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THE NECESSITY TO CONSIDER THE COMPLEXITIES INHERENT WITHIN PLURALISTIC LEGAL SYSTEMS WHEN INTRODUCING DOMESTIC PROPERTY LAW REFORM

THE CASE OF SRI LANKA*

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Abstract

In countries where pluralistic legal systems exist, translating land policy reform to effective legal framework is not an easy task. Although this process of land policies leading to effective laws is largely influenced by the prevailing local social, economic and political conditions, there are other contributory factors. These include the reluctance of the local community to accept change, the inability to change some customary practices deeply rooted in the community and the inability to move past colonial influence. In some cases, it is not a matter of moving past colonial influence. It requires finding ways to harmonize the past with the present by exploring solutions that accommodate the existing mixture of legal traditions.

Key Words: Property law reform, legal pluralism, mixed legal systems, Sri Lanka, Pluralistic legal systems.

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ACRONYMS AND ABBREVIATIONS

RDL	Roman-Dutch Law
RTA	Registration of Titles Act No 21 of 1998
TPO	Thesawalamai Pre-emption Ordinance No 59 of 1947
MRIO	Matrimonial Rights and Inheritance Ordinance (Jaffna) No 58 of 1947

INTRODUCTION

Sri Lanka is a classic example of pluralism that embraces a mixture of cultures, legal traditions and laws that interact and co-exist within a single system. This parallel co-existence within a single system that accommodates and draws from traditions, customary practices, laws and legal institutions is generally considered to be a mixed legal system (Palmer, 2016). Sri Lanka's appeal as a case study to consider the challenges of the pluralist nature of a mixed legal system on domestic property law reform lies in this mixed nature of its legal system. Sri Lanka's legal system consist of common law, civil law and customary laws also known as personal laws.

The objective of this paper is to highlight the necessity to consider the complexities in a pluralistic society of the interaction between general law and customary law when proposing domestic land tenure reform. Using Sri Lanka as a case study, first, Part I of this paper will introduce and examine the background to the making of a mixed legal system in Sri Lanka. Second, Part II will consider the law relating to land, present registration systems, land tenure reform and recent developments in Sri Lanka. Third, Part III will give an overview of the problem and will provide an analysis of some complexities not considered by the *Registration of Titles Act* No 21 of 1998. Finally, Part IV of this paper will conclude with recommendations.

PART I

SRI LANKA: BACKGROUND

A. GEOGRAPHICAL, HISTORICAL AND LEGAL BACKGROUND

Described as Taprobane by Ptolemy, Taprobana by the ancient Greeks, Seylan to the Arabs and Ceylon by the British, Sri Lanka's history dates well over two thousand five hundred years. Strategically positioned, Sri Lanka is an Island in the southern coast of India with a total land area of 62,710 square kilometres. Of this 43.7% (approximately 27404 square metres) is agricultural land (World Bank, 2015). As of 2018 Sri Lanka's population is approximately 21.2 million (World Bank, 2018). The ethnicity breakdown of Sri Lanka comprises of Sinhalese (74.9%), Tamils (Indian and Sri Lankan Tamils) (15.3%), Muslims (9.3%) and other or unspecified (0.5%) of the population (Central Bank of Sri Lanka, 2017). The majority of Sinhalese are Buddhist with a small minority of Sinhalese being Christians. A majority of Tamils are Hindus with a Christian minority. By religion the breakdown comprises of Buddhists (70.1%), Hindu (12.6%), Islam (9.7%), and Christian (7.6%) (Central Bank of Sri Lanka, 2017).

The early civilization in Sri Lanka is characterised by the arrival of settlers from India in the fifth century BC, Dravidian or South-Indian influence and the influence of Buddhism in a thriving and a vibrant society dependent on agriculture. Complex irrigation systems led to the formation of settlements along riverbanks, which later developed into kingdoms (De Silva, 1981). By the thirteenth century, the early vibrant civilization had collapsed mainly due to invasions and infighting between rulers of different kingdoms within Sri Lanka as well as due to the fragmented and changing nature of the polity (De Silva, 1981). In this changing landscape, Hindu culture and laws thrived in northern part of Sri Lanka ruled by Tamil kings especially during 1479-1579 (De Silva, 1981). The arrival of Arab traders marked the beginning of the influence of Islam (De Silva, 1981).

Western influence in Sri Lanka began with the arrival of a Portuguese fleet in 1505, which subsequently led to trade and a close alliance with the king of Kotte kingdom (one of the kingdoms that existed at the

time).[1] Subsequently, the gift of the Kotte kingdom to the Portuguese at the death of the last king of Kotte led to Portuguese rule of Sri Lanka, which spread to other coastal areas from 1597 to 1658 (De Silva, 1981). The Portuguese rule covered a considerable part of Sri Lanka except the central parts and some parts of the eastern coast of Sri Lanka (Pieris and Naish, 1920).

The Portuguese failed in taking control of the central parts of Sri Lanka, which was subject to an ancient monarchy commonly referred to as the Kandyan kingdom. However, the Dutch managed to form relationships with the king of Kandy by signing a Treaty to remove the Portuguese from the Island, which resulted in the Dutch assisting the king to recover two coastal areas from the Portuguese in 1639 (De Silva, 1981) (Arasaratnam, 1958). Subsequently, the Dutch managed to seize power from the Portuguese by taking control of three coastal cities: Colombo (situated in the west coast of Sri Lanka within the Western Province), Jaffna (situated on the north of Sri Lanka) and Trincomalee (situated on the east coast of Sri Lanka) between 1656 and 1665. Although, between 1665 and 1670 the Dutch managed to gain control of some parts of the area that consisted of Kandy, the Kandyan kingdom remained independent under an ancient monarchy (Arasaratnam, 1958). It is during the period of the Dutch rule that Roman-Dutch law ('RDL') was successfully introduced to Dutch-controlled coastal areas of Sri Lanka (Jurriaanse, 1943).

In 1796, the British gained control of Sri Lanka leading to the longest rule by a colonial power in Sri Lanka, which also saw the entire country come under colonial rule in 1815. After taking control of the coastal areas in 1796, the British continued to administer laws that had existed and was administered under the Dutch rule (Royal Charter of Justice of 1801).

B. THE MAKING OF A MIXED LEGAL SYSTEM IN SRI LANKA

At present, the sources of law in Sri Lanka include legislation, precedent, customs, religion, opinion of jurists and equity (Nadaraja, 1972). The present legal system in Sri Lanka originates from RDL as modified by statutes and interpreted by courts (Tambiah, 1972).

[1] *Kotte*, also known as Sri Jayawardenapura Kotte is the modern day official Capital of Sri Lanka and is located in the West coast of Sri Lanka within Colombo in the Western Province.

Sri Lanka's legal system is influenced by both civil and common law legal systems as well as by traditional customary practices (Cooray, 2008). The influence of oriental legal traditions of Hinduism, Buddhism and Islam is seen in the three customary laws: Thesawalamai, Kandyan and Muslim laws presently applicable to some communities in Sri Lanka. Western or the occidental legal traditions and their influence can be traced to RDL and English law, both of which operate in Sri Lanka (Cooray, 2008). As such, RDL and the common law system introduced under the British form the general law of Sri Lanka. To this end, RDL is considered 'the residuary common law' of Sri Lanka (Pieris, 2009). As such, RDL applies, where statutory provisions are silent on property matters.

At the time the British gained control of Sri Lanka in 1796, three types of courts established by the Dutch existed in three regions of Sri Lanka: West, North and South (Jurriaanse, 1943). Known as *civiele raad* (Civil Court), *landraad* (Land Court) and *raad van justile* (Court of Justice) (Nadaraja, 1972). These three courts administered both RDL and customary laws. In particular, the Dutch allowed customary practices to be administered in those courts (Nadaraja, 1972). To this end, the customary laws and practices administered include: *Thesawalamai* law (customs of the Malabar inhabitants of the Jaffna province); *Mukkuvar* law, which comprised of customs that regulated succession and intestate property of the *Mukkuvar* people of a district in the Eastern province known as Batticaloa; and the customs and usages of Sinhalese and the Muslims.

By the time the British gained control, the Dutch had codified customs and customary practices of the inhabitants of Malabar descent living in Jaffna province (located in Jaffna peninsula, northern parts of Sri Lanka) in 1706 in the form of what was known as the *Thesawalamai* code (Katiresu, 1907). This Code was later translated into English in 1806 under the British rule (Katiresu, 1907). Customary laws of the Sinhalese were not compiled by the Dutch, but customary practices continued to be applied. A different approach was taken in the case of Muslims. Due to the existence of various interpretations of the applicable law to Mohammedan community existing among the local population, the then Dutch Governor decided to apply the Batavian Code of law[2] to Moors of Sri Lanka in 1770 (Katiresu, 1907). In 1806, the *Mohammadan* Code was introduced (Tambiah, 1972). This code was referred to as the *Wetten Aangaande Mooren of Muhammadan en Andere Inlandhche Nation* (Tambiah, 1972). Later, during the British rule *Thesawalamai*

[2] Also referred to as the Statutes of Batavia, this was declared to be the Code of the Dutch East India Company on 5 July 1642 by Van Diemen, Governor-General of Batavia and subsequently revised as the New Statutes of Batavia in 1799. (Jurriaanse, 145)

law, Sinhalese law (known as Kandyan law) and Muslim law were formalised by statutes introduced under the British.

Although, the British continued to administer Roman-Dutch law and three customary laws, English laws were also introduced to Sri Lanka. At present, private land ownership represent approximately 17-20 per cent or 3.6 – 4.2 million people. The state owns over 80 percent of the land (World Bank, 2013). Therefore, the three customary laws apply to those who come under those laws falling within the 17 per cent of the population or 3.6 million people. The three customary laws include:

(1) *Thesawalamai* law

Thesawalamai is generally regarded as a personal law because it applies to Tamils of Northern Province, which is sometimes referred to as Jaffna Province situated in the north coast of Sri Lanka (Katiresu, 1907). Although, *Thesawalamai* was considered to be territorial in its application, that is, a person of Tamil origin had to live in Jaffna Province to be considered under *Thesawalamai* law, it is now settled that a person does not have to live in the Jaffna Province to be considered as an inhabitant of the Northern Province. A landmark Supreme Court decision affirmed that '*Thesawalamai* is the personal law of the Tamil inhabitants of the Northern Province' and that it applies to Tamils from Jaffna 'wherever they are and to their movable and immovable property wherever situated in Sri Lanka.' (*Sivagnanalingam v Suntheralingam* (1988) 1 Sri Lanka Law Reports 86–87). *Thesawalamai* law applies to property and intestate succession matters.

(2) Kandyan law

Kandyan law applies to those who can trace their descent to Sinhalese of the Central Province of Sri Lanka (Kandy). Although, originally Kandyan law was territorial in nature, it is now regarded as a personal law by courts in Sri Lanka. Early judicial decisions favoured the territorial nature of *Kandyan* law but were later overturned (*Re Kershaw (1862)* Ramanathan Report 1860–1862, 157). A case decided in 1910: Kapuruhamy *Et Al V Appuhamy* ([1910] 13 New Law Reports 324) authoritatively concluded that Kandyan law applies only to Kandyan Sinhalese. Later decisions have affirmed Kandyan law as a personal law applicable to Kandyan Sinhalese. As such, it does not apply to all persons who now reside in the Kandyan Province but may apply to those who do not live in Kandy (Nadaraja, 1972) (Coomarasswamy, 1949). Kandyan law applies to matters relating to intestate succession, marriage and division of property (De Silva, 1981).

(3) Muslim law

Muslim law is specified in the relevant statues and applies to Muslims (Nadaraja, 1972). The Mohammadan Code of 1806 was amended in 1929 and repealed in 1951. Muslim law applies to matter relating to marriage, divorce, inheritance, intestate succession and related property matters.

The three customary laws have changed over the last two centuries reflecting the changing nature of customs and customary practices. Over the years, laws and rules within these customary laws have become inoperative, obsolete and amended (Thambiah, 2004). In addition, there are continuing and rising demands to amend customary rules that conflict with human rights (Centre on Housing Rights and Eviction (COHRE), 2008).

The making of a mixed legal system in Sri Lanka, therefore is a complex web of RDL, English law and three customary laws. Sri Lanka falls within the basic pluralist conception recognised within legal pluralism that several legal traditions may exist within the same system (Griffith, (1996). In this regard, if Griffith's definition of legal pluralism is applied, Sri Lanka falls within the category that he described as the 'weak' sense of legal pluralism where different laws apply to different communities of the population (Griffith, (1996). Such definitions are useful to understand the complexities in pluralistic legal systems and helps to understand the complexities within legal pluralism. However, they do not necessarily focus on the factors that hinder transforming land policy to effective legal frameworks in pluralistic legal systems.

This process is impacted by a multitude of factors. Some factors include the prevailing local social, economic and political conditions. Other factors include, the reluctance of the local community to accept change, the inability to change some customary practices deeply rooted in the community and the inability to move past significant historical factors such as colonial influence. In terms of customary tenure in a pluralistic legal system, which this paper focuses on, it is essential that law reform process explore solutions by considering complexities unique to each country.

PART II

LAND TENURE IN SRI LANKA

A. LAW RELATING TO LAND

Rights to property in Sri Lanka are determined based on statutes enacted by the Parliament as well as RDL principles. There are areas of rights in real property affected by the three customary laws. More specifically, rights to property are determined in the following manner:

(a) Contract law is governed by RDL, but commercial property and contracts are governed by statutes based on English law (Tambiah, 1972). The general law of contract is strongly influenced by English principles relating to contracts. Some contracts peculiar to persons covered under personal laws as well as the capacity to enter into contracts are governed by rules under those three personal laws (Tambiah, 1972);

(b) State grants are governed by statute;

(c) When a person dies testate, the applicable law is statute law. If the relevant statute is silent on a particular matter, RDL applies (Tambiah, 1972). However, when a person dies intestate in matters relating to persons covered by personal laws, those customary rules apply; and

(d) Various customary tenure practices also exist. These include thattumaru and kattimaru tenure systems that will be examined in Part III (B) (5).

In some real property matters among persons subject to the three customary laws, customary rules applicable under those personal laws apply in the first instance, and if they are silent on a certain matter, RDL applies (Cooray, 2008). Although, common law is secondary to customary law, legislation enacted by Parliament is superior. English common law applies to several other areas of law including constitutional law, criminal law, evidence and civil procedure (Tambiah, 1972). The influence of English law extends from statutes and case law to other areas such as family and property law (Coomaraswamy, 1941). An example is the *Trusts Ordinance* (No 9 of 1917) ('*Trusts Ordinance*'), which is based on English common law principles and applies to trusts in Sri Lanka while RDL, customary laws and statutes govern property

rights not covered by the *Trusts Ordinance* (Cooray, 2008). The RDL institution of the *fideicommissum*[3] was abolished by the *Abolition Of Fideicommissa And Entails Act* (No 20 of 1972).

It is clear from the *Trusts Ordinance* that some areas of religious laws in Sri Lanka operate concurrently with English principles of trust law (Nadaraja, 1972). For example, s 106 (ii)-(iii) of the *Trusts Ordinance* states that in determining any questions relating to religious trusts, among other matters specified in this section, the court shall have regard to 'the religious law and custom of the community concerned; to the local custom and practice with reference to the particular trust concerned'. The *Trusts Ordinance* also states that religious trusts regulated by the *Buddhist Temporalities Ordinance* (No 19 of 1931) or the *Muslim Mosques and Charitable Trusts or Wakfs Act* (No 51 of 1956) are exempted from Chapter X of the *Trust Ordinance*.

B. THE REGISTRATION SYSTEMS

Sri Lanka has a dual system of registration: deed and title registration.

1. DEED REGISTRATION SYSTEM

A formal system of registration of documents (deed registration) was first introduced in Sri Lanka in 1863 under the *Registration of Documents Ordinance* (Sri Lanka) No 8 of 1863. At present, a large number of legislations cover the processes relating to the operation of the deed registration in Sri Lanka. The deed registration system has been operating in Sri Lanka for over century with some adaptation to cater for the needs of the local community. The various intricacies of customary and informal rights, to some extent, are accommodated in the deed registration system in its long history. Along the way, it appears that the system had adopted solutions to some shortcomings.

[3] *Fideicommissum* is a legal institution where a bequest is subject to a condition that on the occurrence of a event or time, or the person or persons specified committing an act forbidden by the conditions of the bequest, the property is transferred to another person or persons (Tambiah, 1972).

The two examples presented below show that deed registration has evolved over time to accommodate the diversity of rights among various communities in Sri Lanka as well as their need to participate in economic activities. Two examples include:

EXAMPLE 1

An example is deeds of declaration. Deeds of declaration are a certain type of deed, which allow any customary right or servitude to be registered. Subject to the conditions set out in the deed of declaration, customary property rights can be attached to property specified on the deed. The rights specified in the deed of declaration are established with the support of various documents that provides proof of ownership.

Deeds of declaration are unilateral or bi-lateral and include information on the boundaries and the extent of the land. If it is necessary to declare ownership, new plans are attached to the deed. If it is a unilateral deed of declaration, an owner could execute the same reciting the details of ownership supported by various documents including the plan. Caveats are allowed in the deed registration system. The purpose of deeds of declaration are different to a caveat. A unilateral deed of declaration is similar to that of a caveat under the title registration system if such a deed has been executed by a third party. In a case where a deed of declaration has been registered by a third party, it notifies a prospective purchaser of the interest of a third party over such land. If registered by the owner, the intention is to formally record a right that may already exist.

A deed of declaration is not the only document that is used to clarify and assert ownership within the deed registration system in Sri Lanka. Other documents include (Gunasekera, 2008):

Deeds of rectification – these types of deeds rectify a specified error and often are followed by a deed of declaration.

Deeds of renunciation – these deeds renounce the rights to land such as the rights to water, life interests and are used for the purpose of correcting registry errors and errors of notaries.

Partition deeds – these type of deeds are considered as a source of title as all co-owners mentioned on the deed confirm and declare the ownership of the divided portions specified on the deed.

Deeds of exchange –these types of deeds were often created between family members who exchanged one parcel of land for another parcel of land.

EXAMPLE 2

Another manner of the local adaptation of the deed registration system is the introduction of the *defective title insurance scheme* in Sri Lanka in the early 1970s. The architect of this system was former Supreme Court judge of Sri Lanka, the late Justice A R B Amerasinghe. The *defective title insurance scheme* does not operate in the same manner as title insurance or mortgage redemption policy available to purchasers in Sri Lanka.

K S Gunasekera, a well-known Sri Lankan property lawyer who was involved in this project notes the reason for introducing the *defective title insurance scheme*. According to her, the financial constraints that prevented the implementing a national project in the 1970s to introduce cadastral survey to the whole country led to the introduction of a title insurance scheme (Gunasekera, 2008).

The purpose of the defective title insurance scheme was to convert defective title to 'mortgage-able' title (Gunasekera, 2008). In an effort to bring land without formal ownership documents into the mortgage market, land owners were encouraged to find sufficient evidence of title to land (old deeds, documents belonging to ancestors, archived documents relating to ancestors, private plans drawn by licensed surveyors in the 1900s, and affidavits from village elders and officials who identified the owner). Such documents were then notarised confirming the claim of ownership and used as evidence of proof of ownership (Gunasekera, 2008). Those notarised documents include deeds of declarations, deeds of renunciation, deeds of rectification, partition deeds, deeds of exchange and conditional transfers.

Conditional transfers were very often used by private lenders to lend money to land owners as banks could not be approached by these owners due to some defect in the title (Gunasekera, 2008). A conditional transfer that was duly executed affirmed that the owner owed a debt and interest to the lender (Gunasekera, 2008). If the debt was not paid, the ownership transferred to the lender and if paid, the land reverted to the owner (Gunasekera, 2008). Conditional transfers were generally registered and used for the purpose of title insurance when ownership had to be proved in the absence of the actual title deeds (Gunasekera, 2008).

Once in possession of a notarised document, the land owners were able to obtain two types of insurance policies. These include: (a) a mortgagees' policy - issued in the name of the bank where a loan was obtained by the owner; and (b) an owners' policy - guaranteed the title of owners by indemnifying them for loss occurred as a result of defects prior to their acquisition of the property (Gunasekera, 2008).

The *defective title insurance scheme* still exists in Sri Lanka. Nevertheless, it has not been reviewed almost during its entire existence. However, it is an example of how some shortcomings of the deed registration system were addressed by a solution introduced to fit local conditions by considering the needs of the community and preserving the rights of the local community.

Deed registration system is also plagued with problems, some of which have been addressed by the introduction of a new Land Information System (LIS) by the Survey Department. These problems are:

1. Registration of a deed is not compulsory;
2. Fraudulent dealings;
3. Registrar does not verify deeds;
4. Notarial fraud;
5. Priority claims under the deed registration system;
6. Problems with establishing the correct boundaries and identifying property;
7. The absence of a compulsory requirement to use survey plans to identify the actual land;
8. The absence of a central database;
9. Inconsistent boundaries;
10. Lengthy process to complete transactions; and
11. Outdated laws.

It is in this background that title registration was proposed as a solution in the late 1990s. However, there were some attempts to introduce title registration prior to 1990s.

2. TITLE REGISTRATION SYSTEM

The first attempts to introduce title registration in Sri Lanka was in the 1800s and the early 1900s. Some sections of the *Registration of Documents Ordinance* (Sri Lanka) No 8 of 1863 were repealed in 1877 (Coomaraswamy, 1948), (Pieris, 2009). A pilot test of title registration commenced in 1877 in selected areas in Colombo with a Titles Commissioner appointed and title certificates issued to lands in some parts of Colombo (Coomaraswamy, 1949). However, this trial failed to establish title registration in Sri Lanka although in the areas where the pilot test was carried out in Colombo (Dehiwala, Wellawatta and Kirillapone) when a deed is registered, a plan prepared by a licensed surveyor must be annexed to the deed to this date (Coomaraswamy, 1949). These areas in Colombo are known as the special registration areas. In 1907, the *Registration of Title Ordinance* (Sri Lanka) No 3 of 1907 proposed title registration, but this legislation was not implemented. Despite these early efforts the first full scale initiative to take effect is the land titling initiative under *Bimsaviya* introduced in 2007 as a result of the attempts in the late 1990s.

A special Committee appointed in 2013 to study the RTA provided the pluralistic nature of the legal system, multiple co-owners, and unregistered interests as reasons for recommending voluntary registration when converting title from deed registration system to title registration system. [4]

C. LAND LAW REFORM AND RECENT DEVELOPMENTS

In the past 50 years, several significant land tenure reforms have been introduced in Sri Lanka. Of these, the *Land Reform Law* (Sri Lanka) No 1 of 1972 (further amended in 1981 and 1986), *Ceiling on Housing Property Law* (Sri Lanka) No 1 of 1973, the *Land Reform (Amendment) Law* (Sri Lanka) No 39 of 1975 and more recently, the *Registration of Title Act* No 21 of 1998, are important. Land reform introduced in the early 1970s placed limits on private land ownership: 25 acres of paddy land and 50 acres of other land. The maximum number of houses that could be owned by an individual was restricted to two houses. In addition, plantation land that covered crops such as tea, rubber and coconut were also taken under government control.

All private lands that exceeded this land ceiling were acquired by the state. The land policies of the 1970s reflect the turning sentiment against colonialism reflected in the significant political changes at the time. In 1972, Sri Lanka introduced a new Constitution and abolished the Westminster system. Although, the objective of land reform introduced during the 1970s was to give back land to the landless, majority of the land acquired by the state has remained as state land facilitating corruption and hindering productivity (Samaraweera, 1982) (Quizon and Liamzon, 2011).

In 1987, the 13th Amendment to the Sri Lankan Constitution (Sch 9 Art 3) proposed the establishment of a National Land Commission with the responsibility of formulating national policy regarding the use of state land (Quizon and Liamzon, 2011). However, this has not been implemented as yet due to an ongoing

[4] This Committee comprised of seven members chaired by Arthur Samarasekera, President's Counsel and was appointed by the former President of Sri Lanka in 2013. The appointment of the special committee was announced in 2013. 'Special Committee to study Title and Ownership Registration Act', *Daily News* (online), 20 February 2013 < http://archives.dailynews.lk/2013/02/20/news13.asp>. This report is also referred to as the 'Samarasekera report.' Arthur Samarasekera et al, 'Report of Special Committee appointed by His Excellency the President to study the Registration of Title Act No 21 of 1998' (Special Presidential Committee Report, 2014).

political discussion regarding the extent of the powers between the central government and provincial councils (Quizon and Liamzon, 2011).

It is in this background that an AusAID[5] supported titling project was introduced between 1996 and 1999. A report prepared during the early stages by AusAID states that it intended to assist in the drafting of a new legislative framework and transferring deed registration into a new title registration system estimated to take 15-25 years (Lyons and Mwesigye, 2000). AusAID advised for a cautious approach in considering transition to title registration highlighting the complexity of the 'interplay of legal, cultural, administrative, and technical factors' (Lyons and Mwesigye, 2000). To this end, a key observation contained in the AusAID report was that the legislation passed during 1996-1999 period to introduce title registration required major amendments (Lyons and Mwesigye, 2000).

In 2002, the World Bank supported a land titling and related service project in Sri Lanka. One of the main objectives of this project was to "to assess and build the methods, framework and capacity for making sustainable and comprehensive improvement in the land administration system. The project aimed to build the foundation for a long -term program to develop a fair, efficient, and sustainable land administration system."(World Bank, 2007). This project also proposed to test the 'applications of models to improve systematic titling and titles registries' and develop an institutional framework (World Bank, 2007). However, by 2007, in its *Implementation Completion and Results Report* ('Implementation Report') the World Bank concluded that project objectives were not achieved. The project was unable 'to define and put in place the legal, regulatory, and institutional framework consistent with a large-scale land titling program and the efficient operation of a land administration system.' (World Bank, 2007).

The failure of the project is attributed to several reasons. One of the reasons is the failure to adopt proposed amendments to the *Registration of Title Act* No 21 of 1998 ('RTA'). At the closing of the World Bank project in 2006/2007 the legal drafting process had not yet been completed or a draft circulated for comment or approved by the Cabinet (World Bank, 2007).

The implementation Report also noted that:

> 'The Project failed to deal with titling of land parcels where there was uncertainty about existing rights. The land parcels for which land titles were issued were almost entirely those for which clarity of rights and

[5] In 2013, AusAID was integrated into and now forms part of the Australian Aid program held under the Department of Foreign Affairs and Trade.

> security of tenure were already high under the existing system of registration of deeds. The value added of titling these parcels is limited and does not support the investment expense required to undertake a program of systematic title registration. Under this Project, only a small percentage of land parcels that were included in a systematic titling area were actually titled. This is inconsistent with good practice and points to failure if attempts were made to roll this out on a broader scale.' (World Bank, 2007)

This observation is crucial to understanding the progress of Sri Lanka's land titling initiatives since the completion of the World Bank project in 2007. In 2007, despite those observations by the World Bank, the legislation introduced in 1998, namely the RTA was used as the platform to commence implementing title registration in Sri Lanka funded by the Sri Lankan government under an initiative titled *Bim Saviya*.

Title conversion progress (current as at 31.08.2017)[6]

	State	Private	LDO*	Total issued
Total titles received	290,862	307,760	5,208	603,830
Total registered/issued titles	280,324	271,877	4,842	557,043
Total title certificates issued	214,034			

*Lands subject to the *Land Development Ordinance* No 19 of 1935

In this table, the difference between the total number of titles received and, the registered and issued titles indicate various problems existing relating to those titles not reflected in the total. Another important indication from this table is that the state owns a significant number of land.

At present, a title registration system is gradually being introduced in Sri Lanka while the existing deed registration system continues to function parallel with the new system. The introduction of a Land Information System (LIS), which holds information based on land parcels have been created using digital geo-spatial data collected for preparing cadastral maps. This is a positive step towards enhancing secure ownership in Sri Lanka. However, the question remains whether converting to title registration from deed registration system as is in the case of Sri Lanka, addresses existing problems within the deed registration system.

[6] This information is provided with permission from the Department of the Registrar General, Sri Lanka.

PART III

THE PROBLEM AND SOME EXISTING COMPLEXITIES

A. THE PROBLEM

In Sri Lanka, introducing title registration is a significant change in land tenure in almost two centuries. Title registration aims to convert the entire deed registration system to title registration. Whether Sri Lanka has accommodated and if so, how has Sri Lanka accommodated the needs of the diverse communities within its pluralistic legal system when introducing the title registration system is one of the main questions. The answer to those questions, offer insights to the necessity to consider the interaction between formal and customary laws. There are several other problems:

- The RTA is not adequate to support the conversion to title registration;
- There is a lack of understanding among the public and the local policy makers of the effects of title registration;
- The law reform process has not considered complexities inherent within Sri Lanka's mixed legal system;

B. SOME EXISTING COMPLEXITIES

This section considers some existing complexities in customary land tenure and examines whether those have been accommodated in Sri Lanka's attempt to modernise its land registration system under the RTA. The purpose of the following analysis is to show that Sri Lanka's mixed legal traditions require law reform that adopts an inclusive approach, one that accommodates its unique needs.

To this end, the primary intention of introducing RTA was to modernise Sri Lanka's land tenure system. However, the RTA is ambiguous and fails to consider the application of customary laws and practices in Sri Lanka. In the absence of provisions to the contrary, it may be assumed that upon registration of title

after conversion from deed registration system, the RTA intends that it supersedes all other legislation covering customary land rights.

(1) The Right of Pre-emption Under *Thesawalamai* Law

The RTA does not provide specific provisions regarding the right of pre-emption stated in section 2 of the *Thesawalamai Pre-emption Ordinance* (No 59 of 1947) ('TPO'). This particular legislation regulates rights of persons subject to *Thesawalamai* law. The right of pre-emption is a preferential right under *Thesawalamai* customary law extended to two classes of persons specified in the relevant legislation granting them the first preference to buy a property available for sale at the price they propose or at market value (section 2(1) of TPO). The two classes of people entitled to the right of pre-emption are: (a) co-owners, and (b) in the event of the intestacy of the seller, his heirs (section 2(1)(a)-(b)). This provision suggests that the preferential right can be exercised by a person from any race, provided such person falls within these two classes of people.

If the owner intends to sell to someone not entitled to the preferential right, the owner must publish a notice of his intention to sell and give three weeks' notice (section 5 of the TPO). The TPO states that any conveyance of the property completed by the vendor during the period of three weeks of public notice is considered 'null and void and of no effect whatsoever in law' (section 6(2)). This is in two instances specified in that provision: (a) during the public notice period, if the vendor completes a sale of property of which he has given notice under the Act; or (b) the property is sold to any person other than a person entitled to the right of pre-emption.

The RTA does not provide clear guidance regarding the pre-emption rights granted to those specific classes of people under the TPO. It does not address the potential clash between the operation of pre-emption right and rights of co-owners under the title registration system. An example highlighting the clash between customary land tenure and the general law are the RTA provisions (section 14(d) that apply to the law regarding co-owners. Those provisions are not clear regarding the following matters:

(1) whether the right of pre-emption under *Thesawalmai* law is granted to co-owners who are subject to *Thesawalamai* law if their lands are registered under title registration; and
(2) how are rights of co-owners who are subject to different rules, distinguished, that is, whether they fall under general law and *Thesawalamai* law?

(2) Division of Property Under *Thesawalamai* Law

Although, for the purpose of intestate succession the general law otherwise known as the statute law of Sri Lanka recognises a married couple's equal entitlement to property including the holding of such property, *Thesawalamai* law recognises property based on inherited and acquired property (section 14, MRIO). The *Matrimonial Rights and Inheritance (Jaffna) Ordinance* No 58 of 1947 ('MRIO') applies to those subject to *Thesawalamai* law.

According to the provisions in MRIO, inherited hereditary property brought to the marriage by the husband is referred to as *Mudusam* (also referred to as *Modesum*). The relevant legislation refers to such property as patrimonial inheritance (section 15, MRIO). *Urumai is* non-patrimonial property received by a person 'by descent at the death of a relative other than a parent or an ancestor in the ascending line' (section 16, MRIO). *Chidenam (*also referred to as *Cheedanam)* is property brought into the marriage such as a dowry by the wife. Since the introduction of the *Prevention of Frauds Ordinance* (Sri Lanka) No 7 of 1840, all properties given on dowry must be by a deed and executed by a notary (Katiresu, 1907). *Thediatheddam* is property acquired for valuable consideration, by either spouse during the subsistence of the marriage (section 19, MRIO). The valuable consideration must not form any part of the couple's separate property. Both spouses are equally entitled to *thediatheddam*, which is required to be divided according to the provisions of the Act (section 20, MRIO).

However, property acquired by a wife or a husband before or during the marriage using inherited property (*mudusam)*, non-patrimonial property (*urumai)* and dowry of wife (*chidenam*) remained their individual property and not acquired property (*thediatheddam*) (sections 6-7 of MRIO). For example, if land was purchased with husband's inherited property and if it can be traced back to hereditary property, the property remained inherited property (*mudusam*) and not acquired property (*thediatheddam*). Those rules have the propensity to create all sorts of complications in cases where title is registered in one party's name under the new title registration system. This is because once registered, title is considered absolute. Although both spouses are equally entitled to acquired property, the Act (MRIO) states that a married woman cannot dispose or deal with her immovable (sections 6 and 39, MRIO) property without the written consent of the husband although a wife can deal with movable property without the husband's consent (section 39, MRIO).

A married husband has full power of disposing of and dealing with all his property, but in the case of acquired property (*thediatheddam*), half of the property belonged to the wife (sections 7-20, MRIO).

The RTA provisions are not clear regarding:

(1) the conflict between *first class title* (section 14(a) of RTA), which confers absolute ownership under the present title registration scheme and ownership rights of married women under the MRIO. For example, during the first conversion to title, when land in Northern Province are converted to title registration, this would include acquired property (*thediatheddam*) already in the name of married Tamil women subject to *Thesawalamai* law. In such cases, the RTA does not state how the conflict between absolute ownership under title registration and legal ownership with restrictions placed on disposal, as is in the case of married women subject to *Thesawalamai* law, are resolved; and

(2) the unequal rights of married women and men regarding dealing and disposal of land specified in the MRIO.

(3) Usufructuary Mortgages Known as Otti Mortgages Under *Thesawalamai* Law

A type of mortgage known as *otti* mortgages exists among those who are subject to *Thesawalamai* law. *Otti* mortgages are considered to be similar to usufructuary mortgages in Roman Law (Coomaraswamy, 1949). The term 'usufruct' in Roman Law means 'the rights to enjoy the property of another and to take the fruits but not to destroy it, or fundamentally alter its character.' (Lee, 1931). Unlike common law mortgages, where the mortgagor has the possession of the property, in *otti* mortgages, the mortgaged property is handed to the mortgagee in exchange of consideration (Srikandarajah et al, 2003). This is carried out on the condition that the mortgagor does not pay interest by way of cash allowing the mortgagee to be in possession of the land and enjoy the profits of such land. The produce harvested from the mortgaged property goes towards the payment of interest of the principal sum owed to the creditor or the mortgagee who is in possession of the land (Coomaraswamy, 1949). The mortgagee has the right to enjoy the produce from the land until the mortgage is redeemed.

If the produce collected from the mortgaged land amounts to more than the agreed equivalent of interest, the surplus goes towards paying off the principle sum. In mortgages under general law a mortgagor is able

to pay the money borrowed at any time and release the property from the burden of a mortgage (*Mortgage Act* No 6 of 1949 as amended by *(Amendment) Act* No 53 of 1949 and *(Amendment) Act* No 11 of 1953). In contrast to this, in an *otti* mortgage, the mortgagor has to wait until the mortgagee is ready to hand over the property, usually due to the timing of the harvesting of a crop. If the mortgagee is about to realise the produce from the mortgaged property, the mortgagor cannot request that the mortgage be redeemed, until the mortgagee realises the benefit of the harvest (Coomaraswamy, 1949) (Srikandarajah, 2003). If the mortgagor pursues demands to take back the mortgaged property, the mortgagor first has to pay the mortgagee all expenses incurred in preparing the property for planting crops together with interest on the money received (Coomaraswamy, 1949).

Several significant issues arise as result of this type of usufrutuary mortgages, which have not been considered in Sri Lanka's domestic law reform attempts:

(1) If the mortgagee could not reap a profit from harvesting of the crops from the property and refused to hand over the property unless interest was paid on the amount lent, the issue is the rights of the mortgagor as much as that of the mortgagee (Srikandarajah et al, 2003).

(2) If the mortgagee delivered the possession of the mortgaged property under a lease agreement to a third party, the rights of the third party as against a claim by the mortgagor are unclear. Similarly, the rights of a mortgagor are also unclear, if the third-party refuses to vacate the property. The *Mortgage Act* 11 of 1953 does not contain provision regarding a situation such as this.

(3) In the case of a property sold with an *otti* mortgage, the question arises as to the nature of the rights of a purchaser who may have become an owner on paper, while someone else might be in possession. Some of the issues that are likely to arise are:

(a) whether the purchaser is entitled to the usufructuary rights if he acquired the property from a mortgagee; and

(b) if he acquired the property from a mortgagee entitled to usufructuary rights, are his rights limited to merely usufructuary rights or does he acquire ownership rights?

A number of early and recent cases have examined some of these issues relating to usufructuary and *otti* mortgages formulating principles concerning some of those issues.

(4) **Recognising Property for the Purpose of Succession and Inheritance in Kandyan law**

At the time Kandy in Sri Lanka ceded to British colonial rule, there was no written record of processes to deal with civil or criminal matters (D'Oyly, 1831). In the case of property matters only, written decrees existed referred to as *sitta* (also referred to as *dewe sittas,* when under an oath) that were held as title deeds by the community (D'Oyly, 1831). Relying on the expert opinions of chiefs and headmen, the Board of Commissioners for the Affairs of the *Kandyan* Provinces collated rules and customs, to ascertain the customary rules that applied to *Kandyans (*Nadaraja, 1972). Although, some customs were abolished in the process of collating *Kandyan* customary rules and practices under the British in the 1800s, customary practices pertaining to land tenure, inheritance and marriage survived (Pereira, 1901).

At present, the *Kandyan Law Declaration and Amendment Ordinance* No 39 of 1938 as amended by *Ordinance* (Sri Lanka) No 25 of 1944 and subsequent amendments contain the law pertaining to property, adoption, marriage, inheritance of immovable and movable property and succession applicable to Kandyan Sinhalese (*Kandyan Law Declaration and Amendment Ordinance* No 39 of 1938 are s 3 transfer of property; s 7–8 adoption; s 9 marriage; s 10–24 inheritance of immovable and movable property).

The nature of the marriage plays an important role in transfer and ownership of property as well as succession and inheritance in Kandyan Law. A woman can marry in *diga* (the wife leaves her ancestral home to live with the husband and his family) or *binna* (the husband comes to live with the wife and her family) (sections 9 (2),12 *Kandyan Law Declaration and Amendment Ordinance* (Sri Lanka) No 39 of 1938). In a *binna* marriage, the husband does not have a right to the wife's property. If, however, the wife's parents had requested the husband to come and live with the wife and her family, the husband could not be evicted from the house without the wife's consent.

The distinction between an ancestral or inherited, also known as *paraveni* property and an acquired property is critical in ascertaining clear property rights and for the application of inheritance laws under Kandyan law (s 10(1) of the *Kandyan Law Declaration and Amendment Ordinance* No 39 of 1938) (s 10(3) of the *Kandyan Law Declaration and Amendment Ordinance* (Sri Lanka) No 39 of 1938). *Paraveni* property is divided into paternal *paraveni*: inherited property through the father's line and maternal *paraveni*: inherited property through the mother's line.

The RTA does not contain provisions as to how to address issues that may arise regarding property ownership, when property subject to Kandyan law is converted to title registration. In addition, the RTA does not provide for a system to record interests under Kandyan law and identify property subject to Kandyan law.

Even if it were possible to note in the title entry of the title register whether it is ancestral or acquired land, the problem with this type of distinction is that it is subject to change. For example, in *Menika v Band* (25 New Law Reports 207 (1923), 207), ancestral property gifted to a daughter, which in the hands of the donor, was considered to be ancestral property but in the hands of the daughter it was considered to be acquired property. In *Kalu Banda v Mudiyanse (*(1926) 28 New Law Reports 463*)* it was decided that when *paraveni* or ancestral property has been subject to a partition case and if subsequent to the partition of the property, one person is given title based on prescription, it is considered to be that person's acquired property.

(5) **Sinhalese Tenure Systems of *Thattumaru* and *Kattimaru***

Two rotational systems of land tenure tracing back to the sixteenth century exist in some areas of Sri Lanka largely inhabited by people of Sinhalese origin (Moore and Wickremasinghe, 1978). Those areas are the low and mid-country (wet zone) of Sri Lanka. Even within those areas, the 'operation of the system very often varies from village to village' (Moore and Wickremasinghe, 1978). These two systems are known as (Moore and Wickremasinghe, 1978):

1. *thattumaru* (also known as *tattumaru)* system, which involves the right to cultivate a paddy plot, annually rotated and shared by one or more persons (referred to as 'shareholders' but similar to co-owners) who have a right to cultivate in such land; and
2. *kattimaru* system where at the death or retirement of an owner, each heir receives the right to cultivate the plot they are entitled to without receiving a permanent right of ownership to the land.

Thattumaru tenure scheme allows a piece of land, which may be cultivated in equal shares by siblings of a family treated as one adjoining unit (Moore and Wickremasinghe, 1978). Paddy land is divided into *ihala katti* (upper section) and *pahala katti* (lower section) with each section having separate *kumburu* (paddy fields) (Moore and Wickremasinghe, 1978). This division is based on the yield of equal amount of paddy

harvested from the upper and the lower sections. The plots are harvested annually in a systematic plot rotation in order for the use of the land to be maximised at different cultivation seasons (Moore and Wickremasinghe, 1978). This ensures that at the end of a certain period of time, all shareholders have worked in each field including fertile and infertile fields (Moore and Wickremasinghe, 1978).

The customary practice of *thattumaru* system has been examined in several cases. For example, in *Haramanis v Amarasekera* ((1912) 16 New Law Reports 207-208), it was held that a person who purchased an undivided share of a land was entitled to a share of the produce and that as co-owner he cannot be excluded by another co-owner. It has been also held that *thattumaru* is only an arrangement of convenience and that it does not impact each of the co-owner's rights to activate his legal rights to land. Chief Justice Lascelles noted that, if, *thattumaru* possession is terminated, it 'may leave rights which require adjustment' (*Haramanis v Amarasekera,*). This alludes to the fact that *Thattumaru* is complex than it appears.

Those two tenure systems or use of land present the following challenge to land tenure reform in Sri Lanka:

(a) Land fragmentation as a result of *thattumaru* and *kattimaru* systems; and
(b) The issue of co-ownership in the context of title registration.

5.1 Land Fragmentation as a Result of *Thattumaru* and *Kattimaru* Systems

Complication in *thattumaru* system of tenure arises when the section or plot has to be divided into units to be assigned to each descendant from generation to generation until land fractioning is impossible. Some problems arising as a result of land fragmentation were also identified by Obeysekere in his study of one village in 1967 (Obeysekere, 1967). More recently, an AusAID project report released in 2000, identifies two problems that directly relate to this type of land fractioning in Sri Lanka (Lyons and Mwesigye, 2000). According to this report, after the death of a person when property is divided equally among all descendants, in such cases, sub-division is required of lands that are not registered in the land registry. In such cases, the new sub-division is often unregistered (Lyons and Mwesigye, 2000). The other problem is that a single land parcel, for example, *thattumaru* type of land examined above may have many co-owners, in some cases a few thousand who may not know each other (Lyons and Mwesigye, 2000).

From the point of clearly defined property rights and property boundaries, and recording title, this type of traditional use of property pose challenges to implementing a streamlined approach such as the one currently being implemented under the title registration system in Sri Lanka. To this end, some important questions are:

(1) for the purpose of registering title, how are the owners ascertained;
(2) whose name should appear in the title when the plot is used by a family jointly, which is due to the operation of customary inheritance and land rights; and
(3) if title is issued to one selected person, what about the property rights of the others in the family?

5.2 *Thattumaru* and the Problem of Co-ownership in the Context of Land Registration

The title registration system proposed by the RTA provides for the appointment of a manager from among the co-owners with the consent of other co-owners (section 15, RTA). The manager is given authority, powers and obligations of a trustee (sections 15–16, RTA) and the rest of the co-owners granted the rights of beneficiaries under the *Trusts Ordinance* (Sri Lanka) No 9 of 1917. Supposing *thattumaru* comes under the ss 15-16, these RTA provisions are not clear in the following areas:

(a) the process for the removal of a manager, replacement and the appointment of a manager when there is no clear consensus among the co-owners; and
(b) how the conflicting duties and obligations placed on a manager who is a co-owner and a beneficiary at the same time, are settled.

Supposing that a co-owner manager appointed under RTA decided to use the entire common land for its intended natural purpose, the question is, whether the manager who is also a trustee, is in breach of the *Trusts Ordinance* No 9 of 1917. Those provisions mentioned in this section are likely to cause disputes in one or all of the areas identified above. In addition, there are other contradictions between some provisions in the RTA and *thattumaru* and *kattimaru* systems. These are:

1. Section 14(d) of RTA allows for *title of co-ownership* and s 48 states that unless 'an instrument pertaining to a land parcel' subject to co-ownership complies with this Act, it is void.

2. Section 54(2) states that '[a]ny provision of a will that makes a person owner of an undivided share or of a divided share smaller in extent than the prescribed minimum extent of a land parcel that may be registered under this Act shall have no legal effect'. Section 54(3) states: '[a] Court in which an application is filed or proved in respect of a provision of a will referred to in sub-section (2) shall order a sale of such land parcel among the contending claimants'.

3. Section 55 of the Act states that if a person dies intestate, an interested party 'may inform' the Commissioner of Title Settlement of the death. After being notified the process to be followed by the Commissioner of Title Settlement is prescribed in the Act, which includes publishing a notice calling for claimants to the land parcel of the deceased person and other steps as specified in the Act.

Those provisions in the RTA do not address:

1. How to resolve cases where the land holding is not in equal shares but in unequal percentages.

2. What becomes of land already smaller than the 'prescribed minimum extent' that already exists and may not be subject to the terms of a Will? s 54(2) of the Act only mentions those parcels that are subject to the provisions of a Will.

3. The use of 'may inform' in s 55 indicates that an interested party has a choice to inform the Commissioner. If a party does not inform the Commissioner, the prescribed process of calling for claimants is not activated. In such a case. what is the position of interested parties who continue to perhaps have possessory rights to the land without the knowledge of this choice in cases where an interested party does not activate the process by informing the commissioner?

PART IV

A. CONCLUDING OBSERVATIONS

The preceding analysis suggests that the process of the shift to title registration under the RTA has not considered the issues that may arise as a result of customary tenure, which may impede the successful implementation and operation of title a registration system in Sri Lanka. The issues identified in this exposition on customary law together with the weaknesses of the existing deed registration system, raise the following matters to be considered by Sri Lanka:

(a) The lack of processes to identify what interests a person hold over property, identify the actual owners and the extent of their interests for recording purposes;

(b) The position regarding customary, documentary and other evidence that may become available after title registration has become operative and the title register becomes conclusive;

(c) The RTA does not provide for a clear process to ascertain rights of undivided shareholders, who hold land under a customary form of land. Instead, by adopting a compulsory sporadic approach to converting deeds to title registration, the title registration process seems to disregard ownership and the apportionment of land to each co-owner;

(d) The efficiency aimed by introducing title registration cannot be achieved if the dispute resolution process is not efficient; and

(e) The three types of titles offered under the RTA are inadequate to accommodate customary rights and disregards the customary aspect of some land holdings such as *thattumaru* and *kattimaru* tenure systems. One could assume that many disputes stemming from this type of tenure would ultimately end up in court and potentially increase the number of land cases in time to come.

B. RECOMMENDATIONS

1. Systematic approach to land law reform

- The analysis provided in this paper does not cover other areas of concern presented by the RTA. However, in terms of customary land tenure, it is evident that a systematic approach to law reform has not been adopted. The assessments made by the World Bank and AusAid considered in this paper provide information of an effort by international organisations to introduce a systematic approach to law reform.

- It is important that a comprehensive feasibility assessment of the existing land rights and use, appropriate stakeholder consultation and evaluation is undertaken prior to introducing significant changes to land law. In adopting such an approach, Sri Lanka would have been able to assess whether the existing deed registration system could have been improved to enhance efficiency rather than expending money on introducing title registration. Some important questions that would have been answered had such an initial feasibility report (the World Bank Implementation report 2007 contained some concerns) are: (a) whether it is necessary to convert the deed registration system to title registration and (b) whether the benefits outweigh the cost of implementation? There is also merit, at least for deed registration system to review the *defective title registration scheme* to explore whether it can continue in its original state or in an amended form. It does not appear that Sri Lanka had undertaken or completed such an exercise prior to introducing title registration.

- One area not covered in this paper is the impact of the war in Sri Lanka, which ended in 2007 on land tenure and post-conflict land tenure management of internally displaced people. The former civil war areas are in the north and east where majority of people are subject to *Thesawalamai* law. Without first understanding the effect of conflict on land tenure by undertaking a comprehensive study, it is impossible to develop effective law reform measures to these areas. By introducing title registration without first understanding the nature of the problem present risks to those communities losing their tenure rights.

- It is not too late for Sri Lanka to slow down the title registration process and undertake a comprehensive evaluation of the impact of title registration introduced so far. Such an exercise must also include a comprehensive assessment of existing land rights and use. In this respect, it is useful and beneficial for Sri Lanka to seek the expertise of World Bank, which has the expertise to undertake such an exercise.

2. Appropriate legislative changes and clear and concise legislative provisions

- To ensure clarity, consistency and efficiency, the main objectives of modernising land registration systems, it is essential to evaluate the RTA as well as introduce other legislative changes. Some of the RTA sections identified in Part III do not cross reference to succession and inheritance laws under customary laws. As such, some provisions of the RTA contradict customary tenure. It is not in harmony with the legislation that applies to customary laws. These provisions are likely to complicate the already complex system of tenure in Sri Lanka.

- Customary practices such as *otti* mortgages have not been considered in Sri Lanka's title registration initiative. *Otti* mortgages requires some solution. On the face of it, it appears that *otti* mortgages can easily be accommodated by appropriate statutory provisions. While there may be other solutions to overcome this problem, one solution is to protect the rights of the parties by learly defining ownership rights and amending the *Mortgage Act* 11 of 1953. Setting down a formal manner in which to record mortgage transactions and incorporating it into the deed or title registration process would also enhance efficiency.

- In relation to *thattumaru* and *kattimaru* land tenure, it is time to re-visit the recommendations by the Agrarian Research and Training Institute of Sri-Lanka: an accessible, cheap and quick partition system and suitable legal institutions. These must be considered as part of the potential solution to address problems arising from *thattimaru* and *kattimaru* tenure systems (Moore and Wickremasinghe, 1978).

3. Explore ways to harmonise customary laws and practices and new laws.

- The informal rights to property created by *thattimaru* and *kattimaru* systems should be considered in respect of the type of difficulties that the Survey Department of Sri Lanka is likely to face when preparing plans and cadastral mapping. Although, the primary intention of the RTA is to enhance efficiency and potentially reduce land disputes, the propensity for multitudes of new land disputes to arise out of these types of customary land division, which is not often registered, is high.

- Present land reform does not reflect the fact the strong interplay of customary and cultural factors exists in Sri Lanka that is intricately interwoven to existing land tenure practices. Practices such *thattumaru* and *kattimaru* exist in a cultural dimension where despite issues concerning land fragmentation the communities continue with rotational cultivation practises. It is a system where family forms an integral part of the division and use of property. In such background, law reform must seek to harmonise cultural factors with formal laws.

4. Appropriate dispute resolution mechanisms to expedite the resolution of land disputes

- Although, title registration is to be a simple and an efficient alternative to the deed registration system, the process to follow specified in s 55 of the RTA does not make it any simpler or more efficient. This is because, lengthy processes have to be followed.

- Where Title of Co-Ownership in granted, this would mean that there is a case for those parcels of land to be considered under the RTA and not under a customary law. This means that owners, who may have come under customary law, may now be subject to title registration legislation without even having been informed of their rights. This is likely to create disputes around the application of the RTA and customary laws.

- Under the RTA recourse is available by way of an application to the District Court. Sections 21-22; 29(1) and 60(4) specifies the instances when relief can be sought from the District Court. This

suggests that the RTA is heavily reliant on the District Court to resolves disputes, which already has a backlog of land cases. In 2000, there were approximately 140,000 land cases before Courts, many of which had remained unresolved for generations (Lyons and Mwesigye, 2000). The RTA provisions mean more land cases before the District Court. It does not in any way make the title registration system efficient but add to the existing case load.

- Although, setting up a land tribunal is an option, the powers and the appointments to land tribunals must be carefully considered. Those who are professionally suited with knowledge of the existing system and the operation of title registration must be appointed to such tribunals.

5. Improved administrative processes

- Ensure that the staff of government departments and professionals involved in the title conversion processes are trained and are equipped with powers granted under appropriate legislative provisions to carry out their tasks.

- As title registration is new to Sri Lanka and it is imperative to place appropriately skilled and knowledgeable people in charge of the process.
- Ongoing stakeholder consultation is imperative for the successful implementation of proposed reform.

6. Registers of Ownership and Interests

- It is proposed that Sri Lanka could have a register of ownership and interest or have them as two separate registers.
- The register of ownership must record a description of land, ownership, interests and encumbrances and process for the notification of interests (such as caveats).
- The register of interests should record customary land interests, which are identified and adjudicated during the adjudication process. This register should provide for the registration of

servitudes and updates if the servitude ceases. It should be linked to the register of ownership, so that a person who looks at the ownership register can check what rights of servitude benefit or burden the land.

C. CONCLUSION

This paper analysed the RTA in Sri Lanka to examine whether some complexities already existing have been considered or not. The examples presented in this paper indicate that the RTA does not appear to consider the complexities within its property law system in implementing title registration. The case study presented in this paper also proves that the interaction between formal law and customary law is an essential and necessary consideration in domestic property law reform in countries where mixed legal systems exists.

In a plural society with a mixed legal system, land policy reform leading to effective legal frameworks is not an easy task. If such reform is not carefully mapped, there is always the risk that the existing situation can be further worsened rather than improve. As examined in this paper, Sri Lanka has a long history and rich mixed cultural heritage. For Sri Lanka, it is not a simple case of moving past colonial influence on land tenure but rather finding solutions to harmonize the past with the present by exploring ways to accommodate diverse needs of its communities, customary practices, colonial legacy as well as other factors that impact property law reform.

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