

# THE POLICY BRIEF

## GENDER DISCRIMINATORY LAND INHERITANCE

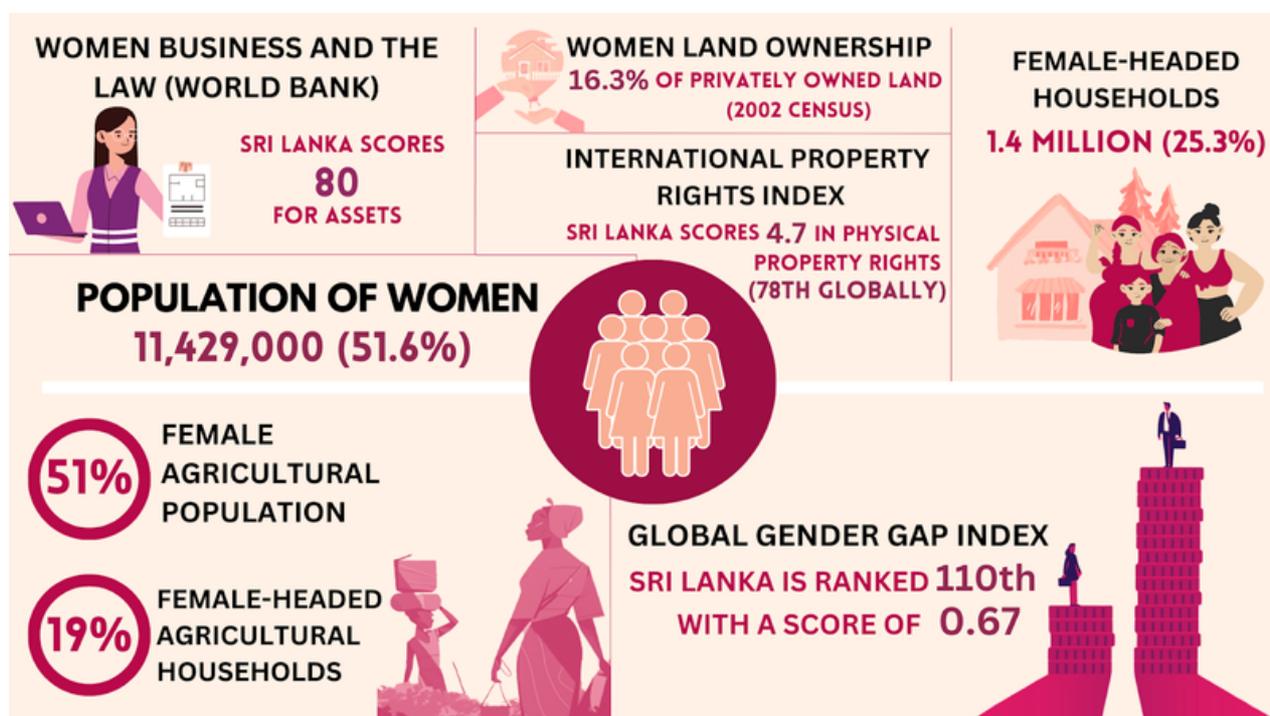
### Introduction

Property rights are crucial for economic development. The ability to own property without any legal barriers will enable the effective integration of women into a country's economy. However, according to a recent study by the World Bank, two-fifths of countries worldwide limit women's property rights.<sup>1</sup>

When it comes to owning land, the interconnection between women's right to own land and the upliftment of their lives including the lives of those around them is evident. Land has been said to be 'survival, an income, a chance to feed, cloth, house and educate their children. Land is also a chance for entrepreneurship.<sup>2</sup> Land ownership is therefore important not only within the economic sphere but also within the social and political spheres,<sup>3</sup> as it affords autonomy to women. The intrinsic connection of land to one's identity is also noted in the literature.<sup>4</sup>

**Women in Sri Lanka account for 51.6% of the total population, yet only 16.3% of all privately owned land is held by women.**

**This disparity is further exemplified by Sri Lanka's ranking in the International Property Rights Index where it is 78th globally.**



The focus of this brief is to take a close look at one component of land rights, i.e., women's land ownership, limited to acquiring land rights through inheritance. This brief will focus on the general law and identify certain legislations and related policies that operate to discriminate against women.

## Land Development Ordinance, No.19 of 1935 (LDO) <sup>5</sup>

According to section 48B, a spouse has a pre-emptive right to succeed to any permit or holding granted under the LDO. While the wording of section 48B appears to be gender neutral, concerns have arisen through the practical application of this section. Prior studies have found that the male spouse is prioritized and granted permits as opposed to a female spouse in a similar situation.<sup>6</sup> In such situations, relevant officials often resort to the option of prioritizing the eldest male as the recipient of land,<sup>7</sup> subject to the life interest of the widow in the land. Recent interviews conducted confirmed continuation of this practice among officials.

Officials often cited a handbook as the source of authority for this practice. This guidance document was prepared by the Land Commissioner's Department in Colombo in July 1985 titled "රජයේ ඉඩම් පිලිබඳ කාර්ය සංග්රහය" and has also been interchangeably referred to as the 'Athapotha,' the functional code, code or law.<sup>8</sup> In this handbook, under the section on orders, clause 143 states that, 'upon the death of a permit holder, the spouse, whether nominated or not, has a life interest in the land. In such a situation the spouse shall have a life interest but shall not be entitled to nominate a successor'.

The tendency for discrepancies in practice are relevant in relation to the recent amendments. Prior to the Land Development (Amendment) Act, No. 11 of 2022, the third schedule to the LDO itemized the order of inheritance of a permit, where the male counterpart was favored. Ex: sons over daughters. Attempts have been made to reform the principles of the LDO for several decades, but have come into effect only with the 2022 amendment.<sup>9</sup> Despite the reforms to the law, there appear to be significant discrepancies in practice.

## Land Grants (Special Provisions) Act, No. 43 of 1979 (LGA) <sup>10</sup>

Section 10 of the LGA states that males are preferred over their female counterparts when inheriting a land grant. The order of inheritance in this provision is identical to the order in the discriminatory third schedule of the LDO prior to the 2022 amendment. Despite the recent amendment to the LDO which removed the gender discriminatory aspect of preference being given to male counterparts, the identical provision seen in section 10 of the LGA remains unchanged.

## Kandyan Law Declaration and Amendment Ordinance No.39 of 1938 (KLO) <sup>11</sup>



A woman (subject to Kandyan Law) married in a diga form of marriage, forfeits her right to inherit paraveni property.<sup>12</sup> According to section 9(1) of the KLO, a woman married in diga cannot regain her lost rights by a later change in residence or conduct.

Prior to the KLO, a diga married daughter who did not sever ties with the family maintained her inheritance rights.<sup>13</sup> However, the current position as interpreted by the courts is that even in the event of a dissolution of marriage, that a diga married daughter could not re-acquire her binna rights.<sup>14</sup> Given the above, at present, a diga married daughter is disadvantaged as she is deprived of her right to inherit paraveni property upon her marriage.

Further, under section 12 (1) if a daughter marries in diga after her father's death, she is legally compelled to hand over her share of the paraveni property, if requested by her brothers or binna married sisters for a fair market value. Thus, a woman married in binna has better rights to her parents' property than a woman married in diga.

Under section 11 of the KLO, upon an intestate death of the husband, a wife is not considered to be an heir to both paraveni and acquired property.<sup>15</sup> For example a brother (of the husband) who does not make any contribution to the husband's family, is preferred over the wife.<sup>16</sup>

As per Section 11(1)(d) the widow inherits as an heir for both paraveni and acquired property only in the absence of all other heirs<sup>17</sup> which includes step-siblings.<sup>18</sup>

## **Jaffna Matrimonial Rights and Inheritance Ordinance (Jaffna) No. 1 of 1911 (JMARIO) <sup>19</sup>**

Under the old Tesawalamai principles, the thediatheddham was considered to be common property to which both husband and wife were entitled on an equal basis.<sup>20</sup> However, this was altered through section 19 of the Jaffna Matrimonial and Inheritance Rights Amendment Ordinance No 58 of 1947.

These amendments to the JMARIO paved the way for contradictory judicial opinions.<sup>21</sup> In one dispute the court stated that the thediatheddham acquired by one spouse belongs to that spouse and no share is vested with the other spouse.<sup>22</sup> In a later dispute, the court held differently and stated that the thediatheddham was common property to which both parties have equal rights.<sup>23</sup> Though the latter position is maintained as the present approach to the topic, there is no assurance that this position will prevail continuously, and a future court might adopt the reasoning based on a strict interpretation of Section 20 of the JMARIO.<sup>24</sup> A reversal in this judicial approach could place a widow, potentially one who has undertaken the role of homemaker, in a disadvantageous position.<sup>25</sup> Further, in certain instances the said issue can worsen as a surviving spouse only succeeds to property in the absence of all heirs.<sup>26</sup>

Sections 6 and 7 impose restrictions on women when dealing with separate immovable property. This even includes property that they have acquired for themselves through inheritance. This gendered approach was introduced through amendment no.58 of 1947. Courts have found that the husband can dispose of the thediatheddham without the consent of the wife in several cases in the past.<sup>27</sup> However, if a wife violates the conditions laid down by the court when granting permission, the husband has a right to bring the violation to the notice of the court and the court will invalidate the transaction.<sup>28</sup>

Section 34 of the JMRO coerces the sentiment that the woman would have to solely provide for her child in the case of illegitimacy. According to available literature, illegitimacy is a concern particularly in the North as there were customary marriages that were entered into during the conflict which remain unregistered, which has raised issues relating to the legitimacy of the children.<sup>29</sup> However, the principle of an illegitimate child inheriting only the intestate mother's property, is present under the general law as well.<sup>30</sup>

In reality, considering the high number of female-headed households, particularly in the North, the practical implications of these restrictions is that those women who wish to deal with their property, in the absence of their husbands, are left with no choice but to undergo a long process of litigation.<sup>31</sup>

### **Debt Conciliation Ordinance No.39 of 1941 (DCO)<sup>32</sup>**

The DCO provides for a debtor to make an application for relief before the expiry of the date specified in the legal instrument mortgaging his property. In the event of the death of the original mortgagor, the persons who can recourse to this mechanism in their place become important, particularly if they live on this same property.

The issue arises in situations of customary law application.

Under Tesawalamai, if the property the widow resided in was a mortgaged property constituting part of the separate property of her deceased husband, she is not entitled under the DCO to apply to the Debts Conciliation Board.<sup>33</sup>

Under Kandyan Law, due to a widow only receiving a life interest in her deceased husband, if a widow resides on the husband's property, such property being mortgaged, she will be denied making an application under the DCO.<sup>34</sup>

### **Rent Act No. 7 of 1972 (RA)<sup>35</sup>**

According to section 36, a widow can succeed as a tenant at business premises only if they carry on the same business. This may lead to discrimination in practice, if the deceased tenant used the business premises for both business and residential purposes, the widow will not be able to remain in the premises after the death of her husband if she was not involved in the business or fails to continue to carry on the same business.<sup>36</sup>

## **Reform Recommendations**

### **Policy Reforms**

- Ensure through the Ministry of Land and Tourism measures are taken so that administrative practices under the LDO, are not applied in a discriminatory manner against the female spouse.
- Provide training and instructions on the application of the recent amendment to the LDO to officers involved in transferring of land.
- Encourage comprehensive research on the practices of succession under the Muslim Succession Ordinance, to identify (if any) discriminatory practices exist in relation to inheritance which require further discussion.
- Urge the Ministry of Land and Tourism to improve the availability of up-to-date information on land ownership through institutions such as ICTA.

## Legal Reforms

### Land Grants (Special Provisions) Act

- Amend the list setting out the order of inheritance in Section 10, to reflect the amendments made to the Third Schedule of the LDO, in Land Development (Amendment) Act, No. 11 of 2022.

### Debt Conciliation Ordinance

- Amend Section 64 of the Debt Conciliation Ordinance to include a surviving spouse.

### Rent Act

- Amend Section 36 of the Rent Act to account for instances of the business premises being utilized for both residential and business purposes.

### Kandyan Law Ordinance

- Amend section 9(1) to reflect a change in a residence following the divorce or death of the spouse to entitle a female married in diga to have the succession rights of a female married in binna.
- Amend section 11 to reflect the widow's entitlement to a share of the acquired property, and in the event, there is no acquired property, or if that share is insufficient for her maintenance, then a share of the paraveni property.
- Review repealing section 12(1)

### Matrimonial Rights and Inheritance Ordinance (Jaffna)

- Amend section 6 to allow a woman to dispose of her immovable property without her husband's consent.
- Amend section 7 to prevent a husband from disposing of the thediatheddham without the wife's consent.
- Amend section 20, to reflect the position in Manickckavasagar v. Kandaswamy.
- Amend section 21, so that the current provision is 21(b), and insert section 21(a), which will provide for the surviving spouse to inherit half the separate property.
- Amended section 34 to allow an illegitimate child to inherit from both intestate parents.

## References

1. Nisha Arekapudi and Nayada L. Almodovar- Reteguis, 'Women's property rights are the key to economic development', World Bank Blog, 24 February 2020, at <<https://blogs.worldbank.org/developmenttalk/womens-property-rights-are-key-economic-development>> citing the Women, Business and the Law 2020 at <<https://openknowledge.worldbank.org/bitstream/handle/10986/32639/9781464815324.pdf>>.
2. "Importance of Property Rights for Women," LandLinks, September 5, 2019, <<https://www.land-links.org/2019/09/importance-of-property-rights-for-women/>>; Rose Wijeyesekera, "Equal land rights for empowerment of women: A South Asian perspective with special emphasis on Sri Lanka," International Journal for Studies on Children, Women, Elderly And Disabled 1 (January 2017): 64-72; Ranmini Vithanagama, "Female Labour Force Participation in Sri Lanka's Eastern Province" (International Centre for Ethnic Studies, 2020), 92, <<https://ices.lk/wp-content/uploads/2021/01/Factors-Associated-with-Female-Labour-Force-Participation.pdf>>; Bina Agarwal, "Gender and Land Rights in Sri Lanka," (International Labour Organization, World Employment Programme, Geneva 1990).
3. Viyanga Gunasekera, "Women and Land in Sri Lanka: A Literature Review," (International Center for Ethnic Studies, 2021), 2
4. Sharika Thiranagama, In My Mother's House Civil War in Sri Lanka (University of Pennsylvania Press, 2011).
5. Hereinafter referred to as the LDO. The LDO, was enacted to provide for the systematic development and alienation of land in Sri Lanka. The LDO contains provisions that relate to granting of permits and land grants for individual persons to hold land and sets out the procedure of nominating a successor to the acquired land after the demise of the original permit holder
6. Hereinafter referred to as the LDO. The LDO, was enacted to provide for the systematic development and alienation of land in Sri Lanka. The LDO contains provisions that relate to granting of permits and land grants for individual persons to hold land and sets out the procedure of nominating a successor to the acquired land after the demise of the original permit holder. Law and Society Trust, "Is Land Just for Men? Critiquing Discriminatory Laws, Regulations and Administrative Practices relating to Land and Property Rights of Women in Sri Lanka," ed. Kishali Pinto-Jayawardena and Jayantha Guneratne, (Colombo: Law and Society Trust, 2010); Key Informant Interviews.
7. Law and Society Trust, "Discriminatory Laws, Regulations and Administrative Practices".
8. Law and Society Trust, "Discriminatory Laws, Regulations and Administrative Practices," 28-30.
9. Jayantha Guneratne, "Path to Law Reform- The Law Commission as a Statutory Institution," The Law Commission of Sri Lanka, Commemorative Journal 203: 37,38.
10. Hereinafter referred to as the LGA. Following the land reforms of 1972, private land which was seized under the Land Reform Act No 1 of 1972, was vested in the State under the Land Reform Commission. The LGA provides that this land vested in the Land Reform Commission (LRC) can be distributed to the landless free of charge through land grants. The LGA sets out how grants can be issued by the LRC and the rules governing such land grants.
11. Hereinafter referred to as the KLO. Key statute governing inheritance under Kandyan Law at present.
12. Gunasekera, "Women and Land in Sri Lanka," 13,14.
13. Mampitiya v. Wegodapola (1922) 24 N.L.R. 129: The court having considered the views of experts on Kandyan Law, decided that a diga married daughter who had not left her ancestral home or mulgedera did not lose her inheritance rights to paraveni property; Seneviratne v. Halangoda (1921) 22 N.L.R. 462: The court held that forfeiture of inheritance rights did not depend on the form of marriage but on the proof of actual severance from the parental home and that it was possible to establish that the diga married daughter had retained binna rights or reacquired binna rights.
14. Though in Rana v. Kiribindu (1978) 79(2) N.L.R 73, the court held reacquisition of binna rights was possible after the dissolution of the marriage; in Jayasinghe v. Kiribindu (1997) 2 Sri L.R. 1, the Supreme Court strictly interpreted Section 9 (1) of the KLO and held that a diga-married daughter could not re-acquire her binna rights after the dissolution of the marriage, by residing in her mulgedera.
15. Law and Society Trust, "Discriminatory Laws, Regulations and Administrative Practices," 61.
16. Law and Society Trust, "Discriminatory Laws, Regulations and Administrative Practices," 63.
17. Isankhya and Helan Menaka, "Gender Discrimination against Women in Intestate Succession; An Analysis on Thesawalamai and Kandyan Law in Sri Lanka," 16th Asian Law Institute Conference (ASLI-2019) Hosted by the Faculty of Law, National University of Singapore 11th and 12th of June 2019 <<http://archive.cmb.ac.lk:8080/research/handle/70130/4648>>.

18. *Lydia v Kiri Ukkuwa* (1967) 70 N.L.R. 272: Preference was given to the half-brother and sisters of the deceased and the widow was only entitled to a life interest over half of the acquired property. If no heirs existed, the widow would have inherited the acquired property.
19. Hereinafter referred to as the JMPIO. The Tesawalamai Law governs Tamils who are permanent residents of the Northern Province. Unlike the other types of personal laws, Tesawalamai governs only matrimonial property and inheritance issues and does not apply to matters of marriage and divorce. Provisions of the Tesawalamai are mainly codified in the Tesawalamai Regulation of 1806 and the JMPIO.
20. *Nalliah v. Ponnammah* (1920) 56 N.L.R. 44: both husband and wife were equally entitled to the *thediatheddham* property.
21. Law and Society Trust, "Discriminatory Laws, Regulations and Administrative Practices," 58,59.
22. *Kumaraswamy v. Subramaniam* (1954) 56 N.L.R. 44: As opined by Gratian J, further stating that if the other spouse predeceases the acquiring spouse, the *thediathettam* which was acquired does not devolve on anybody as it does not belong to the non-acquiring spouse.
23. *Manickckavasagar v. Kandaswamy* (1986) (2) Sri L.R. 8: Half of the *thediatheddham* vests automatically on the non-acquiring spouse from the moment of acquisition. According to the new amendment in 1947 upon the death of a spouse, the surviving spouse obtains half of the *thediatheddham* that belonged to the deceased spouse. Thus, the surviving spouse will become entitled to  $\frac{3}{4}$  share of the *thediathettam*.
24. Law and Society Trust, "Discriminatory Laws, Regulations and Administrative Practices," 59,60.
25. Kamala Nadaraja, *Matrimonial Property and Gender Inequality: A Study of The sawalamai*, (Stamford Lake Publication, 2008), 271.
26. JMPIO Sec 21: Subject to the right of the surviving spouse in the preceding section mentioned...(in relation to *thediatheddham*)..., the right of inheritance is divided in the following order as respects (a) descendants, (b) ascendants, (c) collaterals; Law and Society Trust, "Discriminatory Laws, Regulations and Administrative Practices," 58, as a practical consequence, if the couple did not have any *thediatheddham* but the husband had inherited a large number of valuable properties, the wife gets nothing after his death.
27. *Seelatchy v Visuanathan Chetty* (1922) 23 N.L.R. 97: The husband should be the manager of the common property. He can freely sell and mortgage common property without the consent of his wife. *Sangarapillai v Devaraja Mudaliya* (1936) 38 N.L.R. 1: The husband is the sole and irremovable attorney of his wife with regard to alienations property by sale or mortgage. *Naganathar v. Velautham* (1953) 55 N.L.R 319: The Ordinance prevented the wife from disposing of her own property from disposing without her husband's consent.
28. Law and Society Trust, "Discriminatory Laws, Regulations and Administrative Practices," 57.
29. Danesh Jayatilaka and Kopalapillai Amaraingam, "The Impact of Displacement on Dowries in Sri Lanka," (Brookings Institute, 2015), 17.
30. Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.
31. Gunasekera, "Women and Land in Sri Lanka," 32,33.
32. Hereinafter referred to as the DCO. The DCO establishes a Debt Conciliation Board and provides for the settlement of disputes between debtors and creditors through conciliation.
33. Law and Society Trust, "Discriminatory Laws, Regulations and Administrative Practices," 49.
34. Law and Society Trust, "Discriminatory Laws, Regulations and Administrative Practices," 49.
35. Hereinafter referred to as the RA. The RA was an Act to amend and consolidate the laws relating to rent restrictions. The RA provides for restrictions on unreasonable increases in rent by landlords, prevention of arbitrary eviction, and control of letting and subletting among other matters.
36. Law and Society Trust, "Discriminatory Laws, Regulations and Administrative Practices," 46; *Gomez v Bernard* (1993) 1 Sri L.R. 396.

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