

EQUAL LAND RIGHTS FOR EMPOWERMENT OF WOMEN: A SOUTH ASIAN PERSPECTIVE WITH SPECIAL EMPHASIS ON SRI LANKA

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Introduction

Land is one of the most important modes of property as a scarce natural resource, a tool of human functioning, a strong demarcation of power relationships and a source of income, security, status and recognition. Rights relating to land give a significant amount of control over self and others, and change the way people think and interact with the world. Often, the realization of other fundamental human rights is conditional to shared power and responsibility in relation to land.¹ This paper is based on the premise that rights relating to land are vital in empowering women.

In the real world a gender gap in land rights is visible – clearly and critically in South Asia² where despite women’s individual and collective contribution to food production³ they are denied or discriminated against the main asset in the process: LAND. This paper argues that land has been used to maintain a subordinate status for women within families, in communities and in the open market. Despite commitments at national, regional and international levels to implement legislative and other measures for the advancement and empowerment of women on an equal basis with men, many legal systems still retain laws, mechanisms and traditions that deny land rights to women thus disempowering them. Some legal systems deny women the right to own land; others deny them the right to command over land they own. Since ‘empowerment’ entails equal rights in land and economic participation, this paper further argues that ‘empowerment of women’ essentially requires changing gender relations that discriminate against women and place them at a disadvantaged position, and that state commitment in changing policy, law, institutional mechanisms and social structures necessary for the empowerment of women.

Subsequent to the brief description of different levels of property rights this paper goes on to stress that women are discriminated against with regard to land rights; in many instances women are not given control rights over land, but men manage and control the land that women own. It then discusses the recognition of the fundamental right to non-discrimination relative to land rights in some core international conventions, and briefly discusses the importance of recognizing non-discriminatory land rights in Sri Lanka. A brief description of the concept of ‘empowerment’ is followed by an emphasis on the importance of land rights for empowerment of women. The paper then analyses two important statutes relative to state land and private land in Sri Lanka, to argue the impact of the denial of land rights to women’s empowerment.

Land as a means to an end

In law, land is property, i.e. it is owned, accessed, commanded over, and used by various entities, depending on their legally distinguished nature: state land, clan land or private land. Land has also been used as a means to an end: the end being the long-term suppression over women. Many South Asian legal systems have been instrumental in achieving this end: either providing for direct discrimination against women or being gender-neutral within patriarchal legal and administrative mechanisms. Moreover, laws maintain this bias against women’s rights in respect of land vertically and/or horizontally: vertically, i.e. between men and women, as a result of gender bias on the part of policy makers and leaders in communities/clans; horizontally, i.e. amongst women belonging to different groups - cultural, religious, ethnic or other sociological identities - which have originated due to historical reasons, and on grounds such as marital status.

Throughout history these restrictive definitions and denials of rights relating to land have been influenced by diverse and/or overlapping philosophical theories based on either patriarchal ideologies that promote women’s subordination; or theories that disregard the prevailing discriminations against women in reality, and thus discriminate against them indirectly. Both approaches place women at a disadvantage. These theories define rights and their limitations relating to private and public/state land on the one hand, and on the other, influence state policy, the law, culture and national economy. The way ‘rights relating to land’ has been defined in a particular legal system is therefore critical in identifying men’s and women’s position in society, distinguishing the powerful from the powerless, and demarcating limits on their life’s choices.

The broad concept of property rights in land encompasses a variety of things (corporeal and incorporeal) and ideas.⁴ The concept has been interpreted and defined according to different hypothesis and philosophies.⁵ Property rights relative to land refer to the

¹ Agarwal B., *A Field of One’s Own*, (Cambridge University Press, 1994).

² Kelkar G. and Krishnaraj M.(eds) *Women, Land and Power in Asia*, (Routledge 2013).

³ Savitri Goonesekere, *Policy Formulation, Law Reform and Women’s Property Rights in South Asia*, in Kelkar G. and Krishnaraj M.(eds) *Women, Land and Power in Asia*, op.cit., pp 25-36, atp.25.

⁴ Harris J.W., *Property & Justice*, Oxford, Oxford University Press (1996), p.3.

totality of possible individual entitlements, including security of tenure, i.e., rights to own, sell, lease, rent, mortgage or dwell on land, housing and property, the right not to be forcibly evicted, and the right to restitution where land has been deprived arbitrarily. Due to reasons varying from economic to cultural and from environmental to political, modern legal systems do not explicitly recognize a universal positive right to own land, but only certain property rights, subject to certain statutory and/or customary limitations. The nature of rights relating to land recognized in a particular legal system depends on the socio-political ideologies underpinning a legal system. Sai Mohan divides these rights into three broad categories for analytical purposes: (1) The broadest being all the rights relating to property already held by an owner; (2) equality in whatever rights are guaranteed in law relating to property, including the right not to be arbitrarily deprived of property, to restitution and to acquire new property; and (3) the right to a 'minimum amount of property required for survival.'⁶ In addition to the three categories commonly recognized relative to land rights this paper identifies a fourth: denial of legally recognized property rights to women belonging to certain sections of the population, based on grounds of gender, ethnicity, class, marital status and caste. For instance Sri Lanka land law regime also retains ideologies influenced by patriarchy, ethnic identities and related cultural constraints. Many South Asian legal systems, for instance, India, Nepal, and Bangladesh also share similar ideologies.

Women and land v. Man and land

Land continues to be one of the most important modes of property, a tool of human functioning,⁷ a strong demarcation of power relationships and a 'source of security, status and recognition',⁸ economically and otherwise. This is more so in South Asian Countries where agriculture plays an important part in the economy. Thus rights in respect of land are important to any person, man or woman. Ironically however, women's rights relating to land fall short of 'full ownership' in many legal systems where men are accorded command over land owned by women, thus undermining women's dignity as human beings, denying them the fundamental right to equality and non-discrimination and placing them at a disadvantaged position comparative to men. It may be pertinent at this point to analyse the difference between 'ownership' and 'command'. Honore proposes eleven incidents of 'individual ownership': right to possess; right to use; right to manage; right to the income; right to the capital; right to security; incident of transmissibility; incidence of absence of term; duty to prevent harm; liability to execution; residuary character.⁹ Generally it is perceived that an owner enjoys all these rights. Yet, the law may determine certain limitations over ownership, and such determination may depend on various factors including social, economic, political or cultural. Irrespective of the basis of limitations, the existence or non-existence of these elements determines the strength of the relationship between the person and the property, thus defining the wealth, power and individuality of a person and her status in society. Thus a person-property relationship, which lacks one or more of the above incidents, particularly an incidence of wealth allocation, though in legal terms such a relationship could be termed 'ownership', it stands less than 'full ownership'.

Women and land: a global concern

International law, humanitarian law and jurisprudence of various judicial forums have approached, in many ways, to ensure justice for people in respect of land rights even though property has not been recognized as a specific stand-alone right in any of the core international human rights treaties. A number of core international instruments recognize sex as a prohibited ground for discrimination¹⁰ against women in their rights in, access to and control over land. They further recognize that such discriminations seriously affect their dignity and enjoyment of other rights, contributes to global poverty and development,¹¹ and impair sustainable peace, particularly during and after situations of conflict where women face acute problems disproportionately. Adopting a more realistic approach than a theoretical one,¹² 'sex-based discrimination' has been widely interpreted in internationally accepted instruments to mean 'disadvantage as a result of dominance and subordination'.¹³

⁵ Depending on ownership property has more commonly been subjected to a trilogy of forms, i.e. private, common and state property. See Heller M.A., *Critical Approaches to Property Institutions*, 79 Or. L. Rev.417 (2000).

⁶ Sai Mohan, *The Battle After The War: Gender Discrimination in Property Rights and Post-Conflict Property Restitution*, *The Yale Journal of International Law*, Vol.36 (2011) pp.461-495, at p.473.

⁷ Martha C Nussbaum, *Women and Human Development, the Capabilities Approach*, (Cambridge University Press 2000), p 80.

⁸ Rao N., *Women's Access to Land: An Asian Perspective*, Expert paper prepared for UN Women, September 2011, EGM/RW/2011/EP.3.

⁹ Honore A.M., *Ownership*, reprinted in Honore T., *Making Law Blind: Essays Legal and Philosophical*, (Clarendon Press 1987), p.161, cited in Harris J.W., *Property & Justice*, (Oxford, Oxford University Press 1996), p.126.

¹⁰ Cook R., *Women's International Human Rights Law: The Way Forward*, in *Human Rights of Women: National and International Perspectives*, Rebecca Cook ed., (University of Pennsylvania Press 1994) pp 3-36, at p.10.

¹¹ The link between discrimination against women in acquiring and securing land and their poverty has been well-recognized by the UN system. See OHCHR Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution 1998/15, preamble. Further: Crowley, E., *Women's right to land and natural resources: Some implications of a rights-based approach, in A rights-based approach to women's empowerment and advancement and gender equality*, UNDAW Workshop Report, (1998), Pp. 145-147.

¹² Theoretically, gender-based discrimination has taken a comparative approach based on similarity and difference. See Cook R., *Women's International Human Rights Law: The Way Forward*, in *Human Rights of Women: National and International Perspectives*, *ibid* pp.3-36, at p.11-13, citing Kathleen Mahoney's criticism on the liberal approach on gender-based discrimination.

¹³ Charlesworth H., *What are "Women's Human Rights"?*, in *Human Rights of Women: National and International Perspectives*, Rebecca Cook ed., University of Pennsylvania Press (1994) pp.58-84, at p.74.

Above all other international instruments, the UDHR reaches the primordial consensus on the essential aspects of human existence: integrity, dignity and equality, as achievable ideals to be implemented in national law and policy.¹⁴ Rights relating to land and property; rights to equality before the law and to equal protection¹⁵; the right to own property¹⁶; and the right to adequate housing¹⁷ have been recognized as vital in this consensus.¹⁸ Article 17 (1) and (2) establish the right to property for all people regardless of sex, stipulating that "Everyone has the right to own property alone as well as in association with others" and that "no one shall be arbitrarily deprived of his property." Recognizing the critical role that land, housing and property play within marriages and upon their dissolution, particularly to women across the globe, Article 16 'suggests that women have the right to be free from discrimination with respect to rights in, access to and control over land, housing and property both during marriage and upon its dissolution'.¹⁹ By virtue of being a member state of the UN, Sri Lanka pledges to recognize these as 'achievable standards'.²⁰

The ICESCR²¹ and the ICCPR²² are also important in this regard. Even though neither covenant recognizes property as a human right *per se* partly due to ideological conflicts during the cold war period, Article 11(1) of the ICESCR recognizes the right of everyone to an adequate standard of living including *inter alia* the right to adequate housing and to the continuous improvement of living conditions. Rather than a mere commodity, the right to 'adequate housing'²³ has been recognized as an integral component to the right to life with dignity in a secure and peaceful place to live.²⁴ On the other hand both conventions are explicit on their policy against sex-based discrimination.²⁵ The ICCPR specifies that any law, regardless of its subject matter, which discriminates on the basis of sex, is in breach of the convention.²⁶ Further, the GC 8 on Article 26 makes it clear that equality is an autonomous right and is inclusive of the rights recognized in other conventions. The GC 8 asserts that the discrimination does not have to be intentional; includes both direct and indirect discrimination; equality does not necessarily mean identical treatment – differentiation would be necessary to ensure substantive equality; and every differentiation does not constitute discrimination.²⁷ Elaborating on the right to equality before the law entrenched in Article 3 of the covenant, the Committee states that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground. Further, it emphasises states to ensure that the matrimonial regime contains equal rights and that obligations for both spouses, *inter alia*, with regard to the ownership or administration of property, 'whether common property or property in the sole ownership of either spouse'. Many South Asian states, including Sri Lanka, have ratified both conventions thus obliging to ensure the right to non-discrimination based on sex in civil, political, economic, social and cultural rights.

Why a special emphasis on Sri Lanka?

As an agricultural community, life has been closely connected to land in Sri Lanka. The *Pali* stanza with which the national constitution of Sri Lanka ends, demonstrates the importance of land to the people of this island nation: *Devo Vassatukalena, sassasampattihetu ca, phito bhavatu lokoo ca, raja bhavatu dhammiko*.²⁸ This briefly means 'may the rain fall in season, may the harvest be plentiful, may there be righteousness, and may the rulers be just. As De Silva comments referring to pre-colonial

¹⁴ Asbjorn Eide, Economic, Social and Cultural Rights as Human Rights, pp12, 20.

¹⁵ Art.7

¹⁶ Art.17

¹⁷ Art.25

¹⁸ Art.16

¹⁹ WOMEN'S RIGHTS TO LAND, HOUSING AND PROPERTY IN POST-CONFLICT SITUATIONS AND DURING RECONSTRUCTION: A GLOBAL OVERVIEW, A Research Study Conducted with the Support of the Government of Sweden, United Nations Centre for Human Settlements (Habitat), Nairobi 1999, p.28

²⁰ UDHR, Preamble

²¹ International Covenant on Economic, Social and Cultural Rights, adopted on 16th December 1966 by General Assembly Resolution 2200 (XXI), and entered into force on 03rd January 1976.

²² International Covenant on Civil and Political Rights, adopted on 16/12/1966 by General Assembly Resolution 2200 (XXI), Supp. No.16, U.N.Doc. A/6316 (1966). The ICCPR entered into force on 23/03/1976.

²³ Decided by the Committee on Economic, Social and Cultural Rights (CESCR) was established under ECOSOC Resolution 1985/17 of 28th May 1985. See UN Doc. EC/12/1991/41, <<http://www.unhcr.ch/tbs/doc.nsf/MasterFrameView/469f4d91a9378221c12563ed0053547e?Opendocument>>

²⁴ As per the other General Comments on the ICESCR, the right to housing consists of legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy, (GC 4, Para 8).

²⁵ Art.3 of ICCPR and ICESCR.

²⁶ Art.26. See further: WOMEN'S RIGHTS TO LAND, HOUSING AND PROPERTY IN POST-CONFLICT SITUATIONS AND DURING RECONSTRUCTION: A GLOBAL OVERVIEW, supra note 16 p.22

²⁷ Charlesworth H. and Chinkin C., The boundaries of international law, (2000), Juris Pub, Manchester University Press, p 215.

²⁸ The Constitution of the Democratic Socialist Republic of Sri Lanka, p 117.

period “*Land was not a marketable commodity, but it was the means of sustenance of everybody.*”²⁹ Pre-colonial Sri Lanka had a well-developed land ownership and tenure system, and generally the land law prevailed in the country were favourable for women.³⁰ However, with the change of economy during the period when the country was under colonial rule - from 1505 until the independence in 1948 - many aspects in the legal system had also been changed.³¹ Several gender discriminatory norms relative to land have been introduced by colonial powers, mainly the British, to the Sri Lankan legal system. These discriminatory legal norms and standards, such as ‘primogeniture’ and ‘coverture’ are still retained in some laws relative to private land³² as well as state land³³. Several attempts at land reform, by National Land Reform Committees of 1927, 1955 and 1987, and by Presidential Task Forces in 1990 and 1993 failed to guarantee the right to substantive equality for women in their rights relating to land. This is despite the constitutional guarantee of equality and non-discrimination as fundamental rights and several government pledges at international level to ensure parity between men and women in all rights.³⁴

The present government of Sri Lanka is attempting to reform the national constitution.³⁵ A formal platform for public representations on constitutional reform has been provided by the government by appointing, by the Cabinet of Ministers, a nineteen member committee to receive issues, concerns and opinion of the public. The Committee has presented a Report based on public representations.³⁶ One important recommendation of the Report is to recognize ‘land’ as a fundamental right.³⁷ The proposal has been made in the context where the three-decade long armed conflict between the government and the LTTE³⁸ resulted in the displacement of over a million people in the Northern Province of Sri Lanka. Thousands of people have still not been able to regain their land.

Land has been an issue of national importance and pre-armed conflict land deprivations on irrational grounds had been a contributory factor in the armed conflict.³⁹ In the present post-armed conflict context in Sri Lanka, rights relating to land have become a national concern and a key issue affecting all parties concerned and need to be addressed in a holistic manner.

Land and empowerment of women

The Sustainable Development Goals spell out gender equality as a specific goal to be achieved in the world by year 2030. The Target 5.a stresses the importance of undertaking reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws.⁴⁰ In a context where international attention has been focussed on eradicating discrimination against women and empowering them, it becomes increasingly important to recognize gender equality in rights relating to land in peace time as well as in conflict and afterwards.

In this context, empowerment remains as a fundamental ground to claim equal rights relating to land for women and vice versa. Land has also been recognized as the most valuable economic resource in the third world and also as a politically sensitive issue responsible for many a societal transition.⁴¹ Moreover, rights relating to land give a significant amount of control over the lives and rights of oneself and others.⁴² Land being the ‘most critical factor in women’s empowerment and their struggle for equality in

²⁹ De Silva M.U., Land Tenure, Caste System and the Rajakariya, under Foreign Rule: A Review of Change in Sri Lanka under Western Powers, 1597-1832, Journal of the Royal Asiatic Society of Sri Lanka, vol.xxxvii, 199-1993, pp.1-58, at p.1.

³⁰ Sir John D’Oyly, A Sketch of the Constituion of the Kandyan Kingdom, Op cit. p 67.

³¹ Sri Lanka was known as ‘Ceylon’ during the colonial times.

³² Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 1 of 1911 is an example where the concept of coverture is still retained. See ss 6, 7, and 8.

³³ See Land Development Ordinance No. 19 of 1935, s.72, Rule 1 of the Third Schedule where the concept of primogeniture has been retained relative to intestate succession in state land grants/permits.

³⁴ Sri Lanka has ratified, among other Conventions, the ICCPR, ICESCR and CEDAW.

³⁵ The Constitution of Sri Lanka, 1978.

³⁶ Public Representations Committee on Constitutional Reform, 10th May 2016.

³⁷ Ibid, Chapter 19.4

³⁸ LTTE stands for ‘Liberation Tigers of Tamil Elam’.

³⁹ Measures that have been taken by successive governments of Sri Lanka to alleviate landlessness have been recognized in the LLRC report as a cause which influenced the course of ethnic conflict. See the LLRC, para 6.1 at p.202; See further Bastian S., The Politics of Land Reform and Land Settlement in Sri Lanka, ICES, p.22.

⁴⁰ <www.un.org/sustainabledevelopment/sustainable-development-goals>

⁴¹ Korf, B., Ethnicized Entitlements in Land Tenure of Protracted Conflicts: The Case of Sri Lanka, Paper presented at the 9th Biennial IASCP Conference, Zimbabwe, June 2002, at p 2.

⁴² Rittich K., The Properties of Gender Equality, in Alston, P. and Robinson, M.,(ed.), Human Rights and Development-Towards Mutual Reinforcement, Oxford University Press, 2005, from pp.87-113, atp.99 citing Macpherson, C.B., *Property: Mainstream and Critical Position: A Reader*, et al.

gender relations', in the South-Asian socio-legal context in particular,⁴³ women's access and command over land determines their everyday survival⁴⁴, economic security, physical safety⁴⁵ and social status.⁴⁶

What entails 'empowerment'?

Sen defines empowerment as "replacing the domination of circumstances and chance over individuals by the domination of individuals over chance and circumstances."⁴⁷ In many contexts it refers to a process of emancipation from a state of unawareness and denial to one of actual control over decisions. As Agarwal argues, empowerment "enhances the ability of disadvantaged 'powerless' individuals or groups to challenge and change (in their favour) existing power relationships that place them in subordinate economic, social and political positions."⁴⁸ Thus the process of empowerment is a transformation of power relations between individuals and social groups in search of social justice. Empowerment is thus 'a non-linear process of change'.⁴⁹

Pallas analyses empowerment as transformation of: (a) ideologies (such as gender ideologies); (b) prevailing patterns of access to and control over resources (including land); and (c) the institutions and structures that reinforce and sustain existing power structures (such as the family, state, and market).⁵⁰ Social structures, which are created mostly by men, are generally based on cultural and religious ideologies, and they determine roles and entitlements of individuals. As a result of this role-determination being based on paternalist ideologies, women are disadvantaged as against men and are denied control over land or makes them completely landless, and invariably makes them poor and powerless,⁵¹ which results in women being placed at a status of subordination.⁵²

Empowerment of the disadvantaged individuals requires a transformation of these roles by shifting positions of individuals as well as deconstructing structures. On the contrary, state policy, law, and institutional mechanisms often reinforce patriarchal gender ideologies that restrict women's capacity, and weaken them. Ideological, economic, political and legal transformation that are geared towards enhancing women's ability to challenge, make decisions and take actions to change existing power relationships, which place them in subordinate economic, social, political and legal positions, are necessary in this context.⁵³

Empowerment through land: Global consensus and domestic laws

It has been globally recognized that sustainable development of the world is not possible without empowering women and that in order to achieve this, women and girls must enjoy equal access to economic resources and equality in decision-making at all levels.⁵⁴ Land is an economic asset, which effects decision-making both within and outside one's family. Yet, inequality between men and women in land rights prevails in many societies,⁵⁵ and gender equality in rights relative to land is primacy for empowerment of women.

There is global consensus that empowerment of women through land rights requires ideological deconstruction and social transformation as well as legal and institutional reform. For instance the UNDP measures on world development include gender

⁴³ Agarwal B., *A field of one's own*, Cambridge University Press, 1994, p.2. Agarwal states "Land defines social status and political power in the village, and it structures relationships both within and outside the household." See p.2

⁴⁴ Rachel Waterhouse, *Women's Land Rights in Post War Mozambique*, paper presented at the INTERREGIONAL CONSULTATION which states that because most women in Mozambique rely on subsistence agriculture, access to land ensures their livelihood, cited in Women's equal rights to housing, land and property in international law, UN-HABITAT, July 2006, p.12, <www.unhabitat.org>.

⁴⁵ Women's equal rights to housing, land and property in international law, UN-HABITAT, July 2006, p.12, <www.unhabitat.org>, accessed on 11.02.2013.

⁴⁶ Tsehainesh Tekle, *Women's Access to Land and Property Rights in Eritrea*, paper presented at the INTER-REGIONAL CONSULTATION, cited in Women's equal rights to housing, land and property in international law, UN-HABITAT, July 2006, p.14, <www.unhabitat.org>

⁴⁷ Sen, A., citing Marx, *Gender and Cooperative Conflicts*, July 1987, WIDER Working Papers, paper 18, atp11.

⁴⁸ Agarwal, B., *A Field of one's own*, n. 28, p.39

⁴⁹ From Marginalization to Empowerment: The potential of land rights to contribute to gender equality – observations from Guatemala, India and Sierra Leone, February, ActionAid, February 2013.

⁵⁰ Sabine Pallas, *Women's land rights and women's empowerment: one and the same?* 2010, <graduateinstitute.ch/webdav/site/genre/shared/.../Actes_2010_Pallas.pdf> accessed: 01.08.2016

⁵¹ Henninger, N., *Mapping and Geographic Analysis of Human Welfare and Poverty – Review and Assessment*, (1998) World Resource Institute, USA, p.5.

⁵² Beijing Platform for Action, A/CONF.177/20, 17 October 1995 Para 51.

⁵³ Agarwal B. 'A field of one's own', n.28, p.39, citing Bookman and Morgen (1988:4)

⁵⁴ TRANSFORMING OUR WORLD: THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT, A Report on Sustainable Development Goals, Sam Kutesa, President of General Assembly, 11 August 2015, p 6.

⁵⁵ Most prominent are the Food and Agriculture Organization of the United Nations (1995), the UNWOMEN, the UN Human Rights and the World Bank (2002); Crowley E. *Women's Right to Land and Natural Resources: Some Implications for a Human Rights-Based Approach*. Rome: FAO Rural Development Division; 1999.

empowerment,⁵⁶ including women's power over economic resources as a vital component.⁵⁷ Social, economic, political and legal changes that are geared towards enhancing one's ability to challenge, make decisions and take actions to change existing power relationships that place them in subordinate economic, social, political and legal positions have been recognized as necessary in this context.⁵⁸ States have committed for the empowerment of women at the Fourth World Conference on Women,⁵⁹ where equal access to land was recognized as a core component of advancement and empowerment of women.⁶⁰ By 2015 the states have gone beyond Beijing in their commitment in empowering women.⁶¹ Nations have pledged to achieve specific goals, including gender equality, by year 2030: equality between men and women in whatever rights relative to land being one special target in achieving this goal.

However, despite state commitment to adopt legislative and other measures for the advancement and empowerment of women on an equal basis with men⁶², and to update national action plan, and sustain firm commitment to gender equality and women's empowerment,⁶³ many states, including Sri Lanka, still retain, land laws that discriminate against women in general and mechanisms and traditions that deny some rights relating to land to certain groups of women identified on the basis of sex, ethnicity, and marital status in particular. The Land Development Ordinance⁶⁴ of Sri Lanka is an example for outright discrimination against women. Its declared objective is 'to provide for the systematic development and alienation of crown land in Ceylon'.⁶⁵ The intended beneficiaries were the 'middle class' landless. The Ordinance also lays down rules of succession. The LDO adopts a gender-neutral approach as far as alienation of land is concerned.⁶⁶ Yet, the Ordinance has been instrumental in establishing gender discrimination in relation to rights in respect of state land. It is based on two aspects: one is the surviving spouse's right to succeed to the permit/grant holder on the occasion of the latter's death intestate; the second point is the Third Schedule of the Ordinance which is based on the Roman-Dutch principle of male-preference primogeniture in case of grant/permit-holder's death intestate.

The status and rights of the 'surviving spouse' is questionable in light of the right to equality and non-discrimination recognized in the Constitution and applicable international standards. The LDO does not recognize the surviving spouse as a successor to a deceased intestate permit/grant-holder.⁶⁷ As per s.51 of the pre-amended statute a successor or a life-holder had to be nominated with prior written approval of the GA, with the exception where the nominee was the spouse of the permit/grant holder. As per the new s.51 introduced by Land Development (Amendment) Ordinance No.16 of 1969, only a spouse or a relative recognized in rule 1 of the Third Schedule can be so nominated. Accordingly, the surviving spouse has no holding to the land unless she has been nominated under s.51. The LDO of 1935 does not recognize a widow/er's right to succeed in absence of a nomination of the surviving spouse. It merely referred to 'the nominated successor', upon whose failure the rules in the Third Schedule apply.⁶⁸ The strict positivist approach adopted by the pre-independent parliament is demonstrated in the statute's total disregard of a spouse's rights, and its failure to recognize the spouse's contribution in developing the land and his/her right to be supported out of the proceedings of such developed land. This discriminatory attitude continues to affect women disproportionately, as state land permits and grants are issued to a male majority⁶⁹ notwithstanding the statute's gender-neutral wording.

However, a protectionist attitude towards women is demonstrated in s. 48(A) and (B) of the amendment, which guarantees the surviving spouse's life interest to the land of the permit/grant-holder, where s/he has not been nominated, until (if) 'the surviving spouse marries' after the death of the permit/grant-holder. S/he loses her life interest upon such marriage, but a nominated spouse does not lose her/his rights by reason of a re-marriage.⁷⁰ The new s.72 reinforces the surviving spouse's rights where it prescribes the application of the rules in the Third Schedule subject to the conditions, i.e. upon the death of a permit-holder/grantee (i) without leaving behind his or her spouse, or, (ii) upon the failure of such surviving spouse to succeed to that land, or (III) upon the

⁵⁶ Gender Empowerment Measure (GEM).

⁵⁷ The accuracy of these indices have been criticized by some (Bardhan, K.) due to inadequate emphasis on socio-economic realities, but these indices provide considerable overview on inequalities based on sex and gender across nations.

⁵⁸ Agarwal B. 'A field of one's own', n.28, p.39, citing Bookman and Morgen (1988:4).

⁵⁹ Beijing Declaration and Platform for action, See in particular paras 12, 13, 17, 19, 21 and 24.

⁶⁰ Ibid, Para 35.

⁶¹ In Beijing +20 Global Leaders' Meeting on Gender Equality and Women's Empowerment: A Commitment to Action", 80 states parties committed for women's empowerment - <http://beijing20.unwomen.org/en#sthash.v0I4axoT.dpuf>;

⁶² CEDAW Art. 2(b).

⁶³ <http://www.unwomen.org/en/get-involved/step-it-up/commitments/sri-lanka> accessed 28.09.2016

⁶⁴ The Land Development Ordinance No.19 of 1935, (herein after referred to as LDO).

⁶⁵ See Preamble. According to World Bank 1996 statistics 13% of the state owned land has been given to small holders under the LDO.

⁶⁶ See ss.2,24,26.

⁶⁷ See s.72.

⁶⁸ S. 72(1) and (2) of LDO No.19 of 1935.

⁶⁹ Pinto-Jayawardena K. and de Almeida Guneratne J., Is Land Just for Men?, (LST 2010), p 56.

⁷⁰ Proviso to s. 48(A) and (B).

death of such spouse.⁷¹ Accordingly, rules of the Third Schedule apply subject to the surviving spouse's rights enumerated under s.48 (A) and (B).

On the surface the statute looks fair by women as it uses the term 'spouse' instead of wife, and the Ordinance clearly recognizes the pre-emptive right of the spouse to succeed to the permit/grant, giving recognition to the established principles of matrimonial rights. However, there is a vast difference between a spouse who succeeds as a nominee and a spouse who succeeds by virtue of s.48 (A) of the Ordinance in relation to rights and entitlements. While a spouse who succeeds as a nominee enjoys all the rights that the original permit/grant holder had including the entitlement to apply to get the permit turned to a grant under s. 48 A (2), a non-nominated spouse is entitled only to a life interest of the land subject to limitations specified under s. 48 B(1). A very specific and an ambiguous one at that is the limitation based on 'remarriage' of the spouse who succeeds as a widow/widower of the permit/grant holder. This expresses the protectionist attitude towards women and their resulting disempowerment. As per s. 48 B(1) (a) the successor will lose her/his rights upon remarriage. As men predominate as permit-holders, this limitation disproportionately affects women. As Guneratne opines:

"...These provisions appear to be based on the assumption that the land is merely given to her for economic reasons. If she re-marries there is a further assumption that her present husband will provide her with economic support and therefore she will not require the land anymore. This structure is founded on the hypothesis that a woman must necessarily derive her economic support from her husband, and there is no necessity for her to have an independent means of income. ...Although this would theoretically apply to men as well, it is unlikely that policy makers envisage that a man would be compelled to choose between his land and his wife."⁷²

While the recognition of a spouse's pre-emptive right of succession is appreciated, this difference between a nominated and un-nominated spouse raises doubts as to the legislative intent. There cannot be such a difference if such grant is based on the recognition of the spouse's contribution during the marriage, in which case the re-marriage should not affect his/her being recognized as the recipient.

Moreover, the LDO deals with state lands and a permit/grant-holder do not have unlimited rights over the land upon which s/he holds a permit/grant. In this context, the only rational legislative intent that may be perceived as to the limitation on spouse's remarriage is 'prevention of sub-division'.⁷³ Even if this was the legislative intent, the difference between a 'nominated' and 'un-nominated' spouse cannot be conceived. The irony of this ambiguity lies in the patriarchal attitudes associated with land alienation under the Ordinance, i.e., as of practice, both administratively⁷⁴ and customarily by applicants⁷⁵ land permits/grants are generally applied by and issued to men. In this context the 'surviving spouse' invariably means a 'widow', and unless she is nominated by her deceased husband, she loses even her limited rights once she remarries.

The second basis for criticism on gender-based discrimination lies in the Third Schedule of the Ordinance according to which the title to the land alienated under the LDO should devolve.⁷⁶ As per s.1 of the table given in the Third Schedule of the LDO, the order 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.

Accordingly, subject to the title of the surviving spouse, only one relative of the owner will succeed in the order of priority mentioned in the Third Schedule. This is a direct application of the concept of primogeniture recognized in the Roman-Dutch law into Sri Lanka law. It depicts direct discrimination against women in succession to state land granted under the Land Development Ordinance.⁷⁷

The Matrimonial Rights and Inheritance (Jaffna) Ordinance⁷⁸ fits into the second category where 'command over land' has been effectively used to disempower women. The JMARIO contains specific provision relating to husband's marital power over wife's immovable property. The Ordinance sought to amend the law relating to the matrimonial rights of Tamils who, at the time, were

⁷¹ The rights of the 'surviving spouse' are re-established in s.73 of the Act. 16 of 1969.

⁷² Guneratne C., Women and Land Rights in Irrigation Settlement Schemes in Sri Lanka, CENWOR Study Series No. 35, (2006), p.15.

⁷³ Speech delivered by Hon.D.S.Senanayake, Minister of Agriculture and Lands in the State Council of 1931-1935, on 14th March and 13th October 1933, in Land Marks in Sri Lanka's land Policy, LDO Golden Jubilee Publication, UNDP, 1985, p 56.

⁷⁴ Pinto-Jayawardene K. and Almeida Guneratne J., Is Land Just for Men? n 54, refers to the administrative practices carried out according to misinterpretations in the related guide book. based on public interviews, see. pp 62-63.

⁷⁵ Ibid.

⁷⁶ Land Development Ordinance S. 72.

⁷⁷ Goonesekera S., SRI LANKAN WOMEN'S RIGHT TO HOUSING AND LAND: THE RHETORIC OF EQUALITY AND THE REALITY OF STATE ACTION, in Charting Pathways to Gender Equality – Reflections and Challenges, (CENWOR 2010), pp 46-47.

⁷⁸ Matrimonial Rights and Inheritance Ordinance (Jaffna) 1 of 1911(as amended by Act No. 58 of 1947), herein after referred to as JMARIO.

governed by the *Tesawalamai*.⁷⁹ The paternalistic approach adopted by the legislature in relation to the Tamils who were governed by *Tesawalamai* is reflected in the statute, which says that the applicability of the law to spouses is determined on the issue whether the husband is governed by *Tesawalamai*, and accordingly, the wife is to follow the law applicable to the husband.⁸⁰ This very provision clouds the married woman's independent status.

The most serious violation of the right to equality of women governed by this law is reflected in s.6 of the Act which prohibits a married woman to dispose or deal with her immovable property in any other way unless with the written consent of her husband, depriving her the right to *locus standi in judicio*.⁸¹ This reflects the influence of Roman Dutch Law on *Tesawalamai*.⁸² Section 8, which is similar to section 11 of the Matrimonial Rights and Inheritance Ordinance of 1876, however, provides an alternative to husband's consent. In section 8 husband's marital power is replaced with the District Court's permission where the husband has deserted her or separated from him by mutual consent or 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 require that such consent should be dispensed with.⁸³ Even though some relief is granted to the wife in section 8, it retains her status as a perpetual minor as long as the marriage subsists.

These provisions of the JMPIO challenge both the right to use one's property as well as the owner's "power over others by virtue of a capacity to dictate the use"⁸⁴ As Kant theorises, the owner's right is the "sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom."⁸⁵ Limitations contained in these statutory provisions violate this universal right to freedom.

The legislative intention to discriminate against women is further evidenced by the removal, by the 1911 Ordinance, of the previous restriction imposed on the husband regarding the disposal of his hereditary property. The use of land as a strategy to maintain a power gap between spouses is further evident in section 7 of the Act which in very clear terms states that a husband can, on his own, dispose and deal with his separate property. The removal of the restriction makes a clear distinction between a Tamil husband and a wife, discriminates against her and leaves the wife with no say about her husband's property.

This power gap not only challenges the individual autonomy of married women reflecting them as weak and wretched compared to their male counterparts, but also integrally contributes to the maintenance of a sex-based underclass and to deprive women on the basis of their subordinate position. Also, this discriminates and disadvantages them violating their fundamental right to equality, denying them the right to development, depriving their well-being and disempowering them.

Conclusion

Land not only provides a source of income for consumption; access to and command over land change the way people think and interact with the world.⁸⁶ Rights relative to land are important to civil and political empowerment of women⁸⁷ as much as to economic and social empowerment.⁸⁸ Moreover, ownership and control rights relating to land minimises their dependence on family and is a key determinant in women's bargaining power,⁸⁹ which empowers women⁹⁰ directly as well as indirectly.⁹¹ As

⁷⁹ *Tesawalamai*, meaning customs of the land, is the personal law applicable to Tamils of the Northern Province of Sri Lanka.

⁸⁰ See s 3.

⁸¹ This means legal standing before a court.

⁸² Goonesekere, S., *The Legal Status of the Female in the Sri Lanka Law on Family Relations*, (Gunasena, Colombo 1980), p 32.

⁸³ S. 8

⁸⁴ Harris J.W., *Property & Justice*, 1996, Oxford, Oxford University Press, p 4.

⁸⁵ Kant E., 1797:133

⁸⁶ Sherraden, M. and Morris, L., (Ed.s), *Assets and the Poor: Evidence from Individual Development Accounts Chapter in Inclusion in the American Dream: Assets, Poverty, and Public Policy*, Center for Social Development George Warren Brown School of Social Work, (2003).

⁸⁷ Alexander, S., *Shana Alexander's State-by-State Guide to Women's Legal Rights*, Los Angeles: Wollstencraft, 1975; Dubler, A.R., *Wifely Behaviour: A Legal History of Acting Married*, *Columbia Law Review*, 100(2000) 957-1021; Edelman, J.D., *Marital Status Discrimination: A Survey of Federal Case Law*, *West Virginia Law Review*, 85 (1983), 347-369; Rittich K., *The Properties of Gender Equality*, in Alston P. and Robinson M., *Human Rights and Development: Towards Mutual Reinforcement*, (Oxford University Press 2005), 87-113, atp109.

⁸⁸ Crowley, E., *Women's right to land and natural resources: Some implications of a rights-based approach*, in *A rights-based approach to women's empowerment and advancement and gender equality*, UNDAW Workshop Report, 1998, pp145-147.

⁸⁹ Agarwal, B., "Bargaining" and Gender Relations: Within and Beyond the Household, *Institute of Economic Growth* (1997), 7-8,

< www.binaagarwal.com/downloads/apapers/bagaining_and_gender_relations.pdf>

⁹⁰ Daley, E., Elower, C., Miggiano, L., Pallas, S., *Women's land rights and gender justice in land governance: pillars in the promotion and protection of women's human rights in rural areas*, *International Land Coalition*, (January 2013), p 4.

Gomez and Landessa argue that ‘Without the basic recognition of women’s capacity and right to make fundamental decisions about their lives, women will remain relegated to the side-lines of society, among the first to suffer hardship and homelessness, violence and exploitation.’⁹² Moreover, women are unlikely to be discriminated against and ill-treated in family where they have command over land.⁹³

Access and command over land, rather than mere access, are critical in empowerment. In a context where women are disempowered using land rights as a mode, women’s empowerment calls for shared power and responsibility in relation to land. The sentiment expressed by women when they obtained title for the land they cultivated after the Bodhgaya struggle in Bihar in 1970, explains this reality vividly: “Earlier, we had tongues but could not speak. We had feet but could not walk. Now that we have the land we have the strength to speak and walk!”⁹⁴

Nevertheless, there seems to be a force, which prevents law makers from either realizing this or stops them from transforming this reality into practice. It is common in South Asia. Unlike women in China and Bihar, as stated above, Sri Lankan women’s right to own land has not been denied. Yet, women governed by Tesawalamai lack command over land they own: they have teeth, but unable to bite with their locked jaws. Thus it may be argued that reform of these laws, policy, institutional arrangements and oppressive social relations and structures that disempower women through the denial of equal rights relating to land need urgent and calculated reform in order to empower these women.

⁹¹ Moser C., ‘Asset Accumulation Policy and Poverty Reduction’ in Caroline Mosser (ed.) *Reducing Global Poverty, The Case for Asset Accumulation*, Washington DC; Brookings Institute Press. (Cited in Kelkar G. and Krishnaraj M. (ed.), *Women, Land and Power in Asia*, Introduction, (Routledge, New Delhi 2013).

⁹² Gomez M. and Landesa D.H.T., *WOMEN’S LAND AND PROPERTY RIGHTS AND THE POST-2015 DEVELOPMENT AGENDA*, The Global Initiative for Economic, Social and Cultural Rights, Center for Women’s Land Rights, (October 2012).

⁹³ Unni J. Property Rights for Women: Case for Joint Titles to Agricultural Land and Urban Housing. *Economic and Political Weekly* 1999:34.

⁹⁴ One of the women from the Bodhgaya land movement in India as quoted by Alaka and Chetna (1987).