

Property Rights in Sri Lanka: A Means of Gender Discrimination?

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Background

Property has always been a privilege of a few and not a right of the humankind, and the lack of it makes men and women vulnerable.¹ Those who do not enjoy rights relating to property need the fundamental protection of the law in respect to security of ownership and user rights. Many domestic laws² and international and regional human rights documents³ recognize the rule to respect and guarantee the right to ownership, thus recognizing property as part and parcel of the autonomy and ethical integrity of a person.

However, the very concept of the rule of law, which has been introduced to counter arbitrariness of the powerful, can buttress arbitrariness via discriminatory laws. These laws change property into a 'means' to create a distinction among people and suppress the rights of some of them. Patriarchy has effectively used property as a means to disempower and discriminate women through law. Some property laws in Sri Lanka provide illustrations for the point.

Research Problem

Notwithstanding the recognition of gender equality in the national Constitution⁴ and international instruments⁵, an array of discriminatory laws find validity in the Sri Lanka legal system in the guise of legal pluralism and under the protection of Article 16 of the Constitution.

This paper critically analyses a selection of laws and some deeply entrenched social norms prevalent in the country that do not conform to the ideology of gender equality, with the objective of finding whether, in the socio-legal framework of Sri Lanka, 'property' denotes a 'natural right' vested in humankind which can become a 'personal right where the

¹ Cheneval F. 'Property rights as human rights', <http://swisshumanrightsbook.com/SHRB-01-files/255-01>

² For instance the constitutions of the US and South Africa recognize the right against arbitrary deprivation of property.

³ The UDHR Article 17, European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, s.1, African Charter on Human and Peoples' Rights, Art.14 are a few examples.

⁴ Sri Lanka Constitution guarantees equality before the law and equal protection of the law, and prohibits discrimination of citizens on the basis, *inter alia*, of sex (Article 12).

⁵ The UDHR, recognize the right to own property (Article 17) without discrimination on the basis *inter alia* of sex (Article 2). Non-discrimination in respect of property rights finds recognition in varied forms in other conventions, specifically CEDAW[Art.1,2,3,5,13,15,16 (h)], which has been ratified by Sri Lanka without any reservations.

property is held by one's own skill and/or work'⁶ or a means of gender discrimination as in the pre-historic society where property was vested in men who were naturally stronger.

The main research problem in this article is to critically analyze the underlying basis and rationale of gender discriminatory provisions in some contemporary property laws in Sri Lanka and to examine the legitimacy of retaining them in the context where on the one hand, the Constitution recognizes equality between sexes and on the other, the state, under several international instruments, is committed to eradicate discrimination on the basis, *inter alia*, of sex.

The study reviews the concept of primogeniture in inheritance in the Land Development Ordinance No.19 of 1935, which applies to all Sri Lankans with regard to state land; the Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 01 of 1911 with special emphasis on ss. 6 and 8, which makes it mandatory for a married woman governed by *Tesawalamei* to obtain her husband's consent, which could be replaced by the court's authorization in prescribed instances, to alienate her immovable property; ss. 11 and 12 of the Kandyan Law Ordinance No. 38 of 1939 which recognize discrimination against Kandyan widows and daughters married in *deega*; discrimination against females in respect of intestate succession in Muslim law, which limits women's entitlement only to a half of what a male is entitled to; and the influence of the concept of 'male head-of-household', which has gained recognition in some administrative procedures, in respect of property rights.

The study further explores the historical background of these laws and practices, with the objective of examining the varied influences that may have impacted the enactment of these discriminatory laws⁷, and also gains insights from other Sri Lanka laws where women have been accorded equality through law reform.⁸ The analysis is done in light of philosophical/jurisprudential theories on the one hand and international standards and obligations on the other.

Methodology

This is a qualitative research based on laws, International Conventions and personal interviews as primary sources, and published and unpublished work as secondary sources.

Hypothesis/Conclusions

- (1) As reflected in the selected laws and social norms in Sri Lanka, rights relating to property are subjected to restrictions based on gender;
- (2) property has been used in Sri Lanka as a demarcation of roles, rights, social and economic limits, relationships, etc. between men and women in a family,

⁶ For instance John Locke (Two Treatises of Government, 1690, bk. 2, ch.5) and Lon Fuller (The Morality of Law, 1969) recognize property as a basic human right. This view is reflected in the US Bill of Rights, which recognizes right to life, liberty and property as fundamental human rights.

⁷ For instance the impact of Christianity, which was introduced to the island concurrent to the introduction of some laws, and the positivist approach adopted by colonial rulers, the British in particular, and misrepresentations of local laws and customs by male local leaders to those involved in codifying the laws.

⁸ Inland Revenue Act No.28 of 1979, Maintenance Act No.37 of 1999, Citizenship (Amendment) Act No.16 of 2003

community or ethnic/religious clan, and also as a powerful and effective means of establishing and/or reinforcing inequality between men and women;

- (3) Legitimacy of rights ought to be based on morality and social reality rather than irrational sociological assumptions. Hence, laws which are contrary to these ideologies expressed in international instruments need timely reform.

Expected Outcome

Based on the premise that in Sri Lanka, property has been used to reinforce sex discrimination through law, the study emphasizes the necessity to recognize the right to substantial ownership of property with its essential quality of alienability. It proposes that unless the laws are re-written in the language of human rights, and interpreted with the aim of ensuring justice in its substantive meaning, property will continue to play the role of legitimising inequality between men and women of Sri Lanka thus reducing the equality clause of the constitution to a mere facade. It reiterates that while respect to cultural pluralism is integral to the country, it should not be at the expense of violating human dignity, self-worth and fundamental rights.