

INHERITANCE RIGHTS OF CHILDREN IN SRI LANKA



CENTRE ON
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INHERITANCE RIGHTS OF CHILDREN IN SRI LANKA

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Inheritance Rights of Children in Sri Lanka

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MESSAGE FROM THE SOUTH ASIA PROJECTS COORDINATOR

The Asian Tsunami that struck Sri Lanka's shores on 26 December 2004 caused immeasurable physical and psychological damage to the children of this island nation. Families were separated, homes and communities destroyed, and family and friends were killed. While homes have been rebuilt, and a sense of normalcy has been restored nearly 3 years after, more than 5,000 children who lost one or both of their parents still live in uncertainty over their inheritance rights and what the future will bring.

The aftermath of the Tsunami highlighted the previously overlooked gaps in inheritance rights as countless children were left out of restitution policies or their right to return to their family properties. Added to the devastation of the Tsunami, a civil war that has lasted for over 20 years has claimed the lives of tens of thousands of mothers and fathers. It is imperative that the hard learned lessons from the Tsunami are acted upon and rights of children to land and property are protected fully across the country.

In this report COHRE analyzes the current domestic legal framework for Children Inheritance, and documents the policy gaps that contradict Sri Lanka's human rights obligations, shows how children in Sri Lanka are vulnerable to discrimination and the disentanglement of their family homes, and offers recommendations for reform. We at COHRE believe that Sri Lanka should amend its inheritance laws to bring them into full compliance with international human rights standards and that development and humanitarian programs should give due priority to protect the rights of children who in many cases do not have a strong enough voice to be heard above clamour

of reconstruction and policy debate. We at COHRE look forward to working with our partners and colleagues in Sri Lanka to make this vision a reality for children.

This COHRE report on children's inheritance rights in Sri Lanka is the only report of its kind. We at COHRE hope that it can contribute to building a better, safer, and more secure future for all of Sri Lanka's children.

Todd Wassel,

South Asia Projects Coordinator,
Colombo, Sri Lanka

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EXECUTIVE SUMMARY

Property inheritance is directly related to, and has a significant impact on, the realisation of the right to adequate housing. It is intrinsically linked with issues of housing insecurity, people's economic autonomy, and the transfer of wealth. It also serves as a premise upon which numerous other rights can be realised. Nevertheless, the importance of protecting inheritance rights is often not often highlighted by national and international human rights structures.

International human rights treaties and jurisprudence expressly guarantee the right to housing, yet do not place adequate emphasis on the importance of protecting inheritance rights. However, there have been recent attempts by the international community to bring to light the importance of having a rights-based and a fair set of rules on inheritance.

In principle, laws on inheritance are designed to counteract the disruptive effects of death on the integrity of the family unit. Nevertheless, in reality, rules of inheritance are often not based on human rights standards. In many countries, laws and practices on inheritance are discriminatory towards women and in some cases, towards children as well. Because of discriminatory treatment, women may receive smaller shares of the husband's or father's property at his death, be given limited rights over their acquired property or be completely excluded from any rights to their ancestral property. Often, equal ownership of property acquired during marriage is not reflected in the inheritance rights of widows. The ripples of such unequal treatment of women reach, in turn, their children's right to inheritance as well.

The Sri Lankan laws of inheritance can, for the most part, be said to be fair. However, they are not drafted using a human rights approach and as such some discriminatory practices are being perpetuated. Regarding testate succession, a person is at will to decide the manner in which property belonging to him should be inherited. So long as the last will is executed according to law, the property (either in full or in part) can be disposed of to any beneficiary of the choice of the testator. The Wills Ordinance which governs testate succession and which applies to all communities within Sri Lanka, eliminates disabilities placed by customary laws on women and allows all persons within Sri Lanka to dispose of their property either in whole or in part, to a beneficiary of the testator's choice.

Regarding intestate succession to property, the general law is based on the premise that the immediate family of a deceased should inherit the property. Accordingly, the inheritance is shared between the surviving spouse and children. The children inherit equally without any gender discrimination, though there are certain limitations placed on inheritance rights of illegitimate children. Only where there are no children does one-half of the estate devolve on other relatives, the order of devolution being ascendants and collaterals.

Apart from the general law, three personal laws govern the Kandyan, Tamil and Muslim communities. The Tesawalamai law, which is applicable to the Tamils, preserves the principle that the property should revert to the source from where it came, and as such inheritance depends on the nature of the property to be devolved. The surviving spouse is at a disadvantage as he or she is entitled to inherit only one-half of the acquired property and is not entitled to inherit any other types of property. The other half of the acquired property or *Thediatheddham* and the other types of property devolve on the children. Children and remoter descendants are preferred to all others in the estate of their parents. Where children fail, the property reverts to its original source depending on whether it came from the mother's or father's side. Illegitimate children inherit from their mother but not from the father.

Muslim law contains a complicated set of rules to determine the devolution of property on intestacy, such rules depending on the Sect to which the

deceased belongs. The Muslims in Sri Lanka belong to the Shafi Sect of Sunnis. The general principle followed is that the nearer blood excludes the more remote. Thus, it is ensured that the spouse and children receive inheritance of the deceased. Muslim law recognises three types of heirs: Sharers, Residuarys and Distant Kindred. Among the Sharers are the deceased's spouse, daughter and son's daughter who receive a definite fraction of the estate. The son of a deceased is a Residuary who takes the residue of the estate after the Sharers take their shares. Nevertheless, sons cannot be excluded from inheriting the parent's property. In the presence of a son, the daughter who is a Sharer becomes a Residuary with a lesser share than that of the son. Under Muslim law, adoption carries no right of inheritance to the intestate estate of the adoptive parents.

The Kandyan law inheritance rules are essentially based upon the very nature of a Kandyan family. Thus, the rules of inheritance differ according to whether the property is movable or immovable; the gender of the deceased; and the gender, marital status and the type of marriage of the beneficiaries. A surviving Kandyan wife is at a disadvantage as she is entitled only to a life interest in the acquired property of her husband. Kandyan law discriminates against girl children who contract *diga* marriages, that is, where she leaves her father's house and resides with her husband. In such cases, she forfeits her rights to the father's estate. If she contracts a *diga* marriage after the death of the father, she is entitled to share her father's estate but is bound to return the property to her siblings if they so request within one year of her marriage. Kandyan law in limited respects recognises the right of an illegitimate child to inherit the acquired property of the father.

Apart from the laws directly dealing with testate and intestate succession, there are other laws that affect inheritance rights. For instance, the laws that provide for the grant of State lands to persons either absolutely or on permits and licences are discriminatory towards girl children on the question of succession to such lands. This is significant considering the fact that over eighty per cent of the land in Sri Lanka are state land.

Thousands of children in Sri Lanka remain displaced as a result of the conflict and the Tsunami. Inheritance rights issues that have arisen from the

displacement are matters of concern that have not received the attention of the relevant authorities. The Tsunami Housing Policy, under which the return and resettlement of Tsunami affected IDPs are carried out, does not address inheritance rights concerns. It allows much discretion to Divisional Secretaries, leaving room for abuse of process and denial of inheritance rights to women and in turn to children. The administrative practice adopted by the Government to grant State land to a single person as opposed to joint ownership has raised serious concerns of the rights of children and women to own and/or inherit property. There is a general unwillingness among conflict IDPs to return to and reclaim their former homes and lands due to a range of factors such as the length and nature of displacement, security situation, political instability, response of the Government and legal impediments. These constraints for return and restitution have serious implications on the inheritance rights of the IDPs, especially those of the children. Unless the IDPs return to their lands, a range of practical and legal issues will arise and would prevent them from reclaiming their original lands and properties. Consequently, the inheritance rights to those lands and properties would also be jeopardised.

To ensure that inheritance rights of children in Sri Lanka are protected, it is recommended that the Government adopt a rights based approach to the laws dealing with property inheritance. This report makes a series of recommendations to the Government on the possible amendments to the laws dealing with inheritance as well as amendments to other laws, which, though indirectly, have an impact on inheritance issues. It also contains recommendations to UNICEF and other non-governmental organisations.

The main recommendations of the report include the following:

- The Third Schedule to the Land Development Ordinance should be amended to remove discrimination against women in the order of succession to permits and grants of state lands.
- The Third Schedule to the Land Development Ordinance should be amended by deleting section that provides that in a particular group

entitled to succeed, the older is preferred to the younger. A specific provision should be inserted to allow several persons in one category to jointly succeed to the property of the deceased. For example if the deceased has three children, to give all three children equal rights of inheritance

- Amend Section 10 of the Land Grants (Special Provisions) Act to correspond to the recommendations 1 and 2 above.
- Amend the Kandyan Law Declaration and Amendment Ordinance in the following manner to enable equal rights of inheritance to *diga* and *binna* married daughters:
 - To insert a provision enabling a daughter who was given in *diga* marriage before the death of the father, to inherit the father's property.
 - To delete the provision whereby a *diga* married daughter after the death of the father, is bound to convey the immovable property inherited from her father if her brothers and *binna* married sisters can tender the fair market value (Section 12).
- The Government should ensure that title to the lands on which new houses were built, are granted to the beneficiaries without delay.
- The Government should amend their policies and/or administrative practices to enable the grant of joint ownership of the houses to be given under the Tsunami Housing Policy.
- The Government should ensure that inheritance rights concerns, especially of women and children are adequately recognised in implementing the Tsunami Housing Policy.
- The Government should eliminate socio-economic and legal constraints to return and restitution so that IDPs can return to their lands and/or claim or protect their inheritance rights. The report makes a series of specific recommendations in this regard.

- Amend the Prescription Ordinance to remove the disadvantages faced by IDPs by the operation of the Ordinance.
- Ensure that the right to adequate housing is included in proposed amendments to the fundamental rights chapter of the Constitution.

1.

INTRODUCTION

Inheritance is a sort of real right or right in a thing by which, when a person is entitled to an estate or to a part of it, or by legacy has acquired a title to anything, he succeeds to all the rights of the ancestor so that the property acquired by these titles becomes a new species of property. This property by inheritance or legacy is not acquired by us or cast upon us solely by descent or under a will ipso jure, but must be entered upon or accepted by a private act.¹

Inheritance is one of the key modes by which ownership of housing, land, and property can be acquired and property belonging to a family devolved on the descendants. Property inheritance is also instrumental in realising one's right to adequate housing. Yet, the significance of protecting inheritance rights is often not highlighted by national and international human rights structures. Today, many people are still unaware of their inheritance rights, the importance of protecting their inheritance rights, and the manner and the procedure to be followed in claiming their inheritance. Consequently, they fail to voice concerns over any attempt to infringe their inheritance rights.

Inheritance laws of most countries are not based upon human rights standards and are not drafted using a rights based approach. Instead, they

¹ Van.der Linden. 1.8.1. Quoted by Wijeyadasa Rajapakse *The Law of Property Volume II* (Colombo, 2003) p.1.

are shaped by the society and culture in which they operate. It is common to draft the rules of inheritance preserving the customary laws and practices of communities that can often have adverse and discriminatory effects especially towards women and children. For instance in Sub Saharan Africa there is a practice by in-laws or other family members of stealing the widow's property and ejecting her from her matrimonial home and land. Kenya, Zambia and Ethiopia still practice what is known as wife inheritance² or widow cleansing³. In other societies, males are favoured in inheritance merely to ensure that the property remains within the family stead.⁴

In Sri Lanka, the legislature spells out how inheritance rights are acquired, especially the rules relating to intestate succession. All persons within Sri Lanka are at liberty to dispose of their property by last will and are subject to one legal regime governing testate succession. Intestate succession is governed by three different legal regimes: the general law, which is applicable to all persons to whom the personal laws do not apply; and the three personal laws, namely, Muslim law, Tesawalamai law and Kandyan law. Largely, these rules are fair and are aimed at protecting the inheritance rights of children. Nevertheless, they do not have a rights based approach and some of these legal regimes, especially some of the personal laws, contain provisions that are discriminatory towards children born out-of-wedlock, adopted children and in some respects, girl children.

The need to protect inheritance rights has increased because of the large numbers of people displaced by the conflict between the government and the LTTE, and by the Tsunami of December 2004. Displacement has given rise to several practical and legal issues that seriously hinder the property rights and especially, inheritance rights of the displaced.

² *Women's Inheritance Rights*, Fact Sheet Two, Women and Housing Rights Programme, Centre on Housing Rights and Evictions (COHRE) Available at www.cohre.org. Wife inheritance is where the brother or nearest male relative of the deceased husband marries the widow, often against her will. If the widow refuses such practices, she is thrown out of the house and ostracised by her family and community.

³ Ibid. This is a practice whereby a widow is forced to have sex with a paid cleanse, often the town outcast, in order for her to be 'cleansed' of her husband's evil spirit.

⁴ Ibid.

Sri Lanka is a signatory to many international human rights instruments and is obliged to protect and promote the land, housing and property rights of its citizens. Although its legal system provides a largely fair set of inheritance rules, nevertheless, there are laws that contain discriminatory provisions and others which are not designed to protect inheritance rights in the context of large scale and long-term displacement.

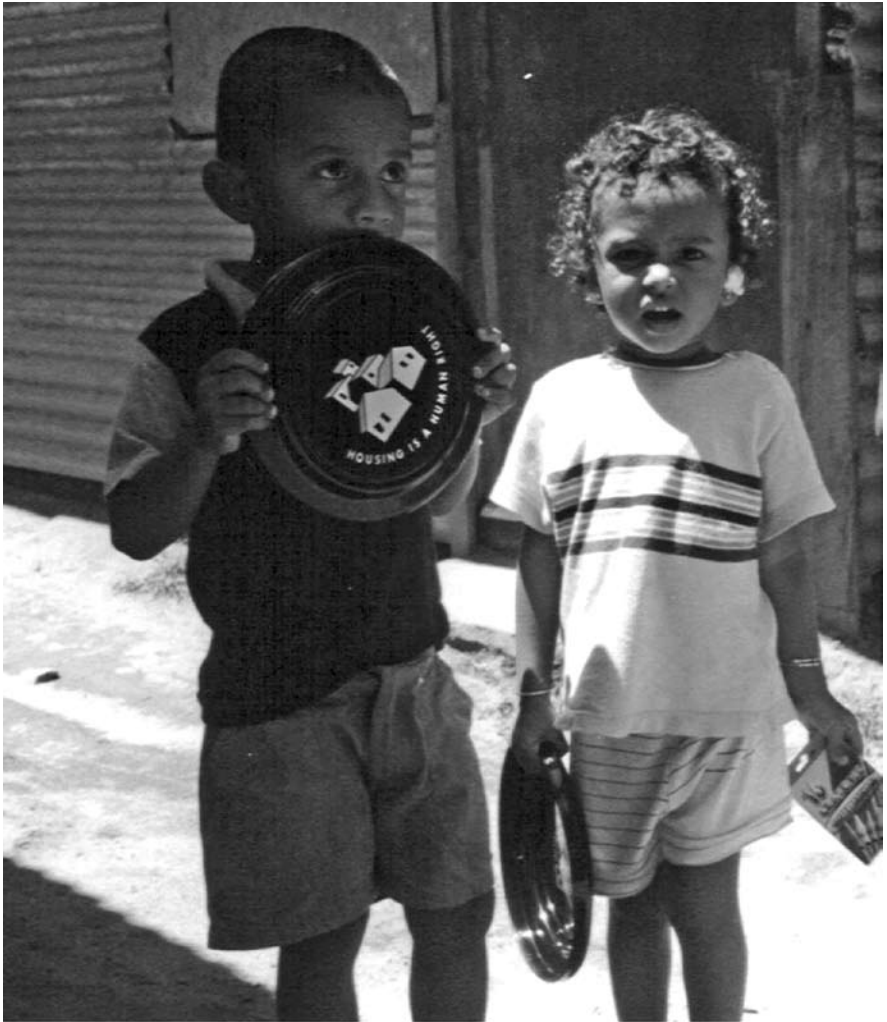
This report provides an in depth analysis of the inheritance rights of children in Sri Lanka. Chapter 2 looks at inheritance rights of children from a human rights perspective. It examines the international human rights instruments which guarantee the right to adequate housing of children and which aim to protect their inheritance rights. It analyses the essential components of the right to adequate housing and looks at Sri Lanka's obligations to protect and promote these rights.

Chapter 3 examines the Sri Lankan domestic law and policy on inheritance rights. It analyses the law on testate succession and intestate succession. There are three personal laws dealing with intestate succession: Muslim law, Tesawalamai law and Kandyan law. The general law on intestate succession applies to those to whom the personal laws do not apply. This section also provides an in depth analysis of the case law on intestate succession.

Chapter 4 highlights inheritance discrimination in Sri Lanka and examines instances of gender discrimination, discrimination based on out-of-wedlock birth and discrimination based on adoption. It also highlights discriminatory legal provisions as regards the grant of state lands.

Chapter 5 provides an overview of the nature of displacement in Sri Lanka and examines in depth, the inheritance rights concerns that have arisen from displacement due to the conflict and the Tsunami.

Chapter 6 contains recommendations to the Government of Sri Lanka, to UNICEF – Sri Lanka and to other organisations working on housing rights. These recommendations would assist in the protection of inheritance rights generally and more specifically those of children.



Two Tsunami affected children at the 'Solis' welfare camp, Matara, Sri Lanka

2.

UNDERSTANDING THE INHERITANCE RIGHTS OF CHILDREN FROM A HUMAN RIGHTS PERSPECTIVE

2.1 The International law and standards

Children, like everyone else, have human rights and are entitled to protection under international human rights law. Many international human rights instruments have recognised the rights of children, guaranteeing, among others: the right to life; the right to non-discrimination; the right to protection from all forms of physical or mental violence, injury or abuse, neglect or exploitation; the right to education; the right to highest attainable standards of health; the right to an adequate standard of living; and the right to housing.

In comparison to other rights, the significance of protecting inheritance rights is often not highlighted in international human rights texts and standard-setting documents. Nevertheless, inheritance rights play a silent yet vital role in the realisation of other rights. They serve as a premise upon which other important civil, political and socio-economic rights can be realised. Protection of inheritance rights assists primarily in the realisation of the right to adequate housing and other important rights such as rights to an adequate standard of living, highest attainable standards of health, education, and protection from violence, injury or abuse.

The right to inheritance is not explicit in international treaties and conventions. Nonetheless, it can be inferred from the right to equality and non-discrimination and the right to adequate housing.

Housing is an essential requirement for a human being to live with human dignity. As human rights essentially uphold human dignity, it is imperative that housing rights of all persons, including children, are secured. One of the first international instruments to recognise the right of children to housing is the United Nations Declaration on the Rights of the Child (“Declaration”)⁵. Principle 4 of the Declaration provides that:

*The child shall have the right to adequate nutrition, **housing**, recreation and medical services. [Emphasis added]*

The right to housing was also incorporated into the United Nations Convention on the Rights of the Child⁶ (CRC), Article 27 of which provides as follows:

1. *States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.*
2.
3. *States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this rights and shall in the case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and **housing**. [Emphasis added]*

The rights enumerated in the CRC must be guaranteed to every child without any discrimination. Article 2 of the CRC provides that:

⁵ Declaration of the Rights of the Child, U.N. General Assembly, (1959), UN Doc. A/4354. Adopted by the UN General Assembly by resolution 1386(XIV) of 20.11.1959.

⁶ Convention on the Rights of the Child, U.N. General Assembly, Document A/RES/44/25. Adopted by the UN General Assembly by resolution 44/25 and entered into force in 1990.

States must respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

The commitment of the international community to protect children's rights is demonstrated by the unprecedented number of states which have ratified the CRC. It is regarded as the most universally accepted human rights instrument in the world, with 192 ratifications.⁷

The right to equality and non-discrimination has direct implications for access to property and inheritance. The United Nations Committee on the Rights of the Child has highlighted the importance of the right to housing without discrimination. The Committee has stated that:

[i]n the light of the pervasiveness of the phenomenon of homelessness and inadequate housing, which occurs in all parts of the world and affects developing as well as developed countries, [it] deems it important to emphasise the universal character of the right to housing. It applies to every child, without restriction or distinction of any kind.⁸

The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in its Resolution on Children and the Right to Adequate Housing⁹ highlighted the importance of complying with State obligations to realise the housing rights of children. The Sub-Commission states in part:

⁷ At present only Somalia and the United States have not ratified the CRC, but both are signatories to the CRC.

⁸ Statement by the Committee on the Rights of the Child to the second UN Conference on Human Settlements (Habitat II), contained as annex VIII in 'Report on the eleventh session of the Committee on the Rights of the Child', 22 March 1996, UN Doc. CRC/C/50.

⁹ Children and the Rights to Adequate Housing, United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution No. 1994/8 adopted on 26.08.1994.

Conscious that one of the areas where the indivisibility and interdependence of human rights and of rights of children become more apparent is with respect to the existence of widespread poverty leading to inadequate housing and living conditions,

Concerned at the especially adverse living conditions of children belonging to vulnerable groups, including indigenous people and ethnic, racial, religious and other minorities,

Deeply concerned at the particularly adverse effects of forced evictions on the health, well-being and development of children,

Stressing in general the adverse impact of poverty, and in particular of inadequate living and housing conditions, on the realization of the basic rights of children, including the right to food, to health, to education and the right to birth registration,

Reminds Governments to comply to the maximum extent of available resources with all existing obligations concerning the legally recognized rights of children to an adequate standard of living and the continuous improvement of living and housing conditions.¹⁰

The Beijing Declaration and Plan of Action (“Beijing Declaration”)¹¹ calls upon Governments which have not ratified the Convention on the Rights of the Child to ratify the same and for those Governments “which have signed and ratified the Convention, ensure its full implementation through the adoption of all necessary legislative, administrative and other measures and by fostering an enabling environment that encourages full respect for the rights of children.”¹²

¹⁰ Ibid.

¹¹ Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15.09.1995, A/CONF.177/20(1995) and A/CONF.177/20/Add.1(1995)

¹² Beijing Declaration and Plan of Action at paragraph 274(a).

In addressing issues concerning children and youth, the Beijing Declaration calls upon Governments to promote an active and visible policy of mainstreaming a gender perspective into all policies and programmes so that before decisions are taken, an analysis is made of the effects on girls and boys respectively. In particular, it urges Governments to take steps to eliminate the injustice and obstacles in relation to inheritance faced by the girl child, so that all children may enjoy their rights without discrimination, by *inter alia*, enacting, as appropriate, and enforcing legislation that guarantees equal right to succession and ensures equal right to inherit, regardless of the sex of the child.¹³

In addition to the aforementioned international instruments, the right to housing is recognised in many other international instruments.¹⁴ The Universal Declaration of Human Rights (UDHR)¹⁵ is the first to recognise this right by providing that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.¹⁶

¹³ Ibid. paragraphs 273 and 174(d).

¹⁴ For example Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (1966), Article 5 (e) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965), Article 14 (2) of the International Convention on the Elimination of All Forms of Discrimination Against Women (1979), Article 27 (3) of the Convention of the Rights of the Child (1989), Article 21 of the International Convention Relating to the Status of Refugees (1951), Article 43 (1) (d) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990).

¹⁵ Universal Declaration of Human Rights (UDHR), GA Resolution 217A (III), UN Doc. A/810 (10.12.1948)

¹⁶ Article 25 of the UDHR.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁷ which is the most comprehensive of the relevant provisions, provides in Article 11 (1) that:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The International Covenant on Civil and Political Rights (ICCPR) in Article 17 provides that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, **home**, or correspondence, nor to unlawful attacks on his honour and reputation.”¹⁸ [Emphasis added]

It is noteworthy that the ICESCR and ICCPR guarantee the rights mentioned therein to “everyone”, including children. The United Nations Committee on Economic, Social and Cultural Rights¹⁹ noted that the right to adequate housing applies to everyone and that the references to “himself and his family” in Article 11 of the ICESCR reflect assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted. The Committee further noted, “the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups”.²⁰ The same reasoning would apply to the applicability of this right to children, and the Committee noted that the concept of ‘family’ must be understood in a wider sense.

¹⁷ International Covenant on Economic, Social and Cultural Rights, (ICESCR) GA Resolution 2200A (XXI), UN Doc. A/6316 (16.12. 1966).

¹⁸ International Covenant on Civil and Political Rights (ICCPR) GA Res. 2200A(XXI), UN Doc A/6316 (16.12.1966).

¹⁹ General Comment No. 4, The right to adequate housing (Art.11, para. 1 of the Covenant), UN Doc. HRI/GEN/1/Rev.1 (1994).

²⁰ Ibid. paragraph 6.

Further, the rights guaranteed by these conventions, including the right to adequate housing, should be guaranteed to everyone including children without any discrimination. The Committee also noted that individuals as well as families are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In the context of inheritance rights, it denotes that it is contrary to the ICESCR to discriminate against children in their access to inheritance of housing, land and property.

In specific cases falling under some of these treaties, for instance, discriminatory inheritance rules based on gender or race, the protection of the relevant treaty can be invoked.

Several Resolutions and General Comments adopted by various UN bodies and other Declarations, - though not with specific reference to children - have emphasised the importance of ensuring inheritance rights and protecting the equal rights of women to property inheritance.

In General Comment No. 28 on Equality of Rights between Men and Women (Article 3 of the ICCPR), the United Nations Human Rights Committee stated that:

States Parties must also ensure equality in regard to the dissolution of marriage, which excludes the possibility of repudiation..... women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses.²¹

The UN Commission on Human Rights in its Resolution on Women's Equal Ownership, Access to and Control Over Land and the Equal Rights to Own Property and to Adequate Housing:

Reaffirms Commission on the Status of Women resolution 42/1, which, inter alia, urges States to design and revise laws to ensure

²¹ General Comment No. 28, Equality of rights between men and women (Art.3 of the Covenant), UN Doc. CCRP/C/21/Rev.1/Add.10 (2000).

that women are accorded full and equal rights to own land and other property, and the right to adequate housing, including through the right to inheritance, and to undertake administrative reforms and other necessary measures to give women the same right as men to credit, capital, appropriate technologies, access to markets and information;

Encourages Governments to support the transformation of customs and traditions that discriminate against women and deny women security of tenure and equal ownership of, access to and control over land and equal rights to own property and to adequate housing, to ensure the right of women to equal treatment in land and agrarian reform as well as in land resettlement schemes and in ownership of property and in adequate housing, and to take other measures to increase access to land and housing for women living in poverty, particularly female heads of household.²²

The Beijing Declaration calls upon States to revise laws and administrative practices to ensure women's equal rights and access to economic resources. It urges Governments to undertake legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and to ownership of land and other property, credit, natural resources and appropriate technologies.²³

The signatory States of the Istanbul Declaration and Habitat Agenda²⁴ committed themselves to:

Providing legal security of tenure and equal access to land to all people, including women and those living in poverty; and undertaking legislative and administrative reforms to give women full and equal access to economic resources, including the right to

²² UN Commission on Human Rights Resolution No. 2003/22, E/CN.4/2003/L.11/Add3.

²³ Beijing Declaration and Plan of Action, at paragraph 61(b).

²⁴ Habitat II Agenda, July 1996, A/CONF.165/1996.

*inheritance and to ownership of land and other property, credit, natural resources and appropriate technologies.*²⁵

The foregoing demonstrates the increasing willingness of the international community to secure property inheritance rights of women and children.

2.2. The scope of the right to adequate housing

The United Nations Committee on Economic, Social and Cultural Rights in its General Comment No. 4, has defined the parameters of the right to adequate housing.²⁶ International law guarantees the right to 'adequate housing' that extends beyond shelter provided by merely having a roof over one's head or viewing shelter exclusively as a commodity. Instead, it denotes the right to live in security, peace and dignity.²⁷

As to the scope of the term 'adequate' housing, the Committee acknowledged that while social, economic, cultural, climatic, ecological and other factors, in part, determine adequacy, the Committee identified seven core aspects of the right applicable to any particular context.²⁸

(a) Legal security of tenure

All persons should possess a degree of security of tenure that guarantees legal protection against forced eviction, harassment and other threats. States parties should take immediate measures to confer legal security of tenure upon those persons and households currently lacking such protection.

²⁵ Ibid. paragraph 40 (b).

²⁶ General Comment No. 4 The right to adequate housing (Art.11, para. 1 of the Covenant), UN Doc. HRI/GEN/1/Rev.1 (1994).

²⁷ Ibid. at paragraph 7.

²⁸ Ibid. at paragraph 8.

(b) Availability of services, materials, facilities and infrastructure

An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.

(c) Affordability

Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels.

(d) Habitability

Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well.

(e) Accessibility

Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere.

(f) Location

Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. Housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.

(g) Cultural adequacy

The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.

The right to adequate housing carries with it, the right to not be forcefully evicted from one's home. The international community has reiterated that forced evictions constitute "a gross violation of human rights, in particular

the right to adequate housing.”²⁹ Forced evictions have been defined as “the permanent or temporary removal against their will, of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”³⁰

International law lays down a three-tier test to determine the legality of evictions:³¹

1. Evictions can only be justified in the most exceptional circumstances and in accordance with the relevant principles of international law.
2. Governments must ensure that all feasible alternatives to eviction are explored in consultation with affected persons.
3. The following procedural protections shall be granted to those evicted:
 - a) an opportunity for genuine consultation with those affected;
 - b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
 - c) information on the proposed evictions and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;

²⁹ Commission on Human Rights Resolution 1993/77, UN Doc. E/CN.4/1997/RES/77; Commission on Human Rights Resolution 2004/28, UN Doc. E/CN.4/2004/RES/28

³⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 7 on *the Right to Adequate Housing: Forced Evictions*, 1997, UN doc. E/1998/22, Annex IV, paragraph 3.

³¹ Committee on Economic, Social and Cultural Rights, General Comments Nos. 4 and 7.

- d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- e) all persons carrying out the eviction to be properly identified;
- f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- g) provision of legal remedies;
- h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

Forced evictions should not, however, result in individuals becoming homeless or vulnerable to the violation of other human rights. Where the affected persons are unable to provide for themselves, the State must take all appropriate measures to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, is available.

2.3 The nature of Sri Lanka's obligations to provide adequate housing

Notwithstanding the reaffirmation of the right to adequate housing by the international community, there remains a large gap between the standards set by the international instruments dealing with housing rights and the situation prevailing in many parts of the world. The same holds true for Sri Lanka, which has ratified the ICESCR.

According to the Committee on Economic, Social and Cultural Rights, more than one billion people around the world lack adequate housing and over one hundred million people are homeless.³² In Sri Lanka, the shortage of housing is estimated at 218 295 units while an additional 1 325 880 sub-standard units require improvement. The demand for new houses is around 100 000 units per year.³³

Under the legal principle *pacta sunt servanda*, as enumerated in Article 26 of the Vienna Convention on the Law of Treaties,³⁴ States are under a legal obligation to perform their treaty obligations in good faith.

Sri Lanka, being a signatory to the ICESCR, is bound to implement the rights contained within it.³⁵ The legal obligations of States Parties concerning the right to adequate housing consist primarily of the duties found in Article 2 (1) of the ICESCR and, more specifically, obligations to recognise, respect, protect and fulfil the right to adequate housing in accordance with Article 11.

Under the ICESCR, Sri Lanka is bound to take steps “to the *maximum of its available resources*, with a view to *achieving progressively the full realization of the rights recognized*” in the Covenant “*by all appropriate means, including particularly the adoption of legislative measures*”.³⁶ [emphasis added].

The norms of the ICESCR must be recognised in appropriate ways within the domestic legal order and appropriate means of redress, or remedies, must be available to the aggrieved parties and appropriate means of ensuring governmental accountability must be put in place.³⁷ The phrase ‘by all appropriate means’ must be given its full and natural meaning. The UN

³² Paragraph 4, General Comment No. 4. *The right to adequate housing (Art.11, para. 1 of the Covenant)*, UN Doc. HRI/GEN/1/Rev.1 (1994).

³³ Census of Housing and Population Survey 2001, Annual Report of the Central Bank of Sri Lanka 2005, at p. 55

³⁴ Article 26 of the Vienna Convention on the Law of Treaties: “*Every treaty in force is binding upon the parties to it and must be performed in good faith.*”

³⁵ Sri Lanka acceded to the ICESCR on 11 September 1980.

³⁶ Article 2 (1) of the ICESCR.

³⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 9 *on the Domestic Application of the Covenant*, 1998, UN doc. E/1999/22, paragraph 2.

Committee on Economic Social and Cultural Rights in its General Comment No. 3 stated each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights. Since the 'appropriateness' of the means chosen will not always be self-evident, the Committee called upon States to include in their reports, not only the measures that have been taken but also the basis on which they are considered to be the most appropriate.³⁸

The Committee also noted that measures that might be considered appropriate include particularly legislative measures, judicial remedies and also may include administrative, financial, educational and social measures.³⁹ In the *Grootboom Case*, the Constitutional Court of South Africa held that the "[p]recise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable".⁴⁰ The Court was also of the view that socio economic rights expressly included in a Bill of Rights cannot be said to exist on paper only. Instead, Courts are constitutionally bound to ensure that they are protected and fulfilled.

Highlighting the responsibility of the State in implementing these rights, the Constitutional Court held that:

*A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The State must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.*⁴¹

³⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 3 *on the Nature of States Parties Obligations* (Art. 2 para 1), 1990, UN doc. E/1991/23.

³⁹ *Ibid.* paragraphs 4, 5 and 7.

⁴⁰ *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC).

⁴¹ *Ibid.*

The ICESCR provides for progressive realisation of the rights and thus their full realisation will generally not be able to be achieved in a short period. Nevertheless, it imposes an obligation to move as expeditiously and effectively as possible towards the full realisation of the rights.⁴² While the full realisation of the rights may be achieved progressively, steps towards achieving the same must be taken within a reasonable time.⁴³ The States have “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.”⁴⁴ For instance, if significant numbers of individuals within a State are deprived of basic shelter and housing, the State party *prima facie* would be failing to discharge its obligations under the Covenant. Even where resources available to a State are demonstrably inadequate, the State remains obliged to strive to ensure the widest possible enjoyment of the rights under the prevailing circumstances.

At the very minimum, negative protection of socio-economic rights must be guaranteed. States should refrain from engaging in “deliberately retrogressive measures”⁴⁵ which have the effect of denying individuals their existing access to these rights. Thus, laws and administrative practices that lead to a decline in the enjoyment of these rights breach the obligations of the State.⁴⁶

In the *First Certification Judgment*,⁴⁷ the Constitutional Court of South Africa considered the nature of the State obligation to protect socio-economic rights. The Court stated:

⁴² Ibid. paragraph 9.

⁴³ Ibid. paragraph 2.

⁴⁴ Paragraph 10 Committee on Economic, Social and Cultural Rights, General Comment No. 3 on *the Nature of States Parties Obligations* (Art. 2 para 1), 1990, UN doc. E/1991/23.

⁴⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 3 on *The Nature of States Parties Obligations*, 1990, UN doc. E/1991/23, paragraph 9.

⁴⁶ The Committee in its General Comment.No. 4 *The right to adequate Housing* stated that ‘a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, in the absence of accompanying compensatory measures, would be inconsistent with the obligations’ under the ICESCR.

⁴⁷ *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC).

It is true that the inclusion of socio economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits.....[M]any of the civil and political rights entrenched in the New Constitution will give rise to similar budgetary implications without compromising their justiciability. The fact that socio economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio economic rights can be negatively protected from improper invasion.

The rights enunciated by the ICESCR should be “guaranteed without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion or social origin, property, birth or other status.”⁴⁸

In its General Comment No. 9, the UN Committee on Economic Social and Cultural Rights has identified several aspects of the duty to give effect to the Covenant.⁴⁹ The mode of implementation must be adequate to ensure fulfilment of the obligations under the Covenant. Similarly, account should be taken of the means that have proved to be the most effective in the country in ensuring the protection of human rights. Justiciability of the rights is also a relevant consideration. States can give effect to Covenant rights by supplementing or amending existing domestic legislation or by formally incorporating them into domestic law. The Committee has highlighted the desirability of formal incorporation of the Covenant into domestic law.⁵⁰

Legal human rights obligations include the obligation to respect, protect, and fulfil the rights. The *obligation to respect* the right to adequate housing means

⁴⁸ Article 2 (2) of the ICESCR.

⁴⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 9 *On the Domestic Application of the Covenant*, 1998, UN doc. E/1999/22.

⁵⁰ *Ibid.* paragraphs 6, 7.

that States cannot take action, such as implementing a forced eviction that interferes with current housing standards. The *obligation to protect* the right means that States must protect persons from non-State actors, for example by adopting tenant protections or protecting communities from forced eviction by corporations. Finally, while the *obligation to fulfil* does entail positive obligations, this obligation clearly has justiciable components such as States adopting a reasonable plan of action for providing housing and devoting reasonable resources towards implementing that plan.

The obligations of Sri Lanka under the Convention on the Rights of the Child (CRC) are also similar to those under the ICESCR. Article 4 of the CRC requires States parties to take “all appropriate legislative, administrative and other measures” for the implementation of the rights contained therein. The Committee on the Rights of the Child in its General Comment No. 5⁵¹ spelt out the general measures of implementation of the CRC that are very similar to those under the ICESCR. They include the implementation of the CRC through legislation, establishment of coordinating and monitoring bodies, comprehensive data collection, awareness raising and training and the development and implementation of appropriate policies, services and programmes.⁵² The Committee highlighted that in implementing the Convention, States parties need to engage all sectors of the society and in particular, children themselves.

In all actions concerning children, the primary concern should be the best interest of the child.⁵³ All actions undertaken by the legislative bodies, courts of law, public or private social welfare institutions, and administrative authorities, are required to apply the best interests principle by systematically considering how children’s rights and interests will be affected by their decisions and actions.

⁵¹ Committee on the Rights of the Child, General Comment No. 5 on *General Measures of Implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5

⁵² *Ibid.* at paragraph 9.

⁵³ Article 3 (1) of the CRC.

2.4. The relevant Sri Lankan legal provisions

In Sri Lanka, the Constitution does not guarantee the right to adequate housing. It only recognises the freedom of choosing one's residence. Article 14 (1) (h) of the Constitution provides that:

Every citizen is entitled to the freedom of movement and of choosing his residence within Sri Lanka.

However, it guarantees equality before the law and equal protection of the law. Article 12 of the Constitution reads as follows:

- (1) All persons are equal before the law and are entitled to the equal protection of the law
- (2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds.

The only provision which expressly deals with housing is found in the Directive Principles of State Policy. Article 27 (2) (c) provides that States must ensure:

The realisation by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities.⁵⁴

The Directive Principles are only declaratory and are not justiciable in a court of law. They serve as a guide to "Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society".⁵⁵

⁵⁴ Article 27 (2) (c) of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

⁵⁵ Article 27 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978

The laws and rules relating to inheritance rights are contained in the Acts of Parliament, and are assessed in detail in Chapter 3.

3.

INHERITANCE RIGHTS UNDER SRI LANKAN DOMESTIC LAW AND POLICY

A person may inherit property either by testate or intestate succession. Where a person dies leaving a will and bequeathing property, the heirs inherit the property by testate succession whereas when a person dies without leaving a will, the property devolves by operation of the laws of intestate succession.

The Sri Lankan legal system includes three personal laws or special systems of law:

- Kandyan law, which is applicable to the Kandyan Sinhalese
- Tesawalamai law, which applies to the Tamil inhabitants of the province of Jaffna
- Muslim law, which is applicable to the Muslims in Sri Lanka

These personal laws govern a variety of matters relating to persons subjected to it, including inheritance rights. Intestate succession of property belonging to persons subjected to the three personal laws is governed by the respective systems of law. The general law covers that of persons not subjected to the personal laws. The Wills Ordinance governs the law relating to testate succession and applies to all Sri Lankans.

3.1 Testate succession

In Sri Lanka, a person can freely dispose of his or her property by a last will. The Wills Ordinance empowers competent persons to devise and bequeath by will, their property within Sri Lanka which at the time of death belong to such person, or to which he shall be then entitled, of whatsoever nature or description the same may be, movable or immovable, and all and every estate, right, share, or interest in any property⁵⁶.

A will executed beyond the limits of Sri Lanka by which movable property or immovable property situate within Sri Lanka is bequeathed or devised is valid provided it is done in conformity with the law of the country in which it is executed⁵⁷. Any person above eighteen years is considered as competent to make a will⁵⁸. Persons below the age of eighteen years are competent to make a will where they have obtained letters of *venia aetatis*⁵⁹ or where such persons are lawfully married⁶⁰.

The Prevention of Frauds Ordinance⁶¹ applies to determine the validity of wills. Wills have to be made either before a notary and two witnesses or before five witnesses⁶². The publication of wills is not a pre-requisite for their validity. However, upon the death of the testator, every will must be duly proved in the District Court⁶³.

In *Gunawardene v. Cabral and Others*⁶⁴, Rodrigo J quoted the following paragraph from the English case of *Barry v. Butlin*,⁶⁵ which illustrates the requirements of proving a will:

⁵⁶ Section 2 of the Wills Ordinance No. 21 of 1844.

⁵⁷ Section 5 of the Wills Ordinance No. 21 of 1844.

⁵⁸ Section 3 of the Wills Ordinance No. 21 of 1844.

⁵⁹ Under Section 4 of the Wills Ordinance, the President is empowered to grant letters of *venia aetatis*.

⁶⁰ Section 3 of the Wills Ordinance No. 21 of 1844.

⁶¹ Prevention of Frauds Ordinance No. 7 of 1840.

⁶² Section 4 of the Prevention of Frauds Ordinance No. 7 of 1840.

⁶³ Section 9 of the Prevention of Frauds Ordinance No. 7 of 1840.

⁶⁴ *Gunawardene v. Cabral and Others* [1980] 2 Sri L.R. 220

⁶⁵ (1838) 2 Moo PC 480.

It is clear first, that the onus of proving the will lies on the party propounding it and secondly, he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. To develop this last rule a little further, he must show that the testator knew or approved of the instrument and intended it to be such. In all cases the onus is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution from which a knowledge of and an assent to the contents of the instrument are assumed. The question is whether the testator knew the effect of the document he was signing. The circumstances attending the execution of the document may be such as to show that there is a suspicion attaching to the will, in which case it is the duty of the person propounding the will to remove that suspicion: this is done by showing that the testator knew the effect of the document he was signing.⁶⁶

Prior to the enactment of the Wills Ordinance, the Muslims were not free to dispose of their property by will. Muslim law (or Shariat law) places certain restrictions on testamentary dispositions. Under Shariat law, testamentary dispositions are limited to one third of the net estate to ensure that two-thirds of the net estate devolves on one's heirs. This is based on the principle that one cannot leave his⁶⁷ heirs completely destitute. However, with the enactment of the Wills Ordinance which gives an unfettered right of disposition to everyone including Muslims, a Muslim is at liberty to bequeath the entirety of his property to anyone of his choice.⁶⁸

Similarly, the Kandyan law did not recognise testate succession. One reason for this may be that in Kandyan law, one finds the remnants of feudal tenures

⁶⁶ Ibid.

⁶⁷ The uses of his and her to denote gender, and the use of his as an all-inclusive term for both genders, are discussed in subsequent sections on discrimination (see Chapter 4). In this context, his is used as a gender inclusive term.

⁶⁸ This was confirmed in the case of *Shariffa Umma v. Rahmathu Umma*, 14 NLR 464, where it was held that the provisions of the Wills Ordinance enable Mohammedans in Ceylon to dispose of the whole of their property by will.

that existed during the time of the Sinhalese kings. The king was the owner of all land. Large tracts of lands were given to village chiefs in return for their services to the king. Such village chiefs in turn gave portions of their land to their servants to be cultivated. As ownership of lands did not pass on to laymen, Kandyan law did not recognise the will as a mode of disposing of one's property. However, with the British influence, several changes regarding land ownership occurred, and this rigid stance was changed. With the enactment of the Wills Ordinance, all Kandyans were free to dispose of their property by will.

A woman subject to the Tesawalamai law is not a *femme sole*.⁶⁹ She cannot dispose of immovable property belonging to her without obtaining the written consent of her husband. However, to dispose of movable property or alienate movable or immovable property by last will, she is not required to obtain her husband's consent.⁷⁰ Thus although during her lifetime she cannot on her own dispose of immovable property, there is no impediment for a married woman subject to Tesawalamai to so dispose by last will and where she so does, the provisions of the Wills Ordinance apply.

Thus as regards testate succession, all persons are at liberty to dispose of their property by executing a will, without any restrictions as to the extent of property to be disposed or as to the beneficiaries.

3.2 Intestate succession

3.2.1 Inheritance under the general law

Where a person dies leaving an intestate estate, his heirs inherit the property *ab intestato*. The general law of intestate succession is found in the Matrimonial Rights and Inheritance Ordinance.⁷¹

⁶⁹ A *femme sole* is a married woman handling her own affairs

⁷⁰ Section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

⁷¹ No. 15 of 1876 as amended.

Prior to the enactment of the Ordinance, this area was governed by the Roman-Dutch law and there was a controversy as to whether it was the Roman-Dutch law of the North Holland or South Holland which was applicable. In Roman-Dutch law, the law of intestacy varied from town to town in the United Provinces. Two systems of intestate succession principally prevailed in Holland and West Friesland.⁷² The system of intestate succession that prevailed in South Holland was known as *Schependomsrecht* and was laid down in the judgments of sixteen local magistrates called Schepenen. The system in North Holland was known as *Azingdomsrecht* or *Aasdomsrecht* and anciently founded in the dooms of neighbours presided over by an officer called the *asega* in Friesland and adjoining districts of Holland.⁷³

An attempt to harmonise the two systems was made with the enactment of the Political Ordinance of 1580. However, the Ordinance failed to win the approval of the states of North Holland, which then enacted a Placaat in 1599 that differed considerably from the old Aasdoms Law and was in some respects closer to the Roman Law.⁷⁴ The controversy as to which of the above laws applied in Sri Lanka came to an end with the enactment of the Matrimonial Rights and Inheritance Ordinance which succeeded the Roman-Dutch Law. However, where the Ordinance is silent, the Roman-Dutch law as it prevailed in the North of Holland is to be applied.⁷⁵

In *W. Herman Silva et al, v. W. Kainerishamy et al*⁷⁶ it was held that while it is true that the rules of the Roman-Dutch Law as it prevailed in North Holland are applicable to questions of intestate succession which are not expressly provided for in the Ordinance, they are applicable only in instances where the Ordinance is silent. As such, it was held that as the Ordinance makes specific provision regarding the inheritance rights of illegitimate children, there is no room for any argument which would permit Courts to apply the rules of any other system of law.

⁷² H.W. Tambiah, *Principles of Ceylon Law*, (H.W. Cave & Company : Colombo, 1972), p. 322.

⁷³ R.W. Lee *Introduction to Roman-Dutch Law* (5th Ed.) cited by H.W. Tambiah *Principles of Ceylon Law* p. 322.

⁷⁴ H.W. Tambiah, *Principles of Ceylon Law*, (H.W. Cave & Company, Colombo, 1972) p. 322

⁷⁵ Section 36 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

⁷⁶ *W. Herman Silva et al, v. W. Kainerishamy et al*, 57 NLR 567

Similarly, in *Wise v. Muniarem*,⁷⁷ the Court did not accept the counsel's argument that the Matrimonial Rights and Inheritance Ordinance is merely declaratory of the common law on inheritance. It was held that the Ordinance recites that it is intended to amend the law relating to inheritance and "Section [36] of the Ordinance, enacting that in questions where the Ordinance is silent the rules of the Roman-Dutch Law are to govern, has also no application, because [the issue in question] is not a question on which the Ordinance is silent..⁷⁸

The Ordinance excludes its application to Kandyans, Muslims and to Tamils of the Northern Province who are subject to the Tesawalamai law⁷⁹ and are governed by separate laws. The Ordinance is silent as to its non-application to Mukkuwas⁸⁰. Thus, it is considered that the Mukkuwa law has been superseded by the Ordinance by implication.⁸¹ For the purposes of the Ordinance, where a woman marries a man of a different race or nationality from her own, she is taken to be of the same race and nationality as her husband so long as the marriage subsists and until she marries again.⁸²

The Ordinance governs intestate inheritance to immovable property in Sri Lanka irrespective of where the person deceased had his actual or matrimonial domicile.⁸³ Inheritance to movable property is to be governed by the law of the country in which the deceased was domiciled at the time of death. Where a person dies leaving movable property in Sri Lanka, in the absence of proof

⁷⁷ *Wise v. Muniarem*, 12 NLR 21

⁷⁸ *Ibid.*

⁷⁹ In *Azhar Ghouse v. Mohamed Ghouse and others* (1986) 1 Sri LR 48, the Court of Appeal stated that there are Statutes containing personal laws, and in such Statutes certain categories of communities are either brought within the Statutes or exempted therefrom. Their Lordships observed that in the Matrimonial Rights and Inheritance Ordinance, Section 2 sets out that the Ordinance shall not apply to Kandyans or Muslims or to Tamils of the Northern Province, who are subject to Tesawalamai.

⁸⁰ Mukkuwas are a community which came to Sri Lanka from the Malabar district of South India in the early period of Sri Lankan history.

⁸¹ H.W. Tambiah *Principles of Ceylon Law* p. 323.

⁸² Section 2 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

⁸³ Section 21 (1) of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

of his domicile elsewhere, inheritance to such property will be governed by the Ordinance.⁸⁴

Sections 22 to 34 of the Ordinance make provision as to the manner in which property is to be inherited. Section 23, which spells out the order of devolution of property, provides that subject to the right of the surviving spouse, the right of inheritance is divided in the order of descendants, ascendants and collaterals.

Where a person dies leaving a surviving spouse, the surviving spouse becomes entitled to one-half of the deceased person's property. The other half devolves on the deceased's children. In the absence of children and all other heirs mentioned in the Ordinance, the surviving spouse becomes entitled to the other half as well.

Children, grandchildren and remoter descendants take preference to all others in the estate of their parents. Subject to the rights of the surviving spouse, children inherit one-half of the property of their deceased parent. If there is no surviving spouse, the children inherit the entire estate. The property devolves on the children equally *per capita* and the children or remoter issue of a deceased child take *per stirpes* or by representation⁸⁵.

Where children or grandchildren, with their brothers and sisters become heirs to the deceased parents, they are bound to bring to hotchpot or collation all that they have received from their deceased parents above the others either on their marriage or to advance or establish them in life. This is so, unless it can be proved that the deceased parent either expressly or implicitly released any property so given from collation.⁸⁶

The Supreme Court in *Jainudeen v. Murugiah*⁸⁷ considered the meaning of the term hotchpot or collation and quoted from Steyn's Law of Wills in South Africa:

⁸⁴ Section 21 (2) of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

⁸⁵ Section 24 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

⁸⁶ *Ibid.* Section 35.

⁸⁷ *Jainudeen v. Murugiah*, 54 NLR 446.

Collation is the duty incumbent on all descendants who as heirs wish to share in the succession to an ancestor, either by will or ab intesto, of accounting to the estate of the ancestor for certain kinds of gifts and debts received from or owing to him by them during his lifetime. Thus, if a child, grandchild or more remote descendant wishes to inherit from a parent, grandparent or remote ascendant from whom he has during his lifetime received any property or money as his portion of inheritance, or as a marriage gift or otherwise for his advancement in trade or business or such like, he will, before the division of the estate, have to bring into or collate with the estate of such parent & c, either what he may have so received or enjoyed, or the true value of same at his option, so that the whole estate, thus augmented, may be divided in terms of the will of the testator or according to the law of succession ab intesto.⁸⁸

In appeal, the Privi Council was of the opinion that if a father gives property to his son on the occasion of the son's marriage, and dies intestate, the son is not deprived by Section 35 of the Matrimonial Rights and Inheritance Ordinance of the option of renouncing all claim to share in his father's estate or of bringing the property into collation. If he chooses the latter alternative, he has a further option of bringing in either the property itself or the value thereof.⁸⁹

Where children and remoter descendants fail, the inheritance goes to the parents of the deceased if they are both alive. Where only one parent is alive, that parent takes one-half of the property. The other half devolves on the brothers and sisters of the full blood and their children by representation, and brothers or sisters of the half blood related to the intestate by the side of the deceased parent and their children by representation. In the case where the deceased leaves no brothers or sisters by full or half blood as mentioned above, the surviving parent inherits the whole of the estate to the exclusion of the children or remoter descendants of a deceased sibling.⁹⁰

⁸⁸ Steyn's Law of Wills in South Africa, 1935 Edn. p. 103

⁸⁹ *Murugiah v. Jainudeen*, 56 NLR 176.

⁹⁰ Section 25 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

Where the parents of the deceased are not alive, the property devolves on his brothers and sisters whether of the full or half blood and their children or other issue.⁹¹ Specific provision is made in the Ordinance in situations where a deceased leaves brothers and sisters of both the full and half blood. In such a case, the inheritance is divided into two parts. One part is divided among the full brothers and sisters and their issue, and among the half brothers and sisters of the father's side and their issue. The other part, the full brothers and sisters and their issue divide with the half brothers and sisters of the mother's side and their issue. If there are only half brothers and sisters and their issue on one side, the full brothers and sisters and their issue take one-half of the property and divide the other half with the half brothers and sisters and their issue.⁹² When brothers and sisters of the full blood or their issue fail, half brothers and sisters of the mother's side take one-half and those of the father's side take the other half.⁹³

Where a person dies leaving brothers and sisters of the half blood related only on one side, they are entitled to the entire inheritance. However, if there is a grandparent or higher descendant related on the other side is alive, such half brothers and sisters take one-half of the property and the other half devolves *per capita* on the grandparents.⁹⁴

All the persons above enumerated failing, the inheritance goes first to the nearest in the ascending line *per capita*, although it should happen that on the one side both the grandfather and the grandmother, and on the other side only one of these parents, should be alive. Afterwards it goes to uncles and aunts⁹⁵ and the children of deceased uncles and aunts *per stirpes*. Uncles

⁹¹ Section 26 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

⁹² Section 27 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

⁹³ Section 28 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

⁹⁴ Section 29 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

⁹⁵ In *Vanderstraaten v. Eaton* 37 NLR 294, it was held that the expression "uncles and aunts" in Section 35 (now Section 30) of the Matrimonial Rights and Inheritance Ordinance includes uncles and aunts of the half blood. In *Caderamen v. Alles* (1918) 20 NLR 308, the deceased intestate left surviving him seven uncles and aunts and their children. One uncle was on the paternal side. It was held that the paternal uncle got only one-seventh of the estate and not one-half. The words '*per stirpes*' in Section 35 (now Section 30) governs only the words 'children of the deceased uncles and aunts' and thus uncles and aunts take *per capita*.

and aunts failing, then the property devolves on their children and also great-uncles and aunts with them *per capita*.⁹⁶

Illegitimate children inherit the property of their intestate mother, as the mother makes no bastard. However, they do not have a right to inherit property of their father or that of the relatives of their mother.⁹⁷ In *W. Herman Silva et al, v. W. Kainerishamy et al*⁹⁸, the question was whether an illegitimate child could claim to be an heir of his father's intestate estate. The Supreme Court reversed the finding of the District Court that the 3rd Defendant, although illegitimate, should be recognised as enjoying the status of a legitimate child in accordance with a doctrine of Roman-Dutch Law relating to "putative marriages" and held that in view of Sections 23,24 and 33 of the Ordinance, the Roman-Dutch law concepts cannot be applied. Similarly, the father of an illegitimate child has no right of succession to the property of the child.⁹⁹

Where an illegitimate person leaves no surviving spouse or descendants, his or her property vests in the heirs of the mother, so as to exclude the State. In *Appuhamy v. Perera*,¹⁰⁰ it was held that where a person of illegitimate birth dies leaving her surviving husband and other illegitimate children of her mother, her husband is entitled to succeed to the entire estate.

If a person dies intestate without any of the heirs mentioned above, the estate escheats to the State. However, if any heirs can be found even beyond the tenth degree, they are entitled to take the inheritance.¹⁰¹

3.2.2 Inheritance under Tesawalamai law

Tesawalamai is a special system of law applicable to the Tamil inhabitants of Jaffna. It has evolved from a system of customary laws applicable to the

⁹⁶ Section 30 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

⁹⁷ Section 33 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

⁹⁸ 57 NLR 567.

⁹⁹ See. *Banda v. Banda* (19 NLR 126), *Kuma v. Banda* (21 NLR 294).

¹⁰⁰ 40 NLR 173.

¹⁰¹ Section 34 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

ancient Tamils and has been moulded by other systems of law such as the Hindu law, Mohammedan law and the Roman-Dutch law.¹⁰² During the period that Sri Lanka was under the Dutch rule, on the order of the Governor of Ceylon, Tesawalamai law was codified by Claaz Isaacs in the Tesawalamai Regulation.

The Jaffna Matrimonial Rights and Inheritance Ordinance now governs property inheritance of those who are subjected to Tesawalamai law.¹⁰³ The Ordinance retains certain fundamental principles of the Tesawalamai Regulation, yet has also made many changes. For instance, the order of succession under the Regulation, which was descendants, certain collaterals and ascendants, has been changed by the Ordinance. Any provisions of the Tesawalamai Regulation that are inconsistent with the provisions of the Ordinance have also been repealed.¹⁰⁴

The Jaffna Matrimonial Rights and Inheritance Ordinance applies only to those Tamils to whom the Tesawalamai applies, and it applies to their movable and immovable property wherever situated.¹⁰⁵ The Tesawalamai Regulation applies to “Malabar inhabitants of the province of Jaffna”.¹⁰⁶ The judiciary in numerous cases has attempted to interpret the term ‘Malabar inhabitants of the province of Jaffna’.

In *Sivagnanalingam v. Sunethralingam*¹⁰⁷ the Court stated thus:

The Tesawalamai is a collection of the Customs of the Malabar Inhabitants of the Province of Jaffna (collected by Dissawe Isaak) and given full force by the Regulation of 1806. For Tesawalamai to apply to a person it must be established that he is a Tamil inhabitant of the Northern Province..... The meaning of the expression ‘inhabitant of the Province of Jaffna’ is a question of

¹⁰² H.W. Tambiah *Principles of Ceylon Law* (H.W. Cave & Company, Colombo, 1972) 199.

¹⁰³ No. 1 of 1911 as amended..

¹⁰⁴ Section 40 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹⁰⁵ Section 2 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹⁰⁶ Section 2 of the Tesawalamai Regulation No. 18 of 1806 and Ordinance No. 5 of 1869.

¹⁰⁷ *Sivagnanalingam v. Sunethralingam*, [1988] 1 Sri LR 86.

law. Inhabitants mean permanent inhabitant – one who has his permanent home in Jaffna in the nature of a domicile in the Northern Province..... The Tesawalamai is the personal law of the Tamil inhabitants of the Northern Province. It applies to them wherever they are and to their movable and immovable property wherever situated in Sri Lanka.

As to the meaning of the term 'Malabar', it was held in *Tharmalingam Chetty v. Arunachalam Chetty*¹⁰⁸ that although historically speaking, many Tamils had come from the Malabar District in India and settled themselves in Jaffna, still the term 'Malabar' as used by the Dutch meant 'the Tamils'.

Although according to the Tesawalamai Regulation, it applies to Malabar inhabitants of the 'province of Jaffna', subsequent case law and the report of the Tesawalamai Commission suggest that it extends to the Tamils who live in the Northern Province.

Where a woman to whom the Tesawalamai applies, marries a man to whom the Tesawalamai does not apply, during the subsistence of the marriage, she is not subject to Tesawalamai. Similarly, where a woman to whom the Tesawalamai does not apply marries a man to whom the Tesawalamai applies, during the subsistence of the marriage, she is subject to the Tesawalamai.¹⁰⁹

The Tesawalamai law recognises different kinds of property and inheritance rights to such categories differ considerably. Property devolving on a person by descent at the death of a parent or of any other ancestor in the ascending line is called *Mudusam*,¹¹⁰ or patrimonial inheritance.¹¹¹ Property inherited from a relative other than a parent or an ancestor in the ascending line is

¹⁰⁸ *Tharmalingam Chetty v. Arunachalam Chetty*, 45 NLR 414 at 416

¹⁰⁹ Section 3 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹¹⁰ In *Nalliah v. Ponnamah* (22 NLR198) it was held that money which a husband has saved out of his earnings before his marriage belongs to him for his separate estate, whether it is strictly called mudusum or not. The circumstance that it was invested during marriage does not change its character.

¹¹¹ Section 15 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

called *Urumai* or non-patrimonial inheritance.¹¹² Another division is made between the property derived from the father's side and from the mother's side. Property received by a person in *Mudusam*, in *Urumai*, in dowry, under a will, in donation or in a manner other than for pecuniary consideration from a father or any of his ascendants or any of the father's collateral relations is termed as property derived from the father's side. Such property received from a mother or any of her ascendants or any of the mother's collateral relations is termed as property derived from the mother's side.¹¹³

There is a further category of property called *Thediatheddham* which is the property acquired by either the husband or wife during the subsistence of their marriage. Property acquired by a spouse during the subsistence of the marriage for valuable consideration (such consideration not forming part of the separate estate of that spouse) and profits arising during the subsistence of the marriage from the separate estate of that spouse is *Thediatheddham* of that spouse.¹¹⁴

The Jaffna Matrimonial Rights and Inheritance Ordinance, prior to being amended by Ordinance No. 58 of 1947, did not recognise a surviving spouse as an heir to the intestate estate of the deceased spouse. The amending Ordinance of 1947 gave a right of inheritance to the surviving spouse by providing that on the death of either spouse, one-half of the *Thediatheddham* which belong to the deceased spouse and has not been disposed of by last will or otherwise shall devolve on the surviving spouse. The other half devolves on the heirs of the deceased spouse.¹¹⁵

In *Manikkavasagar v. Kandasamy and others*,¹¹⁶ Court observed that the surviving spouse was not recognised as an heir of the deceased spouse under the Tesawalamai law or under the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911. The amending Ordinance No.58 of 1947 provides statutorily that half of the undisposed *Thediatheddham* belonging to the deceased spouse will devolve on the surviving spouse. Court also held that

¹¹² Section 16 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹¹³ Sections 17 and 18 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹¹⁴ Section 19 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹¹⁵ Section 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹¹⁶ [1986] 2 Sri LR 8.

it is basic to the concept of *Thediatheddam* that both spouses are equally entitled to it from the moment of the acquisition. An undivided half of the *Thediatheddam* vests automatically by the operation of law on the non-acquiring spouse from the moment of acquisition. One-half of his half will, in the event of the deceased spouse dying intestate, devolve on the surviving spouse so that the surviving spouse will then become entitled to $\frac{3}{4}$ th share of the *Thediatheddam*.

Subject to the above mentioned right of the surviving spouse, the order of inheritance under the Ordinance is descendants, ascendants and collaterals.¹¹⁷

Children, grandchildren, and remoter descendants are preferred to all others in the estate of the parents. While children take equally *per capita*, children or remoter issue of a deceased child take *per stirpes*.

The Ordinance too preserves the rule of collation and provides that children or remoter descendants becoming heirs to the deceased parents,

*unless they abandon all right to inherit as heirs ab intestate, are bound to bring into hotchpot or collation all that they have received from their deceased parents above the others by way of dowry or otherwise on the occasion of their marriage, or to advance or establish them in life, unless it can be proved that the deceased parent either expressly or impliedly released any property so given from collation.*¹¹⁸

The Ordinance preserves the old Tesawalamai rule that property reverts to the source from which it came. Thus, property derived from the mother's side does not devolve on the relations of the father's side and vice versa or on the surviving spouse unless all the relations on the mother's side have been exhausted.¹¹⁹ Accordingly, where children and remoter descendants fail, the

¹¹⁷ Section 21 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹¹⁸ *Ibid.* Section 33.

¹¹⁹ See for eg. *Theagarajah v. Paranchothippillai* (11 NLR 46) where it was held that property inherited by a child from its mother goes on the death of the child, to the mother's next of kin and not to the father.

property of the deceased which was derived from the father's side and one-half of the remainder of the estate of the deceased (exclusive of the property derived from the mother's side) is inherited by the father if he is alive.¹²⁰ Father failing, the aforesaid property devolves upon the intestate's full brothers and sisters and half brothers and sisters related by the side of the father *per capita* and their issue *per stirpes*. In the absence of full brothers or sisters or their issue, the property devolves on the half brothers and sisters and their issue by representation.¹²¹ Where the above-mentioned persons fail, the said property devolves on the paternal grandparents if surviving. Failing them, the property devolves on the paternal uncles and aunts and their issue by representation. Failing them, the property goes to great-grandparents *per capita* if surviving and if not on the brothers and sisters of the paternal grandparents and their descendants if surviving and if not on the brothers and sisters of the next nearest in the ascending line of the father and their descendants by representation.¹²²

Where children and their issue fail, property derived from the mother's side and one-half of the remainder of the estate of the deceased (excluding the property derived from the father's side) devolves on the maternal relatives in the same order described above¹²³. Only where the kindred on the father's side fail, does the property derived from the father's side devolve on the mother and her kindred and vice versa in the order mentioned above.¹²⁴ Where all the persons above fail, the entire inheritance goes to the surviving spouse, if any. Where all heirs fail, the estate escheats to the State.

Illegitimate children inherit the property of their mother and not that of their father.¹²⁵ However, they are not prevented from taking property under a will or by a deed from the father.¹²⁶ Where an illegitimate person does not leave a

¹²⁰ Section 23 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹²¹ Section 25 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹²² Section 27 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹²³ See Sections 24, 26 and 28 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹²⁴ Section 30 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹²⁵ Section 34 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

¹²⁶ In *Visuvanather v. Tiyagaraja* (8 NLR 174) it was held that though it was illegal under the *Tesawalamai* for illegitimate children to inherit paternal property, no provision is made incapacitating them from taking property given under a will or a deed of their parents.

surviving spouse or descendants, the property devolves on the mother and then on the heirs of the mother so as to exclude the State.¹²⁷

If the Jaffna Matrimonial Rights and Inheritance Ordinance is silent on a particular question, the provisions of the Matrimonial Rights and Inheritance Ordinance and such laws as applicable to Tamils inhabitants of the Western Province applies.

3.2.3 Muslim law of inheritance

Muslim law is the special system of law that applies to Muslims in Sri Lanka. Tyabji links the basis of the Muslim law of inheritance to the Quran and states as thus:

*The Muslim Law of inheritance consists primarily of the rules relating thereto laid down in the Quran or by the Prophet in his teachings and the customs and usages prevailing amongst the Arab tribes near Mecca and Medina at the time of the Prophet in so far as they have not been altered or abrogated by the said rules and teachings....the title to succession previous to Islam, was that of comradeship in arms. It was on this basis that women and children who were unable to bear arms were disqualified in regard to inheritance. The law was not amended on this point for the first two or three years during which the Prophet preached. Later this rule was abrogated by the Quran and it was laid down that nothing could furnish so strong a claim to inheritance as blood relation. This was indeed only a part of the general scheme of the new religion to strengthen the family tie.*¹²⁸

Dealing with the law of succession, the Quran states that:

¹²⁷ Section 35 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911. In the case of *Chelliah v. Kadiravelu* (33 NLR 172) it was held that where a woman of illegitimate birth died intestate leaving her husband and no issue, legitimate issue of the mother was entitled to succeed to her dowry property to the exclusion of her husband.

¹²⁸ Tyabji, *Muslim Law* (4th Ed.) 880 et seq.

and they who believed and left their homes afterwards, and have striven along with you, these are also of you, but these who are united by ties of blood are nearer to each other by the books of God. Verily God has knowledge of all things.¹²⁹ Nearer to the believers is the Prophet than they are to their own selves, and his wives are (as) their mothers. In the Book of God they who are related by blood, are nearer the one to the other than the (other) believers and those who fled, but you should show kindness to your kindred.¹³⁰

The laws observed by the Moors in Sri Lanka were laid down in the Mohammedan Code, enacted in 1806. The Mohammedan Code was first applied only to the province of Colombo and in 1862, its application was extended to the rest of Sri Lanka.¹³¹ Subsequent legislation made several amendments to the Mohammedan Code. The Mohammedan Code provided *inter alia*, for matters relating to succession and rights of inheritance among Muslims in Sri Lanka.

However, the Muslim Intestate Succession and Wakfs Ordinance¹³² repealed the Mohammedan Code on intestate succession.¹³³ The Ordinance, which now governs the law relating to inheritance rights of Muslims, provides that the law applicable to the intestacy of a deceased who at the time of his death was domiciled in Sri Lanka or who was the owner of immovable property is the Muslim law governing the Sect to which the deceased Muslim belonged.¹³⁴

This was confirmed by the judiciary in the case of *Ghouse v. Ghouse*,¹³⁵ where the Court held that Section 2 of the Muslim Intestate Succession Ordinance clearly and unequivocally provides that the Muslim Law governing the Sect to which the deceased Muslim belonged shall apply to the intestacy in question.

¹²⁹ Quran VIII - 72-75.

¹³⁰ Quran XXXIII - 6.

¹³¹ This was done by Ordinance No. 5 of 1862.

¹³² Muslim Intestate Succession and Wakfs Ordinance, No. 10 of 1931

¹³³ One of the main reasons for repealing the Mohammedan Code is the criticism of the Code by Akbar J who claimed that it does not accurately reflect the customs of Mohammedan. Akbar J published a series of articles on the topic in the Ceylon Law Weekly.

¹³⁴ Section 2 of the Muslim Intestate Succession Ordinance No. 10 of 1931.

¹³⁵ *Ghouse v. Ghouse*, [1988] 1 Sri LR 25 at p 27-28.

This statutory provision imports the whole body of the Muslim Law governing the Sect to which the deceased belonged to decide the question of succession to the intestacy in question irrespective of whether any part thereof has been accepted earlier or not. The entire body of Muslim Law governing the Sect to which the deceased Muslim belonged has become applicable from the date of the Ordinance to the intestacy in question.

Muslim law of inheritance is extremely complicated and the rules of inheritance vary according to the various schools of law of the Sects. The intricate rules of inheritance are detailed in works on Muslim law, but it is beyond the parameters of this report to engage in an exhaustive analysis of these. The following section provides an overview of the Muslim law of intestate succession.

3.2.3.1 Muslim law on intestate succession¹³⁶

In Islam there are two Sects, namely, the Sunnis and the Shiahs. In the Sunni Sect, there are four schools of thought brought about by four Imams or leaders, namely, Hanafi, Maliki, Shafie and Hanabali. Muslims in Sri Lanka are presumed to belong to the Shafie Sect unless otherwise provided.¹³⁷ In the case of *Alithamby v. Bastianpillai*¹³⁸ court held that according to Section 2 of the Muslim Intestate Succession Ordinance, the law applicable to intestacy is the law governing the Sect to which the deceased Muslim belongs. This is the law applicable to the Shafei Sect of Sunnis to which a majority of the Muslims in Sri Lanka belong.

In the case of *Mangandi Umma v. Lebbe Marikkar*,¹³⁹ the Court held that there is no difference between the various Schools of Thought of Sunni Muslims regarding shares on intestacy. Under all schools of Muslim Law the question who shall be heirs, and who, as such, shall be entitled to take the estate is

¹³⁶ The following section is based on the writings of H.W. Tambiah *Principles of Ceylon Law* (H.W. Cave & Company, Colombo, 1972) pp. 189-193.

¹³⁷ A.H.G. Ameen, *Muslim Law of Succession – A Guide*, (Al Ameen Publishers, Colombo, 2005) p. 20.

¹³⁸ *Alithamby v. Bastianpillai*, [1984] 1 SLR 243.

¹³⁹ *Mangandi Umma v. Lebbe Marikkar*, 10 NLR 1.

determined by ascertaining who are the nearest in accordance with the rules of proximity to the deceased.

According to Tambiah,¹⁴⁰ in order to understand the manner in which property devolves by way of intestate succession, it is necessary to first identify the three principal classes of heirs recognised by Mohammedan law, namely Qur'anic heirs or Sharers, Residuaries and the Distant Kindred.

A Sharer means a person who takes a definite fraction of the estate, under the provisions contained in the Quoran. Sharers owe their rights to Islam. Wilson describes Sharers thus:

*The first step in the distribution is to assign certain specified fractions of the whole heritable property, to the blood relations hereinafter mentioned, should any such happen to exist, and also to the wife or wives, if any, or to the husband, as the case may be, of the deceased. Such persons are called sharers.*¹⁴¹

There are twelve Sharers and they include four males and eight females among whom are the husband, father, father's father how high so ever, uterine brothers, the wife, mother, true grandmother¹⁴², daughter, son's daughter, full sister, consanguine sister and the uterine sister. The proportion in which the property devolves on the Sharers is fixed and is one-half, one-quarter, one-eighth, two-thirds, one-third or one-sixth. These rules are set out in tables in leading books on Muslim law. The general rule is that the nearer blood excludes the more remote. However, the husband, wife, father, mother and daughter are never excluded.

The Residuaries, who are also called *asba*, take the residue after the Sharers, not excluded, have been satisfied. There are three kinds of Residuaries. First is the Residuary in his own right and includes all male relations in the chain of whose

¹⁴⁰ H.W. Tambiah *Principles of Ceylon Law* p.189.

¹⁴¹ Anglo-Muhamedan Law, 6th Ed. para. 209, p. 262

¹⁴² True grandmother is the grandmother in whose line of relationship to the deceased no false grandfather intervenes. True grandfathers are those between whom and the deceased no female intervenes. Other grandfathers are called false grandfathers.

relationship to the deceased, no female enters. They are further divided into four classes, namely, parts of the deceased,¹⁴³ roots of the deceased,¹⁴⁴ parts of the father of the deceased¹⁴⁵ and parts of the grandfather of the deceased.¹⁴⁶ The second category is the Residuary with another's right. They are those females who, as are Sharers, are entitled to either one-half or two-thirds and who become Residuaries if they co-exist with their brothers. The third category is the Residuaries with another. They are the female heirs who become a Residuary because of her co-existence with another female heir. The son of a deceased is not a Sharer but a Residuary. However, the son cannot be excluded from the inheritance of the estate of the deceased. Therefore, uterine relations are not included in this category but only blood relations are included.

Some schools of law recognise Distant Kindred as heirs to the estate of a deceased.¹⁴⁷ They include all relations who are neither Sharers nor Residuaries provided there are no Sharers or Residuaries. There are four kinds of Distant Kindred. Firstly, there are the descendants of the deceased such as children of daughters and children of son's daughters. Secondly, there are those from whom the deceased is descended, for instance the excluded grandfather or grandmother. In the third category are those that are descended from the parents of the deceased, namely, sisters' children and brothers' daughters. The fourth category consists of descended from the parents of the deceased, namely, paternal aunts, maternal uncles and aunts. Among the Distant Kindred, succession is regulated in the order of the above classification of Distant Kindred.

Under the general Mohammedan law, an adoption cannot be made; an adoption, if made in fact by a Mohammedan, could carry with it no right of inheritance. Thus, in the case of *Ghouse v. Ghouse*¹⁴⁸ it was held that:

¹⁴³ ie. the sons and grandsons of the deceased how low so ever.

¹⁴⁴ ie. the father and grandfather of the deceased how high so ever.

¹⁴⁵ ie. brothers and brothers' sons how low so ever.

¹⁴⁶ ie. paternal uncles and their sons how low so ever.

¹⁴⁷ However the Shafi' and Maliki schools of law do not recognise Distant Kindred as heirs.

¹⁴⁸ [1988] 1 Sri LR 25 at p 30.

[a]n adopted son has no right of inheritance since the principle of 'Muslim Law based on the Quran, is that one must be a consanguine relative of the deceased to become entitled to inherit the property of the deceased; there should be actual or natural parentage, not legal parentage over other people's children in order to found a claim for inheritance under the Muslim Law.¹⁴⁹

Tambiah¹⁵⁰ lists out certain principles of the Muslim law of inheritance. The property of a deceased Muslim has to be distributed according to the law of the school to which the deceased belonged at the time of his death and not according to the school of law applicable to the heirs. An heir becomes entitled to the interest in property only on the death of the deceased. Thus the right of an heir who dies before the deceased does not accrue to the benefits of his own heirs. On death of a Muslim, his heirs take a vested interest in the share of the deceased's property, so that if the heir dies before the distribution of his share, his share would pass to his own heirs at the time of his death.

Generally, there is no distinction between the manner in which immovable and movable property is inherited except in Shiah law where the deceased is a childless widow, a distinction is drawn between land and other properties. Most schools of law do not recognise the rule of primogeniture except the Shiahs, Shafi'is and the Malikis where the right of an eldest son to inherit certain articles of his father such as wearing apparel, the Qur'an ring and the sword, is recognised. The principle of representation has no place in the Sunni law.

3.2.4 Kandyan law of inheritance

Kandyan law is the customary law applicable to the Kandyan Sinhalese. Originally, Kandyan law did not recognise testate succession. However, with the British influence, it was accepted that one could dispose of property by executing a will.¹⁵¹

¹⁴⁹ Ibid.

¹⁵⁰ H.W. Tambiah *Principles of Ceylon Law* (H.W. Cave & Company, Colombo, 1972) 191-194.

¹⁵¹ Ibid., p. 161.

The Kandyan law of intestate succession is somewhat complicated and is in the words of Tennyson, “wilderness of single instances”¹⁵². To understand its intricate rules, one has to be familiar with the concept of a Kandyan family. Tambaiah describes a Kandyan family thus:

The gedara or the family is the unit of the Kandyan family. A gedara consists of a man who is married in diga,¹⁵³ his wife, his male children and unmarried female children. A daughter who is given away in diga marriage does not belong to the father’s gedara but becomes a member of that of her husband. But in the case of a binna¹⁵⁴ married daughter, she and her children are members of her father’s family or gedara. Therefore on the death of a person, his property is inherited by his sons, binna married daughters and unmarried daughters.¹⁵⁵

Kandyan law of intestate succession is governed by the Kandyan Law Declaration and Amendment Ordinance.¹⁵⁶ It applies to persons subject to the Kandyan law.¹⁵⁷ The Kandyan Succession Ordinance¹⁵⁸ provides that issue of a marriage contracted between a man subject to the Kandyan law and domiciled in the Kandyan provinces and a woman not subject to the Kandyan law and issue of a marriage contracted in *binna* between a woman subject to the Kandyan law and domiciled in the Kandyan provinces and a man not subject to the Kandyan law are deemed to be persons governed by Kandyan law.¹⁵⁹ Although this definition is not very clear, in practice all Sinhalese who were settled in the Kandyan provinces at the time of the annexation of the Kandyan territory¹⁶⁰ are regarded as Kandyans within the meaning of this Ordinance.¹⁶¹

¹⁵² *Ibid.*, p. 162.

¹⁵³ A *diga* marriage is one where the husband takes the wife away from her paternal home and keeps her either in his parent’s house or in his separate house.

¹⁵⁴ A *binna* marriage is where the husband lives in the wife’s or her parents’ house.

¹⁵⁵ H.W. Tambaiah *Principles of Ceylon Law*, p.162

¹⁵⁶ No. 39 of 1938 as amended by Ordinance No. 25 of 1944.

¹⁵⁷ Section 1(2) of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938.

¹⁵⁸ Kandyan Succession Ordinance No. 23 of 1917

¹⁵⁹ Section 2 of the Kandyan Succession Ordinance No. 23 of 1917

¹⁶⁰ By the British by Proclamation of 2nd March 1815.

¹⁶¹ H.W. Tambaiah *Principles of Ceylon Law*, p.154.

Kandyan law distinguishes between certain types of property. *Paraveni* property, also known as ancestral or inherited property, means immovable property to which a deceased person was entitled by succession, under a deed of gift executed by a donor to whose estate the deceased would have been entitled if the donor had died intestate immediately prior to the execution of the deed, and under the last will of a testator to whose estate the deceased would have been entitled to succeed had the testator died intestate. However, where the deceased does not leave any children or other descendants, the acquired property of the person from whom it passed to the deceased is deemed to be acquired property of the deceased. Depending on from whom it was inherited, *paraveni* property is further divided as maternal *paraveni* and paternal *paraveni*. All other property of the deceased is regarded as acquired property.¹⁶²

Under the Kandyan law, the devolution of property by intestate succession differs according to whether the deceased is a man or a woman and on whether the property is immovable or movable. The immovable property of a deceased intestate man devolves in the following manner:

A surviving wife only has a life interest in her deceased intestate husband's property for the purposes of maintenance. She is entitled to an estate for life in the acquired property of her husband¹⁶³ and if there is no acquired property or if such property is insufficient for her maintenance, then her life interest extends to *paraveni* property. If the deceased leaves a child or a descendant by a former marriage, the surviving spouse's life interest is limited to one-half of the acquired property.¹⁶⁴ If the deceased left legitimate children who

¹⁶² Section 19 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

¹⁶³ In *Lydia v. Kiriuruwa* (70 NLR 272), it was held that where an illegitimate son dies intestate and issueless, leaving him surviving his wife and no relations other than the legitimate children of his mother, the dominium in respect of his acquired property devolves on his mother's legitimate children and his wife is entitled only to a life interest in such property.

¹⁶⁴ In *Tikiri Banda v. Dingiri Banda* (76 NLR 203), court held that when a person who is subject to the Kandyan Law Declaration and Amendment Ordinance dies leaving his widow and children by her and also children by a previous marriage, the per capita shares of the children of the previous marriage are not subject to the widow's life interest in a one-half share of the acquired property of the deceased except if and to such extent as the per capita share of the widow's own issue are less than one-half.

are minors in need of maintenance and if there is no or insufficient *paraveni* property to maintain such children, then the surviving spouse is bound to maintain the children out of her estate for life in the acquired property of the deceased. Only where the deceased leaves no heir to survive him does the surviving spouse succeed to all his property, both *paraveni* and acquired. Where the surviving spouse contracts a *diga* marriage, she forfeits her life interest in the *paraveni* property but not that of the acquired property of the deceased husband.¹⁶⁵

Where a daughter contracts a *diga* marriage before the death of the father, she forfeits her rights to his estate.¹⁶⁶ If however, a daughter contracts a *diga* marriage after the death of the father, she is still entitled to her share of the father's estate. However, if within a period of one year after the date of her marriage her brothers and *binna* married sisters¹⁶⁷ tender her, the fair market value of the immovable property constituting her share, she is bound to convey the said property to them.¹⁶⁸

Where a man dies leaving descendants from two marriages, his estate is shared among them. The property devolves on them *per capita* and not *per stirpes* to the issue of each marriage according to the number of marriages.¹⁶⁹

Unlike the general law of intestate succession, Kandyan law, (although in certain limited respects) recognise illegitimate children as heirs to their deceased father's intestate estate. Illegitimate children have no right of inheritance to the *paraveni* property of their father. Yet, in the absence of legitimate children or their descendants and subject to the interests of the surviving spouse, they are entitled to succeed to the acquired property of their father. Nonetheless, where the deceased had registered himself as the father of the child when

¹⁶⁵ Section 11 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

¹⁶⁶ In *Sirisena v. Dingiri* (45 CLW 24) the deceased left surviving him a son and three daughters who were *diga* married prior to his death. It was held that subject to the surviving wife's life interest over the acquired property, the son succeeded to the entirety of the immovable property of the deceased. The three daughters have no right to succeed since they all married in *diga* during the father's lifetime.

¹⁶⁷ If there is more than one brother or sister, all of them must act jointly.

¹⁶⁸ Section 12 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938.

¹⁶⁹ Section 13 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

registering the birth of that child¹⁷⁰ or where the deceased in his lifetime has been judged by a court to be the father of that child, then such child although illegitimate succeeds to the acquired property of the deceased equally with legitimate children.¹⁷¹

Where a woman whether unmarried, married in *diga* or married in *binna* on her mother's property dies intestate, her immovable property devolves on her children and their issue irrespective of whether they are legitimate or illegitimate, married (whether in *diga* or *binna*) or unmarried. If however the deceased was married in *binna*, her illegitimate children do not inherit her *paraveni* property. Where a woman married in *binna* on her father's property dies intestate, her children¹⁷² and their issue are entitled to succeed to her property in the manner they would succeed to the estate of their father.¹⁷³ Where a woman married in *diga* dies intestate leaving a surviving spouse but no children, the spouse is not entitled to any of her immovable property other than to her acquired property to which she became entitled subsequent to and during the subsistence of such marriage in *diga*.¹⁷⁴ In *Wimalawathie v. Punchi Banda*,¹⁷⁵ the court held that the surviving husband of a *diga* marriage has a life interest in the acquired property of his deceased wife and Section 18 of the Kandyan Law Declaration and Amendment Ordinance has not altered this.

Subject to the aforesaid, the property of a deceased man or a woman subject to Kandyan law devolves in the following manner. Kandyan law preserves the rule that property must revert to the source from which it came and follows the principle that the nearer in relation excludes the more remote. Thus where a deceased man or a woman leaves no children, their

¹⁷⁰ In *Yaso Menika v. Simon* (67 NLR 71) it was held that where a deceased person had merely caused to be registered a birth of a child in the sense that he had informed the Registrar of the birth but had not had himself registered as the father of that child, the latter can maintain no claim as an illegitimate child of the deceased to succeed to any acquired property of the deceased by Section 15 (c) of the Kandyan Law Declaration and Amendment Ordinance.

¹⁷¹ Section 15 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

¹⁷² However, her illegitimate children are not entitled to succeed to her *paraveni* property.

¹⁷³ Section 18 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

¹⁷⁴ Section 19 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

¹⁷⁵ *Wimalawathie v. Punchi Banda* 57 NLR 73.

descendants or a surviving spouse but his or her parents or a parent, the acquired property devolves as follows. Parents of the deceased are entitled in equal shares, to a life estate in the acquired property of the deceased. Where there is one surviving parent, then such parent, if there are any surviving brothers or sisters of the deceased or their descendants, is entitled to a life estate in the acquired property of the deceased. On the death of the surviving parent, the acquired property devolves on the brothers and sisters of the deceased or on their issue.¹⁷⁶ Failing them, the parents become entitled to the property.¹⁷⁷ The paternal *paraveni* devolves on the father or the next heirs on the father's side while maternal *paraveni* devolves on the mother or the heirs on the mother's side. The mother does not inherit paternal *paraveni* unless there is no surviving heir on the father's side and *vice versa*.¹⁷⁸

The Ordinance makes specific provision for the devolution of movable property. Heirlooms and live and dead stock appertaining to immovable property to which the deceased became entitled to as *paraveni* property devolves in the same manner as immovable property. Where a man dies leaving a spouse, she entitled to all wearing apparel, jewellery and ornaments used by her or provided for her by the deceased husband. Where the deceased leaves a surviving spouse and children, the surviving spouse succeeds to all movable property of the deceased as if he or she had been a legitimate child of the deceased.¹⁷⁹ Subject to the right of the surviving spouse, movable property of the deceased devolves upon his or her children and their issue without discrimination as to their gender, marital status or legitimacy of their birth. If however the deceased was a male and leaves legitimate children or their issue, an illegitimate child does not succeed to the property. The surviving spouse becomes entitled to all the movable property of the deceased where he or she leaves no child or descendant.¹⁸⁰

¹⁷⁶ See for eg. 47 NLR 481.

¹⁷⁷ In *Ukkurala v. Ewonisa* (43 NLR 166) court held that where a Kandyan dies unmarried and issueless, his father being dead and his mother alive, with no full brothers or sisters and only a half brother surviving, the mother succeeds to the *paraveni* property of the deceased.

¹⁷⁸ Section 16 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

¹⁷⁹ Section 22 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

¹⁸⁰ Section 24 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

4.

INHERITANCE DISCRIMINATION IN SRI LANKA

4.1 Discrimination in granting State lands

In Sri Lanka, over 80 percent of the lands belong to the State. There are several laws that provide for private persons to hold State lands, mainly the Land Development Ordinance No. 19 of 1935, the State Lands Ordinance No. 8 of 1947 and the Land Grants (Special Provisions) Act No. 43 of 1979. Under these laws, State lands may be alienated to individuals by way of permit or outright grant and may be subject to various terms and conditions. The rules of succession to such lands have proven somewhat controversial and discriminatory.

The Land Development Ordinance on the one hand, protects inheritance rights of children, yet on the other, contains provisions that are discriminatory towards girl children.

The Ordinance provides for the nomination of a successor by the permit-holder or by an owner of a holding. One could only nominate his or her spouse or a person referred to in the Third Schedule to the Ordinance, namely, children, grandchildren, parents, siblings, aunts and uncles, nephews and nieces.¹⁸¹ This is aimed at keeping inheritance rights of the land within the close family unit and thus protects the inheritance rights of the children.

¹⁸¹ Section 51 of the Land Development Ordinance No. 19 of 1935

Upon the death of a permit holder, the spouse is given life interest of the land whether or not such spouse has been nominated as the successor.¹⁸² The spouse will be subjected to the same terms and conditions of the permit and upon their fulfilment, the spouse would become entitled to a grant of the land. Nevertheless, the spouse is subject to certain conditions, which are aimed at protecting the right of the children to succeed to the land of the deceased permit-holder. The conditions are as follows:

- i. The spouse has no power to dispose of the land.
- ii. The spouse cannot nominate a successor to the land.
- iii. Upon the death of the spouse or upon his or her marriage, the person who has been nominated as the successor by the deceased permit-holder or who would have been entitled to succeed as his successor shall succeed to the land.

In the case of an outright grant of State land, upon the death of the owner of the holding, the spouse of the owner becomes entitled to a life interest of the holding and is subject to the conditions stipulated above. Where the deceased owner of a holding has not nominated a successor, the manner in which the holding is devolved is determined according to the Third Schedule to the Act.

Where a spouse of a deceased permit-holder or owner of a holding fails to succeed to the land, it devolves on the nominated successor.¹⁸³ Where a successor has not been nominated, it devolves among the relatives of the deceased in the order provided in the Third Schedule, namely, sons, daughters, grandsons, granddaughters, father, mother, brothers, sisters, aunts, uncles, nephews and nieces.¹⁸⁴ Accordingly, in a particular group, males are preferred to females and the older are preferred to the younger. For example, where a permit holder dies leaving two sons and a daughter, it is the elder son who is entitled to succeed to the land. Where there are two or more persons of the same age who are equally entitled to succeed, the Government Agent can

¹⁸² Section 48 A of the Land Development Ordinance No. 19 of 1935

¹⁸³ Section 49.

¹⁸⁴ Section 72 and Rule 1 (b) of the Third Schedule to the Land Development Ordinance

nominate only one such person to succeed to the holding and such decision of the Government Agent is final.¹⁸⁵ The order of succession discriminates against girl children, who, though may be the oldest in the family, are being deprived of their inheritance rights merely because they are females.

That being said, the Third Schedule does not make a distinction between legitimate and illegitimate children. It provides that the relatives of the deceased permit-holder or holder of a grant mean relatives by blood and not by marriage.

In *Gunawardena v. Rosalin*¹⁸⁶, the deceased grantee of State land has nominated his sister as the life-holder. Upon the death of the grantee, his sister claimed that his widow and their son, the nominated successor, had been in unlawful possession of the land since the death of the grantee. The Court held that since the sister of the deceased did not enter into possession of the land within the period of six months prescribed in Section 68(1) of the Land Development Ordinance, the deceased's son succeeded to the holding by virtue of Section 70.

The Land Grants (Special Provisions) Act also contains similar provisions to the Land Development Ordinance. It provides for the transfer of State lands to landless persons belonging to low income groups and who have the capacity to develop the land. Where a grant has been made under this Act, the grantee can nominate a successor. Unlike under the Land Development Ordinance, under this Act, the grantee is not restricted to a group of relatives from among whom a nomination should be made. Similarly, there are no restrictions placed upon the surviving spouse regarding nominating a successor. Under the Act, where a nomination has not been made, the rights of the deceased grantee to such land devolve on the surviving spouse. Failing such spouse, the rights devolve on one of the relatives of the grantee in the order specified therein, which is identical to that under the Land Development Ordinance. Here too, sons are preferred to daughters and the oldest is preferred to the others. The protection given to illegitimate children remains intact¹⁸⁷.

¹⁸⁵ Rule 2 of the Third Schedule to the Land Development Ordinance.

¹⁸⁶ *Gunawardena v. Rosalin* 62 NLR 213.

¹⁸⁷ Section 10.

4.2. Gender discrimination

As was noted in Chapter 3, the general law on testate and intestate succession does not contain gender-based discriminatory provisions. On the contrary, the Wills Ordinance - which applies to all citizens of Sri Lanka - empowers persons to dispose of their property by will without any restrictions. Thus, even a woman subject to Tesawalamai law can dispose of her immovable property by last will without the consent of her husband. Nevertheless, women subject to customary laws suffer gender-based discrimination to some extent in respect of intestate succession.



A Tsunami-affected child living in a welfare camp in Matara

The Kandyan law of intestate succession contains discriminatory provisions towards girl children. Unmarried girl children and *binna* married girl children, whether married before or after the death of the father, are entitled to inherit their father's property. However, a daughter given in *diga* marriage before the death of the father forfeits her rights to his estate. Where a daughter contracts a *diga* marriage after the death of the father, she can inherit the father's property but if within a period of one year after the date of her marriage, her brothers and *binna* married sisters tender her fair market value of the immovable property, she is bound to convey the property to them.

In *Sirisena v. Dingiri*¹⁸⁸, the deceased was survived by a son and three daughters who were *diga* married prior to his death. It was held that subject to the life interest of his wife over the acquired property, the son succeeded to the entirety of immovable property of the deceased. The three daughters were held to have no right of inheritance since they all married in *diga* during the father's lifetime.

In Muslim law, the son of a deceased - unlike a daughter - is not a Sharer who is entitled to a fixed share of the deceased's property. The son is a Residuary belonging to the second class of beneficiaries of the estate of the deceased. The Residuaries take the residue of what is remaining after the Sharers have had their shares. Nevertheless, sons cannot be excluded from the inheritance of the estate of the deceased. In the presence of a son, the daughter who is a Sharer becomes a Residuary.¹⁸⁹ Thus, where a deceased leaves his father, mother, wife, son and daughter, the father, mother and the wife, being Sharers inherit fixed shares of the property of the deceased. As the deceased has a son, the daughter who is otherwise a Sharer, becomes a Residuary. The son and daughter share the residue of the inheritance on the basis of two parts for the son and one part for the daughter. Similarly, though a son's daughter is a Sharer, she becomes a Residuary in the presence of a son's son or son's son's son.

Thus a son is entitled only to the residue of the inheritance only in the absence of a daughter. Where the deceased has a daughter and a son, the daughter's

¹⁸⁸ *Sirisena v. Dingiri* 45 CLW 24

¹⁸⁹ A.H.G. Ameen, *Muslim Law of Succession – A Guide*, (Al-Amen Publishers: Colombo, 2005).

position falls to that of a Residuary and she becomes entitled only to one part of the residue while the son is entitled to two.

4.3. Discrimination based on out-of-wedlock birth

Sri Lankan law does not prohibit or restrict illegitimate children from inheriting their parent's property disposed to them by way of a last will. Thus in *Visuvanather v. Tiyagaraja*,¹⁹⁰ it was held that though it was illegal under Tesawalamai law for illegitimate children to inherit paternal property by way of intestate succession, no provision is made incapacitating them from taking property given under a will or a deed of their parents.

However, in the case of intestate inheritance, there are discriminatory provisions towards children born out-of-wedlock.

Under the general law,¹⁹¹ illegitimate children are entitled to inherit the property of their intestate mother but do not have a right of inheritance to that of their father or that of the relatives of their mother.¹⁹²

In *W. Herman Silva et al, v. W. Kainerishamy et al*¹⁹³, the question was whether an illegitimate child could claim to be an heir of his father's intestate estate. The Supreme Court reversed the District Court's finding that the 3rd Defendant, although illegitimate, should be recognised as enjoying the status of a legitimate child in accordance with the doctrine of Roman-Dutch Law relating to 'putative marriages.' It held that in view of Sections 23, 24 and 33 of the Matrimonial Rights and Inheritance Ordinance, the Roman-Dutch Law concepts cannot be applied.

Similarly, under the Tesawalamai law, illegitimate children inherit the property of their mother and have no right to that of their father.¹⁹⁴ In *Visuvanather*

¹⁹⁰ 8 NLR 174. COHRE style guide

¹⁹¹ Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

¹⁹² *Ibid.* Section 33.

¹⁹³ 57 NLR 567.

¹⁹⁴ Section 34 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.

*v. Tiyagaraja*¹⁹⁵ it was held that though it was illegal under the Tesawalamai for illegitimate children to inherit paternal property, no provision is made incapacitating them from taking property given under a will or a deed of their parents.

In Muslim law, certain categories of persons are excluded either totally or partially from inheritance and one such category is illegitimate children. According to the rules of the Shafi Sect, an illegitimate child cannot inherit the estate of its putative father but may inherit from the mother or her relations. Under the Shia law, an illegitimate child cannot inherit even from his mother or her relations.¹⁹⁶

Under the Kandyan law, an illegitimate child can inherit the property of her mother who is unmarried, *diga* married or married in *binna* on her mother's property. Where the deceased mother was married in *binna*, the illegitimate children do not inherit her *paraveni* property. These rules of inheritance are designed to ensure that a child born out-of-wedlock, while having a right to inherit a portion of the mother's property, can have no claim on the property of the maternal grandfather. Where the deceased mother was married in *binna* on her father's property, the illegitimate children have no right to succeed to her *paraveni* property but only to her acquired property.

In limited respects, the Kandyan law recognises illegitimate children as heirs to their deceased fathers' intestate estate. Illegitimate children have no right of inheritance to the *paraveni* property of their father. Yet, subject to the interests of the surviving spouse, they are entitled to succeed to the acquired property of their father. This is limited to cases where the deceased does not have any legitimate children or their descendants. Nonetheless, where the deceased had registered himself as the father of the child when registering the birth of that child or where the deceased in his lifetime has been judged by a court to be the father of that child, such child, although illegitimate, succeeds to the acquired property of the deceased equally with legitimate children.¹⁹⁷

¹⁹⁵ *Visuvanather v. Tiyagaraja* (8 NLR 174).

¹⁹⁶ Ameen, *Muslim Law of Succession – A Guide*, p. 47.

¹⁹⁷ Section 15 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938.

In *Yaso Menika v. Simon*¹⁹⁸ it was held that where a deceased person had merely caused the registration of a birth of a child in the sense that he had informed the Registrar of the birth but had not had himself registered as the father of that child, the latter can maintain no claim as an illegitimate child of the deceased to succeed to any acquired property of the deceased by Section 15 (c) of the Kandyan Law Declaration and Amendment Ordinance.

Children born out-of-wedlock can inherit the movable property of their mother as well as their father. However, if their father has other legitimate children, then the illegitimate child loses his right to succeed to that property.¹⁹⁹

4.4. Discrimination based on adoption

Under general Mohammedan law an adoption, if made in fact by a Mohammedan, carries with it no right of inheritance. A Sri Lankan Muslim, by virtue of the Adoption of Children Ordinance²⁰⁰ can adopt a child. Yet, a decision of the Supreme Court, which was in line with the Mohammedan law, debarred adopted children from inheriting from their adoptive parents.

In the case of *Ghouse v. Ghouse*,²⁰¹ the Court of Appeal upheld the decision of the District Court, which allowed an adopted child to inherit from his adoptive parents. However, in appeal, the Supreme Court overruled this decision and held that

*[a]n adopted son has no right of inheritance since the principle of Muslim law based on the Quoran is that one must be a consanguine relative of the deceased to become entitled to inherit property of the deceased; there should be actual or natural parentage, not legal parentage over other people's children in order to found a claim for inheritance under the Muslim Law.*²⁰²

¹⁹⁸ 67 NLR 71.

¹⁹⁹ Section 23 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

²⁰⁰ Adoption of Children Ordinance No. 24 of 1941 as amended.

²⁰¹ *Ghouse v. Ghouse* [1988] 1 Sri LR 25 at p. 30.

²⁰² *Ibid.*

5.

THE IMPORTANCE OF INHERITANCE RIGHTS WITHIN THE CONTEXT OF DISASTER AND CONFLICT

5.1. Understanding the displacement of children in Sri Lanka

5.1.1. The Civil War

Since 1983, Sri Lanka has experienced a conflict between the Government of Sri Lanka and the Liberation Tigers of Tamil Elam (LTTE). A large number of people in the Northern and Eastern parts of the country have been displaced due to the conflict. The ceasefire agreement reached between the two parties in 2002 reduced the displacement to some extent. However, continuous breaches of the ceasefire agreement in 2005 and 2006 have once again considerably increased the number of displaced persons.²⁰³ In 2007 over 300,000 persons were displaced due to increased fighting in the East, and in January 2008 the Sri Lankan Government abrogated the 2002 ceasefire agreement.

²⁰³ UNHCR estimates the number of displaced persons due to recent violence to be 45 674.

A majority of the displaced remain within Sri Lanka, and are living in Welfare Centres, camps or with family and friends in other parts of the country, while others have fled to neighbouring countries. Welfare Centres house the most vulnerable of the IDPs who have nowhere else to go and they receive the attention of the Government and of Non Government actors in the humanitarian field. Those living with family and friends often do not benefit from humanitarian intervention targeting IDPs.²⁰⁴

Reports indicate that condition in the Welfare Centres and transitional housing are poor.²⁰⁵ The IDPs are housed in tents or shell structures with metal structures that heat up during the day compelling people to spend the daytime in the shades of trees. There are complaints of inadequate ventilation, poor sanitation, lack of protection against flooding and lack of essential goods and services such as rations, water, electricity, transportation and healthcare. These camps and transitional structures are often very small and are insufficient to house the extended families or two or three families assigned to them, raising issues of privacy and dignity.

IDPs who have returned or been resettled have not received adequate assistance. Although they are entitled to an allowance from the government to set up a basic shelter and thereafter to build a house, this has not been coming through. As a result, the returnees are compelled to live in huts or with other families.

²⁰⁴ Blanche Tax and Kees Wouters *Sri Lanka: an uneasy ceasefire – Seeking Enhanced Enjoyment of Housing, Land and Property Rights in a Climate of Insecurity*, unpublished..

²⁰⁵ Sri Lanka Waiting to go home - the plight of the internally displaced, Amnesty International, at p. 12 available at <http://web.amnesty.org/library/index/engasa370042006>, After the Tsunami Human Rights of Vulnerable Populations, Human Rights Centre, University of California, October 2005, *Landlessness and Land Rights in Post-Tsunami Sri Lanka*, Centre for Policy Alternatives, November 2005.

5.1.2. The Tsunami



A drawing by a tsunami affected child in Batticaloa, - Sri Lanka

Sri Lanka witnessed its worst natural disaster when the Tsunami hit its coastal areas on the 26th of December 2004, affecting over a million people. An estimated 38 000 people were killed while 21 441 were reported missing. The number of families displaced due to the Tsunami was estimated at 119 900.²⁰⁶ Among those affected were thousands of children. The National Child Protection Authority (NCPA) estimates that over 4 000 children lost one of their parents while 694 were orphaned. According to the NCPA, the number of children who lost a family member by the Tsunami is 5 277.²⁰⁷

²⁰⁶ Post Tsunami Recovery and Reconstruction Strategy, available at : http://www.undp.org/cpr/disred/documents/tsunami/srilanka/pt_recovery_strategy.pdf

²⁰⁷ NCPA , unpublished. data.

Numbers of Children affected by the Tsunami Disaster – by region

District	Father Dead	Mother Dead	Orphans	Total
Ampara	248	647	111	1006
Batticaloa	551	258	93	902
Colombo	26	20	12	58
Galle	247	292	93	632
Gampaha	20	13	18	51
Hambantota	442	524	155	1121
Jaffna	213	59	44	316
Kaluthara	55	14	13	82
Kandy	0	0	3	3
Kegalle	0	3	0	3
Killinochchi	85	139	28	252
Kurunegala	0	0	2	2
Matara	93	159	53	305
Monaragala	2	0	2	4
Mullaitivu	84	204	47	335
Total	2129	2454	694	5277

Table derived from data provided by the NCPA

Most of the infrastructure along the Tsunami-hit coastline was destroyed or damaged, leaving the affected persons homeless. The Government has estimated that nearly 88 000 houses have been destroyed by the Tsunami,²⁰⁸ making shelter a major issue in the post-Tsunami Sri Lanka. The Government also estimates that at least 100 000 permanent homes should be built or repaired, out of which 30 000 are to be built as a part of a donor building programme. Approximately 80 000 families are expected to return to their original land and rebuild their houses under a self-help programme under which cash grants from the Government and donor agencies are given to repair and rebuild the houses.²⁰⁹

²⁰⁸ Ibid.

²⁰⁹ Sri Lanka Waiting to go home - the plight of the internally displaced, Amnesty International, at p. 5 available at <http://web.amnesty.org/library/index/engasa370042006>.

Nearly three years after the Tsunami, many people are still living in welfare camps and temporary shelters and are awaiting permanent housing. The temporary shelters are generally made of wood and contain one or two rooms and a kitchen. Sanitation facilities are common to all residents of a particular camp. In some cases, transitional shelters are below the accepted standards while in others the authorities have withdrawn basic facilities such as water, electricity, and garbage disposal, to pressure people into leaving the camps and transitional shelters.

5.1.3. Unequal treatment between Tsunami-IDPs and conflict-IDPs

A matter of concern in both civil society and among the IDPs is the large disparity in the way conflict IDPs and Tsunami IDPs are treated, especially regarding the accommodation afforded to them and the availability of relocation and resettlement programmes.

After the Tsunami hit the coastline of Sri Lanka, the Government acted swiftly to provide relief to those affected by it. Initially, the Tsunami-affected persons were housed in basic emergency shelters. Within a year or so, most were moved to transitional housing²¹⁰ although a few still live in welfare camps. The Government is at present implementing the Tsunami Housing Policy (THP), which aims at the restitution and/or resettlement of persons displaced by the Tsunami. As discussed in Section 5.2.1 below, those who lived within the buffer zone prior to the Tsunami will be given new land and houses outside the buffer zone. Those who lived outside the buffer zone were required to return to their lands and would be provided with financial assistance to repair or rebuild their houses. The Government originally aimed to complete the implementation of the THP by December 2006 and subsequently the timeline was extended to December 2007.

For the last two decades, Sri Lanka has witnessed displacement due to the conflict. Yet, the authorities have been slow and lethargic in their attempts

²¹⁰ The transitional houses are small houses with one or two rooms and a kitchen and are generally made of wood. In most cases, each family was given a separate house. Most of the transitional houses have basic sanitation and washing facilities.

to provide relief to the displaced. As observed by Amnesty International, the conflict-affected persons have been living in Welfare Centres for long periods, some for over a decade. These Welfare Centres are large camps and are dilapidated, cramped and lacking in privacy and infrastructure.²¹¹ While some IDPs have been moved to transitional shelters, most often their condition is no better than that of the Welfare Centres. There is no overall Government policy directed at the restitution or resettlement of conflict-IDPs. Amnesty International points out that those who have returned to their land, have been resettled, or are still awaiting permanent housing, often live in very poor conditions, in small shelters with no electricity or other infrastructure.²¹²

The housing assistance schemes for the two groups vastly differ from each other. Tsunami affected IDPs who lived within the buffer zone would either be provided land and housing elsewhere or be provided with government land and cash grant of Rs. 250 000/- to construct a house or cash grants of Rs. 150 000/- (for Colombo this amount is raised to Rs.250 000/-) to purchase a land and Rs.250 000/- to construct a house. Those who lived outside the buffer zone will be provided with Rs. 250 000/- to construct a fully damaged house and Rs100 000/- to repair a partially damaged house.²¹³

However, in the case of conflict IDPs, when they initially move to their original lands or are resettled elsewhere, they are provided with Rs. 25 000 to build a basic shelter, although in practice it takes up to two years to receive this money and sometimes the payment is never made. The IDPs are then given monetary assistance to build a house. Although this amount was only Rs. 75 000 until 2004, in 2005 it was raised to Rs. 150 000 and thereafter to Rs. 250 000 to ensure parity with the Tsunami displaced. However, it appears that there are no dedicated funds for this project and accordingly only some of the returnees receive this assistance.²¹⁴

²¹¹ Sri Lanka Waiting to go home - the plight of the internally displaced, Amnesty International, at p. 12 available at <http://web.amnesty.org/library/index/engasa370042006>

²¹² Ibid.

²¹³ Revised Tsunami Housing Policy, Reconstruction and Development Agency (RADA), April 2006.

²¹⁴ Supra n. 26 .

5.2. Inheritance rights, return and restitution

Inheritance rights can still be protected even in situations such as the Tsunami, the conflict and consequent displacement, as long the rights of IDPs to return and restitution are guaranteed. To be able to assert ones inheritance rights, the IDPs must be able to return to their homes and lands and regain their possession or be resettled elsewhere.

5.2.1. Return and restitution of Tsunami IDPs

With regard to the return and resettlement of Tsunami IDPs, the Government has adopted the Tsunami Housing Policy, implemented mainly by the Reconstruction and Development Agency (RADA) through District and Divisional Secretaries.²¹⁵ It provides the following four housing assistance options.

- **Option one** gives the beneficiaries a donor built house on government land.
- **Option two** provides government land, with a government cash grant of Rs. 250 000/- to construct a house.
- **Option three** gives a government cash grant (Rs.250 000/- for the Colombo District and Rs.150 000/- for the Ampara District) to purchase land and a government cash grant of Rs.250 000/- to construct a house.
- **Option four** a government cash grant of Rs.250 000/- is provided to construct a fully damaged house and Rs.100 000/- to reconstruct a partially damaged house.

Option one would be preferred by those whose houses were within Zone 1, which generally covers the buffer zone area. Where option one is not available, options two and three are applied. For those whose houses were within Zone 2, generally outside the buffer zone, option four is preferred. It is

²¹⁵ Supra n. 26.

noteworthy that both legal owners of lands as well as encroachers or those who do not have a legal title to the lands they were occupying prior to the Tsunami, are entitled to receive benefits under this Policy.²¹⁶

5.2.2. Inheritance rights concerns of Tsunami IDPs

There are certain inheritance rights concerns with regard to the implementation of the Tsunami Housing Policy (THP), as well as generally to those children affected by the Tsunami.



Displaced fishing communities mark family plots

Under the THP, lands and houses are granted in two stages. Initially, the Divisional Secretary issues a Gift Certificate in the name of the owner of the land/house affected by the Tsunami. This Gift Certificate is a semi-legal document that announces the eligibility of a person to receive the land grant. The second stage is for the President to issue the Land Grant under the State Lands Ordinance. Among the INGOs engaged in constructing houses

²¹⁶ The Tsunami Housing Policy fails to adequately define the zones.

for the Tsunami affected persons there is growing concern that although possession of the new houses has been handed over to the beneficiaries, the Government has not acted promptly to hand over or grant title of the respective lands to the beneficiaries. This has raised issues of security of tenure as well as inheritance rights of children of the beneficiaries.

It is the duty of the Divisional Secretary to verify the owner of the land prior to issuing the Gift Certificate. However, there have been cases where even though a woman owned the land before the Tsunami, the Gift Certificate had been issued in the name of her spouse. Considering the patriarchal nature of the Sri Lankan family unit, it is easy for a woman to be pressured to give up her claims to lands and houses. This is especially so where title documents have been lost due to the Tsunami and the woman is unable to prove her title. Under the THP, title to the land is granted to the person to whom the Gift Certificate has been issued. Where a woman has been pressured to give up her claims to the lands, it not only affects her property and housing rights but also the inheritance rights of her children.

The general practice of the Government in granting state lands has been to effect the grant in the name of a single person so as to exclude joint ownership of state lands.²¹⁷ However, there is no legal impediment to granting joint ownership of state lands and the authorities have adopted an administrative practice that prohibits the granting of joint ownership. Thus even where spouses had previously owned the land jointly, the new land/house would be granted in the name of a single person, usually in the name of the head of the household who is a male. This has serious implications for the proprietary rights of women and particularly of the inheritance rights of her children.

²¹⁷ At a meeting between COHRE-Sri Lanka and the Commissioner General of Lands, it was indicated that up to now, the practice has been to grant state lands to a single person. This is said to be done to ensure that the grantees have 'clear title' to the lands. However, under the State Lands Ordinance, there is no legal impediment to the grant of state lands in joint ownership. In any event, such a grant would not affect the 'clarity' of the title. Sri Lankan law recognizes joint ownership as a valid form of claiming legal title to land.

The THP also provides housing assistance to encroachers. In the absence of any issue as to previous ownership or documentation relating to title, the ownership of the new land/house would generally be granted in the name of the head of the household.

There are traditions among certain communities in the East to pass property from mother to daughter or for women to own the family property. There have been complaints that these traditions would be seriously affected by the adoption of the so-called 'head of the household' concept, which denies women claiming property.

Denying a woman who owned land previously title to new land, seriously affects the inheritance rights of her children. It prevents the woman from making a testamentary disposition of her property to her children. Where the marriage does not subsist and the man contracts another marriage subsequently, the divorced woman completely loses any interest to the property and allows the man to deprive the children of the first marriage of any rights to the property by disposing of the same or bequeathing the same to another by a will. If the man dies intestate, the children of the first marriage would have to share the property with the spouse and children of any subsequent marriage. On the other hand, it totally deprives inheritance rights of any illegitimate children of the woman.

Where children orphaned by the Tsunami have been adopted by relatives or are placed under their care, there have been attempts by the relatives to grab their property. The Department of Child Care and Probation has reported that it has investigated such incidents in the Balapitiya area.

The THP completely overlooks tenants and fails to grant them any relief. This seriously affects the rights of their children to succeed to any legal claims that the tenant had to the property rented or leased. The Tsunami (Special Provisions) Act²¹⁸ provides that where any person was, on December 26, 2004, a tenant or a lessee of any premises or any land affected by the Tsunami, his tenancy or leasehold rights shall not stand terminated, by reason only of

²¹⁸ The Tsunami (Special Provisions) Act No. 16 of 2005.

the fact that the subject matter of the tenancy or the lease was destroyed or made unsuitable for occupation or possession as a result of the Tsunami.²¹⁹ This provision would be rendered meaningless unless it is interpreted to mean that the tenant should have claims to the house that the owner is entitled to under the THP, depending on the nature of the original tenancy or lease agreement. However, this provision has not yet been made use of for the benefit of tenants.

²¹⁹ Ibid. Section 31.

5.2.3. Return and restitution of conflict IDPs and their inheritance rights concerns

Since the signing of the Ceasefire Agreement (CFA) in 2002, approximately 418 678 conflict IDPs have returned to their homes.²²⁰ However, there is no comprehensive government policy or return and restitution programme for conflict IDPs unlike those that exist for IDPs affected by the Tsunami. Over the years, many government agencies and institutions have addressed this issue on an *ad hoc* basis.

With the change of government in 2005, three new ministries were established to deal with policies, programmes and projects arising from the conflict. The responsibilities of the Ministry of Nation Building and Development included the repair, reconstruction and rehabilitation of dwelling houses of displaced persons in the North-East; resettlement of refugees and displaced persons affected by the war; infrastructure development; co-ordination of rehabilitation and development work implemented in the North and East by the Central Government and the North-East Provincial Council. The Ministry handles the Unified Assistance Scheme in the North and East, under which a permanent housing grant of Rs.75 000/- is provided for IDPs.²²¹

The Ministry of Re-settlement is also responsible for the rehabilitation of persons and properties, resettlement of refugees and implementation of resettlement programmes for conflict affected IDPs. The Ministry provides housing grants and compensation packages to IDPs and has also commenced a large-scale housing project for IDPs in the Puttlam District.²²² The Rehabilitation of Persons, Properties and Industries Authority (REPIA) also comes under the Ministry of Re-settlement. The activities of REPIA include the relocation and resettlement of IDPs, relocation of affected residential and commercial premises, payment of compensation for damaged or destroyed properties etc. The Unified Assistance Scheme in the rest of the country is carried out by REPIA. The functions of REPIA were subsequently taken over

²²⁰ SCOPP Report, 25.07.2006 available at www.peaceinsrilanka.org.

²²¹ *Government Mechanisms on IDPs* in Sri Lanka, National Protection and Durable Solutions for Internally Displaced Persons Project, Human Rights Commission of Sri Lanka, 2006.

²²² *Ibid.*

by the Reconstruction and Development Agency (RADA).²²³ In the latter part of 2007, the functions of RADA were downsized to a project unit dealing with housing and livelihood and the Donor Coordination Unit of RADA was integrated to the Ministry of Plan Implementation.

In addition, the Ministry of Disaster Relief Services and Ministry of Disaster Management and Human Rights also have some functions regarding IDPs.

A significant development among the IDPs is a general unwillingness to return to their original homes and lands. A range of factors emanating from issues such as the length and nature of displacement, security situation, political stability, response of the Government and legal issues add to this tendency, and act as constraints for return and restitution.

This has serious implications on the inheritance rights of the IDPs, especially those of the children. As is illustrated in Section 5.2.3.1, unless the IDPs return to their lands a range of practical and legal issues will arise which would prevent them from reclaiming their original lands and properties. Consequently, the inheritance rights to those lands and properties would also be jeopardised.

²²³ Ibid.

5.2.3.1 Socio-economic constraints for return and restitution



A house in Galle destroyed by the Tsunami

i. Development of socio-economic ties with the local community

While many of the IDPs have been displaced more than once, others have been displaced and living in welfare camps for well over 15 years. Having been displaced for such long periods, many IDPs are accustomed to the surroundings of the Welfare Centres and have integrated themselves to the local society in the area. Many have developed social ties with the others in the area, commenced small businesses or developed other economic ties. Some have reached higher standards of living than those of their pre-displacement situations and have become accustomed to an urban lifestyle. Most of the displaced children either were born in the areas of displacement or spent many years or their entire life in Welfare Camps and have faint or no memories of their original homes and surroundings. For them, home, school, friends and neighbours are in and around the Welfare Centres.

In the circumstances, there is unwillingness among the IDPs, especially among children to return to their original homes and lands. This is a serious hindrance to claiming their inheritance rights. As is explained in Section 5.2.3.2, dispossession of land and its subsequent abandonment or failure to reclaim the land, can raise a series of legal issues disentitling the owners from any legal claim to their lands and properties. Thus, the Government and other agencies working with the IDPs have a significant role in educating them on the importance of return and restitution.

ii. Security concerns

Lack of security in their original places of residence often prevents IDPs from returning to them. Their lands and properties either are occupied by the LTTE or are in LTTE controlled areas to which they do not wish to return. In other cases, their lands are occupied by the security forces or are located within the so-called 'High Security Zones' (HSZs). Those displaced are paid no or a minimal amount of rent for the occupation of their properties and are not given compensation to find alternate accommodation.

In 2004, two fundamental rights applications were filed in the Supreme Court regarding evictions from the High Security Zones.²²⁴ The Supreme Court has responded positively in cases where proper Gazetting had not been done and the evictions had taken place, using HSZs as a cover²²⁵.

²²⁴ SC (FR) Applications Nos. 646/04 and 533/04.

²²⁵ The Court directed the District Secretary of Jaffna to submit a report as to the possibility of allowing the IDPs to return to the HSZs. The Court directed the return and resettlement of IDPs to be carried out after fulfilling the following conditions: obtaining security clearance from the Army, proof of identity, proof of title to the land or property in question. The resettlement process commenced in early 2006. However with the deterioration of the security situation there has not been much progress. The case is still pending.

According to international law and best practice, either these properties should be vacated, enabling the displaced to return to their lands or they should be paid adequate compensation or substantial rent, enabling them to find alternative accommodation.

In some areas, there is fighting going on. In others, there are landmines and unexploded devices, even in paddy fields, villages and places of common use. At the time of signing the CFA, it was estimated that around 900 000 mines were placed in the Northern and Eastern Provinces.²²⁶

Threats of abduction and recruitment of children to the LTTE are other serious impediments to the return of the IDPs. UNICEF has reported 40 verified cases of child recruits since the Tsunami and has highlighted the forcible recruitment of children from relief camps. In February 2005, the LTTE freed 23 child soldiers to the North East Secretariat on Human Rights.

iii. Infrastructure and livelihood options

It is estimated that 58 percent of the houses in Northern and Eastern Sri Lanka have been damaged or destroyed, of which 40 percent are owned by the IDPs.²²⁷ A majority of the houses owned by the IDPs have been damaged as a result of the conflict. The IDPs do not have the resources to repair them, and even where they receive financial assistance, it is insufficient to meet the costs involved. In addition, the deterioration of the security situation has significantly hindered development in their home areas and on return, IDPs find lack of opportunities to earn a decent living. In some cases, IDPs no longer

²²⁶ *Land, housing and property. Proposals to the parties for comprehensively addressing land, housing and property rights in the context of refugee and IDP return within and to Sri Lanka*, UNHCR Sri Lanka and Human Rights Commission of Sri Lanka, 28 May 2003.

²²⁷ World Bank, 'Project appraisal document on a proposed credit in the amount of SDR 51.1 million (US\$ 75 million equivalent) to the Democratic Socialist Republic of Sri Lanka for a North East Housing Reconstruction Programme', 9 November 2004, Annex 1 p.16 and Annex 4 p. 32.

possess the required skills for a particular trade or occupation carried out in the areas.

iv. No ownership of land and land grabbing

A significant number of IDPs had sold their lands at very low prices before they fled their original homes and lands. Thus, now they do not have any land to which they can return. Another issue of grave concern is the growing tension between the communities in the allocation of lands for return and resettlement. Especially in areas such as Trincomalee, where Sinhala, Tamil and Muslim communities live, there is concern among the communities that the areas they traditionally inhabited should not be used to resettle other communities.²²⁸

v. Inadequate support from the government

Another factor contributing to the unwillingness of IDPs to return is the inadequate support extended by the Government to rebuild and repair their houses. As mentioned in Section 5.2.2, returnees are entitled only to a minimal amount of money to put up a temporary structure and thereafter assistance is provided to build or repair their houses. However, considering the very high cost of building material, these monies are insufficient for them to rebuild their houses.

Authorities have also failed to establish effective and impartial mechanisms to resolve disputes relating to housing, land and property restitution. As is explained in the following Section, this has created serious legal impediments for returnees to claim their lands and thus have serious implications on their inheritance rights.

²²⁸ *Supra* n. 26 at page 17.

5.2.3.2 Legal constraints to return and restitution

i. Permit holders of state lands

A major issue faced by conflict IDPs concerns the permits or licenses issued under the Land Development Ordinance, State Lands Ordinance and the Land Grants (Special Provisions) Act. Many IDPs who have been occupying state lands by virtue of permits and licenses given under the above laws - especially under the Land Development Ordinance - have been forced to leave their lands and properties due to the conflict, and now reside elsewhere in the country. Even abandoning the land due to displacement and resulting inability to develop the land often breaches the conditions stipulated in the permits, rendering the permits liable for cancellation. On their return, the IDPs may find that their permits have been cancelled or even without cancellations, others have been given permits to occupy the lands they held prior to their displacement. In other instances, secondary occupants occupy the lands without a permit or a license.

Sri Lankan laws do not take into account the special circumstances of these permit holders. No special account is taken of the reasons for abandoning the lands (whether such abandonment was voluntary or forced), reasons for failing to develop the land or for non-fulfilment of the conditions stipulated in the permit. Legislative reform is urgently needed in this area to provide relief to the IDPs. The provisions relating to cancellation of permits should be relaxed when displaced persons are affected. Similarly, even where the internally displaced permit holder has failed to fulfil the conditions stipulated in the permit, the Commissioner of Lands should be empowered to make special concessions and settle the matter.

The issue of secondary occupation is more complicated. In principle, the original occupants have a right to return. It should however be ensured that secondary occupants are protected against arbitrary and unlawful forced evictions and that adequate alternative housing is provided if they are lawfully evicted. Where the secondary

occupants have been occupying the land for a considerable period and have made substantial improvements to the land, they should be compensated for the improvements made to the land and/or house.

ii. Loss of documentation relating to lands

A common problem among the IDPs is the loss of title deeds, permits, last wills and other documentation relating to their lands and properties. Only a small number of IDPs possess title documents of their lands and many have lost them during multiple displacements. In Sri Lanka, there is no compulsory registration of title documents and therefore, the government Land Registries would have copies of the title documents only if they have been registered. Thus, the displaced persons are unable to provide documentary evidence of their legal title to their original lands and properties.

This has caused considerable difficulty to returnees who, on their return, find that secondary occupants are occupying their lands. In some cases, the secondary occupants have been in occupation of the lands for well over ten years and claim prescriptive title to them. In others, secondary occupants or other IDPs have sold the lands to *bona fide* third parties. With the loss of their title documents, the original owners of these lands face considerable difficulty in proving their title and it has serious implications for their inheritance rights.

iii. Secondary occupation

Displaced owners of property or permit holders also face considerable difficulty in reclaiming the possession of the land from the secondary occupants. In reclaiming the property if a dispute arises, the provisions of the Primary Courts Procedure Act come into operation. These provide that any person who has been in possession for two months preceding the filing of the application or who has been dispossessed within two months is entitled to possession until an order is made by

the District Court in a regular action. Therefore secondary occupants who have been in occupation of the lands for over two months prior to the filing of the case, become entitled to an order that they are entitled to possession of the land.

In order to vindicate their title and eject the secondary occupant, the owners or permit holders would then have to file a *rei vindicatio* action in the civil courts. It would be a lengthy litigation process and most often the IDPs cannot afford the costs involved.

The IDPs dispossessed from their property, whether or not they have title to the property, can bring a possessory action within one year of dispossession and would then be entitled to have possession return to them without proof of title. However the IDPs cannot benefit from this provision as in a majority of cases, they have been dispossessed from their lands for well over one year. Due to their displacement, they would not be able to file action in court within one year of dispossession.

It is thus desirable to extend the time limitation of one year, or the time limitation suspended to enable returning IDPs to regain their lands. IDPs desiring to regain their property through litigation should be given legal aid facilities in order to ensure that financial costs are not a barrier to the realisation of their rights.

While protecting the rights of landowners, it is also important to protect the rights of secondary occupants. Coping with secondary occupation can be particularly difficult when temporary occupation of empty properties may be a legitimate humanitarian undertaking especially when housing shortages are most acute during the conflict. Considering the length of the conflict, the secondary occupants may have been in secondary occupation for a considerable period and may have developed the lands or made improvements and in some cases written deeds of declaration in their favour. It is thus important that they be given viable, affordable and habitable alternative accommodation and compensation is paid for the improvements they have made on the lands.

iv. Prescriptive title

Another legal issue that affects IDPs arises from the operation of the Prescription Ordinance. According to the Ordinance, a person who has ten years of undisturbed and uninterrupted possession of immovable property adverse to or independent of that of the owner can claim a statutory title to the property by prescription. Conflict IDPs who have been living in welfare centres for well over ten years, on their return find that others who have occupied their lands for over ten years, may now be able to claim prescriptive title if they satisfy the requirements of the Prescription Ordinance. To regain possession of their property, the IDPs then have to go through a lengthy legal battle.

It is argued that the occupation of the secondary occupant does not satisfy the requirements of the Prescription Ordinance for the reason that such occupation does not constitute *adverse* possession. Nevertheless, it is a matter to be decided by the Court and the owner has to go through a legal battle to claim his proprietary rights.

The Prescription Ordinance provides for an exception if the owner of the land is under a disability specified in the Ordinance, for example: infancy, idiocy, absence beyond seas, the prescriptive period is extended to 30 years. It is desirable that the Prescription Ordinance be amended to exempt property of IDPs. Internally displaced persons have a distinct right to return to and restitution of their property from which they were forced or obliged to flee. In principle, there are no time-limits attached to these rights.

The Government was swift in bringing amendments to the law with regard to those affected by the Tsunami, by granting a grace period of one year in calculating the prescriptive period. Concurrent protection can be extended to conflict IDPs as well.

The socio-economic and legal restraints to return and restitution highlighted above, have seriously affected housing, land and property rights of IDPs. It is of paramount importance that IDPs are

encouraged to return to their former houses and lands and reclaim their proprietary rights. The failure to do so would, as illustrated above, have serious implications on the inheritance rights of children.

6.

CONCLUSION

The right to property inheritance, while it does not receive much attention, is an important right that plays a silent, yet vital role in the realisation of many other human rights, particularly the right to adequate housing. The right to adequate housing, in turn, is a less visible, yet significant right. Ensuring a child's right to adequate housing is essential for the child's well being, safety, physical and mental development and education.

The rules of inheritance should be -and generally are - aimed at preventing the disruptive effects of death upon a family by ensuring that the deceased's property remains within family circles. Experiences around the world demonstrate that rules of inheritance often do not reflect a human rights approach, and are crafted according to the society and culture in which they operate.

As this report highlights, Sri Lankan laws on inheritance rights are not free from error. They contain rules that are discriminatory towards girl children, adopted children and children born out-of-wedlock. Inheritance rules that deprive women of equal access or rights to property in turn affect the inheritance rights of children. Such rules are commonly found in the personal laws applicable to the Kandyan, Muslims and the Tamils. Due to their customary roots, amendments to these laws have been hard to come by. It is envisaged that such a law reform process would be met with considerable objections from the respective communities who value the preservation of their customary rules and practices. On the other hand, amending the general

laws of inheritance rights and other laws that adversely affect inheritance rights of children is a definite possibility, and should be pursued in the immediate future.

This report has also highlighted the difficulties faced by internally displaced persons in claiming their inheritance rights due to the application of other laws in the context of their displacement. Though the legal constraints to return and restitution of internally displaced persons have been present for a considerable period, successive governments have failed to take action to alleviate them. The same can be said about the socio-economic constraints to return and restitution. Although several government authorities have been authorised to deal with such issues, they do not seem to be working towards achieving a common objective. The main reason for this is the lack of an overall and comprehensive government policy on return and restitution of the internally displaced. These factors have created a general unwillingness among the internally displaced persons to return to their former homes and reclaim their land and property rights. Such unwillingness acts as a serious impediment to securing inheritance rights, especially those of children.

The next section contains a series of recommendations for amendment of the laws, formulation of policies and alleviation of any obstacles to the securing of inheritance rights. These recommendations, if implemented, would assist in the adoption of a human rights approach to rules of inheritance and assist in the realisation of children's right to adequate housing and in turn their ability to live in safety and dignity.

RECOMMENDATIONS

● Recommendations to the Government of Sri Lanka

Proposed amendments to the laws relating to inheritance rights

1. Amend Rule 1 (b) of the Third Schedule to the Land Development Ordinance in the following manner:
 - The order of succession provided should read as follows:
 - j) children
 - ii) grand children
 - iii) parents
 - iv) siblings
 - v) uncles and aunts
 - vi) nephews and nieces
 - To delete the provision that provides that in a particular group entitled to succeed, the older is preferred to the younger. A specific provision should be inserted to allow several persons in one category to jointly succeed to the property of the deceased. For example if the deceased has three children, to give all three children equal rights of inheritance

2. Delete Rule 2 of the Third Schedule to the Land Development Ordinance.
3. Amend Section 10 of the Land Grants (Special Provisions) Act to correspond to the recommendations 1 and 2 above.
4. Amend the Kandyan Law Declaration and Amendment Ordinance in the following manner to enable equal rights of inheritance to *diga* and *binna* married daughters:
 - a) To insert a provision enabling a daughter who was given in *diga* marriage before the death of the father, to inherit the father's property.
 - b) To delete the provision whereby a *diga* married daughter after the death of the father, is bound to convey the immovable property inherited from her father if her brothers and *binna* married sisters can tender the fair market value (Section 12).

Recommendations regarding the Tsunami Housing Policy

5. The Government should ensure that title to the lands on which new houses were built, are granted to the beneficiaries without delay.
6. The Government should amend their policies and/or administrative practices to enable the grant of joint ownership of the houses to be given under the Tsunami Housing Policy.
7. The Divisional Secretaries should establish effective mechanisms to verify the owner of the Tsunami affected land, especially where title documents have been lost.

8. The Government should ensure that Section 31 of the Tsunami (Special Provisions) Act is given effect to in implementing the Tsunami Housing Policy.
9. The Government should ensure that inheritance rights concerns, especially of women and children are adequately recognised in implementing the Tsunami Housing Policy.

Recommendations relating to Conflict IDPs

10. A comprehensive policy or return and restitution programme relating to conflict IDPs must be formulated and implemented without delay.
11. The Government should eliminate socio-economic and legal constraints to return and restitution so that IDPs can return to their lands and/or claim or protect their inheritance rights. The following specific recommendations are made in this regard:
 - Design and implement a policy to provide assistance to IDPs to rebuild and repair their houses. The assistance given to conflict IDPs should be on par with that of the Tsunami IDPs.
 - Establish effective and impartial mechanisms to resolve disputes relating to housing, land and property restitution.
 - Establish effective mechanisms whereby copies of title documents, permits or licences can be issued to IDPs so that loss of documentation would not be a hindrance to claiming housing and inheritance rights.
 - Introduce amendments to the Land Development Ordinance, States Lands Ordinance and Land Grants (Special Provisions) Act as follows:

- provisions relating to cancellation of permits should be relaxed when displaced persons are affected;
 - where a displaced permit holder has failed to fulfil the conditions stipulated in a permit, the Commissioner of Lands should be empowered to make special concessions and settle the matter.
- Amend the Prescription Ordinance as follows:
- Most desirably to exempt the property of IDPs from the Prescription Ordinance, or in the alternative
 - Amend Section 13 to include IDPs as a group suffering from a disability so as to extend the prescriptive time period to 30 years; and
 - Amend Section 4 to allow IDPs to bring possessory actions even after the lapse of a one year.

Other recommendations

12. Ensure that the right to adequate housing is included in proposed amendments to the fundamental rights chapter of the Constitution.
13. The Land Commission should ensure that administrative practices are streamlined with the legal provisions to prevent discrimination against women and children due to the non-grant of joint ownership of State land.
14. Ensure that the basic premise for any legislation should always be equality and non-discrimination.

15. In formulating and implementing legislation, consultations with and participation of all stakeholders is essential.
16. All ownership systems must provide for legal recognition and protection of both spouses' rights to adequate housing and land.

● **Recommendations to UNICEF – Sri Lanka**

17. UNICEF – Sri Lanka should work with the central and local Government to ensure that the recommendations made above to the Government are implemented both on a central policy level and in practice at the district level.

● **Recommendations to NGOs, INGOs and other Civil Society Organisations**

18. Programmes should be designed to make IDPs aware of the importance of return and restitution, especially from a point of view of protecting their land, housing and inheritance rights.
19. Design and implement legal aid programmes to ensure that financial costs are not a barrier to the realisation of their housing and/or inheritance rights.

Housing Rights for Everyone, Everywhere...



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