

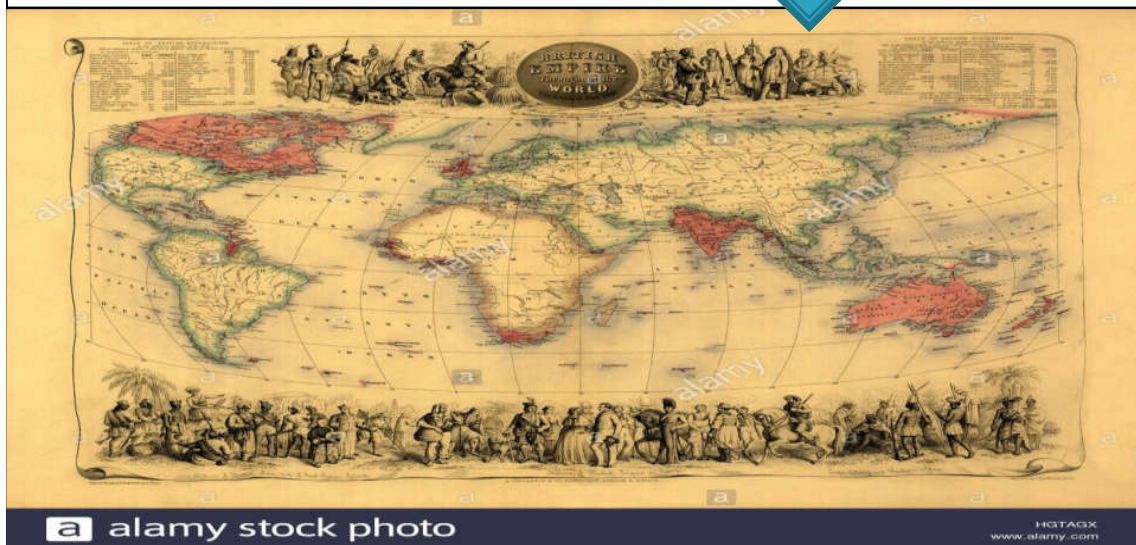
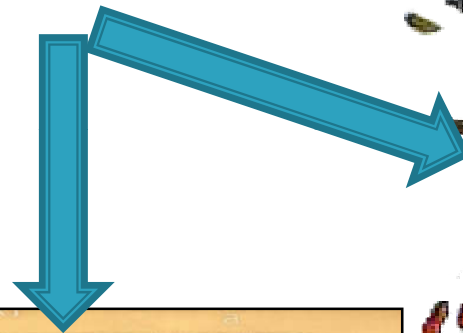
# Gender Discrimination against Women in Intestate Succession; An Analysis on **Thesawalamai** and **Kandyan Law** in Sri Lanka



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# SPECIAL LAWS OF SRI LANKA

- ▶ Sri Lanka is a country enriched by the **multifarious systems of law, including Roman-Dutch law, English law and three special laws, namely;**
- ▶ **Thesawalamai**
- ▶ **Kandyan Law** and
- ▶ **Muslim law**



# JUSTIFICATION

- **01. State Obligation of Sri Lanka to respect the Constitution Guarantees**

**Article 12 (1) and 12 (2) of the Constitution of Sri Lanka (1978)** – “All persons are equal before the law and are entitled to the equal protection of the law”

**Directive Principles of State Policy of the Constitution – Article 27 (6)**  
– “The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of Sex.”

- **02. The obligation under International treaty law**

- International Standards - All human beings are born free and equal in dignity and rights. (UDHR, ICCPR, ICESCR)

- **03. In particular, CEDAW State Obligation**

- **Articles 02 and 3 of the CEDAW** refer to the ‘STATE OBLIGATION (Sri Lanka ratified CEDAW in 1981 and the Optional Protocol to CEDAW in 2002)

# Research Problem

- Despite the constitutional values guaranteed by the Constitution of Sri Lanka and the state obligation undertaken by ratifying international conventions by the country, to what extent principles of equality and non-discrimination of women guaranteed in the area of intestate succession rights under Kandyan law and law of Thesawalamai?

## Research Objectives

- The main objective of this research is to emphasize the state obligation of Sri Lanka to respect, protect and fulfil the constitutional guarantees, and international treaty obligations of the country to guarantee the principles of gender equality and non-discrimination in intestate succession law in Thesawalamai and Kandyan law.

# Application of the Special Laws

- ▶ The law of Thesawalamai applies to all persons who come within the description of the Malabar (Tamil) inhabitants of the Province of Jaffna (Northern)
- ▶ Kandyan Law is the system of law applicable to the Kandyan Sinhalese in the upcountry. (Kandyan provinces).

The rules regarding intestate succession in Thesawalamai and Kandyan Law based on **customs and practices.**

During the British colonial rule in Ceylon, those customary rules were converted into **statutes.**

## DISCUSSION / RESEARCH FINDINGS

- ▶ **Research Methodology**
- ▶ This is a Qualitative research, mainly carried out by the reference of secondary sources, including International Conventions, statutes, judicial decisions, academic writings, electronic databases, commission reports and customary law principles, etc.

# DAUGHTERS IN THESAWALAMAI

- ▶ The undowered daughter under the **Thesawalmi** succeeds to parent's property equally with the sons and unmarried sister.

The forfeiture rule in the law of succession is incorporated into Thesawalamai.

Under the Thesawalamai, if a daughter is dowered she loses her right to her parent's intestate property.

Issue - The practical issues related with dowry

# THE POSITION OF THE MARRIED WOMEN in Thesawalamai

## JAFFNA MATRIMONIAL RIGHTS AND INHERITENCE ORDINANCE, NO 1: of 1911

### Separate property in inheritance

▶ *Section -06*

Property of a wife acquired during or before marriage remains as; her separate property.

▶ *Section -07*

Property of husband acquired before or after marriage remains as; his separate property.



## The issue – HUSBAND’S CONTROL OVER WIFE’S IMMOVABLE PROPERTY

- ▶ The issue in the Thesawalamai is the control over the administration of her property
- ▶ Section 6 of the JMARIO
- ▶ makes it mandatory for married women governed by the Thesawalamai to obtain her husband’s written consent to alienate her immovable property.
- ▶ Section 8 provides that the consent could be obtained from the district court in prescribed instance. (It is an unfair legal requirement)

# Issues to be addressed in THE POST-WAR ERA IN SRI LANKA

- ▶ It is observed that land constitute a major part of the dowry and intestate succession property in the Northern province at present context.
- ▶ Therefore women may own 80% of land in the Northern province but they do not have a significant decision making power over land due to the role played by the husband in relation to managing land belong to women.
- ▶ In some instances husband is disappeared without a trace or husband is in abroad as refugee and he is not having any communication with his wife.
- ▶ These instances have made it is impossible for the women to obtain the consent of the husband to deal with her property.

# Thediatettam under the Thesawalamai and Equitable position of the Widow under the JMARIO No: 01 of 1911

- ▶ **Section 20 of the JMARIO (As amended in 1947)**
- ▶ Was interpreted by the judiciary, in
- ▶ ***Manikkavasagar v. Kandasamy* 1986(2) SLR 8;**
- ▶ It permits a widow  $\frac{3}{4}$  of the entire Thediathettam property (Acquired property during the marriage)
- ▶ Moreover, the widow is given a life interest over the Muthusam property (hereditary property) of her husband.
- ▶ ***Thesawalamai, more equitable than the other indigenous systems of law in Sri Lanka***
- ▶ Because, Thesawalamai acknowledges the contribution of the domestic service of the wife upon the accumulating of the husband's income.

## Kandyan Law

Issue – Discrimination based on the Gender and the Nature of the Marriage

### Two types of Marriages in Kandyan Law

**Diga Marriage**

(Daughter departs parental residence)



**Binna Marriage**

(Daughter stay with parents with her husband)

### The intestate succession rights – Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

Kandyan law recognizes *binna* married daughters, unmarried daughters' and sons' rights are equal to each other in terms of succession to paraveni property.

**Section 12 (1)** – But, diga married daughter's loses intestate succession rights over the paraveni (ancestral property) of the father.

**Section 9(1)** – The permanent nature of the type of the marriage in the register

— A marriage in binna or diga until dissolved shall continue to be a binna or diga & It shall be for all purposes of the law governing the succession.

- ▶ **Jayasinghe v. Kiribindu** (1997) 2 Sri. L.R. 1
- ▶ A diga married daughter cannot re-acquire her rights even though she came back to her parents and resided parental house with her husband.

## (S) Why this Discrimination? The principle of Forfeiture and the Dowry

- #The principles which are based on this :-
- 1. Dowry takes place of diga married daughter's share from the father's estate. & [ Heyley , pp. 333 ]
- 2. Her separation from the father's home and union with a different family. [ Heyley, pp. 331 ]

**But this rule is based on the marriage certificate.  
Not the real physical nature of her marriage-**

- **Refusing to accept the Ground Realities**
- Whether she really received the dowry in the marriage and its valuation.
- The right of emption is not given to any diga married sister who never left the mulgedara or reacquired binna rights by readmission to the mulgedera.
- Whether her dowry was taken by the husband's family
- Whether she spend the dowry for the benefit of her parents
- Her contribution to develop the paternal property even after the diga marriage by changing her residence.

# Issue - Rights of the Widow and Widower in KL

## Gender based discrimination ?

**Rights of the Widow**  
**Section 11 (1) (d)**  
**Kandyan Law Declaration and**  
**Amendment ordinance 1938**



Widow inherits as a remote heir for both *paraveni* & acquired property of the deceased husband in absence of **all other heirs (No possibility)**

**Rights of the Widower**  
**Section 19**  
**Kandyan Law Declaration and**  
**Amendment ordinance 1938**



Widower inherits acquired property of the deceased wife  
If there are **no children or no descendants of children.**

### Lydiya v. Kiri Ukkuwa

(1967) 70 NLR 272 ( Appeal from Kegalle D.C.)

” Deceased person was the illegitimate son of his mother. Court held that, widow is entitled only a life interest of the acquired property , because there were half brothers & half sisters in his mother’s legal marriage .”

## Issue – COMPARING SUCCESSION RIGHTS OF THE WIDOW & WIDOWER IN KANDYAN LAW

- **The Section 11 (1) (a) of KDAO (1938) –**
- The widow shall be entitled to an estate for **life interest (maintenance)** in the acquired property of the deceased intestate property and if **there is no acquired property** or if the acquired property is not sufficient for her maintenance then she is entitled to maintenance out of the ***paraveni* property (ancestral property)**.

# Jurisprudential Analysis

- ▶ Third World Feminist Theory underlines that
- ▶ “women have been discriminated in the third world countries not only the basis of sex, but also in the context of the race, culture, class and religion.
- ▶ SOURCE – M Thornton, The Development of Feminist Jurisprudence, at p. 15
- ▶ The status of women in post-colonial countries who are oppressed by both, (1) **patriarchal influences in their own societies** and (2) **the colonial power**.
- ▶ **The theory of 'Double Colonization'** explains that how do the indigenous women in postcolonial countries were affected by both local patriarchal norms and by the oppression of colonialism.



# RECOMMENDATIONS

- 1. The **CEDAW Concluding Observations of (2017)** recommended amending all personal laws, including the Muslim, **Kandyan and Thesawalamai** to remove **discriminatory provisions regulating ownership, inheritance**, transfer and disposal of land and property.

Therefore, Sri Lanka has a legal & moral obligation to take effective legal measures to abolish the identified discriminatory laws.

## COMPARATIVE STUDY

- Eg:- **India** – Hindu Succession (Amendment) Act 2005
- It has been amended Section 6 of the Hindu Succession Act, 1956, allowing daughters of the deceased equal rights with sons.
- Eg: **South Africa** - The rule of male primogeniture was applied in the customary law of inheritance through the Black Administration Act, No. 38 of 1927 was abolished, Bhe and Others v. Khayelitsha Magistrate and Others (2004),
- Repeal of the Black Administration Act and Amendment of Certain Laws Act, No: 28 of 2005
- 2. Public Awareness Programmes - Encourage women who are affected to raise their voice for their inheritance rights.
- 3. A special Law Commission should be appointed to examine and make recommendations to the legislature for legal amendments. (CEDAW Concluding observation 2017) – **The Dialogic Democracy Theory**

# CONCLUSION

- At the conclusion, this study strongly recommends that Sri Lanka has an inviolable obligation to respect, protect and fulfil the commitments embodied in the international treaties.
- **The 05th Goal of the UN Sustainable Development Goals (SDGs); - “Achieving Gender Equality and Empowering Women**

Elimination of all kinds of gender discrimination against women, in **intestate succession laws** will be ensured the social empowerment, economic security and productivity of women in the modern society.

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