

Legal Analysis of Property Issues affecting Internally Displaced Persons and Refugees in Sri Lanka

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**Commissioned by the United Nations High Commissioner for Refugees and the
Human Rights Commission of Sri Lanka
January 2003**

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Executive Summary

The signing of the Ceasefire Agreement in February 2002 by the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) resulted in the spontaneous return of an estimated 220,000 internally displaced persons (IDPs) by September 2002¹. Anticipated further large-scale movements of IDPs, and refugees returning from India, have heightened the urgency of identifying remedies for existing and projected property-related issues.

The main objectives of this report were: 1) to produce a legal analysis of property-related issues affecting IDPs, 2) to make recommendations for legal reform, 3) to consider the adequacy of the infrastructure and resources of the judiciary to satisfactorily resolve anticipated property disputes in the conflict-affected areas, and 4) to consider the need for an alternative dispute resolution mechanism.

The main issues addressed were:

- Loss of documentation proving ownership
- Unauthorised occupation of property owned by IDPs
- Problems related to IDPs resuming Crown land permits/grants
- Default of bank mortgages by IDPs
- Extensive damage and destruction to property
- Loss of essential servitudes such as rights of way, use of wells and watercourses
- Destruction/encroachment of property boundaries
- Loss of title to property due to unlawful forced transfers
- Disputes over religious property such as temple lands
- Problems related to succession and proof of property inheritance
- Lack of access to private property and agricultural land located in High Security Zones, in uncleared areas, or occupied by the military, the LTTE or other armed or political groups
- Landlessness among displaced persons.

As a result of our legal analysis of these issues, we identified four main categories of recommendations for further action:

(1) Changes to the law and the suspension of discriminatory laws

A number of pre-conflict property-related laws operate unfairly in the present circumstances, where communities have been displaced for long periods of time, and where courts have functioned irregularly or not at all during the conflict period.

- The Prescription Ordinance, which operates to confer title on unauthorised secondary occupants where they have been in occupation for ten years or more, should be amended. The amendment should ensure that persons wishing to return to their homes do not lose title as a result of displacement caused by the civil war.
- The Agrarian Services Act should be amended to enable all family members to succeed to the right to cultivate. At present, where no successor has been nominated, the spouse inherits and, on the spouse's death, the eldest male child inherits the right to cultivate.

¹ United Nations Inter-Agency IDP Working Group, 28 November 2002

- The Money Lending Ordinance and the Mortgage Act should be amended to enable the determination of debts due to private lenders.
- With the case of mortgages to banks, the banks' right to sell land without recourse to court should be suspended. Equally, the Debt Recovery (Special Provisions) Act should be amended to enable a mortgagor to appear and defend without the present requirement of a deposit of security.
- The Land Development Ordinance should be amended so that an IDP who has failed to meet the conditions attached to a Crown land permit due to displacement is not at risk of losing the permit (although this result will also be achieved if the Land Commissioner determines not to cancel the permit).
- The Land Development Ordinance should also be amended to relax the rules regarding succession of Crown land permits/grants. At present, where no successor has been nominated, the eldest male child inherits the permit/grant.
- Where partition or testamentary actions were pending as a result of the civil war, the rule of abatement of actions under the Civil Procedure Code should be suspended so these actions can be continued.

(2) Improvements to the administration of property interests

Proof of ownership is a common problem for returning IDPs and refugees. Documentation pertaining to title, registration and definition of boundaries has been lost, destroyed or seriously damaged. Improved administration including the restoration of damaged records, re-construction of records, regularization of registration of title and production of land surveys and the deposit of land surveys with District Land Registries, may prevent potential disputes from arising.

- Where Land Registry Folios have been destroyed or are incomplete, the Registrar General should re-construct the folio in terms of the provisions set out in the Land Registers (Reconstructed Folios) Ordinance.
- All copies of plans made by surveyors should be tendered and retained by the relevant District Land Registries.
- The Registrar General should be empowered to micro-film all land registers, village indexes and duplicates of registered deeds.

(3) Improvements to the infrastructure and the resources of the judiciary

The infrastructure and resources of the judiciary in the North and East of Sri Lanka have suffered from severe neglect and damage during the conflict. Court buildings have been damaged and some courts are located in unsuitable rented accommodation. Case records and documents have been destroyed and furniture and other necessary equipment are missing. In some regions, the operation of the courts has been suspended for over ten years. The judiciary also suffers from a lack of adequately trained court staff. The lack of basic infrastructure, in addition to Sri Lankan laws of procedure and evidence, contribute to the delay in determining property cases - a straightforward civil dispute may take anywhere from 2 to 5 years for decision and approximately a total period of 10 years for a final decision on appeal.

- The courts in the conflict-affected areas should have adequate accommodation and provided with better resources.
- Where District Courts and Magistrate Courts are combined, they should sit separately so that property cases are considered by District Courts as a matter of priority.
- The Court of Appeal should have sittings as a circuit court in the Northern and Eastern Provinces in order to speed up the appeals process.

(4) Establishment of an alternative dispute resolution mechanism

The expense and delay involved in going to court may deter people from returning to their homes thereby preventing a return to normalcy and contributing to the potential for further outbreaks of conflict. Even with changes to the law and with a better-resourced judiciary, many people do not have adequate redress through the courts.

- An alternative dispute resolution body should be established to deal with property claims in the war-affected regions.
 - The body should be presided over by at least two legally-qualified professionals and should employ qualified officers to record claims and report to the body.
 - The body should have the authority to resolve all property disputes irrespective of the value of the claim.
 - The body should have the authority to issue interim orders for relief, and to recommend alternative accommodation, land or compensation.
- In the case of particularly sensitive disputes, which are likely to disrupt the peace, where the court may have no practical authority and where enforcement of court judgments is difficult, it may be desirable for the dispute to be determined by a committee with an international membership that satisfies the parties' requirement for unquestionable impartiality.

Finally, Stage 1 found that a large number of IDPs had no property interests to protect in the courts. The problem of landlessness, a major issue for the return to normalcy in the conflict-affected regions, falls outside the boundaries of this report.

UN Guiding Principles On Internal Displacement

Principle 21

1. No one shall be arbitrarily deprived of property and possession.
2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:
 - (a) Pillage;
 - (b) Direct or indiscriminate attacks or other acts of violence;

- (c) Being used to shield military operations or objectives;
 - (d) Being made the object of reprisal; and
 - (e) Being destroyed or appropriated as a form of collective punishment.
3. Property and possession left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

Legal systems pertaining to property in the conflict-affected areas

Different personal laws apply to different communities in Sri Lanka. For example, Tésawalamai applies to the Tamils of the Northern Province, Kandyan Law applies to the Kandyan Sinhalese, and Muslim Law applies to Muslims throughout Sri Lanka. Roman-Dutch Law is the common law of Sri Lanka and applies where the personal laws are silent. Several statutes that touch upon property rights have also been enacted by Parliament and have national application. Statutes such as the Prescription Ordinance, Prevention of Frauds Ordinance, Agrarian Services Act, Paddy Lands Act, Land Development Ordinance, Rent Act, Mortgage Act and Partition Law apply with full force in respect of property rights throughout Sri Lanka. In certain specific areas such as commercial law, English law has been introduced by statute, and is relevant to disputes relating to property subject to mortgage.

The intermingling of these different systems of law has, not surprisingly, caused much confusion. As observed by Ivor Jennings and H W Tambiah, "the law of Sri Lanka is embarrassed rather by the richness of its sources than the lack of them"². The question as to which law applies to the resolution of any particular conflict has taken up valuable judicial time over the years.

Roman Dutch Law applies to most of the private property-related disputes we consider in this report. For example, the legal avenue for a displaced person wishing to return to property now occupied by an unauthorised person would be to apply to the civil courts for an eviction order under Roman Dutch Law.

In the case of Crown land (largely located in Vavuniya, Batticaloa, Trincomalee, Anuradhapura, Killinochchi and Mannar), property interests are regulated by statute, and the remedies available to a Crown land grantee or permit holder will be determined by the Government Agent with regard to the Land Development Ordinance.

Tésawalamai is relevant to a limited number of property-related disputes in the Northern Province of Jaffna, in particular, the issues related to co-ownership and succession. Tésawalamai has both personal and territorial application. It is personal to those who fall under the legal definition of the Malabar inhabitants of the Province of Jaffna, in layman's terms, Tamils resident in the Northern Province of Sri Lanka. Residency is decided by an intention to reside (*animus residendi*) in the Province of Jaffna (Velupillai Vs. Sivakamipillai³) and would include displaced persons (sometimes even those who have become foreign nationals) who intend to reside in the Province of Jaffna. Tésawalamai also applies to all those who are resident in the Province of Jaffna, irrespective of the community to which the owner belongs. Where Tésawalamai is silent, the common law (Roman Dutch Law) applies.

² *The Dominion of Ceylon*, London, Stevens, 1952, p184.

³ 13 NLR 74

It is with reference to this array of different legal systems that we analyse the property issues that face IDPs, refugees and local communities.

Legal analysis of property issues affecting internally displaced persons in Sri Lanka

1) Loss or destruction of title deeds and problems of establishing ownership

Proof of ownership has been identified as a common problem for returning refugees and IDPs. Title deeds and other documentation have been lost or destroyed and registration of title deeds has not been consistent. Some Land Registry offices and their registers, too, have been damaged, lost and destroyed.

The applicable laws are: Prevention of Frauds Ordinance No.7 of 1840; Notaries Ordinance No.1 of 1907; Registration of Documents Ordinance No.23 of 1927; Land Registers (Reconstructed Folios) Ordinance No.18 of 1945; and Registration of Title Ordinance No.3 of 1907.

In Sri Lanka, the ownership of immovable property is evidenced by a document commonly known as the deed. This is an instrument, which in terms of the Prevention of Frauds Ordinance, Notaries Ordinance and Registration of Documents Ordinance, should be signed by the transferor in the presence of two witnesses, and attested by a Notary Public. In terms of Section 2 of the Prevention of Frauds Ordinance, any conveyance of an immovable property is invalid if not notarially executed.

The ownership of an immovable property, called title to the land, passes to the Transferee on the signing of the document. However Registration under the Registration of Documents Ordinance gives an opportunity for the public to know whom the owner is. Hence a registered document gains priority over an unregistered document even if the unregistered document is prior in date. Therefore, if a properly registered notarial conveyance (the deed) in favour of the owner is available with the owner, and the Land Registry Folios are available too, there will be no problem in determining the title holder to that property.

In the event of the non-availability of a notarial conveyance (but registered) with the owner, a search of the folio wherein the particulars of that parcel of land is registered will indicate the position of ownership and its encumbrances, if any.

If the registered notarial conveyance is available (but the Land Registry Folios are unavailable) ownership could be assumed in favour of the owner whose name appears as the transferee in the conveyance. This would, however, only be an assumption as there is a possibility of someone else holding a previously registered conveyance that in law could claim priority.

In the event that both the registration folios at the Land Registry and the original notarial conveyance are unavailable, one should look for the duplicate of such notarial document. This would be held in the Land Registry, in which the attesting notary had practised/is practising. (Section 31 Rule (26)(a) of the Notaries Ordinance makes it compulsory for a Notary to transmit a duplicate copy of the deed to the Land Registry). If the duplicate copy has not been submitted, or the Land Registry where the duplicate copy was preserved does not hold it, one should look for the third copy (protocol) kept by the attesting Notary. (Section 31 Rule (24) of the Notaries Ordinance makes it compulsory for a Notary to retain a third copy of the deed).

In the event that the Land Registry Folios are unavailable, the Registrar General should re-construct the folio pursuant to the provisions set out in the Land Registers (Reconstructed Folios) Ordinance.

It is, therefore, clear that registration of a deed is not an essential criterion for conferring title and non-registration of title deeds during the conflict period, in our view, should not create undue problems for land owners. They are free to register their title deeds at any time and may do so even now. Though existing provisions in the law are adequate, administrative mechanisms should, however, be put in place to resolve disputes that arise in the future.

The only problem that may arise, however, is the question of "priority" in circumstances where a subsequent deed has been executed and registered first in regard to the same parcel of land.

The non-registration of a previous deed may be due to the following reasons:

- Non-functionality of the relevant Land Registry during the period in which the deed was executed or thereafter;
- Non-accessibility of the relevant Land Registry; or because
- The owner of the land failed to tender the document for registration.

The execution of a subsequent deed can only have occurred in the following circumstances:

- The executant of the previous deed practising fraud and executing a subsequent deed;
- The executant of the previous deed being dead; his or her heirs executing a deed without knowledge of the first deed;
- The possessor of the parcel of land executing a conveyance on his prescriptive title with or without knowledge of the owner having executed a previous deed.

If the title deeds are available but not registered, an opportunity should be given to those who hold the title deed to tender it for registration. However, if the Land Registry was functional and accessible, our view is that ordinary law should apply. The existing provisions in the law are adequate though some administrative mechanisms should be put in place to resolve disputes that arise in regard to non-registration of title deeds. Amendments to the principle of granting "priority" to registered deeds may be necessary (time and territory limited) since, in many cases, title deeds have not been registered during the conflict period.

In the event of a subsequent deed being executed by practice of fraud or without the knowledge of the previous deed, the remedy would be to sue the person concerned. If such issues occur in large numbers, the existing judicial capacity may not be sufficient to resolve those issues.

2) Displaced owner wishes to return to property occupied by another

Most returning refugees and IDPs find other people in occupation of their properties. If they seek to evict the occupants they will have to follow laid down legal procedures. Should they seek to physically evict occupants without recourse to the law, there is still provision in law to restore possession to the person evicted.

The applicable laws are: Prescription Ordinance No.2 of 1889; Primary Courts Procedure Act No. 44 of 1979; and Rent Act No.7 of 1972.

The primary issue in such situations is the applicability of Section 3 of the Prescription Ordinance. Pursuant to this section, proof of undisturbed and uninterrupted possession for a period of 10 years without acknowledgment of the Plaintiff's ownership entitles the occupier (Defendant) to obtain a decree of court granting him title by prescription. Section 13 lists the disabilities, which would delay the commencement of the period of 10 years. The list is exhaustive and refers to infancy, idiocy, unsoundness of mind, lunacy, and absence beyond the seas.

When the person in possession of the property claims title by prescription, if the owner has lived outside the country when the ouster took place, he can, for example, benefit from the exception provided in "absence beyond the seas". On the other hand, if the owner was displaced internally, he would not be able to get a judgment in his favour. Evidence of non-functioning of courts may not necessarily affect prescription. Although there is a possibility that the owner may be able to challenge the claim of prescription by claiming no "adverse possession", this is likely to involve a lengthy legal battle. Our suggestion is that operation of Section 3 of the Prescription Ordinance be made inapplicable to the affected areas, or that the exceptions listed in section 13 be expanded to include circumstances arising out of the conflict.

Below, we analyse the different scenarios that may be present in different instances:

i) Situations where an unrelated private person⁴ is in possession

If the owner makes a claim on the property and a dispute results, the provisions of the Primary Courts Procedure Act may come into operation.

Sections 66 – 76 of the Primary Courts Procedure Act deal with temporary order for possession and other rights in cases where a breach of peace is threatened or is likely. In terms of Section 68, any person who has been in possession for 2 months preceding the application or who has been dispossessed within two months, is entitled to possession. Even a trespasser can benefit from this provision.

In order to vindicate his title and eject the occupant, the owner will have to file a rei vindicatio action in the civil courts. The provisions of the Prescription Ordinance will be relevant. Section 4 enables a person who was dispossessed to bring a possessory action within one year of such dispossession and entitles him to have possession returned without proof of ownership. Since this remedy would not be available to those who have been dispossessed for longer periods, we recommend that the limitation of time in this provision be suspended to enable returning refugees and IDPs to regain possession.

ii) If the occupant is a person who originally entered the premises as a licensee, tenant or lessee

Such occupiers may not benefit from Section 3 of the Prescription Ordinance as they would be deemed to have acknowledged the title of the owner and have remained on the premises in the same capacity as they entered. The owner may, therefore, be able to eject them upon determining the license, terminating the tenancy or lease, or if the lease has expired, by treating him as an over-holding lessee.

⁴ This would include civilians, members of the security forces, the LTTE or other armed or political groups.

If the occupant can prove, however, that the nature of occupancy changed at a particular point in time (that there was an 'ouster'), he may have recourse to a claim of prescription from that date of ouster.

If the occupying tenant is protected by the Rent Act No.7 of 1972 amended by Act No.55 of 1980⁵, even where the owner obtains a decree, the tenant cannot be dispossessed until alternate accommodation is given by the Commissioner of National Housing pursuant to Section 22(1C).

iii) Settlement by payment of money

a) Lessee, Licensee or Tenant effected necessary repairs and claims jus retentionis

Jus retentionis is a remedy available under Roman Dutch Law to any person who has been in bona fide occupation of another's house and has effected improvements to the property. It allows the occupant to retain possession of the property until the money spent by him on necessary improvements is paid. In affected areas, there would certainly be necessary repairs, such as replacement of roofing structure etc., and therefore if the occupant makes this claim the law will permit him to retain possession until the money is paid.

Our view is that the calculation of a just compensation in each situation must be made by an independent body and, in cases where the owner is unable to meet the cost, some other contingency will have to be made, such as providing alternate accommodation for the occupant or payment of compensation from a fund set up for that purpose.

b) Mortgagee, Conditional Transferee

A similar issue will arise with regard to a situation where the owner can only re-possess after the repayment of the loan. This is dealt with extensively below⁶.

3) Displaced tenant/lessee wishes to return to the property previously occupied

Some refugees and IDPs return to properties which are not owned by them, but which they occupied as tenants or lessees prior to their displacement.

The applicable law is the Rent Act and Common law

Returning Tenants

The question of the applicability of the Rent Act must first be addressed. Section 2 describes the areas in which the Act is applicable and section 2(4) describes the premises that do not come under the Act. The issues will vary according to who is in occupation.

i) Owner in occupation

Unless a returning tenant demands the premises for occupation, the owner can continue in occupation. Under section 28 of the Rent Act, however, the owner of residential premises can also have an action instituted against the tenant on the ground that the tenant ceased to occupy such premises without reasonable cause, for a continuous period of not less than six months. The conflict would be considered a circumstance providing a reasonable cause for displacement, though the burden of proof will rest with the tenant.

⁵ Applicability of the Rent Act will be determined by the provisions of the Act and the regulations made thereunder

⁶ Under heading 8

Section 29 (4) provides that if a tenant vacates the premises prior to the end of the period, the landlord or any member of his family may enter into occupation of the premises, or the landlord may let such premises to any other tenant. Voluntary vacation of the premises and forced displacement are, however, two entirely different situations. Again it will have to be left to courts to decide this issue on a case-by-case basis.

Our view is that a mediatory or conciliatory body be set up to deal with issues of this nature.

ii) Another Tenant in occupation

During the operation of a previous tenancy agreement, the owner cannot enter into a new agreement, and should not let the premises to another person. On the basis of the existing tenancy agreement, the returning tenant can file an action against the present tenant and for damages against the owner.

iii) Unrelated third person in occupation

Section 17 of the Rent Act gives protection to a tenant from a landlord or other person against interference of any sort in the occupation or use of any premises by the tenant, or the person in occupation, or in any manner preventing access to such premises by a tenant or other person. A tenant will not, however, be able to regain possession of the tenanted property if it has been completely destroyed and a new building constructed.

4) Property completely or partially damaged and unable to be occupied

Since a large number of houses have been completely or partially damaged, returning refugees and IDPs are often unable to occupy them. They are also without means to rebuild their properties in the absence of compensation. Guiding Principle 21 on Internally Displaced Persons casts a burden on the State to protect the properties of the displaced.

The applicable laws are: Housing and Town Improvement Act No.38 of 1980; Urban Development Authority Law No.41 of 1978 amended by Act No.70 of 1979 and Act No. 4 of 1982.

The main problem faced by returning refugees and IDPs in rebuilding or repairing their houses is the lack of financial assistance. Although, in theory, one might be able to sue either the State or the person responsible for the damage caused to the property, in practice this may not be possible for various reasons. Therefore this situation can only be addressed by a scheme of compensation or other material assistance to those affected.

At present the State is paying an inadequate amount of compensation and that, too, is not in a consistent manner. Proof of ownership of property is necessary for a claim to compensation. Field studies reveal, however, that a sizeable number of persons in the conflict-affected areas do not have documentation to prove ownership.

Our recommendation is that the State should devise a scheme for compensation that is adequate to repair fully or rebuild houses. In cases where the owner is unable to furnish the necessary documentation, other secondary evidence of ownership ought to be accepted. Care should be taken, however, to ensure that compensation is used appropriately.

Section 6(1) of the Housing and Town Improvement Act does not provide for alterations of any kind (as listed in sub-section (2)) without the written consent of the chairman of the local authority. Therefore, if repairs or reconstruction involve any deviation from the original approved plan, the relevant local authority must first approve the new plan.

If a policy decision is taken to develop a particular area in a planned manner, the following provisions of the UDA law will come into operation:

- Section 3: If the Minister is of the opinion that any area is suitable for development, he can declare it to be an urban development area.
- Section 8 lays down the powers and functions of the UDA in this regard:
 - To formulate and develop an urban land use policy
 - To formulate and execute housing schemes
- Section 8A (1) provides for the preparation of a development plan.
- Section 23(1): Where the Town and Country Planning or any other enactment is in conflict with any development plan under this Act it shall cease to operate.

In terms, however, of section 23(3) the Minister can declare that the UDA shall cease to be the authority responsible and the Town and Country Planning and other enactments shall be applicable.

Our recommendation is that suitable areas be identified for planned development using appropriate criteria.

5) Property rendered uninhabitable as a result of unexploded ordnance or mines in the region

A large percentage of lands fall into this category. Returning refugees and IDPs are, therefore, unable to re-occupy their properties or cultivate their lands.

This issue will arise only in areas that are uninhabited and, therefore, the owners may be able to have their claim determined before taking possession of their property. They would need, however, to liaise with the Government with regard to clearing the place of mines or any other unexploded devices. Of course, obtaining possession of the property alone will not solve all issues connected to this matter: the owner takes a risk in taking possession of the property and he needs to be covered by an appropriate risk cover or insurance.

Although, in theory, it is possible to sue persons responsible for the placing of mines, this is not a practicable remedy for the returning refugee or IDP. We, therefore, recommend suitable administrative measures be taken and, in cases of injury or death, adequate compensation be made available either from the State or through an insurance scheme.

6) Tenant cultivators wish to return to the land for cultivation

Cultivators of land belonging to others are protected by the Agrarian Services Act, which spells out in detail the rights of the cultivator as well as the owner. However displacement of owners or cultivators has rendered this statute ineffective. The applicable law is the Agrarian Services Act No. 58 of 1979.

(i) The owner refuses to hand over the land when they return

The Agrarian Services Act governs the right of a tenant cultivator and landlord. Section 2(1) provides that the agreement can either be oral or written. A tenant cultivator shall have the

right to occupy and use land under section 5(1) of the Act. However, anything done contrary to the agreement will deprive the cultivator of any protection under the Act.

If the owner of the land refuses to hand over the land for cultivation to the tenant cultivator, he can notify the Commissioner for Agrarian Services that he has been evicted from the land. The Commissioner may hold an inquiry and make a determination under section 5 (3). The notification has to be made within one year the eviction.

The right of a tenant cultivator who received the land from a lessee for cultivation will not be affected merely for the reason that the owner (lessor) has come into occupation. Likewise even if the lease is terminated, the right of the tenant cultivator will not be affected. However, if a land has been given to the sub-tenant (tenant cultivator) without the written consent of the owner, he cannot seek the protection of law: Section 5(9).

Pursuant to Section 15 (1), if a land is not cultivated for two or more successive seasons, the Commissioner⁷ can appoint another cultivator. In that event, the returning tenant (Original cultivator) has no right to claim to be the cultivator of the said land. An arrears of rent is a cause for termination of the agreement (section 18). However this will not apply to land, which has not been cultivated for a season (section 19). Therefore the same situation can be applied to land, which is occupied by the security forces or cannot be cultivated due to access being denied by the forces or land mines.

ii) Unrelated third person in occupation

A third person who occupies the land but not appointed by the Commissioner can be evicted by a written order of the Commissioner [Section 15 (2)].

iii) Original tenant cultivator is dead

If the original tenant cultivator died during the displaced time and on the return of the spouse and the other family members, they can claim to continue with the cultivation. Under section 7 of the Act, a nominee of the original tenant cultivator can cultivate and such nomination should be registered. The surviving spouse of the original tenant cultivator or his elder son or any other children can claim to be a cultivator of the said land.

However, if it is proved that the family of the original tenant cultivator depends on the income of the said land but no family member who qualifies under the chain described in section 8 is in a position to cultivate, our recommendation is that the Act be suitably amended to enable any other member of the same family to succeed to the right to cultivate.

⁷ Under the Agrarian Services Act

7) Other ancillary property rights of displaced persons who return (Servitude)

Returning refugees and IDPs seek to reclaim their properties along with the rights attached to those properties at the time of displacement. In some cases, they find that persons who did not have servitude at the time of displacement are asserting new rights over their properties. The applicable laws are: Roman Dutch Law and Tésawalamai.

Rights of way, use of well and watercourse are common servitude. They can be acquired, inter alia, by prescription and be extinguished by non-user. An intention to abandon the servitude must, however, be proved and there is no fixed period of time in relation to which servitude can be extinguished by operation of law. Displacement of persons from possession of their lands, therefore, will not seriously affect their access to servitude, since no intention to abandon servitude could be established.

If servitude is claimed to have been created over the property of a person who has been displaced, upon his return, the claimant should demonstrate that servitude is needed to continue to enjoy full property rights. Since it is anticipated that the frequency of these issues will be high, swift resolution is necessary. It is, therefore, not desirable to leave such issues for determination by courts.

We recommend that issues of disputed servitude be resolved by an arbitration mechanism.

8) Property subject to mortgage or any other encumbrance

Those who have obtained loans by mortgaging immovable property before or immediately after the conflict period have invariably defaulted in the payment of instalments. The main causes of defaults are either that mortgagors were displaced or rendered homeless or they did not have sufficient financial capacity to pay the instalments when demanded by the lending institution or the individual who had granted the loan.

When refugees or displaced persons return to their homes, it may continue to be impossible for them to settle debts. In some cases, the accumulated interest and capital due to long delay in settlement of the debt exceeds the total market value of the property. Under these circumstances the owner/mortgagor of the property may lose the use and occupation of his house or property.

The issues that arise will differ according to the nature of the encumbrance. We deal with types of encumbrance that are widely prevalent in the areas under consideration:

i) Otti Mortgage

The applicable laws are: Tésawalamai; and Mortgage Act No.11 of 1953

This type of mortgage is peculiar to Tésawalamai. It involves a mortgagor, having received consideration, tendering his property as security for the mortgage. In contrast to other mortgages where the possession of the property rests with the mortgagor, possession of the property in an Otti mortgage rests with the mortgagee: in essence, therefore, a usufructuary mortgage of lands.

Since the mortgagor has given effective possession to the mortgagee, he does not pay interest for the advance he received. In lieu of interest, the mortgagee enjoys the produce and profits from the land until the mortgage is redeemed. Therefore, the mortgagor is not able to redeem the mortgage at his wish at any time (unlike in the other mortgages where redemption is possible at any time) and the mortgagor has to wait until the mortgagee

reaps his benefit for a particular crop. If the mortgagor wishes to redeem, he must give prior notice to the mortgagee so that the mortgagee does not invest for the next seasonal crop.

We foresee the following problems arising out of such an arrangement:

- Where the mortgagee has leased farming land or rented residential or business premises to a third party and the third party is in possession.
- Where the mortgagee was unable to make a profit out of the possession of the mortgaged property and, therefore, now seeks interest for the money he advanced.
- Where the mortgagor is unable to pay the capital, but requires the property to live when he returns to the original place of abode following displacement.

In cases where, there is an urgent necessity to resume residence or to eke out a day to day living on the part of the mortgagor, some alternate security method should be introduced to secure the debt due to the mortgagee and return the property to the mortgagor.

In other circumstances, the mortgagee can vindicate his claim through the existing provisions of the Mortgage Act No.11 of 1953. The rule of prescription to sue on the bond might, however, pose a problem since the courts in the conflict-affected areas have not functioned for some years. We suggest, therefore, that the relevant provisions of the Mortgage Act be suitably amended to enable the mortgagee to sue on the bond, if he was not able to do so within the prescribed period due to displacement or non-functionality of courts.

ii) Property subject to conditional sale

The applicable law is: Debt Conciliations Board Act No.39 of 1941 and Common law

The incidence of conditional sale is very high in the Northern Province. It is a transfer with the right of the vendor to re-purchase the parcel of land from the transferee within a specified period of time on repayment of a certain sum of money. The general principles of the law of contract and the Debt Conciliations Board Act No.39 of 1941 apply to most cases. The problems that could arise are:

FOR THE ORIGINAL TRANSFEREE -

- On execution of the conditional transfer, the transferee does not get possession of the land although he pays the stipulated sum of money.
- Although the stipulated time has elapsed and the conditions have been fulfilled, the original transferor does not repay the sum of money within the stipulated period.
- The transferee is unable to obtain possession because either the original transferor is in possession or an IDP is now in possession.

FOR THE ORIGINAL TRANSFEROR -

- The original transferor was and is ready and willing to pay the money but is unable to find the transferee.
- The original transferor having been displaced now finds an IDP in possession and is unable to ascertain his claim because the ownership still rests with the transferee.

- The original transferee is in possession and does not agree to give possession though the transferor is ready and willing to pay the sum of money within the stipulated period (but during that period the transferee was not to be seen or either of them were displaced).

In most cases, a conditional transfer is, in effect, a mortgage. If an application is made to the Debt Conciliation Board before the expiry of the period of the condition, the Debt Conciliation Board can declare that the transfer is a mortgage. In some cases the real value of the land may not have been paid. If, as a result, the rule of *laesio enormis*⁸ is applied the transaction would be set aside.

At most, the existing law would enable a civil suit to vindicate the right of the transferee. On the other hand, it would also pave the way for a suit for specific performance at the instance of the transferor for the retransfer of the property by the transferee.

It is envisaged that conditional transfer of property would be a major issue since past experiences (during the 1960s, 70s and early 80s) show that instead of executing mortgages, the practice in the Northern Province was to execute conditional transfers.

Although current legal provisions adequately address this issue in the normal circumstances, it is our view that these provisions are not adequate in a conflict or post conflict period. Legal mechanisms now in place may not be sufficient to resolve these since the frequency of the disputes will be high. Further, accessibility to the Debt Conciliation Board might also be impossible since it is a centralised institution.

In addition, dissatisfaction of either party may arise in the resolution of this type of dispute. As a result of the conflict and displacement, the transferor being the original owner of the land will seek to have the land retransferred to him for the original sum and the interest stated therein for the period mentioned in the document. This will be prejudicial to the transferee, who had advanced the money but has not properly benefited from it.

On the other hand, the transferee will insist on the repayment of the capital sum with interest for the entire period without granting any concession due to the conflict and displacement. The transferee will be in a better position to bargain since the title rests with him. If the possession of the property also lies with the transferee, the transferor will be in a very weak position.

Taking both these positions into consideration it would be desirable that a mediatory or a conciliatory settlement be reached to the satisfaction of both parties. In this respect it is suggested that opportunity be granted to the original transferor to repurchase the property within a given time frame subject to all other conditions set out in the Conditional Transfer.

iii) Property mortgaged to Banks and other institutions

The applicable laws are: Recovery of Loans by Banks Act No. 4 of 1990; Banking Act No 30 of 1988; Debt Recovery (Special Provisions) Act No 2 of 1990; Money Lending Ordinance No.2 of 1918; Mortgage Act; and the Prescription Ordinance.

Properties mortgaged to commercial banks are always insured against risks. Invariably, the conditions of mortgage stipulate that the annual premium for insurance should be paid by the owner of the property and, if he fails, the obligee bank would pay the insurance premium on behalf of the owner.

During the period of conflict, however, the question of whether the property was properly insured at all material times should be considered. If not, the ultimate position would be that

⁸ If the consideration was less than half the market value the sale is liable to be set aside

no insurance claim would arise in relation to the property. Further, insurance companies may have refused to renew the insurance due to the conflict situation in certain areas, though the property would continue to be subject to mortgage.

The third situation could be: while the insurance was in tact, the insurance company may attempt to escape liability through interpretation of clauses in the insurance policy stating that damage due to terrorism or riots is not covered by the policy.

In all these circumstances, the owner may have to pay the loan and interest even if the property is damaged or destroyed.

In the recovery of the loans, commercial banks would attempt to use the simple and effective method of *parate*⁹ execution in terms of the Recovery of Loans by Banks Act No. 4 of 1990. This would be highly prejudicial to the owner who may not have been in a position to repay the loan due to the conflict situation. Under the Recovery of Loans by Banks (Special Provisions), the right to enforce a security by *parate* execution was granted to Licensed Commercial Banks registered under section 3 of the Banking Act No 30 of 1988. Section 4 of The Recovery of Loans by Banks (Special Provisions) provides that "the board of the particular Bank may by resolution to be recorded in writing authorise any person specified in the resolution to sell by public auction any property mortgage to the bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such loan and the interest due thereupon up to the date of sale".

Under Debt Recovery (Special Provision) (Amendment) Act No 9 of 1994, notwithstanding anything to the contrary in any law, a sum in excess of the principal may be recovered as interest.

In these circumstances the defaulter is left in the hands of the bank and he cannot seek any relief or remedy in court.

The provisions of the Debt Recovery (Special Provisions) Act No 2 of 1990 can only be invoked by a "lending institution" which is defined in Section 30 of the Act to mean a Licensed Commercial Bank within the meaning of the Banking Act, the State Mortgage and Investment Bank, National Development Bank, The Development Finance Corporation of Ceylon and a company registered under the Finance Companies Act No 78 of 1988 to carry on finance business, and includes a liquidator appointed under a Companies Act, No 17 of 1982 or any authority duly appointed, to carry on, or wind up, the business of any bank, corporation or company referred to above.

The above institutions may recover a debt due to it by an action instituted in terms of the Act by the procedure laid down in this Act. If the court is satisfied that the instrument, agreement or document produced appears to be properly stamped and not open to suspicion and not barred by prescription, the court would enter a decree *nisi*¹⁰.

After the decree *nisi* is served on the defendant, he has to obtain the leave of court to appear and defend. Pursuant to Section 6(2) of the amending Act the court may grant leave to the defendant to appear and show cause against the decree *nisi*, either:

- (a) Upon the defendant paying in to court the sum mentioned in the decree *nisi*;
or
- (b) Upon the defendant furnishing such security as, to the court, may appear reasonable and sufficient for satisfying the sum mentioned in the decree *nisi*.

⁹ The right to sell the property without recourse to court

¹⁰ This would be made absolute if no proper cause is shown otherwise to the satisfaction of court

- (c) Upon the court being satisfied that a defence prima facie is sustainable.

The Banks and the lending institutions may invoke the provisions of these Acts to recover their secured debt when normality returns to the affected areas. In the case of banks, the defaulted Mortgagor will not have any remedy to secure his property. Even in the case of lending institutions, the defaulter may not be able to defend his case as he has to obtain leave after furnishing adequate security.

These situations have to be remedied by means of amendments to the laws or by other methods; otherwise refugees and displaced persons may lose their house and property. A solution has to be found to resolve this issue in a just manner for both parties.

It is suggested that the right to parate execution be suspended, for areas affected by the conflict and an extended grace period for repayment or loan, or a waiver of interest for a certain period etc. be applied for the recovery of the loan.

When the Recovery of Loans by Banks (Special Provisions) Act, Debt Recovery (Special Provisions) Act and Debt Recovery (Special Provision) (Amendment) Act are suspended the procedure to institute a hypothecary action, that was in force before 1990, will be applicable. By this procedure, the mortgagor will get an opportunity to defend the case without depositing any security and he may be able to seek the leave of the judge to settle the loan in reasonable terms.

iv) Property mortgaged to individuals

The applicable laws are: Money Lending Ordinance No.2 of 1918; Mortgage Act; Prescription Ordinance.

In relation to property mortgaged to individuals, a hypothecary action has to be instituted to hypothecate the claim on the mortgage bond. Therefore, the mortgagor gets an opportunity to defend his case in court and enter settlement to pay the debt in instalments or seek other remedies to which he is entitled. In most cases, however, the mortgagee is affected due to prescription, as the courts were not functioning or the situation did not permit him to sue the defendant. But the limitation that interest is not to exceed the capital would be disadvantageous for the mortgagee since several years would have lapsed. A just and equitable solution, therefore, has to be found to the mortgagee as well, and the relevant provisions in the Money Lending Ordinance and the Mortgage Act should be suitably amended.

When the provisions of the Money Lending Ordinance and Prescription Ordinance are suspended a hypothecary action could be filed irrespective of the lapse of time and an interest could be claimed over the amount of the capital borrowed. In addition to the above suggestions to suspend certain laws, an alternate dispute mechanism may also expeditiously resolve this issue.

9) Partition of property

Some lands that are reclaimed by returning refugees and IDPs are co-owned by several persons. If the co-owners are neither unable to use nor occupy the property or partition it according to their respective shares amicably, the law provides a mechanism by which the land can be partitioned by court.

The applicable laws are: Partition Act No. 21 of 1977 (as amended); Tésawalamai; Thesawalamai Pre-emption Ordinance No.59 of 1947; Civil Procedure Code; Primary Court Procedure Act; Prescription Ordinance.

The following issues in regard to partition of property could arise:

1. Properties owned in common by several persons in respect of which a partition action in the District Court was pending at the commencement of the conflict.
2. Properties owned in common by several persons used and enjoyed by the several owners in separate divided allotments without a proper partition being made either by deed or by a court decree.
3. Properties owned in common by several persons but occupied and enjoyed by one co-owner either with or without the consent of the other co owners.
4. Properties formerly owned by one person, who had died during the conflict period, and the property has now passed to several heirs either on testacy or intestacy.
5. Properties, which became co-owned by the several methods (either by purchase, gift, succession etc.), but now occupied by a third party.

Due to the non-functionality of courts, pending partition cases may have abated. Interlocutory decrees could have been entered, but final partition plan could not have been made as a result of the conflict. Further steps to complete the pending cases could not have been possible due to one or more parties to the partition action being displaced.

Though parties were holding a common property in separate allotments they, now being displaced, are unable to occupy the divided allotments due to the destruction of boundaries and/or outsiders now occupying the properties. One co-owner may be in exclusive occupation of the property while other co-owners are either displaced or are refugees. Several heirs could have become owners of a property by succession, but have not entered into possession either individually or jointly. Trespassers may be occupying a common property. Heirs to a property may have no any knowledge of the property and/or any knowledge of the pending partition cases.

In analyzing whether existing laws adequately address these issues, the following may be noted:

The statutory provisions of the Partition Act and its amendments entitle a person to obtain superior title to a parcel of land free from all encumbrances (except those spelt out in the decree), provided all proper procedures had been followed and a final partition decree entered. A partition decree will, therefore, settle all property disputes and section 52 of the Act specifically empowers the decree holder to seek eviction of any person who is in occupation (except a tenant who is entitled to be heard) from the allotment of land.

Even if the land does not have a survey plan, a partition action requires two surveys to be made (preliminary survey and final survey) and, hence, the identification of the parcel of land would be complete when a partition action is filed.

The registration of *lis pendens*¹¹ in the correct folio is a pre-requisite for the issue of summons in a partition action. It is possible, however, that the correct folio at the land registry may not be available or may be destroyed due to the conflict. In such situations we recommend that a certificate to that effect from the Registrar of Lands and registration of *lis pendens* in a new folio should suffice for the issue of summons. We also recommend that a separate *lis pendens* register be maintained at the Land Registry in order to give the public notice of pending partition actions.

¹¹ A notice registered in the relevant folio of the Land Registry that a court action is pending

Further, it is suggested that the rule of abatement of actions per the Civil Procedure Code be suspended for all partition actions that were pending at the time the armed conflict commenced, and parties be encouraged to continue to conclude pending partition actions. Even commencement of new actions for co-owned property would be a welcome suggestion since the finality in a partition action solves all disputes in relation to land.

This course of action, however, also has its disadvantages. First, experience indicates that the time needed to conduct partition action is long and the process expensive. Second, institution of partition action would become difficult since the Act requires that all co-owners or their heirs and/or all possible claimants be added as parties. The whereabouts of some of the possible claimants may not be known and some may be missing or have died. Third, there is a possibility of a few co-owners getting together and filing a partition action without adding the names of the other co-owners.

It is, therefore, suggested that a preliminary certificate (such as a non-settlement certificate or a certificate confirming fitness for partition) be issued by a competent board (such as mediation board or the like) prior to the filing of the partition action. This would ensure that fraudulent practice is not resorted to and all necessary parties are added to the action.

The next issue involves a co-owner possessing land and claiming ownership to its entirety. In the case of *Corea Vs. Iseris Appuhamy*¹², it was held that a co-owner possesses the land for and on behalf of the other co-owners and could not prescribe against them. Specific ouster would, however, give a co-owner a prescriptive title. Due to the armed conflict, even if there had been a specific ouster the aggrieved co-owner may not have been in a position to vindicate his rights. Therefore it is suggested that the co-owner's prescriptive title should not be recognized for possession during the conflict, even if specific ouster is visible.

In regard to possession by a third party of a co-owned property, the law stipulates that a co-owner can vindicate his rights of possession without adding the other co-owners as parties. This position could be retained, and the mechanisms suggested for eviction of trespasser from a solely owned property could be applied.

In regard to the other issues concerning co-owned land, there is a possibility of co-owned land being sold to outsiders without offering it to the persons entitled to pre-empt, as required by the provisions of the Thesawalamai Pre-emption Ordinance No. 59 of 1949. This will apply to all lands situated in the Province of Jaffna. The law of Pre-emption is also retained in the Tamil Eeela Thesawalamai Law No 03 of 1993 and enacted by the orders of the LTTE. This shows that the retention of this provision is a will of the people of the land.

Persons who purchased undivided shares in a co-owned land, may have purchased it without the knowledge of the applicable law or it is possible that the whereabouts of the other co-owners were not known. The application of section 6(2) of the Thesawalamai Pre-emption Ordinance making the deed null and void may, therefore, not be reasonable in the circumstances.

It is suggested that if such purchase is made null and void, the purchaser should be properly compensated for any improvements made to the land.

In summary the following may be necessary:

1. Issue of a certificate that the folio is not available and provision to register *lis pendens* in a new folio and a *lis pendens* register
2. Suspension of the rule of abatement of actions for pending partition cases

¹² 15 NLR 65

3. Issue of a certificate prior to the filing of a partition action in District Court
4. The co-owner's prescriptive title should not be recognized for possession during the conflict even if specific ouster is visible.
5. Compensation for improvements made to the property.

10) Lands bought by relatives or others with money sent by people residing overseas who, on their return, claim the land

Those people externally displaced continue to be citizens of Sri Lanka having either sought asylum in other countries or having obtained permanent residence overseas. Many, however, intend to return to Sri Lanka and, in advance, buy property here.

The applicable laws are: Trust Ordinance No.9 of 1917; and Common law.

In these cases, the real purchasers advance the consideration for the purchase of land, but the lands are bought either in the name of a relative who lives in Sri Lanka or in someone else's name. Problems are likely to arise when they return and claim their land.

Section 84 of the Trust Ordinance reads: "Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration."

Hence, if the provider of the consideration claims the land, the holder of the paper title to the property should return the land since he holds it in trust for the provider of the consideration. In the event of a dispute, however, proof that the consideration was provided by one person who did not intend to pay or provide the consideration for the benefit of the transferee, becomes a matter of evidence; the burden of which should be discharged by the person who provided the consideration. There is likely to be a long drawn out civil dispute over this issue.

Though the law as it stands today is adequate, the mechanism to enforce its provisions (civil litigation in a District Court) may be inadequate, particularly if large numbers of such issues arise for resolution.

11) Forcible transfer of properties

There are instances where the owner of a property was forced or compelled during the conflict to transfer the property. In such cases, the applicable laws are: the common law; the Trust Ordinance.

During the conflict period, movement of people was restricted and people were not allowed by the armed and political groups to leave the area under their control if sufficient security was not given for the return of the person concerned. People were asked to transfer all the properties they owned to some others if they did not want to return.

In circumstances where a person is forced to transfer a property, the contract would be declared void ab initio at the instance of the transferor. The transferor could, therefore, sue the transferee and seek to have the deed of transfer set aside. The problem that would arise, however, concerns the proof of duress, and the fact that the transferor may not have

complained about duress at the relevant time, or soon thereafter. It may, of course, be possible to maintain that there were no proper authorities functioning at the time of the transfer to make complaints.

A civil dispute of this nature should be heard and decided without the pre-requisite of a complaint in the nature of a criminal action.

Section 88 of the Trusts Ordinance states: "Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid, and subject to any compensation or other relief to which the transferee may be by law entitled."

The forced transfer of a property is a contract that is "liable to rescission." And, therefore, Section 88 of the Trust Ordinance is applicable, and the transferee should hold the property in trust for the transferor.

There may, however, be instances where the transferee was not an actual participant in the forced transfer; i.e., a third party might have forced the transfer to be executed in the name of the transferee. Even in such circumstances section 88 would be applicable.

Further, the forced transfer may have resulted from extortion if the transfer was forced on the transferor under threat to his life or injury to his body. If this was the case, it is also possible to sue the transferee in a criminal suit. The right to the property, however, would have to be resolved in a civil suit.

In cases where the real value of the land was not paid, the rule of *laesio enormis* can be applied and the transaction could be set aside.

In our view, the law as it stands today is adequate but the mechanism to enforce its provisions (civil litigation in a District Court) may be inadequate, if large numbers of issues concerning forced transfers arise for resolution. If it is found that a forced transfer occurred due to pressure from an armed or political group, then our recommendation is that the assistance of an independent foreign agency be sought to resolve the dispute amicably.

12) Non-existent boundaries of property or encroachment of the lands

Privately owned properties in the North and East were secured by live fences and walls, which served as the boundary of the property. These may have been damaged or destroyed in the conflict areas. Paddy fields and other agricultural farms were also neglected during this period of war and the boundaries of these may also no longer be in existence. The problem is aggravated when persons who remained on the land or the persons who have returned to their lands, encroach onto a neighbour's land and demarcate a new boundary line.

The applicable laws are: Common law; Primary Courts Procedure Act; Definition of Boundaries Act No.22 of 1955; and Registration of Title Act.

Where a dispute in the determination of a boundaries causes (or is likely to cause) a breach of the peace, the provisions of Part VII of the Primary Courts Procedure Act could be invoked by either the Police or the parties to the dispute. Section 66(1) of the Act, refers to a dispute affecting land, which includes "any disputes as to the right to the possession of any land or part of a land and the buildings thereon or the boundaries thereof or..."

The procedure under this section is intended to maintain public peace. The orders made under this section are, therefore, only of a temporary nature and designed to maintain the status quo. Therefore a refugee or a displaced person who is affected will not get any benefit from these provisions.

Remedy under Roman Dutch Law

Whenever boundaries of lands belonging to different owners was uncertain either accidentally or through the act of the owners or some third person, an action for defining and settling boundaries was provided for under Roman Dutch Law. An action for definition of boundaries could, therefore, now be filed in the District court within which the land is situated. A refugee or a displaced person may be able to get relief by way of a District Court action, but he may have to wait for several years. Therefore this is not a suitable remedy to resolve this dispute within a short time.

Definition of Boundaries Ordinance

The provisions of this law could be invoked if the Government Agent finds the boundary of private land adjoining state land should be made or renewed in whole or in part. In these circumstances the GA, with the assistance of the Surveyor General, would survey the land, a procedure that is very effective and quick. When the boundary dispute is between the State and a private individual, therefore, it appears that the existing provisions are adequate to deal with the situation.

Registration of Title Act

The application of the Registration of Title Act to an affected area will have the effect of identifying each plot of land with reference to a survey plan. The title to each plot is determined and registered. Even though the implementation of this Act would resolve boundary disputes and encroachments, the Act has its inherent weaknesses and therefore it has not been implemented in most parts of Sri Lanka. The defects could be overcome in the Act by modifying it and providing for a voluntary registration. But at present this Act will not provide an effective solution to the Boundary disputes and encroachments.

Existing laws are, therefore, not adequate to address this issue.

The solution provided by the common law through civil courts cannot be reached within a short period and amendment to the laws or new legislation will not solve this problem. An alternate mechanism could solve this problem expeditiously.

13) Succession of property where the owner has died during the conflict period

There are several orphans in the conflict-affected areas, who are either unaware of or unable to assert their rights over properties that belonged to their parents.

The applicable laws are: Civil Procedure Code; Evidence Ordinance; Births and Deaths Ordinance; Jaffna Matrimonial Rights and Inheritance Ordinance; Matrimonial Rights and Inheritance Ordinance; Muslim law; and Common law.

In regard to the issue of orphans, parentage and other proof of ownership of properties will have to be ascertained by a monitoring group that will visit welfare centres, orphanages and investigate into the necessary details and document the same.

The non-availability of the death certificate to prove the death of a person to institute testamentary proceedings is a problem for successors. If the death has occurred by an act of the armed forces, and the body of the deceased was identified, an inquest would have been held under the emergency regulations and a death certificate issued. But in most other cases the persons are either in the missing list or there is no proper death certificate. All actions taken by the next of kin, in this regard, may have been futile.

An amendment to the Births and Deaths Ordinance giving powers to the Registrar of Births and Deaths to hold inquiries and to register the death may be a solution to this problem.

Testamentary proceedings will have to be instituted in cases where a person dies leaving a Will. It is the duty of the person who has the Will at the time of the death of the testator, or who finds the Will after the death, to produce the Will in the District Court of the district in which the finder/successor resides or the District Court of the district in which the testator died. As courts in the Northern Province did not function for a substantial period in 1990s, the parties could easily explain any delay and could institute testamentary proceedings.

If a person dies without making a Will or if the Will cannot be found and the value of the property exceeds Rs.500,000.00, an application for the grant of administration should be filed in the District Court which has jurisdiction. Delay in filing these applications due to the displacement of the applicant or the non-functioning of courts could be explained. If all documents are available, the internally displaced persons could institute proceedings in court explaining their delay. Refugees in foreign countries could also institute action by providing Power of Attorney.

A testamentary procedure in court will not be a lengthy proceeding unless the Will is challenged or there are legal problems of succession of property such as the applicability of personal laws. Challenge of a Will and problems in succession arise only in few cases and it should be determined by a court rather than by another mechanism. Even though fair numbers of cases are filed in the District Courts it will not take long to conclude. But we suggest that the provision for the abatement of actions be suspended in respect of pending testamentary cases.

14) A married woman's incapacity to deal with her property without her husband's consent under Tésawalamai

Section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance prohibits a married woman from disposing or dealing with her immovable separate property without the written consent of her husband.

The applicable laws are: Tésawalamai; Married Women's Property Ordinance No.18 of 1923; Jaffna Matrimonial Rights and Inheritance Ordinance.

Once a valid marriage has been contracted by a man under Tésawalamai, there are specific consequences that affect the legal rights of both spouses. The husband is under a legal obligation to support his wife and cannot claim that he should be maintained by the wife's property when he is unable to maintain himself through illness or otherwise. In contrast, a husband who is not subject to Tésawalamai could claim for maintenance under section 26 of the Married Women's Property Ordinance and the Maintenance Ordinance. A married woman governed by the Tésawalamai is not a femme sole; she is subject to the marital power of her husband. The right of the husband to give his consent to the alienation or mortgage of his wife's immovable property is an incident of his marital power.

Tésawalamai is a customary law and its principles are embodied in Jaffna Matrimonial Rights and Inheritance Ordinance. Due to the conflict, certain situations have arisen where the husband is displaced and his whereabouts are not known, or he is missing. In some other cases the husband is abroad as a refugee and is not in communication with his wife, thus preventing her from obtaining the consent of the husband to deal with her own property.

Section 8 of the Jaffna Matrimonial Rights and Inheritance Ordinance provides that the wife could obtain consent in certain circumstances from court to dispose of her property in the absence of a written consent of her husband. One such circumstance is when the whereabouts of the husband is not known. Permission is obtained by way of a summary procedure and will not take long to comply with.

An amendment to this provision allowing the wife the authority to deal with her property without her husband's consent needs serious discussions with the community of persons governed by Tésawalamai. It is a customary law and has other rights and obligations that follow.

We are of the view that the provisions of Section 8 of the Jaffna Matrimonial Rights and Inheritance Ordinance are adequate to meet the difficulties of obtaining the consent of the husband in the present situation.

15) The lands given under Crown Grants and Permits occupied by unauthorised persons

From time to time, the State has alienated land by way of crown grants and permits under the provisions laid down in the Land Development Ordinance. When the grantees and the permit holders who were displaced return to their lands they may not, however, be reoccupied.

The applicable laws are: Land Development Ordinance No. 19 of 1935; and Land Settlement Ordinance No. 20 of 1931.

The Land Development Ordinance (LDO) was enacted in 1935. The intention of the law was to encourage the development and cultivation of land in unpopulated areas. Grants and annual permits were issued under the LDO attaching certain conditions to the permit holder such as the development and/or occupation of the land. The permit was renewed annually and, if the conditions were met, the GA could decide to extend the operation of the permit and, in some cases, to transfer the permit into a grant. Between 1950 and 1960 grants were given in an extent of 5 acres per person under the Middle Class Scheme. Between 1960 and 1980 under "Swarna Boomi" Scheme lands that had been encroached onto were given to the encroachers. State lands were given at different periods depending on the necessity and availability of lands on outright purchase or on long-term lease for periods of 30 years, 60 years or 99 years. A crown grant confers good title to the grant holder subject to the conditions laid down in the grant.

Crown land is governed by the LDO, which is administered by the Land Commissioner subject to the direction of the Land Minister. The Land Commissioner delegates his powers to the Government Agent/District Secretary. A large number of Crown grants and permits are concentrated in Vavuniya, Batticaloa, Trincomalee, Anuradhapura, Killinochchi and Mannar.

The lands alienated by grants are described with reference to a plan and are registered in the relevant Divisional Secretariat. The permit issued in relation to a land is in a prescribed form and the amount to be paid annually will be determined in accordance with the regulations made in that behalf. The permit holders may not execute or effect any disposition of land alienated to them. If the holder of a permit or grant had sold his land to

another person, even though the sale will not be valid, the permit holder or the grant holder will not be entitled to claim the land as he had disposed it in violation of the condition.

Large extents of lands given on grants or annual permits are today not always held by the grantees or the permit holders or their successors. The original permit holders have been displaced and their properties are occupied and developed by unauthorised occupants. In some cases, the original holder of a permit or a grant has transferred the land to another person without the permission of the Government Agent. The situation would be different if the permit holder had given the land on lease or authorised another person to occupy the land due to his inability to remain in the area.

When the grant holder returns to his land and finds a trespasser in possession, the only remedy available to him is a vindicatory action against the trespasser. Similarly, a permit holder under the LDO also enjoys sufficient title to enable him to maintain a vindicatory action against a trespasser. As this is a regular District Court action, it will take a considerable period of time to resolve. Under the provisions of Chapter XII of the LDO, the Government Agent can also institute action to eject an unauthorised person who has encroached onto permit land. The Government Agent considers cases where the land of a displaced person is occupied by an unauthorised person, a licensee or a bona fide purchaser from a third person who refuses to vacate the land.

If the licensee, unauthorised person or a bona fide purchaser has developed the land or is a person falling under the category of persons entitled to receive state lands, we recommend that the Government agent, after regularising the occupation, may offer alternate state land to the original grant holder or permit holder.

In the event that the permit holder has been displaced and, by virtue of non-occupation of the land, lack of development of the land and/or failure to meet land tax payments, is in breach of the conditions attaching to the permit, the State may, after holding an inquiry, cancel the permit (ss106-110 of the LDO). The spouse or the nominated successor of a deceased person may lose the land, which was given on permit by failure to succeed as provided by the LDO. The LDO also provides that if the spouse, or the nominated successor, of a deceased permit holder does not succeed by obtaining a permit from the Government Agent under the provisions of the LDO to occupy that land, or failed to enter into possession within a period of six months reckoned from the date of the death of the permit holder or owner, he shall deem to have surrendered his title to that land to the state.

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

The Supreme Court has held that the surrender of land held on permit under the Land Development Ordinance does not mean the same thing as cancellation of the permit. Where a land has been surrendered to the crown by a permit holder, the Government Agent is not entitled to invoke the powers of the Magistrate's Court (under section 125 of the Land Development Ordinance) for the purpose of obtaining an order of ejectment of any person who is in possession of the land. In such a case the Crown must seek ordinary remedy.

The existing legislation or the common law does not adequately address these issues and claims of displaced persons who return to the property obtained under a Crown grant/permit, which is now occupied by another. In our view, instead of bringing legislative

amendments and legal reforms it will be more effective if administrative arrangements are made.

The State must provide new settlement schemes where alternate land and housing are given to those who are in unauthorised occupation of a land granted to another person. If the land is developed by that unauthorised occupant, he may be given compensation in addition to the alternate land and housing. But if the original grant holder is prepared to get an alternate land the unauthorised occupation may be regularised. This alternate lands/housing should be given as a grant and not on permit.

In relation to permit holders or grant holders who have not fulfilled the conditions or those who have not succeeded the lands due to disturbed conditions, they should be allowed to reoccupy the State land.

16) Landless IDPs or refugees

The issue of landlessness has no particular legal implication. It is a matter of policy for the State. We note that the State has implemented several housing projects to address the issue in areas outside the conflict-affected areas over the last couple of decades. We recommend, therefore, that the state should allocate resources and implement housing projects in the conflict-affected areas in the immediate future.

17) The control and maintenance of places of worship

Due to the displacement of trustees and managers, places of worship have been maintained by people who have remained in the vicinity of the temple or by unauthorized persons. With the return of the original trustees and managers, the control and maintenance of the places of worship has become an issue. There are also disputes in relation to trust properties (movable and immovable), pooja and festival rights.

The applicable laws are: Trust Ordinance; Muslim Mosque and Charitable Trust or "Wakf" No.51 of 1956; and Buddhist Temporalities Ordinance No.19 of 1931.

Hindu temples in Sri Lanka are under the control and management of the persons in whom the fabric is vested:

1. By right of private ownership;
2. By the grant or assignment of the owners of the land on which the temple is built;
3. By appointment by the congregation;
4. By deed of trust.

In Sri Lanka, certain customary laws are recognised and observed with respect to a trustee or manager, not only in his capacity as such, but in his fiduciary relationship to the congregation, and in matters affecting the temporalities of the temple and their proper appropriation. In addition to the rights of the manager and the trustee of a Hindu temple, the right to exercise the office of priest and the right of a worshipper are also recognised.

Under section 102, the Trust Ordinance provides the necessary mechanism to institute an action in a court, by any five persons interested in any place of worship, religious establishment or place of any religious resort, or, in the performance of the worship or service, or in the trusts express or constructive, to obtain a decree specified under (a) to (j) of that section.

Section 102 (3), however, provides a condition precedence to these actions, viz, the person interested in filing action shall present a petition to the Government Agent of the district in which the disputed temple is situated. Unless the Government Agent certifies that an inquiry has been held in pursuance of the said petition and it was reported by the Commissioner who was appointed to inquire in to this matter has reported –

- (a) that the subject-matter of the plaintiff is one that calls for the consideration of the court; and
- (b) either that it has not proved possible to bring about an amicable settlement of the questions involved, or that the assistance of the court is required for the purpose of giving effect to any amicable settlement that has been arrived at.

Under section 103 the ordinance provides for an arbitration mechanism by empowering the courts to refer the disputes for arbitration or inquiry.

The Trust Ordinance provides for a summary inquiry in relation to disputes of control, management and other rights of a place of worship by a Commissioner appointed by a Government Agent. There are also provisions for the courts to refer a dispute to arbitration. By these procedures a dispute relating to a place of worship is dealt with expeditiously and disputes that cannot be settled are tried in courts.

Similarly in Mosques and Charitable Trusts or “Wakf” Ordinance and Buddhist Temporalities Ordinance adequate provisions are made to settle disputes expeditiously.

Places of Christian worship

A majority of the denominational churches have been conferred with corporate personality by respective enactments of Parliament. The Catholic Archbishop is a body corporate. The Church of Ceylon (Incorporation) Act No 43 of 1998 (which repealed the Church of England Ordinance, the Episcopal Churches Ordinance and the Church of Ceylon Act) confers on the Bishop of Colombo and the Bishop of Kurunegala legal personality to hold property. Jaffna and Batticaloa Come under the Diocese of Colombo. The Methodist Churches and the Church of South India remain as unincorporated associations, though they have the corporate personalities of the Methodist Trust Association, and the American Ceylon Mission respectively to hold property on their behalf. The Assemblies of Gods of Ceylon and the Ceylon Pentecostal Mission are also bodies corporate capable of holding property.

In addition to these, a large number of local Churches are now functioning in the country. Some of them are incorporated as Association under the Companies Act No 17 of 1982. Some are trusts that are incorporated under section 115 of the Trust Ordinance and others are unincorporated associations and have different mechanisms by which their properties are held. The most common of these is for a group of persons from the church to hold the property in trust. In areas where private land is not available for purchase, churches have places of worship constructed on state land that has been given to a member of the church on a permit. Ordinarily this would amount to a non-compliance with the conditions of permit as it is used for a purpose not authorised. But if a construction of a dwelling place is permitted for the cultivator to reside, then he can claim the fundamental right to hold worship services in his private property under Article 14(1) (e) of the Constitution.

Our view is that the present laws are adequate to address any possible issue.

It has also been reported that unauthorized persons are occupying some properties belonging to places of worship. If the trustees, managers or worshippers wish to reclaim those properties, they will have to institute regular action to evict such persons. In these cases, we recommend that such disputes be referred to an alternate dispute settlement mechanism that will look into the claims of both sides.

18) Properties within the High Security Zones

IDPs and refugees whose properties are situated within High Security Zones are unable to return to their properties since they are prevented from entering these zones. We are refraining from making any pronouncement about the legality of these measures taken by the security forces since the matter is under discussion as a prioritized issue in the current peace negotiations.

The maintenance of High Security Zones has, however, caused severe hardship to the IDPs as they are prevented from occupying their houses and cultivating their lands. We recommend, therefore, that a scheme for compensation be devised for the time they were prevented from enjoying their full property rights of occupation and earning. The state should also make provision for alternate accommodation and livelihood until such time as the IDPs are able to return to their own properties.

The infrastructure and resources of the Judiciary in the war affected areas

At present, Sri Lankan courts function in all the conflict-affected areas except in areas controlled by the LTTE. The courts in the LTTE-controlled regions of Kilinochchi and Mullaitivu ceased to function before 1987, and have still not resumed work. The courts in the Jaffna Peninsula ceased to function in 1987. The Jaffna District Court/Magistrates' Court resumed functioning in 1996 and the remaining courts in the Peninsula resumed functioning in 1998. The courts in Vavuniya, Trincomalee, Batticaloa, Ampara, Mannar and Puttalam have functioned throughout the conflict interrupted on occasion by incidents of violence and other disturbances.

The buildings in which courts are housed in the Northern Province have been badly damaged and case records, documents, furniture and other equipment are missing. The courts in the Jaffna peninsula are presently functioning as combined courts¹³ in rented buildings that are not suitable for courts.

The judiciary in Sri Lanka is often criticised for delays in adjudicating disputes because of the application of the rules of procedures and evidence. Due to this delay a straightforward civil dispute might take 2 to 5 years for adjudication by a court of first instance¹⁴. The appeal processes may extend final determination of a case for a further 7 years or more. There are provisions for appeal from the Primary Court to the High Court of the Province and from that order to the Court of Appeal and a final appeal to the Supreme Court¹⁵. An order of the District Court is subject to appeal and revision, in the first instances to the Court of Appeal and from that order to the Supreme Court. Therefore a final determination of a civil dispute, not even taking into account the affects of the civil war on the judiciary, would take about 7 to 10 years.

While the language of the courts of the Northern and Eastern province is Tamil, the appeals in the Court of Appeal and Supreme Court are in English. The translation of the case record into English in case of an appeal also contributes to the delay and expense.

In Jaffna, the combined Magistrate's/District Court, which is presided over by a single judge, also adds to significant delay in determining property disputes as criminal cases take precedence over civil disputes.

¹³ The District Court and the Magistrates' Court are presided over by one Judge.

¹⁴ The primary Courts and the District Courts are the courts of first instances exercising civil jurisdiction.

¹⁵ The Court of Appeal and Supreme Court are housed in Colombo.

In ordinary circumstances, the delay in resolving disputes through the courts could be reduced by providing for additional courts, judges, staff and facilities. But in the current situation, with large numbers of displaced persons and the prospect of a large number of new disputes, we do not believe that expanding the judicial infrastructure will provide an adequate solution. For IDPs and refugees wishing to return, the expense of going to court and the lengthy delay in final determination may be a deterrent to returning. Frustration with an inability to resolve the dispute quickly and equitably through the courts may also heighten communal tensions.

The situation demands that disputes be resolved swiftly and in a just, equitable and effective manner. The judicial system is limited to resolving disputes according to the law and with reference to narrow legal remedies. In the case of unlawful secondary occupation, for example, both the original owner and the secondary occupant require effective remedies. If the law were strictly applied, either the owner would lose title due to the operation of the Prescription Ordinance, or, if occupation was less than ten years, the unlawful secondary occupant would be rendered homeless - neither of these outcomes are just or equitable for both parties. We have recommended an amendment to the Prescription Ordinance but, if amended, the unlawful secondary occupant would be evicted without any legal redress. It is clear that amendments to the law, while necessary, are not sufficient to produce humanitarian results.

For this reason, we are of the view that even a restored and better-resourced judiciary would be unable to grant adequate and equitable redress to the parties involved. We therefore recommend the establishment of an alternate dispute resolution mechanism empowered to resolve property disputes expeditiously and to recommend equitable relief and redress (see next section).

Recommendations for the judiciary:

- Courts should be housed in appropriate accommodation and provided with adequate equipment. Court records should be restored. Legally-trained staff should be recruited.
- Provision should be made for the Court of Appeal to have sittings in the conflict-affected areas as a circuit Court in order to speed up the appeal process.
- The courts that are currently functioning as combined courts should be separated into District and Magistrate Courts to allow the District Court to focus on the resolution of property rights cases.

Recommendations for the establishment of an alternative dispute resolution mechanism

It is beyond the capacity of the judiciary to deal fairly and expeditiously with the large number of property-related disputes that are anticipated to result from IDPs and refugees wishing to return to their homes. The expense and delay involved in resolving a dispute through the courts could be reduced if property claims were dealt with by an alternative dispute resolution mechanism. Moreover, parties who do not have an effective legal remedy will be able to obtain some relief/redress.

Article 4(c) of the Constitution of the Democratic Socialist Republic of Sri Lanka sets out that the judicial power of the people shall be exercised by Parliament through courts, tribunals

and institutions created and established, or recognised by the Constitution or created and established by law.

The Parliament has established a number of arbitration and mediation bodies for certain disputes. Arbitration Act No.11 of 1995 provides an arbitration mechanism to resolve disputes in relation to commercial transactions. Mediation Boards Act No.72 of 1988 provides a framework for Mediation Boards empowered to mediate claims less than Rs.25,000.00. The Industrial Disputes Act No.43 of 1950 as amended provides for the resolution of labour disputes by arbitration, conciliation and adjudication by labour tribunals. The Human Rights Commission of Sri Lanka Act No.21 of 1996 provides for the resolution of complaints through conciliation and mediation of complaints entertained by the Commission in relation to fundamental rights violations and also to make recommendations; Agrarian Services Act No 58 of 1979 provides for the appointment of the Commissioner of Agrarian Services who shall have the power of a District Court to hear and to decide any dispute referred to him under this Act.

With respect to property disputes, claims for less than Rs25,000.00 can be heard by the Mediation Board. This ceiling is far too low to cover the majority of property claims. Moreover, we understand that both lawyers and claimants push their claims above the current ceiling in order to have their claims heard in a court. The reason for this is that, where disputes involve complex interpretation of the law, parties would prefer the dispute to be heard by a legally-qualified body so that they do not compromise their legitimate legal rights and claims. In the past, the Ministry of Justice has unsuccessfully attempted to increase the ceiling set by the Mediation Boards Act with the aim of resolving more disputes through the process of mediation. This attempt failed due to opposition from members of the legal community and the public. We do not believe that an increased ceiling would be a solution as Mediation Board members do not have the adequate legal training and technical knowledge to resolve property disputes.

The Ministry of Justice is now in the process of drafting legislation to establish Special Mediation Boards. Special Mediation Boards will have jurisdiction in respect of certain categories of disputes specified by the Minister by regulation (e.g. All disputes relating to secured or unsecured debts, all disputes relating to environmental issues, etc.). The members of Special Mediation Boards, like those appointed to the Mediation Boards, will be respected members of the community. They will not be persons trained in the law.

Based on the views expressed by the Legal Aid Foundations of the conflict affected areas and the discussions we have held with lawyers and members of the judiciary. We recommend the establishment of a separate dispute resolution body to determine property-related disputes in the conflict-affected areas. The number of bodies and the location of the sittings would depend on the number of claims.

The body should comprise no less than two legally-qualified members, possibly retired judicial officers, appointed by the Judicial Services Commission for a specified period. Officers (preferably a degree holder or an equally qualified person) should be appointed for the purpose of recording the claims and making a report to the body. Qualified persons are recommended for this purpose to do away with the added expense and delay involved in representation on behalf of parties. In these proceedings the parties should not be permitted to be represented unless the party is a minor, ill, old or unable to attend without reasonable delay or expenses. Complaints to the body should be made by a party in person who claims the right, title or interest orally or in writing. In addition, the body itself should be empowered to initiate inquiries to settle disputes.

The alternative dispute resolution body should have the authority to resolve all property disputes irrespective of the value of the claim as well as the authority to issue interim orders for relief, and to recommend alternative accommodation, land or compensation. The

body's final determination would be entered with the relevant District Court as a decree of court. If a party was not satisfied by the decision of this body, that party may challenge the order by way of a writ in the Provincial High Court. The body should have the authority to issue a certificate in an appropriate case to a party to institute proceedings in relation to a property dispute in a district court. This certificate should be a prerequisite for instituting proceedings in the District Court.

An alternative dispute resolution mechanism may not be sufficient to deal with property disputes of a particularly sensitive political nature. For example, where one of the parties to the dispute is an armed or a political group, where the dispute is between a civilian and the security forces, or where the dispute is between persons of different ethnic or religious communities. In these circumstances, and against the background of deep mistrust between the different communities and the difficulty of enforcing settlement, it may be desirable for the dispute to be determined by a committee with international membership perceived by the parties to have neutral standing.

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