

Reforming the Land Policies and Land Laws in Sri Lanka

Five Policy Briefs on selected issues

Institute for Constitutional Studies

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Foreword

Institute for Constitutional Studies (ICS) commissioned a study on Key Land Laws in Sri Lanka during 2017-2018 in order to identify the priority areas for which the attention of policy makers and the administrators is required. These policy briefs are prepared focusing on the five important areas identified by that study.

Mr. V.K.Nanayakkara, a retired senior public officer who held the position of Ministry Secretary and Director of Hector Kobbekaduwa Agrarian Research & Training Institute (HARTI) prepared these policy papers following the guidelines provided by the ICS.

The five policy briefs are in three languages. Therefore not only the policy makers, the land administrators but also the ordinary citizens of this country will be benefitted by the publication. These publications are prepared as one of the activities of project sponsored by Oxfam, Sri Lanka.

Author

V. K. Nanayakkara (B.A. Ceylon, Master in Public and International Affairs, Pittsburgh) is a former Secretary to the Prime Minister, Government of Sri Lanka. In a career spanning 37 years in the Sri Lanka Administrative Service, he held senior positions as Secretary, Ministry of Education, Secretary, Ministry of Housing and Urban Development, and Secretary to the Project Ministry of Environment as well as Additional Secretary in the Ministries of Public Administration, Defence and Health.]

POLICY BRIEF NO 1

Legal and Policy Reforms on Securing Land Rights of Women

1.1 The Policy Problem

The central objective of the current policy brief is to advocate necessary reforms in laws and policies related to land ownership, alienation and administration of state land in order to eliminate some of the damaging effects of discrimination of women caused by the law and policy. Secondly, it will make an effort to ascertain what policy changes might be needed to achieve a society free from discrimination on the basis of gender. This policy brief intends to build a solid foundation for policy prescriptions related to the re-appraisal of women's place in society, particularly in respect to land rights.

1.2 Problem Definition

The idea of land policy reform as a stimulus for women's emancipation has gained importance with governments. Land rights can unleash the potential for women to increasingly exert their other rights, thus expanding their freedom, including their freedom from hunger and poverty. Secure access to land provides the most viable opportunity for poor rural women to improve their livelihoods, reduce their vulnerability and manage the natural resources they depend on in a sustainable manner.

The poor women's representation in the multilayers of governance institutions even after 65 years of independence can be used as an indicator of women's status in the system pointing to the discriminatory treatment that exists in the field of land and property rights. Female representation at national, provincial and local levels is extremely low in Sri Lanka. Sri Lanka has a favourable gender ratio of over

51%. However, the participation of women in the elected democracy is low. Women are found in decision-making positions in all sectors, but their presence remains around 5%. Many sections of the country's population, including women, rural populations, marginalized and vulnerable groups do not participate in the electoral process or are left out, often due to violence and unfair practices. Most local government bodies are inherently patriarchal institutions. Their structures and procedures are designed for and by men and they do not take into account women's multiple responsibilities in their homes and communities. In Local Government, Sri Lanka's ranking in terms of female representation is critically low and is less than 2%. All countries in South Asia have better representation of women than Sri Lanka despite Sri Lanka's far grander quality of life indicators.

Women's rights to own, inherit and control property on an equal basis with men are violated in Sri Lanka, contributing to homelessness, dispossession and violence. Therefore, the State should pursue appropriate action in order to create an environment where females are treated equally and equitably. However, in order to do that, existing state policies and legislative enactments need substantial revision.

Provisions under the Land Development Ordinance and the patriarchal practice of allocating a land to male 'heads of households' have deprived women of their land rights, without improving their skills and situation as agricultural producers. Please see sections 1.5.1 and 1.5.2 below for further elaboration of the issues.

In contexts of unstable national economies, speculation on rural land provides an attractive investment option for urban elites, thus further marginalizing rural poor people who rely directly on the land for their livelihood but may not be able to enjoy legal ownership of it. Poor rural vulnerable groups are affected by demands for land by agribusiness, plantation and other commercial interests. Decision making surrounding commercial interests favours an urban political and economic elite which indirectly violates the land rights of rural women who occupy state land with or without permits as the agencies may try to evict these people as encroachers. This reinforces the need for the voice of the marginalized to be included in decision making on land policy.

Accordingly, leverage should be increased for weaker social groups, such as the landless, small holder farmers, women, internally displaced persons to negotiate with stronger interests, such as government departments, plantation owners and commercial entities participatory dialogue on land rights to generate meaningful change.

The concept of a female head of household is virtually non-existent in administration. Even in instances of loss of property due to a Tsunami or a landslide, any alternate land is given in the name of the head of the household, who is a male. *GramaNiladharis* do not recognize a woman as the head of the household.¹This is despite women being agents of action in re-building in the post disaster and post-conflict context.

Gender roles: In most rural societies, gender recognizes a triple role namely productive, reproductive and community managing. Being an essentially agricultural society, Sri Lanka continues with these gender roles. In respect of the productive role, the work done by women includes both market production and subsistence/home production with actual use value and exchange value. For women engaged in agricultural production, this comprises work as self-regulating growers, wage labourers and peasant wives.

Their reproductive role includes child-bearing responsibilities and performance of household chores. Apart from biological fecundity, it involves the care and maintenance of the current workforce (male partner and working children) and the future workforce (infants and school-going children).

The third role, namely, the community managing, comprises activities women undertake at the community level - the provision and maintenance of scarce resources such as potable water, sanitation, education, nutrition and health care. This is voluntary, unpaid work. Nonetheless, the males dominate the political activities in the community.

¹ Personal interview with MsKumuduPerera, Legal Officer, Ministry of Women and Child Affairs on 29 November, 2017

1.3 Background

1.3.1 Legal Context

Equality is one of the founding principles of the Universal Declaration of Human Rights (UDHR), International Covenant for Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These documents highlight the obligation of all state parties to ensure equality to all its citizens.

In 1981, Sri Lanka ratified the UN Convention on the Elimination of All Forms of Discrimination against women, the most important international instrument in terms of women's rights. It mandates state parties to set in place the mechanisms to fully recognize women's rights, to eliminate gender discrimination and to promote the maximum participation of women on equal terms with men in all fields. Yet, the Land Development Ordinance and its subsequent amendments and several personal laws in Sri Lanka continue to erode the rights of women to land ownership.

Unfortunately, one notable drawback exists in the Sri Lankan Constitution which denies the obligation to equal treatment. Article 16 of the Constitution restricts the application of fundamental rights in Chapter III. It permits existing written and unwritten laws to continue in force notwithstanding any contradiction with the fundamental rights provisions in the chapter. This prevents the courts from declaring such discriminatory laws as invalid despite the clear contravention of the right to equality.

The right to equality enshrined in article 12 of the Constitution does not preclude affirmative action for the advancement of vulnerable groups including women. Article 12 (4) states: "Nothing in this Article shall prevent special provision being made by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons".²

²Constitution of the Second Republic. See Article 12 (4).

Under *Thesavalamai*, married women are considered by law to be subservient to men at least as far as their property rights are concerned. It does not recognize the concept of a 'female head of household'. When the Thesavalamai Code and the amended Jaffna Matrimonial Rights and Inheritance Ordinance are taken into account, the proprietary rights of female head of household are adversely affected. Evidently, the husband's written consent is required when dealing with immovable properties of the wife.³

1.3.2 Gender Focal Points

In the structure of the government's executive branch, Ministries are at the top of the hierarchy. Gender mainstreaming demands optimum participation of all levels of institutions and individuals. Focal points are in a position to coordinate all work related to gender mainstreaming in the ministries, departments and other agencies such as the 'National Committee on Women' under their purview. As senior officers are appointed to the focal points, they are in a strong position to convince the political leadership and the policy makers on the significance of women's issues. The focal points can examine carefully the sectoral policies and plans formulated in the Ministries and act as advocates to represent women's issues.

1.4 Approaches to Policy Towards Women

Different policy approaches to women were incorporated into the development discourse in post independent Sri Lanka. Women were seen as passive beneficiaries of development in the 1950s. Through a welfare approach of top down handouts of food aid, measures against malnutrition of women were implemented.

Ministries and Departments of social welfare were established to plan and implement measures for vulnerable groups. Relief assistance for socially deprived groups targeted women, the disabled and the sick through casual relief and TB assistance. The welfare approach assumed that child rearing is the most effective

³ See section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911 amended by Ordinance No. 58 of 1947.

role for women. State assistance included maternal and child welfare schemes and family planning programmes.

A critique of the welfare approach resulted in the advance of several alternative approaches, such as equity, anti-poverty and empowerment. The equity approach recognized women as active participants in the development discourse. It reiterated a productive role in addition to a reproductive role. The anti-poverty approach was preoccupied with the eradication of absolute poverty and the promotion of redistribution with growth.

The anti-poverty approach highlighted the origin of women's inequality to a lack of access to land and capital. The traditional response to the poverty of women headed households has been income transfers either in cash or in kind. Consequent economic dependency of women led to a search for alternative solutions. One of these alternatives is to provide some combination of work incentives, market opportunities to enable destitute women to contribute more earned income to their families. This empowerment approach raises women's consciousness to challenge their subordination and increases their own self-reliance and internal strength.

The Community Livelihoods in Conflict Affected Areas Project, introduced several women-centered activities focused on livelihood restoration, economic reintegration and support of vulnerable people affected by the conflict. It included a special programme called Family Economy Enhancement Package that assisted nearly 6,000 war widows in the eight districts of the Northern and Eastern provinces and four districts in the adjoining provinces. The programme is flexible and allows women to select an income activity that suits the village life pattern with least disturbance to their day-to-day chores. For economic empowerment, interest free concessionary revolving credits are granted at selected Divisional Secretariat Divisions for self-employment projects for low income group families of women headed households.⁴ Empowerment programmes provide a solid foundation that nurtures the inner strength, creativity and self-esteem of women from all walks of life.

⁴Ministry of Women and Child Affairs. *Progress and Performance – 2017*. p. 91

1.5 Policy Issues in Relation to Land and Rights of Women

1.5.1 Land Settlement Policy

The post-independence period saw irrigated land settlements where farmer families were given 5 to 8 acres of land, both field and highland. The district and divisional administration at the time was not sensitive enough to perceive the needs of farmer women and hence the programmes were directed mainly at male farmers. The farmer women continued to fulfill their expected role as child bearer and home carer. They participated fully in the cultivation activities requiring intense labour, namely, transplanting, weeding, harvesting, winnowing and pounding.

A survey in the late 1970's among women in System C of the Mahaweli Scheme revealed that farmer women had the following perceptions:

- They were glad that their families owned land
- They were aware that their children may not have enough land in the next generation as they had large families
- They were aware that land was owned, agricultural decisions made and most cash transactions made by males
- That marketing of upland crops, especially vegetables was difficult making female labour getting less economic returns.⁵

In colonization schemes, the necessity of introducing a gender perspective is still not widely recognized, despite the fact that women as wives and mothers, are primary users of space both in their houses and in the local community. In the planning stage of settlements although consultation with women about housing in allotments would ensure that their spatial needs are met, this rarely occurs. Women are often involved in informal sector activities in or around their homes. When conditions in the LDO permit prevent any commercial activity in their allotment, the only solution is to do it illegally. Permitting household enterprises can therefore meet the practical gender need of women to earn an income.

⁵PriennieRanatunga. 1985. *Women in New Settlements: Change and Challenge*. International Centre for Ethnic Studies and Sri Lanka Federation of University Women. p. 4

1.6 Succession to a land holding

According to the social obligations and family customs, parents prefer to distribute the total inherited land equally among all of their children regardless of the gender and the statutory restrictions of subdivisions. In the event of the death of the permit holder, the entire land will legally pass on to the eldest son. Then the daughter who resides in the scheme and looks after the parents will not get anything according to the existing law.

The rule of unitary succession is patently contrary to the inheritance customs of all communities in Sri Lanka. This leads to numerous conflicts within settler families. Passing the allotment to one son only results in increased landlessness in the second and third generations and also various forms of hidden fragmentation despite the law.

Who is entitled to succeed to a land holding upon the death of a permit holder? If no successor has been nominated, the title to the land devolves as prescribed by rule 1 of the Third Schedule of the Land Development Ordinance. Section 72 states as follows:

“If no successor has been nominated, or if the nominated successor fails to succeed, or if the nomination of a successor contravenes the provisions of this Ordinance, the title to the land alienated on a permit to a permit-holder who at the time of his or her death was paying an annual sum by virtue of the provisions of subsection (3) of section 19A or to the holding of an owner shall, upon the death of such permit holder or owner without leaving behind his or her spouse, or, where such permit-holder or owner died leaving behind his or her spouse, upon the failure of such spouse to succeed to that land or holding, or upon the death of such spouse, devolve as prescribed in rule 1 of the Third Schedule.” Rule 1 is reproduced in Box 1.

For women, tenure rights are strategic gender needs which ensure protection for themselves and their children in unstable or violent domestic situations. In the absence of land rights, women cannot furnish collateral to finance institutions to

gain access to credit. As ownership of lands represents a form of saving, women may end up without capital in the event of marital separation or divorce. There are numerous examples of situations where the daughter looks after the aged farmer parents in a colonization household, to find the eldest son employed in the city, returning to the allotment at the death of the parents, only to chase away the residing sister and sell the land. This is a consequence of land ownership rights not devolving on a female successor.

Box 1.1 Third Schedule of the Land Development Ordinance

THIRD SCHEDULE	
RULES	
1. (a) The groups of relatives from which a successor may be nominated for the purposes of section 51 shall be as set out in the subjoined table.	
(b) Title to a holding for the purpose of section 72 shall devolve on one only of the relative of the permit holder or owner in the order of priority in which they are respectively mentioned in the subjoined table, the older being preferred to the younger where there are more relatives than one in any group.	
Table	
<ul style="list-style-type: none"> (i) Sons. (ii) Daughters. (iii) Grandsons. (iv) Granddaughters. (v) Father. (vi) Mother. 	<ul style="list-style-type: none"> (vii) Brothers. (viii) Sisters. (IX) Uncles. (x) Aunts. (xi) Nephews. (xii) Nieces
In this rule, "relative" means a relative by blood and not by marriage.	

Complaints by rural extension agents that women fail to attend the meetings are widespread. In rural communities, the timing of meetings can drastically affect women's attendance and accordingly their capacity to gain access to significant information relevant to them in both their productive and reproductive roles/work. Rural meetings when fixed for the morning finds low farmer participation as it would disrupt their work in the field. When meetings are fixed for the evening, the male members are not sober and female members are busy with household chores.

In a HARTI study covering Dewahuwa, Minipe, Minneriya and Nawagiri settlement schemes, the respondents had lamented their inability to pass on title to female children except under unregistered notarial deeds. Focus group discussions had revealed that the majority of the original settlers had informally divided their paddy lands into several blocks, each holding 0.75 to 1 acre in extent⁶

1.7 Land acquisition

Acquiring land for public purposes entails a long cumbersome procedure. Even if section 38 of the Land Acquisition Act is invoked, it takes a minimum of 72 weeks. A policy on involuntary resettlement was developed by the ADB to resolve hardships, social tension, and impoverishment arising from the acquisition of lands belonging to the poor and the marginalized.

The absence of legal title would not be a bar to compensation, and special attention therefore would be received by vulnerable groups such as women, ethnic minorities and the like. A cost of resettlement should be included as a part of the project. Based on the donor initiatives, the Government adopted the National Involuntary Resettlement Policy to minimize the adverse socio-economic impacts on the affected persons. The policy provides for the re-establishment of the affected people on a productive, self-sustaining basis. Therefore, it intends to compensate such people promptly and fully. A further objective of this policy is to assist those affected by acquisition to deal with their social, psychological, cultural and other stresses by integrating them into host communities and improve their living standards. Female headed households will be paid special attention. The gender aspect is often neglected in formulating policies, programmes and projects.

Adoption of this policy on involuntary resettlement requires a social impact analysis being done preceding the other feasibility studies. A Resettlement Action Plan (RAP) needs to be formulated that would include the following details.

⁶G.G. de L.W.Samarasingha and M.M.M.Aheeyar. 2013. *Informal Land Fragmentation in Settlement Schemes*. Colombo: Hector Kobbekaduwa Agrarian Research and Training Institute. pp. 23-25

- Description of the project
- Impact of the project
- Lessons learned from similar projects
- Entitlement matrix
- Budget
- Implementation schedule
- The way affected people are addressed
- Land rights can unleash the potential for poor rural women to increasingly exert their other rights, thus becoming agents of change and expanding their freedom, including their freedom from hunger and poverty.

1.8 Concept of ‘Head of Household’

The concept of a head of household appears in a number of government documentation that include land grants, electoral lists, school admissions, and applications for electricity and telephone connections. The concept is enshrined in the administrative practice in the country in relation to the law of property. It appears in citizenship enactments where a person’s citizenship is determined in terms of the father’s lineage and not the mother’s. Therefore, the notion of ‘head of household’ should be redefined to make it a gender-neutral concept. Empowering the ownership of property by women would assist their future, increase their individuality and reinforce their bargaining power against domestic violence.

1.9 Joint Ownership of LDO/SLO Lands

Joint ownership of LDO lands is not possible under the Land Development Ordinance as the permit or grant is given in the name of one person and in the event of intestacy, it devolves on the eldest son. When a state land is granted to a person, preference is given to single ownership to ensure undisputed clear title. Therefore, land grant certificates under the LDO and the State Lands Ordinance (SLO) are not issued in the names of two persons.

The State Lands Ordinance makes grants of state lands under its provisions. The Tsunami Housing Policy of April 2006 makes provision to allocate ‘a house for a house’ regardless of ownership, to those affected by Tsunami. However, in practice it is most often the male head of household who has received title to the property so granted. Land grants to those affected by the tsunami have not been made to joint owners thereby denying the right of a woman to receive redress. While the SLO No. 8 of 1947 as amended and the Registration of Title Act No. 21 of 1988 do not contain any prohibition against making of grants creating co-ownership, the state policy had been to the contrary. Therefore, express provision needs to be made in the SLO for the grant of joint ownership.

1.10 Post-Conflict Setting

Post-1983-armed conflict represents the single most debilitating and pervasive factor affecting the lives of women and children. Large numbers were displaced. Providing secure access to land is not easy, particularly in situations following violent conflict. Vulnerable groups invariably include women, children and ethnic minorities. For every adult male dead or injured, there is a family of descendants, destitute and without economic support.

In conflict situations, while men are recruited as combatants either voluntarily or forcibly, children are forcibly recruited. Women faced increasing responsibility for providing for themselves, their children and the elderly. Girls may have faced sexual violence, and even abduction to serve as ‘temporary wives’ for combatants.

1.11 Recommendations

1.11.1 Reforms in the Land Laws

A strategic set of policy recommendations would include laws designed and revised to ensure that rural women are accorded full and equal rights to land. All discriminatory laws and policies should be removed. Specifically, article 16 of the Constitution of 1978 should be repealed and a new provision included ensuring that all laws in contravention of the fundamental rights to be null and void. The following amendments to specific laws are recommended:

- Amend the inheritance rights in the Third Schedule to the Land Development Ordinance by replacing the ‘eldest son’ with ‘eldest child’.
- Amend Thesavalamai law to enable both women and men to deal with property matters equally, freely and equitably without any gender discrimination
- Amend sections 5 and 8 of the Jaffna Matrimonial Rights and Inheritance Ordinance to conform to the fundamental right to equality.
- The non-provision of compensation for non-title holders under the Land Acquisition Act deprives rural women with occupational rights in the event of state takeover of such lands for commercial, plantation and business ventures. Hence, amend the Land Acquisition Act to compensate non-title holders, thereby providing relief to rural landless women.
- Amend the Land Development Ordinance to recognize the grant of state land in the form of joint and co-ownership.

1.11.2 Policy Reforms

- Convert the ‘National Committee on Women’ into a ‘National Commission on Women’ with legal personality and powers of enforcement. In the structure of the government’s executive branch, Ministries are the top level institutions. Therefore, transforming the ministerial focal point, the National Committee into a National Commission, enables it to act as a catalyst for introducing mainstream approaches within their sectors. This re-constitution will increase leverage for weaker social groups, such as the landless, small holder farmers, women, internally displaced persons to negotiate with stronger interests, such as government departments, plantation owners and commercial entities.

- We recommend the establishment of a special unit within the Commission to address the land rights of women and direct the focal points.
- Formulate a women policy by expanding on the present charter of women which is only a framework document.
- The GOSL shall redefine the term “Head of household” so as to ensure that women’s contribution to the household is recognized and they have equal access with men to all State development programmes, distribution of benefits and resulting responsibilities.
- Permit activities other than “cultivation” in the LDO allotments to enable women to legally pursue household enterprises such as sewing to meet the practical needs of women to earn an income.
- Implement the national policy on female heads of household formulated by the Ministry of Women and Child Affairs.
- Re-train the administrators by pointing out that the concept of “chief householder” is a gender-neutral term, as its practice at district, divisional and village administration has led to the discrimination of women.
- Initiate an expeditious national programme to identify and provide deeds of conveyance to widowed and women led households due to internal conflict, natural disasters, desertion etc.
- Encourage forums for discussion to operationalize the outcomes of the dialogue at the national level. This allows organizations of the weaker groups and their civil society partners to come together with institutions that implement land policies, in order to identify the common ground for reform and other action to make land rights more secure for poor women and men, poor families and communities.

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State Lands Ordinance No. 8 of 1947

Appendix 1.1 - List of Persons Consulted

Dr. I.H.K. Mahanama, Secretary, Ministry of Lands

Prof A. M. Navaratna Bandara, Institute for Constitutional Studies

Mr S.D.A.B. Boralessa, Additional Secretary, Ministry of Provincial Councils and Local Government (former Land Commissioner General)

MsSwarnaSumanasekera, Chairperson, National Committee on Women

MsGayaniPematilleke, Legal Officer, Ministry of Provincial Councils and Local Government

L.B.S.B. Dayaratne, Additional Secretary, Ministry of Lands.

MsGayaniPematilleke, Legal Officer, Ministry of Provincial Councils and Local Government

MsChampaUpasena, Director, Women's Bureau of Sri Lanka

MsKumuduPerera, Legal Officer, Ministry of Women and Child Affairs

Legal and Policy Reforms on Securing Land Rights of Vulnerable Groups

2.1 The Policy Problem

Vulnerable and disadvantaged communities are groups in society that experience a higher risk of being subjected to discriminatory practice, violence, natural or man-made disasters and social exclusion than the rest of the population. In Sri Lanka, when disaster strikes children, pregnant women, elderly people, rural landless poor, and internally displaced persons are particularly vulnerable. Vulnerability is the degree to which a population is unable to cope with and recover from the impacts of disasters.

As poverty remains typically a rural phenomenon, secure access to land provides the most practical and convincing opportunity for the vulnerable groups in rural societies, especially the rural landless peasantry to improve their livelihoods, reduce their vulnerability and manage the natural resources they depend on in a sustainable way. The significance of land rights is not only a matter of leverage for development, but also of human rights and self-esteem.

In Sri Lanka, under the feudal system which existed till the 19th century, all land was owned by the King and held by the people for services rendered to him. During the period of British administration, common lands customarily used by the peasantry were appropriated under the Crown Lands Encroachment Ordinance No. 12 of 1840. From the 1930s there was a growing feeling that the peasants as a class should be assisted. The Land development Ordinance No, 19 of 1935 introduced the principle of selecting settlers and alienating Crown land to landless rural peasants.

Yet, the protected tenancy introduced many new problems. Alienated state land cannot be sold, leased or mortgaged unless approved by the Government. Security of tenure is undermined by fragmentation and decreasing holding size,

prevalence of out of date permits and titles, incomplete land records, encroachment on state reserve lands due to population pressure, informal and hidden transactions on LDO lands and a weak decentralized land administration.

The sparsely populated Dry Zone was affected by the malaria epidemic in the 1930s and the area was in neglect under colonial rule. Poverty, landlessness, unemployment and the lack of irrigation facilities constrained the Dry Zone farmer. The densely populated Wet Zone suffered equally from landlessness, high unemployment, low incomes, increasing indebtedness and poverty. Understandably, the landlessness had become an acute problem in both areas.

2.2 Problem Definition

2.2.1 The Rural Landlessness and Land Tenure in context

State lands account for approximately 82 percent to 85 percent of the total land area of the country. Agricultural lands comprise about one-third of all land. Consequently, around 1 382 000 ha of agricultural land are state owned, while 880 332 ha are privately owned. All private land is subject to the Roman Dutch law on property. Yet, traditional systems co-exist with the Roman Dutch law in some parts of the country influencing the manner in which land is shared, allocated, used and inherited.

The British commenced the plantation economy with coffee cultivation between 1844 and 1849. Due to the obliterating impact the leaf disease *Hemiliavestatrix* when coffee industry virtually collapsed, tea was introduced as a successful substitute. This again stimulated buying and selling land. However, conflicts of interest over lands between planters and peasants often resulted in renewed tension. The new situation led to the enactment of Ordinance No 1 of 1897, commonly referred to as the "Waste Lands Ordinance." This act invigorated Clause 6 of Ordinance no. 12 of 1840 that prohibits encroachment onto crown lands.⁷

⁷V.K.Nanayakkara. 2006. *Agrarian Reform & Rural Development: Issues, Concerns and Future Challenges*. Twenty Second Meeting of CIRDAP, Technical Committee. 12-14 September 2006, Bandung, Indonesia. pp. 24 - 25

The British owned plantations brought to a close the unrestricted access to land , which the peasantry had enjoyed as a birthright throughout centuries under the Sinhalese kings. Between 1837 and 1845, 349 870 acres were sold at advantageous terms to European speculators by the Government. The Crown Lands Encroachment Ordinance No. 12 of 1840 made the crown and not the peasants the owners of all forest reserves and chena lands. All forests, waste, unoccupied and uncultivated lands, were declared the property of the crown unless the opposite was proved.

Under the Crown Lands Encroachment Ordinance and the Waste Lands Ordinance No 1 of 1897, common lands customarily used by the peasantry were appropriated by the British. Section 7 of the Ordinance of 1840 declared waste land to be the property of the State (crown). It stated: “ All forest, waste, unoccupied, or uncultivated lands shall be presumed to be the property of the State until the contrary thereof be proved, and all chenas and other lands which can be only cultivated after intervals of several years shall be deemed to belong to the State ... ”⁸

The ensuing policy asserted that undeveloped land was state (crown) property, and that the initiative for land alienation should come from the individual who wanted land and that the crown land must be paid for, by outright purchase or by payment of lease rent. These principles caused great hardship to the landless rural peasantry. The application system favoured those who knew the availability, location of suitable land and the procedure that should be adopted in securing it. It catered to those who were conversant in English and of the machinery of government. The principle of sale or lease again favoured the investor with ready capital. The landless peasantry could not derive any benefits therefrom.⁹

As rectification of the historical injustice perpetuated by the promulgation of the Waste Lands Ordinance and the consequent landlessness, various land settlement schemes and land distribution programmes were initiated by the colonial government in the early 1930s.

⁸Crown Lands Encroachment Ordinance No. 12 of 1840. Section 7

⁹Sessional Paper X. 1958.*Report of the Land Commission.* p. 14

The motivating factors for a national policy on land settlements included:

- 1) shifting the population from the densely populated Wet Zone into the sparsely populated or unpopulated areas in the Dry Zone in order to ease the population pressure.
- 2) increasing food production
- 3) providing relief for landlessness
- 4) preservation of the peasantry

2.3 The land commissions and their implications on the (state) land alienation policy

2.3.1 First Land Commission, 1927

The first Land Commission identified two main objectives in allocating land among various uses, which was termed as mapping out of state land. The objectives so identified were:

- The preservation of the peasantry
- Encourage the economic development of the country. This second objective was to be achieved after having secured the interest of the peasantry. It also stated that the economic development was for the interests of both the peasantry and the whole community.

The Land Commission proposed a new system of land tenure to achieve these objectives. Successive governments adopted this system with no major adjustments. What was introduced was a protected tenure under which the recipient of state land has the right to occupy and cultivate the land in perpetuity subject to restrictions imposed with regard to alienation, leasing and mortgaging and conditions relating to abandoning or non-cultivation.

The Land Development Ordinance No. 19 of 1935 spells out in detail the type of tenure proposed by the first Land Commission. The tenure was subjected to the following restrictions:

1. The alienee has the right to occupy the land in perpetuity and transfer the right to his successor as long as he observes the conditions of the permit/grant.
2. The alienee has no right to dispose the land by way of sale, lease or mortgage or any other mode of dispossession. Transfer of his right to land is not allowed during his life time. However, he is allowed to mortgage the land only to a cooperative society of which he himself is a member.
3. The land cannot be sold or seized by a decree of a court.
4. The recipient is obliged to develop the land and ensure permanent residence.
5. It provides for a unitary system of succession in order to protect the lands against sub-division owing to the operation of the law of intestate succession. The permit holder is allowed to nominate only one successor to his plot of land. When no successor is nominated, upon the death of the permit holder the title devolves on one member of his family, who is the eldest male member.

2.3.2 Second Land Commission, 1958

Appointed in 1955 to review the recommendations of the first Commission, the second Land Commission examined the policy of the Government relating to alienation and efficient use of Crown land, assistance to peasant colonists and to propose amendments to the Ordinance of 1935. The Commission presented its final report in 1958. The Commission declared that much of the past investment in colonization schemes had been inefficiently used and a burden on the Exchequer and concluded that with the passage of time, the peasant has become much more conscious not only his rights but also the value of the land and hence the protection need not be made available for ever. It also contended that economic rather than social criteria should be uppermost in future settlement planning.

Due to the long delay in giving the colonists title to their allotments, the resulting reduced incentives led to inefficient use of the land. The Commission proposed a tenure system whereby an allottee receives a permit to occupy, cultivate and

develop the land. After fulfilling the conditions of the permit, the allottee can obtain a grant from the Crown subject only to restrictions preventing fragmentation. Further colonists should be selected on the basis of farming experience and ability to achieve maximum economic production, rather than on considerations of social justice.

2.3.3 Third Land Commission, 1987

The field of enquiry of the third Commission appointed in 1985 spread across a wide spectrum of inter-related subjects. It inquired into prevailing land laws, land settlement policies, tenurial issues, encroachment, land registration and development. It revealed that over eighty percent of the total land mass of the country continued under State ownership.¹⁰ It reiterated ‘an urgent need for an effective and meaningful policy for the diffusion of social stresses generated by acute landlessness, particularly existing side by side with large holdings of private or State owned lands. The land reform exercise has significantly failed to achieve even its primary objectives of enhancing employment and productivity.’¹¹

A final recommendation of the Commission was that “ A total freehold system arising from the removal of all such restrictions may prove to be socially undesirable at this stage. In this context, the only option for the time being is to leave the existing provisions regarding the land transactions as they are, but devise measures to correct existing deficiencies.”¹² Thus, no major changes were introduced as a result of the three Commission recommendations.

Security of tenure is weakened by the prevalence of out-of-date permits and grants, incomplete land records, lack of registration, decreasing holding size, and land fragmentation due to inheritance practices, encroachments on state reservations and hidden tenancies and informal land sales. For alienated state lands under the LDO, when a nominated successor is not named by the allottee, the tenure rights of the land devolve on the eldest son in the family. This

¹⁰Sessional Paper No.III - 1990.Report of the Land Commission - 1987. Colombo: Department of Government Printing. p. vi

¹¹ Ibid. p. viii

¹²Report of the Land Commission – 1987. op. cit. p. 221

principle is alien to the traditional customs and practices as well as the Roman Dutch Law, which is the common law of the country. When the original allottee dies intestate, difficulties arise in determining the succession leading to contested inheritance.

2.4 Land Alienation Schemes

Since the enactment of the Ordinance in 1935, around one million hectares of state land had been allocated on perpetual leases on the payment of an annual rent, primarily to small-holders through permit or grant schemes. They were subject to restrictions designed to protect peasants from land usurers.¹³ The main purpose of introducing the LDO was to provide guidelines for the systematic development and alienation of state land. Following the LDO, the following land alienations were made under different settlement schemes.

- 1) Village Expansion Schemes
- 2) Major Settlement Schemes
- 3) Highland Settlement Schemes
- 4) Youth Settlement Schemes
- 5) Middle-class Settlement Schemes
- 6) Rain-fed Farming Settlement Schemes
- 7) Regularization of encroachments

The Land Development Ordinance of 1935 introduces certain limitations on the disposal of lands and the fragmentation of holdings in the inheritance process. They are:

- a) Farmer cannot sell the land except with the prior consent of the Government;
- b) Farmer cannot mortgage the land;
- c) Farmer cannot lease the land to someone else;

¹³Ranasinghe, T., Munro Faure P. and Herrera Garibay, A. 2012. *Status of Land Tenure in the Dry Zone Livelihood Support and Partnership Programme (DZLiSPP) Districts: Kurunegala, Anuradhapura, Badulla and Monaragala*. p. viii

- d) Farmer cannot fragment the holding in the inheritance process below a prescribed size. He must nominate a single successor except in certain prescribed cases.

Where lands are alienated under the Land Development Ordinance, sub-division is permitted only up to the minimum viable unit. With increasing population pressure and failure on the part of other sectors to provide employment to increasing population, lands which are not to be sub-divided are being sub-divided and cultivated by the relatives of the settler families. Studies undertaken in major settlement schemes show that concealed fragmentation or informal sub-division among several offspring has occurred, leading to a deterioration in living conditions of both first and second generation of settlers.

The motive for placing these restraints on land disposal was the feeling that, if they were not there, outside investors might buy up the land and lease it to tenants. Such tenurial conditions would reduce production efficiency, make the many small farmers smaller and poorer and the few large farmers larger, increasing thereby the socio-political tensions in the country. The purpose of the restrictions on fragmentation and designation of a “nominated successor” was to protect the continuance of holdings as viable units. The Gal Oya Project Evaluation Committee of 1970 observed the disincentive effects of a form of tenure which gave the allottee no sense of possession and about the difficulties created by other aspects of this form of tenure such as the insistence on succession by one heir only.¹⁴

2.5 Hidden Tenancies

Problem of lack of clear titles has been discussed in the Land Commissions of 1935, 1957 and 1985. Lack of clear titles is deemed to affect access to credit, land transfer in open market, consolidation of land into viable units etc. On the other hand, land titling and registration is viewed as useful for improving efficiency of land market, transfer of land from inefficient to efficient farmers and consolidation of land into economically viable units for efficient

¹⁴See Report of the Gal Oya Project Evaluation Committee. Sessional Paper No. I – 1970. Ceylon: Department of Government Printing. p. 40

production.¹⁵ Although the LDO prohibits sale, lease or mortgage, survey findings in the Dry Zone show that informal selling, leasing and mortgaging of LDO lands have been practiced from the beginning of the land alienation programmes in 1935.¹⁶

2.6 Regularization of encroachments

Encroachers on state land have no rights whatsoever to the lands they cultivate. Encroachments on state reserves include stream reservations, tank reservations, catchment reservations, road reservations, irrigation channel reservations, wetlands, forests, protected areas etc. Some of the lands they cultivate are allotments blocked out in the command area and alienated to farmers who have abandoned them and in certain cases have left the schemes completely. Subsequently, the present occupiers have settled on the lands illicitly and continue to cultivate without authority. Additionally, they illicitly occupy lands reserved for various other purposes such as pasture, future development and reservations for canals and roads.

By the 1950s, the problem of illicit occupation has assumed such proportions that the Second Land Commission in 1958 took a hard line on this issue. In 1958, the Commission stated that “the regularization of an encroachment should be made the exception rather than the rule, the rule being to remove the encroachments”.

¹⁷ A block by block survey in 1979 found that over 900 000 acres of state lands were under encroachment.¹⁸ In mid-1979, the Government decided to regularize encroachments under the following criteria:

- a) That the encroacher is otherwise landless and is cultivating the land
- b) That the land has already been developed
- c) That the extent to be regularized per encroacher is 2 acres in the case of highland and 1 acre in the case of paddy land

¹⁵V.K.Nanayakkara. 2006. op. cit. p 27

¹⁶Ranasinghe, T. et. al. op. cit. p xviii

¹⁷Sessional Paper X. 1958.*Report of the Land Commission.op. cit.* p. 34

¹⁸A.A.Wijetunga. Land Commissioner.National Policies on Land Settlement.Unpublished. p.9

- d) State to distribute lands in excess of this ceiling to deserving persons on the same criteria
- e) To evict all encroachers instream and forest reservations
- f) To deal *with* encroachers falling within the Mahaweli Development area within the policy framework of Mahaweli settlements
- g) To evict all undeserving persons and those encroached in excess of the limits
- h) To initiate a programme to prevent new encroachments

An island wide survey of encroachments by the State Lands Encroachment Survey of 1979 found that nearly a million acres of land comprising 6 percent of the land area of the country had been encroached upon by about half a million persons.¹⁹ Between 1975-1985 another 175 000 acres of State owned land had been encroached. Regularization of encroachments had been the government policy for decades in terms of section 20 (a) of the Ordinance No 19 of 1935. (repealed by Law No. 43 of 1973). A considerable proportion of land distributed under the Presidential Task Force of 1989 was also regularization of encroachments. Based on the information gathered through another survey of encroachments by the Land Commissioner General's Department in 2003, encroached allotments were being continuously regularized on the recommendations of Divisional Secretaries.

Bona fide occupier: Part VI of the State Lands Act No. 13 of 1949 provides for the constitution of state reservations. Section 51 lays down that title to state reservations cannot be acquired by possession or user. State is not liable to pay compensation for improvements effected on reservations by a bona fide occupier. Excluding liability to pay compensation even to a bona fide occupier, section 53 of the Ordinance No 8 of 1947 states: "Subject as hereinafter provided, no person. Further, section 54 provides for summary ejection of offenders in unlawful possession of state reservations. Section 103 of the State Lands Act

¹⁹Sessional Paper No.III - 1990.*Report of the Land Commission - 1987.Colombo:* Department of Government Printing. p. x

provides that no person can by possession or user of land acquire any prescriptive title against the State (Crown). The State Lands Recovery of Possession Act No. 7 of 1979 makes provision for the recovery of possession of state lands from persons in unauthorized possession or occupation thereof. Further section 10 stipulates that no appeal is maintainable against an order of ejectment by a Magistrate.

Urban Development Projects (Special Provisions) Act No. 2 of 1980 provides for the declaration of lands urgently required for carrying out urban development projects. The President may by order published in the Gazette declare a land required for implementing an urgent urban project. Section 3 restricts the remedies available to an aggrieved party by such acquisition such as injunctions, enjoining order or a stay order to restrain the acquisition of such land. Under section 7 of the Act, the Government can take possession of the land in respect of which an Order has been made under section 2 of the State Lands Recovery of Possession Act without waiting for its acquisition under the Land Acquisition Act. This enables the UDA to take speedy possession of a private land required for urban projects where the affected persons are denied the legal rights in a court of law to restrain acquisition procedure. Under section 15 of the Prescription Ordinance even a bona fide possessor cannot claim acquisitive prescription against the State.

Regularization of encroachments contributes to socio-economic development and social justice in several ways. Firstly, it reduces landlessness among second/third generations of settlers in colonization schemes. Secondly, this process helps to reduce social unrest and land related conflicts frequently created by landless youth in settlement schemes. Thirdly, it paves the way for unemployed youth to join the production process depending on the quality of the unit of land received as a result of regularization. Also, discouraging of *chena* cultivation and finding an alternative solution to discourage *chenacultivation* has become essential while implementing the regularization of encroached land allotments for the benefit of the landless.

2.7 Problems related to land Administration

Unclear land boundaries: A common feature in the Dry Zone settlement schemes is the absence of proper demarcation of land boundaries and title documentation. Where settlers occupy the land legally, but the boundaries are not marked properly, recipients do not know the exact boundaries and are trapped in a situation of uncertainty. Consequently, boundary disputes are rampant. Section 50 of the State Lands Ordinance prescribes the outer limits of stream, irrigation and road reservations. However, section 49 deems it necessary for survey plans to clearly mark the extent of reservations. This encourages encroachment of reserves and discourages eviction as the absence of survey plans indicating the reserve makes a successful prosecution difficult.

Land Surveys: According to the provisions in the LDO, there should be a diagram prepared under the authority of the Surveyor General attached to each grant of state land. *Jayabhoomi* grants were issued during a period when these legal provisions were removed by an amendment to the LDO. Incomplete grants without title documents have caused immense problems for the occupiers including the inability to use the land as collateral to the lending institutions.

Internal displacement: Ethnic strife resulted in the displacement of population as Internally Displaced Persons (IDPs). Large numbers of displaced persons may have been forced to settle on land to which they have no legal claim. Recovery from a violent conflict must address mass eviction of people from their lands, destruction of infrastructure, loss of records, and continued mistrust and fear. Further, internally displaced persons face the additional burden of identifying the boundaries of their lands as the landmarks are obliterated by military takeover.²⁰

Removal of restrictions on alienated state land: The Government has indicated its readiness to remove the restrictions that currently apply to alienated land under the LDO by converting land currently held under state grants to full private ownership. Amending legislation to enable this conversion has been

²⁰*Restoration of Land Rights of People Affected by Land Appropriations and Tenure Insecurity.* Colombo: Institute for Constitutional Studies, 2017. p. 11

circulating amongst the Ministry of Lands, the Legal Draftsman and the Cabinet where the draft has been amended seventeen times.²¹ As the draft legislation requires the concurrence of Provincial Councils prior to inclusion of the Bill in the Order Book of Parliament and as some Provincial Councils have objected to various provisions in the Bill a consensus has been difficult to reach.

Capacity of Staff: A severe constraint in the delivery of land administration services is the lack of experience of the Divisional Secretariat and Provincial Land Commissioner's staff. The transferability of all staff, including the staff handling land matters does not augur well for the retention of technical expertise. This situation may be contrasted with the time when Government Agents had District Land Officers conversant with land matters including a Land Clerk, and staff at the Kachcheri. Lack of surveyors constrains most land work. Lack of capacities delays services to the allottees in obtaining title documents, survey plans and succession.

2.8 National Involuntary Resettlement Policy (NIRP)

Development involvements in the public sector necessitate the acquisition of land. People whose homes and lands are acquired have to move elsewhere and resettle in locations that may be unfamiliar. By and large, resettlement has not been very effective. There are numerous examples where people have shown resistance to projects that cause displacement. Among the significant consequences of poor resettlement has been impoverishment of affected people due to landlessness, homelessness, joblessness, food insecurity, lack of access to common property resources and disruption of the existing social organization.

Notwithstanding several amendments, legislation yet remains limited in scope. It does not deal adequately with the impacts on those occupiers of lands who are not legal owners but whose lands are taken over for development purposes. To remedy the existing gaps in the Land Acquisition Act in addressing key settlement issues and to ensure that people affected by development projects are treated in a fair and equitable manner and that they are not impoverished in the

²¹Personal interview with L.B.S.B.Dayaratne, Additional Secretary, Ministry of Lands on 17 November 2017.

process, a policy was required. Accordingly, the Cabinet of Ministers on 16 May 2001 adopted a national policy on involuntary resettlement (NIRP). Principled on human and ethical considerations entailing the payment of replacement value, the new policy seeks to:

- a) minimize and mitigate negative impacts of involuntary resettlement by facilitating the reestablishment of the affected people on a productive and self-sustaining basis.
- b) Ensure that the affected persons are fully and promptly compensated and successfully resettled. The livelihoods of all displaced persons should be re-established and their standard of living improved.
- c) Safeguard that no impoverishment of people shall result as a consequence of compulsory land acquisition for development purposes by the State.
- d) Assist affected persons in dealing with the psychological, cultural, social, and other stresses caused by compulsory land acquisition.
- e) Make all affected persons aware of processes available for the redress of grievances that are easily accessible and immediately responsive.
- f) Have in place a consultative, transparent, involuntary resettlement process with a time frame agreed to by the project executing agency and the affected persons.

Accordingly, the Government has directed that the scope of NIRP applies to all development induced land acquisition, or recovery of possession, by the State. The NIRP requires that a comprehensive resettlement action plan (RAP) be prepared where twenty or more families are affected. An RAP is defined as a time-bound action plan with a budget, setting out resettlement strategy, objectives, options, entitlements, action, responsibilities, monitoring and evaluation. The required legal amendments to the Land Acquisition Act to give effect to the vulnerable groups that include non-title land occupants are given in Table 2.1.

Table 2.1: Legislative Gap Analysis

Aspect	GOSL Laws/Policies	NIRP Policy	Donor Policies (WB)	Measure to Bridge the Gap
Requirement of a Resettlement Action Plan	Resettlement Action Plan is not required under the Land Acquisition Act as amended, A project affecting 100 families is considered as a prescribed project under the NEA; such projects required the approval of the Central Environmental Authority before implementation but does not address the resettlement issues	National Involuntary Resettlement Plan requires that a comprehensive RAP for project exceeding displacement of more than 20 families and a RAP of lesser detail if the number of families displaced is less than 20.	Resettlement Action Plan is required for projects that affect over 200 people.	Land Acquisition Act to be amended to incorporate requirement of RAP
Compensation for non-title holders	Land Acquisition Act does not provide compensation to non-title holder	Provided in the National Involuntary Resettlement Plan	Compensation should be paid for the non-title holder as well.	Provision should be made in the Land Acquisition Act to compensate the non-title holders.
Consultation with stake holders	Consultations with stake holders are not required under Land Acquisition Act as amended.	Consultation with stake holders are required under National Involuntary Resettlement Plan	Consultation is required with affected people (Same as National Involuntary Resettlement Plan)	Necessary to incorporate amendments to the Land Acquisition Act
Public disclosure	Not required under the Land Acquisition Act as amended. If the project	Provided in the National Involuntary	Public disclosure is	Land Acquisition Act should be amended to

	is subject to an IEE or EIA, the report should be available for the information of the public or Public Comments respectively.	Resettlement Plan	required	introduce this requirement
Income restoration	Act does not provide	National Involuntary Resettlement Plan provides	Income should be restored	Land Acquisition Act needs amendment
Taking over possession before payment of compensation	Act provides for taking possession before paying compensation	National Involuntary Resettlement Plan does not allow.	Does not allow	Land Acquisition Act Should be amended to disallow
Grievance Redress mechanism	No provision in the Land Acquisition Act as amended.	It is a requirement under the National Involuntary Resettlement Plan	Requirement under the WB policy	Introduce an amendment to Land Acquisition Act
Acquisition within 48 hours on an emergency basis	Under 38 (a) of Land Acquisition Act, after 48 hours, even without paying compensation a land can be acquired.	But according to National Involuntary Resettlement Plan, not without paying compensation and reasonable notice.	After payment of full compensation.	This provision should be removed from Land Acquisition Act
Replacement Cost	Not provided	Provided in the National Involuntary Resettlement Plan	Replacement Cost	Replacement cost according to Land Acquisition Act as amended in 2008
Assistance for vulnerable people	Land Acquisition Act is silent on this aspect.	National Involuntary Resettlement Plan require special treatment for the vulnerable groups	WB policy requires a special assistance for the vulnerable people.	Provision is available in the RAP

Compensation by Installment	Land Acquisition Act provides statutory compensation to be paid in installments,	But National Involuntary Resettlement Plan does not agree.	WB desires compensation to be paid in Bullet payment	Resettlement Action Plan provides statutory compensation to be paid in one lump sum.
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2.9 Recommendations

2.9.1 Reforms in Land Laws

- A Land Rights Act must be formulated to protect the interests of private land owners and the permit/grant holders of state lands. Legislation related to land tenure should be identified, and its strengths and weaknesses assessed. What are the major problems with existing legislation and how can it be improved? Existing legislation may be cumbersome for a programme of restitution, particularly when settlers do not have legal documentation to prove their rights.
- Repeal the principle of unitary succession required by the Land Development Ordinance which is contrary to Sri Lankan custom.
- Amend the discriminatory inheritance rights in the Third Schedule to the Land Development Ordinance by replacing the ‘eldest son’ with ‘eldest child’.
- Amend the LDO to allow a gradual transition to a freehold tenure of land to give the settlers the feeling that the land belongs to them.
- The Land Development Ordinance should be amended to recognize the grant of state land in the form of co-ownership and joint ownership.
- Amend the Land Acquisition Act to remove the Government’s powers of forceful acquisition of land and grant redress to the vulnerable groups through:

- Making provision to compensate non-title holders
- Provide for consultation with affected people
- Introduce the requirement of public disclosure
- Disallow taking over possession before payment of compensation
- Introduce the requirement of replacement cost in the entitlement matrix
- Include in the LAA, the requirement of assisting the vulnerable people presently available in the NIRP
- Disallow payment of compensation in installments found in the LAA and introduce compensation in one lump sum
- Incorporate the requirement of a Resettlement Action Plan in the LAA

2.9.2 Policy Reforms

- A comprehensive, explicit national land policy should be formulated that addresses four areas: land tenure and administration; urban and rural land use planning; land use management and surveying and mapping. Currently, an overarching land policy does not exist but instead are dispersed over a number of sector policies and jurisdictions. Examples are the Land Use policy, land settlement policy, land acquisition policy, national involuntary resettlement policy, wetland policy, forest policy, irrigation policy etc. Some of the policies are contradictory, such as the NIRP and the government's provisions for land acquisition. An integrated, comprehensive policy declaration helps the weaker groups in society to understand their claims and rights.
- Formulate a national land policy which recognizes a right of occupancy system. This means in effect recognizing a statutory right of occupancy of not more than 30 years.
- Policies related to land tenure, along with gaps and contradictions should be identified. The operational issues should include an analysis of land administration agencies and their mandates, staffing level of agencies and the availability and condition of land records.

- For landless peasant occupiers on stream and road reservations that cannot be regularized, the Government should provide alternate lands and relocate them.
- Credit institutions such as the SANASA and Cooperative Societies should provide a better service than the moneylenders in order to avoid pledging of crops and ultimately pledging of lands by the rural poor.
- Administrative practice should allow for joint ownership/co-ownership in granting land to married couples. Presently, state agencies allocate land to single owners purely as a matter of administrative convenience.
- Training and capacity building of all staff dealing with land matters is a prime necessity. Where skills are weak or missing, short-term training courses for land administration staff should be designed and implemented to rebuild the technical and managerial capacity of land agencies.
- In order to undertake and deliver land conflict mediation services, the mediation capacities of Divisional Secretaries, *GramaNildharis*, Colonization Officers, Land Officers, and community leaders such as the chief monk of the temple should be strengthened.
- Increase leverage for weaker social groups, such as the landless, small holder farmers, women, internally displaced persons to negotiate with stronger interests, such as government departments, plantation owners and commercial entities participatory dialogue on land rights to generate meaningful change. Poor rural vulnerable groups are affected by demands for land by agribusiness, plantation and other commercial interests. Decision making surrounding commercial interests favours an urban political and economic elite which reinforces the need for the voice of the marginalized to be included in decision making on land policy.

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State Lands Recovery of Possession Act No. 7 of 1979

Urban Development Projects (Special Provisions) Act No. 2 of 1980

Waste Lands Ordinance No 1 of 1897

Wijetunga, A.A. Land Commissioner. *National Policies on Land Settlement.* Unpublished

Appendix A: Legislative Enactments relating to Land

(in chronological order)

NO	Ceylon Legislative Council
1	State[Crown] Lands (Encroachment) Ordinance No. 12 of 1840
2	Definition of Boundaries Ordinance No. 1 of 1844
3	Service (Praveni) Land Ordinance (1852)
4	Registration of Temple Lands Ordinance (1856)
5	Land Surveys Ordinance No 4 of 1866
6	Service Tenure Ordinance (1870)
7	Prescription Ordinance No 22 of 1871
8	Land Resumption Ordinance No 4 of 1887
9	Prescription Ordinance (1887)
10	Waste Land Ordinance No 1 of 1897
11	Waste Land Ordinance No. 5 of 1900
12	Waste Land Ordinance No 6 of 1903
13	Waste Land Ordinance NO. 16 of `1907
14	Forest Ordinance No. 16 of 1907
15	State[Crown] Land Marks Ordinance No 7 of 1909
16	Flood Protection Ordinance No 4 of 1924
17	Plant Protection Ordinance No. 10 of 1924
18	Tea Research Ordinance (1925)
19	Coconut Research Ordinance No 29 of 1928
20	Rubber Research Ordinance- N0 10 of 1930
21	State [Crown] Lands (Claims) Ordinance No 21 of 1931
22	Land Settlement Ordinance No 12 of 1931

23	Land Settlement Ordinance No 22 of 1932
24	Land Settlement Ordinance No. 81 of 1933
25	Land Resumption Ordinance No 2 of 1934
	State Council
26	Land Development Ordinance No 19 of 1935
27	Fauna & Flora Protection Ordinance(1937)
28	Land Resumption Ordinance No 57 of 1942
29	Temple Land (Compensation) Ordinance 1944
30	Irrigation Ordinance No 12 of 1946
31	Land Development Ordinance No 3 of 1946
32	Irrigation Ordinance No. 32 of 1946
33	State [Crown] Lands Ordinance No 8 of 1947
34	State [Crown] Lands Ordinance No.9 of 1947
35	Municipals Councils Ordinance No 29 of 1947
	Parliament of Ceylon
36	State [Crown] Lands Act No 13 of 1949
37	Gal Oya Development Board Act No 51 of 1949
38	Land Acquisition Act No 9 of 1950
39	Requisitioning Lands Act No 33 of 1950
40	Soil Conservation Act No 25 of 1951
41	Rubber Replanting (Subsidy) Act No 36 of 1953
42	Land Development Act No 49 of 1953
43	State [Crown] Lands Act No 8 of 1954
44	Land Development Act No 22 of 1955
45	Land Settlement Act No. 22 of 1955

46	Land Resumption Act No. 22 of 1955
47	Rubber Control Act No 11 of 1956
48	Paddy lands Act No. 1 of 1958
49	Land Development Ordinance (Amendment No. 6 of 1961)
50	River Valley Development Board (Amendment) Act No. 6 of 1965
51	Nindagama Lands Act No 30 of 1968
52	Colombo District (Low Lying Areas) Reclamation & Development Board Act (1968)
53	Land Development (Amendment) Act No 16 of 1969
54	Mahaweli Development Board Act No 14 of 1970
55	Coconut Development Act No 46 of 1971
	National State Assembly of Sri Lanka
56	Land Reform Law No 1 of 1972
57	Agricultural Productivity Law No. 2 of 1972
58	Agricultural Lands No 42 of 1973
59	Sale of State Lands (Special Provisions) Law No 43 of 1973
60	Land Reform (Amendment) law 1975
61	Tea Small Holdings Development Law No 35 of 1975
62	Urban Development Authority Law No 41 of 1978
	Parliament
63	State Lands (Recovery of Possession) Act No 07 of 1979
64	National Housing Development Authority Act (1979)
65	Mahaweli Authority of Sri Lanka No 23 of 1979
66	Lands Grants (Special Provisions) Act No 43 of 1979
67	Agrarian Development Act No 58 of 1979
68	Urban Development Projects (Special Provisions) Act No 2 of 1980

69	Coast Conservation Act (1981)
70	Sri Lanka Land Reclamation and Development Corporation Act No 15 of 1968 as amended by Act No 52 of 1982 and Act No 35 of 2006

Appendix B: List of Persons Consulted

Dr. I.H.K.Mahanama, Secretary, Ministry of Lands

Prof Navaratna Bandara, Institute for Constitutional Studies

Ms Chandra Herath, Land Commissioner General

Mr S.D.A.B. Boralessa, Additional Secretary, Ministry of Provincial Councils and Local Government (former Land Commissioner General)

MsSwarnaSumanasekera, Chairperson, National Committee on Women

L.B.S.B.Dayaratne, Additional Secretary, Ministry of Lands.

MsGayaniPematilleke, Legal Officer, Ministry of Provincial Councils and Local Government

MsChampaUpasena, Director, Women's Bureau of Sri Lanka

MsKumuduPerera, Legal Officer, Ministry of Women and Child Affairs

Ownership/Title Issues on Land and Property in Sri Lanka

3.1 Definitions and Concepts: Ownership, Property and Land

A) What is ownership?

Ownership is a feature protected by law in which a man stands to a thing which he may (a) possess (b) use and enjoy, and (c) alienate.²² Accordingly, there are three attributes of ownership, namely, the right of possession and the right to recover possession; the right of use and enjoyment; and the right of disposition. In contrast, possession is mere physical presence on a land without the right of disposition. As the ensuing discussion shows, the right holders of state lands in Sri Lanka, while they possess the property, do not clearly enjoy the full rights of ownership.

What instruments are used to convey ownership of real estate? Freehold title is conveyed by deeds of transfer, deeds of gift, deeds of exchange, deeds of partition, state grants, instruments of disposition (e.g. by the Commissioner of National Housing), Fiscal's conveyances, certificates of sale executed by a 'bank' as defined in the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 and decrees of court such as a decree in a partition action. Leasehold title is created by a Lease Agreement or an Indenture of Lease. There may also be state leases, state permits, plantation agreements, mining rights agreements etc. Any conveyance or agreement relating to real estate including deeds of transfer and indentures of lease must be by way of a notarially attested document as outlined in the Prevention of Frauds Ordinance, Notaries Ordinance and the Registration of Documents Ordinance. There are requirements for stamping and registration for conveyances, leases and other agreements relating to real estate.

²²*Attorney General v. Herath*(1960). 62 NLR 145 at 148

B) What is Property?

Property incorporates the entirety of legal rights to which a person is entitled. In a more restricted sense, it includes not all a person's rights but only those rights which may be described as proprietary rather than as personal in character. In a still narrower sense, the term 'property' necessitates a further distinction between proprietary rights *in rem* and proprietary rights *in personam*. Generally, property is understood as the area of corporeal property – the tangible objects in respect of which the right is asserted.²³

The legal context of owning property emanates from the Roman Dutch law introduced by the Dutch during Dutch occupation of the Island, and also a set of personal laws. The Kandyan law applies to all Sinhalese families and their descendants living in the provinces that came under the Kandyan Kingdom at the time the British took over the Kandyan Kingdom. The personal laws of the *Thesawalamai* apply to the Malabar inhabitants of the Jaffna Province. It applies to all immovable property (land and buildings) in the Jaffna province - regardless of the ethnicity and religion of the owners. Muslim law applies to followers of Islam living anywhere in the country. If a person lives by a particular personal law, ownership, inheritance, transfer and disposal of land and property would depend on the specific personal law.

C) What is Land?

Land is a tangible and valuable, but finite, resource. It is subject to competing pressures from urbanisation, infrastructure, increased food, feed, fibre and fuel production and the provision of key ecosystem services.

In Sri Lanka, section 2 of the LDO defines land to include:

- (a) The bed of any waterway or of any collection of water, whether natural or artificial,*
- (b) things attached to the earth or permanently fastened to anything attached to the earth, and*
- (c) any title to land or any interest in the crops growing or to be grown thereon*

²³G.L.Peiris. 1976.*The Law of Property in Sri Lanka*.Colombo: Lake House Investments Limited. pp. 1-4

Section 25 of the Land (Restrictions on Alienation) Act No. 38 of 2014 defines “land” to mean any State or private land and includes— (a) any interest in the land; (b) any land covered with water; and (c) any house or building that stands on that land.

Globally, there are four types of land property regimes: freehold (private), state owned, lease-hold and communal. In Sri Lanka most land is state owned. As the population grows, land becomes scarcer, leaving many without a means to a livelihood. The state of the land – its capacity to deliver benefits to people, such as food, water, amenities, cultural meaning and protection from hazards – is not independent of how it is managed. Land is needed for numerous purposes, from economic sustenance to economic prosperity, from cultural identity to ethnic security, from national development to national security, etc.

3.2 Availability of Land

Land is becoming scarcer as a resource, and this is particularly true of land available for primary production of biomass or for conservation related purposes. Competition for land among different uses is becoming acute and conflicts related to this competition more frequent and more complex.

The total land area of Sri Lanka is 65,610 square kilometres, including an inland water area of around 2,905 square kilometres. As a diminishing resource, the per capita extent of land at the beginning of the 20th century was 1.53 ha which stands today at 0.26 ha. Of this land area, only 18% is privately owned land and the balance, 82%, belongs to the State. In Sri Lanka, the thrust of the land-related laws, which mostly originated under colonial rule, is that the State has dominion over all land to the exclusion of all others, unless a person could show ‘title’ through a title document. In practice this equates to a State ‘monopoly’ over lands in the country.

The Land Reform Law No 1 of 1972 fixed a ceiling of 25 acres in the case of paddy and 50 acres in the case of other land that could be owned by individuals. A Land Reform Commission (LRC) was established to take over the land in excess of the ceiling. It determines compensation payable and disposes the land to increase productivity and employment. LRC can alienate the lands by way of purchase by or lease to landless individuals and to those who own less than the ceiling or alienated to cooperatives or

State corporations. The Land Reform (Amendment) Law No 39 of 1975 extended this restriction to publicly held companies.

A notable feature of Sri Lanka's land ownership pattern has been the government control and custody of a large extent of land. Land resources under government ownership include forests, forest reserves, wildlife reserves, land reserved for infrastructure development, and agricultural properties taken over by the Government under the Land Reform laws of 1972 and 1975. In the 1980s, the Government owned and controlled about 84 percent of the total landmass of the country. Structural debilities in the pattern of agricultural land ownership are revealed in the Agricultural Census of 1982 which placed 11 percent of farm operators as landless, 38.5 percent owning home gardens only.²⁴ In other words, nearly half of the smallholder agricultural population in the country was not in control of enough land to enable them to produce a marketable surplus.

Successive governments took steps to transfer State lands to the people through permits and grants under various schemes. Reportedly, over 8,000 square kilometers of Crown lands were distributed under the Land Development Ordinance (LDO) to the people by 1985, and close to 12,000 square kilometers of lands have been distributed under the Mahaweli Project and the Presidential Task Force on Land Alienation since 1985. Consequent to the enactment of the Sale of State Lands (Special Provisions) Law No. 43 of 1973, the peasants were able to obtain LRC lands. This Law regulates the sale of State land available for the purpose of agricultural development.

3.3 Review of Legislation with regard to ownership of state land

Two sets of laws, one relating to state lands and the other relating to private lands, govern the land rights and ownership in Sri Lanka. With regard to State lands, the national legislatures before and after independence enacted many laws. Crown Lands (Encroachment) Ordinance No. 9 of 1840 gave the Crown the right to take over any uncultivated land and to grant, sell or lease such lands 'for any purpose which the Governor General may approve'.

²⁴V.K.Nanayakkara. *Agrarian Reform and Rural Development: Issues, Concerns and Future Challenges*. Twenty-second meeting of CIRDAP. Technical Committee (TC 22). 12-14 September. Bandung, Indonesia.

Section 1 of the Crown Lands Ordinance No. 12 of 1840 makes it clear that the person who occupies a land but who does not have a title to it or who has not cultivated, planted or otherwise improved and held uninterrupted possession of such land for the period of thirty years or more shall be directed to deliver up the said land to the Crown.

It created a presumption of ownership in favour of the Crown in respect of forest, waste, unoccupied or uncultivated land until the contrary was proved. The presumption in favour of the Crown was very strong, so that few peasants could win cases of land disputes with the Crown.

Waste Lands Ordinance No. 1 of 1897, later replaced by the Land Settlement Ordinance of 1933 developed further the process of declaring whether a land is Crown or private.

Land Development Ordinance, 1935 introduced a major change in the traditional colonial attitude by reflecting an increasing concern for improving the position of the peasant cultivator. Land Reform Law No 1 of 1972 fixed a ceiling on the private ownership of lands while the Amending law of 1975 extended the ceiling to estates owned by public companies. The plethora of legislative enactments delineating land ownership and tenure issues is shown in Appendix A.

Sri Lanka's constitution is non-discriminatory on ownership of land, property and/or business ventures. Therefore, both men and women can legally own, transfer, inherit and dispose of land and property and may enter into any economic activity/business or employment as long as it is not illegal or against public policy. However, inequalities persist with regard to ownership of land and property under 'personal laws' operating in the country.

An exception to the general non-discrimination principle of Sri Lankan law, is the section on inheritance, in the Land Development Ordinance of 1935. It promotes gender bias on ownership of land by giving preference to male inheritance where the original owner (traditionally a man), dies intestate. The bias has been reinforced through the custom/practice followed by government officials, of accepting only the male as the head of the household, even in cases where the man is disabled or dead and the woman is the family breadwinner.

Acquisitive prescription is a mode of acquiring ownership of immovable property. Prescription Ordinance No. 22 of 1871 made express provision with respect to the means by which a person may acquire the ownership of a block of land through the peaceable and uninterrupted possession of it for over a period of ten years. Can a person acquire prescriptive title to state land? Section 15 of the Ordinance enacts 'nothing herein contained shall affect the rights of the crown'. Thus, prescription does not run against the state.

3.4 Land Tenure, Land Rights and Land Markets

Land tenure defines how property rights to land are to be allocated within societies. They describe how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions.

A) Protected Tenancy:

The Crown Lands Ordinance permitted freehold tenure with few limitations on its transfer or use. However, the Land Development Ordinance introduced the principle of 'protected tenancy', where land was leased to settlers with conditions guarding its use and with limitations preventing transfer, mortgage, sale or sub-division of holdings below a prescribed size. Although the LDO permits could be converted into grants after developing the land, the restrictions on transfer, leasing and sub-division remain.

Where lands are alienated under the Land Development Ordinance, sub-division is permitted only up to the minimum viable unit. With increasing population pressure and failure on the part of other sectors to provide employment to increasing population, lands which are not to be sub-divided are being sub-divided and cultivated by the relatives of the settler families. Studies undertaken in major settlement schemes show that concealed fragmentation or informal sub-division among several offspring has occurred, leading to a deterioration in living conditions of both first and second generation of settlers. The pledging of crops and ultimately pledging of landholdings to moneylenders are common practices prevalent in settlement schemes and could only be avoided if credit institutions such as Co-operative Societies provide a better service than the moneylenders.

The motive for placing these restraints on land disposal was the feeling that, if they were not there, outside investors might buy up the land and lease it to tenants. Such tenurial conditions would reduce production efficiency, make the many small farmers smaller and poorer and the few large farmers larger, increasing thereby the socio-political tensions in the country. The purpose of the restrictions on fragmentation and designation of a “nominated successor” was to protect the continuance of holdings as viable units. The Gal Oya Project Evaluation Committee of 1970 observed the disincentive effects of a form of tenure which gave the allottee no sense of possession and about the difficulties created by other aspects of this form of tenure such as the insistence on succession by one heir only.²⁵

The Paddy Lands Act of 1957 introduced important tenancy reforms in the paddy sector by protecting the rights of *ande* tenants (sharecroppers). It failed to increase productivity despite achieving greater social justice. Today, tenant protection measures continue to operate under the Agrarian Development Act.

B) Freehold Tenure:

Freehold title is the only form of secure, registrable title available, which affords the holder ownership that is transferable and inheritable. It provides collateral against a loan. Freehold titleholders possess the right to dispose of the land without reference to the State. The original intention of the LDO was to transfer full land ownership to allottees; however, this has been continuously deferred due to fears of “improvident alienation”, unnecessary fragmentation and multiplicity of ownership. Yet, land had been transferred under leasehold arrangements, and the conditional ownership conferred under LDO permits renders the land unacceptable to banks as collateral. The government has declared its intention to confer freehold ownership. Yet, amending legislation is likely to be difficult due to the requirement of concurrence of Provincial Councils in enacting legislation. It would be reasonable for the government to release its hold once the land is developed to a satisfactory level.

²⁵See *Report of the Gal Oya Project Evaluation Committee*. Sessional Paper No. I – 1970. Ceylon: Department of Government Printing, p. 40

It is noteworthy, that along with the relaxation of conditions guarding transfers of Crown Land other important measures have been introduced, which apply to privately held lands as well as to Crown Lands. Such measures limit private ownership of land through impositions of a land ceiling and increase public control of private land use with a view to raising productivity. It seems possible that conflicts may appear between the movement away from conditional leasehold towards freehold tenure of land on the one hand, and the attempts to impose controls on the use that the new freeholders make of their land on the other hand.

C) Collective Tenure:

While the general trend on settlement schemes has been in the direction of individual freehold tenure of land, experiments have been made with collective landholding – both for economic reasons of increasing the scale of operation, and for socio-political reasons of creating egalitarian communities. The objective was first given official recognition in the Paddy Lands Act of 1958 which empowered the Cultivation Committees to establish co-operative paddy farms.

Collective tenure has been adopted mainly on Crown Lands (where existing land rights do not have to be disturbed), or on acquired estates (particularly following land reform) where the economic arguments for maintaining the lands as single units are very clear.

3.5 Prescriptive Title

Can a person acquire prescriptive title to state land? Section 25 of the Prescriptions Ordinance states ‘nothing herein contained shall affect the rights of the crown’. Thus, prescription does not run against the state. Section 3 makes express provision with respect to the means by which a person may acquire the ownership of a block of land through the peaceable and uninterrupted possession for a period of ten years.

Prescription title to *chena* (slash and burn) lands cannot be set up against the state. The reason being that section 7 of the Crown Lands Encroachment Ordinance created a presumption that all waste lands, forests, unoccupied and uncultivated lands belonged to the Crown until the contrary was proved. In the case of such lands, this could only be

done by the production of *sannasas* or grant by proof that customary taxes for services rendered to the Crown.

3.6 Title to State Reservations

State reservations are provided for in Part VI of the State Lands Act No. 13 of 1949. Section 51 stipulates that title to state reservations cannot be acquired by possession or user. Section 53 exempts state from liability to pay compensation for improvements effected on reservations. Sections 227 to 234 of the Land Manual prescribe the width of the reservation for public streams, irrigation channels, reservoirs, roads, and foreshore. Under section 4 (a) 1 of the Sri Lanka Land reclamation and Development Corporation Act No. 15 of 1968 (as amended by Act No. 52 of 1982 and Act No. 35 of 2006), the surface width of all canal, sub canal and feeder canals as reservation areas required from the bank within the Western Province are gazetted.²⁶

Section 53 of the State Lands Act exempts the State from liability to pay compensation for improvements effected on reservations. Section 54 provides for summary ejectment of offenders in unlawful possession of state reservations. Section 103 provides that no person can by possession or user of land acquire any prescriptive title against the Crown.

3.7 Recovery of Possession of State Lands

The State Lands (Recovery of Possession) Act No. 7 of 1979 contains provisions for the recovery of possession of state lands from persons in unauthorized occupation thereof. Section 10 stipulates that no appeal is maintainable against an order of ejectment by a Magistrate. Section 13 provides for reasonable compensation for the damage sustained by reason of his having been compelled to deliver up possession of such land.

Chapter IX of the Land Development Ordinance spells out the procedure for ejectment of a person in occupation of a grant of a holding with a cancelled grant. Section 168 stipulates the offences with regard to state land. It says that if any person without the

²⁶ Government Gazette Extraordinary NO. 1662/17, July 14, 2010

permission of the Government Agent clears for cultivation any state land or erects any structures or fells any trees or otherwise encroaches on such land is guilty of an offence and subject to fine and imprisonment. Accordingly, the rights of mala fide possessors are not recognized for compensation for improvements in Sri Lanka.

3.8 Title to Land of indigenous groups

The title to land of indigenous groups conflicts with the need for resettlement of excess population from elsewhere in the country. Veddhas have challenged the instructions of forest and wildlife authorities restricting access to areas declared as protected. Any settlement on such lands of large numbers of people from over-exploited areas elsewhere in the country, carrying with them land use practices that may not be suitable for the new region, complicates the issue. In view of constant representations by the communities and civil society organizations (CSOs), the government recently granted the Veddha communities, certain exclusive rights in the Maduru-Oya forest reservation. These include access to resources, right to work as guides and issue of special identity cards to prevent them from being suspected as “illegal encroachers”. Customary users of land – such as indigenous peoples – commonly understand their property rights without reference to a legal structure. States have specific obligations arising from the special relationship indigenous peoples enjoy with their ancestral lands and other natural resources traditionally owned, occupied or used by them.

3.9 Land Disputes

Competition among different stakeholders over use, control and management of limited land and natural resources can often lead to disputes, particularly between those who depend on land for subsistence and others who wish to exploit it for other reasons including for profit. Such disputes are often the cause of human rights violations, conflicts and violence. Evictions may also be carried out in connection with conflict over land rights. Moreover, displacement, as a result of conflict and issues of return, restitution and resettlement, are outstanding in many post-conflict situations.

Rights violations can be further aggravated when there are no independent or functioning dispute resolution or grievance mechanisms that can identify effective remedies for land claims and against unlawful actions by state or private actors.

When the Mahaweli area was declared by gazette notification, many people who lived on some of the lands before these declarations were made did not possess the title deeds to prove their title. In other instances, the people who were cultivating or residing in state lands were given permits or grants to use those lands. But due to civil war and related threats, people had to leave. Some of those lands were taken over by the Security Forces, while some are occupied by those who “grabbed” the land. This grabbing represented a second case of encroachment; in certain cases there are multiple encroachments as well. There are also cases where the Forest Department and other state institutions, such as the Divisional Secretariats, the Land Reform Commission, the Sri Lanka Government Railway, the Urban Development Authority (UDA), the Ports Authority, and the Road Development Authority (RDA) have constant conflicts with the people occupying these lands. In several instances certain individuals have moved onto lands previously occupied for generations by others, and have refused to leave when the original occupants returned.

Many actual or potential conflicts exist with respect to land among different owners, claimants, actual land users and otherwise affected persons and communities. Clarification and security of land rights are essential for the successful planning and management of land resources. Settling these rights reduces conflicts between stakeholders, increases the confidence required for sustainable land use practices by the actual land cultivators or protectors, determines the respective responsibilities, and provides the basis for a fair and environmentally-sound allocation of incentives, subsidies or taxes.

Agricultural land is frequently the locus of disputes as boundaries are often uncertain, the nature of the tenure rights that landholders have over a particular parcel maybe obscure, and the exact shares of individual co-owners may be difficult to ascertain.

3.10 Recommendations

- A) Establish the constitutionally mandated body, the National Land Commission (NLC). The formulation of the national land policy is stalled because the NLC is not yet constituted by the Government. It is the responsibility of the Commission to formulate the national policy with regard to the use of State land. The

government should also take steps to make a viable and desirable national land use policy through a consultative process.

- B) The multiplicity of land related laws should be revisited and a comprehensive law to deal with all aspects of State lands should be introduced. The new law should streamline the process and agencies with authority over land. The wide variety of ministries, departments, institutions, and authorities have caused overlapping responsibilities and issues relating to State land, which should be avoided in the future. At times, it is evident that some of these authorities work at cross purposes.
- C) Introduce amendments to the Land Acquisition Act to give effect to the national involuntary resettlement policy.
- D) Establish a Fourth Land Commission as the issues pertaining to state land administration have not been addressed for the last three decades since the recommendations were issued by the Third Commission in 1985.
- E) recognise the right of the indigenous community of Veddhas to live, hunt for their own consumption, and gather forest produce in their ancestral land in the MaduruOya National Park and to enable those who wish to return to do so.

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Appendix 3. A

Legislative Enactments relating to Land

(in chronological order)

NO	Ceylon Legislative Council
1	State[Crown] Lands (Encroachment) Ordinance No. 12 of 1840
2	Definition of Boundaries Ordinance No. 1 of 1844
3	Service (Praveni) Land Ordinance (1852)
4	Registration of Temple Lands Ordinance (1856)
5	Land Surveys Ordinance No 4 of 1866
6	Service Tenure Ordinance (1870)
7	Prescription Ordinance No 22 of 1871
8	Land Resumption Ordinance No 4 of 1887
9	Prescription Ordinance No. 2 of 1889
10	Waste Land Ordinance No 1 of 1897
11	Waste Land Ordinance No. 5 of 1900
12	Waste Land Ordinance No 6 of 1903
13	Waste Land Ordinance NO. 16 of `1907
14	Forest Ordinance No. 16 of 1907
15	State[Crown] Land Marks Ordinance No 7 of 1909
16	Flood Protection Ordinance No 4 of 1924
17	Plant Protection Ordinance No. 10 of 1924
18	Tea Research Ordinance No.12 of 1925
19	Coconut Research Ordinance No 29 of 1928
20	Rubber Research Ordinance- N0 10 of 1930
21	State [Crown] Lands (Claims) Ordinance No 21 of 1931
22	Land Settlement Ordinance No 12 of 1931

23	Land Settlement Ordinance No 22 of 1932
24	Land Settlement Ordinance No. 81 of 1933
25	Land Resumption Ordinance No 2 of 1934
	State Council
26	Land Development Ordinance No 19 of 1935
27	Fauna & Flora Protection Ordinance(1937)
28	Land Resumption Ordinance No 57 of 1942
29	Temple Land (Compensation) Ordinance 1944
30	Irrigation Ordinance No 12 of 1946
31	Town and Country Planning Ordinance N0.13 of 1946
31	Land Development Ordinance No 3 of 1946
32	Irrigation Ordinance No. 32 of 1946
33	State [Crown] Lands Ordinance No 8 of 1947
34	State [Crown] Lands Ordinance No.9 of 1947
35	Municipals Councils Ordinance No 29 of 1947
	Parliament of Ceylon
36	State [Crown] Lands Act No 13 of 1949
37	Gal Oya Development Board Act No 51 of 1949
38	Land Acquisition Act No 9 of 1950
39	Requisitioning Lands Act No 33 of 1950
40	Soil Conservation Act No 25 of 1951
41	Rubber Replanting (Subsidy) Act No 36 of 1953
42	Land Development Act No 49 of 1953
43	State [Crown] Lands Act No 8 of 1954
44	Land Development Act No 22 of 1955

45	Land Settlement Act No. 22 of 1955
46	Land Resumption Act No. 22 of 1955
47	Rubber Control Act No 11 of 1956
48	Paddy lands Act No. 1 of 1958
49	Land Development Ordinance (Amendment No. 6 of 1961)
50	River Valley Development Board (Amendment) Act No. 6 of 1965
	Tourism Development Authority Act No. 14 of 1968
51	Nindagama Lands Act No 30 of 1968
52	Colombo District (Low Lying Areas) Reclamation & Development Board Act (1968)
53	Land Development (Amendment) Act No 16 of 1969
54	Mahaweli Development Board Act No 14 of 1970
55	Coconut Development Act No 46 of 1971
	National State Assembly of Sri Lanka
56	Land Reform Law No 1 of 1972
57	Agricultural Productivity Law No. 2 of 1972
58	Agricultural Lands No 42 of 1973
59	Sale of State Lands (Special Provisions) Law No 43 of 1973
60	Land Reform (Amendment) law 1975
61	Tea Small Holdings Development Law No 35 of 1975
62	Urban Development Authority Law No 41 of 1978
63	Board of Investment Act No. 4 of 1978
	Parliament
63	State Lands (Recovery of Possession) Act No 07 of 1979
64	National Housing Development Authority Act (1979)
65	Mahaweli Authority of Sri Lanka No 23 of 1979

66	Lands Grants (Special Provisions) Act No 43 of 1979
67	Agrarian Development Act No 58 of 1979
68	Urban Development Projects (Special Provisions) Act No 2 of 1980
69	National Environmental Act No. 47 of 1980
70	Coast Conservation Act No. 57 of 1981
	Road Development Authority Act No. 73 of 1981
71	Registration of Titles Act No. 21 of 1988
	Tourism Act No. 38 of 2005
72	Sri Lanka Land Reclamation and Development Corporation Act No 15 of 1968 as amended by Act No 52 of 1982 and Act No 35 of 2006
	Strategic Development Projects Act No. 14 of 2008
	Urban Settlement Development Authority Act No.36 of 2008
73	Land (Restrictions on Alienation) Act No. 38 of 2014

Alienation of State Lands to the Landless in Sri Lanka

4.1 Introduction

The word ‘alienation’ is used to designate the transfer of Crown (state) property. Latin term ‘alien’ denotes a non-naturalised foreigner. Paradoxically, the word ‘alienation’ is used in transferring land to the original inhabitants of the country from whom the land was plundered by the British.²⁷

Sri Lanka’s public land holdings are vast in comparison to the country’s land resources. One of the government’s most significant tangible assets, whether in the hands of central ministries, provincial governments, they occupy a substantial hectarage in rural and urban areas. Indeed, the Central Government departments and agencies are the largest landowners in the country.

As a rapidly modernizing and urbanizing society, Sri Lanka is experiencing pressures from many different directions to invest in public services and economic infrastructure. Disposing of identified, selected state land could free up fiscal resources for investments in other much needed public assets, such as long-lived infrastructure networks that can bring benefits to society for years to come.

There is no definitive publicly available inventory of central land holdings, but the available information indicates that these holdings are very large and potentially underutilized. These massive landholdings include land that belong to the Forest Department, the Department of Wildlife Conservation, Land Reform Commission, reserved areas for streams, reservoirs, canals, roads and railways.

A reliable and consistent inventory of public lands is a *sine qua non* to ensure that valuable assets are not held indefinitely when they could be converted to other use, public or private. The absence of a regularly updated, centralized, and consistent inventory of public lands also leaves considerable scope for alienation through sale, grant, or most likely leasing, of valuable lands without scrutiny of these transactions. A good inventory should record the location and dimensions of each land parcel, the

²⁷Report of the Land Commission – 1987. Sessional Paper No.III – 1990. Colombo: Government Publications Bureau p.11

legal title and any restrictions on development, current use and future planned use, if part of a public development plan and the valuation by parcels of economic significance. A publicly accessible inventory of public lands is an essential element in accountability.

Land and resource related conflicts are often exacerbated by overlapping jurisdictions across tiers of governance. An experimentation with a devolved structure in the aftermath of the Thirteenth Amendment points towards a separation of management arrangements for land alienation.

4.2 Legal Context of State Land Alienation

Any custodian of property has the right of alienation. Who has the custody of State lands? In Sri Lanka, the 13th Amendment to the Constitution in 1987 devolved powers to the Provincial Councils, which included land, irrigation and agriculture. Apart from the Constitutional provisions, there exist more than 39 major pieces of operational legislation on land management.²⁸ (See Appendix A). The number of laws continue to grow.

Appendix II of the Ninth Schedule to the Constitution states that State land vests in the Republic and may be disposed of, in accordance with article 33 (2) (f) and any written law governing the matter. It says that the President shall have the power to make “..... such grants and dispositions of lands and other immoveable property vested in the Republic”.

Para 1:1, Appendix II of the Ninth Schedule to the Thirteenth Amendment to the Constitution states that state land in a province required by the Centre in respect of a reserved or concurrent function may be utilized by the Government in consultation with the Provincial Council. What does ‘consultation’ mean? Is it concurrence, approval, reference, advice, information, notification or what?

Government shall make available to every Provincial Council (PC), any State land within a province required by such Council for a provincial purpose. Alienation of State land within a province to any citizen or to any organization shall be by the President, on the advice of the relevant Provincial Council. (para 1:3).

²⁸*Report of the Land Commission – 1987. Op. cit. pp. 151-152*

Except the administration and management of inter-provincial schemes, all other cases of land alienation, administration of settlement schemes could be handled by the Provincial Councils, subject to the provisions of the Appendix II. Other than the issue of grants (*Swarnabhoomi*), all other activities under the LDO could be done by the PC.²⁹ All activities under the Crown Lands Ordinance No. 8 of 1947 other than the issue of long term leases grants and vesting orders is the responsibility of PCs. The responsibility for regularizing encroachments also devolves on PCs.³⁰

Who determines the unit of alienation of state lands? Para 2:3 states that the criteria regarding the size of agricultural and homestead holdings are determined by the Centre in consultation with the Provincial Councils. With regard to the selection of allottees, settler selection criteria including the degree of landlessness, income level, size of family and agricultural background of the applicants are determined by the Centre (2:4). The actual application of these principles is the responsibility of Provincial Councils. This delineation of functions clearly lacks clarity.

Allottees are distributed on the basis of the national ethnic ratio. (See para 2:5). Priority will be given to persons displaced by the project, landless persons in the district and thereafter the landless in the province. Where the members of any community do not use the full quota of their entitlement of allotments, they would be entitled to receive an equivalent number in another inter—provincial scheme (2:6). The distribution of allotments should conform as far as possible to the demographic pattern of the Province ensuring community cohesiveness of settlements.

4.3 Land Alienation Schemes

The general methods of state land alienation are vesting order, sale, lease, mortgage, LDO permit, LDO grant, acquisition of land for public purposes by the Government, regularization of encroachment etc. Since the enactment of the Ordinance in 1935, around one million hectares of state land had been allocated on perpetual leases on the payment of an annual rent, primarily to small-holders through permit or grant schemes.

²⁹ See circular no. 02/233 dated 01 December 1989 issued by the Ministry of Lands, Irrigation and Mahaweli Development titled 'Transfer of land work to Provincial Councils'.

³⁰ Ibid. p.3

They were subject to restrictions designed to protect peasants from land usurers.³¹ The main purpose of introducing the LDO was to provide guidelines for the systematic development and alienation of state land. Following the LDO, the following land alienations were made under different settlement schemes.

1. Village Expansion Schemes
2. Major Settlement Schemes
3. Highland Settlement Schemes
4. Youth Settlement Schemes
5. Middle-class Settlement Schemes
6. Rain-fed Farming Settlement Schemes
7. Regularization of encroachments

Under the Land Development Ordinance (LDO) of 1935, the Government alienated a substantial area of land to relieve landlessness and for cultivation. Lands distributed under different schemes are shown in Table 4.1.

Table 4.1 - Extent of Land Alienated by the Government, 1935 and 1985

Type of Scheme	Hectares	Acres
Dry zone colonization schemes	175,941.31	434,751
Village expansion schemes	357,238.76	882,737
Highland settlement schemes	13,564.95	33,519
Youth settlement schemes	7,963.98	19,679
Regularization of encroachments	205,762.03	508,438
Middle class allotments	55,018.62	135,951
Land Grants (special provisions)	9,979.77	24,660
Rain-fed farming settlement schemes	5,363	13,252
Total	830,832.43	2,052,987

Source: Report of the Land Commission-1987. p. 133

A. Village Expansion

The alienation of lands since Independence was essentially an exercise in peasant settlements and village expansion. Table 1 demonstrates that village expansion had been the most predominant type of alienation since the 1930s. Village expansion

³¹Ranasinghe, T., Munro Faure P. and Herrera Garibay, A. 2012. *Status of Land Tenure in the Dry Zone Livelihood Support and Partnership Programme (DZLiSPP) Districts: Kurunegala, Anuradhapura, Badulla and Monaragala*. p. viii

settlement was significant not only in terms of the extent of land alienated but also in terms of the number of allottees benefitted. As shown in Table 1, by the end of 1985, a total of 830 832 ha of lands, comprising 12 percent of the land area of the country had been alienated to the people.

Village expansion schemes made lands available to landless families in close proximity to their villages. Among the diverse land distribution programmes, village expansion schemes contributed much to solve the problem of rural land hunger. Small lots of crown land called, 'LDO allotments' were alienated directly to the poorest people in rural areas. Similar to colonization schemes, the Land Development Department undertook the clearing, ridging and stumping work on the allotted land and provided roads, houses, latrines, wells and community buildings.

Financial and material assistance was given for the construction of houses, wells and latrines. At the beginning, an allottee received an extent about 1 acre which diminished over time to 0.05 ha (20 perches). These village settlements tended to be located in marginal areas with poor roads and limited access to water, shops, schools and buses. Evidently, the alienation of lands for village expansion prevented the large-scale growth of urban slums.

B. Regularization of encroachments

Next to village expansion, the most dominant form of alienation was the regularization of encroachments. The Crown Lands Encroachment Ordinance defines an encroacher as a person “ having, without the permission of the Government , entered upon or taken possession of any land which belongs to, or which immediately prior to that entry or taking possession was in the possession of Her majesty, her Heirs or Successors”.³²

The Land Commission, 1987 highlighted the gravity of the problem of encroachment. A survey of encroachments on State lands revealed that nearly a million acres of land had been encroached by some half a million settlers.³³ Reportedly, around 256,241 permits regularizing encroachments were issued up to the end of 1962.³⁴ Between 1979 and 1985, an extent of 70 646 ha (174, 566 acres) or 104,490 new

³² See section 2 of the Crown Lands Encroachment Ordinance No. 12 of 1840

³³ *Report of the Land Commission – 1987*. Op. cit. p. 135

³⁴ *Ibid.* p.135

encroachments had taken place. This high incidence of encroachments may be taken as a symptom of acute land hunger as well as the availability of State land to be encroached upon. A majority of these encroachments have taken place within the major colonization schemes and in areas adjacent to these schemes, mainly due to landlessness among the second and third generation settlers.

How to handle encroachments on land areas that cannot be regularized such as stream, reservoir, canal and road reservations? An encroachment regularization exercise found that 31 percent of the number of encroachments, covering an extent of 112,011 ha cannot be regularized.³⁵The regularization of encroachments commenced in 1980. By the end of 2000, 520 834 allotments covering 667 130 acres have been regularized. Encroachments on stream reservations can lead to problems of diminishing stream flow due to drying of springs, soil erosion, siltation of river beds and attendant flash floods. Hence, it became hard to resolve occupancy of sensitive areas as stream banks, reservoir buffer zones, forest reserves, road and railway reservations which can never be regularized.

Successive governments adopted “encroachment regularization” that was administratively expedient but which opened opportunities for corruption, even as it helped encroachers to purchase their own land. This also became an impediment for long-term scientific land use planning. Under the law of prescription, irrespective of the length of time of land occupancy, an encroacher would never be entitled to a prescriptive right of state lands.

Encroachments in urban areas are primarily for residential and commercial purposes. The main drive for urban encroachment is the lack of cheap, buildable lands for low income groups resulting in high density, low rise slum and shanty settlements. In urban areas, water and electricity were provided to encroachers, strengthening their claims for continued occupancy.

C. Major Settlement Schemes

Peasants from the over-populated and over congested settlements in the Wet Zone were resettled under rehabilitated and newly designed irrigation systems in the Dry

³⁵ Ibid. p. 228

Zone. The alienation of state lands under the LDO, in major colonization schemes was primarily for the alleviation of land hunger and creating a contented peasant proprietary class. In the Sri Lankan context, the word ‘colonization’ meant government sponsored peasant settlement in an area away from the settlers’ homes, as distinct from spontaneous settlement, either near to or away from the settler homes. From 1939 to 2000, an extent of 417,620 acres was alienated under major colonization schemes.

Table 4.2 - Alienation of Crown Lands under Major Colonization schemes, 1939-2007

Year	No. of Allotments Distributed	Extent Distributed (Ac)	% of Extent Distributed
Up to 1939	5683	33452	8.0
1940-49	6365	47623	11.4
1950-59	35132	161000	38.6
1960-69	33558	127759	30.6
1970-79	6038	16409	3.8
1980-89	12891	29877	7.2
1990-99	650	1500	0.4
2000-07	-	-	-
Total	100317	417620	100.0

Source: Land Commissioner’s Department.

The Land Development Ordinance of 1935 introduces certain limitations on the disposal of lands and the fragmentation of holdings in the inheritance process. They are:

- a) Farmer cannot sell the land except with the prior consent of the Government;
- b) Farmer cannot mortgage the land;
- c) Farmer cannot lease the land to someone else;
- d) Farmer cannot fragment the holding in the inheritance process below a prescribed size. He must nominate a single successor except in certain prescribed cases.

Where lands are alienated under the Land Development Ordinance, sub-division is permitted only up to the minimum viable unit. With increasing population pressure and failure on the part of other sectors to provide employment to increasing population,

lands which are not to be sub-divided are being sub-divided and cultivated by the relatives of the settler families. Studies undertaken in major settlement schemes show that concealed fragmentation or informal sub-division among several offspring has occurred, leading to a deterioration in living conditions of both first and second generation of settlers.

The motive for placing these restraints on land disposal in the LDO was the feeling that, if they were not there, outside investors might buy up the land and lease it to tenants. Such tenorial conditions would reduce production efficiency, make the many small farmers smaller and poorer and the few large farmers larger, increasing thereby the socio-political tensions in the country. The purpose of the restrictions on fragmentation and designation of a “nominated successor” was to protect the continuance of holdings as viable units. The Gal Oya Project Evaluation Committee of 1970 observed the disincentive effects of a form of tenure which gave the allottee no sense of possession and the difficulties created by other aspects of this form of tenure such as the insistence on succession by one heir only.³⁶

D. Middle Class Alienation

Under the scheme of middle class alienation initiated in the 1930s, relatively large allotments were distributed among persons who had sufficient income to invest. The size of the allotment ranged from 10 to 50 acres which was appropriate for commercial farming. In order to entice investments on land, efforts were made to promote middle-class land allotments, and this produced mixed results. A thriving sector of middle-class tea smallholders emerged in the south; middle-class paddy holders continued to thrive in Anuradhapura and Ampara districts. In contrast, middle-class highland schemes in the dry zone failed and were subsequently abandoned after extracting valuable timber from the allotments

By the end of 2000, the land area allocated under these schemes amounted to 63 265 ha (156 264 acres). In order to encourage local entrepreneurs to invest in modern agriculture, the post-independence governments vigorously pursued the middle-class

³⁶See Report of the Gal Oya Project Evaluation Committee. Sessional Paper No. I – 1970. Ceylon: Department of Government Printing. p. 40

alienation schemes. During the 1940- 1969 period, 95 percent of the total extent of land alienated had been distributed. The programme gradually declined after 1970.

E. Alienation for Youth Settlements

In 1954, the Government decided to alienate 10 percent of all allotments in colonization schemes to educated youth in order to provide gainful employment to unemployed youth. As the selection criteria adopted for alienating lands under settlement schemes gave preference to landless, large families with agricultural experience, unemployed youth could not find places in these new schemes. As youth unemployment had become acute by the 1960s, the Ministries of Lands and Agriculture commenced establishing settlement schemes for rural youth in 1966. Farms that belonged to the Department of Agriculture which were closed down were earmarked for alienation to educated youth.

Youth schemes were managed by the District Land Officers under a form of collective management. Up to the end of 1987, 19679 acres had been alienated to 7294 allottee youth under this programme. The youth were involved in the management of the farm collectively through a cooperative society. Considerable facilities were provided to these schemes by way of food aid, farm machinery, equipment and inputs, and a subsistence allowance. The youth had to reside in the farm and undertake all development work themselves. Food crops, such as, chillies, onions and vegetables were cultivated initially and later high value crops such as tea, coconut, cardamom and passion fruit were established. The programme failed mainly due to the weaknesses of cooperative management, individualization of land tenure instead of common tenure.³⁷

F. Cooperative Farms

Cooperative farms were established for the purposes of providing a satisfactory income for unemployed youth and generate employment. It minimized the capital costs of establishing alternative land settlement strategy to costly dry zone colonization schemes. Farms established on an electoral basis were managed by a Cooperative Society formed by the members from selectees aged 18 to 35 years who resided within

¹¹See Ellmon, O.L. et. al. (1976). *Land Settlement in Sri Lanka 1840- 1975*. Research Study series No. 16. Colombo: Hector Kobbekaduwa Agrarian Research and Training Institute.

a radius of five miles. By 1974, fifty-two farms were established covering an area of 14,581 acres providing employment to 3,183 persons.³⁸ The weaknesses of planning, heterogeneity of members, lack of experience in agriculture, dislike shown by members to collective forms of ownership and cultivation and inadequate income generated from farming were causal factors for the failure of cooperative farms.

G. Land for Housing the Urban Poor

A new approach to housing development in the late 1970s implemented the construction of rent purchase and rental housing, clarification of land titles and land acquisition for Building Societies. There has been significant progress in addressing the shelter for the poor through arrangements like the Hundred Thousand Houses Development Programme (1984), Million Housing Programme (1984-1989). Direct intervention of the government in settlement development included the provision of land plots to low income families. Slum dwellers in low-lying areas in Colombo City were provided with apartments in high-rise buildings thereby releasing valuable state lands. The net effect of filling up low-lying land and the continued occupation of sensitive reservations, however, has been a greater exposure to natural hazards such as floods, where again the government has to come for rescue in times of disaster.

H. Presidential Task Force on Land Alienation

In 1993, a Presidential Task Force was set up to directly address the acute landlessness through the alienation of state lands. According to its recommendations, large extents of unutilized and under-utilized land owned by the State, Land Reform Commission, and plantation companies were alienated among the *Janasaviya* recipients, landless poor, unemployed youth, government servants and the members of the armed forces for alleviating and enhancing the productivity of land resources. This task force identified 264,702 ha for both agriculture and housing. The largest category was for agriculture, where productivity did not improve because some lands distributed were agriculturally marginalized and unproductive. Politicians took land allocation into their own hands, and officials were relegated to the position of merely endorsing those encroachments.

³⁸Ellmon and Ratnaweera 1974. 64

4.4 Implications of the Land Acquisition Policy

No person should be deprived of land except under the provisions of the Land Acquisition Act which governs the procedure for the acquisition of private lands for public purposes. It makes provision for acquisition of lands and servitudes for public purposes and the payment of compensation at market rates for lands, structures and crops. It entitles an affected person to a hearing before acquisition. Land acquisition is time consuming taking 2 to 3 years to complete the process. There is provision under section 38A of the LAA to acquire lands under an urgency clause. Lands acquired for one purpose cannot be used for a different purpose. Any lands that remain unused should be returned to the owner.

One of the inadequacies of the LAA is that the onus to prove ownership, demonstrate clear title, gather all information and submit a compensation claim is on the affected person. Often, displaced persons are not aware of their rights and not experienced in time frames to be observed under the LAA and dealing with numerous documentation. The law stipulates compensation only for the persons who appear in the land administration records as the owners. It does not recognize the rights of those, such as squatters, who do not possess legal title to the lands they occupy. People who are impacted through the loss of income too are not recognized. There is no provision to assess the impacts on people's income, loss of employment, livelihood, and business for mitigation measures.

A common acceptance and practice in the alienation of State lands under the State Lands Ordinance No. 8 of 1947 (SLO) is that a grant is not possible to be made to joint owners. However, the Ordinance does not expressly prohibit grants to co-owners. Land is allocated to a single owner purely as a matter of administrative convenience. If the objective of the SLO is the grant of State lands to the needy without discrimination, it is only just and fair that co-ownership title is granted to both spouses. What is disconcerting is the fact that when new lands were granted to those affected by the Tsunami, such land had been given in the name of the husband even where women owned the damaged property. This inequity resulted from the administrative practice that deem the husband as the head of the household.

4.5 Concept of the Head of Household

A common acceptance and practice in the alienation of State lands under the State Lands Ordinance No. 8 of 1947 (SLO) is that a grant is not possible to be made to joint owners. However, the Ordinance does not expressly prohibit grants to co-owners. Land is allocated to a single owner purely as a matter of administrative convenience. If the objective of the SLO is the grant of State lands to the needy without discrimination, it is only just and fair that co-ownership title is granted to both spouses. A disconcerting disclosure is the fact that when new lands were granted to those affected by the Tsunami, new land had been given in the name of the husband even where women owned the damaged property. This inequity resulted from the administrative practice that deem the husband as the head of the household.

Is the concept of chief occupant or head of household an accepted legal principle? It is only reflected in the administrative practices of the country. Flowing from this, it is the male head of household who has invariably received the title to property in government relocation schemes. Land titles given by the State, only in the name of the male of the household was criticized by many who made representations before the Public Representations Committee on Constitutional Reform.³⁹ Where the head of household concept is used in programme and project design, contribution of other members of the household to the family unit is undermined. Any individual who has the agreement and assurance of the other members of the family (not necessarily the eldest male) should be allowed to represent the household. It must be reiterated that the Constitutional guarantee of equality is paramount and this archaic policy and practice must be revised.

4.6 Recommendations

- Improve the governance arrangements for management of public lands to ensure that alienation of these assets better serves the public purpose. Establish the National Land Commission
- Prepare a reliable and consistent inventory of public lands to ensure that valuable assets are not held indefinitely when they could be converted to other use, public or private.

³⁹ Report on Public Representations Committee on Constitutional Reform, May 2016. Colombo: Department of Government Printing. p. 195

- Avoid involuntary resettlement as far as possible by reviewing alternatives to projects. Where involuntary resettlement is unavoidable, affected persons should be assisted to reestablish themselves and improve their quality of life.
- Engage affected persons in the selection of relocation sites, livelihood compensation and development options. Affected persons who do not possess legal documents of title should receive fair and just treatment.
- Amend the State Lands Ordinance to recognize the grant of State land in the form of joint or co-ownership.
- Amend the Third Schedule of the Land Development Ordinance to repeal the preference to male heirs in case of intestacy and guarantee equality to both female and male heirs upon intestate succession.
- Abolish the practice of continuing the retention of the concept of the head of household in administration to avoid the discrimination of women. Issue circular instructions to government servants, particularly at Divisional and village levels to ensure both males and females can sign government forms and consider such female signatures as proof of valid information furnished.

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Issues relating to the non-existence of a Comprehensive Land Policy in Sri Lanka

5.1 Problem Definition

Since political independence in 1948, there has been a need for a comprehensive land policy that would govern institutions for land administration, management of land rights and land use planning. In particular, urbanization, industries and commerce have increased the demand for land and competition for plots especially in and around major urban centres. The recent upsurge of prospective investors wishing to acquire large pieces of land in various parts of the country in response to the country's investment promotion policy has also increased the competition for arable land.

At present some aspects of land policy are contained in different statements issued by the government and is further unveiled through legislation, rules, regulations, orders and departmental circulars governing the operations of institutions for land. Despite the absence of a basic, overarching formal land policy, a multiplicity of sectoral land policies has been developed in Sri Lanka (Table 1). Whilst relevant to their specific sectors, these sectoral policies tend to be limited in their focus. This results in increasingly significant land use conflicts between sectors, the duplication of activities by multiple government institutions and intensifying ‘turf’ conflicts between institutions.

Table 5.1 - Sectoral policy statements

National land use policy	Land Use Policy Planning Department, 2007
National Policy on the Protection and Conservation of Water sources, their catchments and reservations in Sri Lanka	(Gazette Extraordinary No 1894/3 of 22 December 2014)
National Status Report on Land Degradation, Implementation of the Convention to Combat Desertification in	Natural Resources Management Division, Ministry of Forestry and

Sri Lanka, 2001.	Environment.
National Wetland Policy and Strategy	Ministry of Environment, Central Environmental Authority, October 2006
National Forest Policy, 1995	Ministry of Agriculture, Lands and Forestry
National Involuntary Resettlement Policy	May 2001
National Housing Policy, 2017	Ministry of Housing and Construction, 2017

There remains a lack of a clear delineation of powers between the central government and Provincial Councils. Until powers are devolved, most administrative functions will remain centralized at the Land Commissioner General. Centralized and inefficient land administration has led to highly politicised decisions on land, as well as to corruption in land administration.

5.2 Need for a Land Policy

What are some of the specific ways in which Sri Lanka could benefit from having a comprehensive land policy? First by articulating the commitment to decentralisation, national land policy would minimise the threat of central government taking centre stage, or of provincial governments and other local institutions not being empowered enough to participate meaningfully in the implementation of the land policy. There are, however, other factors that have a strong bearing on the decentralisation process, such as administrative capacity and financial resources. A good national land policy would outline the institutional arrangements necessary for implementation by indicating the relative responsibilities of the component structures.

Second, a national land policy articulating clear implementation guidelines would push its implementation further up on the relevant Ministry's agenda. One of the outcomes of this,

would be greater commitment to the public awareness campaign guiding a viable strategic plan for implementation. A comprehensive land policy would be a solution to each of the challenges by seeking the harmonisation of legislations as one of its objectives.

Thirdly, an integrated, comprehensive policy declaration helps the weaker groups in society to understand their claims and rights. Currently, an overarching land policy does not exist but instead are dispersed over a number of sector policies and jurisdictions. Examples are the Land Use policy, land settlement policy, land acquisition policy, national involuntary resettlement policy, wetland policy, forest policy, irrigation policy etc. Some of the policies are contradictory, such as the NIRP and the government's provisions for land acquisition.

5.3 Policy Development Process

Specific policy directions in land management were incorporated into the Constitution by the 13th Amendment in 1987. As for the making of the policy, the 13th Amendment requires a National Land Commission (NLC) to be established by the Government. The Commission shall lay down general norms for the use of land, with regard to soil, climate, rainfall, soil erosion, forest cover, environmental factors, economic viability, etc.

As the NLC includes representatives of all Provincial Councils, it becomes the designated forum for Provincial Councils and the Centre to resolve land related issues. But, since the NLC has not been established, the opportunity for joint and co-operative action has been denied.

Land policy reform processes can be driven by three processes. 'Desk-top processes' are generally tightly controlled and managed by top government officials and have largely been ineffective at producing the concrete strategies needed to resolve prevailing problems. Second is the appointment of expert panels of inquiry and task forces to prepare preliminary working documents. Third is the commission of inquiry. The country has seen three land commissions to date from 1927 at 30-year intervals.⁴⁰ They focus on correcting the historical injustices and creating a class of peasant proprietors.

The "land issue" tends to incorporate the questions of land tenure, land distribution, land use, and land planning. Whilst each one of these questions might have a dynamic of its own and differing levels of urgency, these factors are inter-related and thus affect each other. Hence,

⁴⁰ See Policy Brief No. 2, titled "Legal and Policy Reforms on Securing Land Rights of Vulnerable Groups" for policy implications of the three Land Commissions.

in order for the cohesive development of national issues relating to land, an overarching land policy that fosters complementarity and consistency between the respective factors is necessary. The policy development process for an overarching land policy should follow these sequential steps:

- Prepare a white paper based on recommendations of the proposed Fourth Land Commission and circulate the recommendations for wide public discussion. A viable and desirable national land policy requires a consultative process.
- Consultative Conference on land administration and a stakeholder workshop
- Prepare a draft basic law based on the White Paper followed by public consultations
- Obtain Cabinet approval and list in the Order Paper of Parliament.
- Enact legislation

5.4 Constitutional and Legal Issues

Sri Lanka's constitution is non-discriminatory on ownership of land and property. Therefore, both men and women can legally own, transfer, inherit and dispose of land and property and may enter into any economic activity/business or employment as long as it is not illegal or against public policy. However, inequalities persist with regard to ownership of land and property under 'personal laws' operating in the country.

The Article 16 of the Constitution requires the revisiting of laws passed before 1978 constitution and make necessary amendments to remove the provisions that contradict with the provisions in the fundamental rights chapter. As such it should be the responsibility of National Land Commission or the proposed fourth Land Commission to identify such provisions in the existing land laws and make recommendations to the policy makers to amend them. The current policy brief has identified such land laws and related provisions under the section on Recommendations (See below 7(B)- Amendments to Existing Laws).

Land Rights

The proposed land rights legislation should encompass land rights, land tenure, land and natural resource management, land markets and land institutions? The range of rights should cover legislation on natural resource management, joint ownership of land and natural

resources, effective access of the poor for information regarding legal procedures for the registration of rights and transactions and the land rights of indigenous peoples.

Issues related to LDO/SLO Lands

An exception to the general non-discrimination principle of Sri Lankan law, is the section on inheritance, in the Land Development Ordinance of 1935. It promotes gender bias on ownership of land by giving preference to male inheritance where the original owner (traditionally a man), dies intestate. The bias has been reinforced through the custom/practice followed by government officials, of accepting only the male as the head of the household, even in cases where the man is disabled or dead and the woman is the family breadwinner.

According to the social obligations and family customs, parents prefer to distribute the total inherited land equally among all of their children regardless of the gender and the statutory restrictions of subdivisions. In the event of the death of the permit holder, the entire land will legally pass on to the eldest son. Then the daughter who resides in the scheme and looks after the parents will not get anything according to the existing law. The rule of unitary succession is patently contrary to the inheritance customs of all communities in Sri Lanka.

Joint ownership of LDO lands is not possible under the Land Development Ordinance as the permit or grant is given in the name of one person and in the event of intestacy, it devolves on the eldest son. When a state land is granted to a person, preference is given to single ownership to ensure undisputed clear title. Therefore, land grant certificates under the LDO and the State Lands Ordinance (SLO) are not issued in the names of two persons.

Involuntary Resettlement of Displaced Persons

One of the inadequacies of the Land Acquisition Act (LAA) is that the onus to prove ownership, demonstrate clear title, gather all information and submit a compensation claim is on the affected person. Often, displaced persons are not aware of their rights and not experienced in time frames to be observed under the LAA dealing with numerous documentation. The law stipulates compensation only for the persons who appear in the land administration records as the owners. It does not recognize the rights of those, such as squatters, who do not possess legal title to the lands they occupy. People who are impacted through the loss of income too are not recognized. There is no provision to assess the impacts on people's income, loss of employment, livelihood, and business for mitigation measures.

To ensure that displaced persons are treated in a fair and equitable manner and to ensure that people are not impoverished or suffer unduly as a result of project implementation, Sri Lanka adopted a National Involuntary Resettlement Policy (NIRP).⁴¹ It applies to displaced people whose homes and lands are acquired by public and private sector development projects, forcing them to move and resettle in unfamiliar locations. Under this policy, a comprehensive Resettlement Action Plan (RAP) is required where 20 or more families are affected. Where fewer than 20 families are involved, the policy still applies, but a resettlement plan can be prepared with less detail. The NIRP applies to all projects regardless of funding source. One gap in its coverage is that it can leave out people affected by small development projects. The NIRP also lacks sound legal footing as the policy is not supported by legislative enactment.⁴²

5.5 Policy Issues

Land Tenure and Land Markets

Land tenure defines how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. Simply, land tenure systems determine who can use what resources for how long, and under what conditions.

- A. Protected Tenancy: The Land Development Ordinance introduced the principle of ‘protected tenancy’, where land was leased to settlers with conditions guarding its use and with limitations preventing transfer, mortgage, sale or sub-division of holdings below a prescribed size. Although the LDO permits could be converted into grants after developing the land, the restrictions on transfer, leasing and sub-division remains.

The Paddy Lands Act No. 1 of 1958 introduced important tenancy reforms in the paddy sector by protecting the rights of *ande* tenants (sharecroppers). It failed to increase productivity despite achieving greater social justice. Today, tenant protection measures continue to operate under the Agrarian Development Act No. 46 of 2000.

- B. Freehold Tenure: Freehold title is the only form of secure, registrable title available, which affords the holder ownership that is transferable and inheritable. It provides

⁴¹ The Cabinet of Ministers adopted on 16 May 2001, the national policy on involuntary resettlement for all development induced resettlement.

⁴² See Policy Brief No. 3 on ‘Alienation of State Lands’ for implications on the land acquisition policy.

collateral against a loan. Freehold titleholders possess the right to dispose of the land without reference to the State. The intention of the LDO was to grant land to selected peasants on a perpetual lease basis. The conditional ownership conferred under LDO permits renders the land unacceptable to banks as collateral. The long delay in converting the permits into grants under the conditional leases give the settlers the feeling that the land does not belong to them.

It would be reasonable for the government to release its hold once the land is developed to a satisfactory level. The lack of free holding rights creates social and economic issues within the community. The government has declared its intention to confer freehold ownership.⁴³

5.6 Administrative Issues

Concept of ‘Head of Household’

A common acceptance and practice in the alienation of State lands under the State Lands Ordinance No. 8 of 1947 (SLO) is that a grant is not possible to be made to joint owners. However, the Ordinance does not expressly prohibit grants to co-owners. Land is allocated to a single owner purely as a matter of administrative convenience. If the objective of the SLO is the grant of State lands to the needy without discrimination, it is only just and fair that co-ownership title is granted to both spouses. A disconcerting disclosure is the fact that when alternative lands were granted to those affected by the Tsunami, such new lands had been given in the name of the husband even where women owned the damaged property. This inequity resulted from the administrative practice that deem the husband as the head of the household.

Is the concept of chief occupant or head of household an accepted legal principle? It is only reflected in the administrative practices of the country. The concept of a head of household appears in a number of government documentation that include land grants, electoral lists, school admissions, and applications for electricity and telephone connections. The concept is enshrined in the administrative practice in the country in relation to the law of property. It appears in citizenship enactments where a person’s citizenship is determined in terms of the father’s lineage and not the mother’s. Therefore, the notion of ‘head of household’ should be

⁴³ See Policy Brief No. 4 for a detailed discussion on tenurial rights and land markets.

redefined to make it a gender-neutral concept. Empowering the ownership of property by women would assist their future, increase their individuality and reinforce their bargaining power against domestic violence.

5.7 Recommendations

A Policy and Legal Reforms

1. Activate the constitutionally mandated body, the National Land Commission (NLC). It is the responsibility of the Commission to formulate the national policy with regard to the use of State land. The formulation of the national land policy is stalled because the NLC is not yet constituted by the Government.
2. Establish a Fourth Land Commission as the issues pertaining to state land administration have not been addressed for the last three decades since the recommendations were issued by the Third Commission in 1985. The government should also take steps to make a viable and desirable national land use policy through a consultative process.
3. A comprehensive, explicit national land policy should be formulated that addresses four areas: land tenure and administration; urban and rural land use planning; land use management and surveying and mapping. Currently, an overarching land policy does not exist but instead are dispersed over a number of sector policies and jurisdictions. Examples are the Land Use policy, land settlement policy, land acquisition policy, national involuntary resettlement policy, wetland policy, forest policy, irrigation policy etc. Some of the policies are contradictory, such as the NIRP and the government's provisions for land acquisition. An integrated, comprehensive policy declaration helps the weaker groups in society to understand their claims and rights.
4. The multiplicity of land related laws should be revisited and a comprehensive law to deal with all aspects of State lands should be introduced. The new law should streamline the process and agencies with authority over land. The wide variety of ministries, departments, institutions, and authorities have caused overlapping responsibilities and issues relating to State land, which should be avoided in the future.
5. A Land Rights Act must be formulated to protect the interests of private land owners and the permit/grant holders of state lands. Legislation related to land tenure should

be identified, and its strengths and weaknesses assessed. What are the major problems with existing legislation and how can they be improved? Existing legislation may be cumbersome for a programme of restitution, particularly when settlers do not have legal documentation to prove their rights.

6. Avoid involuntary resettlement as far as possible by reviewing alternatives to projects. Where involuntary resettlement is unavoidable, affected persons should be assisted to reestablish themselves and improve their quality of life.
7. For landless peasant occupiers on stream and road reservations that cannot be regularized, the Government should provide alternate lands and relocate them.
8. Avoid involuntary resettlement as far as possible by reviewing alternatives to projects. Where involuntary resettlement is unavoidable, affected persons should be assisted to reestablish themselves and improve their quality of life.
9. Engage affected persons in the selection of relocation sites, livelihood compensation and development options. Affected persons who do not possess legal documents of title should receive fair and just treatment.

B Amendments to Existing Laws

1. Amend the LDO to allow a gradual transition to a freehold tenure of land to give the settlers the feeling that the land belongs to them.
2. Repeal the principle of unitary succession required by the Land Development Ordinance which is contrary to Sri Lankan custom.
3. Amend the inheritance rights in the Third Schedule to the Land Development Ordinance by repealing the preference to male heirs in case of intestacy and guarantee equality to both female and male heirs upon intestate succession.
4. Amend the Land Development Ordinance and the State Lands Ordinance to recognize the grant of State land in the form of joint or co-ownership.
5. Introduce amendments to the Land Acquisition Act to give effect to the national involuntary resettlement policy. Amend the Land Acquisition Act to remove the Government's powers of forceful acquisition of land and grant redress to the vulnerable groups through:
 6. Making provision to compensate non-title holders
 7. Provide for consultation with affected people
 8. Introduce the requirement of public disclosure

9. Disallow taking over possession before payment of compensation
10. Introduce the requirement of replacement cost in the entitlement matrix
11. Include in the LAA, the requirement of assisting the vulnerable people presently available in the NIRP
12. Disallow payment of compensation in installments found in the LAA and introduce compensation in one lump sum
13. Amend *Thesavalamai* law to enable both women and men to deal with property matters equally, freely and equitably without any gender discrimination
14. Amend sections 5 and 8 of the Jaffna Matrimonial Rights and Inheritance Ordinance to conform to the fundamental right to equality.

C Administrative Processes

1. Redefine the term “Head of household” so as to ensure that women’s contribution to the household is recognized and they have equal access with men to all State development programmes, distribution of benefits and resulting responsibilities. Issue circular instructions to government servants, particularly at Divisional and village levels to ensure both males and females can sign government forms and consider such female signatures as proof of valid information furnished.
2. Re-train the administrators by pointing out that the concept of “chief householder” is a gender-neutral term, as its practice at district, divisional and village administration has led to the discrimination of women.
3. Permit activities other than “cultivation” in the LDO allotments to enable women to legally pursue household enterprises such as sewing to meet the practical needs of women to earn an income.
4. Improve the governance arrangements for management of public lands to ensure that alienation of these assets better serves the public purpose.
5. Prepare a reliable and consistent inventory of public lands to ensure that valuable assets are not held indefinitely when they could be converted to other use, public or private.
6. Develop Land Use Policy Planning Department’s capacity to function as a secretariat and provide technical support to a newly established National Land Commission. Government should appoint sub-committees under the NLC to formulate such land use plans.

7. For landless peasant occupiers on stream and road reservations that cannot be regularized, the Government should provide alternate lands and relocate them.
8. Credit institutions such as the SANASA and Cooperative Societies should provide a better service than the moneylenders in order to avoid pledging of crops and ultimately pledging of lands by the rural poor.
9. Administrative practice should allow for joint ownership/co-ownership in granting land to married couples. Presently, state agencies allocate land to single owners purely as a matter of administrative convenience.
10. Training and capacity building of all staff dealing with land matters is a prime necessity. Where skills are weak or missing, short-term training courses for land administration staff should be designed and implemented to rebuild the technical and managerial capacity of land agencies.
11. Re-train the administrators by pointing out that the concept of “chief householder” is a gender-neutral term, as its practice at district, divisional and village administration has led to the discrimination of women.
12. Prepare a reliable and consistent inventory of public lands to ensure that valuable assets are not held indefinitely when they could be converted to other use, public or private.
13. Abolish the practice of continuing the retention of the concept of the head of household in administration to avoid the discrimination of women. Issue circular instructions to government servants, particularly at Divisional and village levels to ensure both males and females can sign government forms and consider such female signatures as proof of valid information furnished.
14. In order to undertake and deliver land conflict mediation services, the mediation capacities of Divisional Secretaries, Colonization Officers, Land Officers, and community leaders such as the chief monk of the temple should be strengthened.

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