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DEVOLUTION OF POWERS RELATING TO LAND
RIGHT TO SUSTAINABLE DEVELOPMENT
LAND RIGHTS OF WAR WIDOWS IN THE NORTH

LAW & SOCIETY TRUST

CONTENTS

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Editor's Note... ... ...

The final Double Issue for 2014, (and also the final ***LST Review*** under the current editorship), examines Sri Lanka's constitutional and statutory scheme in regard to the devolution of powers relating to state land.

Along with theoretical scrutiny of the *Solaimuttu Rasu Case* (2013), practical perspectives emerging from discussions with provincial land commissioners and land officers are included in the concluding part of a three-year long Study conducted by LST's **Civil and Political Rights Programme** on inequitable and arbitrary dispossessions of land by the State. Post-war government policy and practice regarding land rights of majority and minority communities in the Southern, Uva, Central, Northern and Eastern Provinces were focal points of this Study.

In the *Rase Case*, the Supreme Court's studied (and quite unnecessary) emphasis on the 'unitary' nature of the State constituted a populist gloss on the legal issue in dispute which was primarily a pure jurisdictional question. The matter concerned the jurisdiction of a provincial High Court to issue orders in the nature of writs under Article 154 (P) (b) (4) of the Constitution in the context of the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 (as amended).

The 2nd Republican (1978) Constitution through Article 140, conferred jurisdiction solely on the Court of Appeal to issue orders in the nature of writs. This power is subject to the qualification that, in specifically laid down statutory contexts, the Supreme Court is invested with the said jurisdiction (see *Proviso* to Article 140 of the Constitution). It was by the 13th Amendment to the Constitution (1978) that, the High Court of the Provinces was also conferred with jurisdiction to issue orders in the nature of writs through Article 154 (P) (4) (b) of the Constitution brought in by the 13th Amendment read with Section 7 *of* the High Court of the Provinces Act, No 19 of 1990.

In issue here was the simple question whether the Provincial High Court could issue such writs under the State Lands (Recovery of Possession) Act No 7 of 1979 (as amended). The provincial High Court in the case took the view that, it had no jurisdiction thereto. However, a contrary view was taken by the Court of Appeal on appeal. In overruling the Appeal Court, the Supreme Court stressed the fact that state land is vested in the Republic given the unitary nature of the State, quite irrespective of the fact that this issue was not in

dispute in any event in the case. Indeed, judicial precedent on the nature of power given to Provincial Councils by the 13th Amendment had not called into question, the unitary nature of the State or for that matter, the fact that State land continued to be vested in the Republic or that the President was empowered to make grants and dispositions of state land

In the *Rasu Case* however, the Supreme Court's unequivocal privileging of the Centre in the consultative process that should take place between the Centre and the Provinces in this regard departed from more enlightened judicial thinking in the past. In that sense, this decision may be seen as a distinct undermining of constitutional provisions specifying that Provincial Councils have the legislative competence to administer, control and utilize state land.

Given the Court's position that the 'dispossession or encroachment or alienation' of state land was a subject for the central government and not the Provincial Councils, the relevant analysis also looks at practical problems concerning quit notices issued under the State Lands (Recovery of Possession) Act No 7 of 1979 (as amended) in respect of state land situated in the provinces.

An accompanying essay by ***Niran Ankatell*** looks at the jurisprudential context of the *Rasu Case* and critiques the Supreme Court decision as illustrating the nexus between law and politics while 'dramatically' shaping the political landscape (for the worse) in respect of devolution. As the author observes, its ramifications go beyond the politically contested context of the powers being exercised by the Northern Provincial Council.

Thus, 'in the event the Rasu decision is considered binding law and read in its broadest sense' the question becomes relevant as to whether if Provincial Ministers, Provincial Land Commissioners and subordinate provincial public servants apply provincial statutes, or assume powers over state land by virtue of the Provincial Councils (Consequential Provisions) Act, would they be violating the Constitution as interpreted by the Supreme Court? On the other hand, in the event they decide not to exercise those powers, would they stand in violation of properly enacted statutes and laws?

Further, the Double Issue focuses on citizens' rights to land and water arising from the absence of critically sustainable development policies in Sri Lanka. In discussing 'Human Rights, Development and Rathupaswala' which paper was presented at conference sessions titled *Sri Lanka's Road to Sustainable Development* held on 22nd August 2014,

facilitated by the **Economic, Social and Cultural Rights Programme** of LST, ***D.S. Rajasingham*** situates his critique in the context of the Rathupaswela dispute where the army was called out against villagers asking for the clean water, (which they alleged had been polluted by a factory), resulting in two deaths. As he points out, Rathupaswala is, at the very least, an example of State failure to protect against the violation of the right to development - *qua* the right to water - by a third party. As a result, it failed to follow an indivisible approach to sustained development. Moreover it signified a militarized response of the State that remains deeply worrying.

Relevantly, the Rathupaswela incident was 'not an isolated example'. For instance, the writer cites eviction of residents in Mews Street and Java Lane for development under the Urban Development Authority's Urban Regeneration Project (URP) as involving violations of the right to housing. In particular, human rights standards in cases of evictions, such as notice and alternative accommodation were bypassed. This paper's concluding thoughts on the positive and negative aspects of the Rathupaswela incident carry particular force. Indeed, it is correct that both positives (societal outrage) and negatives (little public mobilization in the face of state authoritarianism, militarization, corruption and politicization) are evidenced through this incident. The strengthening of Sri Lanka's civic culture continues to be an imperative.

The final contribution to this Double Issue by LST's **Human Rights in Conflict Programme** focuses on land issues being faced by female-headed families of victims of enforced disappearances in the formerly war-affected areas of Kilinochchi and Mullaitivu. Reflecting commonly echoed concerns, the findings of this paper emphasize the occupation of land by both the military and civilians as primary sources of disputes relating to land ownership and possession. Even several years after the conflict ended, affected minority communities (Tamils and Muslims) are without redress.

Doubtless, the deprivation of land and water rights evidenced through Sri Lanka's unequally located post-war development drive has overriden legal, environmental and societal safeguards against abuse. Marginalized communities of majority and minority ethnicity are both at risk, with minorities facing greater threats due to their extreme political vulnerability. The broad focus of this Issue is premised on the hope that the commonalities of injustice across Sri Lanka will prevail in the national effort in finding solutions thereto.

Kishali Pinto-Jayawardena

Reflections on the *Solaimuttu Rasu* Case and Perspectives from the Provinces*

Civil & Political Rights Programme, LST

1. Introduction - the Factual Context of *Solaimuttu Rasu's Case* [1]

1.1. Preliminary Issues

The Supreme Court was invited to decide the following question of law.

> Does the Provincial High Court have jurisdiction to hear cases where dispossession or encroachment or alienation of state land is in issue?

Consultant/Plantation expert of the plantation reform project (Ministry of Plantation Industries) had issued a quit notice on the basis that, one Salaimuttu Rasu (SR) of the Dickson Corner Colony, Stafford Estate, Ragala, Halgaranaoya was in illegal occupation of a State land and subsequently invoked the jurisdiction of the Magistrate's Court of Nuwara - Eliya to have SR ejected. The said proceedings were initiated under the State Lands (Recovery of Possession) Act No 7 of 1979 (as amended). SR thereafter sought an order in the nature of a writ of *certiorari* to quash the said quit notice in the High Court of the Central Province Holden in Kandy.

The Consultant/Plantation expert filed objections to the application for certiorari and averred that,

a) The land in question is state land

b) He is the competent authority

c) A quit notice was issued in terms of *Section 3* of the Act

d) Rasu has no legal basis to invoke the writ jurisdiction of the Provincial High Court because State land is not a subject falling within the Provincial Council list – *Viz* List 1.

Under the State Land (Recovery of Possession) Act No 7 of 1979, in terms of *Section 3*, the person referred to therein as the Competent Authority could initiate proceedings in the Magistrate's Court by filing a quit notice to recover state land against a person who is said to be in illegal occupation. Unless a valid point or

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* This discussion paper is a collaborative effort of the Civil and Political Rights Programme, Law & Society Trust, co-ordinated by attorney-at-law Radika Guneratne. It contains extracts from the concluding document in a three year initiative conducted by the Programme which includes the publication, '*Not This Good Earth; The Right to Land, Displaced Persons and the Law in Sri Lanka*' (Jayantha de Almeida Guneratne, Kishali Pinto-Jayawardena and Radika Guneratne, October 2013) as well as several policy papers on issues of land rights published by the Programme in the *LST Review*. We express our deep appreciation to provincial judicial officers and attorneys of the Provincial Bar who assisted the Programme on a confidential basis. We also place on record, the immediate support extended by provincial and state Land Commissioners and land officers to this effort despite an external environment that was far from being conducive to the same.

[1] Hereafter referred to as Rasu's Case, SC/Appeal No 21/13 – S.C.M. 26th September, 2013.

written authority could be shown by the occupant the Magistrate has no option but to order the person's ejectment once the competent Authority's affidavit is filed based on the said quit notice.

Three qualifications to that provision in the Act could be identified from the case law

i) The Act requires 30 days' notice to be given (*Kandiah v Abeykoon*)[2]

ii) Where the occupant paid rent and occupied (*Karunawathie Jayamaha v JEDB*)[3]

iii) Where the purported competent Authority's authority was challenged. (*Senanayake v Damunupola*)[4]

That was the legal position and background when the Supreme Court decision in *Salaimuttu Rasu* in September 2013 came to be decided.

1.2. Ruling of the Provincial High Court[5]

The Provincial High Court upheld the objection of the Competent Authority.

1.3. The Court of Appeal Decision[6]

The Court of Appeal reversed the Provincial High Court ruling and held that, State Land is included in Appendix II of the Provincial Council list (list 1) to the 9th Schedule to the 13th Amendment to the Constitution and therefore

i) It is a P/C list subject although-

ii) State land is vested in the Republic.

Relying on past judicial precedents, the Court of Appeal reasoned that, alienation of land – within a province – (*vide*: paragraph 1.3 of the Provincial Council list) is done on the advice of the board of ministers communicated through the Governor of the province and therefore State Land becomes the subject of the provincial council.

1.4. The Supreme Court judgment

Reversing the Court of Appeal Judgment, the Supreme Court held that, List II (the Reserved List) in the 13th Amendment to the Constitution refers to the entirety of State Land which is vested in the Ventral Government (the Republic) and it is from that entirety (in the Republic) that land is assigned to the Provincial Councils for various purposes.

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[2] 1986 (3) CALR, 141 (CA). See further *"Not This Good Earth" Jayantha de Almeida Guneratne, Kishali Pinto – Jayawardena and Radika Gunaratne* (LST, 2013).
[3] 2003 (1) ALR, 10.
[4] 1982 (2) SLR, 621.
[5] HC/CP/Cert./42/97.
[6] CA/PHC/Appeal No 37/2001.

The Court reasoned further, by comparing List I (the Provincial Council List) with List II (the Reserved List) that, it is the state (Central Government) that, has the power to grant leases, grant permits through its agencies and consequently on a reading of Appendix II state land is a subject for the Republic (central Government) except to the extent specified in item 18 of List I (the Provincial Council List)[7]

The final judicial conclusions were as follows:-

a) A Provincial Council could have the use of State land only if assigned but,

b) State Land continues to vest in the Republic

c) The (central) government shall consult the Provincial for the purposes of government in a province wherein it shall make available to such Council State Land as decreed in paragraphs 1.1,1.2 andl.3 of Appendix II[8]

d) Alienation of State Land can only be done by the President

e) Subject notwithstanding the aforesaid limiting factors?[9]

2. As seen from the discussions held at provincial level with the collaboration of the Provincial Land Commissioners, the Central Lands Ministry and the relevant District Secretary, awareness of this decision on the part of public officers was high.

Common ground was evidenced on the following factors;

[1] That, State Land is vested in the Republic as per both Court of Appeal as well as the Supreme Court judgments.

[2] That, a Provincial Council could have the use of state land only if assigned by the central government therefore would logically follow from that initial premise.

[3] Also, there can be no quarrel with the proposition that, according to the Reserved List (List II) it is the State (Central Government) that has the power to grant leases, permits through its agencies.

2. Perspectives emerging from the Provincial Consultations with Land Commissioners, land officials and judicial officers in Nuwara Eliya,[10] Hambantota[11] and in Trincomalee.[12]

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[7] *Vide*: The Chief Justice's exposition of the legal position at page 10 of the judgment.

[8] *Contra* the Court of Appeal view.

[9] Paragraphs 29 to 67 as discussed in this paper.

[10] Held in April 2014 under the auspices of the Central Provincial Lands Commissioner with sixty lands officers participating. This discussion was particularly important as the *Solaimuttu Rasu* decision (SC/Appeal No 21/13 – S.C.M. 26th September, 2013) emerged from a dispute re land situated in Nuwara Eliya. Individual discussions were held with relevant judicial officers.

[11] Held in July 2014 under the auspices of the Government Agent, Hambantota, the Central Government Lands Commissioner and the Southern Province Lands Commissioner with thirty lands officers participating.

[12] Held in August 2014 as facilitated by community organizations working in the East.

2.1. The Import of Appendix II and Item 18, List 1 of the 13th Amendment

The meaning of particular clauses and terms in the 13th Amendment in Appendix II emerged as contentious issues during discussions of *Rasu's Case* by participant land commissioners in the Central and Southern provinces in particular. The divergence between the Court of Appeal view and the Supreme Court's interpretation of the relevant constitutional provisions is clearly evidenced from contrasting determinations as to the word '*Subject*' as contained in Appendix II (9th Schedule) of the 13th Amendment.

While the Court of Appeal held the view that, state land is a subject in the Provincial Council list, the Supreme Court's deduction was that state land is a subject for the Republic (Central Government) except to the extent specified in item 18 of List I. On the Supreme Court's own observation, while broadly state land is a subject for the Republic (Central Government), it stands qualified by the words "Except to the extent specified in item 18 of List I."Accordingly, by a simple process of reasoning, could there be situations where state land could be regarded as a subject of the Provincial Councils, in turn specified in item 18 of List I?

What does Item 18 of List I mean? What does Item 18 of List I specify?

> Land – land, that is to say, right on or over land, tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II.

What does Appendix II Signify?

State Land shall continue to vest in the Republic and may be disposed of in accordance with Article 33 (d)[13] and written law governing the matter.[14] Under other written law, the Divisional Secretaries are empowered to grant permits only.[15] As clarified during the provincial consultations facilitated by the CPR Programme to participant land officers, it is clear that, no authority falling within a Province *per se* is empowered to alienate state land. If it is to be regarded otherwise, it would be a contradiction in terms in as much as state land continues to vest in the Republic. To hold a contrary view would go against both the spirit and the overriding terms of the constitutional provisions.

In paragraph 2 of Appendix II it is stated that, subject as aforesaid, land shall be a provincial council subject. *So* how does one explain the phrase "land shall be a Provincial Council subject," given the well-established principle of interpretation that, the legislature does not use language in vain?

This question arose during provincial discussions held by the Programme and was clarified by the observation that this phrase is qualified twice. First, it is qualified by the words,

> "State land shall continue to vest in the Republic and may be disposed of in accordance with *Article 33 (d)* and written law governing the matter."

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[13] That is, by the President.
[14] State Lands Ordinance No 8 of 1947 (as amended) where again the President is empowered to give grants.
[15] See: The Land Settlement Ordinance No 20 of 1931 as severally amended.

Secondly it is subject to certain special provisions contained in 1.1 to 1.3. In regard to State Land required for the purposes of the Government in a province, in respect of a reserved or concurrent subject may be utilized by the government and the only pre – condition is the duty imposed on the Government to consult the relevant Provincial Council. The following matters were raised by the land officers and by the provincial land commissioners;

[4] Could that duty to consult convert the subject specified in 1.1 and interpret it to mean and be regarded as a Provincial Council subject?

[5] Is the Government to be regarded as being bound by a contrary view taken by the Provincial Council when the overriding factor is that, State Land continues to vest in the Republic?

[6] Paragraph 1.2 of the Appendix II imposes a duty on the Government to make available to every Provincial Council State Land with the Province required by such Council for a Provincial Council Subject.

[7] Item 18 of the Provincial Council List speaks of Land tenure, transfer, alienation, use, settlement and improvement. But that is again is to be to the extent set out in *Appendix II* which means that, it would become a Provincial Council subject only if the Government makes available State Land to a Provincial Council.

[8] Other subjects in the Provincial Council List may warrant different consideration. But, in regard to land tenure, transfer, alienation, use, settlement and improvement it would be conditional upon the government making available State land to a Provincial Council.

[9] It is true that, the words employed in paragraph 1.2 are couched in mandatory terms.

A common question asked by the participant land officers during the provincial consultations was as to whether a provincial Council can request State Land for the purposes specified in Paragraph 1.2 and if the Government should be regarded as having no option but to make available State land to a Provincial Council when so requested, what meaning is to be put on the words "State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33 (d) and written law governing the matter?" Could 'shall' be construed as 'may'?

Paragraph 1.2 no doubt uses the word "shall" and its ordinary signification is mandatory but there may be considerations which ought to influence a court to give a directory construction[16] and that is, the real intention of the legislature which is to be ascertained by carefully attending the whole scope of statute.[17] In *Malik Mohanned Ikhtiya v Khana & Another*[18], it has been stated that, the word "shall" in an Act does not always mean that compliance is obligatory and that it depends on the intention of the legislature to be gathered by reference to the whole scope of the Act.

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[16] See: *Mark v AGA Mannar* (41 CLW 94).
[17] Bindra – Interpretation of Statutes, (7th Edition), p. 1113.
[18] (28) AIR 1941 (Lahore) 310.

2.2. The 13th Amendment to the Constitution – Unitary Character of the State (Republic) of Sri Lanka, Devolution or Comity?

The Supreme Court pronounced on this matter in the *Rasu Case* although none of those questions were relevant to the actual issue that was required to be determined *viz*: whether the High Courts of the Provinces had jurisdiction to grant orders in the nature of writs which will be dealt with later in this paper, in the facts and circumstances of the particular case.

Granted, it was by a proverbial whisker that, in that Determination on the said Amendment, "the unitary character" of the Republic was saved.[19] It could have gone in another direction but it did not. One argument is that, given that constitutional result achieved by the said majority decision of the Supreme Court having regard to the constitutional provisions as they stand, land use etc. is a devolved subject to the Provincial Councils. The other conflicting view is that land stands vested in the Government (Central Government) and when requested by a Provincial Council in pursuance of paragraph 1.2 of Appendix II, that obligation is reduced to a matter of comity. Consequently, if the central government does not respond, that should put an end to the matter. Should it be held otherwise, the will of a Provincial Council would prevail over the will of the central government in which State Land is vested.

In *Selliah v De Silva*[20] it was held that, in reading a statute words could be rejected, transposed or even implied in order to give effect to the intention and meaning of the legislature, which has to be ascertained from a careful consideration for the entire statute. The words "land shall be a provincial Council subject" (*vide*: para 2 of Appendix II) is manifestly contradicted by the unequivocal reminder that;

> "State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33 (d) and written law governing the matter"

Three situations in that context may arise.

First, if the President is so inclined to alienate or dispose of State Land within a Province, would his intention to so alienate depend on the advice of the relevant Provincial Council? Given the untrammeled power the President wields in terms of Article 33 (d) of the Constitution, read with other written law, this question appears to be answered in the negative.[21] Secondly, if the President wishes to effect an alienation and a particular Provincial Council conforms to his wishes, then, there would not arise any conflict. Lastly, if the President wishes to effect an alienation and a particular Provincial Council advices against it, is there room for an argument that, the President's wish would prevail in view of *Article 35* of the Constitution?[22]

Is 'state' land is a subject for the Republic (Central Government) or a subject of the Provinces? It was agreed by several land officers in Nuwara Eliya that, on an examination of the several provisions of the Constitution as interpreted by the Supreme Court, it is clear that, State land is a subject for the central government. Whatever functions in respect of the state land the Provincial Councils are empowered to perform in terms of

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[19] By a thin majority of 5 judges against 4.
[20] 36 CLW at p. 17.
[21] State Land Ordinance No 8 of 1947 (as amended) where the President is empowered to give grants.
[22] *Sulaimuthu Rasu v. Supt. Stafford Estate, Ragala, Halgranaoya* (S.C. Appeal No 21/13, SCM 26.09.2013) at p. 19.

Item 18 of List I stand qualified as is made clear by paragraph 1.1 to 1.3 of Appendix II and Article 33 (d) of the Constitution. A Provincial Council has no power to make statutes on any matter set out in List II (Reserved List), one of the matters referred to in that List (being) "State Lands and foreshore" In paragraph 3 of Appendix II (Re: List II) responsibility is cast to on the National Land Commission in regard to the formulation of National Policy with regard to the use of State Land.[23]

But as a land officer pointed out during this discussion, the issue of the 13th Amendment and the concepts of 'unitary' and 'federal' States are complicated matters.[24] Certainly it may be reasonably contended that there need not have been any necessity to go into 'unitary' and 'federal' concepts in order to decide upon the question in the *Rasu Case*, namely whether in the relevant facts and circumstances, a Provincial High Court had jurisdiction to issue orders in the nature of writs in regard to quit notices issued under the State Lands (Recovery of Possession) Act?

To begin with, the Chief Justice in the *Rasu Case* articulated thus:-

> "it is unfortunate that the Court of Appeal fell into the cardinal error of holding that the Provincial Council (*sic*)[25] has jurisdiction to hear and determine applications for discretionary remedies in respect of quit notices under the Provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 as amended. This wrong reasoning of the Court of Appeal is indubitably due to the unsatisfactory treatment of the provisions of the 13th Amendment that resulted in patently unacceptable precedents that need a revisit in the light of the fact neither Counsel nor the Bench in the cases cited above has subjected the relevant provisions to careful scrutiny"[26]

The Chief Justice's view "on the unsatisfactory treatment of the provisions of the 13th Amendment that resulted in 'patently unacceptable precedents that need a revisit" does not affect the ensuing analysis of the provisions of the Act and the Provincial High Courts' jurisdiction to grant writs against "quit notices" issued under the Act. Those "unacceptable precedents" set down may therefore be confined to the context in which they arose for determination.

2.3. The Practical Issue of Quit Notices issued under the Act

Under the State Land (Recovery of Possession) Act, No 7 of 1979 (as amended), reported decisions of the Court of Appeal and the Supreme Court reveal that, against such "quit notice", the aggrieved party had always invoked the jurisdiction of the Court of Appeal under Article 140 of the Constitution to have them quashed by orders in the nature of writs decreed therein.

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[23] *Ibid*, at p. 19. As must be noted, this body has not yet come into being.

[24] Article 2, The Constitution of Sri Lanka declares in unequivocal terms that, "The Republic of Sri Lanka is a Unitary State.

[25] *Sulaimuthu Rasu v. Supt. Stafford Estate, Ragala, Halgranaoya* (S.C. Appeal No 21/13, SCM 26.09.2013) at p. 18. The reference "to the Provincial Council" in this articulation that, "the Court of Appeal fell into the cardinal error of holding that the Provincial Council has jurisdiction to hear and determine applications for discretionary remedies in respect of quit notices under the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 as amended" should be read as the "High Court of the Province".

[26] At Page 18 of the judgment.

One of the earliest cases was the case of *Farook v Government Agent, Amparai.*[27] As the facts of this case reveals, the land, which was alleged to be State Land was a land in *Kalmunai* in the District of Amparai (in the Eastern Province), the Government Agent, Amparai (claiming to be the competent authority) issuing the "quit notice" as contemplated by the Act. Proceedings were initiated for an order in the nature of a writ under Article 140 of the Constitution in the Court of Appeal by the aggrieved occupant. In *Senanayake v Damunupola,*[28] the land which was alleged to be State Land, was situated in the *Kandy* District (In the Central Province). The government Agent, Kandy had issued the "quit notice' as the competent authority. In *Kandiah v Abeykoon*[29], the "quit notice" was issued by the Assistant Government Agent, Nuwara - Eliya as the competent authority in respect of a land situated in the District of Nuwara - Eliya of the Central Province.

Finally, in *Karunawathie Jayamaha et al v JEDB*[30], the "quit notice" had been issued by a statutory functionary as the competent authority under the relevant Act of Parliament creating the Janatha Estates Development Board, a statutory corporation.[31] In all those cases it is the jurisdiction of the Court of Appeal under Article 140 of the Constitution that had been invoked in seeking relief.

In the *Rasu Case*, it was the consultant expert of the Plantation Reform Project (coming under the Ministry of Plantation Industries) who had issued the "quit notice" in question in respect of a land situated in the Nuwara - Eliya District of the central province. It is also pertinent to note that, there are several statutes that create statutory bodies dealing with State Land. Act No 7 of 1979 itself defines State Land in Section 18 thereof.

> "State land" means land to which the State is lawfully entitled or which may be disposed of by the State together with any building standing thereon, and with all rights, interests and privileges attached or appertaining thereto, and includes land vested in, or under the control of, the River Valleys Development Board and the Mahaweli Development Board or any other authority charged with the function of developing State land or any local authority;"[32]

The question is what is the, appropriate judicial forum that an aggrieved party by such a "quit notice" (even where in pursuance of such a "quit notice" when Magistrate's Court proceedings are filed wherever such courts are situated) could seek an order in the nature of a writ.

2.4. The Jurisdiction of the Court of Appeal under Article 140 of the Constitution in the context of the 13th Amendment and the scope of the Jurisdiction of the Provincial High Courts to issue orders in the nature of writs. – Article 154 (P) (4) (b)

> "Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of

[27] [1980] 2 SLR 243 (CA).
[28] [1982] 2 SLR 621 (SC).
[29] 4 Sri Kantha LR 96 (1986).
[30] 2003 (1) ALR 10.
[31] The Judgment of the Supreme Court does not reveal the situation of the land.
[32] See: in this connection, See: *The Concepts of Ownership and Possession in the Law of Property,* Sarath Mathalila De Silva, (2013) at pp. 272-275.

certiorari, prohibition, *procedendo, mandamus* and *quo warranto* against the judge of any Court of First Instance or tribunal or other institution or any other person:

* [provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal]."

The jurisdiction of the Provincial High Courts to issue orders in the nature of writs. – Article 154 (P) (4) (b) encompasses the issuance of;

"orders in the nature of writs of *certiorari,* prohibition, *procedendo, mandamus* and *quo warranto* against any person exercising, within the Province, any power under –

(i) any law ; or

(ii) any statutes made by the Provincial Council established for that Province, in respect of any matter set out in the Provincial Council List."

Even prior to the Supreme Court decision in the instant case under discussion, the Provincial High Court's power to issue orders in the nature of writs under Article 154 (P) (4) (b) of the Constitution *vis a vis* the Court of Appeal's power to issue the same under Article 140 have come up for consideration in the Appellate Courts of the island in several situations. These situations may be examined *seriatim* as follows.

(A) In the context of privately owned lands

In *Madduma Banda v Assistant Commissioner of Agrarian Services and Another*[33], the dispute was between a tenant cultivator of a paddy land and its landlord who was the owner as well, and therefore a private land. Thus, the Supreme Court had no difficulty in holding that, the Provincial High Court had jurisdiction under Article 154 (P) (4) (b) to issue an order in the nature of a writ. The reasoning of the Court,[34] as contained in the head note, is to the following effect.

"The appellant, a tenant cultivator sought a writ of certiorari from the High Court of the Province to quash an order made by the Assistant Commissioner of Agrarian Services (1st respondent) under section 18 of the Agrarian Services Act as amended by Act, No. 4 of 1991.

Under Article 154P(4) of the Constitution, the High Court has jurisdiction to issue a writ against any person exercising any power under a law or statute in respect of any matter set out in the Provincial Council List. "Agriculture and Agrarian Services" are found in section 9 of the list with an inclusive definition of "Agriculture". The impugned order related to the failure of the appellant to pay rent due to the landlord of the paddy land.

[33] 2003 (2) SLR 80.
[34] Per Shiranee Bandaranayake, J (with Sarath N. Silva, C.J and Yapa, J agreeing).

However, in view of certain limitations provided by section 3 of the Provincial Councils (Special Provisions) Act, No. 19 of 1990 regarding appeals under the Agrarian Services Act, and certain dicta contained in the determination of the Supreme Court on the constitutionality of the Bill for the amending Act, No. 4 of 1991 the High Court opined that the impugned order was not a matter set out in the Provincial Council List and refused the writ.

Held:

1. The word "agrarian" in section 9 of the Provincial Council List relates to landed property and such property could no doubt attract paddy lands and tenant cultivators of such land and hence the impugned order would be covered by the said section 9 in the Provincial Council List.

2. In case of ambiguity, the enactment should be interpreted so as to give effect to its purpose. The purpose of the 13th Amendment is to give a right to an aggrieved party to have recourse to the Provincial High Court instead of having to seek relief from the Court of Appeal in Colombo. As such the High Court is deemed to have jurisdiction to grant writ sought under Article 154P(4).

Per Bandaranayake,J.

"It would not be correct to say (as stated in the S.C. determination on the Bill for amendment No 4 of 1991) that the matters that were dealt with in the Bill are all matters of National Policy that falls within list II"

Apart from what is contained in the head note, it is necessary to extract the following features in the Judgment for later reflections *viz*:

a) That, the Assistant Commissioner concerned therein was exercising power within a particular province.

b) That, it was in respect of a matter contained in the Provincial Council List (List I) *viz*: "agricultural and agrarian service" (Item 9) (as well as the concurrent List)

c) That, the jurisdiction of the High Court of the Provinces to issue orders (in terms of Article 154 (P) (4) is restricted as the Article specifies under any law or any statute made by the Provincial Council.

d) That, the 13th Amendment to the Constitution, which came into effect in 1987, was chiefly introduced for the purpose of devolving power to the legislative *and* from the central government to the Provincial Councils. In addition to the legislative and executive power that was devolved to the Provincial Councils, High Courts of the Provinces were established

and empowered to exercise ....as parliament may be law provide in addition to the jurisdiction vested under Article 154 (P) (4) {(a) and (b) thereof}

Reflections on the Supreme Court Ruling.

It is apt at this point to reflect on some of the features of the Supreme Court ruling in *Madduma Banda's Case* in the light of *Rasu's Case* under discussion. It is to be noted that, the Supreme Court in *Madduma Banda's Case* while speaking of devolution of power from the central government to the Provincial Councils in regard to legislative and executive power, quite appropriately did not speak of devolution of judicial power but read the 13th Amendment in reference to the judicial power of provincial High Courts which as the courts therein observed had power to exercise as Parliament (and therefore the Central Government) may by law provide and also restricted in so far as Article 154 (P) (4) jurisdiction is concerned by the said Article itself.[35]

Disputes between Private Parties on State Land and the Eviction Process

In contrast to the disputes arising between private individuals in respect of private lands such as what arose in the case of *Madduma Banda*[36] not affecting the Provincial High Court's jurisdiction under Article 154 (P) (4) (b) of the Constitution,[37] there are instances where, under the aforementioned statutes, even though the dispute has been between private individuals, the issue of eviction of a person who is allegedly in unauthorized occupation of State land has become a key point.[38] In those situations, by the authorities have resorted to the State Lands (Recovery of Possession) Act No 7 of 1979 (as amended) to effect the eviction of persons who are alleged to be in unauthorized occupation of State Land. This is understandable given that the primary purpose of the Act is to provide "a speedy mechanism" to have such persons evicted.[39]

Pathmanjalee Wijesuriya v Nimalawathie Wanigasinghe[40]

This case involved the exercise of power under the Agrarian Development Act[41] by the Commissioner General of Agrarian Development who exercises power island-wide (as a central government official) and not on the basis of power derived in terms of the Provinces. The said provisions decree that a High Court of the Province is empowered to issue orders as contemplated by the said Article against "any person exercising, within the Province, any power under any law etc." As a Central Government Official, the Commissioner General of Agrarian Development had exercised power in respect of the entirety of Sri Lanka) and not confined to a particular province in pursuance of the law concerned.[42]

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[35] In consonance with the determination of the Supreme Court on the 13th Amendment by majority decision.
[36] 2003 (2) SLR 80.
[37] See also: *Jayasena v Agrarian Development Assistant Commissioner, Hambanthota & others* – CA/PHC/11/2011 – CA. Min. of 21.10.2013.
[38] See in this connection – "Not This Good Earth" – Jayantha de Almeida Guneratne, Kishali Pinto-Jayawardena and Radika Gunaratne, Law & Society Trust, 2013, at pp. 48 – 50.
[39] See In this Regard - *The Concepts of Ownership and Possession in the Law of Property,* Sarath Mathalila De Silva, (2013) ISBN 978-955-44685-2-8.
[40] S.C. No. 33/07 (unreported).
[41] No 46 of 2000 as amended by Act No 46 of 2011.
[42] The Agrarian Development Act No 46 of 2000 (as amended)

Here, the Supreme Court was persuaded to hold that, it was the Court of Appeal and not the Provincial High Court whose jurisdiction ought to have been invoked to have the said Commissioner General's impugned order quashed.[43] However the question arises as to whether, where a Central Government official who exercises power in respect of the whole island as such is concerned, ought not such exercise of power been regarded as encompassing a power exercised for the whole island no doubt, but which island surely must include the several provinces as well?

Jayasena v Agrarian Development Assistant Commissioner, Hambanthota[44]

In that case, the Court of Appeal,[45] however, without going into the aforesaid aspects, held that, the particular Provincial High Court had jurisdiction to issue an order under Article 154 (P) (4) (b)on the basis in as much as that,

a) The land was situated in a particular province

b) The officer concerned was exercising power within that province.

The aforesaid precedents had not been laid before the Supreme Court in *Rasu's Case*. In sum, Rasu's Case amounts to a dilution of the Provincial High Courts' jurisdiction to issue writs in respect of the quashing of quit notices. The Supreme Court's emphasis on State land in Sri Lanka being a subject for the Republic (Central Government) and its underlining of *inter alia*, the unitary character of the State of Sri Lanka, constitute extraneous matters arising outside the scope of the legal issue to be determined n that case.

To begin with, the scope of the Provincial High Courts to issue writs still remains unresolved given the fact that,

a) The 'unacceptable precedents' that the Court saw a need to revisit were also precedents of equal bench strength,

b) Given the additional fact that other contrary precedents had not been laid before the Court for consideration.

Does the Ruling in Solaimuttu's Case impinge on the concept of Competent Authority?

The answer to that question would be in the negative. Whether it is a Divisional Secretary within a Province or an authorized person under a specific statute[46] who is empowered to issue 'a quit notice" to recover State land alleged to be unlawfully occupied, that would not pose a problem. Based upon such a 'quit notice" under the State Lands (Recovery of Possession) Act No 7 of 1979 (as amended), no issue has surfaced where proceedings are sought for eviction in a Magistrate's Court of a Judicial division/District within a Province as well. The problem surfacing, it would appear, is the problem faced by an aggrieved party to select the

[43] Per Justice Shirani Thillekewardena (with two justice agreeing).
[44] CA(PHC) 11/2011 – CA Minutes – 21-10-2013, *Jayasena v Agrarian Development Assistant Commissioner,* Hambanthota & others.
[45] Per Justice A.W.A. Salam (with Justice Sunil Rajapakse agreeing).
[46] Discussed earlier in this paper.

forum to have such a "quit notice" or Magistrate Courts' proceedings ensuing therefrom as to whether, it ought to be the Provincial High Court under Article 154 (P) (4) (b) or the Court of Appeal under Article 140 of the Constitution of Sri Lanka.

When this aforesaid question was posed to parties affected by litigation as well as officials in the provincial consultations conducted by the Trust[47] the answer was in the negative, in that, so far, the Supreme Court ruling has had no effect on their administrative functions re: issuing "quit notice" and subsequently initiating Magistrate Courts' proceedings to secure evictions. Indeed it seemed that the said officials were not concerned about what Court's jurisdiction an aggrieved party would invoke to have their actions reviewed. This is understandably so, as one official commented "it is for any aggrieved party to pursue the correct remedy in the correct Court"[48]

The further question arises as to whether an aggrieved person's grievance should be put in jeopardy on account of choosing the wrong judicial forum? In any event, could such a person be faulted for choosing a Provincial High Court, being obviously advised by Counsel to do so in the light of the very Supreme Court's articulation that, the establishment of the High Court of the Provinces was to "give a right to an aggrieved party to have recourse to the Provincial High Court instead of having seek relief from the Court of Appeal in Colombo?"[49] Several situations arose for consideration on the theme articulated above in the context of the provincial discussions that were conducted.

In such a situation, which is the judicial forum an aggrieved person ought to go to? Is it the Provincial High Court or the Court of Appeal? An illustration of this situation is provided in a recent Supreme Court decision in *Kurukuladeniya and Another v Ramasamy Balan.*[50] In that case 'X' who had a valid permit, purportedly, under the States Lands Ordinance had given an informal lease to 'Y' for three years but without obtaining prior approval from the Divisional Secretary. 'X' was therefore in breach of the conditions stipulated in the permit. Before the said three year period lapsed, 'X' became deceased. After the expiry of the said three year period, 'X's heirs (children) sought ejectment of 'Y' on the basis that 'Y' was an overholding licensee and therefore was a trespasser. The District Court as well as the High Court of Civil Appeals dismissed the action on the ground that, in terms of Section 16 of the State Lands Ordinance, a permit being a personal right conferred, it stood extinguished upon the death of the permit holder and the heirs of 'X' could not have therefore maintained an action to eject 'Y'.

The Supreme Court affirmed both the District Court and the High Court of Civil Appeal's judgments. The Court held that, the informal leave given by 'X' to 'Y' was illegal (because it was contrary to the conditions of the permit – the said lease being given without prior approval from the Divisional Secretary). As noted earlier, 'X's heirs also could not maintain an action to eject 'Y' for, with the death of 'X', the permit stood extinguished.

Was then, 'Y', who was also a party to an informal lease, obtained in breach of the conditions contained in the permit 'X' had obtained to remain in occupation? What was the status of 'Y'? a definite positive aspect

[47] In the Nuwara – Eliya District (Central Province).
[48] Re: Discussion had by the LST Team in the said District.
[49] Per Shiranee Bandaranayake J, in *Maddumabanda's Case.*
[50] SC/Appeal/153/11. S.C. Minutes of 21-02-2013.

of the ruling is seen when the court is seen holding that, ".....the Respondent (Y) is an unauthorized occupant of state land, the District/Divisional secretary or any other competent authority of the state could take steps to recover the possession of state land which is the subject matter of this case" How then are the authorities to act?

On the rationale employed by the Court in all probability, should 'X's heirs seek a writ of *Mandamus*, it may well be held that, they lack *Locus Standi* to maintain such an application under Article 140 of the Constitution. If so, and should the heirs of 'X' not seek a *Mandamus*, are the authorities to condone the continued unlawful occupation of 'Y' perhaps even regularising his occupation by granting him a permit? Ought not the heirs of 'X' be given consideration notwithstanding Section 16 of the State Lands Ordinance and its interpretation?

From a practical angle, it emerged from provincial discussions conducted by the Trust with Land Commissioners and land officers in the Kandy Districts that Land officers are cognizant of the need to be equitable in this respect; it was opined by them that,

> "in such a situation, would they recover possession from 'Y' and act according to the legislative intent reflected in the State Lands Ordinance (as amended) and the Land Development Ordinance (as amended) contained in the schedules of the said enactments, as being the more equitable decision because, the way we see it, it is a dispute between a Trespasser as against the heirs of the original permit holder. Of course, this is in our District and how the authorities in other District would act, we cannot say"

Here then was a case, the parties had gone to the District Court and thereafter in appeal to the High Court of Civil Appeals, finally ending up in the Supreme Court to have the issue resolved.

The upshot of what follows then is, the High Court of the Province would be deemed to assume jurisdiction in appeal in respect of admittedly a state land but would be regarded as having no jurisdiction to issue a writ?

As the Supreme Court ruling *perse* reveals, a final resolution of the matter was left to the hands of the authorities falling within a Provincial Council. If so, should the said authorities fail to take appropriate action in the fulfillment of their duty, would not an order by way of a writ lie against them for inaction, perhaps by way of a writ of *Mandamus* under *Article 154 (P) (4) (b)* of the Constitution in the same Provincial High Court? Would it not be pertinent to pose the question as to whether a distinction could be drawn between the appellate powers of the High Court of the Province and its jurisdiction to issue orders in the nature of writs?

No doubt the power conferred on the Provincial Council is restricted *viz*:

> "Land – Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II."

In consequence of Item 18 List I Paragraph 1.2 of Appendix decrees that the Provincial Council shall administer, control and utilize such State Land in accordance with the laws and statutes governing the matter. When the Divisional Secretary of a Province in respect of State land within that Province issues a quit notice

in accordance with the State Lands (Recovery of Possession) Act, would it not amount to administering and control State Land in seeking to eject a person alleged to be in unauthorized occupation of such State Land? In such an event, would not the matter fall within the four corners of *Article 154 (P) (4) (b)* vesting the Provincial High Court with jurisdiction? In *Solaimuttu's Case* it was an official attached to the Ministry of Plantation Industries (therefore attached to the Central Government) that issued the "quit notice" in question.

Section 18 of the State Lands (Recovery of Possession) Act defines "Competent Authority" thus:-

> "In this Act, unless the Context otherwise requires- competent authority" used in relation to any land means the Government Agent, an Additional Government Agent or an Assistant Government Agent of the district in which the land is situated and, includes
>
> (a) The Managing Director of the Railways Authority, where such land is under the control of the Railways Authority established by the Railways Authority Act, No. 60 of 1993 ;
>
> (b) the Commander of the Sri Lanka Navy, where such land is under the control of the Sri Lanka Navy;
>
> (c) the Commander of the Sri Lanka Air Force, where such land is under the control of the Sri Lanka Air Force;
>
> (d) the General Manager of Railways, where such land is under the control of the Railway Department;"

It is clear from Section 18 (d) that "the quit notice", if it was to be regarded as having been validly issued by the said Central Government Official (being any other public officer) the same had to be authorized by the Government Agent (District Secretary of the District of Nuwara – Eliya). That does not appear to be the basis on which the 'quit notice" in question had been challenged.

Even if one presumes having regard to Section 114 (d) of the Evidence Ordinance that, such authorization had been obtained,[51] the High Court of the Provinces would have had jurisdiction on the criteria laid down in Article 154 (P) (4) (b) of the Constitution, for the order sought against him would have been as being in respect of "any person exercising, within the Province under authorization by the 'Government Agent'"[52]

3. Conclusion

In a context where the Sri Lankan judiciary has been drawn into a veritable thicket of political controversy regarding *Rasu's Case*, its finding that the High Court of the Province lacked jurisdiction in regard to the

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[51] Section 114 (d) of the Evidence Ordinance provides that,
"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.
The Court may presume;
d) that judicial and official acts have been regularly performed."

[52] Article 154 (P) (4) (b) of the Constitution read with Section 18 of State Lands (Recovery of Possession) Act.

issuance of quit notices under the State Lands (Recovery of Possession) Act No 7 of 1979 is open to debate in the light of questions articulated above.

The preoccupation of counsel in the case appears mainly to have been with the issue whether State land is a subject of the Central Government or the Provincial Councils and not on whether the Provincial High Courts have jurisdiction to issue orders under Article 154 (P (4) (b) in a given situation. Perhaps it may be opportune that at an appropriate time and in terms of the relevant constitutional provisions[53] the Supreme Court take action to constitute a full bench of the Supreme Court to finally determine regarding the scope and content of the Provincial High Courts' jurisdiction under Article 154 (P) (4) (b) of the Constitution in respect of the working of the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 (as amended).

From a larger perspective, the existing legal framework is demonstrably out of step with the problems that provincial lands officials are being bombarded with day to day, particularly in Sri Lanka's former conflict zones. In their commitment to execute their role in public office, they have made efforts to transcend their statutorily conferred powers and functions, looking for a duty beyond those powers and functions. Their vulnerability to political pressure is woefully apparent. The clarion call made by the Law Commission of Sri Lanka almost a decade ago to fill certain gaps in the existing legal framework has fallen on deaf ears.

In the minimum, existing gaps and inconsistencies arising out of varying judicial reasoning must be addressed legislatively. In the alternative, and as was witnessed first-hand in the provincial consultations conducted by the Civil & Political Rights Programme during this period, a disturbing possibility is that the level of cynicism if not open disregard shown by public officers for the authority of the Court may reach levels that are ungovernable in the future.

[53] Article 132 (3) of the Constitution; "The Chief Justice may –
(i) of his own motion ; or
(ii) at the request of two or more Judges hearing any matter ; or
(iii) on the application of a party to any appeal, proceeding or matter if the question involved is in the opinion of the Chief Justice one of general and public importance, direct that such appeal, proceeding or matter be heard by a Bench comprising five or more Judges of the Supreme Court."

The *Solaimuttu Rasu Case* and Devolution of Powers under the Constitution

Niran Ankatell[*]

1. Introduction – The Devolution of Powers Over Land Under the Sri Lankan Constitution

The Thirteenth Amendment to the Constitution of Sri Lanka was introduced in 1987 pursuant to the Indo-Sri Lanka Accord which envisaged the devolution of a measure of state power to the peripheries. The Amendment, which is located within the unitary nature of Sri Lanka's constitutional structure, was nevertheless a departure from the several post-independence constitutional frameworks under which Sri Lanka had hitherto been governed. However, Sri Lanka's recent history attests to the failure of devolution under the Amendment, owing primarily to the lack of political will to give effect to the spirit of devolution that characterised the Indo-Sri Lanka Accord.

The Thirteenth Amendment provides for a scheme of devolving executive and legislative power. The Provincial executive functions through a Governor—appointed by the President—and a Board of Ministers headed by a Chief Minister.[1] Legislative power is devolved to each Provincial Council to make statutes applicable to the province on matters provided in the Provincial Council List.[2] The powers devolved to Provincial Councils (PCs) are limited to those specifically devolved by the Thirteenth Amendment. The amendment provides for three lists: the Provincial Council List (List I) which contains devolved powers and functions; the Reserved List (List II) containing powers reserved to the centre and the Concurrent List (List III) over which both the centre and provinces have power, though the centre prevails in cases of conflict.[3]

While the Constitution provides that the Provincial executive may exercise executive power in respect of subjects for which the relevant PC has made legislative provision, the Provincial Councils (Consequential Provisions) Act No 12 of 1989 provides that even where provincial statutes have not been passed in respect of provincial or concurrent subjects, executive authority under existing (central) laws dealing with those subjects shall be deemed also to refer to the provincial executive.

What is State Land and the vesting of State Land

The State Lands Ordinance defines state lands 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".[4] Thus, state land is generally defined in distinction to private lands. The state controls the vast majority of lands within Sri Lanka, with approximately 82 percent of the entirety of Sri

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[*] The author is an attorney-at-law practicing primarily in administrative and constitutional law. This paper was written with input sought from senior legal consultant to the Civil & Political Rights Programme, Law and Society Trust, Kishali Pinto-Jayawardena. The views expressed therein are solely those of the author.

[1] Article 154C, Constitution of Sri Lanka.

[2] Article 154G, Constitution of Sri Lanka.

[3] Ninth Schedule to the Constitution of Sri Lanka.

[4] Section 110(1), State Lands Ordinance No.8 of 1947.

Lanka's landmass being state land.[5] Appendix II to the Ninth Schedule to the Constitution—which deals with devolution concerning state land—provides that "[s]tate land shall continue to vest in the Republic and may be disposed of in accordance with Article 33 (d) and written law governing this matter."

Thus, while state lands are described as being a devolved subject, their ownership vests in the Republic. While this paper notes in Part 2 that the 'Republic' does not refer to central government, the President—as Keeper of the Public Seal—is the sole authority empowered to formally effect an alienation of state land. Appendix II also extends the ambit of the Centre's power in relation to state land in the other ways. For instance, state land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilised by the Government in accordance with the laws governing the matter. The Government is merely obligated to "consult"[6] the relevant PC with regard to the utilisation of such land. Further, state land utilized for inter-provincial irrigation and land development projects are also reserved to the centre.[7]

However, state land required for provincial purposes 'shall be made available' to PCs by the Centre.[8] Part 2 discusses the interpretation of the Supreme Court in *Rasu*[9] in respect of this provision, as well as a more plausible interpretation of the provision in light of the imperative language of the text.

Division of powers over state land between the centre and provinces, especially concerning land alienation.

The Thirteenth Amendment acknowledges the exclusive power of the President to alienate state land, though, until *Rasu*, it was believed to have introduced a significant fetter to the exercise of that power.[10] Accordingly Appendix II states that alienation or disposition of state land within a Province to any citizen or to any organisation shall be by the President, on the advice of the relevant PC, in accordance with the laws governing the matter.[11]

The importance of the advice of a PC to the President was considered in the *Determination on Land Ownership Bill*. In its determination, the Supreme Court held that the sole contribution of the Thirteenth Amendment to the scheme of land alienation was the introduction of a consultative process with regard to alienation or disposition of State land, which would continue to vest in Republic.[12] However, the Supreme Court subsequently interpreted the advice clause as imposing a condition precedent to the alienation of State

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[5] Ranjith Amarasinghe, Provincial Councils under the 13th Amendment-Centers of Power or Agencies of the Center?, 13th Amendment: Essays on Practice, Ed. Jayampathy Wickramaratne, Lakshman Marasinghe, Stamford Lake, 2010, p. 113.

[6] The word 'consult' is often used to convey a different meaning to the word 'concurrence'. In *S.P. Gupta v President of India and Ors.* AIR 1982 SC 149, the Supreme Court of India held that "consultation is different from consentaneity. They may discuss but may disagree; they may confer but may not concur."

[7] Clause 2 of Appendix II, Ninth Schedule to the Constitution of Sri Lanka (hereinafter "Appendix II".

[8] Clause 1:2 of Appendix II.

[9] *Solaimuthu Rasu v Superintendent, Stafford Estate and Others.* SC Appeal 21/2013 (decided on 26 September 2013).

[10] *Vasudeva Nanayakkara v N.K. Choksy, P.C. former Minister of Finance et al.,* S.C (FR) 209/2007, pp. 49-50. Also see *Ratnayake v De Silva*, [1999] 3 Sri LR 57.

[11] Clause 1:3 of Appendix II.

[12] *Determination on Land Ownership Bill*, [1991-2003] VII DSCPB 453, cited in Lakshman Marasinghe, Jayampathy Wickramaratne (eds), Judicial Pronouncements on the 13th Amendment, Stamford Lake, 2010, p. 475.

land by the President. In *Vasudeva Nanayakkara v N.K. Choksy, P.C. former Minister of Finance et al.* (the LMSL case), the Court held:

> Appendix II in my view establishes an interactive legal regime in respect of State land within a Province whilst the ultimate power of alienation and of making a disposition remains with the President, the exercise of the power would be subject to the conditions in Appendix II being satisfied. A pre-condition laid down in paragraph 1.3 is that an alienation or disposition of State land within a Province shall be done in terms of the applicable law 'only' on the advice of the Provincial Council. The advice would be of the Board of Ministers communicated through the Governor. The Board of Ministers being responsible in this regard to the Provincial Council.[13]

While the *Rasu* decision has now sought to reverse this position, this paper argues in Part 2 that the statement of law in the LMSL case remains good law in respect of modalities concerning the alienation of state land.

The administrative structure concerning State lands at central and provincial levels

Because it envisaged a system of land administration at the provincial level, the Thirteenth Amendment necessitated the creation of a provincial land administrative structure that did not previously exist. However, with some exceptions, the Amendment did not effect any major structural changes at the central level. As a consequence, the structure through which land is administered in Sri Lanka continues to be centralized. At the helm of the structure at the central level is the Minister of Lands, under whom the Secretary of the Ministry of Lands functions as the head of the public service in respect of land administration.

The Land Commissioner's Department—the largest and most influential department through which lands are administered—is headed by the Land Commissioner, a statutory office created by the Land Development Ordinance[14] and State Lands Ordinance[15]. Prior to the Thirteenth Amendment, the regional administration of land was the responsibility of Government Agents assisted by Assistant Government Agents and District Land Officers. These officers' primary functions included implementing statutory provisions relating to land development, the administration of crown lands, the recovery by the state of the possession of state lands, and the acquisition of private lands by the state.

As noted previously, some post-Thirteenth Amendment changes have been made at the central administrative level. For instance, the Ministry of Lands now provides de facto appointments to Additional Land Commissioners at the central level to function as 'Provincial Land Commissioners', despite the explicit devolution of functions assigned by legislation to Provincial Land Commissioners appointed by the provincial executive.[16]

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[13] *op cit, Vasudeva Nanayakkara, note 10,* pp. 49-50.
[14] Sections 3 and 4 of the Land Development Ordinance, 19 of 1935 (as amended).
[15] Sections 91 and 92 of the State Lands Ordinance, 8 of 1947 (as amended).
[16] Austin Fernando, 'Is Power Sharing in Land Administration Practical in Sri Lanka', *Groundviews,* accessed at: http://groundviews.org/2012/01/18/is-power-sharing-in-land-administration-practical-in-sri-lanka/

At the provincial level, the administrative apparatus in respect of land is headed by the Provincial Minister of Lands under whom the Provincial Land Commissioner functions. However, several layers of central control persist even at the provincial level. First, Provincial Land Commissioners are appointed by the Governor—an appointee of the President—though it is arguable whether or not the Governor's power over appointments ought to be exercised in accordance with the advice of the Board of Ministers in terms of Article 154F(1) of the Constitution. Nevertheless and more critically, pursuant to the transfer of powers from Government Agents to Divisional Secretaries in 1992, Provincial Land Commissioners are compelled to carry out their activities through the Divisional Secretary, who is an agent and appointee of the central government.[17] As a consequence, even though the Provincial Land Commissioner exercises formal control over Divisional Secretaries in respect of land administration as a matter of statutory function, he is unable to exercise oversight or disciplinary control over these central officers, resulting in substantial centralisation over land administration at the implementation level.[18]

Furthermore, land administration of inter-provincial irrigation and land development projects continue to function independently of Provincial Land Commissioners, since they are central subjects.

Post-Thirteenth Amendment provincial statutes concerning State land

The record of Provinces adopting statutes in respect of state lands has been extremely poor. In the twenty-five years since the introduction of the Thirteenth Amendment, only a handful of statutes in respect of land have been adopted at the provincial level, of which three were adopted by the North Central Provincial Council. Notably, neither the Northern Provincial Council not the Eastern Provincial Council—where the demand for the devolution of powers appears to be strongest—have passed land related statutes.

The two Provinces that have passed statutes dealing with land powers are the Western and the Northern Central Provinces.

The Western Province:

Land Development Statute, Statute No. 07 of 2002 of Western Provincial Council

This statute has extensive provisions to clearly demarcate the land utilized by the PC. It has interpreted lands granted to the PC as per 1:2 of Appendix II to mean any State land already being used by the PC for PC subjects at the commencement of operation of this statute and that the Provincial Minister of Lands may publish in the Gazette the extent of such land subsequent to formal approval by the President.[19] It also sets out a procedure by which any new state land may be obtained by the PC required for any PC subject.[20] It further states that any land which the Government was continuing to use upon the effective date of this

[17] Section 4, Transfer of Powers (Divisional Secretaries) Act, No 58 of 1992.
[18] Ranjith Amarasinghe, Provincial Councils under the 13th Amendment-Centers of Power or Agencies of the Center?, 13th Amendment: Essays on Practice, Ed. Jayampathy Wickramaratne, Lakshman Marasinghe, Stamford Lake, 2010, p. 118.
[19] Section 2(1) Land Development Statute, 7 of 2002 of Western Provincial Council.
[20] Section 3 Land Development Statute, 7 of 2002 of Western Provincial Council.

statute for a reserved or concurrent subject shall be considered to be land used by the Government in consultation with the PC in terms of the provisions of the Constitution.[21]

However, in an article on the devolution of land powers, Mr. Austin Fernando—a retired senior public servant—describes the interference of the centre with the statute making power of the provincial council. He states:

> Having informed the Chief Secretary of Western Province by letter dated 18-09-2002 that its Land Development Statute is legal in all aspects, the Attorney General reverted his stance on 15-11- 2002 on concerns expressed by the Secretary Ministry of Lands...Having studied the second opinion given by the Attorney General the Western Provincial Council revised some sections, passed the Statute and received the certification for the Statute from the Governor on 19-02-2003. Then started the Secretary to the Ministry of Provincial Councils and President's Secretary moving in the matter to 'block' similar statute making by their letters of 03-12- 2002 (No:PL/6/1/64/10) and 21-04-2006 (No: PL/6/8/2/8) respectively. The process of "blocking" was finally sealed off by a Gazette Extraordinary 1680/01 of 15-11-2010 with a notice of by Western Province Chief Minister withdrawing the Regulations under section 74 of the Statute.[22]

This political interference with the implementation of the law must occupy a central place in any attempt to understand the nature and consequences of the *Rasu* decision. As this paper discusses in Part 3, the *Rasu* decision highlights the deep influence of politics on law, as well as the reverse.

The North Central Province

Land Development Statute, No. 02 of 2002

This statute mirrors the provisions of the Land Development Statute, No. 07 of 2002 passed by the Western Provincial Council, and repealed the provisions of the previous Land Development and Land Statutes, Nos. 4 and 5 of 1994, respectively. However, there is considerable confusion on the status of the repealed Land Development Statute, No. 4 of 1994, as other Statutes passed after its repeal make reference to the applicability of the terms of the repealed statute. For instance, section 29 of the North Central Province Provincial Industrial Development Authority Statute (as amended by Statute No. 02 of 2008) stipulates that "[i]n the event of any land situated in the Province is required for any purpose of this statute, relevant article of the Land Development Statute No. 4 of 1994 of the North Central Provincial Council shall be followed."[23] This cross referencing and deeming of a repealed statute to be applicable law is unfortunate and bound to cause considerable confusion to judges, lawyers and litigants.

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[21] Section 6 Land Development Statute, 7 of 2002 of Western Provincial Council.

[22] *op cit, Austin Fernando, note 16.*

[23] Clause 8 amending Section 29, Provincial Industrial Development Authority Amendment Statute, 02 of 2008 of North Central Provincial Council.

Land Statute, No. 05 of 1994.

This Statute contained general provisions to administer, control and utilize State land vested in the North Central Provincial Council. It dealt with matters relating to permanent and temporary alienation of land, the entering into agreements for the sale, lease and other dispositions, the issuing of permits for grantees of land and other related issues.[24] Its provisions corresponded to those in the existing State Lands Ordinance.

Land Development Statute, No. 04 of 1994

This Statute was enacted to make provisions enabling the implementation of the Land Development Ordinance regarding the land vested in the PC. Accordingly it established a mechanism by which such land can be alienated or disposed for cultivators, persons with low-income, educated youth and persons with high-income of the Province.[25] It also established the post of Provincial Land Commissioner of North Central Province for the purposes of administering the provisions of the Statute.[26]

The Indian experience with land devolution compared

Unlike in Sri Lanka, the Indian experience with land devolution has not been marked by an intense struggle between the centre and the States. This is partly because, despite the Sri Lankan devolutionary structure's obvious similarities with the Indian structure on which it was modelled, the Indian Constitution is explicit in devolving land powers to the states in a way that the Thirteenth Amendment is not.

The Seventh Schedule to India's Constitution, like the Thirteenth Amendment, contains three lists: List I – Union List, over which the Union has exclusive powers; List II – State List, over which States have exclusive powers, and List III – Concurrent List, over which the Union and the States have powers. Notably, the States are provided near plenary power with respect to land. Item 18 of the State List devolves powers relating to "[l]and, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization". The centre is provided some powers in respect of land through the Concurrent List, namely transfer of property other than agricultural land and acquisition and requisitioning of property. As such, the centre has passed laws relating to the acquisition of property[27], but the States are primarily responsible for taking legislative and executive action in respect of land. For instance, the power to enact laws to evict encroachers into state land lies squarely with the States, which generally have elaborate legislative provisions to deal with the eviction of encroachers.[28]

In Sri Lanka, however, Appendix II to the Ninth Schedule establishes a number of restrictions on the devolution of powers over state land; resulting in a lack of clarity regarding the precise scope of devolution, but also opening the door to restrictive interpretations of the scope of devolution.

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[24] Section 3, Land Statute, 5 of 1994 of North Central Provincial Council.
[25] Section 3, Land Development Statute, 4 of 1994 of North Central Provincial Council.
[26] Section 68, Land Development Statute, 4 of 1994 of North Central Provincial Council.
[27] See for instance, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.
[28] See for instance, Tamil Nadu Land Encroachment Act, 1905; Andhra Pradesh Land Encroachment Act, 1905; Orissa Prevention of Land Encroachment (Amendment) Act, 1970.

2. The *Rasu* Case: An Analysis of Language, Precedent and Law

2.1. The dispute in the *Rasu* case

While the case of *Solaimuthu Rasu vs. Superintendent, Stafford Estate and Others*[29] will come to be known as a pivotal moment in Sri Lanka's experience with devolution of land powers, the case was not always destined for wide publicity. The Respondent in the matter before the Supreme Court – Solaimuthu Rasu – filed a writ application in the High Court of the Central Province naming three respondents, where the primary relief sought was a writ of certiorari to quash a quit notice issued by the 2nd Respondent, an official of the Ministry of Plantation Industries and the competent authority in terms of the State Lands (Recovery of Possession) Act (hereinafter the 'Act'), No. 7 of 1979.

The Act provides a procedure through which certain identifiable officers of the state, deemed competent authorities, could initiate proceedings to recover possession of state land from those in unauthorised possession or occupation of those lands. In terms of the Act, a competent authority is empowered to initiate such a procedure by issuing a quit notice, which was sought to be quashed in the *Rasu* case.

Nevertheless, when the matter came up in the Provincial High Court, the 2nd Respondent took up a preliminary objection on the basis that the Provincial High Court had no jurisdiction to entertain the matter as 'the subject of the action pertains to State lands and the subject does not fall within the Provincial Council list – namely List 1'[30]. The jurisdiction of the Provincial High Court is set out by Article 154P of the Constitution, which provides that the Court may:

> "...order in the nature of writs of *certiorari*, prohibition, *procedendo, mandamus* and *quo warranto* against any person exercising, within the Province, any power under –
>
> (i) any law ; or
>
> (ii) any statutes made by the Provincial Council established for that Province, in respect of any matter set out in the Provincial Council List."

Thus, the question at the heart of the jurisdictional objection was whether the power to issue a quit notice under the State Lands (Recovery of Possession) Act was a "a power in respect of any matter set out in the Provincial Council List". Notably however, an administrative circular recognising the effect of the Provincial Councils (Consequential Provisions) Act of 1989 adopted by the Land Commissioner's Department suggests that the power to issue a quite notice was a power in respect of a matter set out in the Provincial Council List, in that it provided that the provincial executive could also take steps toward the recovery of possession of state lands.[31] Since the Court's jurisdiction is tied to exercises of power in respect of laws or statutes in respect of matters set out in the Provincial Council List, the objection to jurisdiction raised by the 2nd

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[29] *op cit, note 9.*

[30] *op cit, note 9,* Opinion of Chief Justice Pieris, p. 5.

[31] Land Circular No. 02/233 of 1st December 1989 titled 'Transfer of land work to Provincial Councils – Land Commissioner's Department'.

Respondent necessitated an inquiry into the scope of List 1, and more specifically, whether powers relating to the recovery of state land from unauthorized possessors was set out in List I.

In adjudicating Rasu's application, the Provincial High Court upheld the preliminary objection and dismissed the application for want of jurisdiction. However, on an appeal by Rasu, the Court of Appeal overturned the decision of the High Court, asserting that the power to issue a quit notice was a power in respect of a subject in List 1. The matter was then taken to the Supreme Court, where the Court issued special leave to appeal and heard the matter.

2.2. The three opinions in the Supreme Court

The decision of the Supreme Court in *Rasu*'s matter was expressed through three separate opinions penned by Chief Justice Peiris, Justice Sripavan and Justice Wanasundera respectively. While the decision to effectively uphold the preliminary objection concerning jurisdiction was unanimous, the three judges took divergent, and as this paper argues, problematic paths in arriving at that conclusion. These divergences are apparent in the approaches of the opinions to the task of textual interpretation, constitutional analysis and existing precedent.

Justice Sripavan

Based on the text of Chief Justice Peiris's opinion, Justice Sripavan's opinion appears to have been the first opinion to be circulated between the judges.[32] For this reason, it is also the only opinion that does not reference the other two opinions, a significant factor affecting the precedential value of the *Rasu* decision. After a recital of the procedural history of the case, the opinion commences with an acknowledgment that "an attempt must be made to reconcile entries in Lists I, II and III of the Constitution and the Court must avoid attributing any conflict between the powers of the Centre and the Provinces", and that in doing so, the Court cannot place reliance on the headings in the lists.[33] The opinion then turns to Appendix II and attempts to identify limitations to the devolution of powers over state land. They are: 1) that the centre may utilize state land in respect of a reserved or concurrent subject in compliance with laws governing the matter and in consultation with the relevant provincial council; 2) that a provincial council may administer, control and utilize state land for a List I subject only upon that land being made available by the centre; and 3) that only the President may alienate state land, and that the advice of the Provincial Council in respect of alienation "cannot be construed to bind the President".[34] The opinion then proceeds to observe that "state lands and foreshore, except to the extent specified in Item 18 of List I" is a reserved subject, and the centre is vested with residual powers over state land not devolved to the Provincial Councils.[35] In view of his analysis, Justice Sripavan concludes by declaring that "Provincial Councils can only make statutes to administer, control and utilize State Land, if such State Land is made available to the Provincial Council by the Government for a Provincial Council subject.[36]" Given the absence of evidence indicating that the corpus in

[32] *op cit, note 9,* Opinion of Chief Justice Pieris, p. 3.
[33] *op cit, note 9,* Opinion of Justice Sripavan, p. 7.
[34] *op cit, note 9,* Opinion of Justice Sripavan, p. 10.
[35] *op cit, note 9,* Opinion of Justice Sripavan, p. 12.
[36] *op cit, note 9,* Opinion of Justice Sripavan, p. 12.

question was 'made available' to the relevant provincial council, the opinion concludes that the Provincial High Court did not have jurisdiction to entertain *Rasu*'s petition.

As we shall examine later, the opinion is significant in that it seeks to effect significant changes to the law hitherto in place, but did not acknowledge existing precedent. Nevertheless, the opinion's central conceptual claim was predicated on an interpretation of the text of Appendix II to read that unless the centre makes state land available to the province, the relevant PC is not empowered to administer, control or utilize state land.

Chief Justice Peiris

The opinion of Chief Justice Peiris begins with an expression of agreement with the reasoning and conclusion of Justice Sripavan, and attempts to set out the Chief Justice's own views on the question of law before the Court. The opinion assumes as the starting point of its analysis the reference to state land in the Reserved List, and claims that because what is devolved can only be a portion of that which is reserved "to the Republic", "one would be driven to the conclusion that the subject matter in its entirety would belong to the dominant owner of property.[37]" Having then concluded that the centre maintains dominium over state lands, the Chief Justice proceeds to identify limitations to the devolution of powers over land by Item 18 of List I. For instance, he notes that the phrase "that is to say" in Item 18 limits the devolution over lands to the powers specified explicitly: rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement. He also notes that Appendix II is an exhaustive delineation of powers devolved to the Provinces. The opinion then claims that the category "land" in Item 18 is a "lesser category" than the category "state land" in List III, giving the latter an exalted position.[38]

In his treatment of Appendix II, the Chief Justice argues that the vesting of state land in the Republic "sets out the overarching dominium of State Lands with the centre.[39]" He then sets out to identify further limitations to devolution in Appendix II, which he claims must be understood in the light of the Constitution having "grafted the brooding presence of the Republic on all State Lands in List II, List I and then the Appendix II.[40]" Like Justice Sripavan, the Chief Justice notes three further limitations in Appendix II, which are also substantially the same as those identified by Justice Sripavan. However, the Chief Justice goes further. For instance, whereas Justice Sripavan was content to state that the President would not be bound by the advice of the Provincial Council related to the alienation of state land, the Chief Justice claims that even such advice must be limited to lands that are 'made available' to the province by the centre. Further, unlike Justice Sripavan who did not cite existing precedent, the Chief Justice recognizes the dicta in the *Land Ownership Bill Determination* and *Vasudeva Nanayakkara's* case, but dismisses them as being "patently in error", "unacceptable" and "not supportable."[41] The opinion also references the distinction between a unitary state—which Sri Lanka is—and federal states as supporting his claim that the power over state lands lies with the centre. Here, it is noteworthy that while Justice Sripavan's opinion was—with a few exceptions—directed towards determining whether the specific powers over recovery of possession fell within List I, the

[37] *op cit, note 9,* Opinion of Chief Justice Pieris, p. 8.
[38] *op cit, note 9,* Opinion of Chief Justice Pieris, p. 12.
[39] *op cit, note 9,* Opinion of Chief Justice Pieris, p. 13.
[40] *op cit, note 9,* Opinion of Chief Justice Pieris, p. 14.
[41] *op cit, note 9,* Opinion of Chief Justice Pieris, p. 18.

Chief Justice's wide ranging opinion repeatedly makes pronouncements on the broader question of whether state lands in their totality fall within the domain of the centre.

Justice Wanasundera

Justice Wanasundera's short separate opinion notes her agreement with the opinions by the Chief Justice and Justice Sripavan. The opinion commences with the claim that "it is abundantly clear that land in item 18 cannot include dominium over State land except the powers given over State Land in terms of the Constitution and any other powers given by virtue of any enactment.[42]" It also opines that the power of the President to alienate land is 'unfettered'. In this regard, Justice Wanasundera remarks that the Supreme Court's determination in the Land Ownership Bill Determination was in error.[43] She then reiterates the opinions of Justice Sripavan and the Chief Justice in deciding that the limited power of provincial councils to administer, control and utilize state land is restricted to lands made available to a provincial council by the centre. Further, in echoing the Chief Justice, Justice Wanasundera also refers to the unitary nature of the Sri Lankan state as supporting the Supreme Court's position on the limitations on the devolution of land powers.[44]

The three opinions: analysis of textual arguments

The common position adopted by all the opinions was that unless the centre takes the prior affirmative step of making available certain lands to a provincial council, the provincial council would have no power to legislate concerning the administration, control and utilization of those lands. In arriving at this conclusion, all three opinions referenced Clause 1:2 in Appendix II which reads: "[g]overnment *shall* make available to every Provincial Council State land within the Province required by such Council for a Provincial Council subject. The Provincial Council shall administer, control and utilise such State land, in accordance with the laws and statutes governing the matter." (emphasis added) In crafting their opinions, the judges focused on the words "make available" as introducing a condition precedent to the exercise of powers over state by a provincial council. However, none of the three opinions address the significance of the verb "shall" in the provision. It is an accepted principle of statutory interpretation that the word "shall" usually conveys a mandatory requirement, though there may be exceptions where "shall" may be interpreted as a directory imperative.[45] Thus, a plain and literal interpretation of the text of the Constitution imposes an obligation on the centre to make available state lands required by a Council for a Provincial Council subject. Given this obligation, Clause 1:2 may even be read as merely a prohibition against interference with the exercise by provincial councils of powers in respect of those lands, and not as a provision requiring an affirmative act. Nevertheless, it is unclear as to where authority lies to specify the procedure through which state lands shall be made available to provincial councils.[46] Given the mandatory obligation imposed on the centre as well as

[42] *op cit, note 9,* Opinion of Justice Wanasundera, p. 4.
[43] *op cit, note 9,* Opinion of Justice Wanasundera, p. 5.
[44] *op cit, note 9,* Opinion of Justice Wanasundera, p. 6.
[45] See for instance *Visuvalingam and Other vs. Liyanage,* 1983 (1) Sri.L.R 203, p. 221; and *Mahindasoma vs. Maithripala Senanayake,* 1996 (1) Sri.L.R 180, pp. 187-188.
[46] See Land Circular02/232 of 16th November 1989 issued by the Secretary, Ministry of Lands, Irrigation and Mahaweli Development. This circular proposed a set of procedures to process applications and release lands required by Provincial Councils. It envisaged an application to be made by the Provincial administration to the Ministry of

the lack of clarity in terms of the procedure through which state lands are to be made available to a provincial council, the Supreme Court's treatment of the text of Clause 1:2 is flawed in that it ignores the mandatory qualifier and does not lend clarity to a provision that is central to its own reasoning.

The argument in Chief Justice Peiris's opinion concerning what he claims is "lesser denomination" of the category "land" *vis-à-vis* "state land" is also textually suspect. In fact, on a plain reading of the two words, the category "land" appears to be broader than the qualified category "state land".[47] This apparent error undermines the Chief Justice's approach of 'going from List II to List I'.

The Chief Justice's reading of significant limitations relating to the advice of provincial councils to the President in respect of land alienation is also premised on problematic constructions of the relevant text, which states: "[a]lienation or disposition of the State land within a Province to any citizen or to any organisation shall be by the President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter.[48]" The Chief Justice's argument that the absence of the word "only" in front of the words "on the advice of the relevant Provincial Council" ignores domestic and foreign jurisprudence on the meaning of the word 'advice' in relation to constitutional functions.[49] Further, the Chief Justice's claim that the prefix "the" before "State land within a Province" limits the provision to lands made available to provincial councils appears to read into the Constitution provisions that do not feature in the text; an approach the Chief Justice cautions against in other parts of his opinion.[50]

Finally, all three opinions appear to use the words "Republic" and "centre" interchangeably.[51] While this conflation is textually unsupported, it will be discussed later as it belies a problem concerning the Court's treatment of the constitutional concepts underpinning the devolution of power.

The three opinions: an analysis of the Court's treatment of constitutional concepts

The most striking features of the Supreme Court's constitutional analysis in *Rasu* are its pronouncements on the relevance of the unitary nature of the Sri Lankan state to the case at hand, its treatment of the word 'Republic' and the court's recurrent use of the concept of 'dominium'. This paper argues that the court's constitutional analyses surrounding these issues are problematic for a number of reasons, and offers an alternative reading of these concepts.

Lands, it would have to be approved by a certification of release by the Minister. For lands in excess of 500 acres, the approval of the Cabinet of Ministers is necessary.

[47] See also Kirsty Anantharajah, *Solaimuthu Rasu: A Critical Analysis,* LST Review Vol. 24, Issue 319, p. 6.

[48] Clause 1:3 of Appendix II.

[49] See for instance *Vasudeva Nanayakkara vs. Choksy, op cit, note 19,* p. 49; *Premachandra vs. Montague Jayawickrema,* 1994 2 Sri.L.R 90; *Shamsher Singh v. State of Punjab,* 1975 SCR (1) 814; *U.N.R. Rao v. Indira Gandhi*, AIR 1971 SC 1002

[50] *op cit, note 9,* Opinion of Chief Justice Pieris, p. 3.

[51] *op cit, note 9,* Opinion of Chief Justice Pieris, pp. 8, 12, 15; Opinion of Justice Sripavan p.; Opinion of Justice Wanasundera p.

The unitary state and Rasu

While Justice Sripavan's opinion in *Rasu* did not explicitly reference the unitary status of the Sri Lankan Constitution, the other two opinions do so directly. Moreover, as noted previously, Chief Justice Peiris and Justice Wanasundera cite the unitary structure of the Constitution in support of their restrictive reading of devolution in respect of state land. The judicial thinking behind these references appears to signify that unlike in federal states, the extent of power devolution over certain subjects—and land in particular—must be read restrictively within a unitary state. This approach is best characterized by Justice Wanasundera's opinion, where she states:

> [t]his limited cession of state lands which must be for purposes of administration, control and utilization of State lands made available by the government to a provincial council subject must be understood in the context of the two important features of a unitary state when examining the matters in issue.[52]

The two concepts she then refers to are the supremacy of the central legislature and the absence of subsidiary sovereign bodies. This paper disagrees with the reasoning of the Court. While the 'unitary' appellation may appear in common parlance to signify a lesser degree of powers exercisable by the devolved units, the distinction between unitary and federal structures is—as identified by Justice Wanasundera—the retention by the central legislature of full legislative power, such that the legislature remains competent to override the Provincial Councils if it so wishes. Justice Sharvananda's opinion in the Thirteenth Amendment Bill Determination—which is cited by all three opinions in the *Rasu* case—considered the meaning of the unitary status of Sri Lanka's Constitution and held:

> In regard to legislative power, although there is a sphere of competence defined by the two Bills both in respect of matters set out in the Provincial list and in respect of matters set out in the concurrent list within which a Provincial Council can enact statutes, this legislative competence is not exclusive in character and is subordinate to that of Central Parliament which in terms of Article 154G(2) and 154G(3) can, by following the procedure set out therein, override the Provincial Councils. Article 154G conserves the sovereignty of Parliament in the legislative field. Parliament may amend or repeal, the provisions in the Bill relating to, the legislative authority of the Provincial Councils. The Provincial Council is dependent for its continued existence and validity and for its legislative competence in respect of matters in the Provincial list and in the concurrent list on Parliament. It was submitted by the Petitioners that Articles 154G(2) and (3) restrict the legislative powers of Parliament in respect of matters in the Provincial Council list and the concurrent list. In our view Articles 154G (2) and (3) do not limit the sovereign power of Parliament. They only impose procedural restraints.[53]

Justice Sharvananda then distinguished "manner and form" procedural restrictions imposed by Parliament upon itself which did not infringe on the unitary nature of the Constitution, and substantive restrictions on

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[52] *op cit, note 9,* Opinion of Justice Wanasundera, p.

[53] *In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill,* 1987 2 Sri.L.R 312, pp. 320-321

Parliament's legislative competence.[54] Clearly therefore, even the devolution of plenary powers in respect of land including the vesting of land in the Provinces would not impinge on the unitary nature of the state, provided Parliament retains the competence to override the legislative and constitutional instruments on which a Provincial Council relies.[55] Recent comparative constitutional scholarship also suggests that formally unitary states may in fact evolve to be flexible structures capable of embracing a wide range of different constitutional arrangements for power sharing.[56] This understanding of the constitutional meaning of the unitary state is thus radically at variance with the Supreme Court's reliance on the term in *Rasu*, and suggests that a more robust imagination of constitutional forms of accommodation may have occasioned a divergent approach by the bench in *Rasu*'s case.

Rasu and the Republic

As this paper has noted previously, the Supreme Court's interpretation of the provision in Appendix II that "state land shall continue to vest in the Republic" uses the 'Republic' interchangeably with 'central government'. As a matter of textual interpretation, this is highly problematic as the two concepts have entirely different meanings. Black's Law Dictionary defines 'republic' as "a commonwealth; a state in which the exercise of the sovereign power is lodged in representatives elected by the people. In a wider sense, the state, the common weal, the whole organized political community, without reference to the form of government.[57]" In short, the 'republic' would either mean the state as a political entity or more broadly as the collective citizenry. The distinction between 'state' or 'republic' and 'government' is central to representative democracy, where governments are chosen to conduct the affairs of the state. In any event, in a devolved structure of governance—even where it takes a unitary form—governmental powers are exercised both by a central government and devolved units.

The use in Appendix II of the word 'Republic' thus signifies that state land vests in the state qua representative of the collective citizenry, while powers to administer, control, utilize and alienate that lands lay with the central government and provincial governments as delineated in the Constitution. The role retained for the President in alienating state lands must be seen as a natural corollary to Article 33(d) of the Constitution, in terms of which the President is the keeper of the Public Seal of the Republic, consequent to which he is empowered to grant and dispose lands and immovable property under the Public Seal. This reading would also be compatible with a symbolic role for the President in the alienation of state land. The Supreme Court's conflation of 'republic' and 'central government' therefore grants the central government a status never intended by the framers of the Constitution, and wrongfully excludes a more limited role for the President in disposing state lands.

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[54] *Ibid*, p. 321.
[55] *op cit, Anantharajah, note 48*, p. 14.
[56] For a recent analytical piece on the United Kingdom's experience with devolution in a formally unitary state, see Neil Walker, *'Beyond the Unitary Conception of the United Kingdom Constitution* in "The Sri Lankan Republic at 40; Reflections on constitutional History, Theory and Practice, Volume 2", ed. Asanga Welikala, p. 441.
[57] Black's Law Dictionary, 1st Edition, p. 1026.

Rasu and the concept of 'dominium'

The opinions of the Chief Justice and Justice Wanasundera are both punctuated by repeated references to the term 'dominium'. Black's Law Dictionary defines the term dominium as "ownership; property in the largest sense, including both the right of property and the right of possession or use. [58]" A close inspection of the variety of ways in which the court references the phrase demonstrates its rather inconsistent use. For instance, the Chief Justice states that "having regard to the fact that in a unitary state of government no cession of *dominium* takes place, the Centre has not ceded its *dominium* over State Lands to the Provincial Councils except in some limited circumstances as would appear later in the judgment." (emphasis added) While the assertion that no cession of dominium over state land takes place in a unitary state has no apparent support in constitutional theory and practice, the concession that there are exceptions to that principle in Sri Lanka's Constitution would appear to contradict the earlier claim regarding central dominium in a unitary state. In other paragraphs, the Chief Justice notes that "dominium over all State Land lies with the Republic and not with the Provincial Councils." Justice Wanasundera's opinion also carries the notion of exclusivity when she notes "it is observed that the draftsmen of our Constitution have given List II primacy leaving state lands in the safe dominium of the Republic", but later suggests that "it is abundantly clear that land in item 18 cannot include the dominium over State Land except the powers given over State Land in terms of the Constitution and any other powers given by virtue of any enactment."

While this treatment of the idea of dominium is inconsistent, this paper suggests that it is also unnecessary. The Constitution is explicit in that state land vests in the Republic. However, whatever ambiguities that exist do so in respect of the powers to administer, control, utilize and alienate state lands; and not in respect of the ownership of those lands. The Supreme Court's accordance of importance to the dominium question can only be seen as an incident of its conflating 'republic' and 'centre', as central government ownership of lands would be seen to militate against extensive power sharing in respect of those lands. In reality, however, the question of ownership is mostly irrelevant to provisions concerning power in and over state land. Moreover, the Thirteenth Amendment to the Constitution—and indeed any devolutionary instrument dealing with land—disaggregates the notion of dominium, such that a variety of actors and agencies are granted different roles in the possession, use, control and administration of those lands. The references in the Chief Justice's opinion and Justice Wanasundera's opinion to exceptions to the dominium of the centre concede as much. Given this, the Supreme Court's attempt to identify the site of dominium over state lands obscures as much as it is unnecessary.

The three opinions: an analysis of the Supreme Court's approach to precedent and assessing the precedential value of the Rasu decision

As noted previously, the three opinions approached existing precedent in divergent ways. While Justice Sripavan's opinion did not cite relevant precedent, the Chief Justice and Justice Wanasundera dismissed existing precedent as being in error, without explicitly overturning them. This paper contends with respect that the Supreme Court's approach to dealing with existing precedent was contrary to law, and therefore deeply problematic.

[58] *Ibid*, p. 387.

The Supreme Court's conclusions in the *Rasu* case were contrary to a number of established authorities. In the *Land Ownership Bill Determination*, a considered opinion by a three judge bench held unanimously that the powers relating to the alienation of state lands were devolved subjects, although state land continued to vest in the Republic, and also that the power of the President to dispose state land in accordance with Article 33(d) was qualified by the requirement that such disposition be on the advice of the Provincial Council in terms of Clause 1:3.[59] In SC Reference 4 of 2011—which the Supreme Court did not reference in *Rasu*'s case—another three judge bench held, citing the Court's previous decision in the Land Ownership Bill Determination, that "[i]t is therefore evident that the constitutional provisions pertaining to the subject of land are quite clear and had been considered and interpreted earlier by the Supreme Court. When those decisions are examined it is clearly seen that there cannot be any ambiguity with regard to the provisions in question."[60] Further, in *Vasudeva Nanayakkara*'s case, a three judge bench held unanimously that the Constitution envisaged "an interactive legal regime" between the centre and provinces in respect of land alienation, and that the President could alienate state land within a province only on the advice of the Chief Minister and Board of Ministers communicated through the Governor.[61]

As a preliminary note to examining the Supreme Court's treatment of precedent in *Rasu*, it is important to highlight that the question of whether or not the President's powers over land alienation were fettered by the Thirteenth Amendment is peripheral to the dispute before the Court in *Rasu*'s case. While *Rasu*'s case necessitated an interpretation of paragraph 1 and Clause 1:2 of Appendix II, the question of alienation is only dealt with in Clause 1:3 of Appendix II. As the court's observations on the role provincial councils in disposing state land were not central to the reasoning of the judgment, they are *obiter dictum* and cannot assume any binding precedential value. More critically, the Court's approach raises a significant concern regarding the propriety of disturbing existing precedent when the case does not require a judicial foray into the area.

In any event, the Supreme Court's decision in *Rasu* raises more fundamental questions relating to *stare decisis*. In *Bandahamy vs. Senanayake*, Basnayake CJ identified the practice of Sri Lankan courts relating to stare decisis, noting "[t]hree Judges as a rule follow a unanimous decision of three Judges, but if three Judges sitting together find themselves unable to follow a. unanimous decision of three Judges a fuller bench would be constituted for the purpose of deciding the question involved."[62] He went on to hold:

> In regard to the specific question before us I am of opinion that the Pinikahana case (*supra*) does not overrule the decision in Jayasinghe's case (*supra*) not only because the observation therein is obiter but also because a majority of three Judges in a bench of five Judges cannot overrule the unanimous and considered decision of a bench of three Judges. The fact that no reference is made to Jayasinghe's case and no reasons are given for disagreeing with it is an

[59] *In re the Bill titled "Land Ownership"*, SC SD 26/2003, decided on 10 December 2003.
[60] *SC Reference 4 of 2011*, decided on 16 January 2011, p. 8.
[61] *op cit*, note 10, pp. 49-50.
[62] *Bandahamy v Senanayake*, 62 NLR 213, p. 345.

added circumstance which goes to show that Jayasinghe's case is unaffected by the Pinikahana case and is still good law.[63]

Thus, the Supreme Court's failure to follow established rules of precedent also brings into question the precedential value of the *Rasu* decision. Moreover, Justice Sripavan's opinion—which unlike the other two opinions does not refer with approval to the opinions of the other two Justices, and thus does not incorporate the other judges' views into his opinion—did not reference existing precedent, and did not provide reasons for departing from settled law. This further brings into question the precedential value of the *Rasu* decision.

However, while *Rasu*'s decision would appear not to disturb existing law relating to Clause 1:3, the question of whether the court has established precedent in relation to other questions of law is more complicated. For instance, does the court's interpretation of Clause 1:2 to read that provincial councils are empowered to legislate with regard to the administration, control and utilisation of state lands only where lands are made available by the centre disagree with existing precedent? The answer to this question is not immediately apparent, because existing authorities only appear to address the question obliquely. The jurisprudential thrust of existing authorities on state lands were that they were devolved subjects, subject to certain restrictions found in Appendix II.[64] The reasoning in *Rasu*, which articulated a wholly different approach—that state lands are a reserved subject—was thus incompatible with existing jurisprudence. Yet, given the absence of any existing dicta specifically concerning an interpretation of Clause 1:3, it is arguable as to whether Supreme Court in *Rasu* was bound by existing authorities to read Clause 1:2 differently. Inevitably, the Supreme Court will be called on again to provide clarity given the legal uncertainty flowing from the *Rasu* decision. This paper claims that a more deferential attitude to existing precedent would have avoided the opacity resulting from the *Rasu* decision.

This paper thus argues that the Supreme Court's treatment of the constitutional text, jurisprudential concepts and existing precedent in *Rasu* were flawed, and would require a re-examination by the Supreme Court in the interests of legal certainty and constitutional best practice.

3. Post *Rasu* Challenges and the 'Political' Constitution

3.1. Post-*Rasu*: Challenges for the Judiciary; Policy Makers; and Provincial Councils

As this paper highlights in Part 2, the precedential scope and value of the *Rasu* decision is unclear. This problem is compounded by the fact that Justice Sripavan's opinion has a significantly narrower focus than those of the other two judges. Further, because the two other opinions make expansive pronouncements that, for instance, recognise 'the overarching dominance of State Lands with the centre', those interpreting the decision may choose to read the judgments narrowly—as being applicable only to the State Lands (Recovery of Possession) Act—or more broadly in respect of all matters concerning state land.

While it is inevitable that Provincial High Courts are unlikely in the near future to entertain writ applications in respect of powers exercised in terms of the State Lands (Recovery of Possession) Act—notwithstanding

[63] *Ibid*, p. 350.

[64] *In re Land Ownership Bill*, SC SD 26/2003, decided on 10 December 2003; *Prema Jayantha vs. Divisional Secretary, Rajanganaya*, SC Reference 4/2011, decided on 5 October 2011.

concerns relating to *stare decisis* raised in Part 2—it is uncertain as to whether courts will entertain writ applications concerning other state land related matters.

A lawyer who regularly appears in writ matters filed in the High Court of the Northern Province stated that in the aftermath of the *Rasu* decision, the Northern Provincial High Court has already dismissed writ petitions filed concerning the exercise of powers under the State Lands (Recovery of Possession) Act. He said that the dilemma facing lawyers was whether or not to advice clients to file writ petitions concerning the exercise of powers over land that were hitherto though to be devolved. For instance, he stated that in Kilinochchi and Mullaitivu, there are a large number of pending cases challenging the issuance or non-issuance of permits under the Land Development Ordinance and that in the event the *Rasu* decision were to be accepted in its broadest sense and assumed to be good law, the Provincial High Courts lack the jurisdiction to hear these cases. He said that in the circumstances, he now advises clients to minimise their risk and file writ cases concerning an exercise of power over state land Court of Appeal, although the law on point was unclear. However, he said that the state had objected to the Court's jurisdiction in a case in which he appears which was filed concerning land permits before the *Rasu* decision, and that he would be compelled to take up the position that *Rasu* did not disturb existing precedent.[65] A lawyer who is a member of the Kandy Bar Association also echoed these views, stating that he now advises clients not to file state land related writ applications in the Provincial High Courts.[66] Another practitioner in the Northern Province—a retired judicial officer—also explained that with the end to state land related writ applications being filed in the Provincial High Court, the writ jurisdiction of the High Courts was rendered virtually redundant, as most of the writ applications filed in the Northern Provincial High Court were state land related matters, with a small number of matters concerning cooperative societies.[67]

For judges in the Provincial High Courts, to refuse to entertain writ applications concerning state land would require a departure from the law recognised by the Court of Appeal and Supreme Court in previous cases. In May 2011, the Court of Appeal overruled the State's objections to the Provincial High Courts exercising writ jurisdiction in respect of powers exercisable under the Land Development Ordinance and directed the Provincial High Court to hear the case on its merits.[68] This position was strengthened by the judgment of the Supreme Court a few months later in SC Reference 4 of 2011, which was also in respect of powers exercisable in terms of the Land Development Ordinance.[69] While the existing precedent would appear to remain good law given that it was not even referenced—let alone overturned—in *Rasu*, the language of the three opinions in *Rasu* clearly contradicts existing precedent even in respect of the Land Development Ordinance. As a consequence of the ensuing lack of clarity, litigants and judges will be compelled to choose between two judgments of the Supreme Court – a wholly undesirable state of affairs.

There are also significant ramifications for executive decision makers, particularly at the provincial level. In the event the *Rasu* decision is considered binding law and read in its broadest sense—which this paper has suggested it must not—the constitutionality of existing provincial statutes would be cast into question.

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[65] Interview, *Attorney at Law from the Northern Province,* 3 November 2014.
[66] Interview, *Attorney at Law from Kandy,* 30 October 2014.
[67] Interview, *Attorney at Law from the Northern Province; a retired judicial officer,* 3 November 2014.
[68] *Alice Nona vs Wahalawatte and Others*, CA Revision 50/2009, decided on 20 May 2011.
[69] *op cit, note 65.*

Further, such a reading would also prevent provincial council functionaries from exercising powers in terms of the Provincial Councils (Consequential Provisions) Act, which permits certain provincial functionaries to exercise powers under central legislation on devolved subjects even in the absence of provincial statutes.[70] Thus, those holding executive positions with respect to land at the provincial level—such as Provincial Ministers, Provincial Land Commissioners and subordinate provincial public servants—face a number of dilemmas in the wake of the *Rasu* decision. In the event they apply provincial statutes, or assume powers over state land by virtue of the Provincial Councils (Consequential Provisions) Act, would they be violating the Constitution as interpreted by the Supreme Court; and in the event they decide not to exercise those powers, would they stand in violation of properly enacted statutes and laws?

A lawyer and member of the Northern Provincial Council stated that given the timing of the *Rasu* decision, the newly elected provincial administration was unable to exercise powers that were previously thought to be devolved. He said that notwithstanding issues concerning the binding value of the *Rasu* decision, it had a very significant impact on the provincial public service. He stated that officers of the public service now assume that all powers over state land are reserved subjects, and carry out their duties based on that assumption. Thus, his view was that, as far as the Northern Provincial Council was concerned, there is no effective devolution of powers over state lands. He also said that to his knowledge, no land had been made available by the state to the province.[71]

The choices facing judges, policy makers and provincial functionaries in the aftermath of the *Rasu* decision will not be made in a political vacuum. Instead, those decisions will take place in a political space that is constitutive of, and constituted by, the political currents that reinforce the *Rasu* decision. This paper seeks to discuss these currents in the following section.

3.2. Conclusion: *Rasu* and the Political Constitution

Though the *Rasu* case may have appeared at its initiation to be a routine writ application filed in a Provincial High Court, it later assumed enormous political significance given the timing and circumstances in which it was heard in the Supreme Court. That hearing had all the trappings of a political site of battle given the timing of the judgment, the recent history of the Supreme Court itself, and the identities of counsel representing the parties.

The matter was argued in the Supreme Court in July 2013 amidst the political excitement of impending elections to the Northern Provincial Council, in which a Tamil National Alliance controlled administration intent on exercising land powers was expected to be elected. Unsurprisingly, the run up to the Northern Provincial Council elections saw repeated assertions by senior government functionaries that the government was unwilling to devolve land powers in terms of the Constitution.[72] Thus, the question of whether and how a

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[70] Section 2, Provincial Councils (Consequential Provisions) Act, 02 of 1989.

[71] Interview, *Attorney at Law from the Northern Province; a member of the Northern Provincial Council;* 5 November 2014.

[72] See for instance, 'Nimal says 13A forced on Sri Lanka', accessed at: http://colombogazette.com/2013/06/28/nimal-says-13a-forced-on-lanka/; 'MEP for District Based Devolution', The Nation, 27 June 2013, accessed at: http://www.nation.lk/edition/breaking-news/item/18765-mep-for-district-based-devolution-dinesh.html#sthash.L9uEmEZQ.dpuf

newly elected Northern Provincial Council would exercise land powers was foremost in political debates leading up to the election. The election was concluded on 21 September 2013, and Justice C.V. Wigneswaran was duly appointed Chief Minister of the Northern Province. The timing of the *Rasu* decision—within five days of the election and even before the new administration was in the Northern Province was sworn in—was a thus a critical moment in the political struggle over the devolution of land powers.

The Supreme Court's recent troubles also highlighted the apparent seamless continuity between law and politics, echoing Griffith's observation in his seminal piece "The Political Constitution" that "law is politics carried on by other means."[73] The former Chief Justice Dr. Shirani Bandaranayake's controversial impeachment—denounced as illegal by the Supreme Court and Court of Appeal at the time[74]—took place closely following two Bill Determinations in which Chief Justice Bandaranayake upheld constitutional procedural safeguards against Parliament legislating on devolved subjects without due consultation with provincial councils.[75] The identities of counsel representing parties in the *Rasu* case also provided an indication of the significant political battles at the heart of the case. Rasu himself was represented by Mr. M. A. Sumanthiran—a Member of Parliament representing the Tamil National Alliance and a vocal supporter of power devolution in respect of land—while the Respondents were represented by Mr. Manohara de Silva, President's Counsel and Mr Gomin Dayasiri respectively – both public figures known for their opposition to the Thirteenth Amendment and power devolution.

The nexus between law and politics in this case is not, however, limited to the political factors that were at play in *Rasu*'s case. Indeed, the *Rasu* decision—regardless of its legal and precedential value—dramatically shaped the political landscape in respect of devolution. The press coverage of the decision in *Rasu* conveyed the unequivocal view that land powers were not devolved to Provincial Councils, and that the Court had settled the controversy surrounding land devolution.[76] Mr. Gomin Dayasiri himself penned a jubilant opinion piece in the media where he credited the Supreme Court for "walking on a guided path located the lost paradise; brought it out in its glory to public pasture.[77]" Mr. Sumanthiran in turn published a rejoinder in which he claimed that while the precedential value of the *Rasu* decision was not strong, the case highlighted the inadequacies of the Thirteenth Amendment to the Constitution and subtly called for increased pressure on the government to devolve power, stating:

> The Supreme Court's judgment reminds us that devolution can never be meaningful and permanent within the asphyxiating confines of a unitary state. The urgent need is for

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[73] JAG Griffith, 'The Common Law and the Political Constitution' (2001) 117 LQR 42-67, p. 64.

[74] See Colombo Telegraph,"Impeachment: Full Text of The Supreme Court Determination Today", 3rd January 2013, accessed at: http://www.colombotelegraph.com/wp-content/uploads/2013/01/S.C-Referance-No.-358-2012.pdf; Colombo Telegraph, "CJ's Case: Full Text Of The Court Of Appeal Determination Today", 7th January 2013, accessed at: http://www.colombotelegraph.com/wp-content/uploads/2013/01/CAwrit-411-2012.pdf

[75] *In re the Town and Country Planning Ordinance Amendment Bill,* SC SD 3/2011, decided on 2 September 2011; *In re the Divineguma Bill (1),* SC SD 1-3/2012, decided on 16 September 2012; *In re the Divineguma Bill.*

[76] See 'Land Powers only Vested with the Centre – Supreme Court' *ITN News,* 26 September 2013, accessed at: http://www.itnnews.lk/?p=27488; 'Supreme Court Settles Question of Land Powers', *FT Lanka,* 27 September 2013, accessed at: http://www.ft.lk/2013/09/27/supreme-court-settles-question-of-land-powers/; 'Land Power Not Vested with PCs', *The Nation,* 26 September 2013, accessed at: http://www.nation.lk/edition/latest-top-stories/item/21310-land-powers-not-vested-with-pcs-supreme-court.html

[77] Gomin Dayasri, 'Judgment of land: Story untold', *Sunday Times,* 29 September 2013, accessed at: http://www.sundaytimes.lk/130929/news/judgment-on-land-story-untold-64191.html

> meaningful constitutional reform so that devolution can be made more secure, the rule of law protected, and the judiciary made independent. The steady erosion of minority protections in the India-Sri Lanka Accord through judicial pronouncements can only be reversed by a permanent political solution and a new constitutional order. Moderate Tamil leaders have articulated this message for more than 60 years. If people within and outside Sri Lanka didn't believe us then, they should, and will, believe us now.[78]

As negotiations between the government and Tamil political parties remain stalled, it is unlikely that the short term future will witness a constitutional reworking of existing provisions on devolution concerning state land.[79] Instead, the *Rasu* decision continues to shape the political logic undergirding governance in Sri Lanka, and provide legitimacy to the government's refusal to share power more liberally with provincial councils. Thus, notwithstanding the legality or otherwise of the *Rasu* decision, the Supreme Court's pronouncements in *Rasu* have and will continue to occupy a central role in Sri Lanka's political Constitution.

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[78] M. A Sumanthiran, 'On Shaky Ground', *The Hindu,* 8 October 2013, accessed at: http://www.thehindu.com/todays-paper/tp-opinion/on-shaky-ground/article5211935.ece

[79] See however Rajiva Wijesinha, 'The Ease of Negotiating With Sympathy', accessed at https://rajivawijesinha.wordpress.com/2014/06/16/the-ease-of-negotiating-with-sympathy/. The article reproduces correspondence between the author as a representative of the government at negotiations and a TNA delegate Mr Sumanthiran with whom Professor Wijensiha claims he reached substantial agreement on the satisfactory degree of devolution in respect of land powers.

Human Rights, Development and Rathupaswala

D.S. Rajasingham[*]

1. Introduction

In August 2013, Rathupaswala exploded.[1] Enormous crowds spilled onto the streets, protesting the pollution of their water by Venigros (Pvt) Ltd[2] - a nearby latex glove manufacturing factory - and demanding its closure.[3] When the crowds became too large for the police to control, the army was called in. It crushed the protest in a brutal operation, killing three civilians and injuring many others in the process.[4] In the public outrage that followed, the factory was relocated.[5]

Rathupaswala is significant on many levels, but its overriding importance lies in what it tells us about Sri Lanka and its post-war development drive. After all, as VPL's owners repeatedly reminded the public - the factory created jobs and earned revenue, that is, it contributed to development.[6] But what *is* development? What place should human rights have in development? And is development that is holistic and meaningful possible in Sri Lanka today?

In this paper, I explore these questions and advance two theses. First, Rathupaswala demonstrates why an *indivisible* and *participatory* approach to development is essential. Second, and more importantly, Rathupaswala surfaces systemic flaws in Sri Lanka. While these remain uncorrected, holistic development will be impossible.

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[*] Undergraduate, Faculty of Law, University of Colombo. Thanks are due to Dinesha Samararatne, Lecturer at the Faculty of Law, for suggesting this paper and for her invaluable advice and comments. Field research for this paper was conducted in the village of Nedungamuwa, Rathupaswala. Given the sensitive nature of the controversy surrounding water in the area, many of those interviewed spoke on the condition of anonymity. Apart from such interviews, newspaper reports and articles have also been used to establish the relevant facts. This paper was presented at the *Sri Lanka's Road to Sustainable Development Forum* held on 22nd of August 2014, facilitated by the Economic, Social and Cultural Rights Programme of LST.

[1] The village of Nedungamuwa, Rathupaswala is at the center of the controversy. However, given the wide ranging effects of the incident in question, this essay will examine the right to water in relation to the broader Rathupaswala area.

[2] Hereinafter VPL. VPL is a subsidiary of Dipped Products Ltd (DPL). It was was set up under the Board of Investment [BOI] Act no 4 of 1978 (as amended) s 17. While newspaper reports use the names interchangeably, this essay will refer to VPL, except where decisions of the holding company, DPL, are concerned.

[3] Aanya Wipulasena, 'Rathupaswala water crisis and new moves to dam it', *The Sunday Times* (20 October 2013) <http://www.sundaytimes.lk/131020/news/rathupaswala-water-crisis-and-new-moves-to-dam-it-66321.html> accessed 28 July 2014.

[4] 'Army exceeded mandate in Weliweriya says internal inquiry', (*The Republic Square*, 4 October 2013) <http://www.therepublicsquare.com/politics/2013/10/04/army-exceeded-mandate-at-weliweriya-coi/> accessed 28 July 2014.

[5] Aanya Wipulasena, 'Likelihood of groundwater contamination due to elevated location of DPL factory', *The Sunday Times* (24 November 2013) <http://www.sundaytimes.lk/131124/news/likelihood-of-groundwater-contamination-due-to-elevated-location-of-dpl-factory-nwsdb-74575.html> accessed 28 July 2014.

[6] See Aanya Wipulasena, 'Rathupaswala water crisis and new moves to dam it', *The Sunday Times* (20 October 2013) <http://www.sundaytimes.lk/131020/news/rathupaswala-water-crisis-and-new-moves-to-dam-it-66321.html> accessed 28 July 2014; Aanya Wipulasena, 'Likelihood of groundwater contamination due to elevated location of DPL factory', *The Sunday Times* (24 November 2013) <http://www.sundaytimes.lk/131124/news/likelihood-of-groundwater-contamination-due-to-elevated-location-of-dpl-factory-nwsdb-74575.html> accessed 28 July 2014.

Rathupaswala and the Right to Development

What is development?

Development is not simply about jobs and economic growth. Rather, it is "a process that expands the capabilities or freedom of individuals to improve their well-being and to realize what they value."[7] It results in the realization of the potentialities of the human person, individually and in community.[8] It is a comprehensive economic, social, cultural and political process.

A *right* to development is now part of international human rights law.[9] All persons are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[10] This right entails "sub-rights" to effective participation in all aspects of development, equal opportunity and access to resources, the fair distribution of the benefits of development, respect for civil, political, economic, social and cultural rights or an indivisible approach to human rights, and an international environment in which all these rights can be fully realized.[11] Moreover, the link between human rights and development led to the creation of a "human rights-based approach" to development. This requires development programs to focus on the most vulnerable groups, to be locally owned and for human rights principles such as indivisibility, accountability and transparency to inform the entirety of development programs.[12]

Sri Lanka's Obligations

Sri Lanka has an international legal obligation to respect the right to development, and has ratified treaties that recognize certain aspects of this right.[13] However, as a dualist State, Sri Lanka needs incorporating legislation or judicial recognition before an obligation becomes domestically enforceable.[14] Though Sri Lanka does not recognize the right to development in its Constitution, it may be possible to enforce certain aspects of this right by reading the Directive Principles of State Policy[15] with the constitutional right to equality.[16]

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[7] 'Report of the Independent Expert on the Right to Development' UN Doc A/55/306 (2000), p. 22; See also A Sen, *Development as Freedom* (Alfred A Knopf 1999), pp. 24-25.

[8] Office of the High Commissioner for Human Rights, *Realizing the Right to Development* (United Nations 2013), p. 8.

[9] Declaration on the Right to Development (1986) GARes A/RES/41/128 [DRD]; Vienna Declaration and Program of Action (1993) A/CONF157/23, p. 10; United Nations Millennium Declaration (2000) GARes A/RES/55/1, p.11; World Summit Outcome Document (2005) GARes A/RES/60/1, p. 10.

[10] DRD Article 1.

[11] *Realizing the Right to Development* (n9), p. 59; Stephen P Marks, *The Politics of the Possible: The Way Ahead for the Right to Development* (Friedrich- Ebert-Stiftung, 2011), p. 2.

[12] United Nations Organization 'The Human Rights-Based Approach to Development Cooperation: Towards a Common Understanding Among the United Nations Agencies' (May2003).

[13] Such as the *International Covenant on Civil and Political Rights* (23 March 1976) 999 UNTS 171 [ICCPR] and the *International Covenant on Economic and Social Rights* (3 January 1976) 993 UNTS 3 [ICESCR].

[14] See *Singarasa v Attorney General* SC Spl (LA) No 182/99 (Supreme Court Minutes 15 September 2006), p. 5; *Bulankulama and Others v Secretary, Ministry of Industrial Development and Others* (2000) 3 SLR 243, pp. 275-276.

[15] Though not directly enforceable, these principles can be used to in interpreting other sections of the Constitution of Sri Lanka (1978) per *R Haputhantrige v BL Karunawathie and Others* SC (FR) 10/07, SC Minutes 29.03.2007. The relevant Directive Principles include the requirement that the State ensure an adequate standard of living (Article

Indivisibility and the Right to Development

The principle of indivisibility recognizes that all human rights are of *equal status and importance.*[17] In terms of development, this means that States must respect and protect all types of rights in promoting development.[18] I would argue that in allowing the factory to operate the State failed to protect a crucial economic, social and cultural (ESC) right – the right to water. The consequences of doing so make the case for an approach to development that is indivisible – that protects all types of rights.

The Right to Water

International and Domestic Recognition

The right to water is recognized by international treaties,[19] several States,[20] the United Nations General Assembly[21] and the Human Rights Council.[22] As a State-party to these treaties, and having voted in favor of the relevant General Assembly resolution,[23] Sri Lanka has an international law obligation to respect this right. Domestically the right has no constitutional recognition but is accepted at a policy level,[24] with legislation governing water usage.[25] Though constitutional or legislative recognition would be ideal, the right

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27(2) (c)); the rapid development of the country (Article 27(2) (d)); the equitable distribution of resources (Article 27(2) (e)) and participation at every level of national life (Article 27(4)).

[16] The Constitutional provision on equality in Article 12 has been used to recognize new rights in the past, and could be used in this instance as well. See *Kavirathne and Others v Commissioner General of Examinations and Others* SC FR 29/2012 (Supreme Court Minutes 10 May 2012) [right to education]; Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka* (Stamford Lake 2007), pp. 332-370. References to sustainable development have already been made by the Supreme Court in *Gunarathne v Homagama Pradeshiya Sabha et al* (1998) 2 Sri LR 11 and therefore the further step of recognizing the right should be possible. See further Shyami Puvimanasinghe 'Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest' (2009), p.10; Sustainable Development Law and Policy, pp. 41, 45.

[17] DRD Articles 1, 6(2), p. 9.

[18] Vienna Declaration and Program of Action (1993) A/CONF157/23, p. 5.

[19] *Convention on the Elimination of all Forms of Discrimination Against Women*, 3 September 1981, 1249 UNTS 13 [CEDAW], Article 14(2)(h); *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3 Article 24(2)(c).

[20] **Constitutions** - Congo – Constitution of 2005 Article 48; Kenya – Constitution of Kenya Act 2010 Article 43(1)(d); South Africa – Constitution of 1996 section 27(1)(b); Uruguay – Constitution of 2004 Article 47; **Judicial Decisions** – Belgium - *Judgment N° 36/98* Belgian Court of Arbitration, 1 April 1998; Bangladesh - *Dr Mohiuddin Farooque v Bangladesh* Writ Petition 998 of 1994, CA 24 of 1995, Supreme Court of Bangladesh, Appellate Division (Civil), 25 July; India - *Subhash Kumar v State of Bihar and Others* (1991) AIR 420; Ireland - *Gladys Ryan v The Attorney General* [1965] IR 294; Nepal - *Advocate Prakash Mani Sharma and Others v Nepal Drinking Water Corporation and Others*, Supreme Court of Nepal, Writ Petition 2237/1990 (10 July 2001).

[21] 'The Human Right to Water and Sanitation' UNGARes 64/292 (3 August 2010) UN Doc A/RES/64/292.

[22] 'Human rights and Access to Safe Drinking Water and Sanitation' HRC Res 15/9, (6 October 2010) UN Doc A/HRC/RES/15/9.

[23] General Assembly Department of Public Information, 'General Assembly adopts resolution recognizing access to clean water, sanitation' <http://www.un.org/News/Press/docs/2010/ga10967.doc.htm> accessed 28 July 2014.

[24] Ministry of Water Supply and Drainage, National Drinking Water Policy, Section 4, 6(1) found at <http://www.waterboard.lk/Scripts/htm/Publications/Drinking_Water_Policy_updated.pdf> accessed 28 July 2014.

[25] **Agriculture** – Irrigation Ordinance no 32 of 146 (as amended); Water Resources Board Act no 29 of 1964 (as amended); **Domestic usage of water** – Housing and Town Improvement Ordinance no 19 of 1915 (as amended); Municipal Council Ordinance no 29 of 1947 (as amended); National Water Supply and Drainage Board Law no 2 of 1974 (as amended); **Regulation of third-party pollution** – National Environmental Act no 47 of 1980 (as amended).

to water might also be protected through an expansion of the Supreme Court's jurisprudence on the right to life[26] or equality.[27]

The Right to Water: Normative Content

In General Comment 15 the UN Committee on Economic, Social and Cultural Rights [CESCR], outlined the normative content of the right to water.[28] This right entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.[29] While violations of several aspects of this right are evident in Rathupaswala, I will focus on the requirement of *quality* because this was at the heart of the dispute.

The requirement of *quality* means that water must be safe and thus free from, *inter alia*, chemical substances that are a threat to a person's health.[30] It should also be of an acceptable color, odor and taste for each personal and domestic use. However, the water in Rathupaswala had low pH values[31] and high concentrations of harmful chemical substances.[32] It also caused health problems such as gastritis, blackened skin, hair-loss and throat and skin irritation.[33] This was a violation of the right to water, and consequently of

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[26] *Sriyani Silva v Iddamalgoda, OIC, Police Station Paiyagala and Others* (2003) 2 SLR 63 where it was held that an implied right to life exists in Articles 11 and 13(4) of the Constitution of Sri Lanka, and that this allows heirs or dependants of victims of alleged fundamental rights violations to complain of those violations under Article 126(2) where those victims are dead. A narrow reading of the case would restrict it to its facts. However it is possible for a broad reading to allow the right to life as recognized in *Sriyani Silva* to be used to recognize the right to water, on the basis that life is impossible without water. India's Supreme Court has already used such reasoning to recognize the right to water. See *M C Mehta v Union of India* 2004 (12) SCC118; *Attakoya Thangal v Union of India* (1990) I KLT 580.

[27] An noted above in footnote 17.

[28] UN Committee on Economic Social and Cultural Rights, *CESCR General Comment No 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, (2002) E/C12/2002/11 [GC 15], p. 2. While General Comments are non-binding, and cannot create new obligations, they may draw out the implications of existing obligations and are of persuasive value. This is because, firstly, as noted by the International Court of Justice in relation to the United Nations Committee on Civil and Political Rights, they are prepared by the body established to supervise the application of a treaty. See *Ahamadou Sadio Diallo (Republic of Guniea v Democratic Republic of the Congo)* [2012] ICJ Rep 324, p. 66; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, pp. 109-113 & 140. The same argument applies, *mutatis mutandis*, in relation to the CESCR. Furthermore, they are formed out of the practice of States parties in applying the treaty. Finally the General Comment in question was affirmed by the General Assembly and Human Right Council resolutions that recognized the right to water.

[29] GC 15, p. 2.

[30] GC 15, p. 12; World Health Organization, *Guidelines for Drinking Water Quality* (3rd ed. WHO 2004).

[31] The pH value of water in the area was as low as 4. Normal water has a pH value of 7. See Sri Lanka Standards for Potable Water standard no SLS 614, 1983; Malaka Rodrigo, 'DPL's CSR dips as the gloves come off its operations' *The Sunday Times* (11 August 2013) <http://www.sundaytimes.lk/130811/news/dpls-csr-dips-as-the-gloves-come-off-its-operations-57410.html> accessed 28 July 2014.

[32] Aanya Wipulasena, 'Likelihood of groundwater contamination due to elevated location of DPL factory' *The Sunday Times* (24 November 2013) <http://www.sundaytimes.lk/131124/news/likelihood-of-groundwater-contamination-due-to-elevated-location-of-dpl-factory-nwsdb-74575.html> accessed 28 July 2014. The report of the National Water Supply and Drainage Board (NWSDB) indicated a high concentration of Nitrate and Sulphate in the water.

[33] Aanya Wipulasena, 'Rathupaswala water crisis and new moves to dam it', *The Sunday Times* (20 October 2013) <http://www.sundaytimes.lk/131020/news/rathupaswala-water-crisis-and-new-moves-to-dam-it-66321.html> accessed 28 July 2014.

the right to development. It also resulted in violations of the rights to health,[34] life,[35] and possibly the right to an adequate standard of living.[36]

Imputing Responsibility

Imputing responsibility for the above requires an analysis of the obligations of the Sri Lankan State and VPL in relation to the right to water.[37] These include ICESCR obligations as well as those concerning and businesses and human rights.[38]

State Responsibility

The responsibility of States in relation to ESC rights is different to that in relation to civil and political rights. Within their obligation to progressively realize ESC rights,[39] States parties have certain non-derogable core obligations - such as, in this case, the obligation to ensure access to the minimum essential amount of safe water.[40] They also have *immediate obligations* of non-discrimination and to 'take steps' that are deliberate, concrete and targeted to achieve the full realization of Covenant rights.[41]

In situations of third-party interference with the right to water, as in Rathupaswala, the above translate into an obligation to *protect*.[42] Thus States must prevent third parties, including corporations, from interfering in

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[34] ICESCR Article 12(1); GC 15, p. 8.

[35] ICCPR Article 6. There are allegations that the seeping of industrial waste into paddy lands had led to the deaths of several farmers. See Aanya Wipulasena, 'Rathupaswala water crisis and new moves to dam it' *The Sunday Times* (20 October 2013) <http://www.sundaytimes.lk/131020/news/rathupaswala-water-crisis-and-new-moves-to-dam-it-66321.html> accessed 28 July 2014.

[36] ICCPR Article 11(1); GC 15, p. 3. Apart from allegations concerning the deaths of farmers noted above, some of those interviewed alleged that toxic waste was sold by the factory as fertilizer to some villagers. If this is true, then the ability of those concerned to earn a living through agriculture was impaired by the factory's activities. See Aanya Wipulasena, 'Rathupaswala water crisis and new moves to dam it' *The Sunday Times* (20 October 2013) <http://www.sundaytimes.lk/131020/news/rathupaswala-water-crisis-and-new-moves-to-dam-it-66321.html> accessed 28 July 2014.

[37] Insofar as the right to development entails the right to water, responsibility for a violation of the latter amounts to responsibility for a violation of the former.

[38] 'Human rights and transnational corporations and other business enterprises' HRC Res 17/4, (6 July 2011) UN Doc A/HRC/RES/17/4 ; 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' HRC (7 April 2008) UN Doc A/HRC/8/5 [Business and Human Rights Report] ; 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' HRC (21 March 2011) UN Doc A/HRC/17/31 [Guiding Principles].

[39] ICESCR 2(1); Gehan D Gunatilleke, 'Judicial Activism Revisited: Reflecting on the Role of Judges in enforcing Economic, Social and Cultural Rights' (2010) 1 Junior Bar Law Review, pp. 21, 22.

[40] UN Committee on Economic Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations (Art. 2, Para 1, of the Covenant)*, (1990) E/1991/23 [GC 3], p.10; GC 15, p.37(a); International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, (26 January 1997), p. 9.

[41] ICESCR Art 2(1); GC 3, pp.1, 2, 9; UN Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")* (8 January 1987) E/CN4/1987/17, p. 16.

[42] GC 15, p.20; 'Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments' HRC (16 August 2007) UN Doc A/HRC/6/3, p. 37.

any way with the enjoyment of the right to water. This includes adopting those legislative and other measures – such as regulatory and monitoring mechanisms[43] - which are necessary and effective to prevent third parties from polluting water resources.[44]

Sri Lanka uses a system of Environment Protection Licenses (EPLs), administered by the Central Environmental Authority (CEA) and the BOI, to fulfill its obligation to protect.[45] However, it allegedly failed to regulate VPL's polluting activities. The EPL issued to the company was allegedly for a single processing plant, whereas five plants were in operation at the factory. Residents also claim that it had insufficient water purification plants.[46] VPL denies these claims.[47] If true, the pollution was partly due to the failure of State agencies to monitor VPL's adherence to the terms of its EPL.

Moreover, the CEA's policy of annually renewing EPLs based on reports submitted by *the company seeking renewal itself* is an undeniable regulatory failure.[48] Failing to require independent reports on companies' activities prior to renewing EPLs invites abuse and pollution. This amounts to a failure by the State to *protect* against third-party interference with the right to water.[49]

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[43] GC 15, 44(b); **Argentina** - *Neuquen, Sala II, Cámara de Apelaciones en lo Civil: Menores Comunidad Paynemil, Acción de Amparo* (Expte No. 311- CA-1997, 19 May 1997) [the State of Argentina has an obligation to realize the right to water, and to take reasonable measures to prevent the pollution of water sources in the indigenous Paynemill community]; **India** - *Perumatty Grama Panchayat v State of Kerala High Court of Kerala* (16 December 2003) [the State has a duty to act to protect against excessive groundwater exploitation, and inaction amounted to an infringement of the right to life]

[44] GC 15, p.23; Business and Human Rights Report, p.18; Guiding Principles, Principles 1, 3.

[45] The National Environmental Act no 47 of 1980 (as amended) ss 23A-23E provides that no person shall emit waste into the environment that will cause pollution except under the authority of a licence issued by the CEA. However, since this factory was set up under the BOI Act, it received its EPL from the BOI with the concurrence of the CEA, as per s 20(a) of that Act. Regulations relating to EPLs are found in Gazette Notifications no 1533/16 (25 January 2008) and 1534/18 (01 February 2008).

[46] Green Movement of Sri Lanka Inc, *The Public Right to Water, Industrial Pollution and its Prevention* (Green Movement of Sri Lanka Inc 2013) 4; Interview with a resident of Rathupaswala.

[47] Malaka Rodrigo, 'DPL's CSR dips as the gloves come off its operations' *The Sunday Times* (11 August 2013) <http://www.sundaytimes.lk/130811/news/dpls-csr-dips-as-the-gloves-come-off-its-operations-57410.html> accessed 28 July 2014. DPL maintains that it complies with all CEA and BOI standards for releasing rubber industry effluents to the surface water and operates under a renewed EPL. Moreover, it states that the quality of its effluent water is tested by the National Building and Research Organization every three months.

[48] *Ibid.* The CEA admitted that only when complaints are made are companies investigated independently. However, its website suggests that field inspection by CEA officers is standard procedure in cases of renewal. The regulations in the Gazette Notifications cited above do not mention independent inspections for renewals of EPLs. See Central Environmental Authority, 'Environmental Protection Licensing' <http://ceanew.lankapanel.biz/index.php/ta/environmental-protection-licensing> accessed 28 July 2014

[49] This need for independent CEA monitoring prior to renewing EPLs was recognized by the national Human Rights Commission in its report on the pollution of water in Rathupaswala. See RL Jayakody 'Police should not attempt to wash their hands of responsibilities' *Ceylon Today* (11 May 2014) <http://www.ceylontoday.lk/90-63643-news-detail-police-should-not-attempt-to-wash-their-hands-off-responsibilities.html> accessed 28 July 2014.

Corporate Responsibility

VPL, a company, does not have a direct international law obligation to respect human rights. This is despite strong arguments for a compulsory regime of corporate human rights accountability.[50] Nonetheless, there is increasing acceptance that companies must respect human rights,[51] and this is particularly so in relation to development, as it generally involves companies. The current regime emphasizes the need for companies to exercise *due diligence*. That is, they must comply with national laws and take steps to become aware of, prevent and address adverse human rights impacts from their activities.[52]

VPL allegedly failed to exercise due diligence. Coupled with violating the terms of its EPL are claims that it released untreated industrial waste into the environment.[53] However, the company denies these allegations[54] and indeed no State testing institution expressly held it responsible for Rathupaswala's low water quality.[55]

However, in an illustration of the broader issues involved, it may be that political influence prevented State institutions from holding the company responsible.[56] Indeed, circumstantial evidence suggests that the factory may have been responsible. First, the high concentrations of chemicals in the water in and around the

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[50] Voluntary regimes tend to prove ineffective when companies need to choose between respect for human rights and the protection of profit margins. Moreover individuals are *entitled* to remedies when their rights are violated, which makes a compulsory regime essential. Further, the rule of law requires all power, particularly corporate power, be restrained by law. See Nicholas Howen, "Business, Human Rights and Accountability" Copenhagen (21 September 2005) at <http://www.ihrb.org/pdf/Business_Human_Rights_and_Accountability.pdf> accessed 28 July 2014

[51] **States** - 'Human rights and transnational corporations and other business enterprises' HRC Res 17/4, (6 July 2011) UN Doc A/HRC/RES/17/4; Guiding Principles, Principles 11-22; Business and Human Rights Report, p. 9, 23; Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy ILO Official Bulletin, Series A, No 3 (2000); Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises DAFFE/IME/WPG(2000)15/; **Companies** - The United Nations Global Compact <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html> accessed 28 July 2014; International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development , "Business and Human Rights: The Role of Business in Weak Governance Zones" (December 2006), p.15. found at <http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf> accessed 28 July 2014.

[52] Guiding Principles, Principles 13, 17; Business and Human Rights Report, pp. 25, 56; N Chowdhury, B Mustu, H St Dennis, M Yap, 'The Human Right to Water and the Responsibilities of Businesses: An Analysis of Legal Issues' SOAS School of Law Research Paper No 03/2011, 18; Final Statement by UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, (28 August 2008), pp. 41, 64, 77 [company found to have failed to exercise adequate human rights due diligence].

[53] The Public Right to Water (n47) 4; Interviews with residents and a former worker at the factory.

[54] Malaka Rodrigo, 'DPL's CSR dips as the gloves come off its operations' *The Sunday Times* (11 August 2013) <http://www.sundaytimes.lk/130811/news/dpls-csr-dips-as-the-gloves-come-off-its-operations-57410.html> accessed 28 July 2014. DPL contends that solid waste was disposed at landfills prior to January 2012, and that following this it had an agreement with Holcim PLC whereby it disposed of solid waste, while wood ash, wood chips. Waste cotton continued to be disposed of at Pradeshiya Sabha approved sites. It also claims that since it mainly uses alkaline chemicals to process rubber, any contamination of the water in the area would have increased its pH value, rather than decreased it.

[55] Reports of tests by the National Water Supply and Drainage Board (NWSDB), the CEA and the Government Analyst Department did not find clear evidence of a causal nexus between the factory's activities and the low pH value of the water. See Aanya Wipulasena, 'Likelihood of groundwater contamination due to elevated location of DPL factory' *The Sunday Times* (24 November 2013) <http://www.sundaytimes.lk/131124/news/likelihood-of-groundwater-contamination-due-to-elevated-location-of-dpl-factory-nwsdb-74575.html> accessed 28 July 2014.

[56] Verite Research, *The Media Analysis – July 29, 2013 – August 04 2013* Vol 3 No 26, 3. This issue is analysed in greater detail below.

factory suggest that its waste water was not purified.[57] Second, the National Water Supply and Drainage Board *did* find that the elevated location of the factory could lead to the contamination of the groundwater by the factory.[58] Third, these allegations come from multiple sources.[59] Thus, though the evidence is inconclusive, it is possible that the company *did* release untreated industrial waste into the environment. If so, it failed in its due diligence obligations.

The Case for Indivisibility

Rathupaswala is, at the very least, an example of State failure to protect against the violation of the right to development - *qua* the right to water - by a third party. As a result, it failed to follow an indivisible approach. Moreover, this is not an isolated example. For instance, the eviction of residents in Mews Street and Java Lane for development under the Urban Development Authority's Urban Regeneration Project (URP) [60] involved violations of the ESC right to housing.[61] In particular, human rights standards in cases of evictions, such as notice and alternative accommodation, were often completely ignored.[62]

Human rights protect human dignity. [63] Rights are indivisible and must be given equal attention because all violations of human rights are violations of human dignity. A failure to respect this principle in Rathupaswala caused disease, destroyed livelihoods, damaged the environment and led to agitation and violence. A similar failure under the URP rendered several families destitute and helpless. Development, or the realization of human potential, is impossible when human dignity is not respected. This is why an indivisible approach is essential.

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[57] See the reports by the NWSDB and the Government Analyst Department. Aanya Wipulasena, 'Likelihood of groundwater contamination due to elevated location of DPL factory' *The Sunday Times* (24 November 2013) <http://www.sundaytimes.lk/131124/news/likelihood-of-groundwater-contamination-due-to-elevated-location-of-dpl-factory-nwsdb-74575.html> accessed 28 July 2014.

[58] *Ibid.*

[59] Residents, a former worker at the factory and environmental activists all attribute the contamination to the factory. Indeed some claim that water quality in the area has improved following the closure of the factory. See Aanya Wipulasena, 'Rathupaswala water crisis and new moves to dam it' *The Sunday Times* (20 October 2013) <http://www.sundaytimes.lk/131020/news/rathupaswala-water-crisis-and-new-moves-to-dam-it-66321.html> accessed 28 July 2014.

[60] This involves the relocation of residents of different parts of Colombo in order to free land for commercial and city beautification purposes. See Defence.lk, "Prospects of relocating underserved settlements in Colombo suburbs", (2 February 2013) <http://www.defence.lk/new.asp?fname=Prospects_of_relocating_underserved_settlements_in_Colombo_suburbs_20130205_01> accessed 29 July 2014.

[61] ICESCR Article 11(1); Constitution of Sri Lanka Article 27(2) (c) [a State obligation in relation to housing under the Directive Principles of State Policy]. See also Centre for Policy Alternatives, *Forced Evictions in Colombo: The Ugly Price of Beautification* (CPA 2014), [CPA Report], pp. 25, 28.

[62] As per UN Committee on Economic Social and Cultural Rights, *CESCR General Comment 7: The right to adequate housing (Art.11.1): forced evictions*, (1997) E/20/05/97, pp.15, 16. For instance, Mews Street residents are yet to get the alternative accommodation promised to them, a whole *four years* after they were evicted. See CPA Report (n62), p.27.

[63] Heiner Bielefeldt, "Historical and Philosophical Foundations of Human Rights", in Martin Scheinin and Catarina Krause (eds), *International Protection of Human Rights: A Textbook* (Abo Akademi University 2009), pp. 3-18.

Development and Participation

The Principle of Participation

The right to development also requires that State development policies be based on the *active, free and meaningful* participation of stakeholders.[64] This involves public consultation, provision of information, and participatory-decision making in development plans.[65] *Meaningful* participation involves people being able to make their voices heard in institutions which have power over the development process.[66]

Sri Lanka does not directly recognize a right to participatory development. However, it may be possible to do so via the Directive Principles of State Policy, particularly Article 27(4).[67] The administrative law right to a fair hearing is another possible avenue to recognizing the right.[68]

The analysis below demonstrates that a participatory approach was not followed in Rathupaswala. The consequences of this failure demonstrate why it is crucial to any development process.

Participatory Development in Rathupaswala

The Absence of Participation

Participation is an aspect of the right to development as well as the right to water.[69] However, the residents of Rathupaswala were not consulted prior to the setting up of the factory.[70] Moreover, earlier attempts to take legal action against pollution by the factory were allegedly thwarted by threats and intimidation by

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[64] DRD Article 2. This is accepted in other international treaties such as the Universal Declaration of Human Rights GARes 217A (III) (1948) Article 21; ICCPR Article 25; CEDAW Article 7. Moreover, participation is an aspect of various ESC rights including the right to water. See GC 15, p. 56.

[65] *Realizing the Right to Development* (n9), p. 105.

[66] *Ibid,* p. 106.

[67] "The State shall strengthen and broaden the democratic structure of the government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government." It is worth noting that the one of the recommendations of the Lessons Learnt and Reconciliation Commission was for development to be participatory. See 'Report of the Commission of Inquiry on Lessons Learnt and Reconciliation' (November 2011) [LLRC], Section 9.223.

[68] The principles of natural justice are of wide application, applying every tribunal or body with the authority to adjudicate upon matters involving civil consequences to individuals. This makes them a viable means for ensuring this right. See *Dissanayake v Kaleel* (1993) 2 SLR 135, 181; Mario Gomez, *Emerging Trends in Public Law* (Vijitha Yapa Bookshop: Colombo, 1998), p. 126.

[69] The right to water include an obligation on the State to ensure that before any action that interferes with an individual's right to water is carried out by a third party, those affected are consulted and given all the relevant information. See GC 15, p. 56.

[70] Aanya Wipulasena, 'Rathupaswala water crisis and new moves to dam it' *The Sunday Times* (20 October 2013) <http://www.sundaytimes.lk/131020/news/rathupaswala-water-crisis-and-new-moves-to-dam-it-66321.html> accessed 28 July 2014.

unidentified groups.[71] The use of threats to prevent action against polluting factories has occurred in other areas as well.[72]

A lack of genuine participatory development is a feature of other post-war development projects. For instance even under the URP, visits by senior officials to inform residents of alternative accommodation arrangements are passed off as 'consultation'.[73] In one case, a resident who protested against the terms of the proposed alternative accommodation received threatening phone calls, was abducted, threatened, and following protests, released.[74]

State Responsibility

States must refrain from violations of civil and political rights and prevent, punish, investigate or provide redress for violations by third parties.[75] In this case the failure to include a participatory component in setting up the factory constitutes a violation of the right. The failure to create an environment free of violations of the right, particularly by the unidentified groups mentioned above, is another possible violation.

The Importance of a Participatory Approach

Participation is essential for development to be people-centered and respecting of rights. Moreover, allowing those affected by development programs gives decisions-makers more perspectives, leading to better and more accurate decisions. It also affirms the dignity of those affected and takes their needs and concerns into account. In fact, it makes them more likely to accept development policies that are unfavorable towards them.[76] If there had been a participatory element to the setting up of the factory, it is possible that the CEA would have been more vigilant. Moreover, a genuine participatory element may have defused the situation, and prevented it from escalating into wide-scale protests.

Failing to ensure participation inevitably risks causing great harm to the environment and to surrounding stakeholders. These harms can lead, as they did in Rathupaswala, to protests and violence. They can also lead to a sense of grievance and alienation, as in the case of those displaced by the URP. These results of ignoring a participatory approach prove its importance.

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[71] Interviews with residents of Rathupaswala. Also see Aanya Wipulasena, 'Rathupaswala water crisis and new moves to dam it' *The Sunday Times* (20 October 2013) <http://www.sundaytimes.lk/131020/news/rathupaswala-water-crisis-and-new-moves-to-dam-it-66321.html> accessed 28 July 2014.

[72] Mirundala Thambiah, 'Not just Rathupaswala, many more areas polluted by factory waste' *The Sunday Times* (18 August 2013) <http://www.sundaytimes.lk/130818/news/not-just-rathupaswela-many-more-areas-polluted-by-factory-waste-58338.html> accessed 28 July 2014.

[73] CPA Report (n62), p. 32.

[74] CPA Report (n62), p. 32; "Wanathamulla abduction: Red Pajero has replaced white van syndrome - Eran", *The Island* (28 February 2014) <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=98879> accessed 29 July 2014.

[75] ICCPR Article 2(1); *UN Human Rights Committee, CCPR General Comment 31[80], Nature of the General Legal Obligation on States Parties to the Covenant*, (2004) UN Doc A/59/40, pp. 6, 8. Insofar as the right to participation is subsumed under Article 25(a) of the ICCPR, these obligations apply in respect of that right as well.

[76] *Heather Therese Mundy v Central Environment Authority and Others* (2004) SC/58/03; Mario Gomez, *Emerging Trends in Public Law* (Vijitha Yapa Bookshop, 1998), p. 126.

Systemic Issues

Rathupaswala does not only make the case for an *indivisible* and *participatory* approach to development. In my view the responses of Sri Lanka's government and its society to the Rathupaswala dispute demonstrate that a human rights-based approach to development is systemically impossible in Sri Lanka today. For this to change, the fundamental flaws exposed in Rathupaswala – the failure of public institutions, militarization, impunity and a weak civic culture – must be addressed.

The Failure of Public Institutions

Rathupaswala was partly the result of the failure of public institutions. The pollution there may not even have occurred, or resulted in large-scale protests, if public regulatory institutions had effectively monitored the factory.[77] This failure may not be due to incompetence alone - several residents and environmentalists are convinced that corruption,[78] and the close political connections between the factory and the government, played a role.[79] Some claim that these connections were the reason State institutions did not assign responsibility for the pollution to the factory.[80]

Even if these allegations are baseless, the public institutions meant to act as neutral umpires in these matters evidently have no credibility.[81] This perception of corruption and politicization is fuelled by factors such as the reality of corrupt public bodies,[82] the politicized impeachment of the Chief Justice[83] and by structural

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[77] The increasing number of cases of pollution of water by third-parties indicates that this is a structural flaw. See Mirundala Thambiah, 'Not just Rathupaswala, many more areas polluted by factory waste' *The Sunday Times* (18 August, 2013) <http://www.sundaytimes.lk/130818/news/not-just-rathupaswela-many-more-areas-polluted-by-factory-waste-58338.html> accessed 30 March 2014; Aanya Wipulasena, 'Hanwella protest a repeat of Rathupaswala?' *The Sunday Times* (23 February 2014) <http://www.sundaytimes.lk/140323/news/hanwella-protest-a-repeat-of-rathupaswela-90206.html> accessed 30 March 2014; The Public Right to Water (n47) 2

[78] Malaka Rodrigo, 'DPL's CSR dips as the gloves come off its operations' *The Sunday Times* (11 August 2013) <http://www.sundaytimes.lk/130811/news/dpls-csr-dips-as-the-gloves-come-off-its-operations-57410.html> accessed 28 July 2014.

[79] In this case, the factory is owned by the Hayleys Group, which is chaired by Dhammika Perera, the Secretary to the Ministry of Transport and confidant of the presidential family. Interestingly the recent protest in Hanwella was also against water pollution by a factory owned by the Hayleys Group. In that case the CEA and the NWSDB contradicted each other on whether the factory was responsible for the pollution. See Verite Research, *The Media Analysis – July 29, 2013 – August 04 2013* Vol 3 No 26, 3; Verite Research, *The Media Analysis – March 17, 2014 – March 23, 2014* Vol 04 No 12, p. 4.

[80] Interviews with residents of Rathupaswala.

[81] For instance, Sri Lanka ranks 91st out of 177 countries in Transparency International's 2013 Corruption Perceptions Index < http://cpi.transparency.org/cpi2013/results/> accessed 28 July 2014.

[82] 43% of Sri Lankan households that came in contact with the police paid a bribe in 2012, with 22% having paid a bribe to the judiciary, and 20% to the tax authorities. See Transparency International Corruption Perceptions Index 2013 < http://cpi.transparency.org/cpi2013/results/> accessed 28 July 2014.

[83] The process of impeachment was steeped in procedural unfairness and its timing suggested that it was prompted by political reasons, i.e.: a series of unfavorable judgments by the Chief Justice. See "Judges claim impeachment against natural justice" *Daily Mirror* (4 December 2012) <http://www.dailymirror.lk/news/23987-judges-claim-impeachment-against-natural-justice.html> accessed 28 July 2014; 'Report of the Office of the High Commissioner for Human Rights: Promoting Reconciliation and Accountability in Sri Lanka' HRC (24 February 2014) UN Doc A/HRC/25/23 [OHCHR Report], p. 12.

changes such as the 18th Amendment to the Constitution.[84] Independent, confidence-inspiring public institutions are essential for human rights-based development. They are crucial for monitoring development activity, settling disputes and setting normative standards. Moreover, they are needed to ensure that the rights of the weak and marginalized are not trampled on by the powerful. Until such institutions are in place, human rights-based development will not be possible in Sri Lanka.

Militarization

The government responded to Rathupaswala by calling in the army, rather than the riot police, to control the protests once the police failed. The army's response was disproportionate and violent - using live ammunition instead of rubber bullets and brutally assaulting civilians, leaving three dead and many others injured.[85] These actions are symptomatic of the militarization of Sri Lanka. Militarization is the process by which public life increasingly falls within the military's purview.[86] Today, the military has wide-ranging responsibilities.[87] It maintains public order,[88] conducts leadership training for university students and - most crucially – is involved in development activities.[89] This includes the fields of infrastructure, business, agriculture and tourism.[90] Moreover, it is used as an instrument of coercion to implement the government's development policy.[91]

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[84] This vested significant power in the President to appoint members of independent commissions, as well as members of the higher judiciary. For an analysis see Centre for Policy Alternatives, *The Eighteenth Amendment to the Constitution: Substance and Process* (2011).

[85] The army claims that it was responding to petrol bombs from the crowd. However, even if so, its response was completely disproportionate, with a blackout imposed on the area, reports of telephone lines being cut, and one civilian dying of blunt force trauma after being assaulted in the premises of a nearby church. See 'Army exceeded mandate in Weliweriya says internal inquiry' (*The Republic Square*, 4 October 2013) <http://www.therepublicsquare.com/politics/2013/10/04/army-exceeded-mandate-at-weliweriya-coi/> accessed 28 July 2014.

[86] Cynthia Enloe, *Maneuvers: The International Politics o Militarizing Women's Lives* (University of California Press 2000) 3; Ambika Satkunanathan, 'Militarisation as panacea: development and reconciliation in post-war Sri Lanka' (*Open Democracy*, 19 March 2013) <http://www.opendemocracy.net/opensecurity/ambika-satkunanathan/militarisation-as-panacea-development-and-reconciliation-in-post-w> accessed 28 July 2014

[87] Its influence is particularly evident in the Northern and Eastern Provinces. See OHCHR Report, Sec. 75(h).

[88] This is under the Public Security Ordinance of 1947, Section 12.

[89] Namini Wijesdasa 'Is this a government of laws or a government of men?' *The Sunday Times* (30 March 2014) <http://www.sundaytimes.lk/140330/news/is-this-a-govt-of-laws-or-a-govt-of-men-91039.html> accessed 28 July 2014 ; 'Company to be formed by Army to undertake projects' *Daily Mirror* (19 January 2014) <http://www.dailymirror.lk/news/16179-company-to-be-formed-by-army-to-undertake-projects.html> accessed 28 July 2014; The OHCHR Report also notes heavy military involvement at, pp. 13-15.

[90] Ambika Satkunanathan, 'Militarisation as panacea: development and reconciliation in post-war Sri Lanka' (*Open Democracy*, 19 March 2013) <http://www.opendemocracy.net/opensecurity/ambika-satkunanathan/militarisation-as-panacea-development-and-reconciliation-in-post-w> accessed 28 July 2014 [infrastructure development]; 'The rise of military-run tourism in Sri Lanka' (*Sri Lanka Campaign for Peace and Justice*, 12 February 2013) <http://blog.srilankacampaign.org/2013/02/the-rise-of-military-run-tourism-in-sri.html> accessed 28 July 2014 [tourism].

[91] 'Army trying to relearn Weliweriya lesson in Wanathamulla: Ranil' *Daily Mirror FT* (28 February 2014) <http://www.ft.lk/2014/02/28/army-trying-to-relearn-weliweriya-lesson-in-wanathamulla-ranil/> accessed 28 July 2014 [evictions for development projects].

The military is particularly effective in the latter role as it has a chilling effect on the protests of stakeholders.[92] Moreover, using the military in this manner allows the government to exploit its post-war ideological construction as the savior of the State.[93] By involving the military in its development policy, the government can easily conflate criticism of its policy with criticism of the military, and then brand this as unpatriotic. This possibility can mute criticism of military-led coercive actions in the development process.[94]

This is not to suggest that the armed forces must immediately be demobilized. Demobilization must be a gradual process, with proper policies of reintegration.[95] However the government appears to be moving towards increased militarization, rather than demobilization.[96] This is problematic because, as seen at Rathupaswala, the logic of the military – of hierarchy, following orders and the legitimization of violent and militant solutions to conflict – is opposed to the participation, responsiveness, dissent and minimization of violence which are hallmarks of a development process that respects human rights.[97] This is further seen in its activities in the Northern and Eastern Provinces,[98] as well as in the militarized eviction process in Colombo.[99] So long as Sri Lanka's development process is militarized, it will not – and cannot – be participatory or human rights-based development.

Remedies and Impunity

Rathupaswala is also an example of the impunity that reigns in Sri Lanka today. This is evinced by the failure to provide remedies to the victims of violations of rights, particularly in relation to the right to development and the actions of the armed forces.

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[92] See CPA Report (n62), p. 28.

[93] Ahilan Kadirgamar, 'The Question of Militarisation in Post-war Sri Lanka' *Economic & Political Weekly* (Feb 16, 2013, Vol XLVIII, No 7), pp. 42, 45.

[94] The military's brutality has resulted in the contestation of this image. For instance residents interviewed for this essay expressed anger regarding the army's actions. See also Namini Wijedasa and Aanya Wipulasena 'Betrayed by the Army, Weliweriya asks why' *The Sunday Times* (11 August 2013) <http://www.sundaytimes.lk/130811/news/betrayed-by-the-army-weliweriya-asks-why-57441.html> accessed 28 July 2014.

[95] See United Nation Organization, *Integrated Disarmament Demobilization and Reintegration Standards* found at <http://pksoi.army.mil/doctrine_concepts/documents/UN%20Guidelines/IDDRS.pdf> accessed 29 July 2014

[96] Namini Wijesdasa 'Is this a government of laws or a government of men?' *The Sunday Times* (30 March 2014) <http://www.sundaytimes.lk/140330/news/is-this-a-govt-of-laws-or-a-govt-of-men-91039.html> accessed 28 July 2014.

[97] Ahilan Kadirgamar, 'The Question of Militarisation in Post-war Sri Lanka' *Economic & Political Weekly* (Feb 16, 2013, Vol XLVIII, No 7) pp. 42, 45. The LLRC also noted the need for the military to reduce its involvement in civilians affairs, See LLRC, Section 9.227.

[98] See OHCHR Report, pp. 13-15; Sri Lanka Campaign for Peace and Justice, *Crimes Against Humanity in Sri Lanka's Northern Province* (March 2014); Yasmin Sooka et al, *An Unfinished War: Torture and Sexual Violence in Sri Lanka* (March 2014).

[99] Here, military involvement resulted in 'consultation sessions' being 'one-way meetings', with residents too intimidated by the military to raise objections or concerns regarding their eviction. CPA Report (n62) 32.

Development and Remedies

There is controversy about the nature of the obligations entailed by the right to development, and the extent to which they are enforceable.[100] However in Rathupaswala the right to development was violated *qua* the right to water, and international law clearly requires States to ensure effective judicial or other appropriate remedies for violations of the latter.[101] Many oppose *judicial* remedies, however, arguing that justiciable ESC rights allow institutionally incompetent judges to make resource allocation decisions,[102] undermine the democratic process,[103] and result in queue jumping[104] and unacceptable trade-offs.[105] Nonetheless certain States allow for justiciability and have developed jurisprudence to avoid its pitfalls.[106]

However, resource allocation is irrelevant where, as in Rathupaswala, State failure to *prevent* third party interference with a right is at issue.[107] Here, justiciability has great value. It gives victims a clear cause of action. It nullifies the political leverage of businesses – which could influence informal settlements - since the judiciary is more insulated from such pressures. Indeed, justiciability allows for a judicial response like that in the *Vellore Citizens Welfare Forum* case,[108] which involved the release of untreated effluent by tanneries into river water. Here, the Indian Supreme Court ordered compensation for the damage caused to the community and the environment, and directed the tanneries to pay a pollution fine and to install pollution

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[100] Marks argues persuasively that though some of these obligations are "imperfect" - that is with no perfect correspondence between the right-holders and the duty-bearers - and thus difficult to enforce, others are amenable to judicial enforcement. The latter are the obligations to respect– that is to prevent, investigate and punish State agents' violations of this right, and to protect – that is to prevent third parties from violating this right. The "imperfect" obligations are those to promote or create an enabling environment and to fulfill or allocate resources to enable people to enjoy the right. These are more in the nature of "general commitments to pursue a certain policy or achieve certain results". See Stephen P Marks, "The human rights framework for development" in Sengupta, A Negi and M Basu (eds) *Reflections on the Right to Development* (Sage Publications 2005), pp. 23-60.

[101] GC 15, p. 55; UN Committee on Economic, Social and Cultural Rights, *CESCR General Comment No 9: The domestic application of the Covenant* (1998), E/C 12/1998/24 [GC 9], p. 4; Rio Declaration on Environment and Development (13 June 992) UN Doc A/CONF 151/26 (vol I) Principle 10; Environment and Human Rights Report, p. 41; Guiding Principles, Principle 25.

[102] Philip Alston and Ryan Goodman, *International Human Rights: Text and Materials* (OUP 2013), pp. 297-301; Dennis M Davis, 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' 8 SAJHR (1992), p. 475. The debate on justiciability applies to the right to development as well, given the resource allocation decisions involved.

[103] Aryeh Neier, 'Social and Economic Rights: A Critique', 13/2 *Hum Rts Brief* (2006) 1.

[104] Gunatilleke (n40) 30 "The concept of queue jumping refers to the phenomenon of permitting a particular segment of society to access scarce resources through means that are outside the democratic process".

[105] Gunatilleke (n40) 32 "... the concept of trade-offs refers to the competition between different segments of society for the allocation o resources towards different interests... more money for road development inevitably means less for health, education, or water, or food etc. Therefore judicial activism in matters of ESC rights may pose a serious threat to the proper determination of these trade-offs."

[106] This involves using the principles of non-discrimination and reasonableness to review certain resource allocation decisions. See Gunatilleke (n40) 36-40; *Government of the Republic of South Africa and Others v Grootboom and Others* [2001] (1) SA 46 (CC).

[107] As required by the right to development and the right to water, see discussion above.

[108] *Vellore Citizens Welfare Forum v Union of India* (1996) AIR 2715.

control devices or face closure.[109] Thus, justiciability ensures that third-party interference with victims' rights is penalized and put to an end.

Impunity via the Settlement

Despite no direct recognition of the right to water, administrative law remedies[110] or the offence of public nuisance[111] could have resulted in *some* redress for its violation.[112] Instead the relief offered was a settlement whereby DPL agreed to relocate its factory.[113] This is deeply problematic because, first, the settlement does not impute responsibility to any actor for the harm caused to the community and the environment by the polluted water.[114] Second, it does not provide for compensation for the damage caused. Indeed if the company *was* at fault, a mere transfer will not deter it, or similar companies, from polluting in the future. Therefore, the settlement essentially ignores the rights violations in this case.

Impunity and the Military

The military's actions violated several rights. These include the freedom of expression[115] and the freedom of assembly[116] in dispersing the protest.[117] Moreover its attacks on civilians amount to torture[118] and a violation of the right to life.[119] Indeed the incident was serious enough to warrant specific mention in the recent UN Human Rights Council Resolution on Sri Lanka.[120]

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[109] See also **France** - *Compagnie Générale des Eaux v Le Bras and Others* Cour d'Appel (Court of Appeal) of Rennes, Order No. 770, 14 November 1996 [nitrate pollution – water supplier liable for non-compliance with water quality standards].

[110] Under Article 140 of the Constitution.

[111] Code of Criminal Procedure Act no 15 of 1979 (as amended), Section 98(1).

[112] Unfortunately the national Human Rights Commission's report on the pollution does not seem to have assigned responsibility to any party for the violation either. See RL Jayakody 'Police should not attempt to wash their hands of responsibilities' *Ceylon Today* (11 May 2014) <http://www.ceylontoday.lk/90-63643-news-detail-police-should-not-attempt-to-wash-their-hands-off-responsibilities.html> accessed 28 July 2014.

[113] Residents are unhappy with this settlement, as it allowed VPL to operate in the area for a further six months. Aanya Wipulasena, 'Likelihood of groundwater contamination due to elevated location of DPL factory' *The Sunday Times* (24 November 2013) <http://www.sundaytimes.lk/131124/news/likelihood-of-groundwater-contamination-due-to-elevated-location-of-dpl-factory-nwsdb-74575.html> accessed 28 July 2014.

[114] As noted above, this may be because of the links between the company and the government.

[115] ICCPR Article 19; Constitution of Sri Lanka Article 14(1)(a) [includes the right to picket and demonstrate per *Amaratunga v Sirimal* (1993) 1 SLR 264].

[116] ICCPR Article 21; Constitution of Sri Lanka Article 14(1)(b) [includes public meetings, demonstrations and processions, see *Atukorale v De Silva* [1996] 1 SLR 280].

[117] This would be the case insofar as the protest was largely peaceful. If reports of petrol bombs being thrown by protestors are accurate, a decision to disperse the protesters might fall within the restrictions of these rights under Article 15(7) of the Constitution. This would not, however, justify the brutal manner in which the operation was eventually carried out.

[118] ICCPR Article 7; Constitution of Sri Lanka Article 11.

[119] ICCPR Article 6; in Sri Lanka, under Article 13(4) of the Constitution per the *Sriyani Silva* case, see footnote 27.

[120] 'Promoting reconciliation, accountability and human rights in Sri Lanka' HRC Res 25/22 UN Doc A/HRC/25/L1/Rev1 (27 March 2014), 5 "*Calls upon* the Government of Sri Lanka to release publicly the results of its investigations into alleged violations by security forces, including the attack on unarmed protesters in Weliweriya on 1 August 2013, and the report of 2013 by the court of inquiry of the Sri Lanka Army."

The government's response, however, defies belief. First, it immediately initiated an Army Court of Inquiry into the matter, and based on its report suspended three officers. Then, in an outrageous turn of events, it reinstated the suspended officers a few months later![121] Thus *not a single member* of the military was held responsible for the brutal suppression of the protest in Rathupaswala.[122]

Impunity and Development

Development requires, *inter alia*, respect for rights and the protection of vulnerable groups. This is impossible today because Sri Lanka faces a crisis of impunity. Allegations of war crimes at the end of the armed conflict[123] and several serious cases of human rights violations[124] are yet to be the subject of credible and independent investigations. The failure to prosecute the Buddhist monk Ven Gnanasara Thero for palpable hate speech in Aluthgama,[125] juxtaposed with the prompt arrest of the Muslim politician Azath Salley – on the basis of a misquote – for causing damage to ethnic and religious harmony[126] is yet more proof. It seems that where politically significant cases are concerned, government protection, rather than the law, is what determines redress for the violation of rights.[127]

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[121] Tisaranee Gunasekera 'Conjurers and Dupes' *Daily FT* (17 May 2014) < http://www.ft.lk/2014/05/17/conjurers-and-dupes/> accessed 28 July 2014; *Lankadeepa* (9 May 2014).

[122] There was also an investigation by the Human Rights Commission, however it has failed to indicate if the facts disclose a violation of fundamental rights, despite being empowered to do per the Human Rights Commission of Sri Lanka Act no 21 of 1996 (as amended), Section 14. See RL Jayakody 'Police should not attempt to wash their hands of responsibilities' *Ceylon Today* (11 May 2014) <http://www.ceylontoday.lk/90-63643-news-detail-police-should-not-attempt-to-wash-their-hands-off-responsibilities.html> accessed 28 July 2014.

[123] This has drawn the most international attention as evinced by the recent Human Rights Council Resolution. See 'Promoting reconciliation, accountability and human rights in Sri Lanka' HRC Res 25/22 UN Doc A/HRC/25/L1/Rev1 (27 March 2014), 10 (b) "...requests the High Commissioner... To undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission, and to establish the facts and circumstances of such alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability, with assistance from relevant experts and special procedures mandate holders."

[124] See 'Promoting reconciliation, accountability and human rights in Sri Lanka' HRC Res 25/22 UN Doc A/HRC/25/L1/Rev1 (27 March 2014). The OHCHR Report lists a series of "emblematic cases" that indicate a lack of credible and independent investigations into human rights violations in Sri Lanka. These include the Trincomalee Five (n48); Action Contre le Faim (n52) and Prageeth Ekneligoda (n63).

[125] Ven Galaboda Aththe Gnanasara Thero, 'Bodu Bala Sena Meeting – Aluthgama' *You Tube* (15 June 2014) <https://www.youtube.com/watch?v=RiHEYxOyrfc> accessed 28 July 2014. The Ven Gnanasara Thero's immunity is allegedly due to links with powerful members of the government. See Tiasaranee Gunasekera 'Gotabhaya Rajàpaksa and his Bala Sena' *Colombo Telegraph* (13 March 2014) <https://www.colombotelegraph.com/index.php/gotabhaya-rajapaksa-and-his-bala-sena/> accessed 29 July 2014

[126] Ranga Jayasuriya 'The arrest and release of Azath Salley' *Ceylon Today* (12 March 2013) <http://www.ceylontoday.lk/59-32130-news-detail-the-arrest-and-release-of-azath-salley.html> accessed 28 July 2014.

[127] The recent conviction of the Chairman of the Tangalle Pradeshiya Sabha Sampath Vidanapathirana for murder and rape is an exception that proves the rule. In that case the victims were nationals of the United Kingdom and Russia, and the issue was raised privately and publicly by the government of the United Kingdom. See Tisaranee Gunasekera 'No National Justice Without International Pressure' *Colombo Telegraph* (20 July 2014) <https://www.colombotelegraph.com/index.php/no-national-justice-without-international-pressure/> accessed 29 July 2014.

Human rights-based development will often prioritize the rights of the vulnerable against those of the powerful. In an environment of impunity, however, the latter will generally be able to trump the former. Therefore, the crisis of impunity must be resolved for human rights-based development to be possible in Sri Lanka.

Sri Lankan Society

Finally, Rathupaswala reveals to us the state of Sri Lanka's civic culture. I refer here to the level of civic engagement, activism and solidarity of average Sri Lankan citizens. This includes their willingness to respond to abuses of power and to speak up against injustice even when they are not directly affected by it. Ultimately, human rights-based development, and indeed human rights-based democracies, cannot exist without these qualities.[128] In one sense, Rathupaswala inspires hope. The army's actions provoked enormous public outrage, leading to the relocation of the factory, the (initial) suspension of military officers, and even an apology from a high-ranking Minister.[129] Similar outbursts of public opposition were evident during the impeachment of the Chief Justice,[130] and the recent casino controversy.[131]

In another sense, however, Rathupaswala demonstrates the weakness of Sri Lanka's civic culture. Those responsible have gone unpunished, yet there is no public outcry. Polluting factories are widespread, yet there is no public anger. Authoritarianism, militarization, corruption and politicization are growing, yet there is no public mobilization. This is partly because public anger is easier to mobilize against outrages that are easy to understand and are evocative of sympathy. It is harder to evoke in response to the systemic issues faced by Sri Lanka, as they require deeper analysis, greater public communication and more meaningful participation.[132]

Instead of the latter, what one often finds is helplessness, pragmatism and apathy. Discussions with students from different parts of the country reveal a pervasive sense of helplessness in the face of creeping militarization, rampant corruption and the further polarization of the communities.[133] Some citizens blame opposition political parties or the "common man" for Sri Lanka's ills, and are unwilling to take steps – however small – to do what *they* can to address these issues, for fear of reprisals. Some others simply do not

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[128] Nishan De Mel, 'The Idea of Justice and the Importance of Democracy' (2010) 11 Nethra Review, pp. 20, 25.

[129] JT De Silva "Basil seeks pardon from public" *Ceylon Today* (10 August 2013) <http://www.ceylontoday.lk/16-39786-news-detail-basil-seeks-pardon-from-public.html> accessed 28 July 2014. It was the rights to free expression, assembly and information that ensured public attention focused on the issue, demonstrating Amartya Sen's thesis that civil and political rights can play a crucial role in vindicating ESC rights. See Amartya Sen, *Poverty and Famines* (OUP 1982); Amartya Sen, 'Freedoms and Needs' (10 and 17 Jan 1994) *The New Republic*, pp. 31, 32.

[130] "Judges claim impeachment against natural justice" *Daily Mirror* (4 December 2012) <http://www.dailymirror.lk/news/23987-judges-claim-impeachment-against-natural-justice.html> accessed 28 July 2014.

[131] 'Casino crisis: first major revolt within Rajapaksa regime' *The Sunday Times* (27 April 2014) <http://www.sundaytimes.lk/140427/columns/casino-crisis-first-major-revolt-within-rajapaksa-regime-93805.html> accessed 28 July 2014.

[132] Amartya Sen, 'Freedoms and Needs' (10 and 17 Jan 1994) *The New Republic*, pp. 31, 32.

[133] The recent disturbances in ALuthgama are the latest in the long history of fraught ethnic relations in Sri Lanka. See 'Aluthgama Riots' (*The Republic Square*) http://www.therepublicsquare.com/tag/aluthgama-riots/> accessed 29 July 2014.

care. Most disturbing is that often those *with the capacity* to act – having a basic minimum of education and financial security – are unwilling to do so.

Civic culture is crucial because the fundamental problems facing Sri Lanka cannot be solved through structural reform alone.[134] Structural legal reform, as in the case of the 13th Amendment to the Constitution for instance, makes no difference in a society unless it is backed up by social consensus and social norms that support such reform.[135] Until Sri Lanka has a strong civic culture that demands honesty and participation, speaks out for those who cannot, and holds its rulers to account, little will change in the long run.

Conclusion

Rathupaswala, then, does not merely tell us why an indivisible and participatory approach to development is essential. Rather, it is also symptomatic of underlying flaws in Sri Lanka that not only prevent holistic development, but also threaten the integrity of Sri Lanka's democracy. Instead of transparent and accountable public institutions, the rule of law and responsive and participatory government, there is corruption and politicization, impunity, and a militarized, centralized State.

These problems are deep-rooted and require a long-term process of transformative action. Structural change is necessary, but not sufficient. Ultimately what Sri Lanka needs is a strong civic culture. We, the average citizens of this country, must use our spheres of influence to demand human rights-based development, and to embody the values of such development. Only then will Sri Lanka, and Sri Lankans, be able to realize their potential.

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[134] BZ Tamanaha 'The Primacy of Society and the Failures of Law and Development' (2011) 44 Cornell International Law Journal 209.

[135] Introduced due to external pressure, the 13th Amendment is not supported by a wide social consensus on the need to reduce centralised power, or one that accepts the demands for the sharing of State power with the Tamil minority. This is why, in my view, many of its most important provisions, such as those relating to police and land powers, have remained a dead-letter. See De Mel (n129) 26.

Land Issues Affecting Female-Headed Households of Victims of Enforced Disappearances, in the Districts of Kilinochchi and Mullaitivu

M. H. Mohammed Hassan Rushdy, Sivarajini Sivarajah & Saruja Sivanesan[*]

1. Introduction

The three decade long war, one of the bloodiest in recent history fought between the Liberation Tigers of Tamil Eelam (LTTE) and the government of Sri Lanka has left the country in political turmoil ever since. Although a period of five years has lapsed since the Sri Lankan forces managed to crush and defeat the LTTE, the Northern and Eastern parts of Sri Lanka has yet to return to normalcy. The districts of Kilinochchi and Mullaitivu were directly and severely affected by the conflict, its inhabitants being subject to multiple displacements and untold hardship, particularly during the final stages of the war and continue to suffer despite its conclusion.

The Mullaitivu and Kilinochchi districts in the Northern Province were subject to the control of the LTTE for many years during the civil war up until the Sri Lankan military recaptured the areas in early 2009. The main sources of income of the people of these districts are agriculture and fishing. The government began a hurried resettlement process of these districts from 2010 onwards without first ensuring the suitability or providing the necessary facilities required for survival. The communities continue to face countless struggles including but not limited to problems related to land disputes, enforced disappearances, loss of basic documents, human rights violations, militarization, alcoholism, unemployment, lack of media freedom and gender based violence and family disputes.

Disputes as to land in these areas centers on reasons mainly attributable to illegal land acquisitions, loss of documents and land records, delay in the issue of land documents by the authorities, secondary occupation, border disputes, competing claims and lack of access to land and are major concerns affecting people from both these districts.

> *'We are in the same position as when we were in the IDP camps and remain only with the clothes we were wearing'. 'Enable us to build prosperous lives for ourselves.'*

These were the heartrending requests made by the people of Kilinochchi to the members of the LLRC[1] when the Commission, under the chairmanship of C.R. De Silva, held sittings on 18th of September 2010 at the Karachchi District Secretariat. These pleas affirm their post resettlement plight subjected to live in harrowing conditions despite having been returned/resettled to their places of origin. Land issues and livelihood concerns of families whose breadwinners have been killed or gone missing, remain largely unaddressed.

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[*] This research report is the combined effort of attorney M. H. Mohammed Hassan Rushdy, social worker Sivarajini Sivarajah, social worker, Saruja Sivanesan, attorney Anetivini Silvester - Attorney-at-Law. It reflects the result of field visits, interviews and focus group discussions conducted by the Human Rights in Conflict Programme, LST from September to November 2013.

[1] The Lessons Learnt and Reconciliation Commission was a commission of inquiry appointed by Sri Lankan President Mahinda Rajapaksa in May 2010. The commission was mandated to investigate the facts and circumstances which led to the failure of the ceasefire agreement made operational on 27 February 2002.

The issue of 'disappearances' (or in some cases, the inability to trace missing persons) a common phenomenon during the period of war has a significant impact on the lives of these people especially, the families (women folk) of victims who are left to deal with the aftermath and start life often from scratch. The focus is always on either the victim or the perpetrator, with hardly any attention paid to the grievances of women (wives, daughters) who are the family members of the victims, directly affected by the loss of their loved ones. Disaggregated data on the disappeared is crucial for the purposes of obtaining a more comprehensive picture of enforced disappearances in Sri Lanka.

On 14th of August 2013, Sri Lanka President Mahinda Rajapaksa appointed a three-member committee to investigate the cases of disappeared and the missing persons in the North and East during the three-decade long war. Accordingly the Presidential commission has received complaints of over 2,300 cases of disappearances said to have taken place during the war, from the North alone. A civil society organization from Mannar following a research carried out by them in the North submitted its report to the commission, in which it was reported, 610 incidents of missing persons in the Kilinochchi District and 468 incidents of missing persons in the Mullaitivu District.[2] The research also revealed that although the commission published notices about the sittings, in the newspapers inviting families of the victims of enforced disappearances to make their complaints it is doubtful whether the information actually reached people living in remote and interior parts of these districts.

The information gathered from families of the victims of enforced disappearances in both districts reveals that the overwhelming majority of the disappeared were young males between the ages 20 – 30. To a large extent, enforced disappearances occurred during the final stages of the civil war and both state and non-state actors are said to be responsible for carrying out these incidents in both districts.

As a result of enforced disappearances, the majority of whom are young males, many women had to transform instantly from the role of a wife/mother to a sole provider to their families These women were forced to bear multiple burdens despite having no means of livelihood in order to fulfill even the most basic needs of their children such as purchasing food and milk. This research aims to give specific focus to the special vulnerabilities faced by female-headed households and to identify how the inequalities in women's right to land as defined in law or as implemented in practice victimizes women in the families of victims of disappearances in these two districts. There exist a significant number of female-headed families in the districts of Mullaitivu and Kilinochchi due to the occupation of the LTTE and the systematic practice of enforced disappearances. The objective of this report is to explore the challenges faced by female/single headed households, especially with regards to their right to land. It is important to note that the primary concern of these women is the safety of their family members and everything else is incidental.

Most interviewees blamed the LTTE or the military for the forcible disappearance of their relatives. A large number of enforced disappearances of young males have been reported to the Human Rights Commission. The most number of disappearances have been reported from the Mullaitivu and Kilinochchi districts. Since most of the disappeared are reported to be ex-combatants of the LTTE, it is possible to conclude that their disappearances were enforced politically.

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[2] http://freedomtonationsl.blogspot.com/2013/11/disappearances-in-north.html

The general practice in Sri Lanka has been to declare as 'dead' a person found to be missing for over a considerable period of time. One reason for doing so is to ensure that the families of the victim could move on and resume their normal day to day activities. The State by enacting the Registration of Deaths (Temporary Provisions) Act No19 of 2010 gives legal recognition to such declarations. However, female-headed families from both Mullaitivu and Kilinochchi districts are reluctant to apply for death certificates under this Act since they constantly live in the hope that their loved ones will one day be found.

These women, whose lives are constrained by culture, revolve around their households, looking after their children and extended families. With no formal education and exposure to the outside world, they are incapable of facing the sudden challenges imposed on them, for instance matters related to their lands. These women in the absence of their husbands and fathers face difficulties in terms of handling disputes related to land are also reluctant to approach/seek assistance from the relevant authorities. Ninety percent of lands in the Mullaitivu and Kilinochchi districts are owned by the State who distributes them for settlement and cultivation purposes under annual permits, LDO permits and grants. A common problem faced by women whose husbands have gone missing is to get the permit or grant transferred to their names, and their lack of knowledge of legal procedure, in the absence of male assistance is the biggest challenge faced by them to this effect. The objective of this research is to determine the extent of the problems faced by female-headed families of victims of enforced disappearances in matters relating to land ownership.

2. Methodology and National/International Legal Framework

A mixed methodology was adopted, including – a question and answer method utilizing a questionnaire, focus group discussion among people and unstructured discussions with government staff working on land issues.

This research entailed the gathering of relevant data and information from families headed by women consequent to the enforced disappearance of her husband, son or father as well as concerned authorities and compiling them in order to analyze all the challenges, especially land issues faced by women in the districts of Kilinochchi and Mullaitivu so as to arrive at a more complete understanding of their land rights.[3]

Data Collection

The study is mostly qualitative. The research term used a questionnaire, to obtain qualitative results. The Team collected data, largely by means of surveys, discussions with rural development societies, women rural development societies and interviews with female- headed families. All interviewees were assured that the

[3] A semi-structured questionnaire was utilized to shed light on the following questions; relationship to the victim, age at which they disappeared, date and place they disappeared, party/parties responsible for carrying out the disappearance, how they disappeared, whether the families had lodged a complaint, if so when and where, whether they are aware of the Registration of Death (Temporary Provision) Act, whether a death certificate was obtained for the disappeared person, what type of land belongs to female- headed families, do they have land documents such as deeds and permits, whose name is mentioned in the land documents, if the permit is in the name of the disappeared person, the difficulties faced by female- headed families as a result, any other land issues they are facing, are they entitled to assistance under a housing scheme, any other challenges being faced by female-headed families such as security concerns, livelihood assistance, and gender based violence etc., whether they are engaged in any form of employment, how they deal with their financial difficulties, have they made a complaint with the Presidential Commission on missing persons.

data gathered will be treated with absolute confidentiality and that their names would not be published. Questions from the questionnaire were directly posed to the interviewees by the research team. During field visits the team was approached by individuals (whose concern is not within the purview of this report) related/connected to victims, who were under the impression that the team was collecting information on victims of enforced disappearances, eager to provide whatever information they had on their disappeared loved ones. Four discussion meetings in four divisional secretariat divisions of Mullaitivu were held in order to collect information from rural development societies and women rural development societies.

The research team was also able to collect information from women development officers and social service officers who are also attached to every divisional secretariat division. The members of the protection group, a composition of key organizations (DRC, Oxfam-Australia, Legal Aid Commission[4] of Sri Lanka, Care International, ZOA, UNICEF, UNHCR, IOM, District forum on sexual Gender Based Violence, TDH, FRC, Home for Human Rights, UNHABITAT) tasked with monitoring issues of protection were interviewed. Each protection working group meeting held discussions covering the areas of enforced disappearances, land issues and gender based violence and the research team present at these meetings was able to gather information relevant to the research.

Local organizations working on issues related to women's rights, such as the Mullaitivu Women's Development Rehabilitation & Federation and Women Action Networks for Transformation were helpful in providing additional information on women's status and details of enforced disappeared persons at research locations. Every two months, a District forum on Sexual Gender Based Violence headed by a Government Agent and attended by Government officers including police officers, INGOs & local NGOs are held where challenges faced by women are shared, discussed and referred to relevant agencies. Participation at this forum helped the research team to gather more information relevant to the research.

All the members of the research team worked with the Legal Aid Commission (LAC) for a period of more than one and a half years in the Kilinochchi and Mullaitivu districts. The LAC provides free legal assistance to vulnerable people in both districts. Exposure to the LAC enabled the research team to gain sufficient knowledge, experience and insight on land issues, disappearances, challenges faced by women with regard to land disputes, and gender based violence all of which has been incorporated into this research. To gather information on the research topic, the research team went on field visits covering the whole of the two districts. The team conducted door to door visits of female-headed families of the victims in order to gather information. The contact details of these families were obtained through government officers such as women development officers and Grama Niladharis' as well as rural development societies.

During field visits, the questionnaire was used. The interviewees gave detailed information of enforced disappearances and the land issues they faced which were relevant to this research. The interviewees had to be handled with much tact and sensitivity when getting their stories as they showed signs of distress when made to recount the horrors and trauma they suffered. Further, the Additional District Registrars and local registrars of births and deaths were very well informed and provided detailed guidelines on the procedure to

[4] Legal Aid Commission of Sri Lanka (LAC) is the foremost amongst the various other institutions and organizations that cater to this important requirement, mainly due to its sustainability and stability. The Legal Aid Commission (LAC) of Sri Lanka was established in the year 1978 by Law No 27 of 1978. It is a statutory body.

obtain death certificates under the temporary provisions Act. Moreover, the land officers attached to each divisional secretariat divisions were primary sources of obtaining information on land disputes faced by women in Kilinochchi and Mullaitivu. The methodology for analysis and reporting included desk research on laws related to female-headed families of victims of enforced disappearances and their right to land with the main focus given to laws relating to state lands.

As this research focuses on land issues being faced by female-headed families of victims of enforced disappearances, it is necessary to discuss the laws regarding enforced disappearances and women's land rights at both national and international level. Specific articulations in international law are relevant to this topic. Sri Lanka is a state party to the primary United Nations Human Rights Treaties. However, Sri Lanka subscribes to the dualist theory whereby international law and municipal law are two separate and independent legal systems. In order to give effect to a particular International Convention in Sri Lanka, Sri Lanka should enact enabling legislation.

The responsibility to guarantee human rights including land rights and freedom from enforced disappearances is grounded in international law based on the concept of responsibility to protection. A State has the responsibility to protect its population from violation of human rights. The international community has the responsibility to assist the State to fulfill State's responsibility.

International human rights law embodies universal standards against which Sri Lanka's human rights/fundamental rights jurisprudence may be interpreted and understood. Disappearance is one of the most serious/grave forms of violations of human rights. In international law, disappearance is referred to as enforced disappearance and is regarded as a heinous crime. The promulgation of the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED) 2006 signifies a crucial and positive step in the sophistication of international law and human rights protection, since it not only ensures and encourages state protection of the individual from enforced disappearance but also enshrines the right of the victim's family to uncover the truth and also to widen their accessibility to the law in doing so. Sri Lanka is not a contracting party to this Convention.

Under ICPPED[5], "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Article 1 of the Convention[6] proclaims that;

1. No one shall be subjected to enforced disappearance.

[5] Article 2 of International Convention for the Protection of All Persons form Enforced Disappearance.
[6] Article 1 of International Convention for the Protection of All Persons form Enforced Disappearance.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

The International Covenant on Civil and Political Rights[7] (ICCPR) grants individuals the right to life, to liberty and security, protection from torture, and the right to humane treatment, yet the treaty does not explicitly address enforced disappearances, even though the enforced disappearance necessarily violates the rights stated in the ICCPR.

According to the Universal Declaration of Human Rights (UDHR)[8], enforced disappearance violates Articles 3, 5, 9, 10, and 11 of the UDHR which covers the right to life, security, liberty, freedom from torture or inhuman treatment or punishment, freedom from arbitrary arrest, detention or exile, and right to a fair and public trial. Many International instruments have dealt with the right of a woman to have control over property. While speaking of land rights of women, International law is very clear on the principle of nondiscrimination based on sex.[9] The UDHR recognizes the right to equality in terms of property rights of all persons. Article 17 of the UDHR ensures the right to own property. The recognition of women's right to ownership of land has been embodied in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[10]

Article 25 of the UDHR proclaims that everyone has the right to a standard of living adequate for the health and well – being of himself and his family including food, clothing, housing and medical care. Article 11 of the ICESCR[11] recognizes the right to an adequate standard of living for all persons. Article 3 of the ICCPR proclaims that state parties to the present Covenant undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights. Both Article 26 of the ICCPR[12] and Article 3 of the ICESCR[13] binds state parties to ensure the right of equal treatment in the enjoyment of the rights set out in each of the Covenants. This means that the State Party should ensure that all persons including women are not discriminated against and are offered equal protection of the law. It may be said that the right to an adequate standard of living includes access to land and livelihood improvements from the land such as farming.

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[7] Article 6, 7, 9, and 10 of International Covenant on Civil and Political Rights.

[8] A non – binding treaty that has set a broad foundation of rights.

[9] Article 1 & 7 of Universal Declaration on Human Rights.

[10] Article 16(1)(h) of Convention on the Elimination of All Forms of Discrimination Against Women states that the state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure on a basis of equality of men and women the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property of, whether free of charge or for a valuable consideration.

[11] Article 11 of the International Covenant on Economic, Social and Cultural Rights states that the state parties to the covenant recognize the right of everyone to an adequate standard of living for himself and his family including food, clothing, and housing and to the continues improvement of living condition.

[12] "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[13] "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, Social and Cultural rights set forth in the present Covenant."

Where the national legal framework is concerned, it is significant to note that under Sri Lanka's Constitution,[14] both men and women can legally own, transfer, inherit and dispose of land and property, subject to the application of customary laws relating to the same. The right to an adequate standard of living is also included in the Constitution of Sri Lanka[15] in the Directive Principles of State Policy and fundamental duties. However, there are provisions that lead to 'inequalities with regards to women's ownership of land and property under personal laws operating in Sri Lanka. Under the Jaffna Matrimonial Rights and Inheritance Ordinance, the husband's right to give his consent to the alienation or mortgage of the wife's immovable property is an incidence of his marital power[16]. There are three personal laws in Sri Lanka: Kandyan Law, Thesawalamai and Muslim Law. Each of these three personal laws has separate norms applicable to marriage, divorce, custody, intestate succession and property rights.

As the research areas include Kilinochchi and Mullaitivu, the applicable personal law is Thesawalamai. This system has special principles which apply to the sale and use of land in the Northern provinces, but also determine ownership and distribution of marital property, and property of family members, on death. The Thesawalamai law on matrimonial rights and inheritance has been statutorily incorporated into the Jaffna Matrimonial Rights and Inheritance Ordinance (JMRIO) of 1911. According to Thesawalamai the property can be divided into three catergories – Muthusam, Cheedanam and Thediatheetam. Muthusam is the inherited property of the man from his; Cheedanam is the inherited property of the wife from her parents or dowry and Thediatheetam is the acquired property of the man and wife during the course of their marriage. This law prevents women from having free control over her owned rightful property. While movable property can be sold or mortgaged by the wife the immovable property can only be mortgaged, sold or dispossessed other than by way of a last will with the consent of the husband. In contrast, the man has no such impediments in his freedom to alienate his ancestral or acquired property. Marriage under Thesawalamai confers on the husband, the power to control the alienation of marital property including the properties belonging to his wife. Even where there are no cultural or socio-economic barriers to women dealing with land, women must follow this requirement in Thesawalamai law. The issue of enforced disappearance may arise in Kilinochchi and Mullaitivu when dealing with land issues in the court. In instances where a woman's husband has gone missing, appearing before the District Court in which civil cases are being filed each time she wishes to transfer land would be both costly and time consuming for the woman concerned.

As regards state land, a number of existing laws relating to property rights such as the Land Development Ordinance[17] and the Land Grants law[18] are discriminatory to women. [19] These Ordinances are applicable to

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[14] Article 12(1), 12 (2) and 12(4) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

[15] Article 27 (2) (c) of the Constitution of the Democratic Socialist Republic of Sri Lanka states that the State is pledge to establish in Sri Lanka a democratic Socialist Society, the objectives of which include the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living condition.

[16] Section 6 of JMRIO.

[17] Schedule 3 of Land Development Ordinance No 19 of 1935.

[18] Land Grants (Special Provisions) Act No 43 of 1979.

[19] See for further reading, *Select Laws on State Lands* by RKW Goonesekere, Law & Society Trust (2006) ; *Is Land Just for Men? Critiquing Discriminatory Laws, Regulations and Administrative Practices relating to Land and*

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State lands which give preference to male heirs where the original owner dies intestate and in practice joint ownership for both spouse is not provided. The title of ownership is given only in the name of the husband. 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, dead or 'disappeared' as in this case and the woman is the family breadwinner. These discriminatory laws are considered to be contrary and in conflict to the general non-discrimination principle provided for by the Constitution. The spouse of the permit holder/owner will succeed to the land whether he/she has been nominated, however, in instances where spouses have not been nominated as successors they face restrictions in dealing with land, such as no power to dispose land, no power to nominate their own successor to it and further lose the land on remarriage.[20] Further, when it comes to inheritance in the absence of nomination of a successor, the inheritance devolves in the male line, with the oldest male obtaining preference over everybody else.

As far as women's land rights in Kilinochchi and Mullaitivu are concerned, women whose husbands are victims of enforced disappearances are unable to transfer the land documents such as grants and permits in their names. The relevant authorities demand death certificates of the disappeared. The Registration of Deaths (Temporary Provisions) Act[21] passed in 2010 legally aids families whose relatives had died or gone missing due to the armed conflict. The death certificate issued under the Temporary Provisions Act does not differ from the structure of a general death certificate. However, two main reasons can be identified as follows:-

1. The reason for the death is written as, "missing for more than a year and believed to be dead".

2. Under the 'name of the informant' the certificate states that it has been issued under the Act of 2010, based on the details given by the informant

The Act provides for the cancellation of the death certificate if the person who is registered to be dead is found to be alive.[22]

The disappeared individuals cannot be registered through the regular procedure for registration of deaths. The Temporary Act permits families to register as deceased any person reported missing for over a year where the disappearance is a result of terrorist or subversive activity or civil commotion in Sri Lanka.[23] Some of the families of victims of enforced disappearances are not aware of the procedures for getting death certificate under this act. The difficulties they face in obtaining death certificates discourages them from doing so and as a result they are faced with further problems when applying for land in their name, as the Death Certificate of the family member is a must for soothe transfer.

Property Rights of Women in Sri Lanka, Law & Society Trust, (eds; Kishali Pinto-Jayawardena and Jayantha de Almeida Guneratne, 2010).

[20] LDO, Secton 16(1)(h).

[21] Registration of Deaths (Temporary Provisions) Act No 19 of 2010.

[22] Section 13 the Registration of Deaths Act 2010.

[23] Section 02 the Registration of Deaths Act 2010.

3. Outline of Findings

3.1. An Overview of Land issues in Kilinochchi & Mullaitivu Districts

As much as 90% of land in the Kilinochchi and Mullaitivu Districts are owned by the state and the rest is privately owned. The majority of the people in these districts have been provided with land by the State under annual permits, grants and LDO permits.[24] The Land Development Ordinance lists out the procedure for divesting land to that in need. Grants and permits are issued subject to several conditions including fairly stringent conditions regarding the ability of a permit holder to dispose of the land. In order to obtain a permit, a person must first make an application to the Divisional Secretary. Permit lands cannot be sold, nor cannot they be acquired under a prescriptive title. A permit can be converted to a grant over a period of time, for instance, in the case of paddy land after a period of three years subject to conditions. Once converted, grants confer legal ownership and cannot be taken back by the State except under the Land Acquisition Act. However, the grantee cannot divide the plot, nor can he transfer the land without the permission of the GA. During the thirty year war, multiple actors were involved in the administration of land simultaneously.

Outlined below are the land related issues, faced by the Tamil speaking people of Kilinochchi and Mullaitivu. In Kilinochchi and Mullaitivu districts, secondary occupation of land by both the military and civilians is identified as the two main issues that give rise to disputes relating to land ownership and possession. Large scale land acquisitions of state owned land and private land have been carried out for high security zones and military usage as well as in the name of development, resulting in large scale relocation. Those relocated to alternative lands continue to live in dissatisfaction due to being forced out of their own lands. For instance, the villagers of Keppapilavu, a village in Mullaitivu were resettled in a place called Keppapilavu model village and their original village is now under the control of the military.

The victims of forceful land acquisitions are often helpless with no knowledge of fair and effective redress mechanisms to reclaim their land. Unfamiliar with court procedure, they are fearful and hesitant to resort to court. In addition to losing their lands as a result of conflict related misappropriations carried out by various actors they continue to face hardships due to lack of proper documentation and limited or no knowledge on matters related to land law. Information gathered during field visits and from relevant officers such as Divisional Secretariat, land officers and colony officers, reveals the following to be the main land related issues faced by people from these areas.

- Those who have lost original documents due to the war have been unable to get new documents from their respective divisional secretariat which is most likely not in a position to provide the same due to destruction of documents during the war. As a result of which people continue to occupy lands for long periods without valid documents.

- Demands made by secondary occupants for permits in their names despite there being a primary permit holder.

[24] State Land documents given under the Land Development Ordinance No 19 of 1935 and State Land Ordinance No 08 of 1947.

- Lack of a timely legal process to expedite return of persons. – Upon their return, the primary permit holders/grantees are unable to reoccupy their lands given to them under the Land Development Ordinance due to unauthorized occupation. The sole remedy available to evict the trespasser and re take possession of the land is a vindicatory action against the trespasser. A vindicatory action is a regular district court action, which will take a considerable time to resolve, most often around 3 years. The prolonged period will subject the concerned parties to difficulties in terms of a place to live and additionally legal fees and other related costs.

- The LTTE during their occupation distributed land (previously belonging to people who either fled or from other communities who were driven out by the LTTE) under permits to various persons who later sold these lands. Now the returnees (ones who fled or were driven) are trying to re-claim the lands which once were owned by them under State Permits/Grants, on their return.

- The continued military occupation of lands given to individuals under permits and grants despite claims of ownership made by these holders. Further, private lands are also under military occupation.

- Two different persons having being granted the same land under Grants/Permits possibly due to oversight of authorities responsible for land documentation. Apparent cases of irresponsible land administration.

- Irregular transfer of land documentation – the execution of notarial deeds made without the consent of a Government Agent.[25]

- The land described in the Grant document differs from the land occupied by the grant holder.

- Alteration made to the name of permit holder in the land ledger, not incorporated in the permit.

- Border disputes – Authorities tasked with granting permits for the distribution of land, at times, fail to adequately measure the land. Often the description[26] provided in the permit does not correspond to the land under discussion which leads to evitable border disputes.

- Claims of prescriptive title[27] made by individuals against the State in ignorance of the law.[28] Deeds of declaration [29] in respect of State lands have been executed, and these are commonly referred to as "Japan Deed" in both Districts.

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[25] According to Section 162 of the Land Development Ordinance No 19 of 1935, a notary is prohibited from attesting disposition of a holding unless consent of Government Agent is attached.

[26] According to Section 30 of the Land Development Ordinance No. 19 of 1935, the land alienated to be described with reference to a plan prepared under the authorization of the Surveyor General, and the diagram to be attached to the grant.

[27] Section 3 of the Prescription ordinance No 22 of 1871.

[28] According to Section 161 of Land Development Ordinance No 19 of 1935, No prescriptive title can be acquired to land alienated under this ordinance.

[29] If any person wishes to make a claim or declare a right to any property, a Deed of Declaration may be executed to make legal basis for such right or claim. When a person has had undisturbed and uninterrupted possession of a

- After the death of a permit holder, in instances where neither the spouse nor the nominee claim the permit land, a third party making claims to the land on the basis of a note signed before a Justice of Peace.[30]

- Permits granted without obtaining the permission of the Provincial Land Commissioner.

- Authorities refusing to issue permits and grants. The families living in conflict affected areas have to face a number of obstacles from the authorities to obtain state land permits or to upgrade their permits into grants.

- The loss of land documents due to war time activity. Proof of ownership has been identified as a common problem for IDP returnees in Kilinochchi and Mullaitivu. Annual Permits, LDO Permits, Grant and Deeds have been lost, destroyed or badly damaged during the period of war.

- Unavailability of basic land documents, Land Registers, Land ledgers and Survey plans at Divisional Secretariat offices and at Land Registry. During the final stage of war, certain land registry offices in Kilinochchi and Mullaitivu were damaged thereby resulting in the loss and destruction of registers and other documents held there. Lack of knowledge of even the most basic laws relating to land. For instance some do not know that state land cannot be sold and purchased.[31]

- People from these areas are denied access to paddy lands due to the Mahaweli Scheme. They have been refused permission to cultivate in their lands by the authorities who have confiscated these lands stating various grounds such as failure to pay taxes over a period of time and so on. However these paddy lands have been re-allocated to people from the South.

- State lands were sold and purchased by people who have no documentation except a note to prove the transaction and their ownership.

- Due to the conflict many land documents have not been updated to reflect deaths, disappearances and transfer of ownership.

- Certain individuals were not familiar with the mechanism under the 2013/01 land circular. An analysis of this land circular is provided later in the report.

- Landless IDPs. Many people from Kilinochchi and Mullaitivu do not have ownership to any land and are occupying forest reservation lands.

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property against the right of any other, for a period of ten years such person can execute a Deed of Declaration and declare that he has gained prescriptive title to the property. But prescriptive title cannot be claimed against state land.

[30] According to Section 170 (1) and (2) of Land Development Ordinance No 19 of 1935, succession should be regulated entirely by this ordinance.

[31] According to Section 169 of Land Development Ordinance No 19 of 1935, No trust, fidei commissum or equitable charge shall be created, declared, recognized or enforced in respect of any land alienated under this ordinance; According to Section 46 of Land Development Ordinance No 19 of 1935, No permit- holder shall execute or effect any disposition of the land held under his permit; According to Section 47 of Land Development Ordinance No 19 of 1935, any disposition of land held under a permit shall be invalid.

- Lands allocated for resettlement are found to be unsuitable for habitation and/or do not support traditional livelihoods of these people.

- Unable to access land – High Security Zone. Maintenance of high security zones has resulted in severe hardship to IDP returnees as they are prevented from occupying their houses and cultivating their lands. They are also prevented from entering these zones.

3.1.1. Land issues faced by female-headed families of the victims

At the outset of the field visits, the research team observed that female- headed families of victims of enforced disappearances showed little interest in land disputes that they were faced with, their only concern being the whereabouts of their relatives. Female- headed families with land have problems mostly as to the title of land they own. In this research other than two families who own private lands, the rest of the female-headed families face problems with regard to state land. As already mentioned previously, more than 90% of the land in Kilinochchi and Mullaitivu is state owned. Private land is governed by Tesawalamai law, a personal law applicable to the people of this region and to the land in these regions. During field visits, the research team did not come across any land disputes with regard to private land.

The main reason for land disputes faced by female- headed families of the victims is the existence of discriminatory land laws[32] applicable in Sri Lanka. The non-recognition of joint ownership under the Land Development Ordinance has also given rise to a number of problems, where women are discriminated against and given limited control over land. Land distributed under the Land Development Ordinance can only be passed on to one person as the land cannot be further divided. This has implications in situations where a woman's spouse has been disappeared. Although these women head their households, they are not able to legally hold title to the property. This is especially a concern for situations in which the husband's death is not documented or the man is missing.

In addition, the research team identified the following land related problems faced by female- headed families of the victims listed; secondary occupation of land by the military, authority's refusing to issue land documents in the woman's name, prevented from accessing land – High Security Zones, unavailability of land documents (permits and grants) including survey plans due to destruction during the war, lack of interest by women to obtain land documents, lack of procedural knowledge to apply for land documents, sexual favours demanded from women in return for services related to their land matters and inability to obtain housing schemes and other benefits due to permits being in the sole name of the husband and no documentation in the name of the wife to prove ownership. The families have been promised of being provided land, however no documentation whatsoever has been provided to back these up.

Moreover some of the wives of the victims of enforced disappearances were not able to register their marriages with the disappeared due to the final stages of war as a result of which they are now unable to claim the lands which are in their husbands' name. Also other concerns included lands from forest areas being allocated to female-headed families of victims which entail further safety related issues, state lands

[32] Rule 1 of third schedule of the Land Development Ordinance No 19 of 1935 and Section 10 of Land Grants (Special Provisions) Act No 43 of 1979.

purchased by victims of enforced disappearances by transferring a note signed before a justice of peace which has no legal validity, is now being reclaimed by the seller (original owner) from the females of these victims and female-headed families of victims of enforced disappearances are reluctant to obtain death certificates under the temporary provisions act[33]. As a result of this women are unable to get the land document transferred in their name as the death certificate of the husband is necessary to carry out the transfer. In practice, a general gender bias exists in granting state land as these lands are always given out in the man's name.

3.2. Analysis of women's status regading land rights in post conflict Kilinochchi and Mullaitivu

3.2.1. Initial Reflections

War widows, female-headed households whose husbands are missing, single women, female ex combatants and girl children are generally the most vulnerable groups in a post conflict area and the districts of Kilinochchi and Mullaitivu is no exception to this. The war cost these women their loved ones. Some women lost their husbands due to death while some have disappeared or gone missing. In these districts, there exists a cultural stigma attached to widowhood. Some women lost both their parents and are now living in welfare homes.

These women are exposed to outside men, currently employed in the area due to ongoing road constructions, who falsely lure them with promises to marry into having sexual relations with them. These men upon completion of their work, or after a certain period, leave often deserting these women, some of whom are pregnant. They are then unable to obtain birth certificates for these children considered by law as illegitimate and stigmatized by society at large. According to local women activists, most of the perpetrators of sexual violence are fluent in spoken Sinhala, and this enables them to talk their way out of any serious punishment from law enforcement authorities.

Another major challenge faced by women is the increase in late night phone calls and text messages received by war widows, former female combatants and wives of disappeared men; and the frequent visits to their homes by security personnel. During the final stages of the war, most of the women were forced by their families into marriages to prevent them from being captured by the LTTE. Some women were forced to marry total strangers and in most cases the consent of both the parties were not obtained. As a result of forced marriages, family disputes are on the rife, with instances of husbands abandoning their families for extra marital affairs. This has consequences on women and children who have to suffer great physical and mental trauma as well as financial difficulty. With no formal education, and no knowledge of their rights or procedure to obtain legal address, these women are left helpless faced with multiple burdens forced to work so as to look after her children and family. Equipped with no training of any sort they are forced to take up work as labourers, mostly in road construction sites only to be paid a meager sum and be subjected to further exploitation.

Furthermore, some of these women are not in possession of basic documents such as their marriage certificates and their children's birth certificates. This is mostly due to destruction or having misplaced them

[33] The Registration of Deaths (Temporary Provisions) Act 19 of 2010.

during displacement times. The major problem with regard to land is that female- headed families do not have proper legal documents to prove ownership to their lands most of which was destroyed or lost during the war. The other problem is their lack of knowledge in matters related to land law due to never having to deal with them on previous occasions. Even in instances where women have permits or grants, it is always in the name of their husbands or fathers.

These women, whose participation in the labour force is involuntary, mainly engage in informal employment assisting in road construction sites, as cleaners in hospitals and temples and sometimes agriculture related work. At times, women are employed in the clearing of mines on a contractual basis. Further, in situations where men are unable to find employment, their wives are compelled to work to support the family. Twelve farms have been set up by the Civil Security Department, which currently under the supervision of the military provides employment to people from these areas. Most of the work in these farms is agricultural in nature and a monthly salary is paid to the employees working in these farms. Many war affected women are provided work on these farms and are also given access to loans.

Furthermore, INGOs working in these areas provide livelihood assistance for women promoting and assisting them in their self employment initiatives. In terms of government jobs it is very rare for women from Vanni to get government jobs mostly due to lack of basic education.The following categories of women are eligible for housing under the state housing scheme, with assistance from India and INGOs (Indian Housing scheme); widows who have lost their husbands during the war, women whose husbands have gone missing or disappeared and women with children whose husbands have abandoned them.There is no hindrance to voting, as most of these women have voted in Provincial Council elections. However, it appears that some are not interested to register their names in voting lists which is completed by the respective Grama Niladhari. Although women are able to access government services, they do not have the means to spend on transport to reach hospitals and schools which are mostly situated in the town area. It is expensive in terms of cost and also takes up a lot of their time.

Following offices have been set up to protect the rights of these women; Woman Development Officer at DS level, Child Probation Officer, National Child Protection Authority, Legal Aid Commission, Sexual Gender Based Violence Forum, Women's desk at hospitals, INGOs (providing livelihood assistance) and NGOs working for women

3.2.2. Female- headed families of the victims of enforced disappearances and the challenges they face in Kilinochchi and Mullaitivu.

Female headed families are the worst affected in Kilinochchi and Mullaitivu. Disintegration of the social fabric, family life and social values has caused hardship and pressurized female-headed families in these regions.The reason for the increased number of female- headed families in conflict affected districts is the direct involvement of their males in the conflict as combatants of the LTTE which as a result subjected them as targets for enforced disappearances. In Kilinochchi and Mullaitivu, female-headed households include the following; war widows, spouses of victims of enforced disappearances, spouses of long term detainees, wives abandoned by their husbands, daughters of fathers who are victims of enforced disappearances. (No

other males in the family) and mothers of sons who are victims of enforced disappearances. (The father in the family is either disabled due to some natural cause or related to armed conflict)

There are many such female-headed families of victims of enforced disappearances in Kilinochchi and Mullaitivu. These women have been given special attention due to their vulnerability and poverty during the post-conflict period. As female- headed families of victims of enforced disappearances are forced to take up employment in order to rebuild their livelihoods, some women have gone abroad in search of employment opportunities leaving their children in the care of their aged parents. In the absence of their husbands, the women are required to fulfill the duty of sustaining their families with food, shelter and other basic needs.

Houses in Mullaitivu and Kilinochchi are situated far apart. Some families of victims have set up their houses in deserted forest areas. In situations of emergency, families living in deserted forest areas are unable to approach or seek help. People in these regions have severe security concerns and the risk of being subject to violence and harassment is much higher. It is a cause for concern that the females of these victims are especially targeted due to their obvious vulnerability, often by security forces that have easy access to them. Despite the threats they face these women are reluctant to speak up out of fear for their lives.

In these districts, women who have lost their men due to enforced disappearances are forced by security forces to obtain death certificates under the temporary provisions act[34]. However, these women are not in favour of obtaining death certificates as they continue to live in hope for the return of their loved ones. The application and issuance of death certificates can have both a positive and negative impact on the mental health of family members. From the interviews it was gathered that female-headed families of victims of enforced disappearances are in need of death certificates of their loved ones for the following reasons:-

1. The perception that it will help them in receiving assistance from humanitarian organizations.

2. Allows the transfer of land and property in the name of the missing person to the next of kin.

3. In order to apply for Samurdhi payments, and other forms of social welfare.

Although under existing legal policies in Sri Lanka, families require death certificates in order to carry out these activities, many female- headed families of victims of enforced disappearances are reluctant to apply for death certificates for one or more of the following reasons:-

1. Inability to come to terms or accept that their loved ones are dead and are unwilling to receive a document confirming the same.

2. They want the tracing and searching to continue and are worried it will cease on obtaining a death certificate.

3. Concerned that registration of death will mean that information as to what actually happened to the missing person will not be provided;

[34] Registration of Deaths (Temporary Provisions) Act 19 of 2010.

4. Out of fear that the application for a death certificate will bring undue attention to their family from the military intelligence.

It should be mentioned at this point that about 20 out of 30 interviewees were unaware of the temporary provisions act for obtaining death certificates and the complaint mechanism provided by the presidential commission to investigate into missing persons. In Kilinochchi and Mullaitivu, none of the female-headed families of the victims of enforced disappearances interviewed were ready to apply for the Death Certificate under the Temporary Act. During one of the field visits, the research team observed that a wife of a victim had failed to register her marriage legally. During the final stage of the war, she cohabited with the disappeared to escape being captured by the LTTE. As a result of the non- registration of their marriage, she was not able claim anything under the name of her disappeared husband.

Some families of victims, who had no right to land, have settled in other districts such as Vavuniya and Jaffna with their relatives. Promises to provide land permits in the future have been made by the DS to female headed families of landless victims. Although these families have been provided with houses under housing schemes by government and humanitarian organizations, they cannot enter and live in those houses which are situated near forest reservations. Some families have received a sum of Rs 25,000/- as compensation for their loved ones' disappearances. Some wives of victims of enforced disappearance are being asked or forced by their parents to re -marry. None of the wives interviewed were ready to re-marry and were keen to remain as they were looking after their children.

The team observed that female-headed families of victims are not only in need of help with reunification, they also require support and protection to continue with their day to day lives. Female- headed families also require assistance to transfer land from the missing relative to the next of kin.

3.2.3. Land circular-2013/01 and its procedures[35]

In the aftermath of the war the freedom of movement in the North and East areas, even to returnees to enter their lands have been curtailed severely. In November 2011, the Ministry of Land and Land Development issued a land circular[36] to deal with the many land related disputes in the post- war era. Under the 2011 land circular, all landowners of the North and East, including private landowners were required to furnish details to the relevant Divisional Secretary or Assistant Government Agent, within two months for the purposes of resolving land disputes in the Northern and Eastern Provinces. Despite the wide range of unresolved land disputes, an effective administrative procedure has yet to be identified to find solutions to these disputes.

As indicated previously, disputes related to State Land have been on the increase in both Kilinochchi and Mullaitivu districts. Cases have been initiated in both Primary and District courts with the hope of settling these disputes. Apart from a number of vindicatory actions[37] filed in the District Courts there are, 66 other applications[38] filed in Primary Courts. Although having initiated action in court these people are not in

[35] See for further reading, *Brief Commentary on Accelerated Programme on Solving Post Conflict State Lands Issues in the Northern and Eastern Provinces, Land Circular: 2013/01*, Centre for Policy Alternatives, 2013.
[36] Land circular – 2011/04.
[37] Section 165 of Land Development Ordinance No 19 of 1935.
[38] Section 66 of Primary Courts' Act No 44 of 1979.

possession of land documents proving ownership to title, which were mostly, lost during the war. The delay and cost inherent to the system has served to lose even the little confidence they had in the system.

Apart from Courts, alternative dispute resolution methods such as Mediation were adopted in order to resolve land disputes. The district of Mullaitivu is divided into five divisional secretariat divisions namely, Maritime Pattu, Puthukudiyiruppu, Ottusuddan, Manthai East and Thunukkai. Out of the five divisions, Mediation board functions only in the Puthukudiyiruppu and Ottusuddan divisions. In the whole of Kilinochchi, mediation is available in only one division, namely at the Karachchi division and the rest of the three divisions of Kandavalai, Poonakari and Pachchilaipalli is yet to have the option made available. Unfortunately, people lack confidence in this mechanism too, given that Mediation Boards have no binding authority and their decisions cannot be implemented.

In January 2013, the Government yet again issued a new circular[39] the most recent effort by the Land Ministry to address the land problems in the North and East. The Circular will be implemented over a period of two years in order to identify and address problems relating to State land in these two provinces. The programme would be completed by December 2014. This programme envisages the participation of all government officers involved in the subject at Provincial, District, Divisional and Grama Niladhari levels[40] and is efficiently carried out in the Kilinochchi and Mullaitivu Districts.

The key aspects of Land Circular 2013/01 are as follows:

- The implementation of the programme is twofold i.e. first identifying the problems and then solving problems[41].
- The following persons are able to submit information relating to problems to the DS[42];
    - Those residing in the Northern and Eastern Provinces.
    - Those who have abandoned the area.
    - Those who have resettled or who are expecting to settle again after being displaced.
    - Those who have problems relating to state land.
- Annex I of the Circular provides the format to present problems. The format has two parts; one is for the landless people and those who have lost lands and the other is for those with any other problem with regard to state land.[43]
- This format includes the following details

[39] Solving Post Conflict State Lands Issues in the Northern and Eastern Provinces- Land Circular 2013/01.
[40] Paragraph 1 of Land Circular 2013/01.
[41] Paragraph 2 of Land Circular 2013/01.
[42] Paragraph 2.1.1 of Land Circular 2013/01.
[43] Paragraph 2.1.2 of Land Circular 2013/01.

- Full name of the applicant
- Current Address
- Telephone Number
- Names of other members in the family
- Location of the land related to the problem
    - Village
    - Boundaries
        - On the North by
        - On the South by
        - On the West
        - On the East by
    - Plan number
    - Block number
- Description of Land Problem (briefly)

- The Land Commissioner General's Department is tasked with giving publicity to this process at the National level while the DS is tasked with publicizing the process at the divisional level[44].
- DS should also take action to raise public awareness about submitting problems adopting the format provided in Annex 1[45].
- The relevant problems are noted down in the reports and a receipt is prepared with the sequential registration number to acknowledge the problem according to the format provided in Annexure IV which is issued through an authorized officer at the divisional secretariat. This registration number is used as the reference number for the problem until the problem is solved[46].

[44] Paragraph 2.1.1 of Land Circular 2013/01.
[45] Paragraph 2.1.3 of Land Circular 2013/01.
[46] Paragraph 2.1.4 of Land Circular 2013/01.

- Problem solving programs includes two sub programmes; namely distribution of lands to landless people or to the people who have lost lands, and solving various problems people experience with regard to state lands[47].

- State land will not be alienated to landless persons until the land related problems of those affected by the conflict are solved. However, there is no barrier to alienate lands for government approved development projects[48].

- Land to be distributed to people who have "Lost Land" due to reasons such as[49] where; the land has been acquired for development activities by government institutions and armed forces, instances where the land cannot be practically claimed again, instances where third parties have permanently settled on the land and in instances where the land cannot be practically claimed due to various reasons. Even if people have lost their encroached state lands and are qualified to get lands, then they should be considered when alternative lands are given.

  The following to be considered prior to provisioning of alternative land;

  - It should be suitable land from the area in which the lost land was located. The consent of the person who has "lost" the land has to be acquired.

  - If alternative land is given for "private lands" or for lands distributed under state grants, the alternative land should be given according to the compensation assessment carried out during the acquisition process.

  - The DS should be satisfied that lands selected to be distributed does not legally belong to anyone else.

- Land must only be alienated by holding "land kachcheris" and before alienation the DS is required to take action to forward the land kachcheri proposal to the authorized officer for approval[50].

- Special programmes held for the purposes of solving problems relating to State land.

  - Divisional day programmes at Grama Niladari Division level or as one programme for several divisions[51]. The DS, Assistant DS, Land officer, Colonization officer, Field officer, Public Management Assistant (Land), Grama Niladari (GN) officer should participate. Officers of the Provincial Land Administration Department and Land Commissioner General's Department, divisional level officers of relevant departments such as the Department of Surveys, Department of Archaeology and Department of Forest Conservation should be involved as needed. Information relevant to the problem should be collected from

[47] Paragraph 2.2 of Land Circular 2013/01.
[48] Paragraph 2.2.1.1 of Land Circular 2013/01.
[49] Paragraph 2.2.1.2 of Land Circular 2013/01.
[50] Paragraph 2.2.1.2 of Land Circular 2013/01.
[51] Paragraph 2.2.2.2 of Land Circular 2013/01.

within the DS office as well as through field investigations (where necessary). Whenever approval is needed from the Provincial Land Commissioner or the Land Commissioner General for a particular action, it should be forwarded immediately for same.

- Mobile Service programmes; in instances where DS is unable to provide solutions to problem through Divisional Day Programme such problems should be forwarded to Mobile Services Programme to be held at DS level[52]. All relevant officers and all parties should participate with the relevant information. Officers of the Provincial Land Commissioner's department and other government officers related to land matters should participate.

- Land Kachcheris; where original permits kept in DS office are destroyed or misplaced, such problems should be forwarded to Provincial Land Commissioner for instructions. In order to update such documents actions should be taken to reselect it through the land kachcheri method and issue permits[53]. Annual permits should not be renewed further, if only there is an uninterrupted residence in the lands, annual permit has been issued and if it has been continuously renewed annually up to date. Such lands should be forwarded to be selected by land kachcheris if the original permit holders of those annual permits issued lands claim ownership and are enjoying the undisturbed possession[54].

The Circular provides broad powers to the Divisional Secretary (DS) to decide on matters related to State land. However, most people lack confidence in the mechanisms adopted by the circular. They are dissatisfied with the way some of the DS's and land officers handle disputes blaming them for acting in a partial manner. Instead they suggest that it would be fair to seek the assistance of individuals close to the parties who have knowledge of the dispute and history of the land.Female- headed families of the victims of enforced disappearances are also required to comply with the procedure under the new land circular in matters related to their land disputes. Despite having followed the mechanisms provided for in the circular, most have not been given dates for inquiries. It was revealed at the interviews that the people were generally dissatisfied with the Circular, mostly blaming the officers for acting with a bias in solving their disputes.

3.3. Recommendations

Given below are the recommendations regarding land issues faced by women, whose family members have been subject to enforced disappearances. Some recommendations were proposed by the interviewees themselves, members of the rural developments society and land officers. The other recommendations have been formulated based on the findings of this research paper by the research team.

Recommendations to government

- Issuance of certificate of absence as an alternative to death certificates to those whose husbands have gone missing during the final stage of war.

[52] Paragraph 2.2.2.3 of Land Circular 2013/01.
[53] Paragraph 2.2.2.4 of Land Circular 2013/01.
[54] Paragraph 2.2.2.5 of Land Circular 2013/01.

- Establishing permanent legislative procedures for issuance of certificates of death or absence for missing persons rather than issuing death certificate.

- Collection of gender disaggregated data on land ownership by Ministry of Land and Land Development after complete resettlement.

- Providing of joint or co-ownership to both spouses when the State allocates land to married couples.

- Inclusion of prohibition of enforced disappearance as a fundamental right in the Constitution of Sri Lanka.

- Providing more power to existing mediation boards to solve land disputes.

- The establishment of special mediation boards.

    1. It should be very authoritative.

    2. It should include elders from the villages who know the history of land.

    3. It should be conducted at every village level.

    4. Its decisions should be implemented in an effective manner.

Recommendations to provincial government

- Recognition of easier procedures for female-headed families at every divisional secretariat level for delivering land documents and making changes in those documents.

- Conducting comprehensive training programs on women's land rights to government officials working with land disputes to facilitate that all necessary and relevant information is available to woman headed families in a timely and relevant manner.

- Special attention to female-headed household families in order to gain entitlements due to disappeared persons.

- Raising awareness on land circular 2013/01 for public and speeding up of procedures explained in land circular 2013/01.

Recommendations to stake holders and duty bearers

- Conducting awareness programs for female-headed families regarding their land rights and land documents at village level.

- Awareness- raising for relatives on how to make complaints of enforced disappearances to the national commission on disappeared persons.

- Advocating for non discrimination against women in personal law. Adoption and Ratification of International Convention for the Protection of all Persons from enforced Disappearances by the Government of Sri Lanka.

- Conducting awareness programs with regard to land rights of women among community leaders, activists and opinion makers to help institute the changes.

- Advocating and addressing challenges of female-headed families of victims of enforce disappearances to Ministry of Women's Affairs and Child Development by relevant government officers.

- Encouraging full participation of women, in decision-making processes relevant to land and formulation of laws and policies on land. Encouragement should be given through education.

- Promoting socio-economic status of women through income generating opportunities by relevant stake holders. According to women in Kilinochchi and Mullaitivu, having adequate finances to look after their children, enables them to fight for other basic needs such as their lands.

Recommendations to civil society

- Advocacy to relevant stakeholders and policy makers regarding challenges faced by female-headed families of victims of enforced disappearances in land ownership.

- Sensitization campaign to draw attention to the discriminatory nature of customs and practices on women's ownership of property aimed at changing attitudes in favour of a more gender equal approach to land ownership.

4. Conclusion

This research focuses on the group of women (wives and daughters) who are families of victims of enforced disappearances and the challenges they face in relation to their land. Land disputes and the consequences of enforced disappearances are a major toll on the people in Kilinochchi and Mullaitivu. As nearly 90% of land in these districts are state owned, the Land Development Ordinance and the Land Grants (Special Provisions) Act is adopted to settle land disputes/issues faced by female- headed families.

In addition to worrying about the whereabouts of their loved ones, female- headed families of victims of enforced disappearances are further burdened by the challenges they face in accessing land and/or claiming ownership thereto. The existing procedural laws for the transfer of documents continue to pose problems and although they have applied for the land to be transferred in their names, it takes a long time for these transfers to take effect. As the rate of unemployment among women is higher compared to that of men in the Kilinochchi and Mullaitivu districts, land issues constitute an additional burden to these female-headed families.

Although Articles 12 (1) & (2) of the Constitution guarantees equality before the law and the equal protection of the law and prohibition of discrimination on the grounds of one's gender, women are discriminated against under the Tesawalamai law (personal law), the Land Development Ordinance and the Land Grants (Special Provisions) Act.

The inference drawn from the research findings is that although female-headed families of victims of enforced disappearances face many land issues, they are reluctant to bring them to the attention of the relevant authorities. Further, they are also unable to take any action on land issues due to their lack of knowledge on land matters. It was observed during field visits that most of the women were unfamiliar with their land rights and were indifferent to land issues. Although female-headed families of victims of enforced disappearance feel the need of obtaining death certificates for the purposes of transferring land in their names they are still not ready to apply for death certificates of their loved ones. Sri Lanka boasts of impressive socio-economic indicators and high literacy levels. However, discriminatory provisions in land laws violate international norms and standards and are a direct violation of International treaties such as the ICCPR, ICESCR and CEDAW.

The amendments to discriminatory laws, issuance of certificate of absence and awareness raising programs at village level on women's land rights together with recommendations mentioned previously will, it is hoped, to a great extent, help to resolve land related issues and challenges faced by female-headed families of victims of enforced disappearances in the Mullaitivu and Kilinochchi districts.

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