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Devolution of Land Powers

A Guide for Decision-makers

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Executive Summary

This is a practical guide for decision-makers on devolving land powers in Sri Lanka. It is meant to help comprehend the complex and sometimes contradictory provisions in relation to the devolution of powers over land. The guide is presented in three parts.

PART 1: THE FRAMEWORK examines the constitutional, legislative, administrative and institutional framework with respect to land in Sri Lanka, both prior to the Thirteenth Amendment and after.

The Constitutional Framework pertaining to land powers is contained in the Thirteenth Amendment to the Constitution. The subject of 'land' is devolved to the Provinces under Item 18 of the Provincial Council List. To the extent set out in Appendix II of the Ninth Schedule to the Constitution, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement are reserved for the Provincial Councils (PCs). There are two conditions to this general rule. First, State land continues to vest in the Republic and therefore may only be alienated under the seal of the President and written law governing the matter, but on the advice of the relevant PC. Second, they are subject to other special provisions set out in Appendix II regarding State land, inter-provincial irrigation and land development projects.

The Legal, Administrative and Institutional Framework stipulates the various authorities empowered under existing law to exercise powers relating to land. These authorities wield considerable powers in relation to 'State land'. State land applies to all land in Sri Lanka to which the State is lawfully entitled or which may be disposed of by the State and includes all rights, interests and privileges attached or appertaining to such land.' Under the existing framework, the Sri Lankan State is the largest landowner in the country, owning 82% of land. Moreover, powers over Policy Formulation on all subjects and functions are vested in the Cen-

tre, regardless of whether or not the subject has been devolved to the Provinces. However, the responsibility of policy formulation on land is given to the The NLC (National Land Commission) composed of representatives of the PCs. Despite these constitutional provisions, successive governments have failed to appoint a NLC. Consequently, the Central Executive has usurped this role. The most recent attempt by the central government to lay down guidelines for management of State land is the Interventions by the Central authorities on National Policy formulation titled 'Accelerated Programme on Solving Post-Conflict State land Issues in the Northern and Eastern Provinces'.

Appendix II reaffirms the authority of the Centre in relation to State land required for the purposes of the government in a Province and State land utilised for inter-provincial irrigation and land development projects. In both instances, the PCs are to be consulted, which appears to support the participation of the PCs to a certain extent. Moreover, the central government makes State land within the Province available to PCs on request.

Meanwhile, both the Central and Provincial governments can exercise powers over acquisition and requisition of land, as they are Concurrent List subjects. Such powers are yet to be exercised by PCs. However, the Centre has wide powers of acquisition under the Land Acquisition Act No. 9 of 1950 (as amended), Requisitioning of Land Act No. 33 of 1950, State Lands (Recovery of Possession) Act No. 7 of 1979 and the Land Resumption Ordinance No. 4 of 1887.

Appendix II also states that Powers over Acquisition and Requisition of the State land within a Province to any citizen or to any organisation shall be by the President, on the advice of the relevant PC. According to the Supreme Court's decision in the LMSL Case, no alienations may be made without the advice of the PC. Further, the Land Development Ordinance No. 19 of 1935 (LDO) provides for the system-

atic development and alienation of State land and provides for the issuing of permits and grants of land to deserving persons. Similarly, the Crown/State Lands Ordinance No. 8 of 1947 provides the President with the power to grant State land, issue long-term leases, and issue annual land permits. Moreover, the Land Grants (Special Provisions) Act No. 43 of 1979 provides that land already vested in the Land Reform Commission is vested in the State, thus enabling such lands to be easily transferred to the landless. However, much of the procedure for alienation of State land is provided for under the Land Circular No. 2008/4.

Pre-1989 land administration structure, land administration in Sri Lanka was managed within a completely centralised structure. The Minister of Land was the head of the structure and the Land Commissioner's Department was responsible for administration. However, under the Post-1989 land administration structure, the Centre has continued to maintain substantial influence over provincial land administration directly and indirectly. For example, the Ministry of Lands has since appointed 'Provincial Land Commissioners' as Additional Land Commissioners within the Ministry, thus bringing these provincial functionaries directly under the control of the Centre. Though the Governor of each Province appoints Provincial Land Commissioners, these officers have been circumvented by the Land Commissioner General, who relies directly on Divisional Secretaries for execution of functions within the Province.

PART 2: TO MAXIMISING THE FRAMEWORK of this guide, two issues have been focussed on. First, the manner in which the Centre has expanded its control over powers relating to land, and second, the manner in which provincial administrations and legislatures may attempt to assert some measure of control over land powers. It explores the potential for expanding the extent of control over land exercised PCs through the devolution of land powers. Such expansion involves simultaneously limiting central control over land under the existing constitutional framework.

The Centre maintains overriding control over land mainly through powers dealing with National Policy and Urban Development. Because 'National Policy on all subjects' is a reserved subject, there is a danger of the Centre claiming that any given Bill is based on 'National Policy', despite it being in respect of a subject in the Provincial List. National policy on land ought to be formulated by the NLC. However, the NLC is yet to be appointed. Hence a range of institutions at the Centre, including the Cabinet and the Land Commissioner's Department, currently formulate national policy on land. Further, the Urban Development Authority (UDA) Act has resulted in a large-scale appropriation of powers over land. It also grants the UDA the power to take over land belonging to a local authority or acquire private property, which and acquisition could be expedited under the Urban Development Projects [Special Provisions] Act.

The Centre also maintains control over land through the process of refusal to make available State Land required for Provincial Council Subjects. In terms of the Constitution, even where land, which is a devolved subject, is required for another devolved subject, such land must first be made available to the PC by the central government. Additionally, the Centre controls land through the alienation of State land, land utilised for reserved or concurrent subjects and regulation of private land.

In the above context, targeted interventions may be necessary to maximise devolution. Such interventions mainly relate to national policy and urban land. The primary avenue available to restrict the Centre's arrogation of the power to frame national policy is to challenge each instance of national policymaking in the absence of the NLC. Moreover, the UDA Act clearly deals with the Provincial Council List subjects of land and local government. Hence two types of initiatives may need to be taken to ensure that these powers remain with the PCs. First, the Act may be interpreted to mean that the Minister and public servants specified in the Act are in fact the Provincial Minister and provincial public servants. Second, PCs may pass their

own Urban Development Authority Statutes or remove the powers of the Urban Development Authority within its Province. If they were to do so, Article 154G(8) deems that the statute would override the provisions of the Act within the Province. Yet, the Centre may still stall such a statute if the Governor refuses to assent to the statute and the President subsequently refuses to refer the statute to the Supreme Court.

PART 3: REFORM: This guide offers comparative models for land devolution from past constitutional reform proposals within Sri Lanka and federal jurisdictions such as India, Canada and Australia.

Due to the inadequacy of the Thirteenth Amendment as a power-sharing model for Sri Lanka, several proposed constitutional reforms for devolving land powers have been proposed from time to time. Significantly, almost all such proposals refer in depth to the issue of devolution of land powers. This part examines several such proposals: the Mangala Moonesinghe Interim Report (1993), Proposals of the Movement for Constitutional Reform (1994), The Government's Proposals for Constitutional Reform (1995-2000) and Reports of the APRC (2006-2007). A close look at these constitutional reform proposals permits two main conclusions. First, devolution of powers relating to land is an important and sensitive issue, which needs special attention in a power-sharing model in Sri Lanka. Second, almost all proposed models recommended that land powers be devolved comprehensively to the Provinces or Regions.

A comparative analysis of devolution of land powers in federal jurisdictions relevant to the Sri Lankan situation requires an analysis of countries that have powers dealing with State land. This guide attempts to look at the federal constitutional models of India, Canada and Australia to exemplify constitutional arrangements that have devolved powers over land successfully. The Indian model grants substantial powers over land to the States. It bears some resemblance to the Thirteenth Amendment. Yet the major difference between the two Constitutions is that the Sri Lankan Thirteenth Amendment contains Appendix II, which substantially limits the devolution of powers in respect of land and reserves a number of important powers for the Centre. Moreover, the structural limits of the Thirteenth Amendment, which is placed within an explicitly unitary context, limits devolution. The Canadian Constitution Act of 1867 allocates powers between the federal and provincial governments. Accordingly, in relation to land powers, management and sale of public lands (Crown lands) is fully assigned to the Provinces. These provisions are extensive considering the fact that about 89% of Canada's land area constitutes Crown land. Hence the Provinces own the majority of such land. Moreover, in Australia, administration of Crown land is completely within the purview of the States and is governed effectively by the laws and institutional structures of the State governments. These structures provide a frame of reference for future reform and reinforce the notion that devolving land power is both a desirable and feasible endeavour.

Introduction

The purpose of this guide is to assess the devolution of land powers in terms of the Thirteenth Amendment to the Constitution of Sri Lanka. It is a practical guide and is meant to help comprehend the complex and sometimes contradictory provisions in relation to the devolution of powers over land.

Part I looks at the constitutional, legislative and administrative framework with respect to land in Sri Lanka, both prior to the Thirteenth Amendment and after.

Part II focuses on two issues. First, the manner in which the Centre has expanded its control over powers relating to land, and second, the

manner in which provincial administrations and legislatures may attempt to assert some measure of control over land powers.

Part III offers comparative models for land devolution from past constitutional reform proposals within Sri Lanka and federal jurisdictions such as India (which is debatably federal), Canada and Australia.

While this guide is primarily meant to function as a practical tool, the analysis contained herein demonstrates the need for urgent constitutional reform, and increased devolution of powers over land.

PART 1: THE FRAMEWORK

1.1. Constitutional Framework

The Thirteenth Amendment to the Constitution (Thirteenth Amendment) was introduced in 1987 to devolve certain powers of the government¹ to the Provincial Councils (PCs) as envisioned under the Indo-Sri Lanka Accord. The system of devolution of powers provided by the Thirteenth Amendment is within the framework of Sri Lanka's unitary Constitution and has been functioning for almost 25 years. Much has been written and debated on the success and failure to address its purpose, namely, a solution to the ethnic conflict.

The Thirteenth Amendment consists of a scheme of devolution by means of executive and legislative powers.² Each PC functions through a Governor (appointed by the President for a 5-year term) with executive powers, and a Board of Ministers consisting of a Chief Minister and four Ministers.³ Legislative power is devolved to each PC to make statutes applicable to the Province on matters provided in the Provincial Council List.⁴ The Thirteenth Amendment also provides for some form of decentralisation of judicial power with the establishment of the Provincial High Court,⁵ which has jurisdiction to determine certain matters falling within the legislative capacity of a PC.⁶

The capacity of a PC is limited to the subjects and functions specifically devolved by the Thirteenth Amendment. Accordingly, the Amendment has divided all governmental subjects and functions into three lists: the Provincial Council List (List I), the Reserved List (List II) and the Concurrent List (List III). The subjects and functions devolved to the PCs are provided in List I. The items which the PCs do not have any power to legislate upon, and that fall within the exclusive purview of the central government, are provided in List II. List III contains those functions relating to which both the Centre and the Provinces can legislate, with the Centre prevailing over the Provinces in cases of conflict.⁷

The devolution of land powers has a special importance in the history of Sri Lanka's ethnic conflict.⁸ Thus, related issues within the framework of the Thirteenth Amendment have received significant attention. The control of power over land has been a controversial issue because the Sri Lankan State is the largest landowner in the country and thereby holds considerable power over a majority of the land. Accordingly, the subject of 'land' is devolved to the Provinces under Item 18 of the Provincial Council List.⁹ Thus, to the extent set out in Appendix II, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement are reserved for the PCs.

These aspects of land administration are within the purview of PCs, which are in turn subject to two conditions in the Preamble to Appendix II. First, that State land continues to vest in the Republic and therefore may only be alienated under the seal of the President and written law governing the matter, but on the advice of the relevant PC.¹⁰ Second, they are subject to other special provisions set out in Appendix II regarding State land, inter-provincial irrigation and land development projects, and the NLC. The central government is, however, required to make land needed for PC subjects available to every PC, since the Centre remains the owner of State land. Furthermore, land required for subjects in the Reserved List and in the Concurrent List continues to be utilised by the Centre in the consultation with the relevant PC.

The authority over inter-provincial irrigation and land development projects is with the Centre. In addition, the Constitution provides for the establishment of a NLC responsible for the formulation of national policy with regard to the use of State land. Therefore, the exercise of powers, regarding State land apart from the above qualifications are with the PCs. In any

case, the exercise of powers on the above aspects (except transfer and alienation of land) regarding private land lies with the PCs.

1.2. The Legal, Administrative and Institutional Framework

1.2.1. What is State Land?

Sri Lanka has a total land area of 65,610 square kilometres¹¹ of which approximately 82 per cent is controlled by the State,¹² the remainder being privately owned. The Sri Lankan State is thus the largest landowner in the country. The State gained ownership of large amounts of land by virtue of enactments such as the State Lands Encroachments Ordinance No. 12 of 1840 and the Land Settlement Ordinance No. 20 of 1931. Further, the Land Reform Law No. 1 of 1972 fixed a ceiling on the extent of agricultural land that could be privately owned and vested all excess lands with the Land Reform Commission. The common definition of State land provided by the legislative enactments is 'all land in Sri Lanka to which the State is lawfully entitled or which may be disposed of by the State and includes all rights, interests and privileges attached or appertaining to such land.'¹³

1.2.2. Policy formulation

The main purpose of national policy is to provide principled guidelines to a State's executive, administrative and legislative functions. Powers over the formulation of national policy on all subjects and functions is vested in the Centre,¹⁴ regardless of whether or not the subject has been devolved to the Provinces. Thereby the PCs are expected to work within policy when making Statutes. The practical consequence of the reserved power of policy-making, however, is that the Centre has used it as a justification to enact – by a simple majority – legislation pertaining to matters devolved under the Provincial Council List, despite the limitations on Parliament set out in Article 154G(3) of the Constitution.

Despite the general provision stated above,

special constitutional provisions are included in Appendix II of the Thirteenth Amendment regarding policy formulation on the use of State land. Accordingly, the responsibility of policy formulation for land is given to the NLC by the Constitution.¹⁵

1.2.2.1. The National Land Commission

The constitutional provisions regarding the devolution of powers include the establishment of a NLC by the government. The NLC is responsible for the formulation of national policy with regard to the use of State land. There has been no provision made with regards to private land, which indicates that the NLC is not responsible for formulating policy on the use of private land. The NLC must have representatives from all PCs.¹⁶ It should further have a Technical Secretariat representing all the relevant disciplines required to evaluate the physical as well as the socio-economic factors that are relevant to natural resources management.¹⁷ With the assistance of the Technical Secretariat, the national policy formulated by the NLC should be based on technical aspects and not on political or communal aspects. In addition, the Commission should lay down general norms with regards to the use of land, in terms of soil, climate, rainfall, soil erosion, forest cover, environmental factors and economic viability.¹⁸ Furthermore, the Provinces are required to exercise the powers devolved to them with due regard to the national policy formulated by the NLC.¹⁹

Despite these constitutional provisions, successive governments have failed to appoint a NLC. This has deprived PCs of the opportunity to participate in policy formulation on land as required by the Constitution. According to an opinion of the Attorney General's Department on the matter, legislation is required for the formulation of the NLC. Although a Bill was drafted on the basis of this opinion in 1992, it was never enacted and lapsed after two years due to the dissolution of Parliament in 1994.²⁰

Some of the reasons expressed for the non-formulation of the NLC by central government functionaries include: first, the perception that

policy formulation should exclusively lie within Cabinet functions; second, and will dictate to the Centre; third, the possibility of conflict if the Centre and PCs are controlled by different political parties; and fourth, the unpreparedness of Centre land ministers to accept the NLC.²¹

1.2.2.2. Interventions by the Central authorities on National policy formulation

As a consequence of the failure to appoint a NLC, the country has failed to develop a comprehensive national policy on land as envisaged by the Thirteenth Amendment.²² Consequently, the Central Executive has usurped this role from time to time. This usurpation is problematic for two reasons. First, the unconstitutionality of the Central Executive exercising powers specifically reserved for a NLC; and second, the incompatibility of making national policy through Ministerial Circulars and Cabinet decisions with the Attorney-General's opinion that national policy must be laid down by a body established through legislation.²³ Furthermore, since the PCs are only required to give due regard to national policy formulated by the NLC,²⁴ they are not required to follow a national policy on the use of State land formulated by any other institution.

Nevertheless, at present, the main agencies purporting to engage in policy formulation on land are the Ministry of Lands and Land Development, the Land Commissioner General's Department and the Presidential Secretariat. As such, many Ministerial Circulars have been published laying down policy.²⁵ These go to the extent of advising the Provinces and District Administration to obtain instructions on national policy from the Land Ministry,²⁶ and further establish a Land Use Policy Planning Department under the Ministry.²⁷ With the end of the war and new governmental initiatives in the North and East, central authorities have fully appropriated the responsibility of policy formulation for the use of land in the North and East. This is evident in the controversial Land Circular of 2011/04 dated 22 July 2011 'Regulating the Activities Regarding Management of Lands in the Northern and Eastern

Provinces' issued by the Land Commissioner General's Department.²⁸ The Circular proposed a process for making land claims in the North and East, which included process for examining claims, securing documentation and titling land. Some of the key provisions of the Circular include: preference for those who owned land in the North and East prior to the war over any other subsequent claim for the land; guidelines in deciding the status of land alienated during the war; and preventing new land distribution except for security and development activities.²⁹

The most recent attempt by the central government to lay down guidelines for the management of State land is the Land Circular of 2013/01 titled 'Accelerated Programme on Solving Post-Conflict State Lands Issues in the Northern and Eastern Provinces' and issued by the Land Commissioner General. This Circular is applicable only to the Northern and Eastern Provinces and is addressed to Divisional Secretaries as implementing authorities. This Circular was issued to implement the policy decision taken by Cabinet on 4 May 2011 according to Cabinet Memorandum No: 11/0737/533/015. The policy decision was dated 7 March 2011 and was on 'Regularising land management activities in the Northern and Eastern Provinces'.

The programme introduced by the 2013/01 Circular only meant to apply to State land and was to be implemented in 2013 and 2014 under two programmes that identify and solve problems. The programme on identifying problems introduces a mechanism for persons to submit information on problems to the relevant Divisional Secretary, and also categorises such information.³⁰ The programme on solving problems involves distribution of lands 1) to landless people; or 2) to those who have lost lands and also involves solving various problems people experience with regard to State lands.

With regard to distribution of lands to landless people, although State land will not be alienated to landless persons until the land problem of those affected by the conflict are solved (according to a policy decision taken by Cab-

inet), there is no barrier to alienate lands for government approved development projects.³¹ On the issue of 'lost Land' the Circular refers to cases where people have lost land for reasons such as the use of land for development activities under government institutions and armed forces; and the permanent settlement of other people on the land. In both these cases, the land cannot be practically claimed again. According to the Circular, if land is lost, alternative land should be received in lieu of it after an assessment of required compensation. In the case of distribution of land to people who have lost land, the Land Kachcheri system (i.e. the procedure set out in the Land Development Ordinance as amended) is to be followed with special reference to Circular No. 2008/4 dated 20 August 2008.³² The Circular also introduces special programmes to solve problems relating to State land,³³ the procedure to be followed in cases of missing or destroyed documents³⁴ and the procedure to deal with lands for which Annual Permits were issued.³⁵

It is noted that none of these policies were made in consultation with the PCs, disregarding the relevant constitutional provisions. Unless the NLC – which is constitutionally empowered to make policy on land – is established, it is difficult to curtail the encroachment of the Centre into policy-making. However, it is also worth mentioning that due to its unconstitutionality, such policy-making by governmental bodies is open to be challenged in court.

1.2.3. Vesting of State Land

1.2.3.1. Land vested with the Centre

The preamble to Appendix II states: 'State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing this matter.' Therefore, despite land being a devolved subject, State land that is to be administered by the PCs continue to vest in the Centre. Additionally, Appendix II reaffirms the authority of the Centre in relation to State land in two specific instances:

- i. State land required for the purposes of

the Government in a Province, in respect of a reserved or concurrent subject may be utilised by the Government in accordance with the laws governing the matter. The Government shall 'consult'³⁶ the relevant PC with regard to the utilisation of such land in respect of such subject.³⁷

- ii. State land utilised for inter-provincial irrigation and land development projects.³⁸

The definition of inter-provincial irrigation and land development projects include irrigation and land development schemes that are utilising water from rivers that flow across Provinces; those that are utilising water diverted from outside the Province; and all schemes where the command area falls within two or more Provinces, specifically the Mahaweli Scheme.³⁹ Since these projects are the responsibility of the Government of Sri Lanka,⁴⁰ and because the Government is responsible for the administration and management of such projects,⁴¹ lands related to these projects are under the direct authority of the Centre. This is reaffirmed by Circular No. 02/233 of 1 December 1989 issued by the Secretary to the Ministry of Lands, Irrigation and Mahaweli Development, which states: 'accordingly, administration and management of inter-provincial schemes will be the responsibility of the Government and for certain activities, the assistance of the PCs would be sought.' Hence, these provisions effectively take away arguably the most important land development projects from the purview of the PCs.⁴² However, Appendix II has set out comprehensive provisions on the management of such projects, which support the participation of the PCs to a certain extent. These provisions include:

Clause 2:3 - The principles and criteria regarding the size of holdings of agricultural and homestead lands arising out of these projects are to be determined by the Centre in consultation with PCs.

Clause 2:4 – The selection of allottees for such lands will be determined by the

Centre having regard to settler selection criteria including the degree of landlessness, income level, size of family and agricultural background of the applicants. However, the actual application of these principles, the selection of allottees and other incidental matters connected thereto will be within the powers of the PCs.

Clause 2:5 - The distribution of all allotments of such land in such projects will be on the basis of the national ethnic ratio. In the distribution of allotments according to such ratios, priority will be given to persons who are displaced by the project, landless in the District in which the project is situated and thereafter those who are without land in the Province.

Clause 2:6 - In the case that an ethnic group cannot use its quota, they are to be given a quota from another scheme within a given time frame.

Clause 2:7 - The distribution of allotments in such projects on the basis of the aforesaid principles would be done as far as possible so as not to disturb very significantly the demographic pattern of the Province and in accordance with the principle of ensuring community cohesiveness in human settlements.

In the case of schemes controlled by the Provinces, settlement is to be on the basis of provincial ethnic ratios. These provisions appear to demonstrate significant concern with patterns of population distribution due to irrigation schemes, which continue to have a bearing on the ethnic conflict. However, it is questionable whether or not the proposed method serves this purpose.⁴³

1.2.3.2. Land for the use of Provincial Councils

Since the Preamble of Schedule II vests State lands that are required by a Council for a PC subject with the Republic, the central government makes State land

within the Province available to PCs.⁴⁴

The PCs are to administer, control and utilise such State land in accordance with all laws and statutes governing the matter. However, it is not clear how these lands are to be made available by the Centre.

Land Circular 02/232 titled 'Release of State lands required by Provincial Councils for Provincial Council subjects' attempted to answer this question.⁴⁵ This Circular proposed a set of procedures to process applications and to release those lands required by Provincial Councils. Accordingly, once an application (including a brief note on the proposed utilisation and survey plan of the land) for release of lands is made to the Ministry, it will then be processed and approved by a certificate of release by the Minister. If the request for release of lands extends to more than 500 acres, the approval of the Cabinet of Ministers in addition to the Minister of Land is required. Subsequently, the Land Commissioner should release the lands to the PCs through the Government Agent (presently the Divisional Secretary). Thus, the position of the PCs in requesting State land is similar to a private individual requesting a permit to use State land. The extent and use of State land by a PC is therefore limited to the prerogative of the Centre.

This Circular, however, is not legally binding on PCs and it is furthermore unclear as to how the Centre will respond to a Provincial Statute that sets out an alternative manner in which State land may be made available to itself.

1.2.3.3. Provincial statutes in relation to land administration and their status

The main purpose for demarcating a subject to the Provinces in a devolution package is to enable legislation in each Province. However, since the adoption of the Thirteenth Amendment, only three Statutes have been passed by Provincial Councils. They are:

- i. Land Statute, Statute No. 05 of 1994 of the North Central Provincial Council

This Statute contains general provisions to administer, control and utilise State land vested in the PC. It deals with matters relating to permanent and temporary alienation of land, the entering into agreements for the sale, lease and other dispositions, the issuing of permits for grantees of land and other related issues.⁴⁶ Its provisions correspond to those in the existing State lands Ordinance.

- ii. Land Development Statute, Statute No. 04 of 1994 of the North Central Provincial Council

This Statute has been enacted to make provisions enabling the implementation of the Land Development Ordinance regarding the land vested in the PC. Accordingly, it establishes a mechanism by which such land can be alienated or disposed-of for cultivators, persons of low or high income, educated youths within the Province.⁴⁷ It also establishes the post of Provincial Land Commissioner of North Central Province for the purposes of administering the provisions of this Statute.⁴⁸

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

This Statute has extensive provisions to clearly demarcate the land utilised by the PC. It has interpreted lands granted to the PC as per 1:2 of Appendix II to mean any State land already being used by the PC for the subjects of the PC at the commencement of op-

eration of this Statute. It also provides that the Provincial Minister of Land may publish in the Gazette the extent of such land subsequent to formal approval by the President.⁴⁹ It sets out a procedure by which any new State land may be obtained by the PC when required for any PC subject.⁵⁰ It further states that any land which the Government was continuing to use upon the effective date of this statute for a reserved or concurrent subject shall be considered to be land used by the Government in consultation with the PC in terms of the provisions of the Constitution.⁵¹

The current status of the implementation of even these three Statutes has been restricted based on the opinion of the Attorney General made on the recommendation of the Land Commissioner that such implementation must be stopped.⁵² In accordance with this opinion, several executive actions have been taken by the Secretary to the Ministry of Provincial Councils and the President's Secretary to compel the Western PC to stop the implementation of its Statute.⁵³

1.2.4. Powers over acquisition and requisition

Acquisition and requisition of property is a concurrent subject under Item 6 of List III. Therefore, both the Central and Provincial governments can exercise power over acquisition and requisition of land.⁵⁴ However, these powers are in fact exercised completely by the central government under the legislative framework mentioned below.

1.2.4.1. Legislative framework applicable to land acquisition and requisition

- i. Land Acquisition Act No. 9 of 1950 (as amended)

This Act provides for procedure to be followed in the acquisition of lands and servitudes for public purposes.

When land is required for a public purpose, a proposal is made by the government functionaries requiring the land to the Minister, who then makes a declaration published in the Gazette in accordance with the criteria established by law under section 5 of the Act. In practice, such proposals are made to the Provincial Land Commissioner who in turn makes recommendations to the Minister. Once the declaration is made, the Survey General's Department surveys the land. When the land is valued at over Rs. 500, notices are published in the newspapers and notices are also placed on the land. Those who have a claim on the land may then appear before the Acquiring Officer to assess and receive compensation.

The Act also provides for the awarding of compensation for acquired land. Accordingly, the Acquiring Officer should evaluate the compensation following an inquiry, based on the market value of the land. If a claimant is not satisfied with the decision of the Acquiring Officer, an appeal can be made to a Board of Review within 21 days of the notice of the award. A further appeal can thereafter be made to the Court of Appeal.

- ii. Requisitioning of Land Act No. 33 of 1950

This Act provides for a competent authority to take possession of any land with the approval of the President for certain specified purposes (such as maintenance of supplies or services essential to the life of the community), implementing any scheme approved by the President for the importation, storage or distribution of essential commodities by any gov-

ernmental institution and use or occupation by the Armed Forces or any visiting force. The Act also provides for the payment of compensation for land requisitioned in such a manner.

- iii. State Lands (Recovery of Possession) Act No. 7 of 1979

This Act provides for the recovery of the possession of State lands from unauthorised possessors or occupiers. A competent authority is empowered to serve a quit notice on any person who is in unauthorised possession or occupation of any State land. In addition, the administrative circular adopted in 1989 also suggests that PCs could mobilise under this Act in conformity with government policy and give Divisional Secretaries and PC officials the authority to act as competent authorities.⁵⁵

- iv. Land Resumption Ordinance No. 4 of 1887

This Act provides for the State to take back land that has been alienated by the State and subsequently abandoned by the owners for eight years or more. The powers under the Act are implemented by the Divisional Secretaries.

1.2.5. Powers of alienation

The most influential and politically sensitive aspects of administration of State land are powers relating to alienation. However, the devolution scheme introduced by the Thirteenth Amendment has excluded those powers from the purview of PCs by reaffirming the exclusive power of the President to alienate land.⁵⁶ Accordingly, Appendix II states that alienation or disposition of State land within a Province to any citizen or to any organisation shall be by the President, on the advice of the relevant PC, in accordance with the laws governing the matter.⁵⁷ The President is entitled to exercise this power based on Article 33(d) of the Constitution.

1.2.5.1. Importance of the advice of the relevant Provincial Council

The only provision of this clause that is conducive to the devolution of land is that alienation of State lands by the President should be on the ‘advice’ of the PC. The importance of this advice from the PC was expressed in the Determination on the Land Ownership Bill where the Supreme Court held that the only change made in respect to the alienation position of State land prior to the establishment of PCs is the introduction of a consultative process.⁵⁸ However, diverse interpretations have been expressed by a number of authorities on the strength of the advice and how far it can influence the decision of the President.⁵⁹

One of the issues is whether seeking advice of the relevant PC is imperative in alienating all State land. An opinion of the Attorney General expressed that the advice of the relevant PC will be required only for the alienation or disposition of State lands which have been made available to PCs in Clause 1:2 of Appendix II.⁶⁰

However, the Supreme Court implicitly rejected this view in *Vasudeva Nanayakkara v N.K. Choksy, P.C. former Minister of Finance et al.* (LMSL case), where it held:

Appendix II in my view establishes an interactive legal regime in respect of State land within a Province. Whilst the ultimate power of alienation and of making a disposition remains with the President, the exercise of the power would be subject to the conditions in Appendix II being satisfied. A pre-condition laid down in paragraph 1.3 is that an alienation or disposition of State land within a Province shall be done in terms of

the applicable law ‘only’ on the advice of the Provincial Council. The advice would be of the Board of Ministers communicated through the Governor. The Board of Ministers being responsible in this regard to the Provincial Council.⁶¹

Accordingly, under the prevailing law, no alienations may be made without the advice of the Provincial Council.

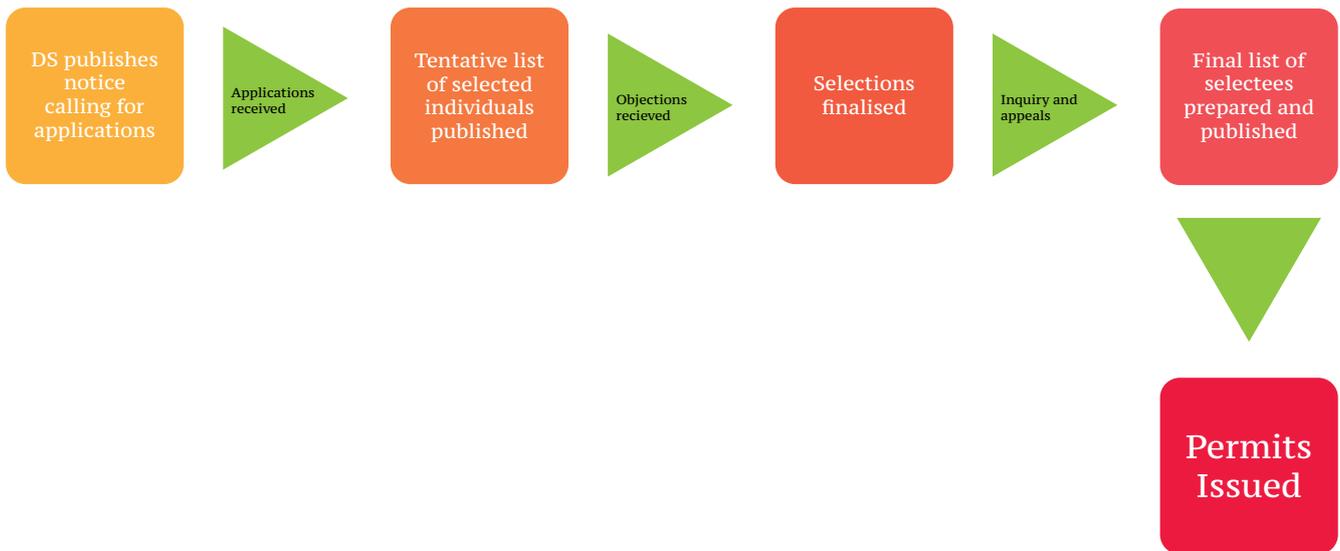
1.2.5.2. Legislative framework applicable to alienation of State Land

- i. Land Development Ordinance No. 19 of 1935

This Land Development Ordinance (LDO) provides for the systematic development and alienation of State land and provides for the issuing of permits and grants of land to deserving persons. It also establishes the post of Land Commissioner for the purpose of implementing those provisions.

Accordingly, alienation of State land under the LDO is in the first instance by way of a permit authorising the recipient to occupy the land upon the payment of an annual fee determined by the Divisional Secretary.⁶² Subsequently, the permit-holder may apply to convert such a permit to a grant, which confers legal ownership to the land. Furthermore, the LDO prohibits the alienation of land to persons who are not citizens of Sri Lanka.⁶³

The mechanism set out in the LDO to alienate land is explained below.



Permits

Permits under the LDO are given to the following classes of persons for the purpose of developing the land:⁶⁴

1. Peasant class;
2. Educated youth;
3. Persons with low income i.e. those who fall under village expansion schemes; and
4. Persons belonging to the middle class i.e. persons with a monthly income exceeding Rs.15,000 but that does not exceed Rs. 25,000 if unmarried and an annual income exceeding Rs.25,000 but does not exceed Rs. 45,000 if married.

The authority to issue permits under the LDO to recipients of land vests with the respective Divisional Secretaries.⁶⁵ The selection of persons to alienate State land under the Ordinance should be made at a Land Kachcheri.⁶⁶ A ‘Land Kachcheri’ is defined as a meeting held in the prescribed manner for the purposes of alienating State land.⁶⁷ Accordingly, the statutory mechanism provides that once a land proposed to be alienated is identified, the Divisional Secretary gives notification in the prescribed manner that a Land Kachcheri will be held and calls for applications.⁶⁸ After the Land Kachcheri, the tentative list of selectees is published, welcoming objections to and appeals this to a list with the view to finalise the selections. Subse-

quently, a date is fixed for the examination of objections and appeals pursuant to which a final selectees list is prepared and published. Thereafter, the permits are signed and issued to the selected persons by the relevant Divisional Secretary.

Some administrative changes have been made to the above-mentioned statutory mechanism. For example, the Land Circular No. 2008/4⁶⁹ introduces some important changes. Henceforth, any person in need of land should make an application to the Divisional Secretary to obtain a permit. Upon receiving the applications, the Divisional Secretary identifies suitable land and makes a recommendation to the Provincial Land Commissioner to hold a Land Kachcheri and the above procedure is followed at the Land Kachcheri. It is to be noted that since this Circular appears to be inconsistent with the statutory provisions, it is open to be challenged in court.

Grants

A permit may be converted into a grant where a permit-holder:

- a) has paid all sums required to be paid;⁷⁰
- b) has complied with all the other conditions specified in the Schedule to the permit; and
- c) has been in occupation and has fully developed, to the satisfaction of the Divisional Secretary, irrigated land for a period of three

years or high land for a period of one year.⁷¹ A grant is made upon the application made by the permit-holder, which follows a lengthy administrative process. The grant is issued under the hand of the President,⁷² which thus entitles such person to the ownership of the land. However, the grants may also be subjected to certain conditions.⁷³

To date, land has also been granted for several programmes such as Swarnabhoomi, Jayabhoomi, Ranbhoomi and Ranbima.⁷⁴

ii. Crown/State Lands Ordinance No. 8 of 1947

This Act provides for grants, leases, and other dispositions of State lands, as well as management and control of such lands. The President is given the power, on behalf of the country, to make absolute or provisional grants of State land and to sell, lease or dispose of State land in any other manner deemed fit.⁷⁵ The President is also empowered to accept the surrender of any land, on behalf of the State.

The authority to alienate land under this Ordinance vests with the President, which has been delegated to the relevant Minister, Land Commissioner General and Divisional Secretary.⁷⁶ However, all grants made under this Ordinance should be under the hand of the President.⁷⁷

Land permits may also be issued under the State Lands Ordinance. However, it is not similar to the procedure established under the LDO and there is no mechanism to convert such permits into grants. Therefore, land permits issued under State Lands Ordinance are limited and are known as Annual Permits, particularly in cases where immediate alienation is needed or for chena cultivation.

There are two kinds of grants that can be made under the State Lands Ordinance:

1. Special grants issued under section 6 of the Ordinance for any charitable, educational, philanthropic, religious, or scientific purpose or any other purpose which the President may approve of.

2. Free grants made with the approval of the President (under Regulation No. 20 under the Ordinance)

The most common form of land alienation under this Ordinance is by way of long-term leases.⁷⁸ This lease is made after a public auction or by tender, is an agreement between the President and the lessee, and is signed by the President.⁷⁹ In practice, a permit is initially given for the leased land, which is then converted into a long-term lease agreement.

iii. Land Grants (Special Provisions) Act No. 43 of 1979

This Act provides that land already vested in the Land Reform Commission is to be vested in the State, thus enabling such lands to be transferred (free of charge) to the landless. This Act specifically refers to agricultural and estate land vested in the Land Reform Commission. The President may, by an instrument of disposition, grant land to any citizen of Sri Lanka who does not own any land and who has the capacity to develop such land. Further, the Land Commissioner is empowered to implement the provisions of this Act. The grants made under this Act are also subject to certain conditions stipulated in section 5 of the Act. In addition, such land can be disposed of only with the prior written consent of the Land Commissioner General.⁸⁰

iv. Land Circular No. 2008/4

Apart from the above-mentioned legislative mechanisms, at present, alienation of State land is governed mainly through the Land Circular No. 2008/4, dated 20 August 2008. The main purpose of the Circular is to discontinue the regularisation of State land encroachments and provide a transparent procedure for alienation of State land. The scheme introduced by the Circular includes:

1. Identification of genuine landless persons within a Divisional Secretariat division;
2. Establishment of the transparent selection procedure which has been introduced by State land legislations; and

3. Prevention of organised or private illegal encroachments of State lands.

Accordingly, it requires the identification of genuinely landless persons within a Divisional Secretariat Division and registration of such persons on a list of persons eligible to obtain State land. The Circular also provides for new mechanisms to establish transparent procedures for alienation of State land under the LDO, State Lands Ordinance and Land Grants (Special Provisions) Act and accordingly, such alienation is restricted to persons registered in the above-mentioned list.

1.2.6. Existing administrative and institutional structure

Sri Lanka’s current land administration structure is complicated and often internally contradictory. Most Sri Lankan governmental institutions maintain the methods of administration introduced by the British during the Colonial era. The superimposition of political and administrative structures on existing methods has rendered comprehension of the existing scheme difficult.

1.2.6.1. Pre-1989 land administration structure

Before the introduction of the Thirteenth Amendment, land administration in Sri Lanka was managed within a completely centralised structure. At the top of the hierarchy was the Minister of Land, acting as a government representative and the head of the Ministry of Lands. The administrative head of the Ministry was the Secretary to the Ministry who was responsible for the overall administration of land.

The most important of the institutions placed under the Ministry with regard to land administration was the Land Commissioner’s Department.⁸¹ The powers relating to administration, development, recovery of possession and distribution of all State lands were vested within this department. The head of the department was the Land Commissioner General, a position created by laws such as the Land Development Ordinance⁸² and the State Lands Ordinance.⁸³



The posts of Deputy Land Commissioner and Assistant Land Commissioner functioned at the bottom of the hierarchy within the Land Commissioner’s Department.

Regional administration of land was vested in Government Agents, who were assisted by Assistant Government Agents and District Land Officers (DLOs). Officers at the divisional and village levels in turn supported the Assistant Government Agents and District Land Officers. The main function of these officers included implementing provisions of the LDO, State Lands Ordinance, State Lands (Recovery of

Possession) Act and the Land Acquisition Act.

1.2.6.2. Post-1989 land administration structure

With the introduction of the Thirteenth Amendment, the existing centralised structure needed to be changed to accommodate coordination between the Centre and Provinces. However, in reality, the Centre has continued to maintain substantial influence over provincial land administration directly and indirectly.

Central level

No substantial changes have been made to the central government structure other than those adopted to accommodate the Thirteenth Amendment.

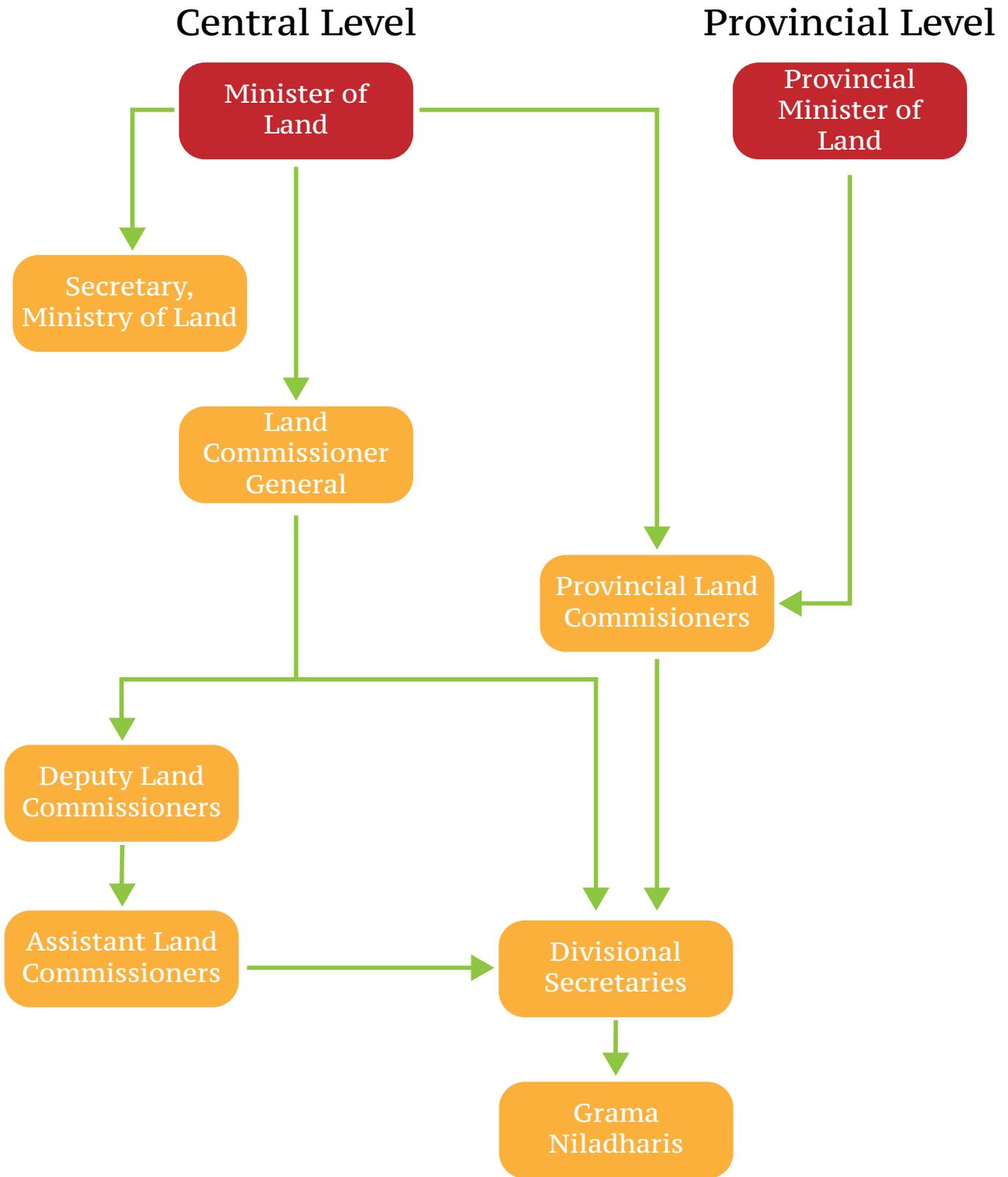
Similar to the pre-devolution system, the Ministry of Lands and Land Development occupies the apex of the hierarchy.⁸⁴ Although the Land Commissioner General's Department is subordinate to the Ministry, it is statutorily powerful and responsible for all land administration matters of the country. Although there are several Deputy and Assistant Land Commissioners, they only provide regional assistance to the Land Commissioner General in Colombo. The Ministry of Lands has since appointed 'Provincial Land Commissioners' as Additional Land Commissioners within the Ministry – thus bringing these provincial functionaries directly under the control of the Centre. Furthermore, with the introduction of the Transfer of Powers (Divisional Secretaries') Act No. 58 of 1992, the powers of the Government Agent stipulated in laws such as the LDO and State Land Ordinance were transferred to Divisional Secretaries. Recently, even decentralised Provincial Land Commissioners have been circumvented

by the Land Commissioner General, who has relied directly on Divisional Secretaries for the execution of functions within the Province.⁸⁵

Provincial level

The head of the provincial land administration structure is the Provincial Minister of Land who is the political authority responsible for each Province. The administrative authority on land administration for each Province lies with the Provincial Land Commissioner.⁸⁶ The Governor of each Province appoints the Provincial Land Commissioner. By virtue of the Provincial Councils [Consequential Provisions] Act, where Statutes have not been made in relation to land in the Provinces, the Provincial Land Commissioner is empowered to carry out the powers and functions of the Land Commissioner General as provided in the existing enactments of Parliament, such as the LDO and State Lands Ordinance in relation to land within the Province.⁸⁷ The Provincial Land Commissioner, though responsible for provincial land administration, has to depend on the Divisional Secretaries to carry out devolved powers on land due to the transfer of all powers of Government Agents in 1992.⁸⁸ The Divisional Secretary is appointed by the Cabinet on the recommendation of the Minister of Home Affairs. The resulting situation is that the Divisional Secretary is required to serve two levels of Government, one at the Centre and the other in the Province.⁸⁹

Furthermore, land administration of inter-provincial irrigation and land development projects (particularly the Mahaweli Development Project) continues to be under the Mahaweli Authority of Sri Lanka and functions independently from Provincial Land Commissioners.



PART 2: MAXIMISING THE FRAMEWORK

This part explores the potential for expanding the extent of control over land exercised by Provincial Councils through the devolution of land powers. Such expansion involves simultaneously limiting central control over that land under the existing constitutional framework.

2.1. Mechanisms through which the Centre Maintains Overriding Control

2.1.1. National policy

In sections 1.2.2.1 and 1.2.2.2, we have noted that the Constitution places the power to make national policy on land in the hands of the NLC. In the absence of such a Commission established by law, a number of central authorities - ranging from the Cabinet, to the Ministry of Lands and Land Development, the Land Commissioner General's Department and the Presidential Secretariat - exercise that power in a manner that is unconstitutional.

Because 'National Policy on all subjects' is a reserved subject, there has always been a danger of the Centre claiming that any given Bill is based on 'National Policy', despite it being in respect of a subject in the Provincial List. In recent times, a number of Bills have been described in the preamble as being relative to 'National Policy'. As alluded to in Part 1, while the Courts have resorted to the functional test to determine whether a Bill is in relation to the 'National Policy', the absence of a prescribed manner in which 'National Policy' should be formulated creates uncertainty. Moreover, it is unclear from the judgments in which the functional test is set out, as to how the functional test operates, and more critically, who is responsible for identifying 'National Policy'. While the test indubitably has the effect of questioning any invocation of 'National Policy' by the Centre and thus operates as a minimal check, its precise contours have not been identified yet. It is possible therefore, for a Supreme

Court that is averse to greater devolution, to either set out a new test, or to limit the functional test to the point of rendering it ineffective.

Furthermore, in terms of the former government's National Action Plan (NAP) to implement the recommendations of the Lessons Learnt and Reconciliation Commission (LLRC), the policy issues highlighted on land were to be addressed by a 'Fourth Land Commission'.⁹⁰ The Terms of Reference of this Fourth Land Commission would be similar to the Land Commissions appointed previously in 1927, 1956 and 1985 - at roughly thirty-year intervals. The Fourth Land Commission referred to in the NAP is merely a Presidential Commission of Inquiry with the power to make recommendations and is not mandated to formulate national land use policy, unlike the NLC envisaged under the Thirteenth Amendment. Hence, the Fourth Land Commission cannot be considered as a substitute to the NLC, which is a constitutionally mandated body with a permanent Technical Secretariat.

2.1.2. Urban development

2.1.2.1. UDA Act

The Urban Development Authority Act [UDA Act] of 1978 [as amended] has resulted in a large-scale appropriation of powers over land - particularly over lands vested to local authorities and private land - to a centralised Urban Development Authority [UDA]. The long title of the UDA Act describes the Act as 'a law to provide for the establishment of an urban development authority to promote integrated planning and implementation of economic, social and physical development of certain areas as may be declared by the minister to be urban development areas and for matters connected therewith or incidental thereto.' In terms of section 3 of the Act, the Minister may identify any area suitable for development as an 'urban develop-

ment area' through an order published in the Gazette.⁹¹ Presently, the Central Minister is in fact exercising such powers.⁹²

Section 8J of the UDA Act prohibits any government agency or any person from carrying out a 'development activity' in any gazetted development area except under the authority of a permit issued by the UDA. The definition for 'development activity' provided by the Act is wide-ranging and covers the entire gamut of activity in relation to the development of land. The definition provided by section 29 reads:

... the parcelling or sub-division of any land, the erection or re-erection of structures and the construction of works thereon, the carrying out of building, engineering and other operations on, over or under such land and any change in the use for which the land or any structure thereof is used, other than the use of any land for purposes of agriculture, horticulture and the use of any land within the cartilage of a dwelling house for any purpose incidental to the enjoyment of a dwelling house, not involving any building operation that would require the submission of a new building plan.

Furthermore, section 15 provides that where the Minister certifies that any land or interest in land vested in a local authority is required by the Authority for any purpose of the Authority, the Minister may by Order published in the Gazette, vest such land or interest in such land in the Authority, subject to conditions, if any. Such an order would convey 'absolute title to any land or interest in land and to any buildings and other structures on such land as specified in the Order, with effect from the date specified therein and free of all encumbrances, and no compensation shall be payable by the Authority in respect of such land or interest in such

land or buildings or other structures therein.' Sections 16 and 17 effectively permit the acquisition of private and state property for the UDA, while section 18 permits the alienation of any interest in land held by the Authority to third persons.

Section 28A sets out the powers reposed in the UDA to take steps where unauthorised developmental activities have taken place. These powers include the demolition or altering of any building, provided sufficient notice is given.

2.1.2.2. Urban Development Projects [Special Provisions] Act

The Urban Development Projects [Special Provisions] Act of 1980 provides for an expedited process of land acquisition. If the President, upon a recommendation of the Minister in charge of Urban Development, is of the opinion that any particular lands are urgently required for the purpose of an urban development project, he may specify such lands in an order published in the Gazette. Further, the jurisdiction of the Court of Appeal is ousted and vested in the Supreme Court, which shall render its decision within two months, thus denying an aggrieved party the right of appeal.

2.1.2.3. Powers over land

The powers over urban land exercised by the President, the Minister in charge of Urban Development, and the UDA are extensive. These include powers over land use and planning, land alienation, land development and land management. Thus, the UDA's ability to restrict any land development on gazetted areas, and its ability to take over lands vested in local authorities directly conflict with List I [Provincial List] subjects of land (Item 18) and Local Government (Item 4).

2.1.3. Refusal to make available State Land required for Provincial Council subjects

The extent of devolution of powers over land is laid down in Item 18 of the Provincial List. It states the following powers are devolved: 'Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II.' Clause 1:2 of Appendix II in turn sets out the manner in which land required by the Provinces for use in respect of a PC subject is to be made available. It states: "[g]overnment shall make available to every PC State land within the Province required by such Council for a PC subject. The PC shall administer, control and utilise such State land, in accordance with the laws and statutes governing the matter.'

Thus, in terms of the Constitution, even where land, which is a devolved subject, is required for another devolved subject, such land must first be made available to the PC by the 'government'. From the manner in which the word 'government' has been used in Appendix II – in contradistinction to Provincial Council – it is apparent that 'government' refers to the central government. This is an ambiguous situation for a number of reasons. First, it is uncertain as to which central government authority is empowered to make lands available to the Province. Second, it is not clear as to whether the central government has the discretion to refuse a request by the Province, and if so, what recourse the PC can have to challenge such refusal. The use of the phrase 'shall make available' suggests that there is no discretion involved, but in the absence of a mechanism through which that provision could be interpreted authoritatively, confusion abounds. Finally, it is further unclear as to whether a request to the central government ought to be made by the PC at all. Apart from the administrative arrangement set out in Land Circular 02/232 mentioned above, there are no statutory provisions that set out how and when the 'government' could make land available to the PC.⁹³ One possible interpretation of Clause 1:2 of Appendix II is that it merely prohibits the central government from

interfering with a PC's use of State land required by the Council for PC subjects, and that it does not require prior-approval.

When the Western PC passed its Land Development Statute of 2003, it addressed the issue of obtaining land required for PC subjects. Section 3 provided that 'whenever a new State land is required for any Provincial Council subject, the Provincial Council shall request the President to grant that land to the Provincial Council.' However, while the Statute was an attempt to provide an answer to the constitutional silence on how lands may be obtained by the PC, and while the Centre resisted its implementation, it does not answer any one of the questions we have raised in the previous paragraph. In fact, the Statute-makers appear to have assumed that since the power to alienate state land is bestowed solely on the President, only the President can make lands available to PCs. Thus, even in terms of the Statute, the Centre maintains an overriding control over State lands, even in relation to subjects appearing to be devolved to PCs.

2.1.4. Alienation of State Land

Clause 1:3 of Appendix II states: '[a]lienation or disposition of the State land within a Province to any citizen or to any organisation shall be by the President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter.'

As we have noted previously, land alienation is the most politically contentious issue surrounding land powers, and PCs are precluded from exercising substantial control over these powers. We also noted that in terms of Vasudeva Nanayakkara's case, land could only be alienated by the President on the advice of the PC. Nevertheless, the PC has no power to alienate land unilaterally. The 'interactive legal regime' alluded to by the Supreme Court requires consultation. However, the higher courts have not ruled on the question of whether the President

is bound by the advice of the PC, in the manner that the Governor is when exercising his powers in terms of Article 154F[1]. While it is possible that the Court would adopt such an interpretation, it is not likely, because Courts have traditionally been reluctant to curb the powers of the President. Moreover, even if it did, given the immunity enjoyed by the President, challenging the President's inaction is precluded by law. While PCs may attempt to initiate land alienation by advising the President to do so, the President effectively maintains control.

Further, any alienation must be 'in accordance with the laws governing the matter'. Clearly, therefore, PC Statutes cannot provide for the manner in which lands may be alienated. That may only be done by law, which is defined by Article 170 of the Constitution to mean 'any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council.' Critically, however, these laws, such as pre-independence laws, do not provide for any mechanism through which PC advice may be obtained. The LDO for instance, provides for land alienation through a process originating with a Land Kachcheri called by the Government Agent i.e. District Secretary, but does not specify how a PC may transmit its advice. Thus, the provision in Appendix II, as interpreted by the Supreme Court as requiring that alienation be only on the advice of the PC, appears to be

incongruous with the same provision that such alienation be 'in accordance with the laws governing the matter'.

The Western PC's Statute also attempted to address the apparent contradiction in the law. Part III of the Statute contains several provisions that mirror those of the LDO. It too provides for alienation through a Land Kachcheri, but in this case, conducted by the Provincial Commissioner for Land, and not his central counterpart. The Statute provides for the request for alienation to be made by the Board of Ministers, with the President making the final decision.

The Provincial Councils [Consequential Provisions] Act of 1989 states that any power to be exercised by a Minister or public official in relation to a subject found in the Provincial Council List (List I provided by an existing law), be read as if it were to be exercised by the Provincial Minister or Provincial Public Service. Thus, if powers over land are construed to be devolved powers, then references to the Minister and Land Commissioner in the LDO must be construed to be references to the Provincial Minister and Provincial Land Commissioner. In practice however, the LDO continues to be administered primarily by officials appointed by the Centre.

2.1.5. Land utilised for reserved or concurrent subjects

The Centre maintains control over land in the Province required by it for Reserved and Concurrent subjects.

Clause 1:1 of Appendix II states:

‘State Land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilised by the Government in accordance with the laws governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilisation of such land in respect of such subject.’

Here, unlike in cases where the Province requires State land and such land has to be made available to the PC by the government, the land is merely utilised by the government, provided only that the Centre shall consult the PC in that respect. As we have noted, the duty to consult, unlike the duty to receive advice, does not usually entail a prohibition on further action without the permission of the other party. Thus, as long as the Centre notifies the PC and receives its views in respect of the utilisation of land envisaged, the requirements of the law would be satisfied.

Thus, these provisions permit utilisation of State lands within the Provinces by the Centre without substantive restraints. In the event a disagreement over the utilisation of such land, it is open to the Centre to utilise such lands. More critically, however, since the decision to ‘utilise’ is not subject to any checks beyond the need to consult with PCs, it would be open to the Centre to claim that the entirety of State land within a Province is required for Reserved and Concurrent subjects, thus thwarting any Provincial influence over State lands within the Province.

2.1.6. Regulation of private land

As stated above the powers of the government regarding land administration chiefly involve State lands. The government’s involvement in

the regulation of private land was mainly limited to the maintenance of a land title registration system under the Registration of Documents Ordinance No. 8 of 1863. However, due to the significant flaws in their system, which resulted in a large number of land disputes, the Registration of Title Act No. 21 of 1998 was passed. The Act generally maintains the fundamental advantage of a system of registration of title by passing the registered title conclusively to the claimant. Under sections 13 and 14 of the Act, the Commissioner of Title Settlement shall investigate claims on designated land parcels and grant First Class titles to claimants with absolute ownership and Second Class titles to claimants who do not qualify for the former but who are in bona fide possession of the land. Such Second Class titles will be elevated to First Class titles upon completion of a ten-year period of uninterrupted and unchallenged possession from the date of registration as a Second Class Title. The Commissioner will register such titles in the Title Register according to section 20 of the Act and the entries in the Title Register will be conclusive evidence of the rights conferred therein.⁹⁴ Under the Rajapaksa government, the implementation of the provisions of the Act through programmes such as ‘Bim Saviya’ widened the regulation of private land by the government through a comprehensive title registration system. The Bim Saviya programme is the method of implementation adopted by the former government to implement the above-mentioned provisions of the Act and facilitates a system to survey and demarcate the land, ensure ownership and to issue Title Certificates.

The institutions empowered to carry out the functions under the Bim Saviya programme included the Land Settlement Department, the Survey Department, the Land Commissioner General’s Department under the Ministry of Lands and Land Development and the Registrar General’s Department under the Ministry of Public Administration. Although land is a devolved subject under the Constitution, and reg-

ulation of private land is within that purview according to the Determination on Town and Country Planning (Amendment) Bill, all the institutions involved in the process belong to the central government. The PCs do not play any significant role in the decision-making process. The role of the Provincial Land Commissioner is limited to the assistance provided to the Land Commissioner General's Department in Colombo as a regional officer, and therefore the programme as a whole undermines the devolution of land powers to the Provinces.

2.2 Targeted Interventions Necessary to Maximise Devolution

In this section, we examine the possibility of targeted interventions within the existing constitutional, legal and political framework to expand the extent of devolved powers.

2.2.1. National policy

As we have noted previously, the absence of a NLC has led to a number of central authorities claiming the right to draw up national policy on land issues. Thus, a number of commentators have argued for the establishment of a NLC, so as to facilitate coherence in, and depoliticise the framing of, national policy on the use of State land.

The Centre has opposed the appointment of a NLC, as commentators have noted, because of fears that such a Commission would be partial to the Provinces and would undermine the authority of the Centre to frame national policy. However, the composition of the Commission is, in terms of Appendix II, a matter for the central government. Thus, provided that all PCs are represented in the Commission, it is open to Parliament to create a Commission that is heavily weighted numerically towards the Centre. As a matter of fact, the draft Bill provided for precisely that kind of majority to central government nominees.

Given this background, two different sorts of interventions are possible to expand the scope

of devolution.

1. Challenge any reliance by the Centre on 'National Policy' to justify legislation on the subject of land. Such a challenge would be based on the assertion that in terms of the Constitution, the only body mandated to frame National Policy on the use of State land is the NLC, and therefore, that any purported attempt to frame National Policy by any other body is unconstitutional.
2. Advocate for and ensure enactment of a NLC Act. However, in the prevailing political climate, it is doubtful whether the Parliament and the Executive would be even willing to consider passing such a law.

Given the above, the only avenue available to restrict the Centre's arrogation of the power to frame National Policy is to challenge its ability to do so in the absence of a NLC.

2.2.2. Urban land

As we have noted previously, the UDA Act is clearly in respect of the Provincial Council List of land and local government. This raises a number of questions. First, is the Provincial Councils [Consequential Provisions] Act applicable to the UDA Act? While section 2 of the UDA Act clearly contemplates a national Authority evidenced by the reference to the establishment of an Authority 'which shall be called the Urban Development Authority of Sri Lanka', it would stand to reason that, given the exercise of devolved powers by the UDA, the Act should be interpreted to mean that the Minister and public servants specified in the Act are in fact the Provincial Minister and Provincial public servants. This interpretation would, however, be anomalous, in that there would have to be nine Provincial Urban Development Authorities, which the UDA Act does not even remotely envisage. At the functional level, however, an official of the UDA functions in every local authority in declared urban development areas for the purpose of implementing planning functions at the local level.

The second question is: can the PCs pass Statutes repealing or amending the Urban Development Authority within the Province? In our view, there would be no constitutional bar to doing so, given that the UDA exercises devolved powers. Thus, it is open for PCs to pass their own Urban Development Authority Statutes or remove the powers of the Urban Development Authority within its Province. If they were to do so, Article 154G(8) deems that the Statute would override the provisions of the Act within the Province. In this respect, Item 5 of the Concurrent List (List III) warrants attention. Item 5 reads: 'National Housing and Construction - the promotion of integrated planning and implementation of economic, social and physical development of urban development areas.' It may be argued that the UDA Act pertains to integrated planning and implementation of economic, social and physical development of urban development areas. However, it should be noted that in applying the functional test, the use of the phrase 'urban development' in the UDA Act does not bring it within the scope of the Concurrent List. On the contrary, the Concurrent List subject is limited to 'National Housing and Construction', while the UDA Act defines 'urban development areas' as those that the Minister opines are 'suitable for development'. The title 'urban development areas' is a misnomer, since the UDA is neither limited nor concerned primarily with urban development per se. Consequently it would appear that the Concurrent List does not correspond to the functional powers set out in the UDA Act.

However, even if the UDA Act is interpreted to be in respect of a Concurrent List subject, the passage of a Provincial Statute would render the UDA Act inoperative within the Province in

terms of Article 154G(9). The Article reads:

Where there is a law with respect to any matter on the Concurrent List on the date on which this Chapter comes into force, and a PC established for a Province subsequently makes a Statute on the same matter inconsistent with that law, the provisions of the law shall, unless Parliament, by resolution, decides to the contrary, remain suspended and be inoperative within that Province, with effect from the date on which that Statute receives assent and so long only as that statute is in force.

2.2.2.1 Constitutional limitations on such action

Even if a PC were to vote in favour of a Statute repealing or amending the Urban Development Authority Act within that Province, the Centre could nevertheless stall the operation of the Statute. Article 154H provides that Provincial Statutes require the assent of the Governor. Where the Governor refuses to assent, the Statute is sent back to the PC, which may amend the Statute prior to passing it again, or pass it again without amendments. The Statute would then have to be reserved for reference by the President to the Supreme Court for a determination on whether the Statute is inconsistent with the Constitution. However, if the President were to refuse to refer the Statute to the Supreme Court, there is no conceivable way in which his inaction may be reviewed due to the immunity enjoyed by the President in terms of Article 35 of the Constitution. Thus, even Provincial Statute-making power is effectively subject to the decision of the President.

PART 3: REFORM

This section explores the options available for expanding regional control over land beyond the maximum scope under the current constitutional framework.

The Sri Lankan Constitution declares the Republic of Sri Lanka to be a unitary state⁹⁵ and did not include a system of devolution of powers until the Thirteenth Amendment was enacted in 1987. The model of devolution introduced by the Thirteenth Amendment was declared by the Supreme Court to be within the unitary structure.⁹⁶ The measure of devolution afforded under the Thirteenth Amendment requires further thought and constitutional reform may be necessary to provide decision-making autonomy that satisfies national and regional minorities. It is timely therefore to consider possible suggestions for effective future reform pertaining to devolution of land powers. In this Part, we examine proposed constitutional arrangements made in Sri Lanka post-1987. We also examine the method used to devolve land powers to regions in several federal constitutional models.

3.1. Proposed Constitutional Reform for Devolving Land Powers

Due to the inadequacy of the Thirteenth Amendment as a power-sharing model for Sri Lanka, several constitutional proposals have been proposed from time to time. Significantly, almost all of such proposals refer in depth to the issue of devolution of land powers. Since 1987, there have been several attempts to propose a wide range of constitutional proposals including: the Mangala Moonesinghe Interim Report (1993), Proposals of the Movement for Constitutional Reform (1994); the Government's Proposals for Constitutional Reform (1995-2000); the Interim Report of the Sinhala Commission (1997); the LTTE's ISGA Proposal (2003) and; Reports of the APRC (2006-2007).

3.1.1. Mangala Moonesinghe Interim Report (1993)

A Parliamentary Select Committee was appointed in 1991 to find a solution to the ethnic conflict, and Mr. Mangala Moonesinghe, MP was selected as its Chair. The Select Committee presented a report in 1993 containing its majority view, which proposed separate PCs for the North and East and an Apex Council for both Provinces.⁹⁷ With regard to the aspect of devolution of power between the tiers of the Government, the Committee recommended a system which was to follow the footsteps of the Indian Constitution.⁹⁸ Although its recommendations did not specifically deal with powers over land, the option paper submitted by the Chairman for the consideration of the Parliamentary Select Committee made specific reference to land as a matter within the Provincial List.⁹⁹

3.1.2. Proposals of the movement for Constitutional reform (1994)

A civil society initiative known as the Movement for Constitutional Reform proposed a draft Constitution with a federal parliamentary system of government. In addition, it recommended a Federal Council with the responsibility of recommending the appointment of persons to key public posts, similar to the Constitutional Council established under the Seventeenth Amendment to the present Constitution. The demarcation of powers between the Parliament and the Regional Councils was provided in two lists and Land was included in the Regional List, subject to special arrangements. As such, the proposed constitutional provisions recommended a Regional Land Commission for each Region with powers over land alienation within the Region, determination of land settlement policies and the formulation of land development policies. The seven-member

Regional Land Commission comprised three members nominated by the Chief Minister of the Region, two members nominated by the Federal Council and two members to be nominated by the National Environmental Authority.¹⁰⁰

3.1.3. The Government's proposals for Constitutional reform (1995-2000)

During the time period of 1995 to 2000, the Sri Lankan government was engaged in a constitutional reform programme with a view to introducing a new Constitution that would ensure democracy and greater devolution of powers. There were four proposals in all – namely the Government's Proposals for Constitutional Reform of August 1995; the draft Provisions of the Constitution containing the Proposals of the Government of Sri Lanka relating to Devolution of Power of January 1996; the Government Proposals for Constitutional Reform of October 1997; and the Constitution Bill of August 2000 presented to Parliament to repeal and replace the 1978 Constitution. All these documents contained specific provisions relating to land.

The 1995 proposals provided that Land will be a devolved subject and was therefore included in the Regional List as Item 24: State land and its alienation or disposal. State land was to be vested in the Region subject to a process of consultation when the Centre required land in respect of a reserved subject.¹⁰¹ Similar to the 1995 proposal, the 1996 document also recognised the principle that State land within the region was too vested in the Region and provisions were to be made to make available to the Centre, land required for reserved subjects.¹⁰² However, it reserved responsibility regarding inter-regional irrigation projects to the Centre.¹⁰³

The most specific and comprehensive provisions regarding devolution of land powers were provided in the 2000 Draft Constitution, which contained a separate Chapter XVI on State Land, Waters and Minerals. Similar to Appendix II of the Thirteenth Amendment to the 1978 Constitution, Chapter XVI of the Draft

Constitution contained provisions relating to land under the following headings: State Land, Inter-regional Irrigation and National Land Use Council.

Provisions in the Draft Constitution relating to State land specifically refer to instances where the Centre has control and is limited to Article 143(3)(a) where the Centre shall succeed to State land controlled or used in relation to subjects in the Reserved List. However, this framework is subject to subparagraph (b), which provides that a Regional Administration may negotiate with the central government for the release of State land, referred to in Article 143(3)(a) for the purposes of subjects in the Regional List. It further reserves the succession of State land situated within the Capital Territory to the Centre. Unlike Appendix II of the Thirteenth Amendment, which vests all State land in the Republic, the Draft Constitution, by Article 143(5) provides that every Region shall succeed to all other State land within the Region and to be at the disposal of the Regional Administration for the purposes set out in the Regional List. Furthermore as mentioned above, the Draft Constitution provides for the central government to require the Regional Administration to make available to the central government any State land that is required for the purpose of a subject in the Reserved List. This framework may be contrasted with the system in Appendix II of the Thirteenth Amendment where the government is required to make available to every PC State land required for a PC subject.

The above provisions included in the 2000 Draft Constitution still gave the Centre considerable power over all State land in contrast to earlier drafts. This is due to the introduction of provisions such as those defining State land as land vested in the Republic prior to the commencement of the new Constitution and because the Centre and the regions succeeded to such State land as provided in the Constitution though the land was to be held in the name of the Republic.¹⁰⁴

Furthermore, unlike the outright reservation

of power to alienate State land to the President in Appendix II, draft Article 143 (7) provides that alienation of any State land is to be made on behalf of and in the name of the Republic and is to be subject to national land use policy as determined by the National Land Use Council. Nevertheless, inter-regional irrigation projects and the relocation of persons displaced as a result of their implementation are reserved as a subject and function of the central government. Provisions relating to inter-regional irrigation are not as comprehensive as Appendix II. Yet draft Article 144(2) reserves the subject to the central government.

In expanding the scope of central control vis-à-vis earlier drafts, the 2000 Draft Constitution proposed a National Land Use Council together with a mechanism for the Council to take action where a Regional Administration is in non-compliance with its policies. In terms of these provisions, the National Land Use Council could recommend that the central government assume control over the contentious land after giving the Regional administration a hearing. In this context, the Draft Constitution ultimately ensures that considerable powers over land are retained at the Centre.

3.1.4. Reports of the APRC (2006-2007)

The All Party Representative Committee (APRC) was established in 2006 to design a political settlement to the ethnic conflict. Subsequently, a panel of seventeen experts was appointed to advise the APRC, and due to its inability to reach a consensus, the panel submitted two reports: the report of Sub-Committee A (majority report) and the report of Sub-Committee B (minority report). In 2007, the Chair of the APRC presented a set of proposals to the APRC to form the basis of a future Constitution (commonly known as the Tissa Vitharana Proposals). The proposals integrated ideas from all reports submitted.

3.1.4.1. The Majority Report

Extensive provisions with regard to devolution of land powers were contained in the report.

As such, the Centre was to succeed to State land controlled or used by the central government in relation to subjects and functions in the National List and every Province was to succeed to all other State land within the Province.¹⁰⁷ The Provincial Government was entitled to exercise rights in or over such land, including land tenure, transfer and alienation of land, land use, land settlement and land improvement.¹⁸ The Provincial Government could request the Centre to make available State land required for purposes in the Provincial List. Compliance by the Centre was mandatory. The arrangement equally applied vice versa where the central government required land from the Province for purposes in the National List.¹⁰⁸ It also provided for the establishment of a NLC and for the alienation of State land under inter-provincial irrigation schemes on the basis of the national ethnic ratio.¹⁰⁹

3.1.4.2. The Minority Report

The Minority Report of the APRC was an interim report submitted by four experts of the panel due to their inability to consent to the Majority Report's proposals. It showed grave concerns on the issue of vesting all State land in the PC, stating that it will threaten the survival of the State by making the Centre landless except in the capital territory of Colombo.¹¹⁰ Furthermore, restricting the rights of the central government for the immediate requisition of land in a Province was considered unacceptable in view of security considerations. These restrictions placed on the central government were seen as seriously affecting the use of land for defence purposes and other national requirements.¹¹¹ Additionally, in its critique of the Draft Report by Sub-Committee A (Majority Report), the Minority Report made specific reservations to the provision on mandatorily requiring the Centre to make available land required for any purpose in the Provincial List upon the request made by the PC.¹¹²

Having disapproved the proposals of the Majority Report, this report contained the following recommendations with regard to the issue of lands. Thus 'Land' was to be a reserved sub-

ject. It emphasised the importance of having a permanent Land Commission with overarching powers over all aspects of policy relating to land and to inquire into complaints about whether any ethnic group has suffered in land alienation and to determine a method of rectification.¹¹³ In short, the Minority Report did not permit any form of devolution of land powers to the Provinces.

3.1.4.3. The Tissa Vitharana Proposals

Despite the opposition made in the Minority Report on the issue of land, the Tissa Vitharana Proposals, which attempted to integrate the ideas from all the reports of the experts, almost entirely adopted the recommendations made by the Majority Report on the devolution of land powers. In addition, the proposals recommended a Provincial Land and Water Commission to be appointed by the Provincial Minister in-charge of lands with adequate representation of the various communities in the Province to ensure the proper distribution of land. Further, it recommended the prioritisation of land settlement schemes to needy persons of the District and then the Province.

Therefore, a close view at the constitutional reform proposals mentioned above permits two main conclusions. First, the devolution of powers over land is an important and sensitive issue, which needs special attention in a power-sharing model in Sri Lanka. Second, almost all proposed models recommended that land powers be devolved comprehensively to the Provinces or Regions.

3.2. Comparative Analysis of Devolution of Land Powers in Federal Jurisdictions

In Sri Lanka, governmental power over land primarily involves the administration of State land. Therefore, a comparative study of constitutional models that are most relevant to the Sri Lankan situation requires an analysis of countries that have powers dealing with State land. Such countries mainly include Commonwealth countries with federal constitutional

arrangements. Although these countries share a common colonial heritage, the problems involving land are not identical. For example, most issues concern the rights of indigenous peoples over land and customary land tenure systems. Despite the fact that Sri Lanka does not share such problems, this guide attempts to look at the federal constitutional models of India, Canada and Australia to exemplify constitutional arrangements that have devolved powers over land successfully.

3.2.1. India

India is a Union of States and is a Federal Republic with a parliamentary system governed by the Constitution of India of 1950.¹¹⁴ The Seventh Schedule of the Constitution outlines the duties and division of powers between the Union government and governments of the States, whilst the residual powers are vested in the Parliament. The Seventh Schedule's three lists of items are namely, List I – Union List (items where the Union has exclusive powers), List II – State List (items where the States have exclusive powers) and List III – Concurrent List (where both the Union and the States have powers regarding the items).

Powers involving land are fully devolved to the States as per Item 18 of the State List. Item 18 includes powers relating to 'Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonisation'. In addition, a limited set of powers relating to land are exercised concurrently; namely transfer of property other than agricultural land and acquisition and requisitioning of property. Under the provisions of the Constitution, in the event of conflict between federal law and state law on any issue included in the Concurrent List, federal law will prevail.¹¹⁵ For example, the central government recently introduced the Land Acquisition, Rehabilitation and Resettlement Bill No. 77 of 2011 to repeal and replace the Land Acquisition Act of 1894. Due to the concurrent nature of the power, the scope of the Bill includes all

land acquisitions done by both the central government and any State Government, except the State of Jammu and Kashmir.¹¹⁶ Hence, if this Bill is enacted, it will prevail over existing State legislation on land acquisition.

Each State in India has its own legislative and institutional measures for the regulation of powers on land. Each State has State legislation dealing with land matters. For example, in the State of West Bengal, land is regulated by the Lands (Acquisition & Regulation) Act, 1981, the West Bengal Premises Tenancy Act, 1997 and the West Bengal Public Demand Recovery Act, 1913.¹¹⁷ In general, States also have a department or ministry for the formulation of policy, acts, rules and procedures relating to land matters, such as, land records and survey, land revenue, land reforms, land use, management of government lands, requisition and acquisition of land as well as their implementation. The scope of the central government in land administration is mainly advisory, and coordination is through the Department of Land Resources of the Ministry of Rural Development.¹¹⁸

Despite the close similarities in the constitutional provision in the State List of the Indian Constitution and the Provincial List of the Thirteenth Amendment regarding land, there are significant differences in the level of devolution of such powers in the two countries. The major difference between the two Constitutions is that the Sri Lankan Thirteenth Amendment contains Appendix II, which substantially limits the devolution of powers in respect of land, and reserves a number of important powers with the Centre. Moreover, the structural limits of the Thirteenth Amendment, which is placed within an explicitly unitary context, limits devolution.

3.2.2. Canada

Canada is a Parliamentary Democracy with a Federal System. Due to the clear division of powers between the Centre and the Provinces Canada's federal structure is considered to be a divided rather than shared model of federalism.¹¹⁹ The main constitutional documents of

Canada include the Constitution Act of 1867 and the Constitution Act of 1982. Sections 91-95 of the Constitution Act of 1867 allocate powers between the federal and provincial governments. Accordingly, in relation to land powers, management and sale of public lands (Crown lands) are fully assigned to the Provinces.¹²⁰ However, the Provinces of Manitoba, British Columbia, Alberta and Saskatchewan were given jurisdiction over Crown lands, other public lands, and natural resources only by a subsequent amendment in 1930, thus bringing them in line with the other Provinces.¹²¹ This power is significantly extensive considering the fact that about 89% of Canada's land area constitutes Crown land. By virtue of the above constitutional provision, the Provinces own the majority of such land. This arrangement provides Provinces with a significant source of revenue and substantial capacity to manage the provincial economy.¹²² For example, in the Province of British Columbia, 94% of the land is Provincial Crown land, whilst 5% is privately owned and only 1% is Federal Crown land.¹²³

The Provinces exercise full powers over Provincial Crown land of each Province and are governed by the specific laws enacted by provincial legislatures. For example, the legal provisions governing the administration of Crown land in the Province of Ontario are laid out in the Public Lands Act,¹²⁴ while in the Province of British Columbia, Crown land is managed under the Land Act, the Ministry of Lands, Parks and Housing Act, and the University Endowment Lands Act.¹²⁵ Moreover, the Provinces contain strong institutional structures to implement these laws with specific provincial ministries.

With regard to Federal land, most centrally-owned Crown land is in the Canadian territories including First Nations, Inuit and Métis and Northern territories, which are administered by Aboriginal Affairs and Northern Development Canada (AANDC), a department of the Federal Government.¹²⁶ The remaining Federal Crown land in the Provinces includes national parks, Indian reserves and some harbours and canal systems, all of which fall under the

control of the Federal Government. The Federal Government also holds a certain degree of power over the management of land in the First Nations and Northern territories, which though not an issue in terms of devolution of powers within the Federation, has posed some issues with regard to the rights of aboriginal people.¹²⁷ Therefore, the Federal Government has been conferred with the responsibility of dealing with land claims arising in areas of Canada where aboriginal land rights have not been dealt with by past treaties or through other legal means by way of negotiating modern treaties that ensure greater certainty over rights to land and resources to aboriginal people.

3.2.3. Australia

Australia is a Federation of States with a Parliamentary Democracy. Australia's six British colonies were federated in 1901 to become States within the Commonwealth of Australia. The Australian constitution assigns 42 enumerated powers to the Commonwealth (the Centre)¹²⁸ leaving the residue to the States. However, there is a tendency to expand Commonwealth powers through usage and judicial interpretation, such as the decision of the High Court in 1920 to give Commonwealth powers their literal meaning unconstrained by assumptions about the nature of the Federation.¹²⁹ Despite this trend, and the absence of explicit constitutional references to powers relating to Crown land, it is generally accepted that these powers are vested with the States. Due to the States obtaining its power residually, the legal authority to administer Crown land was conferred upon

the States indirectly. For example, responsibility for the management and control of the waste lands (lands not granted in freehold title) of the Crown was committed to the Western Australian Parliament by section 3 of the Western Australia Constitution Act 1889.¹³⁰ Thus there is a clear categorisation of Crown land as federal-owned or State-owned in Australia and it is noted that the land held by the Commonwealth is very limited i.e. land in the Australian Capital Territory.

Various States in Australia have adopted differing policies towards the sale and use of their Crown lands and have included very comprehensive legal regimes. In the State of Western Australia, compatible with the above-mentioned provision of the Western Australia Constitution Act 1889, legislative authority from the Western Australian State Parliament is required for all dealings with the waste lands of the Crown and is therefore governed by legislation such as the Land Administration Act, 1997.¹³¹ Similarly, in the State of Victoria where nearly 30% of the landmass is Crown land, the subject is governed by comprehensive laws, passed within the State for dealings with reserved and unreserved Crown land including the Land Act 1958, the Crown Land (Reserves) Act 1978, the National Parks Act 1975 and the Native Title Act 1993.¹³² Therefore, it is evident that in Australia, administration of Crown land is completely within the purview of the States and is governed effectively by the laws and institutional structures of the State governments.

Conclusion

This guide has sought to provide decision-makers with some insight into the complex issue of devolving land powers in Sri Lanka. Three conclusions emanate from the extensive study that was undertaken.

First, examining the constitutional, legal, administrative and institutional frameworks pertaining to land powers, it is clear that the Centre has, in theory and in practice, maintained substantial control over State land. Despite the fact that land is a devolved subject, the present framework affords the Centre significant scope to exercise powers pertaining to land directly. In fact, there is very little scope to compel or pressure an uncooperative central government when provisions of the Constitution on devolving land powers are not implemented. A classic example of this reality is the failure of the Government to appoint the NLC. Meanwhile, the Provinces have been unable to enforce the provisions of the Constitution, which stipulate that a NLC should be the sole authority in terms of formulating national policy on land.

Second, maximising devolution under the current framework is possible through the inge-

nuity of PCs. Such ingenuity entails utilising concurrent powers to acquire land, challenging national policies on land in the absence of a NLC and passing provincial statutes on urban development, thereby restricting the application of the UDA Act within the Province. These initiatives may prove to be useful in order to mitigate the control over land currently exercised by the Centre, and to maximise the Thirteenth Amendment in terms of devolving land powers.

Finally, a comparative analysis of past proposals for constitutional reform in Sri Lanka reveals that land has always been viewed as a devolved subject. Hence, future efforts towards reforming the current framework ought to take into account past proposals that sought to strengthen provincial decision-making power with respect to land. Moreover, constitutional models currently in place in other jurisdictions such as India, Canada and Australia demonstrate that such a reform initiative is both a desirable and feasible endeavour.

Endnotes

1. Judicial decisions have constantly referred to the purpose of the Thirteenth Amendment of the Constitution as devolution of power from the central government to the Provincial Councils: *Madduma Bandara v Assistant Commissioner of Agrarian Services*, [2003] 2 Sri.L.R.80, *Determination on Town and Country Planning (Amendment) Bill* (SC SD 03/2011) as cited in the *Determination on 'Divineguma' Bill* (SC SD 01/2012), p. 25.
2. The judicial power *per se* has not been devolved to the Provinces but with the establishment of the Provincial High Court (Article 154P) there is an institutional arrangement for a court system that has the jurisdiction to determine on a matter falling within the legislative competency of a Provincial Council.
3. The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Article 154C.
4. *Ibid.* Article 154G.
5. *Ibid.* Article 154P.
6. The Court of Appeal in its judgment in Case No. 50/2009 of 23 June 2011 reiterated the fact that jurisdiction over matters relating to State land lies with the High Court of the Province because the subject of land is devolved under List I. The Court of Appeal therefore directed the High Court of the Southern Province to hear the case again on its merits.
7. Ninth Schedule to the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.
8. Every major attempt made to devolve political power as part of resolving the ethnic conflict has given prominence to matters relating to the utilisation and distribution of land, Ranjith Amarasinghe, 'Provincial Councils under the Thirteenth Amendment-Centers of Power or Agencies of the Center?', in *Thirteenth Amendment: Essays on Practice*, Lakshman Marasinghe & Jayampathy Wickramaratne (Eds.), Stamford Lake, 2010, p. 113.
9. *Determination on Land Ownership Bill*, [1991-2003] VII DSCP 453, cited in Marasinghe & Wickramaratne (2010) (*op. cit.*), p.462.
10. The vesting of land with the State has been interpreted by the judiciary thus: 'From time immemorial, land has thus been held in "Trust" for the people in this Island; now a Republic. The principle that State land is held in public trust could be clearly seen in the Land Development Ordinance and the State Grants (Special Provision) Act, where land was allocated to landless persons while reserving certain control by the State over such land", *Determination on Land Ownership Bill*, [1991-2003] VII DSCP 453, cited in Marasinghe & Wickramaratne (2010) (*op. cit.*), p.477.
11. Statistical Data Sheet, Sri Lanka 2012, Department of Census and Statistics, available at: <http://www.statistics.gov.lk/Data-Sheet/dataenglish.pdf>.
12. Ranjith Amarasinghe, 'Provincial Councils under the Thirteenth Amendment-Centers of Power or Agencies of the Center?' in Marasinghe & Wickramaratne (2010) (*op. cit.*), p. 113.
13. Section 110(1) of State lands Ordinance No. 8 of 1947 (The definition is similar with few variations in Section 2 of the Land Development Ordinance No. 19 of 1935 and Section 18 of State lands (Recovery of Possession) Act No. 7 of 1979).
14. First item of the Reserved List of the Thirteenth Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.
15. The judiciary, however, has attempted to give a limited interpretation to the meaning of national policy by setting out a functional test to determine what constitutes national policy as per the Determination on Water Services Reference Bill (SC SD 24/2003, 25/2003) and the Determination on Town and Country Planning (Amendment) Bill (SC SD 03/2011) and differentiating between national policy and governmental policy as per the Determination on 'Di-

- vineguma' Bill* (SC SD 01/2012) p. 29-31. See also Agrarian Services (Amendment) Bill of 1991, Transport Board Statute of the North-Eastern Provincial Council; See, Jayampathy Wickramaratne, 'National Policy and Dual Responsibility-Two Critical Issues on Devolution' in Marasinghe & Wickramaratne (2010) (*op. cit.*), pp. 45-70.
16. The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Appendix II, Clause 3:1.
 17. *Ibid.* Clause 3:2.
 18. *Ibid.* Clause 3:3.
 19. *Ibid.* Clause 3:4.
 20. Austin Fernando, 'Is Power Sharing in Land Administration Practical in Sri Lanka?', 18 January 2012, at <http://groundviews.org/2012/01/18/is-power-sharing-in-land-administration-practical-in-sri-lanka>.
 21. *Ibid.*
 22. Centre for Policy Alternatives, *Land in the Northern Province: Post-War Politics, Policy and Practices* (December 2011), p. 23.
 23. Jayampathy Wickramaratne, 'National Policy and Dual Responsibility - Two Critical Issues on Devolution' in Marasinghe & Wickramaratne (2010) (*op. cit.*), p. 58.
 24. The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Appendix II, Clause 3:4.
 25. Some of the examples include Circulars PPA/2/30/35(1) of 19 October 1990, SP/RD/02/10 of 3 February 2010 issued by the Secretary to the President.
 26. Circular 2/1993 of 20 November 1993 issued by Secretary Lands (File L/08/27).
 27. Gazette Extraordinary Notification 1654/21 of 20 May 2010.
 28. This circular was challenged through a Writ application (620/2011) and a Fundamental Rights Application (494/2011) and the Respondents gave an undertaking to withdraw the Land Circular when the case was taken up in January 2012 by the Court of Appeal.
 29. Land in the Northern Province: Post-War Politics, Policy and Practices, CPA, p.48-57.
 30. Land Circular No. 2013/01, clause 2.1.1.
 31. *Ibid.* Clause 2.1.1.1.
 32. *Ibid.* Clause 2.1.1.2. Discussed below at section 1.2.5.2.
 33. *Ibid.* Clause 2.2.2.
 34. *Ibid.* Clause 2.2.2.4.
 35. *Ibid.* Clause 2.2.2.5.
 36. The meaning of the word 'consult' does not denote concurrence and thus the consulting authority is not bound by the view of the consultees. Bhagwati J. in *S.P. Gupta v President of India and Ors.* AIR 1982 SC 149 citing Krishna Iyer, J. in *Sankalchand Sheth's case* observed: 'consultation is different from consentaneity. They may discuss but may disagree; they may confer but may not concur.' However, a different opinion was given in the later case of *Supreme Court Advocates-on-Record Association and another v Union of India* Case No. Writ Petition (civil) 1303 of 1987, that consultation is required to indicate that absolute discretion was not given to any one, and that primary aim must be to reach an agreed decision taking into account the views of all the consultees and in case of conflict, the opinion of the Chief Justice to get primacy. Since the above-mentioned situation was specific to the provisions relating to the appointment of judges in the Indian Constitution, the applicability of the broader interpretation of the latter case in the present context is doubtful.
 37. Thirteenth Amendment to the Constitution, Appendix II, Clause 1:1.
 38. *Ibid.* Clause 2.
 39. *Ibid.* Clause 2:1.
 40. *Ibid.* Clause 2:2.
 41. *Ibid.* Clause 2:8.
 42. Ranjith Amarasinghe, 'Provincial Councils under the Thirteenth Amendment-Cen-

- ters of Power or Agencies of the Center?’ in Marasinghe & Wickramaratne (2010) (*op. cit.*), p. 116.
43. Sunil Bastian, ‘Control of State land – The Devolution Debate’ in *Sri Lanka: The Devolution Debate* (5th ed.) International Centre for Ethnic Studies (2006).
 44. The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Appendix II, Clause 1:2.
 45. Land Circular 02/232 of 16th November 1989 issued by Secretary of the Ministry of Lands, Irrigation and Mahaweli Development.
 46. Land Statute, Statute No. 05 of 1994 of North Central Provincial Council, Section 3.
 47. Land Development Statute, Statute No. 04 of 1994 of North Central Provincial Council, Section 3.
 48. *Ibid.* Section 68.
 49. Land Development Statute, Statute No. 07 of 2002 of Western Provincial Council, Section 2(1).
 50. *Ibid.* Section 3.
 51. *Ibid.* Section 6.
 52. Austin Fernando (2012) (*op. cit.*).
 53. The Land Development Statute, Statute No. 07 of 2002 of Western Provincial Council was passed on 19th February 2003 after the receipt of the Governor’s certification. Subsequently, the Secretary to the Ministry of Provincial Councils, by letter dated 3 December 2002 (No. PL/6/1/64/10) and Secretary to the President by letter dated 21 April 2003 (No. PL/6/8/2/8) intervened to block similar Statute-making by the PC. Consequently, the Western Province Chief Minister by Gazette Extraordinary 1680/01 of 15 November 2010 issued a notice withdrawing the Regulations under section 74 of the statute.
 54. Land Circular No. 02/233 of 1 December 1989 titled ‘Transfer of land work to Provincial Councils – Land Commissioner’s Department’ refers to the acquisition of lands for village expansion and provides that the acquisition of lands is a concurrent subject and action should be taken as present.
 55. Land Circular No. 02/233 of 1 December 1989 titled ‘Transfer of land work to Provincial Councils – Land Commissioner’s Department’.
 56. Also see *Ratnayake v De Silva*, [1999] 3 Sri LR 57.
 57. The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Appendix II, Clause 1:3.
 58. *Determination on the Land Ownership Bill*, [1991-2003] VII DSCP 453, cited in Marasinghe & Wickramaratne (2010) (*op. cit.*), p. 475.
 59. See discussion below at 2.1.4.
 60. Land Circular No. 02/230 of 24 July 1989 titled ‘Devolution of Powers and Functions to Provincial Councils’ issued by the Secretary to the Ministry of Lands, Irrigation and Mahaweli Development.
 61. *Vasudeva Nanayakkara v N.K. Choksy, P.C. former Minister of Finance et al.*, S.C (FR) 209/2007, pp. 49-50.
 62. LDO, Section 19. Although the original enactment states that a payment must be made in order to obtain a permit, subsequent internal circulars have removed this clause.
 63. LDO, Section 22A.
 64. Regulation No. 3 of 1981 under the Land Development Ordinance.
 65. The power to alienate land under the LDO through a Land Kachcheri vests with the respective Government Agent (GA) under Sections 22-24 of the LDO. However, with the enactment of the Transfer of Powers (Divisional Secretaries’) Act, No. 58 of 1992, the Divisional Secretary is authorised to carry out the powers of the GA as stipulated in the LDO.
 66. LDO, Section 20.
 67. *Ibid.* Section 2.
 68. *Ibid.* Sections 21 and 22.

69. Referred to below.
70. Currently the permit-holders are exempted from making such annual payment.
71. LDO, Section 19(4).
72. Regulation No. 136 under the Land Development Ordinance. Also see Manual on State Land published by the Land Commissioner General's Department, 14 July 1985.
73. LDO, Section 19(6).
74. The role of the Provincial Land Commissioner is minimal in this process and, in practice, he acts as an intermediate officer between the Divisional Secretary and the Land Commissioner General. However, the Land Circular No. 02/233 of 1989, allowed for all activities except the issuing of grants under the Land Development Ordinance to be carried out by the PC.
75. The Land Circular No. 02/233 also provides for the involvement of the PCs in the administration of grants under this Act. As such, PCs are empowered to carry out all activities other than the issue of long-term leases, grants and vesting orders.
76. Regulation No. 191 under the State Lands Ordinance. Also see the Manual on State Land published by the Land Commissioner General's Department, 14 July 1985.
77. See Article 33(d) of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, and Regulation No. 194 under the State Lands Ordinance. Also see Manual on State Land published by the Land Commissioner General's Department, 14 July 1985.
78. Regulation Nos. 195-204 under the State Lands Ordinance. Also see Manual on State Land published by the Land Commissioner General's Department, 14 July 1985.
79. Regulation No. 208 under the State Lands Ordinance. Also see Manual on State land published by the Land Commissioner General's Department, 14 July 1985.
80. The Land Circular No. 02/233 of 1989 provides a detailed process of disposition of land under this Act where the PCs want lands to be distributed. Accordingly, except for the issue of grants, all other activities including release of lands from the Land Reform Commission was provided for by the Circular.
81. The last of such major development projects before 1989 was the Lunugamvehera Development Project.
82. LDO, Sections 3 and 4.
83. State Lands Ordinance, sections 91 and 92.
84. As per Extraordinary Gazette No. 1681/3 of 22 November 2010 the subjects and functions in the charge of the Lands and Land Development Minister include: 1) Formulation of policies, programmes and projects in regard to the subjects of Lands, Land Development and all subjects that come under the purview of Departments and Statutory Institutions listed in Column II, on the basis of Mahinda Chinthana – Vision for the Future and any other overall national policies that may be adopted by the Government, 2) Direction of the implementation of such policies, programmes and projects with a view to achieving the relevant national objectives within time lines agreed with the national planning authorities and within budgeted resources, 3) Provision of all public services that come under the purview of the Ministry in an efficient and people friendly manner, 4) Alienation of land and development of settlement projects as specified by law, 5) Administration and Management of State lands and land use planning, 6) Land settlement and registration of land titles, 7) Acquisition of lands for development projects. 8) Land surveying and mapping, provision of land information and related services. 9) All other subjects that come under the purview of Organisations listed in Column II, and 10) Supervision of the Organisations listed in Column II.
85. Ranjith Amarasinghe, 'Provincial Councils under the Thirteenth Amendment-Centers of Power or Agencies of the Center?' in Marasinghe & Wickramaratne (2010) (*op. cit*), p. 118.
86. The appointment is made by the Governor by virtue of the Provincial Councils (Consequential Provisions) Act No. 12 of 1989.

87. Provincial Councils (Consequential Provisions) Act No. 12 of 1989, Section 2(1)(b).
88. Transfer of Powers (Divisional Secretaries) Act No. 58 of 1992, Section 4.
89. Ranjith Amarasinghe, 'Provincial Councils under the Thirteenth Amendment-Centers of Power or Agencies of the Center?' in Marasinghe & Wickramaratne (2010) (*op. cit.*), p. 118.
90. Due to the withdrawal of the Land Circular 2011/4, most of the recommendations mandated for the Fourth Land Commission by the NAP are not actionable.
91. Past practice shows that power of declaring urban development areas is driven by political motives: for example, the declaration of Kataragama as an urban development area to suit 'Gam Udava' Programme by President Premadasa.
92. For discussion on whether the 'Minister' ought to be a reference to the Central Minister or Provincial Minister see section 2.2.2. below.
93. See 1.2.3.2. above.
94. See section 33 of the Act.
95. The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Article 2.
96. In the *Thirteenth Amendment to the Constitution and the Provincial Councils Bill*, [1987] 2 Sri LR 312.
97. Rohan Edrisinha, Mario Gomez, V.T. Thamilmaran, Asanga Welikala (Eds.), *Power-Sharing in Sri Lanka Constitutional and Political Documents 1926-2008*, Centre for Policy Alternatives (2008), p. 410-411.
98. Parliament of Sri Lanka Report No. 47 (Mangala Moonesinghe Report), Edrisinha *et al* (2008) (*op. cit.*), p. 420.
99. *Ibid.* p. 442.
100. *Ibid.* p. 470.
101. Government's Devolution Proposals of 3 August 1995, Section 4.1.
102. Draft Provisions of the Constitution containing the proposals of the Government of Sri Lanka relating to Devolution of Power, 1996, Sections 24(1), (2), (3).
103. *Ibid.* Section 24(4).
104. Rohan Edrisinha, 'Meeting Tamil Aspirations within a United Lanka: Constitutional Options', in *Essays on Federalism in Sri Lanka*, Rohan Edrisinha & Asanga Welikala (eds.), Centre for Policy Alternatives (2008), p.123.
105. 2000 Draft Constitution, Article 145.
106. Paragraph 17:1, 17:2 of the Majority report.
107. Paragraph 17:2 of the Majority report.
108. Paragraph 17:3, 17:4 of the Majority report.
109. Paragraph 17:5 – 17:11 of the Majority report.
110. Chapter I paragraph (f) of the Minority report.
111. Chapter I paragraph (f) of the Minority report.
112. Comment on Section 13A, Part II Minority report.
113. Chapter III and V of the Minority report.
114. George Mathew, 'India, Handbook of Federal Countries', in Ann L. Griffiths (Ed.), *Forum of Federations* (2005), p.168.
115. The Indian Constitution, Article 251.
116. Land Acquisition, Rehabilitation and Resettlement Bill No. 77 of 2011, Section 1(2).
117. For further information see: <http://www.banglarmukh.com/portal/banglarMukh/Government/Departments/DepartmentListPortletWindow?action=e&window-state=normal&mode=view>.
118. For further information see <http://dolr.nic.in/index.asp>.
119. David R. Cameron, 'Canada, Handbook of Federal Countries', in Griffiths (2005) (*op. cit.*), p.108.
120. Constitution Act, 1867, section 92(5).

121. British North America Act, 1930, 20-21 Geo. V, c. 26 (U.K.).
122. David R. Cameron, 'Canada, Handbook of Federal Countries', in Griffiths (2005) (*op. cit.*), p.111.
123. For further information see <http://www.for.gov.bc.ca>.
124. For further information see <http://www.mnr.gov.on.ca/en/Business/CrownLand/index.html>.
125. For further information see: http://www.for.gov.bc.ca/Land_Tenures/legislation_and_regulations/general_information.html
126. For further information see <http://www.aadnc-aandc.gc.ca>.
127. However, it has also been observed that the aspirations of aboriginal peoples for self-government may raise the possibility of the emergence of a third order of government in Canadian federalism, David R. Cameron, 'Canada, Handbook of Federal Countries', in Griffiths (2005) (*op. cit.*), p.116
128. Commonwealth of Australia Constitution Act, 1900, Section 51.
129. Cheryl Saunders, Australia, Handbook of Federal Countries, in Griffiths (2005) (*op. cit.*), p.33.
130. Crown Land Administration and Registration Practice Manual, Department of Regional Development and Lands, Government of Western Australia (March 2012), p. 1-2.
131. *Ibid.*
132. For further information see <http://www.vgso.vic.gov.au/services/crown-land>.



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