of his wife who if predeceases him²³ is traceable from the power of the *Karanavan* over the *tarwad* property. However, unlike matriarchal *Karanavan*, the patriarchal husband was free to dispose of his family property without the consent of his family members to the extent of one tenth of its share and he as a manager of the entire family property,²⁴ had the power to consent for the transaction of any immovable property by his wife.²⁵ Thus, his power was more identical to Roman *paterfamilias* as both Hindu settlers and Dutch codifiers were greatly influenced by patriarchy and male chauvinism and there were hardly any remarkable differences of opinion as to whether the Dutch codified the customs that prevailed at that time or whether it was their own experiences in their homeland (K. Nagendra, 2008).

It was a matriarchal custom of providing *tavazhi illam*, or considerable share in it or other landed property as *cheedanam* to daughters with the objective of providing for the new household. Although it was favourable to women and discriminatory to males as the sons were restricted to claim anything from their parents until all daughters were dowered,²⁶ and they were required to bring into the common estate of their parents all that they had gained or earned during the bachelorship, and they were unable to claim anything until their parents died, even if they had married and left the paternal roof.²⁷ However, the patriarchal peasants from Coromandel Coast adjusted the concept of *cheedanam* in their favour by depriving (K. Nagendra, 2008)²⁸ the right of dowered daughters to their paternal inheritance in contravention to the principles of matriarchy. There was no discrimination against the dowered daughters of early settlers as their system of inheritance traced the lineage from common ancestress that was originated due to

23 Ibid, Part I:5

24 Ibid, Part IV;1

25 Ibid, it provides that the wife being subject to the will of her husband, may not give anything away without the consent of her husband

26 Ibid, Part I: 9, 11

27 Ibid, Part I: 7

28 Ibid, Part I: 3

the military occupation of the Nairs that led to recognize a polyandrous union and not marital union as their customary practice (K. Nagendra, 2008).

The incorporation of “marital power” by Dutch colonizers.

As the second settlers were patriarchal peasants, the power to control and manage the land was shifted to husbands because of the natural muscle power that they had to exploit the land and to generate the income for their households. Thus, the concept of the head of the household was emerged with the advent of agriculture by which women participation in economic production was restricted and their status was converted into a dependent one. Since the Dutch colonizers were also patriarchal peasants, the discriminatory practices of early settlers were further fortified by Dutch whose influence became greater after the codification of the *Thesawalamai* by them.

The fatal gender discriminatory approach that was perpetuated by the Dutch colonial legislature in respect of personal status and property of *Thesawalamai* governing married women, was the introduction of the doctrine of marital power (*potestas maritalis*) of the husband over the wife which derives not from Roman Law²⁹ (Domingo, 2017; Joseph F. English, 1961) rather from Roman-Dutch Law as an effect of marriage on the personal status and capacity of the wife on the one side and to the other, the matrimonial property of the spouses (R.W.Lee, 1953). This is because of (a) the RDL considered the wife as a minor under the guardianship of her husband though she attained full age before marriage since her *persona* is merged with the husband to whom alone the law looks,³⁰ and (b) the institution of universal community of goods by the law of Holland. She has no independent *persona standi in judicio* and she is deemed to be a minor under the guardianship of her husband in the matters of contract (R.W.Lee, 1953). “During the marriage, the husband administers the joint property and property of wife which has been kept out of community. The wife on the other hand, may not alienate or encumber her property without her husband’s consent unless in due course of trade or for household expenses and be the administrator of the properties including dowry” (R.W.Lee, 1953).

Since the exalted position of husband as founded by Brahmanic patriarchy and

29 The Roman law recognized only the paternal power (*patria potestas*)-the power of the oldest male ascendant, commonly the father or grandfather who is known as *paterfamilias* and had the power to control all the members of his family. In a marriage contracted under *manus*, one of the two forms of marriage recognized under Roman Law, a wife who became subject to her husband’s control and became a member of his family with the legal status of a daughter, was known as *materfamilias*. See (R.W.Lee, 1956; Joseph F. English, 1961; Rafael Domingo 2017)

30 Macdonell C.J. In *Sangarappillai v. Devaraja Mudaliyar* (1936) 38 NLR, 1 at p.7

the property of Hindu joint family were generally in community, the codifiers, based the resemblance of the practices of Jaffna to the RDL marital power and community of property, simply incorporated the fatal gender discriminatory provision into Thesawalamai. Thus, it became easy for them to reproduce the words of Van Leuwan who laid down that “the wife being subject to the will of her husband, may not give anything away without consent of her husband”³¹ in the Thesawalamai Code Part IV:1. Scharenguivel (2015), views that the application of the Roman Dutch Law concept of marital power by the courts were not in contravention to the practices of Jaffna since it was similar to the practice among early migrant settlers from Malabar coast where *Karnavan* of *tawazhi illam* managed family property as head of the family. Yet, this study emphasizes that the power exercised by the *Karnavan* was limited as he was required to get the consent of other members for the property disposal and he exercised his power common to all the members of the *taward*. Thus, it was the patriarchal influence of the subsequent settlers which was fortified by the Dutch colonizers who directed the power to be exercised by husbands.

The substitution of marital power by English law “Coverture”.

The subsequent colonization by the British perpetuated the women’s subordination and discrimination in relation to their personal status and property rights as their English legal system too developed an institution that is identical to RDL marital power. Married women under the common laws of England which were developed with the legal system of the Romans, and the Normans with the Canon law of the Catholic Church and the Anglo-Saxon traditions, were generally considered to be under the protection and cover of their husbands (Basch, 1979; Zaher, 2002). The coverture constructs the wife as civilly dead (Zaher, 2002) since her legal existence is suspended during the marriage by which the husband and wife are considered as one person in law as she is under the protection and cover of her husband. Thus, her status during the subsistence of the marriage is called *coverture* or *femme covert*. Hence, it was not difficult for the British colonizers to introduce their principle of *coverture* or *femme covert* in Ceylon as the married women had already been deprived of their status by the principle of marital power as introduced by the Dutch colonizers.

The vital reasons for the perpetuation of discriminatory land laws against women by the British were in high demand for land that became a marketable entity, as the colonial economic policy that boosted the plantation and paddy sector, and multiple avenues that were created for economic mobility, only for males. The discrimination was further fortified with the introduction of monogamous marriages, registration of marriages, independent and individualized land ownership due to the complexity in the inheritance rules under the customary

³¹ The Supreme Court in Case No. 3852 decided on 14th May 1858, referred appendix to Van Leuven. See (H.F. Mutukishna, 1862; Nagendra, 2008)

laws (Risseeuw 1991). Thus, the changes that effected to customary inheritance rules to enhance the colonial capitalism, have severely altered the status of women concerning land.

Although the British translated the *Thesawalamai* Code of Dutch into English and officially recognized³² the same as a part of the Ceylonese law in 1806,³³ the customary practices were not legitimized until 1911 in which the British adjusted the customary practices in conformity to their laws and institutions.³⁴ In 1910, Jaffna Matrimonial Rights and Inheritance Bill (JMARIO) was brought before the Legislative Council to amend the *Thesawalamai* since it was felt that the Dutch version of the *Thesawalamai* Code was said to differ materially from the original Tamil one which had never been authoritatively translated, and certainly the rules in the English translation of the Dutch version was found to be harsh, defective and obsolete.³⁵ An absolute departure from the customary practices of Tamils in the North and legitimization of discriminatory provisions can be seen in respect of: (a) management and control of property and (b) *locus standi in judicio*.

Although, the JMARIO enhanced the status of the dowered daughters to inherit their parental property³⁶ and of the surviving spouse to continue the possession of the property of the deceased regardless of subsequent marriage,³⁷ the discrimination against *Thesawalamai* governed married women was further fortified by section 6 that deprive their right to dispose of or deal with their separate immovable property that they acquired prior to, at the time or during the marriage, unless, accompanied by the written consent of their husbands. It is interesting to note that the Code³⁸ restricted the property disposal by way of *donation* (emphasis

32 See Proclamation of 23rd September 1799 (Adoption of Roman Dutch Law) by which British proclaimed to respect the local laws in areas that came under their jurisdiction

33 Regulation No. 18 of 1806

34 It was proclaimed in 1799 that the British institutions could make 'useful alterations as may render a departure therefrom, either absolutely necessary and unavoidable, or evidently beneficial and desirable' to the local laws in conformity to the colonial policies for the purpose of its applicability

35 Debates in the Legislative Council of Ceylon, 14th December 1910, Hansards, Ceylon Session 1909-1911, p.376

36 Under the Code, dowered daughter was forfeited to inherit future claim unless there be no children. The Bill allowed her to inherit future claims subject to the obligation of collating all the properties that she had already been given, into the hotchpot. See JMARIO s.33

37 The surviving spouse, under the Code, was only entitled to receive the interest from the property of the deceased with the duty to look after the children.

38 Supra Note.14, Part IV:1

added) (a) by the wife, who being subject to the will of her husband, may not give anything away without the consent of her husband, and (b) by the husband who can dispose only one tenth of his hereditary property without the consent of his wife and children. The restriction was accepted as justifiable in accordance with the principle of community of goods-“the proceeds of sales or mortgages are presumed to be expended in the interests of the community, whereas a donation means a permanent reduction in its assets without any corresponding compensation.”³⁹ Yet, the JMARIO necessitates⁴⁰ the wife to obtain the *written consent* (emphasis added) of her husband in disposing of and dealing with the separate property by any lawful act *inter vivos* and the provision was interpreted by the courts⁴¹ to extend the restriction to all kinds of dealings whether sale, mortgage or donation while it removed the previous restriction⁴² imposed on the husband regarding the disposal of his hereditary property so as to give him full power of disposing and dealing with his separate property.⁴³ However, compared to other customary laws, *Thesawalamai* law recognized⁴⁴ the wife’s equal entitlement to the common property *i.e. thediathettam* irrespective of its acquisition by her husband, it places the wife in a far worse position, as she does not have the right to give her consent that she has in respect of her separate property, to sell her share in *thediathettam* (Nagendra, 2008). This is due to the interpretation of the courts that recognized that the husband can, freely sell, donate and mortgage the entirety of the *thediathettam* as a manager of the common property, which is an essential feature of the RDL community of goods as restricted by JMARIO to *thediathettam* only.⁴⁵ Yet, the wife cannot dispose of her half share without her husband’s consent even if acquisition is made by herself. Although it is acknowledged⁴⁶ that the disability of *Thesawalamai* governed married woman⁴⁷ was the same as under the general law⁴⁸ prevailing in the Island, neither the colonial legislature nor the

39 Betram C.J. In *Seelachy v. Visuvanathan Chetty*, (1922) 23 NLR, 109

40 JMARIO, section 6

41 *Chellappa v. Kumarasamy* (1915) 18 NLR, 435; *Vijeyaratnam v. Rajadurai* (1966) 69 NLR, 145; *Sangarappillai v. Devaraja Mudaliyar* (1936) 38 NLR, 1

42 *Thesawalamai* governed husband could not dispose of his hereditary property without the consent of his family members. See *Supra* Note. 14, Part IV:1.

43 See JMARIO (1911), s.7

44 *Ibid*, s. 19

45 Betram C.J. In *Seelachy v. Visuvanathan Chetty* (1922) 23 NLR, 97, at p. 108; by Macdonell C.J., in *Sangarappillai v. Devaraja Mudaliyar* (1936) 38 NLR, 1, at p. 7 interpreted the husband’s position as a “sole or irremovable attorney of the wife”

46 De Sampayo J., In *Chellappa v. Kumarasamay* (1915) 18 NLR, 435 at p.487

47 *Supra* Note. 14, Part. IV:1

48 Matrimonial Rights and Inheritance Ordinance No.15 of 1876, section 9 required a married woman to get her husband’s written consent in dealing with and disposing of her

judges paid attention to bring the subsequent development that was effected to remove the disability of the general law which governed married women in 1921⁴⁹ into *Thesawalamai*.

By virtue of marital power, *Thesawalamai* governed married women are deprived of their right to *locus standi in judicio*, and that renders them not to sue or be sued.⁵⁰ It is the judiciary that “mistakenly introduced RDL disabilities with regard to a married woman’s contractual capacity and legal status in court proceedings into *Thesawalamai*.” (Goonesekere, 1990, p.163). Thus, sustaining the disability in favour of a *Thesawalamai* governed married woman, on the one hand, attributed the use of land as a strategy to maintain a power gap between spouses, (Wijeyesekera, 2017, p.71) and on the other, discriminated them vertically and horizontally *i.e.* between the husband and wife as the removal of previous restriction imposed on husband discriminates against her and leaves the wife with no right to her husband’s property,⁵¹ and between the married women governed by general law and *Thesawalamai*.

Meanwhile, the JMARIO provides an alternative⁵² to the husband’s written consent, it has not benefitted the married women in reality in spite of the justification that it was intended to protect the wife by the court when she cannot have that of the husband (Scharenguivel, 2015). Moreover, the consent required under section 6 has to be ad hoc, and neither husband nor the District Court can grant the wife general permission to deal with her property.⁵³ Thus, the provision that provides the alternative, does not rectify the unequal power relation between the spouses, rather, retains her status as a minor during the subsistence of the marriage (Wijeyesekera, 2017). Yet, the legislative retention of marital power become irrational since “a woman governed by *Thesawalamai*, who attains a majority prior to marriage, once married is treated as a minor” (Scharenguivel, 2015, p.385).

property by any lawful act.

49 Married Women’s Property Ordinance No. 18 of 1921, section 5 recognized the married women to be capable of holding property and of contracting as a feme sole

50 See the judicial approach to differentiate the locus standi of the wife in institution and maintainability of an action. In *Piragasam v. Mariamma* (1952) 55 NLR, p.114 at p.115; *Candappa v. Sivanathan* CALA 206/92 – CA712/92 CAM 28.5.93 cited in (Scharenguivel 2015, 390); *Easwary v. Sivanathan and Others* 2003 3 SLR, p.211

51 *Sangarapillai v. Devaraja Mudaliar* 38 NLR 1, 4

52 JMARIO, s. 8 provides that in lieu of husband’s written consent, the District Court’s Order would be obtained by a married woman if the husband has deserted her or she is separated from him by mutual consent or is imprisoned under an order of a court for a period exceeding two years, or where he is a person of unsound mind or his place of abode is unknown, or his consent is unreasonably withheld, or interest of the wife or children of the marriage require that such consent should be dispensed with.

53 *Ponnupillai v. Kumaravetpillai* (1963) 65 NLR, p.241

Socio-economic transformation of gender roles in contemporary Sri Lanka.

Cecilia Rivera Vera and Patricia Tovar (2003) view that the term gender refers to the role of a female and a male within a given culture and that these roles and the expected behaviors of men and women are based on cultural practices practiced over time. As they construed, the gender roles are based on myths, assumptions, expectations and duties that vary from society to society because of the influence of class, ethnicity, cultural practices, caste and religious belief (Cecilia Rivera et.al., 2003) since the “work” assigned to men and women are generally constructed by society based on biological differences. As already pointed out, the work assigned to her traditional gender role is undervalued with the advent of agriculture, and her entry into economic production is limited or excluded by the nature of such work that is designed to accommodate males in an uninterrupted work schedule” (Samarasinghe, 1990). Consequently, “the dominance and control of the males are operationalized through many devices such as patrilineal descent, patrilocality, control of women’s sexuality, ownership and inheritance of property, denial of educational, political and religious participation” (Thiruchandran, 1997).

In this context, with reference to *Thesawalamai* governed married women, this paper analyses the transformation in two aspects: (a) transformation in economic structure that allowed women’s entry into economic production and (b) transformation in holding the headship of the household after the end of a 30 year armed conflict.

The industrial development and modernization process of the world transformed “the economic activity of a home based family-unit into an efficient, organized, surplus generating process” (Samarasinghe, 1990). The demand for a labour force led a large number of women to join formal work. However, the economic expansion and subsequent social, welfare schemes brought after the industrial revolution were, though expected by the West to replace the traditional values and forms of social hierarchy, did not transform the role of women in third world countries in which the priority is given to agriculture to generate an income (Samarasinghe, 1990). This is primarily due to the patriarchal based agrarian societies in the third world developing countries that retain and legitimize discriminatory customary laws to bestow ownership, control and management of all the economic resources *inter alia*, land in the hands of men. Samarasinghe (1990) claims, the transformation of women’s role in the economic production has only reduced but neither removed the traditional values and norms of patriarchy nor enhanced women’s equal access to economic resources inspite of the constitutional guarantee on the equal enjoyment of legal rights in third world countries. Yet, this research emphasises that the transformation does not improve the women’s unequal status as far as the provisions of *Thesawalamai* are concerned. *Thesawalamai* governed married women who are employed in superior positions and earn more compared to their husbands, are not able to dispose of their share

in the immovable property, that they acquired independently from their earnings, as they are subject to the marital power of their husbands whose written consent is required by section 6.

The other aspect of transformation of gender roles is related to the post-armed conflict context of the Northern Province of Sri Lanka where women are compelled to take the role that was traditionally assigned to the head of the family by men since the armed conflict often left more women alive than men. Thus, the increasing number in growth of women-headed families in the post-armed conflict context of the Northern Province requires a special emphasis on women's land rights, that were deprived to them in the pre-armed conflict phase, since land is considered as not only one of the main income generating resources for consumption, but as a means for obtaining, processing and preparing food for the family members who depend on the head i.e. the women.

Due to the disappearance of husbands, the *Thesawalamai* governed married women who head their families, cannot transfer, dower, or even for the survival of their family, mortgage their separate property or their share in the *thediathettam* since the law requires their husbands' written consent for the disposal of their property. During a survey conducted among ten women headed families who were purposively selected for this study, two of them agreed that they cannot dispose of their share in the acquired property as they are separated from their husbands and one is unable to dower her daughter with the *cheedanam* that was given on her marriage, since her husband is disappeared at the end of the armed conflict. Yet, neither of them were aware of the alternative provided under section 8 of the JMARIO. Upon the awareness given during the survey, the woman whose husband is disappeared, applied to the District Court of Mallakam⁵⁴ and obtained an order under section 8 to dower her *cheedanam* to her daughter who married almost ten years ago.

Due to the social transformation, the government legislated the Registration of Deaths (Temporary provisions) Act No.17 in 2005 and Act No.16 in 2016, of which the former provides a Certificate of Death and the latter with a Certificate of Absence. Yet, they do not benefit the families of the missing persons as women are unwilling to accept any certificates as they face significant cultural and religious consequences if their husbands are declared dead or absent according to law. However, since October 2019 there has been an increase in the number of women applying for the Certificate of Absence in order to get compensation of Rs. 6,000/- per month.⁵⁵ However, it is unfortunate to have the legislations that neither provide any temporary special measure nor special focus on the socio-economic condition of women-headed families, particularly their status in relation to disposal of their

54 Case No. MISC/289/2019

55 It was revealed by Assistant Registrar General of Northern Zone in an interview conducted by this researcher on 05th March 2020.

immovable property.

Conclusion

According to UN Women as cited by Goonesekera (2012), “women perform 66% of the world’s work, produce 50% of the food, earn 10% of the income and own 1% of the property.” The disparity in the ownership of property and deprivation of their right to access to land and other economic resources is resulted due to inadequate legal standards and ineffective implementation of land rights; socially recognized stereotyped roles and patriarchal ideologies; and the supremacy given for the discriminatory customary and religious laws.

As far as Sri Lanka is concerned, the customary laws that were enacted during the colonial era have failed to accommodate the socio, economic transformation in the society. Neither the post-colonial legislature nor the judiciary have played an active role in eliminating gender discrimination in customary laws in particular, they failed to recognize the status and capacity of married women as *feme solo* in contractual matters and judicial proceedings as recognized under the general law. Even the post-republic government disinclined to repeal the discriminatory provisions in *Thesawalamai* on the grounds that the repeal or revision of such provisions would be very sensitive as they were derived from the inherent customary practice of the Tamils in the North and are constitutionally guaranteed by the Republican Constitution of 1978.

Hence, this study emphasizes that the discriminatory provisions in *Thesawalamai* are not derived from inherent customary practices of early settlers in Jaffna rather they derived from patriarchal ideologies that were perpetuated by the subsequent colonizers and were codified and legitimized by the outsiders as the customary practices of Tamils in the North. Meanwhile, Sri Lanka is invited by the Committee on the Elimination of Discrimination Against Women⁵⁶ to abolish the discriminatory laws including *Thesawalamai* which deprive or restrict women’s right to inherit property.⁵⁷ Accordingly, this study proposes for the adoption of temporary special measures as legitimized by the Constitution⁵⁸ to sustain the *de facto* equality until a substantive change is effected to (a) alter the status of married women as *feme solo* under the JMRO and (b) repeal the Article 16 (1) and

56 It is established in accordance with the Optional Protocol to the Convention as adopted by the General Assembly in its 54th session on 15 October 1999, available https://www.ohchr.org/Documents/HRBodies/CEDAW/OP_CEDAW_en.pdf

57 General Recommendation No. 21 (1994), para.35. see further paras. 27, 31, and 35 on factors restrict women’s right to land; Committee on the Elimination of Discrimination against Women (2011), Concluding observations of the Committee on the Elimination of Discrimination against Women: Sri Lanka, CEDAW/C/LKA/CO/7, para.22, available: <https://undocs.org/CEDAW/C/LKA/CO/7>

58 *Supra* Note.2, Art. 12 (4)

empower the judiciary to declare the customary laws to be void to the extent of its inconsistency with the fundamental rights as guaranteed under the Constitution.

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