

Legal and Policy Issues in the Alienation of State Land for Peasantry in Sri Lanka

S. Sarath Mathilal De Silva

Retired Professor in Law

Faculty of Management Studies and Commerce

University of Sri Jayawardenepura

Abstract

This paper reviews literature on the law governing alienation of State land for peasantry in order to identify legal issues in particular and socio economic issues associated with the operation of the law. This study which is primarily a legal study, is confined to two related law areas namely, the Land Development Ordinance No.18 of 1935 and the 13th Amendment to the 1978 Constitution. As revealed in the literature review, land as a source of economic and social issues entered the community as a result of the law and land policy adopted by the British colonial era. At the start, land utilization issues emerged as a social ethnic problem. Later it has become a political issue extending towards the worsening of the ethnic problem. In the final analysis, as the literature review reveals, country's legal framework on the alienation of State land for peasantry in the context of major peasant settlement schemes is posing crucial legal issues on land tenure, gender discrimination, encroachment linked to productivity and living standards of the peasantry involving both statutes and constitutional aspects, which have had adverse impact on the proper administration of State land in Sri Lanka.

Introduction

Land is a finite resource. Hence down the ages it has been a repository of all human emotions. Land provides status, wealth and power. Looked at from the point of Western Economics, it is an important factor of production. The Issue of land has occupied a place of centrality in State policy under all post – independence Governments. The utilization & distribution of lands & land settlement also became a factor in the ethnic issues in the country & figured in previous attempts at solving such issue.

Objectives and Scope of the Paper

The objectives of this paper are to review literature the law governing the alienation of State land for peasantry in order to identify indentify legal issues in particular and policy based socio economic issues associated with the operation of the law. The study which is primarily a legal study, is confined to two related law areas namely, the Land Development Ordinance No.18 of 1935 and the 13th Amendment to the 1978 Constitution.

Historical background in outline

The ownership patterns and the tenurial systems prevailing in Sri Lanka to date are the result of a process of evolution over many centuries. In ancient times, while our kings claimed certain rights in relation land, it is likely that the role of the king was more as a trustee or custodian It is generally accepted that the king controlled grants in land. There were several types of grants that were given by the king

During the British period in Sri Lanka (1796 -1948), legislation enacted by the British colonial government provided the initial legal thrust for such a state ownership of land. All lands in the country that were not permanently occupied and those for which ownership could not be proven became the property of the Crown under the Crown Lands Encroachment Ordinance No.12 of 1840 and the Wastelands Ordinance No. 1 of 1879.

The Land Development Ordinance of 1935 was enacted as a result of the conclusions reached by the Land Commission of 1927. In Sri Lanka, settling people by alienation of various types of State land as a development strategy has become a popular rural development strategy during the pre and post-Independence eras. Among various types of settlement schemes, major settlement schemes, known also as major peasant colonization schemes have been subjected to more debate than other schemes due to their contribution to society and economy of the country.

Prior to 1987, the law governing land settlement schemes has been the Land Development Ordinance of 1935. After 1987, with the introduction of the

13th Amendment to the 1978 Constitution, Land Development Ordinance still operates subject to the 13th Amendment to the 1978 Constitution.

Land Development Ordinance and the Irrigated Paddy Sector.

Land Policy

Three important works of literature for review under land policy are three Reports of Land Commissions of 1927, 1957 and 1987. They are important because they are the official government Reports of the Land Commissions appointed by the Government at that time. It was noted that the Land Commission of 1927 indeed placed preservation of peasantry first and foremost. Hence conditions concerning use and fragmentation as recommended by the Land Commission of 1927 had been embodied in permits and grants under the Land Development Ordinance.

In the view of the Second Land Commission of 1957, it was not enough to ascribe the land problems at that time solely to failures of administration within the framework of the present Land Development Ordinance or even to failure to implement the recommendations of the Land Commission (1927). According to the Land Commission of 1957, the general situation of country had altered so radically and fewer restriction on allotments in the settlement schemes were thus essential.

The Land Commission of 1957 also noted that a high proportion of land alienated under the Ordinance had not been satisfactorily developed. The Land Commission of 1957 stated in its Report that certain features of the tenure may have contributed to the failure to develop so much of this land. On the other hand, the Commission of 1957 was satisfied that there are several reasons not connected with the tenure why land had not been developed such as its unsuitability for cultivation, lack of roads and marketing facilities etc.¹⁴

The 3rd Land Commission of 1987 reviewed the operation of the Reports of the two periods of the Land Commissions, 1927 and 1957. In the view of Land Commission of 1987, in spite of certain positive aspects like such

as peasant colonization and village expansion in unoccupied lands under State ownership, there were also more negative aspects, such as the widespread problems of landlessness, large scale encroachment of state lands and the restrictive nature of the land market.

The Land Commission of 1987, strongly 'believed that 'land policy must necessarily form an integral and organic component of wide national development strategy. It should neither be treated in isolation nor confined to State land alone, but must rather be a comprehensive review at national level.' The Land Commission of 1987 also believed that the established policy of creating and preserving a multitude of prosperous, self-supporting and self-respecting peasant proprietors still hold valid and should continue for the future.¹⁶ The Land Commission of 1987, was inclined to believe that any failure to create a class of prosperous peasant proprietors was due not so much to any innate incapacity of the peasantry itself, but rather to constraints inherent in a highly bureaucratized system of land management.

Apart from the above mentioned three Reports of the Land Commission of 1927, 1957, 1987, a fair number of Commissions and Committees of inquiry as well as foreign missions have gone into various aspects of land policy and related issues from time to time since the beginning of 1950s.

Kumarasiri (1998) who at that time also held the post of the Land Commissioner of the Department of Land Commissioner, focused on review of the fifty years of land administration in Sri Lanka. As he noted, with the introduction of the 13th amendment to the Constitution, land administration activities have become confused due to improper coordination, lack of clarity and defects in the legal framework governing State land. Herath (2010), is critical of the State land law in Sri Lanka in that he emphasizes that State land law in Sri Lanka is in a state of ambiguity and complexity. According to Herath (2010), the provisions made in the legislation relating to state land are not adequate for the present social and economic circumstances. In addition, through the 13th Amendment to the Constitution, the powers of the State land have been devolved and issues

have arisen between the Central Government and the Provincial Councils due to delay in the implementation of devolved powers. In consequence a great inconvenience have been caused to the public.

Informal land Transactions and Encroachments

Shanmugarathan (1982), as far back in 1980s noted two issues in State land. The first issue has been the illegal land market operating in the colonization schemes and the second issue has been the encroachment of state land within or around the settlement schemes by the unauthorized persons. Findings of Ratnayake (2014) reveal that entrepreneurs in the colonization schemes have lent money to farmers and when the farmers were unable to repay them took over their lands, resulting serious issues: *de facto* land owners and labourers.

The Article by Chandrasiri (2011) examines changes in land ownership – possessory system in the colonization schemes and the future challenges to land ownership – possession resulting therefrom. The field survey covered major irrigation schemes namely, Parakrama Samudra, Mahaweli H, Udawalawa and Kirindi Oya settlement schemes started at different period and findings of other research on this subject by others were taken into account.

The findings of both sources revealed that 60% of the protected land holdings of the schemes in terms of number of holdings and the extent of all holdings are subject to different informal possessory systems such as leasing, mortgaging etc. The reasons for transferring of holdings to others on informal basis included the inadequacy of family labour, inability to cultivate due to engagement in other occupations, residence outside the scheme and urgent financial needs. In consequence of this process, two categories of farmers due to concentration of land holdings among the rich holders on the one hand and landless persons on the other hand had been the result. When the land holdings are subject to different informal possessory systems without permanent title, as Chandrasiri (2010) emphasizes there is no long term investments to improve its productivity.

The study by Samarasingha and Aheewar (2013) reveal that about 28% of the lowland plots in the study areas are informally fragmented into less than 1.5 acres in extent. In older schemes of Minnariya and Minipe stage I, the informal land fragmentation of less 1.5 acres has occurred among 45% and 56% of the farmers respectively. Some of the direct effects of land fragmentation as noted by the study are reduced land productivity, intensive cultivation, deforestation, cultivation of reservations and disputes among community members harming social integration.

Gender Perspective

Kishali and Dr. Almeida Guneratne, pay attention to the impact of constitutional provisions, statutory provisions and administrative practices on gender discriminatory laws. Accordingly, at one level, the need for specific reform of gender discriminatory laws arises from the fact that existing laws cannot be struck down by the Sri Lankan courts, even though they may be violative of the constitutional provisions relating to gender equality, namely Article 12(1) and Article 12(2) of the 1978 Constitution. Moreover, Article 16(1) of the Constitution stipulates that all existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the Constitution of 1978. The impact of this provision is further aggravated by the fact that Sri Lankan courts do not have substantive powers of judicial review.

As the study emphasized, discrimination against female spouses who succeed to land under the Land Development Ordinance is found both in the legislative scheme for succession and according to the findings of the empirical research of this study. Therefore literature indicates that the situation of surviving spouse being deprived of their full legal right to succeed to state land, appears to be the result of an unfortunate combination of unnecessarily complex legislation, incomplete and erroneous transferring of such legislation into guidance for officials and selective implementation even of such guidance. The research study by Kishali and Dr. Almeida (2010), finally conclude, a thorough overhaul of laws and regulations

relating to land and property rights of women as well as the initiation of a comprehensive awareness program in this regard is imperative.

Having examined the provisions of Land Development Ordinance on the subject of succession, Herath (2010), also confirms gender disparity provisions in the Land Development Ordinance.

Irrigation policy

Since the prosperity of the peasantry is one of the objectives to be achieved under the major peasant settlement schemes under the Land Development Ordinance, the impact of irrigation policy and profitability irrigated paddy farming have greater bearing on the realization of the aforesaid objective of the prosperity of the peasantry. Moreover, paddy is the dominant crop cultivated under the major irrigated schemes in Sri Lanka. Therefore a brief review of literature on irrigation policy and its impact on paddy sector is useful.

Three researchers namely, Aheeyar, Bandara, Pathmajani, (2012), conducted a research into 'Farmer Participation in Irrigation System Management: Achievements and Drawbacks' to assess the problems and prospects of the Participation in Irrigation System Management (PIM) policy implemented through different management models. The study highlighted the main issues confronting farmer participation irrigation system management. As found in the literature, though the Government envisaged that PIM policy would help to solve the problems in irrigated agriculture and water resources management, research observations show that long term substantiality of the management transfer problem have raised doubts on the effectiveness of the policy. Past study findings referred to by Aheeyar et al, (2012) showed mixed results on the performance of PIM in irrigation system management, water use efficiency, agriculture production and the government cost reduction.

Furthermore, as noted by Aruna and Ali (2014), irrigation is the most important strategic factor in the development in the rural sector in Sri Lanka and irrigation can play a central role in poverty reduction. As they noted,

authorized state organizations failed to accomplish equity principles among upstream and downstream users. Under these circumstances, in the view of Aruna Shantha and Assan Ali (2014), the irrigation investments in Sri Lanka have not been playing a rationale role on resource optimization.

Profitability of the Irrigated Paddy Sector

It is also necessary to review the literature on the profitability of irrigated paddy sector in the context of the prevalence of informal land transactions and consequent fragmentation of allotments obtained in the settlement scheme with its impact on the land productivity and paddy farming real incomes. As Wijetunge and Abeysekera (2010) noted in their study, despite the decline of the share of agriculture in national output and increasing industrial and services sector output, agriculture still plays an important role in increasing the country's food supply as well as providing employment opportunities specially for the rural sector.

Wijetunge (2013), added, that irrespective of the fact that all the successive governments followed some intensive measures to protect paddy farmers, their living standards have been continually deteriorating over the years owing to rising production cost over the farm gate price and yield improvement.

As Wijetunge and Abeysekera (2010) also find, despite numerous public sector interventions and the incentive mechanisms introduced by the government. Sri Lanka's agriculture sector up to now has in general, failed to deliver the expected. The study clearly shows that present system of paddy farming is less attractive to the younger generations. As Padamajani (2010), noted, in spite of the significant advances in the rice production in the past few decades, there is a rising concern about declining productivity and restricted scope for expansion of future rice production in Sri Lanka.

Nadeeka and Gamage (2011), provides statistics pertaining to the trajectories of transformation in the agriculture sector particularly the smallholder farming sector in Sri Lanka during the six decades after

independence. According to Nadeeka and Gamage (2011) it is a matter of concern that over the last six decades, the country has achieved self-sufficiency in rice while the paddy holdings have fragmented resulting in operation of uneconomic extents by the majority of farmers. The latter tendency has implications for income of paddy farmers.

Therefore they conclude that in spite of the relatively better productivity performance of crops over the years, Sri Lanka's yield remained well below their technical potential. The poor performance of paddy in Sri Lanka in realizing technical potential could be attributed to a few factors. A major one is non availability of perennial sources of irrigation water to a significant sector of farmers. Though area under irrigation has increased over the years many areas in the island lack an assured water supply. This has affected the productivity potential of new seeds even in the irrigated areas in the dry zone.

One of areas of considerable controversy, as highlighted by Sanderatne (2001), is with respect to the protected tenure in colonization schemes under the Land Development Ordinance of 1935. According to him, merits and defects of the restrictions imposed on the land held under this Ordinance have led to controversy till today.

The 13th Amendment to the Constitution and the Subject of State Land.

At the time of the adoption of the 13th Amendment, the State owned as much as 82.3% of all lands in Sri Lanka as stated in the Report of the Land Commission of 1987. In terms of the 13th Amendment the Constitution some activities relating to the subject of land have been allocated to the Provincial Councils. Thereafter in 1992, these activities have been further decentralized to Divisional Secretaries under the Transfer of Powers (Divisional Secretaries) Act No .58 of 1992. In consequence there are three institutions dealing with the subject of State land: Land Commissioner General, Provincial Council Land Commissioner and Divisional Secretaries. Although these three officers are independent from one another the statute they are required to comply with are the same which have

created complexities in land administration. Due to defects of the land management at the Divisional Secretariat level, there has been an increase of the problems of people. Therefore a need has arisen to devise a comprehensive scheme to oversee the land work of the Divisional Secretariats.

Referring to 13th Amendment to the Constitution which emerged as a result of the ethnic conflict there are many elements in the package which limit the powers enjoyed by the regions and allow the Centre to interfere even in the areas that have been devolved. There are two principal issues that the devolution debate over State land need to address. The first is the extent to which the regional units are given power and autonomy to control and manage State land in the region. The second is what needs to be reformed at the Centre, in order to make these a reality. Very often the second does not automatically follow from the first.

Under mentioned remaining issues are linked to the 13th Amendment to the 1978 Constitution (a) wide powers of the President inconsistent with the proper devolution of powers over the State land. (b) issue of the extent of devolution of powers over the State land (c) issue with regard to inter provincial schemes (d) issues relating to ethnicity and criteria for land settlement (e) issues relating to institutional framework – the establishment of the National Land Commission as provided by the 13th Amendment. The outcome of this situation is the increasing encroachments, failure to alienate State land to the lawful citizens, encroachment of environmentally sensitive land, corrupt practices resulting from non-compliance with laws and regulations.

Legal Aspects.

The Article published by Sunil Bastian (1997) is centred around the question of taking away the power over state – owned land from the central State in the political struggle to develop power to regional units in Sri Lanka. He makes the central point that the state owned land had been

distributed in a variety and different ways and the colonization schemes are the centre of debate when it comes to the ethnic question.

According to Bastian (1997) another political link between these policies and ethnic politics arises due to changes in the demographic patterns brought about by these projects. Colonization schemes have contributed to changes in the ethnic composition with an increasing Sinhalese population and decreasing Tamil population. Especially in the Eastern province where such settlements took place. Referring to 13th Amendment to the Constitution which emerged as a result of the ethnic conflict he is of the view there are many elements in the package which limit the powers enjoyed by the regions and allow the center to interfere even in the areas that have been devolved.

Bastian (2013) in another succinct paper alleged that policies to protect the peasantry through distribution of state land became a major factor in worsening ethnic relations. The main issue was the settlement of the people in the Eastern Province. He strongly believes that this became a fundamental reason for the civil war.

The Article by Soyza (2007) has discussed land utilization issue in Sri Lanka and its social and political dimensions with an evaluation of efforts to resolve it. Explaining the development of the land utilization issues he stated that at the start land utilization issue emerged as a social ethnic problem. Later it has become a political issue with the worsening of the ethnic problem. The heightened state of the ethnic problem is the claim of the Tamil community for North- East Provinces as their native land and their demand for self-governance of these two Provinces together.

According to Soyza (2007) land ownership issue in Sri Lanka is highly complicated and confused issue among other political, economic and social issues of the country. On the one hand, it is a complex economic and social issue faced by the whole country. On the other hand it has gone to such an extent demanding separate State.

Implementation Aspects.

According to Boralassa (2007) commenting on the operation of the 13th Amendment, although a scheme has been formulated for the release of the State land of the Republic to the provincial Councils that scheme is not in place. As he noted, some Provincial councils have even passed Ordinances exceeding the limits of 13th Amendment and as a result, great delay and confusion have been caused in land administration activities.

According to Jayatilake (2007) , today there are three institutions dealing with the subject of State land. : Land Commissioner General, Provincial Council Land Commissioner and Divisional Secretaries. Although these three officers are independent from one another, the statutes they are required to comply with are the same, which has created complexities in land administration.

The study by Nadeeka (2011) evaluated the relationship between the Central Government and Provincial Council system in relation to land delivery to beneficiaries through an empirical study. Nadeeka(2011) noted that although the powers had been devolved on the Provincial Councils, the powers relating to alienation of State land are still with the centre. Therefore powers entrusted to Provincial Councils, according to Nadeeka, are powers of utilization of State land and not the powers of alienation of State land.

Discussion

As revealed in the literature review, land as a source of economic and social issues entered the community as a result of the land policy adopted by the British colonial era. Some of the key steps in the political - economic history of Sri Lanka took place during the British colonial period. Literature review suggests that in making use of the control over state land, the Central Government has carried out policies that have contributed directly to the worsening of ethnic relations. The most glaring example of such a policy as commented by some literature, is the large scale irrigation schemes in Dry Zone in Sri Lanka a part of which is in the North and East.

As literature review indicated, one of the areas of considerable controversy is with respect to the protective tenure on colonization schemes under the Land Development Ordinance of 1935. The merits and defects of the restrictions imposed on land held under this Ordinance has led to controversy till today. Literature review indicates that although the provisions of Land Development Ordinance have instituted the state of the 'protected tenure' for the land granted to settlers the empirical situation in settlement schemes is complex.

Literature review indicates that a considerable proportion of land under Land Development Ordinance had not been sufficiently developed, and certain features of the tenure may have contributed to the failure to develop so much of this land. It was also revealed that there are several reasons not connected to tenure as to why land has not been sufficiently developed. Literature review reveals that law and policy to deal with encroachment issue has met with limited success. Literature review on gender discriminatory aspects of law finds that gender discriminatory aspects of law are apparent both in the terms of the Constitution of 1978 and the statute law.

Therefore question to be posed from the aforesaid literature review is how can the key objective of prosperity of the peasantry with the aforesaid defects in the major irrigated settlement schemes governed under the Land Development Ordinance be realized and what legal and policy interventions are necessary to resolve the connected issues which remain today. The review of literature on legal and operational aspects of the 13th Amendment on the subject of confirm that there are legal and operational problems in the land administration after the introduction of the 13th Amendment.

Conclusion

In summing up, this Literature Review concludes that there are in the context of alienation of State land for peasantry in the context of major peasant settlement schemes, several issues remaining to be addressed for resolution, which have arisen in the two areas of law namely (a) Land

Development Ordinance and (b) the 13th Amendment to the Constitution of 1978 in relation to the subject of land.

With regard to the Land Development Ordinance the issues remaining to be resolve include:

- (a) To ascertain substance of the Land Development Ordinance as amended.
- (b) Whether to continue with the objective of prosperity of the peasantry under the existing protected tenure.
- (c) Issues relating to existing land tenure.
- (d) Issues relating to disposal, inheritance of allotments also involving gender perspective.
- (e) Issues relating productivity and profitability of the irrigated paddy sector which is intimately linked to the objective of the prosperity of the peasantry.
- (f) Ethnic implications of the major irrigated peasant settlement schemes.

With regard to the 13th Amendment to the Constitution, issues remaining to be addressed include

- i. Legal issues which have arisen due to defects in the provisions of the 13th Amendment in relation to the subject of land.
- ii. The operational issues which have arisen due to improper devolution of powers from the Central Government to the Provincial Councils.

Therefore it is concluded that the above issues revealed from the aforesaid literature review need to be addressed for resolution with regard to alienation of State land for peasantry in Sri Lanka. At a time a new Constitution is being drafted, it is essential give proper consideration in the drafting process so as not to repeat issues as found in the 13th Amendment to the Constitution in relation to the subject of State land.

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