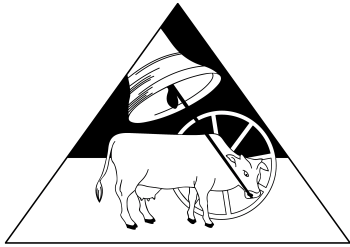


**LAND DEVELOPMENT  
ORDINANCE  
KEY CONCERNS  
AND IDEAS FOR  
REFORM**

**NABEELA RAJI**





LAW & SOCIETY TRUST

The Law & Society Trust (LST) is a not-for-profit organisation engaged in human rights documentation, legal research and advocacy in Sri Lanka. Our aim is to use rights-based strategies in research, documentation and advocacy in order to promote and protect human rights, enhance public accountability and respect for the rule of law.

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Any responses to this paper are welcome and may be communicated to us *via* email or post.

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# **THE LAND DEVELOPMENT ORDINANCE: KEY CONCERNS AND IDEAS FOR REFORM<sup>1</sup>**

**JUNE 2017**

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<sup>1</sup> This paper was written by Nabeela Raji and draws on conversations and feedback from lawyers and practitioners to whom the Law & Society Trust is grateful.

## **SUMMARY**

This paper outlines and reprises some of the key issues and problems regarding the Land Development Ordinance (LDO) and its implementation. Despite significant changes in the political economy of land use and regulation, the LDO remains pertinent. The paper notes that notwithstanding changes in administrative practice over time, there are long standing concerns as well as recommendations for reform of the LDO that warrant urgent attention.

## **Introduction**

Land is often a fundamental aspect of collective and individual life due to its many layered political and socio-economic implications. The political, economic, social and cultural dimensions of land rights play a central role in the shaping of individual and collective identities. Land and right to land have also been central to the organising of political authority and to most forms of statehood just as they are also integral to claims of nationhood, at least in terms of its territorialisation. Control over land and establishing the regulations pertaining to the occupation, ownership, transfer, alienation, and acquisition of land, state and non-state, were central to the legal and political economic architecture of the late and post-colonial Sri Lankan state.

This paper focuses on the Land Development Ordinance (LDO) of 1935, which continues to be a central piece of the legal architecture concerning land, especially state land, in Sri Lanka. Following a brief introduction to the history and context of the LDO, the paper discusses its provisions in brief before making an assessment of its shortcomings and suggesting possible reforms. The LDO is a much discussed law and the purpose of this paper is to present a succinct analysis of its provisions and outline directions for some important changes. The Law & Society Trust is cognizant of the fact that several initiatives towards law reform in relation to the LDO have taken place before this paper was presented, and some of the suggestions for reforms that are highlighted in this discussion have already been recommended by institutions such as the Law Commission, Human Rights Commission of Sri Lanka (HRCSL) and other civil society organizations. As such, this paper hopes to build on what has already

been recommended by integrating to the discourse the outcome of ongoing conversations and engagements of the Law & Society Trust regarding land issues and drawing on discussions with lawyers and activists engaged in land rights advocacy.

### **State Land and the Evolution of Land Policies in Sri Lanka**

The Sri Lankan State controls 82% of its landmass<sup>2</sup>, with the remainder being privately owned. State land has been defined as “...all land in Sri Lanka to which the State is lawfully entitled or which may be disposed of by the State and includes all rights, interests and privileges attached or appertaining to such land.”<sup>3</sup> The significance of State land has been interpreted by the judiciary in the following way: “From time immemorial, land has thus been held in ‘Trust’ for the people in this Island; now a Republic. The principle that State land is held in public trust could be clearly seen in the Land Development Ordinance and the State Grants (Special Provision) Act, where land was allocated to landless persons while reserving certain control by the State over such land.”<sup>4</sup>

In Sri Lanka—with a significant share of the population in the agrarian economy and with varying agro-ecological conditions—landlessness and access to land in general has become an acute and critical issue that has led to the implementation of various land policies by way of ordinances, amendments and policy statements by successive governments since independence, in order to alleviate landlessness. An analysis of the evolution of land policies in Sri Lanka since the 1930s reveals that the ideologies that underpin land law reform varied under successive governments. Under the British Colonial government, the focus was on fostering the growth and development of the plantation sector, which was a major source of revenue. As such, large tracts of native land were appropriated for commercial plantation ventures under the Crown Lands Encroachment Ordinance (CLEO), which caused the transfer of nearly 90% of the country’s landmass to the Crown. The sale of these lands to the plantation industry was the first major step undertaken to establish a capitalist mode of production in Sri Lanka.<sup>5</sup>

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<sup>2</sup> “Land Reform in Sri Lanka: A Poverty and Social Impact Analysis”, World Bank, 2008

<sup>3</sup> Section 110(1) of State lands Ordinance No. 8 of 1947 [The definition is similar with few variations in Section 2 of the Land Development Ordinance No. 19 of 1935 and Section 18 of State lands (Recovery of Possession) Act No. 7 of 1979]

<sup>4</sup> Determination on Land Ownership Bill, [1991-2003] VII DSCPB 453, cited in Marasinghe & Wickramaratne (2010) (op. cit), p.477.

<sup>5</sup> Sunil Bastian, “Sri Lanka: Land, Class and Ethnicity”, Colombo Telegraph, 8 August 2012, available at < <https://www.colombotelegraph.com/index.php/sri-lanka-land-class-and-ethnicity/>> (last accessed on 13 March 2017)

Subsequent legislation, such as the Waste Land Ordinance of 1897, the Partition Ordinance of 1863, Land Surveys Ordinance of 1863 and the Services Tenure Ordinance of 1870, which served to formalize and facilitate the smooth passage of land transactions, were essentially conceived as a means of improving the plantation sector and illustrate the colonial attitude to land policy in Sri Lanka.<sup>6</sup> However, the formation of the Land Commission in 1927 was set to inaugurate a significant change in land policy. A significant concession to nationalist interests, the Commission was empowered to review land policy and make recommendations. As Samaraweera (1981) notes, the Commission's recommendations were based on two important premises: Firstly, that the government is holding Crown land in trust for present and future generations of the Island's inhabitants, and secondly, that the "...*preservation of the peasantry as a social group...*" should guide land policy.<sup>7</sup> The Commission called for crown lands to be mapped and apportioned to meet the needs of different groups but with the peasantry being given priority. Crucially, it also recommended that "...*when land was to be granted for settlement as opposed to grants for large-scale agricultural enterprises, alienation was to be strictly confined to 'Ceylonese'*". In defining the latter, the Committee excluded Tamils of recent Indian origin (Up-Country Tamils).<sup>8</sup> The Committee of Agriculture and Land, under the leadership of D.S. Senanayake, in the State Council, colonial Ceylon's body of elected representatives, began to give effect to the Commission's recommendations through executive action until the Land Development Ordinance No. 19 of 1935 (LDO) was passed to give full legal effect to the Commission's recommendations.

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<sup>6</sup> Janaranjana Herath, "Distributional Impacts of Land Policies in Sri Lanka", Sri Lankan Agricultural Economics Association (SAEA) and Movement for National Land and Agricultural Reform (MONLAR), 2006, available at <[http://www.academia.edu/29758232/Distributional\\_Impacts\\_of\\_Land\\_Policies\\_in\\_Sri\\_Lanka](http://www.academia.edu/29758232/Distributional_Impacts_of_Land_Policies_in_Sri_Lanka)> (last accessed on 5 March 2017)

<sup>7</sup> Vijaya Samaraweera (1981), *Land, Labor, Capital and Sectional Interests in the National Politics of Sri Lanka*. Modern Asian Studies, 15, pp 127-162, doi:10.1017/S0026749X00006818, p. 145.

<sup>8</sup> Ibid.

The focus of policy was on expanding colonisation of the dry zone, also the areas of Sri Lanka's hydraulic kingdoms direction, with a focus on preserving the peasantry<sup>9</sup>—a policy that contained at its core the interests of Sinhalese (not just 'Ceylonese') nationalists and came to be the bedrock of the politics of ethnic identity and patronage around land in the decades to come.<sup>10</sup> The policy of land colonisation and distribution, which continued after Independence, has always been framed in terms of furthering the interest of the peasantry and agricultural development but almost from the outset its political economic, spatial and demographic dimensions also contributed to territorializing Sinhala nationalist claims and contributed to an ethnic politics that eventually led to decades of ethnic armed conflict.<sup>11</sup>

The recommendations of the second Land Commission appointed in 1955 led to some amendments in the LDO aimed at more efficient land utilization and providing assistance to peasant colonists.<sup>12</sup> While the Paddy Lands Act of 1958, which sought to regulate tenancies on paddy lands, was a significant intervention in terms of land rights,<sup>13</sup> the Land Reform Law No. 1 of 1972 precipitated major changes. The law, enacted by the United Front government in which the political Left was a major partner, placed a ceiling on the ownership of land at 50 acres per individual with a lower limit on paddy land at 25 acres,<sup>14</sup> but company-owned estates were exempted from the purview of this legislation.<sup>15</sup> The socialist ideology that drove these reforms resulted in the nationalization of large swathes of land assets, which were acquired by the Land Reform Commission and vested in the Land Commissioner's Department for

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<sup>9</sup> As evidenced by the report of the Land Commission of 1927, which contained recommendations concerning the use and fragmentation of land and has been subsequently embodied in the permit and grant scheme in the Land Development Ordinance. See Sarath M. de Silva, "Land Worth Fighting For", Daily News, 22 November 2016, available at <<http://www.dailynews.lk/2016/11/22/features/99783>> (Last accessed 13/03/2017)

<sup>10</sup> Samaraweera 1981 *supra* note.

<sup>11</sup> Sanderatne, Nimal "Economic Policy In Sri Lanka: Issues And Debates", eds. Saman Kelegama, (New Delhi: SAGE Publications India (Pvt) Ltd, 2004)

<sup>12</sup> Janaranjana Herath, "Distributional Impacts of Land Policies in Sri Lanka", Sri Lankan Agricultural Economics Association (SAEA) and Movement for National Land and Agricultural Reform (MONLAR), 2006, available at < [http://www.academia.edu/29758232/Distributional\\_Impacts\\_of\\_Land\\_Policies\\_in\\_Sri\\_Lanka](http://www.academia.edu/29758232/Distributional_Impacts_of_Land_Policies_in_Sri_Lanka)> (last accessed on 5 March 2017)

<sup>13</sup> Ibid.

<sup>14</sup> D. Marawila, "Revitalizing Small-Scale Agriculture: Rental Policies of Alienated State Lands of Sri Lanka", Sri Lankan Journal of Agricultural Economics, Vol. 9, (2010) pp.23-42, available at < <http://sjae.sljol.info/articles/abstract/10.4038/sjae.v9i0.1831/>> (last accessed 29 May 2017)

<sup>15</sup> These were subsequently nationalized by the Land Reform Law of 1974

distribution. With the policies of economic liberalization, which characterized the regime change in 1977, also came the Accelerated Mahaweli Development Programme that led to significant and far-reaching interventions in land use, policy and governance—both in terms of agrarian relations as well as expanding settlements and colonisation. While both land settlement schemes and distribution as part of the land reforms, under the Land Grants (Special) Provisions Act 1979, and Mahaweli development had agrarian and broader development objectives, Herath, writing in 2006, notes, “...most dry zone farmers are subsidized and are close to the poverty line. So one can argue that the land policy in recent years at the macro level has not benefited the poor”.<sup>16</sup>

While skewed distribution of land, political interference, outdated regulations and dysfunctions in institutions relating to land management, and weakening and ineffective support for agriculture have constrained the efficacy of land policies aimed at alleviating landlessness and precariousness,<sup>17</sup> policies aimed at resolving landlessness or land distribution have been embroiled in a vexed political debate. Land policy has been held hostage by several different interest groups and political pressures, including capitalist growth, Sinhala nationalism, wielding of political influence and a means of political patronage.<sup>18</sup> The politics around the governance of land and the lack of an equitable and principled national policy on land have been important factors in fueling the ethnic conflict and in generating significant roadblocks to a meaningful solution to the ethnic conflict. The Lessons Learnt and Reconciliation Commission (LLRC) noted that a just National Land Policy is a critical need, especially given the myriad impacts of the war on land relations and also the militarization of land in the post-war North and East. The importance of such a measure has again been affirmed by the report of the Consultation Task Force on Reconciliation Mechanisms.

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<sup>16</sup> Janaranjana Herath, “Distributional Impacts of Land Policies in Sri Lanka”, Sri Lankan Agricultural Economics Association (SAEA) and Movement for National Land and Agricultural Reform (MONLAR), 2006, available at <[http://www.academia.edu/29758232/Distributional\\_Impacts\\_of\\_Land\\_Policies\\_in\\_Sri\\_Lanka](http://www.academia.edu/29758232/Distributional_Impacts_of_Land_Policies_in_Sri_Lanka)> (last accessed on 5 March 2017) p. 10

<sup>17</sup> Ibid. See also D. Marawila, “Revitalizing Small-Scale Agriculture: Rental Policies of Alienated State Lands of Sri Lanka”, Sri Lankan Journal of Agricultural Economics, Vol. 9, (2010) pp.23-42, available at <<http://sjae.sljol.info/articles/abstract/10.4038/sjae.v9i0.1831/>> (last accessed 29 May 2017)

<sup>18</sup> Sunil Bastian, “Sri Lanka: Land, Class and Ethnicity”, Colombo Telegraph, 8 August 2012, available at <<https://www.colombotelegraph.com/index.php/sri-lanka-land-class-and-ethnicity/>> (last accessed on 13 March 2017)



The Constitution of Sri Lanka, under the 13th Amendment, provides for a National Land Commission that will be responsible for the formulation of a National Land Policy with regard to the use and distribution of state land. Such a policy would also have to account for several fault lines in the existing social and political economic relations that shape access to land, including gender, class, caste, ethnicity as well as concerns pertaining to housing, livelihoods, the commons and the environment. While it is crucial to continue to press for such a policy, it is equally important to recognize that it would have to also account for the many concerns about existing legal frameworks on the regulation and distribution of state land. It is in this context that this commentary focuses on the Land Development Ordinance No. 19 of 1935 and canvasses some of the central concerns pertaining to it and outlines a number of recommendations to address these concerns.

### **The Land Development Ordinance No. 19 of 1935 - An Introduction**

The Land Development Ordinance No. 19 of 1935 (LDO) provides for the systematic development and alienation of state land in Sri Lanka. It legislates the powers and functions of government officials who are tasked with the responsibility of regulating the use and distribution of state land. In this regard, the post of Land Commissioner is established for the purpose of implementing the provisions of the Ordinance. The Ordinance also provides for procedural measures related to the issuing of permits and grants of land to deserving persons.<sup>19</sup>

As outlined earlier, the history of the Ordinance goes back to the Crown Lands Encroachment Ordinance of 1840 that was enacted to transfer to the State all lands to which title could not be established and is the basis of the concept of eminent domain in Sri Lanka.<sup>20</sup> The enactment created landlessness as it effectively dispossessed many, particularly those in the agricultural community who occupied state lands as cultivators but could not discharge the burden of proving title to such land. The Ordinance, as discussed above, was the result of a political context in which ‘Ceylonese’ identity was being defined and territorialized, including in terms of preserving the peasantry, alleviating landlessness and developing state

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<sup>19</sup> State Land is alienated by issuing either permits or grants under Chapter III and Chapter IV of the Land Development Ordinance.

<sup>20</sup> Eminent Domain refers to the power of the State to take over privately held land on the grounds of public interest, subject to payment of compensation.

lands.<sup>21</sup> As such, the new policy allocated land—subject to a series of conditions—to selected peasants who were given their allotments on the basis of permissive tenure under the LDO,<sup>22</sup> which was meant to also provide an economically productive resource to impoverished peasants.<sup>23</sup>

### **The Concept of Eminent Domain under the LDO**

The LDO encapsulates the concept of eminent domain by virtue of its embodiment of the notion of government alienation of Crown land. Today, the Divisional Secretary or Assistant Divisional Secretary of each Divisional Secretariat's division exercises the powers of alienation of state lands under the Land Development Ordinance.<sup>24</sup> Alienation of state lands occurs primarily through permits and grants. The permit holder may become a grantee, but not the owner of the land. Rights as a permit holder are limited, where the permit constitutes a form of lease in perpetuity with the reversionary right of the State. Further, the Grantee cannot not lease, mortgage or fragment the land by transfer. This 'protective' policy that underpins the allocation of state lands under the LDO seeks to minimize the sub-division and fragmentation of alienated lands in order to prevent "*improvident alienation*" (i.e. poor families engaging in distress sale of their lands).<sup>25</sup> In this way, the State ensured monopoly over land ownership, to the extent that the Ordinance provides that the Government Agent (i.e. the Divisional Secretary) has the power to cancel the permit if the conditions attached to the permit are not complied with.

### **Challenges to the Implementation of the LDO and Suggestions for Reform**

A convenient starting point of analysis would be to examine the contemporary understanding of state land that underpins the implementation of the LDO today. As highlighted before, the LDO encapsulates the concept of eminent domain in Sri Lanka by way of the notion of government alienation of state land and the restrictive land alienation policy that it seeks to implement. This restrictive approach has resulted

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<sup>21</sup> "Land Ownership and the Journey to Self-Determination: Sri Lanka Country Paper", Land Watch Asia Study, 2010

<sup>22</sup> Weerawardena 1991: 49-50

<sup>23</sup> Diana Montero Melis, Milanga Abeysuriya, Nilakshi De Silva (eds) "Putting Land First? Exploring the Links between Land and Poverty", Annual Symposium on Poverty Research in Sri Lanka, Series No. 5 (2006)

<sup>24</sup> Chapter II provides for the mapping out of state land for alienation to the public for the various purposes specified in Section 8 of the Ordinance, for the preparation of schemes and diagrams of state lands for the purposes of such alienation and for the consideration and possible modifications of such schemes or plans.

<sup>25</sup> "Land Ownership and the Journey to Self-Determination: Sri Lanka Country Paper", Land Watch Asia Study, 2010, p. 223

in the State's monopoly over land ownership, which is seen to this day. A consequence of this is the high incidence of encroachment on state lands due to the large population that is landless and competing for land.<sup>26</sup> In practice, the increasing politicization of land has resulted in successive governments resorting to "*encroachment regularization*", a process that gives legal recognition to irregular occupants of state land.<sup>27</sup> This phenomenon has resulted in a situation where currently, regularization of encroachment is the largest category of government-alienated land for which permits are still being issued.<sup>28</sup>

However, it is concerning to note that even though regularization of encroachment is carried out under the provisions of the LDO (Section 19(2) of the Ordinance, which provides for the issuing of permits), political influence and interference prevents both the consistent implementation of the LDO and the adoption of a transparent and fair process of selection.<sup>29</sup>

### **Unbridled Discretionary Powers Vested in Government Officials by the LDO**

The Ordinance contains a major lacuna in that vast discretion is vested in government officials when selecting persons from the public and issuing permits for the purpose of alienation of state land. Although the Ordinance and successive government circulars and regulations have provided guidelines for the selection of recipients of permits, the extent of discretion is still large and the process non-transparent and lacking in effective checks and balances leading to corruption and inefficiencies bedeviling the process. Beneficiaries have reported that bribery is commonplace when dealing with government representatives authorized to make case-by-case decisions in the administration of LDO programs.<sup>30</sup>

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<sup>26</sup> Ibid., p. 225

<sup>27</sup> The evidence in the data also shows that encroaching is a strategy for expansion by some better-off families who are politically well connected or are seeking alternative lands.

<sup>28</sup> Since the 13th Amendment to the Constitution in 1987 and its subsequent implementation, only the Mahaweli Authority and Provincial Land Commissioners issue permits to regularize encroachment. See Diana Montero Melis, Milanga Abeysuriya, Nilakshi De Silva (eds) "Putting Land First? Exploring the Links between Land and Poverty", Annual Symposium on Poverty Research in Sri Lanka, Series No. 5 (2006)

<sup>29</sup> The low-income encroachers are deprived of service upgrades, such as electricity, holding membership in community-based organizations and cutting down trees on their homesteads, because all of these are contingent on showing a permit and establishing eligibility as a settler.

<sup>30</sup> "Land Reform in Sri Lanka: A Poverty and Social Impact Analysis", World Bank, 2008

A cause for concern is the fact that although land officials under the LDO are employed by Provincial Councils, they work directly under the supervision of the Divisional Secretariat. The ambiguity in the chain of command further amplifies the already wide discretion and lack of accountability when carrying out their functions, especially in the allocation of state land.<sup>31</sup> Another problematic aspect of the Ordinance is the lack of a mechanism that provides for the devolution of land alienation powers through the Provincial Councils. Although land administration powers are given to the Provincial Councils, the Ordinance only provides for alienation through the process originating with a Land Kachcheri called by the Government Agent i.e. District Secretary, and does not specify how a Provincial Council's advice may be obtained.<sup>32</sup>

The unbridled discretionary powers vested by the Ordinance in the Divisional Secretaries and other officials, as well as the concerned Minister, and the lack of adequate oversight of their discretion invariably causes distrust and breeds corruption, lack of transparency and abuse of power.

### **The Process of Alienation of State Land under the LDO**

Furthermore, the primary mechanism in place for the selection of recipients of state land, which is the Land Kachcheri<sup>33</sup> system, must be reformed to ensure greater equity, efficiency and accountability. After the convening of a Land Kachcheri, the LDO does not provide for a timeline within which the list of selected recipients of permits is to be published. Moreover, it also does not provide for a timeline within which recipients will receive their permits and can begin to enjoy their rights over the land. The issue of permits is often delayed. Due to these discrepancies, many participants at Land Kachcheris are inconvenienced and sometimes have to participate in Land Kachcheris multiple times in order to secure their permits. These delays and inefficiencies can partly be attributed to the fact that it is the Divisional Secretariat (DS) that has been delegated<sup>34</sup> the role of carrying out the issuing of permits to recipients. It

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<sup>31</sup> Mohamed Hafiz Zainudeen, "Land Administration in Sri Lanka: Issues and Challenges", 2016 World Bank Conference on Land and Poverty, The World Bank - Washington DC, March 14-18, 2016, p. 11

<sup>32</sup> "Devolution of Land Powers: A Guide for Decision-makers", Verite Research, 2016

<sup>33</sup> Section 20 of the LDO provides that a Land Kachcheri should be held for the purpose of selecting recipients of state land. A 'Land Kachcheri' is defined as a meeting held in the prescribed manner for the purposes of alienating State land.

<sup>34</sup> Bhavani Fonseka and Mirak Raheem, "Land in the Eastern Province: Politics, Policy and Conflict", Centre For Policy Alternatives (2010), p. 83

has been contended that the overload of responsibilities for the DS prevents the efficient administration of its responsibilities under the LDO and it has been recommended that either a separate Land Department should be established within the DS or that an independent body is assigned this task, so as to produce greater efficiency and independence from political pressure in the alienation of state land. It is further recommended that the LDO should be reformed to incorporate timelines within which these administrative procedures are to be carried out so as to minimize delay and ensure greater efficiency and transparency. With regard to this, the following amendments<sup>35</sup> to the LDO are recommended:

- (i) A period of one month after the holding of a Land Kachcheri should be stipulated within which the Divisional Secretariat must publish the list of names of those recipients of land permits and inform all recipients of the same in writing.
- (ii) Appeals regarding the list of names should be made within 14 days of its publication or receipt of written notification.
- (iii) Appeals should be heard and disposed of within a further period of one month.
- (iv) The final list of names of permit holders should be published within one month of the conclusion of the adjudication of appeals.
- (v) Within one month of the final list of land recipients being issued, undisturbed possession of the relevant plots of land should be handed over to the land recipients.
- (vi) Within one month of undisturbed possession over the relevant plots of land being granted to land recipients, a permit under the Land Development Ordinance must be issued to those recipients.

A judicial officer or a committee of independent persons who will exercise objectivity and ensure equality and transparency in the process of selection should carry out the selection of recipients at a Land Kachcheri. Where applicants for permits at a Land Kachcheri are rejected, it is also recommended that a mechanism is put in place whereby the applicants are informed of the reasons for such rejection and of the fact that they have an option to appeal under the Act. In this regard, it should be provided for that the appeal from the Land Commissioner is to be to a Court of Law. In order to facilitate this process, a special land tribunal should be set up in the district, where such appeals can be adjudicated.

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<sup>35</sup> See Jagath Liyanaarachchi, "Proposals on Legal Reforms to Minimize the Issues Faced by State Land Users", Law and Society Trust (2016)

### **Land Rights under the LDO Permit/Grant System**

The Land Development Ordinance provides that a permit holder may make an application to convert the permit to a grant that gives her or him full legal ownership to the land. Although grant status provides clear title and greater protection from administrative interference, the grantee is denied the right of freely disposing of the land.<sup>36</sup> Land converted into a grant title can only be taken back by the State under the Land Acquisition Act. Given the relatively better security of tenure associated with grant status, permit holders should be entitled to the conversion of their permits to grants upon the fulfillment of the conditions attached to the permit. However, the LDO does not stipulate a timeframe within which a permit holder is eligible to apply for the conversion of his permit into a grant. Though appeals can be made to the Divisional Secretary, the associated procedure and outcome is entirely at the discretion of the Divisional Secretary and no specific timeframe is followed.<sup>37</sup> Accordingly, it is recommended that the LDO should be reformed to include provisions specifying timeframes for the eligibility of permit holders to apply for a grant.

A further problematic aspect is the restriction of a number of activities related to land, which are attached to the LDO permit/grant. The restrictions, with various amendments over time, are as follows: (i) Land cannot be sold or disposed except with the prior approval of the Government Agent/District Secretary (ii) Land can only be mortgaged to selected financial institutions (iii) The allottee is disallowed from leasing or sub-leasing the land, except in cases of extenuating circumstances, such as illness, and then only for up to one year (iv) The recipient cannot dispose of a portion of the land, which is less in extent than the prescribed minimum unit of sub-division (v) The recipient cannot dispose of the land or a part of it that would result in co-ownership (vi) Transferability of land is restricted to individuals belonging to the same class with the prior approval of the Government Agent.

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<sup>36</sup> “Land Reform in Sri Lanka: A Poverty and Social Impact Analysis”, World Bank, 2008

<sup>37</sup> See Jagath Liyanaarachchi, “Proposals on Legal Reforms to Minimize the Issues Faced by State Land Users”, Law and Society Trust (2016)

These limitations or restrictions are meant to be protective in nature,<sup>38</sup> and prevent dispossession, fragmentation and an unregulated open market in alienated state lands. Equally these limitations also act to secure the use value of small and middle peasants against the vagaries of fluctuating exchange value that drive market dynamics, which can also lead to accumulation or concentration of land. However, it is also true that these restrictions may prove disadvantageous to recipients of such grants/permits. Uncertainty of ownership and long-term use may discourage occupants from investing in their land; as such, in practice, it cannot necessarily be said that there is a strong relationship between LDO tenure and productivity. Moreover, it is commonly reported that there is a high frequency of irregular and informal transactions including mortgaging, leasing and even sale of lands. A free market oriented view is that the current raft of restrictions under the LDO renders the state land alienated under it a very limited asset, as it cannot be inherited, subdivided, mortgaged or sold without prior approval, which in turn is seen as negatively affecting LDO households by reducing the productivity of land and preventing farmers from pursuing non-agricultural pursuits, as the land cannot be sold.<sup>39</sup>

While exceptions to these restrictions can be made on a case-by-case basis by authorised officials, these interactions occur within a framework where there are no clear criteria, discretion is excessively wide and the process characterised by a lack of transparency, and in a context where allegations of political interference, bias and corruption are rife. The *ad-hoc* application of the law and excessive discretion may appear to justify strong suit of rules but it is equally important that there is space to account for the unique context and realities of particular cases. The rationale for protective limitations remains relevant, especially in a context where peasants and farming communities are so vulnerable to dispossession and displacement. It is vital that a comprehensive set of principles along with clear operational norms be developed to rein in executive discretion with respect to alienation of land. Appropriate checks and balances and review of and appeal against decisions are also vital to ensure additional safeguards. However all of these must also be based on a comprehensive study and assessment that accounts for a rich diversity of experiences of both officials and permit/grant holders.

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<sup>38</sup> Saman Kelegama (ed), “Economic Policy in Sri Lanka: Issues and Debates”, Institute of Policy Studies, p. 205

<sup>39</sup> “Land Reform in Sri Lanka: A Poverty and Social Impact Analysis”, World Bank, 2008

Another issue that warrants attention is the provision of the LDO under Section 19(4) that mandates the compliance of all conditions attached to a land permit or grant. These conditions run with the land, and the original owner to whom the grant was issued as well as successors, are bound by them. This places at risk those who cannot meet the stipulated conditions under Section 19(4) due to factors such as displacement as a result of war or natural disasters,<sup>40</sup> or other circumstances beyond their control where a permit holder has failed to meet the conditions attached to the permit. In all such cases the State may, after holding an inquiry, cancel the permit. However, the Act does not provide for claims of compensation of any kind whatsoever by any court when a land permit or grant is cancelled.<sup>41</sup> Here again it is vital to develop principles and norms that safeguard the interests and right of permit holders while ensuring that the conditions themselves are justified.

### **Succession under the LDO**

Succession under the LDO can take place as permit-holder to or owner of the land in question. The relevant statutory provisions are found in Chapter VI of the LDO.<sup>42</sup> This paper focuses on the succession of the spouse of a permit holder or owner under the LDO, which has led to implications in terms of gender justice. Although the relevant statutory positions relating to the position of a spouse of a permit-holder or owner are on their face gender-neutral, succession to state lands by the spouse has clear gender dimensions, due to the large majority of those to whom State lands have been granted under the LDO being male.<sup>43</sup> As such, a large majority of surviving spouses are female and in light of this reality, it remains a concern as to whether the provisions of the LDO have been construed in a manner that ensures gender justice. Discrimination against female spouses has been found in the legislative framework

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<sup>40</sup> S. Sriskandarajah, R. C. Karunakaran, M.A. Sumanthiran, “Legal Analysis of Property Issues affecting Internally Displaced Persons and Refugees in Sri Lanka”, United Nations High Commissioner for Refugees and the Human Rights Commission of Sri Lanka, 2003

<sup>41</sup> B. Fonseka, “Legal and Policy Implications of Recent Land Acquisitions, Evictions and Related Issues in Sri Lanka”, Centre for Policy Alternatives, 2014

<sup>42</sup> Succession to state land occurs either by being nominated by the original permit-holder/owner, or where the permit-holder or owner dies without nominating anyone, according to the provisions for succession found in the Third Schedule of the LDO.

<sup>43</sup> Law and Society Trust, *Is Land Just for Men? Critiquing Discriminatory Laws, Regulations and Administrative Practices relating to Land and Property Rights of Women in Sri Lanka*, ed. Kishali Pinto-Jayawardena and Jayantha De Almeida Guneratne (Colombo: Law and Society Trust, 2010), p. 55



for succession and in the practice of the LDO. The provisions relating to succession by spouses, as found in Section 48A and 48B of the Ordinance, set out that the spouse of a deceased permit holder or owner of a holding is entitled to succeed to the land whether or not he/she has been nominated for succession. Upon re-marriage or the death of the spouse, the land devolves upon the person nominated by the original permit holder or, if no such nomination exists, according to the order of succession found in the Third Schedule to the Ordinance. The Ordinance draws a distinction between the land rights of spouses who have been nominated and those who have not been nominated. Spouses who have not been nominated as successors face certain restrictions in dealing with the land, i.e. they have no power to dispose of the land or to nominate their own successor to it. Where a spouse has been nominated as successor, none of these restrictions apply and the succeeding spouse has the same powers over the land as the original owner. However, it has been found that this distinction drawn by the Ordinance is not being complied with in practice<sup>44</sup>. An earlier study conducted by the Law & Society Trust, which involved substantive empirical research in all parts of the country,<sup>45</sup> found that administrative officials use a handbook (a consolidation of various statutes relating to rights in the context of State land, regulations made thereunder and a separate section described as “Land Orders”), which presents a simplified version of the provisions of the Ordinance so that they are more accessible.<sup>46</sup> Clause 143 in the Orders section<sup>47</sup> of the handbook<sup>48</sup> provides that surviving spouses, whether nominated or not, enjoy only a life-interest in the land. The reasons put forward in defence of this practice by administrative authorities in pursuance of Clause 143 is mainly that in many cases the surviving female spouse prefers the deed to be registered

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<sup>44</sup> Ibid., p. 64

<sup>45</sup> The Study envisaged the conducting of substantive empirical research in all parts of the country in order to ascertain the current needs and perspectives of women and men who are affected by discriminatory laws relating to land and property rights and the formation of a coherent and comprehensive body of recommendations in this regard. For the findings of the Study, see Law and Society Trust, *Is Land Just for Men? Critiquing Discriminatory Laws, Regulations and Administrative Practices relating to Land and Property Rights of Women in Sri Lanka*, ed. Kishali Pinto-Jayawardena and Jayan-tha De Almeida Guneratne (Colombo: Law and Society Trust, 2010)

<sup>46</sup> Ibid.

<sup>47</sup> “143. Upon the death of a permit holder if the spouse of that permit holder is living, even if he or she has not been nominated as successor, he or she shall be entitled to life interest in respect of the land. In such a situation since the surviving spouse shall be entitled only to a life interest, such surviving spouse shall not be entitled to nominate a successor. Furthermore...”

<sup>48</sup> Clause 143 appears to be an attempt to put in non-legalistic terms the effect of subsection 48A(1) of the Ordinance, which contains the provision that the spouse of a deceased permit holder or owner of a holding is entitled to succeed to the land whether or not he/she has been nominated for succession.

under a male's name, be it her son or, in the absence of a son in a given family, a nephew or grand-nephew.<sup>49</sup> This practice is clearly in contravention of the LDO, which differentiates between nominated and un-nominated spouses and affords full rights to a nominated spouse. Steps should be taken to reform the law to the effect that it ensures the rights of the spouse, within the legal framework as well as in practice.

The spouse or the nominated successor of a deceased person may lose the land that was given on permit due to failure to succeed as provided by the Ordinance. Further, the Ordinance also provides that if the spouse or the nominated successor of a deceased permit holder does not succeed by obtaining a permit from the Government Agent as per the provisions of the LDO to occupy that land, or fails to enter into possession within a period of six months reckoned from the date of the death of the permit holder or owner, the successor shall deem to have surrendered his title to that land to the State. The consequences of such stringent provisions are illustrated by the existence of judicial precedent to this effect. For example, in **Gunawardana v. Rosalin**<sup>50</sup>, the Supreme Court allowing the appeal of the decision given by the District Court, held that since Section 68(1) of the LDO provides that a nominated life-holder fails to succeed if he refuses to succeed or does not enter into possession of the holding within a period of six months reckoned from the date of the death of the owner of the holding, the plaintiff fails to succeed as she did not enter into possession within the period prescribed in the provision. Such a judgment leads to inequitable consequences when the Court so strictly adheres to the provisions of the Ordinance regarding “*entering into occupation*”, as the nominated life-holder is denied her rights, as intended by the deceased grantee.

Furthermore, in the Supreme Court decision in **Rasammah (wife of N Munigapillai) and another v. Manamperi, Government Agent, Anuradhapura**<sup>51</sup>, it was decided that the 2<sup>nd</sup> Petitioner had failed to apply for a permit within 1 year from the date of death of the permit-holder M and therefore it was

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<sup>49</sup> Law and Society Trust, *Is Land Just for Men? Critiquing Discriminatory Laws, Regulations and Administrative Practices relating to Land and Property Rights of Women in Sri Lanka*, ed. Kishali Pinto-Jayawardena and Jayan-tha De Almeida Guneratne (Colombo: Law and Society Trust, 2010), p. 64

<sup>50</sup> (1960) 62 NLR 213

<sup>51</sup> (1974) 77 NLR 313

deemed that the 2<sup>nd</sup> Petitioner had surrendered to the Crown her title as successor to the land, as per Section 85 of the Ordinance. Thereafter, a fresh permit was issued to the 1<sup>st</sup> Petitioner (the deceased permit-holder's widow) for a half-share of the land. Again, the inequitable outcome was that only a half-share of the said allotment came to the 2<sup>nd</sup> Petitioner, a female minor of 2 years at the time her father had nominated her as his successor to the permit, whereas the deceased permit-holder's intention had been otherwise.

Such judicial precedents reveal that although the succession procedure<sup>52</sup> provided for in the LDO cannot be termed as inherently discriminatory, the stringent requirements in place may adversely impact the rights and interests of the parties concerned. This is especially true of those permit holders who may have suffered prolonged displacement and a complicated return process. In light of the fact that the LDO has been misconstrued in such a manner, it is submitted that a strong case exists for the reform or even the overhaul of the LDO.

In the same vein, the rules of succession with regard to land given on permit under the Land Development Ordinance should be amended. Section 72 of the Ordinance presents a significant problem in that it decrees that, in the absence of a nomination of a successor to land alienated under the Ordinance, the title devolves as prescribed by the rules set out in the 3<sup>rd</sup> Schedule to the Ordinance. The inheritance set out in the 3<sup>rd</sup> Schedule to the Ordinance essentially devolves in the male line according to the concept of primogeniture. The rules require that the oldest male obtain preference over everybody else. It is only in the absence of male children that daughters, grandsons, granddaughters, father, mother, brothers or sisters become eligible for title. In practice this means that land title succeeds to a single owner. Therefore, land alienated *via* permits and grants cannot be divided equally among all children. While this not only has negative implications in terms of the inheritance rights of the children of a particular land owner, it also leads to family disputes and disharmony and increases the dependency of the

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<sup>52</sup> The succession provided in the LDO authorizes the permit holder to nominate a person of his choice—it may be his wife, a child or any other relative by blood (LDO Rule 1). This arrangement is provided to monitor the actual development of the land and the landless persons to enjoy the benefit of the land. If the land is allowed to devolve in the normal course of succession, the land may be divided among all children and the spouse and, as a result, be fragmented, which would not serve the purpose of the LDO.

family on a single person. It is recommended that the concept of joint ownership or co-ownership of state land between husband and wife, where state land is alienated to a family unit, should be introduced.<sup>53</sup>

Fundamentally though the rules are a violation of the principle of gender equality. Daughters are automatically eliminated from inheritance and widows do not have the right to transfer or sell land if their husband did not name a successor. Amendment to the 3rd Schedule is essential in order to ensure compliance with both constitutional and international obligations of Sri Lanka that require ensuring gender equality. Accordingly, it is suggested that Rule 1(b) of the 3rd Schedule is amended, repealing the current table of succession and substituting the following:

- (i) Children
- (ii) Grandchildren
- (iii) Parents
- (iv) Siblings
- (v) Aunts and Uncles
- (vi) Nieces and Nephews

A further amendment in terms of Rule 4 is suggested as follows, in addition to the existing rules:

Rule 4. If any relative on whom the title to a holding devolves under the provisions of these rules is unwilling to succeed to such holding, the title thereto shall devolve upon the relative who is next entitled to succeed under the provisions of rule 1.

Although these amendments were proposed by the Law Commission (together with a draft bill to give effect to it) and submitted to the Ministry of Justice in 2001, they are yet to be implemented. Subsequently, the HRCSL undertook further efforts at reform.<sup>54</sup> As a result, it was again highlighted that gender discriminatory aspects of the LDO need to be repealed. However, none of the said initiatives have resulted in any positive responses on the part of the Government, although the Ministry of Lands

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<sup>53</sup> "Land Reform in Sri Lanka: A Poverty and Social Impact Analysis", World Bank, 2008

<sup>54</sup> The research was conducted from 2002-2004.

pursued some course of action, which resulted in a draft Bill. The provisions of the proposed Amending Bill covered the rules of succession found in Rule 1(b) and 2 of the Third Schedule of the current Act and recommended the reforms illustrated above. However, this Bill also did not come to fruition as an Act of Parliament. Given the fact that several efforts have already been made in respect of these amendments, which, if passed, may curb the adverse consequences of the current provisions and ensure equality in the succession of title, it is imperative that urgent action is taken to review and reform the law to reflect these long-proposed amendments.

### **Gender Discrimination Practices under the LDO**

It is also important to consider the issue of access to land faced by women in the context of war.<sup>55</sup> The war has seen an increase in the percentage of women who assume responsibilities within the home due to the disappearance, death, disability or migration for employment purposes of their spouses. Women have had to bear the brunt of the war and there has been a significant increase in the percentage of female-headed households due to the impact of war, especially in the North and East. In this regard, research reveals that women are not given equal access to state-allocated land. Since the Ordinance alienates state land for agricultural purposes, priority is given to male applicants. Administrative interpretation of the Ordinance favours men due to the perception that it is they who cultivate the land. Furthermore, Section 48B(1) provides that a spouse who has not been nominated by the permit holder has only a life interest in the land. If the spouse re-marries, title to the land devolves upon the nominated successor; or if there is no nominated successor, to the person entitled to succeed under the Third Schedule. A spouse who has not been nominated also cannot dispose of the land and cannot nominate a successor to the title. Due to the fact that males are given preference in the succession of title and are vested with sole ownership of the land, this can increase the vulnerability of females to decisions by male counter-parts that are detrimental to their interests. As such, joint ownership of state land should be given under the Ordinance, in order to circumvent the negative consequences of the current legislation.

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<sup>55</sup> Centre on Housing Rights and Evictions, “Shadow Report to the United Nations Committee on the Elimination of Discrimination against Women: Sri Lanka”, 2011

In the same vein, it is also imperative to scrutinize regulations that have been made by the Minister<sup>56</sup> for the purpose of carrying out or giving effect to the principles and provisions of the Statute. Section 156(g) specifically empowers the Minister to make regulations that categorize recipients of LDO lands. Regulation 3 made thereunder provides for 4 categories of persons to whom state lands are to be alienated to; cultivators, educated youngsters, low-income earners and high-income earners. The definitions of Low Income Earners and High Income Earners expressly refer to those categories in a gender-specific manner. However, the term “Educated Youngsters” remains equivocal, due to there being no such gender-specific definition. A study conducted by the Law & Society Trust (2010)<sup>57</sup> found that the response of relevant officials to the concerns arising from this problematic definition was characterized by gender-bias, as it was admitted that the regulation was made use of to give land to males as a result of the perception that “...they are better equipped to handle the work of cultivation...” Although the said regulation, which contains the classification formula, may not by itself be gender discriminatory, it remains imperative that the said category 2 (Educated Youngsters) should not be misconstrued to refer to the male gender. Given the response of administrative officials, there is an urgent need to ensure that the provisions of the LDO are not exploited to perpetuate gender discrimination in this manner. Overall it is critical that the LDO is reviewed to address and correct all discriminatory norms, practices and effects that are either inherent or flow from the procedures it lays down.

## Conclusion

Land rights remain a significant bone of contention in Sri Lanka. A more principled, equitable, efficient, transparent and accountable system for distribution of state land remains a vital need. The norms the LDO currently embodies and the processes it lays down are far from adequate to develop such a system. Far reaching reforms and changes, and not just with respect to the LDO, are urgently needed to prevent further land rights violations and safeguard the goals of equity and equality in land policy.

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<sup>56</sup> Section 155 and 156 of the Ordinance empower the Minister to make such regulations.

<sup>57</sup> Law and Society Trust, *Is Land Just for Men? Critiquing Discriminatory Laws, Regulations and Administrative Practices relating to Land and Property Rights of Women in Sri Lanka*, ed. Kishali Pinto-Jayawardena and Jayan-tha De Almeida Guneratne (Colombo: Law and Society Trust, 2010), p.79

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