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The Impact of Colonialism on Women's Right to Land under the *Thesawalamai* Law

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Abstract

Although there has been considerable progress in the realization and recognition of the women's right to land and property at an international level, certain countries, including Sri Lanka, are far from achieving gender equality concerning land rights due to the retention of colonial legislation that deprives or restricts women's right to land. Legal pluralism in Sri Lanka permits the application of property regimes under the general law, Kandyan law, *Thesawalamai* law and Muslim Law. This article explores how colonialism influenced women's right to land under the *Thesawalamai* law, i.e. the customary law of Tamils in Northern Sri Lanka, that has a limited application to matrimonial rights and inheritance at present, and why the colonizers drastically altered their status concerning land to which the women had a certain level of independence before colonization. The central focus of this article is on *Thesawalamai* law since the fatal gender discrimination perpetuated by the colonizers against women concerning land had severe implications in the post-armed conflict context. The retention of the gendered provisions has been justified on the ground that such provisions resemble inherent customary practices of the Tamils. In this context, this article aims to examine whether the discriminatory provisions constitute an inherent customary practice of the Tamils and seeks to identify the means to deconstruct the inequality in *Thesawalamai* law.

Keywords: Women's right to land; Colonialism; *Thesawalamai* law; Gender discrimination

Introduction

Land is not only a significant source of survival but also a sign of power and dominance.¹ Power has been further embedded by socially constructed gender roles that have assigned the headship of the household to men, thereby limiting

¹ Shelly Grabe, Rose Grace Grose, and Anjali Dutt, 'Women's Land Ownership and Relationship Power: A Mixed Methods Approach to Understanding Structural Inequities and Violence Against Women,' (2015) 39(1) *Psychology of Women Quarterly*, 8.

the role of women within the household. As far as South Asia is concerned, a region in which the primary income is generated largely from agriculture, most women are either deprived or denied of their land rights due to patrilineal forms of inheritance practices. During colonialism, women became more marginalized by colonial laws, policies, and regulations on economy, marriage, succession, and land that discriminated against them, in addition to the discrimination perpetuated on the grounds of race, ethnicity, religion, class, caste, and colonial social distinctions.

This article draws special attention to Sri Lanka, then Ceylon, through analyzing the colonial intervention in restructuring, legitimizing and freezing the patriarchal practices under customary land laws. As Goonesekere points out, during the British period, the scope of customary laws was restricted by several factors including proof of local custom; enabling the courts to declare customary law repugnant through statutory provisions; a dual legal structure in respect of foreigners and natives; showcasing the inadequacies and gaps in customary laws after its compilation and codification; and resorting to Roman-Dutch law to fill the gaps in customary laws.² Legal pluralism in Sri Lanka permits the application of property regimes under General law, Kandyan law, *Thesawalamai* law and Muslim Law. Among the customary and statutory laws that were legislated during the colonial era, the central focus is paid to the *Thesawalamai* law³ of Northern⁴ Tamils since the fatal gender discrimination perpetuated by the colonizers against women's land rights have severe implications at present.

In responding to the questions of (a) how colonialism impacted women's right to land under the customary laws of Sri Lanka and (b) why the colonizers drastically altered the status of women concerning land to which they had a certain level of independence before colonization, this article focuses on *Thesawalamai* law and emphasizes that during the colonial era,⁵ the women in the third world including Sri Lanka, were oppressed and marginalized in accessing their land by the legislative provisions and judicial pronouncement. Adopting a

² Savitri Goonesekere, *The Sri Lanka Law on Parent and Child*, (M.D.Gunasena, 1987), 8.

³ The term '*thesa*' in English denotes nation and '*walama*' means customs. Thus, it is a customary practice of a nation *i.e.* Tamils in the North.

⁴ *Thesawalamai* law is applicable only within the districts of Jaffna, Kilinochchi, Vavuniya, Mannar, and Mullaitivu in the Northern Province of Sri Lanka.

⁵ The changes made to land tenure and inheritance rights during the colonial period can be referred to as being reflective of the importance of land, not only to economic activity but also to social and political power. See Viyanka Gunasekera, *Women and Land in Sri Lanka: A Literature Review* (International Centre for Ethnic Studies, 2021); Janaki Jayawardena, 'Cultural Construction of the 'Sinhala Woman' and Women's Lives in Post-Independence Sri Lanka', (PhD thesis, Centre for Women's Studies, 2002) p. 169; and Carla Risseuw, *The Fish Don't Talk About the Water: Gender Transformation, Power and resistance among women in Sri Lanka* (Manohar, 1991) 30, 54.

socio-legal approach to studying the implications of colonialism on land rights of women in Sri Lanka, this article analyses how *Thesawalamai* governed women are being discriminated against and disadvantaged by colonial legislation and how their status in relation to land could be transformed as equivalent to the status held by men concerning land, in the future.

Status of Women's Right to Land in Pre-colonial Ceylon

Although the ancient history of Sri Lanka includes several examples of upper-class women, it failed to reflect the position of ordinary women⁶ whose roles were limited to mothers, wives, and daughters within the home. Because of the patriarchal hierarchies within the family, they were in subordination to the male members of the family. Moreover, the cultural practices, religious beliefs and rites, class and caste structure served as a basis for developing patriarchal ideologies that legitimize and reinforce existing gender hierarchy in a society.⁷ Hence, the following analysis focuses on how culture, religion, and caste contributed to gender-discriminatory land rights under the customary laws of the pre-colonial era. Moreover, this study is limited to examining women's land rights concerning sale, use, ownership and inheritance under customary laws since they are often criticized for gender-based discrimination.

It is evident from historical studies⁸ that the origin of *Thesawalamai* can be traced back to the customs of the Malabar people, as the Malabar were the first immigrants who settled earlier in the Northern part of this Island. The scholars strongly affirm that the customary practices - of holding the property in community;⁹ tying down the property to females¹⁰ and not to the males; providing *cheedanam*¹¹ to daughters on their marriage¹² - were brought into *Thesawalamai* by the early settlers from Malabar. Although Coomarasamy¹³ is not

⁶ Kumari Jayawardena, *Feminism and Nationalism in the Third World*. (Zed Books, 1986), p. 109.

⁷ Kochurani Abraham, 'Religion and Patriarchy: Gendered Inscriptions on Religious Beliefs and Practices,' in Kochurani Abraham, *Persisting Patriarchy: Intersectionalities, Negotiations, Subversions* (Springer, 2019) p. 143-165.

⁸ L.J.M. Cooray, *An Introduction to the Legal System of Sri Lanka*, (Stamford Lake, 2009); H.W. Thambiah, *The Laws and Customs of the Tamils of Jaffna*, (Rev.edn) (Women's Education and Research Centre, 2004); Nagendra Kamla, *Matrimonial Property and Gender Inequality: A Study of Thesawalamai* (Stamford Lake, 2007)

⁹ *Thesawalamai Code* of 1806, Part I, para 3.

¹⁰ *Ibid*, Part I, para 5.

¹¹ The *Cheedanam* which was developed from matriarchal society, in its original form, obliges the parents to dower their daughters.

¹² *Thesawalamai Code*, Part I, para. 1.

¹³ V. Coomarasamy, 'Thesawalamai and its origin: Thesawalamai and Marumakkal Thayam Law: Two analogous law', in *The Hindu Organ*, (21 December, 1933).

certain whether the *taward*¹⁴ and *Karanavan*¹⁵ systems of tenure, which prevailed among the Malabar, were ever introduced or used in Jaffna, he refers to the customary tenure of *tavazhi illam* of Malabar when he traces the origin of a dowry system in *Thesavalamai*.¹⁶ Besides, Nagendra claims that the most senior female being matriarch as in Malabar *tarnad*, never existed in Jaffna as the geographical and physical conditions of Jaffna were suitable for agriculture, and paved the way for a husband or father to assume an exalted position over the *tavazhi illam*. However, concerning historical context, since most of the settlers from Malabar were employed either as traders or warriors to the Kings in Ceylon,¹⁷ 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 historical experience of women's land rights in pre-colonial Ceylon was further attributed to religious belief. Religious practices became the essence of defining the culture of society since they were considered the origin of the culture and the centre and semantic source of the cultural system.¹⁸ The ideology of Brahmanism which was considered an orthodox core of traditional Hinduism as developed by Aryan tribes in B.C.2000-1000, and has been embodied in the religious scriptures known as *Veda*, was founded as the basis for patriarchy. Thus, penetration of Brahmanic patriarchy into *Thesavalamai* was strongly encouraged by the subsequent peasants who migrated from the East Coast of India, referred to as the Coromandel Coast by the Dutch. Since they were patriarchal peasants, the father or husband was given an exalted position to head the family and to hold significant powers and rights compared to women. Moreover, a patrilineal form of inheritance was introduced to deprive the right of daughters to inherit from their fathers, though they are in the same lineage, to avoid the ancestral properties being inherited by outsiders.¹⁹ Consequently, a fusion of both

¹⁴ This refers to the 'joint family' system of Malabar in which the common property is devolved either through mother to daughter or through maternal uncle to his nephew and nieces, or a mixture of both. Yet, from the 19th century onwards, *tarnad* was split into a number of *tavazhis* due to several reasons, *inter alia* the increase in several members of *tarnad*, willingness to form nuclear family, change of residence by men, and the difficulties faced in holding joint possessions.

¹⁵ He is the eldest matriarchal uncle on whom the collective economic and social identity and solidarity of the family revolve.

¹⁶ Upon marriages, the daughters of the early settlers were provided with a separate house or a distinct share in the parental house or any landed property or movables. This enabled them to branch off from their parents' *tarnad* into a *tavazhi illam*, with their husbands serving *as its karanavan*." (emphasis added). See Coomarasamy, note 13 above.

¹⁷ Nagendra, note 8 above, p. 68-69.

¹⁸ Tayyebinia Mehri and Jabbar Rahmani, "The Relationship between Religion and Culture in Cultural Policy-Making," (2016) *International Journal of Humanities and Cultural Studies*, 595.

¹⁹ The patriarchal cultural norm suggests that upon marriage, the women are taken to their husbands' family and if they are permitted to inherit their paternal properties, that would be controlled and owned by their husband's family.

matrilineal rule of female succeeding female, daughter succeeding mother,²⁰ and dowered sister succeeding another dowered sister who died issueless to the exclusion of her brother²¹ and patrilineal rule of males succeeding males, sons succeeding fathers,²² and brother succeeding issueless brother to the exclusion of his sisters,²³ was developed²⁴ in respect of two kinds of property: *cheedanam* and *mudusom* respectively.

While analyzing the historical experience of women concerning their land rights, it is pertinent to consider the impact of caste on their rights. The caste system in Jaffna is a vital institution that was developed in various ways not only of race and religion but of economics, law, and customs of the people.²⁵ In the hierarchy of the early Jaffna caste system, the Brahmins were privileged at the top and followed by *Vellalas* who were the great farmers and powerful land-owning people. Hence, the lower castes of *Nallavars*,²⁶ *Pallars*,²⁷ and *Parayyas*,²⁸ were economically, socially, and culturally marginalized compared to other castes, and were treated as slaves by the higher castes. In particular, the *Pallars* were employed to cultivate lands owned by *Vellalas*. Thus, if a higher caste woman married a lower caste man, she was denied any landed property as a dowry by their parents and relatives and was not entitled to inherit their parents' intestate property as well, on the ground that otherwise such property would move from their caste to a lower caste. Similarly, by Kandyan custom, the marriage of a higher caste woman to a lower caste man was prohibited and considered a disgraceful marriage²⁹ and thereby the woman would forfeit her *paraveni* right of inheritance from her parents.

Status of Women's Right to Land during the Colonial Era

With the advent of imperialism, in 1505, the political, social, and economic structure of this country was radically changed by western colonizers. Lindsay claims³⁰ that colonialism not only transformed the socio, cultural, and economic

²⁰ *Thesavalamai Code*, Part I, para 5.

²¹ *Ibid*, para 6.

²² *Ibid*, Part I, para 1.

²³ *Ibid*, para 7.

²⁴ *Ibid*, Part I, para 1.

²⁵ Thambiah, note 8 above, p. 87.

²⁶ The climber or creeper.

²⁷ Those who cultivate the fields of their lords.

²⁸ The people who play '*parai*' i.e. drums at funerals and temple festivals.

²⁹ Sharya Scharenguivel and Lakshman Marasinghe, *Compilation of Selected Aspects of the Special Laws of Sri Lanka*, (Vijitha Yapa, 2015), p. 161; E. Modder and F. Modder, *The Principles of Kandyan Law*, (Kurunegala, 1914) p. 471.

³⁰ Beverly Lindsay, *Comparative Perspectives of Third World Women: The Impact of Race, Sex & Class*, (Praeger, 1983), p. 15.

structure of the country but radically altered the status of women and placed them in a more dependent position. The shifting of power in the hands of men in land-related activities, where their role is greatly valued, led to the conceptualisation of the “head of the household” to confer ownership, assign state lands, and register the land in favour of a male.³¹ Through a systematic *Tombos*³² register implemented by the colonizers, many patriarchal peasant women started to lose their traditional rights concerning land³³ since the land was registered in the name of the head of the household or male breadwinner.³⁴

As far as *Thesawalamai* law is concerned, it has a curious blend of principles governing a patriarchal as well as a matriarchal system of society that exists in the North.³⁵ The *Thesawalamai* law was not codified until the Dutch colonized Ceylon.³⁶ Yet, the Dutch codification of *Thesawalamai* was considered as not the original *Thesawalamai*, but rather, an altered or modified version of practices as observed during the period of Portuguese and Dutch.³⁷ While codifying *Thesawalamai*, the Dutch successfully stimulated the penetration of Roman-Dutch principles into *Thesawalamai* as they traced the similarities of the family structure, marriage settlement, and ancestor-based lineage which prevailed at the time of their arrival in Jaffna. They found that the exalted position of the husband in Jaffna was equivalent to the status of *paterfamilias*³⁸ in their system; marriage

³¹ Historical records on boundary divisions among the indigenous *Vedda* community show, for example, six women heads of households known as ‘*Vedda* Women Chiefs’ among other women, revealing thereby the willingness of the early *Vedda* community to not confine the power to head the household to men. But subsequently, during the monarchical period, the absolute ownership of land was vested on the King. Thus, upon services rendered to the King, the ordinary people received service tenures called *nindagam* that were undertaken solely by men and if the *nindagam* was granted by the King with a *sannasa*, it became a *paraveni*, inherited by males. See Scharenguivel, note 29 above, p. 53-54.

³² It is a system of land registration by the Dutch. During the monarchical period, it was known as *tombuwa*. According to historical records, the registration is divided into two parallel series: one was known as ‘hoofd’ (head) and the other as ‘land’, which were complementary to each other. It was only after the registration of the heads of the families that the appropriate persons were summoned for land registration.

³³ Carla Risseuw, *Gender Transformation, Power and Resistance among Women in Sri Lanka*, (Manohar, 1991), p. 30-31.

³⁴ K.D. Paranavitana, *Land for Money: Dutch Land Registration in Sri Lanka* (Royal Netherlands Embassy, 2001) p. 83.

³⁵ Thambiah, note 8 above, p. 12-13.

³⁶ L.J.M. Cooray, note 8 above, p. 141.

³⁷ The Code was not intensively reviewed by twelve *Mudaliars*, as requested by Claas Isaacs, as they had paid much attention to the matter of slaves. See Thambiah, note 8 above, p. 28-29; L.J.M. Cooray, note 8 above, p. 139; Nagendra, note 8 above, p. 114.

³⁸ 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.

settlements made by the parents of Jaffna in the name of *cheedanam*³⁹ were something similar to *dos*;⁴⁰ and the resemblances of inheritance over *mudusom* by male heirs.⁴¹ Thus it became easy for the Dutch 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 the consent of her husband”⁴² into the *Thesawalamai* Code Part IV:1.

Hence the Codifiers, while recognizing the matrilineal form of inheritance, introduced the principle of marital power (*potestas*) into the *Thesawalamai* Code that limits the right of a wife to dispose of her immovable property. Lee reiterates⁴³ that the marital power deprives the wife of personal status and capacity in (a) the matters of contract⁴⁴ including property transactions, and (b) judicial proceedings⁴⁵ as her husband is the *persona* to whom the law looks.⁴⁶ Scharenguivel views that the Roman Dutch Law (RDL) concept of marital power was not in contravention of the practices in Jaffna as she points out a similarity to the practice among the early settlers from the Malabar coast where *Karnavan* of *tamazhi illam* managed family property as head of the family. Yet the study claims that the power exercised by the *Karnavan* was common to all the members of the family and his power was limited to getting the consent of his nephews in disposing of family property. The exalted position of the husband, as fortified

³⁹ Since the Portuguese regime, the dowry was taken indifferently from parents' *mudusom* or *cheedanam* or *thediathettam*. Before this, the daughter was dowered by the *cheedanam* property of her mother. See *Murugesu v. Subramaniam* (1967) 69 NLR 532, at 535.

⁴⁰ *Dos* was a gift to the husband on the part of the wife as her contribution towards the expenses of the joint establishment either by her father or ancestor (*dos profecticia*) or by wife or anyone else (*dos adventicia*). See R.W. Lee, *The Elements of Roman Law with the Translation of the Institutes of Justinian* (Sweet and Maxwell, 1956). While the husband was the legal owner and administrator of the *dos*, it was considered the separate property of his wife. On her death, *dos profecticia* (received from her father or grandfather) reverted to her family and children. See Rafael Domingo, 'The Family in Ancient Roman Law', *Researchgate* (2017), available at: https://www.researchgate.net/publication/317999401_The_Family_in_Ancient_Roman_Law. (visited 25 Nov. 2024)

⁴¹ Nagendra, note 8 above, p. 114-115.

⁴² The Supreme Court referred to the work of Van Leuven in Case No. 3852, decided on 14th May 1858. See H.F. Mutukishna, *The Thesawaleme or The Laws and Customs of Jaffna with the Decisions of Various Courts, the Seventy-Two Orders & etc.* (Ceylon Time Office, 1862) 268, 269; Nagendra, note 8 above, p. 279.

⁴³ R.W. Lee, *An Introduction to Roman-Dutch Law*, (Clarendon Press, Oxford, 1946, 4th edn), p. 65.

⁴⁴ She cannot bind herself except by her husband's authority.

⁴⁵ She cannot institute or defend an action in her name whether as a plaintiff or defendant unless accompanied by her husband. See R.W. Lee, note 43 above, p. 65.

⁴⁶ Macdonell C.J., in *Sangarappillai v. Devaraja Mudaliyar*, (1936) 38 NLR, 1, 7.

with absolute power in property management, was introduced into *Thesawalamai* only by the Dutch colonizers.⁴⁷

Women's subordination and discrimination in relation to their land rights were further perpetuated by the subsequent colonizers from Britain. The common laws of England, which were influenced by patriarchy, generally considered the married women to be under the protection of their husbands.⁴⁸ The English law concept of coverture that constructs the wife as civilly dead⁴⁹ was something similar to the RDL concept of marital power. Hence, it was not difficult for the British colonizers to introduce their principle of *coverture* or *femme covert* to the *Thesawalamai* law.⁵⁰

It is pertinent to note the reasons behind the Victorians' perpetuation and legitimization of gender discriminatory legislation in relation to land, before analysing the changes made to *Thesawalamai* law during their tenure. Independent and individualized land ownership were the prerequisites of their Colonial economic policy⁵¹ and hence the traditional system of communal land ownership was swept away by them, since land was becoming a marketable entity for their economic mobility. Although the economic mobility of capitalism extinguished feudalism, caste monopoly remained a divisive force in the working class and peasant struggle.⁵² Until 1833, the colonial perceptions of the social structure

⁴⁷ Purathani Mathanaranjan, 'Engendering land rights: A special emphasis on the application of *Thesawalamai* law in the post-armed conflict Northern Province of Sri Lanka' (2020) *Sri Lankan Journal of South Asian Studies*, 72-90.

⁴⁸ N. Basch, 'Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America', *Feminist Studies*, pp. 346-366, 1979, available at: <http://www.jstor.org/stable/3177600?origin=JSTOR-pdf>. See also, Claudia Zaher, 'When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture,' (2002) *Law Library Journal* 459-486, available at: <http://people.virginia.edu/~jdk3r/ZaherWMS.pdf>.

⁴⁹ Zaher, *ibid*.

⁵⁰ N.R. Wijeyesekera, 'Equal Land Rights for Empowerment of Women: A South Asian Perspective with Special Emphasis on Sri Lanka,' (2017) *International Journal for Studies on Children, Women, Elderly and Disabled* 64-72.

⁵¹ Risseuw, note 33 above, p. 53.

⁵² Selvi Thiruchandran, *Ideology, Caste, Class and Gender: A Gender-Specific Analysis* (Vikas Publishing, 1997), p. 15.

were related to the concepts of nation⁵³-caste⁵⁴-religion.⁵⁵ To break out of the structure based on caste distinction, colonial capitalism introduced class relations associated with professionalism and occupations. The educational opportunities offered in the 18th century and the expansion of the plantation economy in the latter part of the 19th century led to the emergence of bourgeoisie women and working-class women, both of whom demanded equal status with men and economic and political rights respectively.⁵⁶ The women workers/peasants on the tea and rubber plantations and arable land became the most exploited and oppressed group, as they worked as the lowest-wage workers. Thus, the group of professional middle-class women who were involved in the nationalist and liberal movements to promote awareness of social issues regarding women's emancipation⁵⁷, started to join the working-class women in their campaigns for *inter alia* abolition of the dowry system, which induced many women to commit suicide since it became more commercialized along with colonial capitalism.⁵⁸

Meanwhile, the culture and marriage arrangements of natives were adjusted by the colonial economic policy, since the primacy was given to land, and the avenues for economic mobility created by the British were exclusively opened for males. Accordingly, *binna* marriage became less attractive than ever before and men moved towards monogamous and *diga* marriage⁵⁹ to claim the land through clear titles. Similarly, the concept of *cheedanam* in Jaffna is compromised of the patriarchal ideology and transformed from a provision for the new household to a consideration of marriage.⁶⁰ Consequently, the women had started to lose power, and their economic status was dependent on the progress made by their men, be they fathers, husbands, brothers or sons.

⁵³ Hugh Cleghorn, the first colonial secretary to Ceylon, declared in a 1799 minute, that: "Two different nations [Sinhalese and Tamil], from a very ancient period, have divided between them the possession of the island... These two nations differ entirely in their religion, language and manners", as cited in K. M. de Silva, *The 'Traditional Homelands' of the Tamils: Separatist Ideology in Sri Lanka, a Historical Appraisal*, (International Centre for Ethnic Studies 1994), p. 9.

⁵⁴ In 1820, mercantilist political economy prioritized caste to refer to "the groups that were employed for organizing the state's compulsory labour which was later abolished by Colebrooke-Cameron reforms in 1833." See John D. Rogers, 'Early British Rule and Social Classification in Lanka', in *Modern Asian Studies*, vol.38, issue.3, (Cambridge University Press, 2004), 635.

⁵⁵ The social distinction based on religion was not strictly considered due to the prominence of Christianity and ignorance of other religious beliefs. John D. Rogers, *ibid*, p. 638.

⁵⁶ Jayawardena, note 6 above, p. 116.

⁵⁷ Samarasinghe Vidyamali and Sirima Kiribamune, *Women at the Crossroads A Sri Lankan Perspective*, (Vikas Publishing, 1990), p. 10.

⁵⁸ Jayawardena, note 6 above, p. 130.

⁵⁹ Risseuw, note 33 above, p. 57.

⁶⁰ Nagendra, note 8 above, p. 102-135.

As previously stressed, changing the status of colonial women from independent to dependent was effected through colonial capitalism that paved the way for perpetuating and legitimizing gender discrimination in customary land rights of the people. Although the Dutch version of the *Thesavalamai* Code was officially recognized⁶¹ and applied since 1799, it was not legitimised until 1911 despite the translation of the Code into English in order to make it a part of the Ceylonese law in 1806.⁶² In 1911, the colonial legislature enacted the Matrimonial Rights and Inheritance Ordinance (Jaffna)⁶³ (JMRIO) by adjusting⁶⁴ the customary practices in conformity with their laws and institutions.⁶⁵

In 1910, Jaffna Matrimonial Rights and Inheritance Bill was brought before the Legislative Council to amend the *Thesavalamai* since it was felt that the Dutch version of the *Thesavalamai* Code differed 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.⁶⁶ It is interesting to note that the *Thesavalamai* Code⁶⁷ restricted the property disposal by way of *donation* (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. Yet, the JMRIO necessitates⁶⁸ the wife to obtain the *written consent* of her husband in disposing of, and dealing with, the separate property by any lawful act *inter vivos* while it removed the previous restriction⁶⁹ 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

⁶¹ See Proclamation of 23rd September 1799 (Adoption of Roman-Dutch Law) by which the British proclaimed to respect the local laws in areas that came under their jurisdiction.

⁶² Regulation No. 18 of 1806.

⁶³ Ordinance No. 01 of 1911.

⁶⁴ The Dutch version of the Code governed inheritance, mortgage, servitude, and pre-emption. Yet, the British recognized and legitimized the inheritance rights and pre-emptive rights of co-owners through the enactments of JMRIO that govern the matrimonial and inheritance rights over the private lands of those who are subject to *Thesavalamai* and the Pre-emption Ordinance No.59 of 1947 that governs the pre-emptive rights over private lands that are situated within the Northern Province. The former has personal application, while the latter has territorial application. The present application of *Thesavalamai* is limited to these two legal enactments.

⁶⁵ It was proclaimed in 1799 that the British institutions could make 'useful alterations as may render a departure therefrom, either necessary and unavoidable, or beneficial and desirable' to the local laws in conformity to the colonial policies for its applicability.

⁶⁶ Debates in the Legislative Council of Ceylon, 14th December 1910, Hansards, Ceylon Session 1909-1911, p. 376.

⁶⁷ Note 12 above, Part IV:1.

⁶⁸ JMRIO (1911), section 6.

⁶⁹ *Thesavalamai*-governed husband could not dispose of his hereditary property without the consent of his family members; see note 12 above, Part IV:1.

property.⁷⁰ It is interesting to note that the concept of marital power of the husband, which was confined only to the community of property in the RDL, was extended to the separate property of the wife⁷¹ during the British colonial period. Further, section 6 was interpreted by the courts⁷² to extend the restriction to (a) all kinds of dealings whether sale, mortgage or donation, irrespective of the provisions in the Code that limited the dealings only to donation, and (b) the marital separation⁷³ to show that the husband, as a legal head, administers the family property by his marital power.⁷⁴

Although the judiciary⁷⁵ acknowledged that the disability of the *Thesawalamai*-governed married woman was the same as under the general law⁷⁶ prevailing in Ceylon, the legislature did not remove the disability by a statute as effected in the law of England.⁷⁷ Under the general law, the enactment of the Married Women's Property Ordinance No. 18 of 1921⁷⁸ transformed the status of married women as *feme sole* in dealing with or disposing of the property. The Ordinance applies to the majority of Sri Lankan women, including Tamil women who are not subject to *Thesawalamai*. Thus, the failure to adopt the relevant changes, as adopted in the general law, resulted in the use of land as a strategy to maintain a power gap between spouses⁷⁹, and to discriminate the married woman on the ground of

⁷⁰ See JMARIO of 1911, s.7.

⁷¹ Savitri Goonesekere, (1996) 'Asian Values, Equity and a Sri Lankan Family Policy,' G.C. Mendis Memorial Lecture, p. 14.

⁷² *Chellappa v. Kumarasamy* (1915) 18 NLR, 435; *Vijeyaratnam v. Rajadurai* (1966) 69 NLR, 145; *Sangarapillai v. Devaraja Mudaliyar* (1936) 38 NLR, 1.

⁷³ In *Rasammah v. Karthigesu* (1951) 54 NLR, 110, at pp. 112, 113; here, the court distinguished the case of *Ramalingam v. Puthathai* [*Ibid*] which decided that the rule is not applicable if both spouses are separated, and decided that under the Code, a married woman cannot transfer her dowry property without the consent of her husband even if she lives separately from her husband. See also *Rajaratnam v. Cinnakone* 71 NLR, 241, where the court decided that the marital power will not be terminated unless the marriage is dissolved by death or the decree *nisi* is made absolute.

⁷⁴ *Naganathar v. Velayutham* (1953) 55 NLR, 319, at p. 321; *Vijeyaratnam v. Rajadurai* (1966) 69 NLR, 145, at p. 147; *Soorannammah v. Amirathapillai* 1950, 53 NLR, 334, at p. 335.

⁷⁵ De Sampayo J., in *Chellappa v. Kumarasamy* (1915) 18 NLR, 435 at p. 487.

⁷⁶ Section 9 of the Matrimonial Rights and Inheritance Ordinance No.15 of 1876 required a married woman to get her husband's written consent in dealing with, and disposing of, her property by any lawful act.

⁷⁷ Married Women's Property Act of 1882.

⁷⁸ Section 5 of the Married Women's Property Ordinance No. 18 of 1921 recognized married women to be capable of holding property and of contracting as a *feme sole*.

⁷⁹ Wijeyesekera, note 50 above, p. 71.

gender⁸⁰ and ethnicity.⁸¹ Yet, *Thesawalamai* provides an alternative⁸² to the husband's consent by substituting the District Court's permission instead of the husband's consent. Thus the law retains her status as a perpetual minor as long as the marriage subsists.⁸³

Meanwhile, the concept of forfeiture deprives the rights of dowered daughters. The Malabar immigrants considered *cheedanam* – a kind of marriage settlement generally by the bride's parents – as the primary asset to be inherited by the female members of the family. However, the subsequent settlers, particularly the Hindu *Vellalas* who were farmers and owned land to a great extent, considered the system as discriminatory against the male members, since under the Hindu joint family system, the sons were obliged to bring whatever they earned during their bachelorhood into their parents' common estate⁸⁴ from which the daughters were given dowry and the sons had nothing to inherit other than their parental property if anything remained after dowering the daughters.⁸⁵ Thus, the forfeiture was justified on the grounds that: (a) the *cheedanam*, that is given in advance, on marriage, or late,⁸⁶ is considered as a daughter's share in the family inheritance,⁸⁷ and (b) the forfeiture would equalize the chances among children to acquire their parental properties. Thus, the practice of forfeiting dowry daughters from claiming their future inheritance rights over the parental intestate is recognized in the *Thesawalamai* Code.⁸⁸ Nagendra⁸⁹ emphasises that "the doctrine of dowry and forfeiture reflects an ancient practice and is embodied in the principle of

⁸⁰ The husband has the full power to dispose of, and deal with, his separate property but the wife does not have similar powers.

⁸¹ Neither the married women governed by General law nor other special laws (Kandyan and Muslim law) are subject to the marital power of the husband, except the *Thesawalamai*-governed married women.

⁸² JMRO of 1911, section 8 entitles a married woman to lodge an affidavit before the District Court in which she resides to seek its permission, in case the husband has deserted her or she is separated from him by mutual consent or is being 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 requires that such consent should be dispensed with.

⁸³ Wijeyesekera, note 50 above, p. 70.

⁸⁴ *Thesawalamai Code* Part I, para7; Part IV, para5.

⁸⁵ Ibid, Part I, paras 9 and 11.

⁸⁶ It was a question of fact "whether a subsequent gift by a parent to a married daughter operates as a donation simpliciter or as a postponed fulfilment of the earlier obligation to provide her with her dowry." See Gratien J., in *Thesigar v. Ganesalingam* (1952) 55 NLR, p. 14, 15; *Murugesu v. Subramaniam* (1967), note 22 above, p. 537.

⁸⁷ Savitri Goonesekere, *The Legal Status of the Female in Sri Lanka on Family Relation*, (M.D.Gunasena, 1980), p. 30.

⁸⁸ Note 12 above, I: 3 provides that "the daughters must content themselves with the dowry given them by act or *doty ola* and are not at liberty to make any further claims on the estate after the death of their parents unless there be no more children."

⁸⁹ Nagendra, note 8 above, p. 137.

collation of the Roman-Dutch Law." However, Agarwal views that the principle was alien to Malabar matriarchy in which women, irrespective of their marital status i.e. divorced or widowed, have a strong claim in their maternal *taravad*.⁹⁰

Thus, compared to Kandyan *diga*⁹¹ married daughters who forfeit not only her future claims over the paternal property⁹² but also of her share in the paternal property that she had inherited before marriage,⁹³ *Thesavalamai*-governed married daughters forfeit only their future inheritance of their parental inheritance⁹⁴ and not of the inheritance rights already vested in them on the death of their parents.⁹⁵ Yet, the concept of collation, which was subsequently applied by the British equally to sons who would have benefitted by some receipts from their parents during their lifetime to advance them in life, is discriminatory against the daughters. The sons generally do not forfeit their rights since they have less opportunity to receive the property during the lifetime of the parents as the parents are obliged to dower the daughters. Consequently, the sons would have benefitted twice: (a) from the dowry received by their wives and (b) by parental inheritance.

The other aspect of gender discrimination as a result of the application of marital power can be perceived concerning *thediathettam* despite the argument that the *Thesavalamai* governed widow is more secure, as she is entitled to an equal share in the acquired property as compared to the widows governed by Kandyan law⁹⁶

⁹⁰ Agarwal Binna, *A Field of One's Own: Gender and Land Rights in South Asia* (Cambridge University Press, 1994), p.115.

⁹¹ The Kandyan law recognizes two forms of marriage: *diga* and *binna*. The former compels the wife to leave *mulgedera*-an ancestral home with her husband, while the latter invites the husband to live in the wife's place.

⁹² The loss of her right is viewed not as discrimination but rather as a substitution for her departure from the collective economic production of her paternal family, since she became a member of her husband's family in the pre-colonial era. See Savitri Goonesekere, 'Social Transformation, Gender Inequality and Violence against Women in Contemporary Sri Lanka' (2012), available at: www.kln.ac.lk/units/cgs/pdf/CGSUKOration2012.pdf (visited 25 Nov. 2024); F.A. Hayley, *A Treatise on the Laws and Customs of the Sinhalese*, (Reprinted, Booksellers and Publishers, 1993), p. 331.

⁹³ The *diga* married daughter is obliged to convey the same to her brothers, unmarried sisters, and sisters married in *binna* for the fair market value within one year of such marriage. See Kandyan Law Declaration and Amendment Ordinance No.39 of 1938 (as amended), s. 12(1).

⁹⁴ Note 12 above, 1:3 provides that "the daughters must content themselves with the dowry given them by act or doty ola and are not at liberty to make any further claims on the estate after the death of their parents unless there be no more children."

⁹⁵ See Basnayake J., in *Murugesupillai v. Muthiah* (1963) 65 NLR, p. 87; Gratian J., in *Thesigar v. Ganesalingam*, note 32 above.

⁹⁶ A *diga* married widow under the Kandyan Law is not entitled to inherit the acquired property. Rather she has only an estate for her life in the acquired property of her deceased husband. See section 11 (1) (a) and (d) of the Kandyan Law Declaration and Amendment Ordinance No.39 of 1938

and Muslim law.⁹⁷ As far as *thediathettam* is concerned, the resemblance of its nature is very distinct⁹⁸ from the Roman-Dutch Law principle on the community of property. Although the provision⁹⁹ of JMARIO 1911 recognized the equal entitlement¹⁰⁰ of the wife to *thediathettam* irrespective of its acquisition by her husband, neither the Code¹⁰¹ nor the Ordinance¹⁰² provide for the separate use of the *thediathettam* during the subsistence of the marriage. This is despite the subsequent development effected by an amended Ordinance No.58 of 1947 that was interpreted by the court to entitle the surviving spouse to inherit a further half of the other half that 'belonged' to the deceased spouse on his demise.¹⁰³ It is the courts that stepped in to fill the gap by referring to the principle of the RDL marital power,¹⁰⁴ and to a great extent, was instrumental in projecting the position of the husband as (a) a manager of the common property¹⁰⁵ and (b) a sole and irremovable attorney of the wife,¹⁰⁶ and give him the full power to sell, donate and mortgage the entirety of the *thediathettam* during the subsistence of the marriage without his wife's consent. Yet, it places the wife in a far worse position, as she does not have the right to give her consent,¹⁰⁷ that she has in respect of her separate property, for the disposal of *thediathettam*.

⁹⁷ Intestate succession relating to the Muslim community is governed in Sri Lanka by Muslim Intestate Succession Ordinance No 10 of 1931, which legitimizes the application of *Sharia* law in case of intestacy of a deceased Muslim. Accordingly, the wife is entitled to ¼ share in the absence of children or grandchildren, or 1/8 if the children or grandchildren are alive.

⁹⁸ *Thesavalamai* was limited to a community of profits as it recognized the separate interest of the spouses over the property that they brought into the marriage. See section 19 of Ordinance No. 01 of 1911.

⁹⁹ JMARIO of 1911, S. 19, defined the *thediathettam* of any husband or wife as the property acquired for valuable consideration by either husband or wife during the subsistence of the marriage and the profits arising from the property of any husband or wife during the subsistence of the marriage.

¹⁰⁰ Ibid, S.20 provides that the *thediathettam* of each spouse shall be property common to the two spouses; that is to say, although it is acquired by either spouse and retained in his or her name, both shall be equally entitled thereto.

¹⁰¹ See *Thesavalamai Code*, Part I paras 7, 4, and 5 and Part IV, para 5.

¹⁰² JMARIO of 1911, ss.19, 20 (2).

¹⁰³ Accordingly, a *Thesavalamai*-governed widow can inherit ¾ share of *thediathettam* acquired by the deceased. See Sharvananda C.J., in *Manikkavasagar v. Kandasamy and Others* (1986) 2 SLR, at p. 23.

¹⁰⁴ According to the RDL principle, the community of property, though it appears to be a fairer matrimonial property regime as it recognizes the equal entitlement of the spouses to a half share, entrusted the husband with the full power to administer the matrimonial property. See Sharya de Soysa, Rights of spouses within the marriage relationship, (1986) *The Comparative and International Law Journal of Southern Africa*, Vol. 19, No. 2, at p. 292; Nagendra, note 8 above, p. 213, 214.

¹⁰⁵ Bertram C.J. in *Seelachy v. Visuvanathan Chetty* (1922) 23 NLR, 97, at p. 108.

¹⁰⁶ Macdonell C.J., in *Sangarapillai v. Devaraja Mudaliar*, (1936) 38 NLR, 1, at p. 7.

¹⁰⁷ Since, according to section 19 of JMARIO 1911, *thediathettam* falls under the purview of community of property. It is excluded by sections 6 and 7 from the scope of the separate

Hence, it is evident that during colonial times, the women in the Third World, including Sri Lanka, were oppressed and marginalized in accessing their land as colonial capitalism targeted excessive income from highlands and arable lands. The historical experience of Third World women reveals how Western colonialism, through the internalisation of gendered aspects in land ownership, deprived their independent position and economic security regarding land. The introduction of independent and individualised land ownership to enhance the colonial export economy was one of the main reasons for the deprivation of women's right to land.

This marginalisation was further aggravated by the creation of multiple avenues for economic mobility for men by the male chauvinists. Accordingly, the women who were already oppressed by patriarchal ideologies were further colonised by colonial capitalism that permitted the legitimisation of discriminatory concepts through statute law. Thus, the transformation of women's independent status, which they had exercised to a certain extent before colonization, into dependent status during Western colonialism, can be drawn from the historical analysis of the customary laws of Sri Lanka. Particularly, in *Thesawalamai* law, there was a conversion of the concept of *cheedanam* which was earlier provided by the bride's parents as a support to the groom to establish a new household. Now, it is considered or converted as a consideration of marriage.

Status of Women's Right to Land in Post-Colonial Sri Lanka

During the colonial period, the male-centric local legislature, which was in collaboration with biased colonizers, legitimized the traditional laws that favoured them; adjusted the system that favoured women in their favour; and incorporated the colonial gender discriminatory concepts to deprive women's right to land. Consequently, the women who had been deprived of their rights due to patriarchal ideologies were further marginalized and oppressed by colonial legislation. This was further embedded by 'colonial capitalism' that targeted plantation sectors and paddy fields, and 'neocolonialism' that denotes the economic, political, and socio-cultural dependency of an independent nation with former colonizers.¹⁰⁸ Thus, the status of women was not altered even after Sri Lanka gained independence from British colonization in 1947. What will be discussed briefly, below, is the double colonization of Sri Lankan women

properties of the spouses. The wife has no right to dispose of and deal with her equal share in the *thediathettam* during the subsistence of the marriage. Yet, the husband, by virtue of marital power, has the right to dispose of and deal with the *thediathettam*, which, though acquired by his wife, is under his control.

¹⁰⁸ Lindsay, note 30 above, p. 8-9.

concerning land; their *de jure* and *de facto* right to land; and the impact of the lack of land rights on the contemporary women in Jaffna.

In post-colonial Sri Lanka, the majority of land, 82%, is owned and controlled by the State and the rest is privately owned. The disproportion in land ownership resulted from colonial capitalism that convinced the British officials to legitimise the colonial economic exploitation of colonizing countries through the enactment of the Crown Lands Encroachment Ordinance in 1840. This Ordinance vested all uncultivated and unused lands, and the land to which the title could not be established, with the Crown. Consequently, many local peasants, irrespective of gender and ethnicity, had been deprived and dispossessed of their land. Yet, the policy enabled the colonial capitalist to acquire large tracts of land to cultivate commercial crops to enhance the colonial export economy. Almost a century later, the Land Development Ordinance was legislated in 1935 to settle the issue of landlessness created by the Crown Lands Encroachment Ordinance. It is interesting to note that in 1840, the deprivation was effected irrespective of gender; but in 1935, the women were ignored in land allocation schemes and most of the lands were given to and succeeded¹⁰⁹ by males to develop the State land through agriculture.¹¹⁰

It is pertinent to analyze the post-colonial constitutional framework on women's *de jure* rights before analysing their *status quo*. The right to land or property is not recognized as one of the fundamental rights under the 1978 Constitution of Sri Lanka. Rather, it is inferred from the provisions on Directive Principles of State Policy.¹¹¹ Yet, despite the guarantee of right to equality before the law and equal protection of the law,¹¹² all existing discriminatory laws, whether written or unwritten, are constitutionally recognized as valid and operative notwithstanding any inconsistency with the provisions in the fundamental rights chapter¹¹³ since (a) there is no provision for judicially reviewing the past discriminatory legislation and (b) there is only a limited period¹¹⁴ offered to review Bills. Consequently, the gendered laws that were enacted by British colonials before the adoption of the

¹⁰⁹ The devolution order, prescribed under rule no.1 of the Third Schedule to the Land Development Ordinance No.19 of 1935, is as follows: (a) sons, (b) daughters, (c) grandsons, (d) granddaughters, (e) father, (f) mother, (g) brothers, (h) sisters, (i) uncles, (j) aunts, (k) nephews, (l) nieces.

¹¹⁰ Kishali Pinto Jayawardene et.al., *Is Land Just for Men? Critiquing Discriminatory Laws, Regulations and Administrative Practices relating to land and Property Rights of Women in Sri Lanka*, (Law and Society Trust, 2010), p. 56.

¹¹¹ The Constitution of Sri Lanka, 1978, Art. 27 (2) (c).

¹¹² Ibid, Art. 12(1).

¹¹³ Ibid, Art.16(1).

¹¹⁴ Ibid, Art.121 limited the period to one week within which Bills must be challenged before the Supreme Court, before such Bill becomes law.

Constitution of 1978, remain as black letter law, and are invoked by administrative officials to discriminate against women.¹¹⁵

The judiciary, in post-colonial Sri Lanka, played a major role in interpreting the provisions of JMARIO to further deprive the married women's right to land. Particularly, the bench in *Manikkavasagar v. Kanthasamy and Others*¹¹⁶ had failed to overrule the decisions of Bertram C.J., in *Seelachy v. Visuvanathan Chetty*,¹¹⁷ and of Macdonell C.J., in *Sangarappillai v. Devaraja Mudaliyar*¹¹⁸ both of whom had decided that the husband, as a manager of the common property, has the marital power to sell, mortgage, and donate the entirety of the common property without his wife's consent since his marital power proceeds from the enjoyment of dominium of his wife's half share. Moreover, the failure of the legislature to enhance the status of married women, as effected by the general law in 1921,¹¹⁹ placed the *Thesawalamai* governed women in a more vulnerable situation in post-war Jaffna.

The growth of women-headed families in post-war Sri Lanka has compelled women to play the role of men, as the armed conflict often left more women alive than men. Due to the disappearance of husbands, the *Thesawalamai* governed married women who head their families, cannot transfer, dower or mortgage their separate property or their share in the *thediathettam* as the law requires their husbands' consent for the disposal of their immovable property. Moreover, widows under Kandyan law¹²⁰ and *Thesawalamai* are not considered as heirs to their husbands' *paraveni* and *mudusam* respectively, unless there are no other heirs to succeed the intestate. Since land is considered one of the economic resources of the family, the deprivation of a widow's right to land under these laws incurs severe hardship in managing the economic needs of their family. The marginalization of *Thesawalamai* governed married women, even in the post-armed conflict context, is paid neither legislative attention nor policy commitments despite the constitutional legitimization¹²¹ of introducing any temporary special measures to remedy the present effects of past discrimination as perpetuated by colonialism and to achieve *de facto* equality among women in Sri Lanka.

The interesting point is that most of the land laws that were enacted by the British colonial rulers are applied to date without amending the gender discriminatory provisions in them. The colonisers perpetuated gender discrimination and

¹¹⁵ Jayawardena et.al, note 110 above, p. 50.

¹¹⁶ (1986) 2 SLR, 8.

¹¹⁷ (1922) 23 NLR, 97

¹¹⁸ (1936) 38 NLR, 1

¹¹⁹ See note 78 above.

¹²⁰ Kandyan Law Ordinance, S. 11(d); JMARIO, S. 31.

¹²¹ The Constitution of Sri Lanka, 1978, Art. 12(4).

legitimised orthodox patriarchal ideologies in the land laws to gain maximum economic benefit through the males since their role was more valued in agricultural activities. Hence, the land statutes aided in discriminating against women through restriction, exclusion, distinction, and denial of their land rights. Particularly, the marital power of the husband under the *Thesawalamai* law has been applied without revision, as changes made to the general law, on the belief that such system constitutes an inherent customary practice of the Tamils in the North and also due to the belief that repeal or reformation of such personal laws would infringe their cultural or religious sensitivities.

Yet, as this article has shown, the concept of marital power does not form an inherent customary practice of early Malabar settlers. Rather, it was brought by the Dutch colonisers since they found a similarity in the marriage and family arrangement of the subsequent settlers from the Coromandel Coast. Thus, it was easy for them to reproduce the words of Dutch jurist *Van Leuwan* who laid down that “the wife being subject to the will of her husband, may not give anything away without the consent of her husband” in Part IV:1 of the *Thesawalamai* Code. Subsequent British colonisers replaced the concept of marital power with the common law concept of coverture, resulting in an absolute departure from the customary practices of Tamils in the North, thereby promoting discrimination against women on the grounds of marital status, gender, and ethnicity.

Conclusion

Land is not only one of the main income-generating sources; it is also a source which can empower women, economically and socially, increasing their bargaining power and independence. Although matrilineal and bilateral systems of land inheritance advantaged women in many respects, especially in granting them economic and social security, as well as considerable autonomy and equality in marital relations, they were subject to interventions by the colonial and post-colonial States that effected transformation in the legal, economic, social and cultural spheres, in ways that eroded customary practices.¹²² The historical experience of Third World women reveals how Western colonialism deprived them of their independence, autonomy and economic security, through the internalization of gendered aspects in respect of land ownership.

The introduction of independent and individualized land ownership to enhance the colonial export economy was one of the chief reasons for the deprivation of women's right to land. Colonialism oppressed and marginalized the agrarian women in the Third World, including Sri Lanka, since colonial capitalism targeted

¹²² Agarwal Bina, *A Field of One's Own: Gender and Land Rights in South Asia*, (Cambridge University Press, 1994), p. 153.

excessive income from highlands and arable lands. This was further embedded by patriarchal colonialism that created multiple avenues for economic mobility only for men. Thus, the transformation of women's status in this regard could be seen particularly under the *Thesavalamai* where there was a conversion of the concept of *cheedanam*. The *cheedanam* was given by bride's parents as a support to the groom to establish a new household. But it is now being considered as a consideration for marriage; hence it becomes compulsory for the bride's parents to provide it.¹²³

The discrimination perpetuated by the Western colonizers in legitimizing the customary land tenure of *Thesavalamai* continued even in post-colonial Sri Lanka, upon the belief that such a system constitutes an inherent customary practice of the Tamils and any repeal or reformation of the personal law of Tamils would infringe their cultural or religious sensitivities¹²⁴, despite the national and international commitments to protect and promote the right to equality and non-discrimination. Notwithstanding the adoption of several Action Plans,¹²⁵ the intersecting forms of discrimination - *i.e.* gender, marital status, culture and ethnicity - perpetuated against *Thesavalamai* governed women, especially those who head their families due to the disappearance of their husbands, continue, even though over a decade has lapsed since the end of the armed conflict.

Hence, substantive reforms should be introduced to dismantle the husband's marital power which is legitimized by section 6 of the JMRO, since such power is not derived from any inherent customary practices of the early settlers; rather, it is derived from Western colonial practice. Moreover, the retention of the provision (a) placed the women-headed families in a more vulnerable position and (b) seemed irrational, as unmarried women and widows are considered by the law as capable of controlling their land, while married women are considered incapable of dealing with their land. Goonesekere emphasises¹²⁶ that a human rights focus would help eliminate discrimination by formal law reforms, while also helping in achieving substantive equality through the introduction of gender-neutral laws. Meanwhile, Wijeyesekera has suggested¹²⁷ that it would be "ideal in post-conflict land restitution to adopt a human rights-based approach focusing on restorative justice for conflict-related violation of rights to address

¹²³ It is a gift, conditionally made, on the occasion of marriage. See Nagendra, note 8 above, p. 117-125.

¹²⁴ The Women and Media Collective, (2017) 'Sri Lanka Shadow Report to the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW).

¹²⁵ See *Sri Lankan National Action Plan for the Women-Headed Households* (2017-2019) and the *National Action Plan for the Protection and Promotion of Human Rights* (2017-2021)

¹²⁶ Savitri Goonesekere, 'The Concept of Substantive Equality and Gender Justice in South Asia' (UN Women, 2011).

¹²⁷ Rose Wijeyesekera, *Land for Women: The Forgotten Development Agenda* (University of Colombo Press, 2020), p. 290.

retrospective structural discriminations relating to land rights.” This emphasises that distributive justice, in land restitution in the post-conflict Northern Province, would promote equality for women. This article suggests in this regard that repealing sections 6 and 8 of the JMPIO, 1911, and replacing them with a similar provision found in section 5 of the MWPO, 1921, would help achieve *de facto* and *de jure* equality. This would enable *Thesavalamai* governed married women to be considered equal, not only to their husbands but also to unmarried, widowed and divorced women. Moreover, amending Article 16 of the Consitution - by stating that any written or unwritten laws shall be considered void to the extent that they are inconsistent with fundamental rights - is essential. The outcome of the implementation of such proposals would, it is hoped, lead to a social transformation that recognizes not only the equal right to land held by women, but also their right to economic independence and greater empowerment.
