LST REVIEW

Volume 15 Issue 213 July 2005

Housing Rights And Forced Evictions

LAW & SOCIETY TRUST

CONTENTS

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ISSN - 1391 - 5770

Editor's Note ... ...

The Review, in this instance, intertwines a variety of concerns that are relevant in regard to the general issue of housing rights and forced evictions.

In the past, the process of forced evictions has been extremely discriminatory in Sri Lanka. Constitutionally, there is no right to property guaranteed though the Supreme Court has, through judicial interpretation, recognised a right to due process when persons are deprived of their properties. This has included the right to be informed and to be heard when land is to be acquired.

A corresponding duty has been imposed on the State when acquiring property ostensibly for an urgent public purpose, to give due notification of the exact purpose as well as the urgency of the proposed acquisition.

This is, of course, in strict legal theory. Practically, the right to due process in respect of land acquisition and consequent evictions of landowners from their property has existed only in respect of those fortunate enough to go before court and to obtain a fair hearing from judges sympathetic to their plight. The effect of those decisions have not trickled down to administrative and government officers in a manner as to benefit the marginalised and underprivileged who are unable for many reasons, including financial, to invoke the jurisdiction of the courts in their favour.

The attitude of the Government in relation to acquisition of land, whether for development purposes or otherwise has thus been very cavalier. The bypassing of norms that demand fairness and accountability is well evidenced. These concerns are particularly important to us at this point of time given the serious implications arising from mass evictions that have already taken place or are about to take place in Sri Lanka as a result either of large scale development such as major expressways or as an inevitable consequence of the post tsunami re-building process.

A case in point is the Southern expressway which has led to the Supreme Court stressing certain cautionary principles regarding the manner in which development ought to take place *vis a vis* the rights of people who are affected. Appealing to the Court from the dismissal of their applications by the Court of Appeal, a primary argument of villagers from Akmeemana and Bandaragama whose lands were to be arbitrarily acquired for the building of the expressway was that the summary changing of the trace (over which the expressway was due to run) without notice to them by the road development authority affected their rights.

Accepting this argument, the Supreme Court emphasized that the courts in Sri Lanka have long recognized and applied the "public trust" doctrine: that powers

vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes;

Executive power is also necessarily subject to the fundamental rights in general, and to Article 12(1) in particular which guarantees equality before the law and the equal protection of the law. The "protection of the law" would include the right to notice and to be heard. Administrative acts and decisions contrary to the "public trust" doctrine and/or violative of fundamental rights would be in excess or abuse of power.

In this case, affected villagers were held entitled to notice and to be heard as per the principles of natural justice and their fundamental right to equal treatment and to the equal protection of the law. In not being given such a hearing, they were at least entitled to compensation for the violation of their rights. Though the Court thought it fit, (albeit disappointingly), to limit relief to the awarding of compensation without ordering a second environmental assessment which was what the villagers actually wanted, these principles are outstandingly important in determining future governmental action in the context of development processes.

As important is the manner in which the judges determined that a rights violation had taken place in the context, not of a usual fundamental rights application but rather arising within the scope of the writ jurisdiction as linked to fundamental rights violation in terms of Article 126(3) of the Constitution.

The judgement in this regard (Mundy vs CEA and Others, SCM 20/1/2004 per Mark Fernando J. writing for the Court) is published in the Review as is a critique of its substance by ***Lavanya Mahendran***. Its publication is occasioned by the fact that it has not yet been published in the official law reports (viz; the Sri Lanka Law Reports) despite the lapsing of one and a half years after it was delivered by the Court.

In more general terms, it needs to be pointed out that all actions of the State are governed in this regard not only by domestic norms but also by provisions of the International Covenant on Civil and Political Rights (ICCPR) which imposes certain restrictions on the Sri Lankan State in this regard despite the fact that the right to property is not a constitutionally protected right domestically.

A briefing paper on the manner in which the ongoing process of acquisition of lands for the expressway offends cardinal principles of the ICCPR (Article 17 (right to a home) and Article 2(3) (Right to an Effective Remedy), as well as the commoner

breaches of Article 14(1) (Right to Due Process) and Article 19(2) (Right to Free Expression and to Information). is also published.

These questions are relevant too within the International Covenant on Economic, Social and Cultural Rights (the other main human rights treaty ratified by the Sri Lankan State) which is the theme of a short discussion paper by ***Bret Thiele***.

It may be recalled in this context that the requirement of consultation, information and adequate procedural fairness as an inherent aspect of the right reflects the approach of other international bodies such as the UN Economic, Social and Cultural Rights Committee which has stated in relation to forced evictions that it is crucial that appropriate procedural protections are in place prior to any evictions from the home.

These include (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all those affected persons prior to eviction and (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.

These decisions and jurisprudence illustrate that the State needs to observe a particularly high standard of vigilance in ensuring procedural fairness. Public participation must be ensured from the beginning of the procedures for evictions and due account has to be made of the outcome of the public participation in reaching the final decision.

The prevailing attitude of pervasive non-accountability is however bound to govern the response of the Government to tsunami affected landowners, particularly as the legal rights of many of these people to the land on which they had been living prior to the tsunami are not well secured. Equally disturbing are reports of tourism master plans being prepared for parts of the tsunami affected North-East as well as the South that would inevitably result in mass scale evictions.

The concluding paper by ***Dr Jayantha de Almeida Guneratne, P.C.*** addresses crucial concerns in relation to the need for a Right to Housing in Sri Lanka as well as the lack of an adequate National Housing Policy. The overall lacunae highlighted thereto are inevitably aggravated by unprecedented natural disasters such as the tsunami where general concerns in relation to housing and forced evictions assume a pressing – and very specific - urgency. The paper suggests several practical initiatives that are useful in bringing about an improved domestic legal framework.

Kishali Pinto-Jayawardena

The Supreme Court of the Democratic Socialist Republic of Sri Lanka

SC Appeal 58/2003
CA Application 688/2002

Heather Therese Mundy,
1, Baddegodahena Estate,
Weedagama,
Bandaragama.

Petitioner-Appellant

Vs

1. Central Environmental Authority,
   Robert Gunawardena Mawatha,
   Battaramulla.

2. The Road Development Authority,
   "Sethsiripaya",
   Battaramulla.

3. Rajitha Senaratne,
   Minister of Lands,
   80/5, 'Govijana Mandiraya',
   Rajamalwatte Road,
   Battaramulla.

4. C.Gamage,
   Divisional Secretary,
   District Secretariat,
   Bandaragama.

Respondents-Respondents

1. Susila M.Dahanayake,
   Ihalagoda,
   Akmeemana.

2. A.A.Hema Mangalika,
   'Athu Sevana' '
   Ihalagoda,
   Akmeemana.

3. P.M.Koralage,
   Ihalagoda,
   Akmeemana..

4. A.K.Maginona,
   Ihalagoda,
   Walahanduwa.

Petitioners-Appellants

Vs

SC Appeal 59/2003
CA Application 1330/2002

1. G.A.A.L.Wijewickrama,
   Divisional Secretary,
   Akmeemana.

2. Rajitha Senaratne,
   Minister of Land Development

3. Central Environmental Authority.

4. The Road Developmental Authority.

Respondents-Respondents

Arambawelage Weerapala,
211,Wattegewatte,
Ihalagoda.

And 37 others

Petitioners-Appellants

SC Appeal 60/2003
CA Application 1447/02

Vs

1. G.A.A.L.Wijewickrama,
   Divisional Secretary,
   Akmeemana.

2. Rajitha Senaratne,
   Minister of Land Development

3. Central Environmental Authority

4. The Road Development Authority

Respondents-Respondents

BEFORE : Fernando, J,
Ismail, J. and
Wigneswaran, J.

COUNSEL : D.S. Wijesinghe, PC, with Dr Jayantha de Almeida Gunaratne, M. Adamaly & Kishali Pinto Jayawardene for the Appellant in 58/2003,
M.A. Sumanthiran with M. Adamaly and Viran Corea for the Appellants in 59/2003 and 60/2003,
S.Aziz, PC, with Nalin Ladduwahetty for the Road Development Authority in all three appeals.
Ms Bimba Tilakaratne, DSG, with M.R. Ameen, SC, for the Central Environmental Authority, the Minister of Lands, and the other Respondents in all three appeals.

ARGUED ON : 10th November 2003

DECIDED ON : 20th January 2004

FERNANDO, J:

Many years ago the Government of Sri Lanka decided to construct the Southern Expressway ("the Expressway") in order to link Colombo and Matara. The parties to the three appeals now before us agreed that the project itself is of national importance and benefit, but the Appellants complained in regard to the proposed route ("the Final Trace") of two sections of the Expressway, which adversely affected their lands. Four sets of petitioners filed writ applications in the Court of Appeal. Those applications were heard together, and one judgment was delivered on 30.5.2003 dismissing all four applications. Dissatisfied with that judgment, three sets of petitioners appealed to this Court having obtained special leave to appeal.

The Appellant in SC Appeal 58/2003 (CA Application 688/2002) complained about the Final Trace from Kahathuduwa to Diyagama (in the Bandaragama area). SC Appeal 59/2003 (CA Application 1330/2002) was filed by four Appellants, and SC Appeal 60/2003 (CA Application 1447/2002) was filed by 38 Appellants, all of whom complained about the Final Trace from Boralukade to Kokmaduwa (in the Akmeemana area). Those three appeals were taken up together.

Under and in terms of sections 23Y, 23Z and 23BB of the National Environment Act, No 47 of 1980 as amended by Act No 56 of 1988 ("the Act"), and the relevant regulations and orders made thereunder, the Expressway was a "prescribed project", for which the approval of the "project approving agency" was required, and an Environmental Impact Assessment Report ("EIAR") was an essential pre-condition to such approval. The Road Development Authority ("RDA") was the project proponent, and the Central Environmental Authority ("CEA") was the project approving agency. The RDA submitted an EIAR, prepared by the University of Moratuwa, to the CEA.

Section 33 of the Act defines an EIAR as:

> *" ... a written analysis of the predicted environmental project and containing an environmental cost-benefit analysis ... and including a description of the project and includes a description of the avoidable and unavoidable adverse environmental effect of the proposed prescribed project; a description of alternatives to the activity which might be less harmful to the environment together with the reasons why such alternatives were rejected ..."*

As the Court of Appeal observed, the purposes of Environmental Impact Assessment are:

> *" ... to ensure that development options under consideration are environmentally sound and sustainable, and that the environmental consequences are recognized and readily taken into account early in the project design... This process fosters sound decision-making as it enables decision-makers to consider all relevant environmental consequences and afford affected persons an opportunity to voice their opinion. It fosters dialogue between decision-makers and involved parties, which is an essential pre-requisite of any development project for such project to have sustainability over a long period." [emphasis added]*

The EIAR submitted by the RDA evaluated two alternative routes, referred to as the "Original Trace" and the "Combined Trace", and recommended the latter.

On 23.7.99, the CEA approved the Combined Trace subject to numerous conditions:

> *"III. RDA should where necessary obtain fresh approval in terms of Regulation 17(i)(a) ... in respect of any alterations that are intended to be made to the project ...*
>
> *IX. The UDA ... has identified the Weras Ganga / Bolgoda lake wetland as a major recreational area. It is recommended that the final trace should be moved on to the original RDA trace as specified in the EIAR to avoid traversing through these wetlands.*
> *X Wetland Site Reports ... have already been prepared for Koggala and Madu Ganga wetlands. The proposed expressway should be sited in such a manner to avoid traversing through these wetlands.*
> *XI. The proposed expressway should be sited in such a manner as to minimize traversing through [other] wetlands ...*
> *Fl. The final trace should be selected in such a way that it minimizes the relocation of people ...*
> *F4. When acquiring residential land and houses, alternative land should be provided together with sufficient compensation to enable families to build and move into new houses...*
> *F7. In payment of compensation for acquired land with structures, particularly dwelling houses, the minimum payment should be the market value.*
> *F8. Compensation for non-residential lands should be paid on the basis of the present market value ...*
> *F9. The payment of compensation should not be delayed and should be paid before moving into the alternative land.*
> *F10. Usable building materials of the acquired houses should be given to the owners and the value of such materials should not be taken into account in the payment of compensation...*
> *The developer shall comply with any additional conditions that may be communicated from time to time by the CEA during the execution of the project." [emphasis added]*

Besides condition III, there were other statutory provisions relevant to alterations. Section 23EE provides:

> *"Where any alterations are being made to any prescribed project for which approval had been granted ... the [proponent] who obtained such approval shall inform the appropriate project approving agency of such alterations ... and where necessary obtain fresh approval in respect of any alterations that are intended to be made to such prescribed project for which approval had already been granted."*

Regulation 17 of the National Environmental (Procedure for approval of projects) Regulations No 1 of 1993 provides:

> *"(i) A project proponent shall inform the appropriate Project Approving Agency of –*
> *(a) any alteration to [an approved] prescribed project ...*

(ii) The project proponent shall where necessary obtain fresh approval in respect of any such alterations that are intended to be made to the project. The Project Approving Agency shall in consultation with the [CEA] determine the scope and Format of the supplemental report required to be submitted for such alterations."

The decision of the CEA was impugned in a writ application filed in the Court of Appeal (CA Application 981/99) which was dismissed on 20.11.2000, and special leave to appeal was refused on 22.6.2001.

Thereafter, in purported compliance with the terms and conditions of the CEA approval, the RDA prepared what has been described as the "Final Trace", in regard to which three distinct issues arose. First, whether the Final Trace was adopted in order to avoid environmental harm to the wetlands mentioned in conditions IX and X. This is not now in dispute. Second, whether the adoption of the Final Trace was procedurally flawed: the Appellants complained that they were denied an opportunity of being heard before such adoption, that the CEA was not informed of the Final Trace, that there was no supplementary EIAR, and that CEA approval was not obtained. Those allegations were not denied, and the Respondents (the RDA, the CEA, the Minister of Land, and the Divisional Secretaries) claimed that the 1999 CEA approval was sufficient to cover the Final Trace as well. Third, whether the Appellants (though unaffected by the Original Trace and the Combined Trace) were adversely affected by the Final Trace.

In regard to the third issue, it was quite clear that in the Akmeemana area the Final Trace was some distance away from both the Original Trace and the Combined Trace, and that the lands of the Appellants in SC 59/2003 and SC 60/2003, which had not been affected by the Original Trace and the Combined Trace, were adversely affected by the Final Trace.

However, there was some doubt in regard to the Appellant in SC 58/2003. The Final Trace was admittedly very near the Original Trace, but did not coincide with it; and it did adversely affect the Appellant's residential property. It seemed uncertain whether that property was in any event affected by the Original Trace, Accordingly, at the conclusion of the oral hearing, we requested all Counsel to make written submissions on the question whether that Appellant's land lies on the Original Trace or adjacent to it.

On behalf of the Appellant it was submitted that:

"... the Original Trace was marked on the ground ... there was no such marking on the [Appellant's] property, ... thus evidencing that the Original Trace was not situated either on the [Appellant's] property or adjacent to it.

On behalf of the RDA it was contended that:

"... the [Appellant's] land ... lies on the Final Trace at a point which is no more than 50 metres from the path of the Original Trace, and not as far away as 600 metres as erroneously contended by the [Appellant] ... The distance between the Final Trace and the Original Trace in the relevant section is between 40 to 50 metres."
[emphasis added]

The necessary inference was that the Original Trace and the Final Trace did not overlap; that there was a distance of 40 to 50 metres between them; and that in any event the Appellant's land was 50 metres away from the Original Trace.

The submissions made on behalf of the CEA, the Minister, and the Divisional Secretary of the area were not helpful:

> *"The Original Trace is a 400 ft wide corridor ... the Final Trace that traverses through the residence of the [Appellant] is located within 120 ft - 150 ft of the centre line of the Original Trace. Thus the [Appellant's land] is located on the Original Trace." [emphasis added]*

There is no dispute that the Appellant's land was situated on the Final Trace. The Appellant and the RDA - which was responsible for the preparation of the Final and Original Traces - agree that the Appellant's land was some distance away from the Original Trace. The inference drawn by the CEA that the Appellant's land is located on the Original Trace is not only contrary to the RDA's position, but is not a necessary or reasonable inference from the facts stated. Even if the Final Trace is located within 120 to 150 feet of the centre line of the Original Trace, it does not follow that the Appellant's land is located on the Original Trace - for it could well be situated on that section of the Final Trace which was outside the Original Trace.

I must note at this point that the Appellant had commenced construction of her residence with the required local authority approval in 1998. That approval was renewed in 1999 and 2000, and the house was completed in February 2001. It was only then, when she applied for her electricity connection, that she learnt that her residence would be affected by the Expressway.

I therefore accept the Appellant's version, confirmed by the RDA itself (and supported by the observations of the "Judicial Committee" to which I will refer shortly) that her land was unaffected by the Original Trace.

Notices under section 2 of the Land Acquisition Act were issued in respect of the lands of some of the Appellants in or about January 2001.

The Final Trace in respect of the Bandaragama area was ready in or about February 2001. The Appellant in SC 58/2003 complained to the Human Rights Commission on 3.4.2001 that her fundamental rights - of equality, under Article 12(1), and of occupation and residence, under Articles 14(l)(g) and (h) – had been infringed. While that matter was still pending, on learning that Land Acquisition proceedings were to commence, she filed her writ application in the Court of Appeal on 2.4.2002.

The Final Trace in respect of the Akmeemana area was completed only in December 2001. The Appellants in SC 59 & 60/2003 filed their writ applications in or about July or August 2002; some of them had previously complained to the Human Rights Commission.

The factual basis on which these appeals have to be decided is that the Appellants' lands were not adversely affected by the Original and/or Combined Traces; that the Final Trace was adopted by the RDA without notice to them, and without giving them an opportunity of being heard; that the CEA was not informed of the Final Trace, and its approval was not obtained; that no supplementary EIAR had been submitted; and that the Final Trace adversely affected all the Appellants.

The Appellant in SC 58/2003 prayed for *Certiorari* to quash the 1999 CEA approval insofar as it purported to approve a route not described in the EIAR, and for *Mandamus,* to direct the CEA to call for a supplementary EIAR from the RDA in accordance with the prescribed procedures. The other Appellants prayed for *Certiorari* to quash the section 2 notices, and pleaded that the alterations

effected by the Final Trace were illegal, although they did not specifically pray for *Mandamus* to direct the CEA to call for a supplementary EIAR.

What transpired in the Court of Appeal when the writ applications first came up for hearing on 8.10.2002 was recorded thus:

> *"All parties agree that the ... Expressway Project is an absolute necessity. With that as an important indicator this Court makes order on the following terms as agreed by all parties.*
>
> *The 'Committee' to be appointed should consist of not less than 3 retired Judges nominated by this Court and the Committee should confer, discuss with the parties and their representatives, and submit a report to Court with regard to matters in dispute ... on the following issues:*
>
> *1) Whether the deviations which form the subject-matter of these cases from Akmeemana including Niyagama, and Bandaragama including Gelanigama, are feasible, on a consideration of the National Environmental Act, its regulations and the economy of the project.*
>
> *2) Whether such deviations are environmentally and socially the most desirable ...*
>
> *The Petitioners in CA Applications 688/2002, 1322/2002, 1330/2002 and 1447/2002 will place all material led before the Human Rights Commission before the aforesaid Committee, and would withdraw the action before the Human Rights Commission at the conclusion of these cases."*

Accordingly, three Judges were nominated, and the parties agreed to meet the expenses of the Committee.

Those three Judges (who were later referred to as the "Judicial Committee") visited the relevant areas and in their report dated 28.10.2002 set out their observations, recommendations and reasons in detail. The following extracts, besides those cited in the Court of Appeal judgment are relevant.

> *" [The incumbent priest of the Kohombadeniya Temple in Bandaragama] complained that ... the Final Trace traversed through the Temple resulting in several of the structures of the Temple and the Bo tree being destroyed ... that the boundary marks of the proposed [Expressway] have been planted within the Temple premises and that they had no intimation from anyone in authority in any form that a road was to be constructed over the Temple property. At that stage officers of the RDA ... indicated that a change has been made and that no structure of the Temple or the Bo tree would be affected and that only a strip of land within the Temple premises will be taken over. It has to be noted that this was the first intimation to one who has been affected by earlier plans finalized without his knowledge, that further changes are being contemplated even at this stage...*
>
> *The residents of Gelanigama [including the Appellant in SC 58/2003] maintained that they have had no opportunity of making representations to the authorities. ... [and] that even the local authority ... seemed to have been unaware of the proposal to construct any such roadway through Gelanigama because [it] had continued to permit the construction of buildings within the said areas even in the year 2000...*

The position of the Respondents is that any steps taken in pursuance of a condition set down in an order of approval made or given by an 'approving authority' ... would not come within the term 'alteration'...

[In regard to the Akmeemana area] the reasons given by the RDA for the shift or alteration are (a) to minimize damage to property, (b) to minimize bad effects on water resources, and (c) to minimize costs...

The complaint of the villagers [in the Akmeemana area] is that while there had been an Environment Impact study done as regards the Original Trace (and accordingly they had notice of the proposal and could have and did make their representations), there was no such notification as regards the Final Trace, thus depriving them of an opportunity of being heard. It was conceded that no feasibility study was done regarding the Final Trace, and that some portion of the deviation does fall outside the corridor studied for the preparation of the EIAR."

In its judgment, the Court of Appeal addressed four issues, which were formulated as follows:

I. Whether the CEA approved the Combined Trace in the EIAR and whether the RDA attempted to deviate From the approved Combined Trace.

II. Whether the approval of the CEA was necessary for the Final Trace as it deviated from the Combined Trace.

III. Whether - where the wider public interest is at stake - the Court has the discretion in deciding whether to grant or refuse the remedy [by way of writ] even if the impugned decision affects certain individuals.

IV. Whether there had been "inordinate delay on the part of 'the Appellants in filing their writ applications.

I. In regard to issue I, the Court of Appeal held that the CEA approval did require the RDA to prepare the Final Trace so as to avoid the wetlands referred to in conditions IX and X, and I entirely agree with that conclusion.

II. Turning to issue II, the Court of Appeal observed:

"It is true that at the time the EIAR was prepared, the Final Trace was not envisaged. However ... the Final Trace was not an alteration that would come under Regulation 17(i)(a) and section 23EE [of the Act]." [emphasis added]

However, the Court went on to add:

"In support of this contention the attention of Court is drawn to the report of the Judicial Committee ... [which] states:

The word 'alteration' cannot and must not be construed to encompass only changes that are made voluntarily by a project proponent. Alterations made in pursuance of a direction made by one in authority too need subsequent examination and affirmation. The need for such approval after the event is more so in the case of changes effected

as required by an official authority. The sanctioning authority needs to be assured that such directions have been strictly complied with as required by the said authority. The alterations effected in this case are in fact changes of a substantial nature and extent. They need to be approved afresh...

On a consideration of the foregoing the view we take is that the deviations, both at Bandaragama and at Akmeemana, can only be considered feasible and desirable if the procedure set. out in the [Act] and Regulation 17 relating to 'alterations' are complied with, and the petitioners and the other residents of the villages, including Gelanigama and Niyagama, affected by the said deviations are afforded an opportunity of making representations in respect of the Final Trace and also the approach roads." [emphasis added]

The Court of Appeal nevertheless concluded that the deviations did not amount to alterations, giving several reasons, the first being:

" ... the question arises as to what is meant by an alteration. It possibly could not mean that every alteration needs a supplementary Environmental Assessment Report. For example Environmental Impact Assessment recognizes certain areas that need further study and one such area refers to sections of the highway that need to be elevated. Such decision could be decided when the project is in operation. Could it be argued that for each such alteration an EIA is required as it is not encompassed in the EIAR? The ... approval ... states that 'the developer shall comply with any additional conditions that may be communicated from time to time by the CEA during the execution of the project'. Is it logical to infer that any condition which differs from the assessments and evaluations in the EIAR requires approval?"

It is sufficient to observe that those two situations are completely distinguishable from the present. The elevation of the highway and additional conditions imposed on the developer will not affect anyone else's land. In the present case, the deviations from the approved Trace certainly did. In any event, from the fact that additional conditions imposed by the CEA itself require no further CEA approval it cannot be inferred that deviations determined unilaterally by the project proponent or developer require no approval.

A second reason given by the Court of Appeal was that condition VII of the CEA approval imposed a duty on "the RDA to inform the CEA of any environmental impacts which were not anticipated at that stage", and observed that in "a project of this magnitude it is bound to encounter diverse situations as it progresses, as it is humanly not possible, despite expertise, to encompass all kinds of environmental impacts that would arise once the project is implemented". This situation, too, is distinguishable. The alteration of the route of the Expressway before the project commenced is entirely different to measures necessitated by unforeseen circumstances arising after commencement - although natural justice may nevertheless require notice and hearing.

The Court of Appeal also dealt with the Appellants' contentions that the Final Trace was not within the corridor studied in the EIAR:

" But the EIAR makes several references to the Bandaragama Divisional Secretariat of which both Weedagama and Gelanigama are included ... The EIAR specifically states that a systematic sampling procedure was not followed in selecting households for interviews. An attempt was made to get a cross section ... Therefore the specific areas in which the [Appellant/s] are resident may not have been covered by the EIAR... Nevertheless, most of the areas in which the [Appellant/s] claim to be

resident were specifically studied during the Environmental Impact Assessment..." [emphasis added]

The Appellants' principal grievance is that they were denied the right to be heard in regard to the Final Trace - which the Judicial Committee confirmed. The fact that some of their neighbours might have been heard, at some previous stage, does not excuse the denial of their right to be heard, and that aspect the Court of Appeal failed to consider.

Finally, the Court of Appeal concluded that:

> *" ... the CEA granted approval ... provided that the conditions stated therein were adhered to. In the present situation the deviation was made according to theconditions provided in the [CEA] approval."*

Later in this judgment I will deal with the questions whether the deviations amounted to "alterations", whether they were covered by the 1999 CEA approval, and whether in any event the Appellants had a right to notice and to be heard.

III. The Court of Appeal referred to *Goa Foundation v Konkan Railway Corporation,* AIR 1992 Bombay 471, where it was held that a public project (a railway line) of great magnitude undertaken for meeting the aspirations of a section of the people cannot be defeated on account of "extremely negligible" damage to a few persons; cited *R v Gateshead Metropolitan Borough Council, ex p Nichol,* (1988) 87 LGR 435, and Clive Lewis on *Judicial Remedies in Public Law* (2nd. ed, 2000, pp 347-349), to the effect that "the interest of the applicant had to be measured against the needs of good administration which include need for speed, finality in decision- making and the public interest"; and held that:

> *"the court should be cautious when exercising the discretionary remedy of writ jurisdiction where a project of public importance had already commenced and resources have been committed towards its implementation and the possibility of quashing a decision leading to unbudgeted expenditure"*

The Court referred to the facts that other residents in the relevant areas had consented to relocation, that proceedings under the Land Acquisition Act had commenced, that tender documents had already been prepared, that additional costs would have to be incurred in re-designing the Final Trace, that consultants would have to be appointed, that the Environmental Impact evaluation process would have to be re-commenced, and that at the end of that process there was a likelihood of further litigation by persons who would be affected by the CEA's final decision.

Another matter, relevant to the exercise of discretion, surfaced in the course of the hearing before this Court, namely the generous terms and conditions as to compensation. According to the Respondents, some of the features of the compensation package were that all affected persons were entitled to the market value of their property (Rs 130,000 to Rs 175,000 per acre having being paid for paddy lands, and Rs 5,000 to 20,000 per perch for residential land), replacement cost of buildings and structures, payment of compensation before possession is taken, a 25% increase if vacant possession is given before the date on which possession is required for the Expressway, and an additional sum of *Rs* 50,000 as a contribution towards rent until alternative premises are found.

The Court of Appeal concluded:

" ...Courts have to balance the right to development: and the right to environmental protection. While development activity is necessary and inevitable for the sustainable development of a nation, unfortunately it impacts and affects the rights of private individuals, but such is the inevitable sad sacrifice that has to be made for the progress of a nation. Unhappily there is no public recognition of such sacrifice which is made for the benefit of the larger public interest which would be better served by such development. The Courts can only minimize and contain as much as possible the effect to such rights...

The judgment delivered by Justice Weeramantry in the case of Hungary v Slovakia ... provides a detailed discussion about the concept of sustainable development and its relevance in the modern commercially advancing society ... Another important aspect referred to by Justice Weeramantry ... is the principle of trusteeship of earth resources, in other words the concept of 'public trust' ... a doctrine which has been carefully followed as invaluable by Indian Judges in several landmark judgments ..." [emphasis added]

The Court dismissed the writ applications, in the exercise of its discretionary powers, holding that:

"[When balancing the competing interests] the conclusion necessarily has to be made in favour of the larger interests of the community who would benefit immensely by the construction of the proposed expressway ... the adoption of the Combined Trace would undoubtedly result in irreversible damage to the eco-system in the Bolgoda Wetland area. Therefore the only option is to adopt the Final Trace which ... will result only in the displacement of affected people in that area ... the obligation to the society as a whole must predominate over the obligation to a group of individuals, who are so unfortunately affected by the construction of the expressway. " [emphasis added]

Although the Court of Appeal referred to "rights" and "obligations", and to the Court's power to "minimize" the effect on such rights, it nevertheless took the view that there was only one option, and did not consider whether any other relief should be granted to the Appellants in respect of the breach of their rights. I will revert to that question later.

IV. The Court of Appeal also referred to the "inordinate delay" on the part of the Appellants in filing their writ applications:

"Petitioner/s in CA Applications 688/02 and 1322/02 stated that they became aware that they would be affected by the Southern Expressway in early 2001. The reason alleged for the delay was that they made applications before the Human Rights Commission. However, it must be noted that the proper remedy would have been the invocation of the writ jurisdiction of this court as it is clear ... that the delay in filing the application would cause considerable prejudice to the Respondent: and third parties who are directly or indirectly affected if the proposed Final Trace was to be changed." [emphasis added]

Although the issue of the alleged infringement of fundamental rights was clearly before the Court - even on 8.10.2002 - the Court of Appeal did not consider that issue, its impact on the writ jurisdiction, and the applicability of Article 126(3), which too I will deal with.

Before dealing with the Court of Appeal judgment, it is necessary to consider the scope of the writ jurisdiction - the basis and the grounds on which executive acts and decisions may be reviewed, as well as the Court's power and discretion in regard to relief - in the light of several Constitutional

provisions. Historically the writ jurisdiction had limitations, arising from its linkage to the English "prerogative" writs in regard to which it has been observed:

> *" ... the development of administrative law remedies in the common law sphere proceeded piecemeal from a variety of historical antecedents and, unto well into the [twentieth] century, without any recognition of the character and needs of administrative justice as a separate legal discipline. In fact, the main traditional remedies are classed as 'extraordinary remedies'..." (Friedmann, Law in a Changing Society, 1959, p 403)*

The jurisdiction conferred by Article 140, however, is not confined to "prerogative" writs, or "extraordinary remedies", but extends - "subject to the provisions of the Constitution" - to "orders in the nature of" writs of *Certiorari,* etc. Taken in the context of our Constitutional principles and provisions, these "orders" constitute one of the principal safeguards against excess and abuse of executive power: mandating the judiciary to defend the Sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive, with no trace of any deference due to the Crown and its agents.

Further, this Court itself has long recognized and applied the "public trust" doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes (see *de Silva v Atukorale,* [1993] 1 SriLR 283, 296-297; *Jayawardene v Wijayatilake,* [2001] 1 SriLR 132, 149, 159; *Bandara v Premachandra,* [1994] 1 SriLR 301, 312); and that doctrine extends to national and natural resources (such as the air-waves, *Fernando v SLBC,* [1996] 1 SriLR 157, 172, and mineral deposits, *Bulankulame v Secretary Ministry of Industrial Development,* [2000] 3 SriLR 243, 256-257).

Besides, executive power is also necessarily subject to the fundamental rights in general, and to Article 12(1) in particular which guarantees equality before the law and the equal protection of the law. For the purposes of the appeals now under consideration, the "protection of the law" would include the right to notice and to be heard. Administrative acts and decisions contrary to the "public trust" doctrine and/or violative of fundamental rights would be in excess or abuse of power, and therefore void or voidable. The link between the writ jurisdiction and fundamental rights is also apparent from Article 126(3) - see *Perera v Edirisinghe,* [1995] 1 SriLR 148, 156 - which contemplates that evidence of an infringement of fundamental rights may properly arise in the course of hearing a writ application, whereupon such application must be referred to this Court which may grant such relief or make such directions as it may deem just and equitable. Thus, although this Court would still be exercising the writ jurisdiction, its powers of review and relief would not be confined to the old "prerogative" writs. These Constitutional principles and provisions have shrunk the area of administrative discretion and immunity, and have correspondingly expanded the nature and scope of the public duties amenable to *Mandamus* and the categories of wrongful acts and decisions subject to *Certiorari* and *Prohibition,* as well as the scope of judicial review and relief.

It is in that background that I now turn to a consideration of the Act and the CEA's power to grant approval, the rights of the Appellants to notice and to be heard in regard to "deviations", and the power and the discretion of this Court in regard to the grant of relief.

Did the deviations at Bandaragama and Akmeemana constitute "alterations" within the meaning of section 23EE of the Act, Regulation 17(i)(a), and condition III? It is unnecessary to decide whether minor changes not adversely affecting anyone, changes necessitated by unforeseen

circumstances after the commencement of a project, etc, amount to "alterations". Here the changes were substantial, as the Judicial Committee too found; they adversely affected the Appellants and their property rights; they were changes in respect of the route of the Expressway, and the route was a principal component of the project; and they were changes proposed before the commencement of the project. The purposes of Environmental Impact Assessment - as explained by the Court of Appeal itself - would not be achieved if, contrary to the ordinary meaning of the word, such changes are treated as not being alterations. Indeed, those purposes would be defeated if the project proponent itself - the potential infringer - was allowed to decide whether such changes were environmentally objectionable or not, without reference to the CEA. I hold that the deviations were "alterations".

Were the Appellants, as persons affected, entitled to notice and to be heard; was notification to and approval by the CEA necessary; and was a supplementary EIAR necessary? There is nothing in the Act or the Regulations which purported to exclude the principles of natural justice, and the Appellants were entitled to notice and to be heard before the RDA adopted the Final Trace; the Appellants' fundamental right to equal treatment and to the equal protection of the law also entitled them to notice and a hearing. Section 23EE and Regulation 17(i)(a) further required the RDA to notify the CEA and obtain CEA approval; and so did condition III. A "supplemental report" in terms of Regulation 17(ii) was necessary.

Did the 1999 CEA approval constitute "approval in advance" of the alterations? The 1999 approval was based on a consideration of two Traces, and the Final Trace was not in contemplation. The preceding Environmental Impact Assessment procedure did not involve the Appellants. Having regard to the purposes of that procedure, as explained by the Court of Appeal, the CEA was obliged to consider the Final Trace in substantially the same way as those two Traces. That was a power and a duty which the CEA held subject to a public trust, to be exercised for the benefit of the public, including affected individuals. The CEA was not empowered to delegate that power and duty to any other body, and least of all to the project proponent itself - for that would make the project proponent the sole and final judge in its own cause. The 1999 CEA approval did not constitute, and cannot be construed as constituting, an absolute, uncontrolled and irrevocable delegation to the RDA to determine the Final Trace. In any event, whether it was the CEA or the RDA which had the power to decide, the Appellants were denied their rights to notice and to be heard. I must add that, in any event, condition IX required the Final Trace to be moved on to the Original Trace, and not just near the Original Trace, and thus the location of the Final Trace was contrary to the CEA approval.

If the deviations did not constitute "alterations" were the Appellants nevertheless entitled to notice and to be heard? Even if the deviations were not alterations, the Appellants were adversely affected thereby and were therefore entitled to a hearing, under the *audi alteram partem* rule as well as Article 12(1).

Did the Court of Appeal err in holding that some of the Appellants were guilty of inordinate delay? That finding was based on the view that a writ application was the "proper" remedy, and that recourse to the Human Rights Commission was not. Not only was a complaint to the Human Rights Commission - particularly, alleging the infringement of Article 12 - lawful and proper, but it was also a proper attempt to exhaust alternative remedies, and the Appellants could hardly be blamed for the Commission's delays.

Did the Court of Appeal err in refusing relief in the exercise of its discretion? Although the Court of Appeal seemed to agree that the rights of the Appellants had been infringed, that their sacrifice had not been duly recognized, and that the Court should minimize as much as possible the effect on their rights, nevertheless it felt obliged to choose between two options only: to grant relief or to dismiss the

applications. The Court did not take note of the impact of the fundamental rights on its writ jurisdiction. While the circumstances were such that the Court could reasonably have concluded that, on balance, the Final Trace should be left undisturbed, one of the major considerations was cost - as well as delay, which also involved cost. If a judicial discretion was exercised in favour of the State, *inter alia,* to save costs, it was only equitable that the Appellants should have been compensated for the injury to their rights. Had the matter been referred to this Court under Article 126(3), the Appellants would have been held entitled to compensation in lieu of further Environmental Impact Assessment procedures. That jurisdiction is an equitable one, and since *equity regards as done that which ought to have been done,* the matter must now be dealt with as if it had been duly referred to this Court. If it is permissible in the exercise of a judicial discretion to require a humble villager to forego his right to a fair procedure before he is compelled to sacrifice a modest plot of land and a little hut because they are of "extremely negligible" value in relation to a multi-billion rupee national project, it is nevertheless not equitable to disregard totally the infringement of his rights: the smaller the value of his property, the greater his right to compensation.

I hold that the deviations proposed by the RDA were alterations requiring CEA approval after compliance with the prescribed procedures and the principles of natural justice; that despite the lack of such approval, the refusal of relief by way of writ, in the exercise of the Court's discretion was justified; but that the Appellants ought to have been compensated for the infringement of their lights under Article 12(1) and the principles of natural justice. To that extent, the appeals are allowed, and the order of the Court of Appeal is varied.

I therefore grant and issue an order in the nature of a writ of *Mandamus* directing the CEA to require the RDA to pay, and directing the RDA to pay, each of the Appellants compensation in a sum of Rs 75,000/-. That will be in addition to the compensation payable by the State under the Land Acquisition Act, and in terms of the CEA approval and the compensation package referred to by the Respondents in their written submissions. To preclude further delays, misunderstandings and allegations of victimization, I further direct that the Appellants shall have the right to accept such compensation and to hand over possession of their lands without prejudice to their rights of appeal in respect of the quantum of compensation.

In respect of costs, I direct the RDA to pay the Appellant(s) in each appeal one set of costs in a sum of Rs 50.000/- (aggregating to Rs 150,000/- for the three appeals) and to reimburse them in respect of all sums paid towards the costs, expenses and fees of the Judicial Committee.

JUDGE OF THE SUPREME COURT

Ismail, J:

I agree

JUDGE OF THE SUPREME COURT

Wigneswaran , J:

I agree

JUDGE OF THE SUPREME COURT

CONFLICTING PRIORITIES AND 'HARD' DECISIONS - EVALUATING THE REASONING OF SRI LANKA'S SUPREME COURT IN THE *MUNDY CASE*

Lavanya Mahendran[*]

Introduction

In examining implied or express rights enshrined in constitutional provisions that no person shall be deprived of life, liberty or property, without due process of law, (containing impliedly therein the principle that private property shall not be taken for public use without just compensation), balancing the competing interests has not been easy for judges.

The property interest is, of course, not an unqualified right; courts have always shown a relatively broad deference to legislative and executive determinations that a particular public use necessitates the taking of private property. This deference does not mean, however, that the right at issue is a paltry right. Indeed, John Locke believed that property, liberty, and life were 'natural' rights, and the role of government was to preserve these pre-existing rights.

Thus, when the constitutionality of governmental takings is at issue, courts must strictly evaluate the balance between the greater public necessity and the individual's right—particularly because the right at issue is of such a personal, fundamental nature. Recently, in *Heather Therese Mundy v. Central Environmental Authority and Others*,[1] the Sri Lankan Supreme Court tilted this balance somewhat on the side of the greater public neccesity, holding that while the government may have violated the due process protections guaranteed to Sri Lankan citizens, these individuals could seek no other recourse than compensation.

Sri Lanka's Constitution does not include the right to property among its constitutionally guaranteed rights. Despite this lacuna, the Court did avail itself of right to equality provisions in the Constitution to press home a jurisprudentially novel application of the rights doctrine in an appeal from the Court of Appeal on a writ application. However, other rights equally infringed by the actions of government bodies were not upheld. Importantly, the substantive relief claimed by the appellants, (viz; the mandating of a second environmental impact assessment) in the wake of the judicial finding that such an assessment was called for though not complied with, was not awarded by court. Thus, although the court appeared cognizant of the injustice done to the applicants in the case, the standard of governmental accountability it proposed was both paltry in its application and inconsistent with the laws.

The Case in Issue

In 1996, Heather Mundy purchased a plot of land at Gelanigama village in Bandaragama in the Western Province in Sri Lanka. On 1 June 1998, Mundy obtained planning permission from the local

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[1] SC Appeal 58/2003, SC Minutes 20th January 2004

authority, the Bandaragama Pradeshiya Sabha, to construct two dwellings on the land - one as a home for herself and her husband and the other for members of her staff - and one month later she began construction. Planning permission was renewed in 1999 and 2000. Since November 2000, Mundy has been in residence on the property, in what is now her only home and in which she hoped to retire with her husband.

In 1996, it was proposed to construct an expressway from Matara to Colombo ('the Southern Expressway') for which purpose, an Environmental Impact Assessment Report was produced as mandated by law.[2]

The carrying out of an EIA is governed by four sets of guidelines published by the CEA. According to these guidelines the assessment should: a) examine the impact of the project on the environment (including sensitive areas and local flora and wildlife); b) examine the local society, economy and the need for resettlement; and c) lay down the considerable extent of public participation required. The EIA must also study alternatives and reasons for not pursuing them, the need to mitigate any adverse impacts and systems for monitoring implementation. One set of guidelines is specifically devoted to public participation highlighting the importance of the procedural aspect of the process.

An EIA was produced recommending one route, but due to concern that the proposed pathway would endanger a region of wetlands, the CEA proposed a slightly modified route. However, the Road Development Authority ('the RDA'), the body responsible for the execution of public road development projects and schemes, independently decided upon a third route (the "Final Trace"), without completing the required EIA.

The homes of Heather Mundy and the other applicants fell directly in the line of the Final Trace. As a result of the failure to conduct an environmental impact assessment, there is no official information on the number of homes that will be affected by the proposed expressway. However, the RDA itself, in a related court case, stated that the final trace would result in the destruction of 1,315 homes, more than double those affected by the combined trace, and a significant increase from the original trace, which was set aside in large part on this basis. The relevant state authorities authorised the use of eminent domain to take these properties.

The Land Acquisition Act No. 9 of 1950 provides for the acquisition of land and servitudes by the state where there is a 'public purpose'. Once the Minister deems a particular plot of land necessary for some public use, he or she may order the land's acquisition on behalf of the State. However, once the Minister publishes the decision to acquire a piece of land, notice must be provided to affected parties so that they have an opportunity to express any objections.

[2] The expressway is a "prescribed project" under the National Environmental Act 1980 as amended by Acts No.56 of 1988 and 53 of 2000 ('the NEA'). This means that it must be approved by the Central Environmental Authority ('CEA'), established under the NEA, and that it must be subject to an Environmental Impact Assessment ('the EIA').

Invoking the Jurisdiction of the Courts

Most homeowners never received adequate notice of the proposed expressway. In fact, many continued to expend resources on their homes in the years leading up to the acquisition. When they did become aware, they immediately began legal proceedings, arguing on grounds of due process.

The Sri Lankan Court of Appeal, however, rejected the homeowner's arguments, holding that the Final Trace did not represent an alteration from the original pathway necessitating a new EIA; the taking was authorized by statute and satisfied the public use requirement of the Sri Lankan Constitution; and found of little merit the complaint that the claimants were denied the right to be heard in regard to the Final Trace. The aggrieved persons appealed therefrom to the Supreme Court.

On the point of the right to natural justice, the Sri Lankan Supreme Court disagreed with the appellate court judgement. Writing for the court, Justice Fernando conceded that a significant alteration to the original trace had occurred, resulting in great economic and personal damage to the claimants. Moreover, the court found that the Final Trace was adopted without notice to the claimants, and without giving them an opportunity to be heard. Justice Fernando went on to emphasize that the –

> *"executive power is also necessarily subject to the fundamental rights in general, and to Article 12 (1) in particular, which guarantees equality before the law and the equal protection of the law...the 'protection of the law' would include the right to notice and to be heard.."*.

The Supreme Court essentially found that a fundamental right, guaranteed all citizens and protected by the constitution, had been ignored. However, the court nevertheless determined that the relative costs and delay that would result from an order requesting another EIA would be unduly burdensome for the State.

Could the Supreme Court have Gone Further in Its Reasoning?

While the Sri Lankan Supreme Court was no doubt correct to consider costs, the problem at issue here is more than the relative difficulties of developing a public expressway, but rather the flippant disregard for legal process, and the impact such disregard performs on the concept of governmental legitimacy. When legitimacy surfaces in rights-talk, it inevitably invites more than economic or political considerations of cost and effect, but necessarily invites both legal and sociological claims of public acceptance. The Constitution and the three branches of government do not derive their legitimacy from their historical roots so much as from the people. State legitimacy in part derives from an active belief accepted on the part of citizenry that governmental claims of authority are exercised with fairness and rationality.

However, this acceptance is tempered by a specific compact: that the State will not abuse its governance capacity by unruly demands for power or consideration of private interests. Due process is integral to this political relationship; it works the implied limitation on the State's police powers in order to ensure democratic boundaries to the government's control.

In the instant case, the refusal to enforce due process requirements was contrary to both the Sri Lankan Constitution and statutory obligations. The Sri Lankan Supreme Court concluded that the adoption of the Final Trace, without a final EIAR, was contrary to the RDA's statutory obligations. Moreover, as referenced above, the court also notes the constitutional guarantee of equal protection of the law. Yet the final holding limits itself to a discussion of compensation alone.

Several concerns plague the judicial result. First, while the court acknowledges that the RDA was acting outside of its statutory boundaries when self-approving the Final Trace, it does little more than that. In fact, the court appears to say that economic pressures may require a humble villager to 'forego his right to fair procedure', but not his right to compensation. Admittedly, the desire to save money is a pressing concern for state agencies, and in the case of very slight changes a new evaluation of a given route would seem burdensome. But where the court concedes that the RDA has not followed statutory direction, does not protection of the law demand re-analysis of the property, and rights, at issue?

Moreover, to the extent that one can discern the court's concern for economic development, it is important to note that efficiency on the part of the State is not the only consideration in takings doctrine. When public policies are uncertain and subject to unpredictable change, individuals are unable to make informed decisions—and investments—on what the government will do in the future. Indeed, the failure to complete a final EIA makes it impossible to assess the sum total environmental, social, and public interest factors at issue in the Final Trace.

Conclusion

The relevant question here is not whether the state has the authority to seize private lands, but whether the failure on the part of the State to provide a fair hearing for those citizens affected resulted in an arbitrary and unlawful violation of a number of rights, including not only the right to natural justice but also the right to adequate information regarding the pending acquisition of their lands and homes.

The court's determination that compensation alone satisfies the injustice done ignores the problem of democratic legitimacy and individual rights by selecting a baseline at which economic necessity overrides due process. The danger is that the State may always circumvent social expectations by ignoring legal procedure, merely by citing unduly high costs.

While no one denies that a pressing public need may occasionally trump particular individual rights, in the property context process ensures that public authorities are circumspect in their exercise of the eminent domain power. Indeed, any interference with an interest as fundamental as one's home should be governed by a principle of legality. If one's right to property is not unlimited, neither is the state's ability to seize it; it is due process that maintains justice, and reason, in this balance.

BRIEFING PAPER ON THE BREACHES BY THE SRI LANKAN STATE OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AS A RESULT OF ACQUISITION OF LAND FOR THE SOUTHERN EXPRESSWAY*

I. INTRODUCTORY INFORMATION - STATE CONCERNED

1. The State Party to the International Covenant on Civil and Political Rights ('the Covenant' or 'ICCPR') and the First Optional Protocol whose actions are in issue in this case is the Democratic Socialist Republic of Sri Lanka.

2. Sri Lanka acceded to the International Covenant on Civil and Political Rights ('ICCPR') on 11 June 1980 (entry into force on 11 September 1980) and the First Optional Protocol to the ICCPR on 3 October 1997 (entry into force on 3 January 1998).

II. ARTICLES OF THE ICCPR ALLEGEDLY VIOLATED

1. The facts in this case (as explained more fully below) arise in relation to the imminent forcible seizure and demolition of land and properties as the result of the illegal rerouting of a major expressway from Matara to Colombo. This action could be argued to involve breaches of Articles 2(3), 14, 17 and 19(2) of the ICCPR together with Article 2, which requires the State Party to take positive measures to 'respect and ensure' the rights recognized in the Covenant.

2. At the heart of this action is the violation of the rights of the affected property owners to a home under Article 17. Currently, their homes are under an immediate threat of seizure and demolition for construction of the expressway through a process that is both contrary to domestic law and arbitrary, in breach of Article 17.

> *EW et al v The Netherlands*[1] *"[F]or a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent;" Cox v Canada*[2] *State Party will be in violation where necessary and foreseeable consequence that rights will be violated.*

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* This Briefing Paper was prepared by a team of domestic and international lawyers with support from INTERIGHTS (International Centre for the Legal Protection of Human Rights) Lancaster House, 33 Islington High Street, London N1 9LH, United Kingdom. It may be specifically noted in this context that while an individual communication has already been filed in the United Nations Human Rights Committee in terms of the Optional Protocol to the ICCPR by affected villagers from Akmeemana, equally affected villagers from another portion of land affected by the proposed Expressway, namely from Weedagama, Bandaragama are in the process of filing similar communications. The instant Briefing Paper relates to the proposed action by this latter group of villagers.

[1] *(Comm. No. 429/1990, para. 6.4)*

[2] *(Comm. No. 539/1993, para. 16.1)*

3. Violations in respect of their rights to due process in respect of their civil rights and obligations, and to an effective remedy in respect of rights infringed, have already taken effect.

III. SUMMARY OF FACTS

1. In 1996, it was proposed to construct an expressway from Matara to Colombo of approximately 128 km in length with the aim of linking the outskirts of Colombo with the South of the country. An Environmental Impact Assessment Report (see below) was produced. As the Government had insufficient funds to construct the Expressway, the required approval process was not started. In 1998 the Asian Development Bank (ADB) and the Japan Bank for International Co-operation offered funds for the project.

2. In 1998 a Feasibility Study was carried out by international consultants in respect of the 1996 proposed route, known as the Original Trace, examining its impact on the local environment, agricultural production and human habitation. As a result, the original trace of the expressway was varied to follow a new route, called the Combined Trace which was 60% of the original trace and 40% from the designers' trace. This was on the basis that the study found that the combined trace would considerably reduce the number of homes to be destroyed (from 938 with the original trace to 622 with the combined trace), in addition to being closer to the main sources of potential traffic.

3. The expressway is a "prescribed project" under the National Environmental Act 1980 as amended by Acts No.56 of 1988 and 53 of 2000 ('the NEA'). This means that it must be approved by the Central Environmental Authority ('CEA'), established under the NEA, and that it must be subject to an Environmental Impact Assessment ('the EIA').

4. The carrying out of an EIA is governed by four sets of guidelines published by the CEA. According to these guidelines the assessment should examine the impact of the project on the environment (including sensitive areas and local flora and wildlife), the local society and economy and the need for resettlement, and lays down the considerable extent of public participation required. The EIA must also study alternatives and reasons for not pursuing them, the need to mitigate any adverse impacts and systems for monitoring implementation. One set of guidelines is specifically devoted to public participation highlighting the importance of the procedural aspect of the process.

5. An EIA was produced strongly recommending the alternative trace, which was found to be the best of all options. Those affected by the alternative trace were invited to comment. On 23 July 1999 the CEA wrote to the Road Development Authority ('the RDA'), the body responsible for the execution of public road development projects and schemes (under s 2 of the Road Development Authority Act No.73 of 1981, amended by Act No.5 of 1988). The CEA informed the RDA of its decision to approve the expressway on the combined trace, subject to a number of conditions, relating to the need for the combined trace to be deviated back on to part of the original trace as there were concerns regarding the recreational area of an identified wetlands area.

6. However, the RDA ignored the CEA's recommendations. Instead it moved the expressway to a completely new route, known as the Final Trace.

The Impact on Individual Rights and on the Environment - Failure to Assess

7. Contrary to its statutory obligations, referred to above, the RDA failed to conduct another EIA before deciding to change the route. The final trace was settled on without any social or environmental impact assessment that would have enabled due regard to be had to the impact on, *inter alia*, the rights of the affected propoerty owners.

8. In addition to ignoring statutory requirements, the failure to investigate and analyze the impact on the environment or social impact fell foul of ADB requirements for granting loans. The final trace was not the one described in the loan documentation or that for which the loan was granted. When this was brought to the attention of the ADB President and its internal audit procedure (Inspection Process) in 2001, the Management of the ADB denied to the Board of the ADB that the location of the final trace was outside the corridor approved for the loan, but since then, the ADB has admitted that the final trace is outside the corridor approved and that the required studies have not been done

9. As a result of the failure to conduct an environmental impact assessment, there is no official information on the number of homes that would be affected. However, the RDA itself, in a related court case, has stated that the final trace would result in the destruction of 1,315 homes, more than double those affected by the combined trace, and significantly more even than the original trace, which was set aside in large part on this basis.

10. The final trace would run directly through the land of local residents resulting in large-scale forcible displacement and disruption of the longstanding social and cultural fabric of the local community. In many cases it would involve the displacement of families who had lived on their land for several generations. For example, 167 homes would be destroyed in the Gelanigama area, most of which have been there for many years. Again, in this area, it would affect a number of sacred religious sites, including the Dharma Chakra Temple lands in Gelanigama and the Yogashramaya Temple in Polgasowita, together with the temples at Weniwelkola, Gelanigama and Kolamediriya

Failure to Consult the Affected Property Owners

11. The property owners were never consulted and never received any information about the proposed expressway. While they made inquiries on numerous occasions from the local authority whether the route would affect their properties, they were not afforded the necessary information.

12. Many of the affected landowners petitioned the Court of Appeal on 2 April 2002 asking for a writ to be issued against the RDA and the CEA compelling them to undertake a comprehensive environmental impact assessment before implementing the final trace.[3]

13. The Court, with the consent of all parties (and paid for by them), appointed a Committee of retired Justices of the Supreme Court[4] to consider written evidence, take testimony and visit the proposed route of the final trace in order to determine whether the latter was feasible under the law and the economy of the project and environmentally and socially the most desirable.

14. The Committee concluded in its report that both the local authority and the Divisional Secretariat had been unaware of the exact location of the changed route of the Expressway until March 2000 and February 2001 respectively, and consequently were not in a position to inform villagers as to whether their lands would be affected or not[5] the Committee went on to find that any proposed deviation should only be implemented if the procedure set out in the NEA - and Regulation 17(i)(a) and (ii) issued under the NEA - was complied with. This required a Supplementary EIA and affording the Applicant and other affected villagers an opportunity to make representations in respect of the final trace and approach roads. The Committee further concluded that given that the alterations proposed were in fact, 'of a substantial character, nature and extent. They need[ed] to be approved afresh.'

15. However, the Court of Appeal in its judgment on 30 May 2003 effectively disregarded the Committee's conclusions and dismissed the Applicant's petition and those of the other petitioners on the grounds that society's interests in seeing the expressway constructed should take priority over individual rights. It did not address the Committee's findings that such an assessment had to be made in accordance with law and pursuant to an EIA.

16. Some of the petitioners appealed thereafter to the Supreme Court on the grounds that the Court of Appeal, by deciding that the interests of society should take precedence, fundamentally misdirected itself in law and/or failed to take into account relevant considerations including whether the final trace was in fact in the public interest (and that it had failed to consider that, in the absence of an EIA in relation to the final trace, its total social, economic and environmental cost could not be assessed), the breach of procedural laws and the corresponding prejudice to affected individuals. They requested that proceedings to acquire their home and land and any related construction work be halted prior to another EIA being conducted.

17. The Supreme Court gave special leave to appeal and heard oral argument and considered written submissions filed by both parties. The Court considered whether (a) the adoption of the final trace was procedurally flawed by denying affected villagers a hearing and (b) the appellants although unaffected by the original and combined trace, were adversely affected by the final one.

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[3] Vide petition filed by Heather Therese Mundy together three other villagers from Gelanigama representing both themselves and other residents (case no. CA WR 1322/2002) and petitions from forty seven people from another affected village Akmeemana (cases no. CA WR 1330/2002 and 1447/2002).

[4] ('the Committee'), comprising Justice Parinda Ranasinghe (Chairman and former Chief Justice of Sri Lanka), Justices M. Jameel and Priyantha Perera

[5] Vide page 4 para. 3 of report.

18. The Court found for the appellants on both points, holding that since the final trace adversely affected her land she was entitled to be properly consulted and informed of the decision to proceed with it and to make representations and that the failure to do so had breached her rights under the Constitution.[6]

19. The Court found that the deviation of the route at Bandaragama constituted "alterations" within the meaning of s. 23EE of the NEA, Regulation 17(i)(a), and CEA condition III. Given that the changes were substantial, adversely affecting the Applicant and her property rights and that they were proposed before the commencement of the project, the affected villagers were entitled to notice and to be heard, as per the principles of natural justice and their fundamental right to equal treatment and to the equal protection of the law. Indeed, the Court held, even if the deviations were not 'alterations' within the meaning of the NEA, the appellants had still been adversely affected and were therefore entitled to a hearing, under the *audi alteram partem* rule as well as Article 12(1) of the Constitution.

20. It also found that the RDA was in breach of its own statutory obligations under s 23EE and Regulation 17(i)(a) to notify the CEA of alterations and obtain its approval. In turn, the latter was obliged to consider the final trace in substantially the same way as the other two traces as part of its own duty to exercise its powers in the public interest, including affected individuals. The CEA was not empowered to delegate that power and duty to any other body, in particular the RDA as the project proponent, since that would make the latter the sole and final judge in its own cause. In these circumstances, the 1999 CEA approval did not constitute, and could not be construed as constituting, an absolute, uncontrolled and irrevocable delegation to the RDA to determine the final trace.

21. However, the Court concluded that the only appropriate remedy for the affected persons, in respect of the violation of their rights to natural justice in not being informed beforehand of the manner in which the final trace was to negatively affect the petitioner's land, was compensation. It determined the amount of such compensation as SLR 75,000/= (USD750) per each appellant. Compensation under the land acquisition laws for acquisition of the land itself was left to be determined by the government authorities.

22. The application to the Supreme Court was on appeal from the judgement of the Court of Appeal and would therefore normally not have involved matters concerning violation of rights (which are impugned in fundamental rights applications made directly to the Supreme Court in terms of Article 126 (2) of the Constitution). However, in the instant case, the Court utilised Article 126(3) which states as follows:

> *Article 126(3) – Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of*

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[6] Vide judgement of the Supreme Court in *Heather Therese Mundy vs the Central Environmental Authority* and others, SC Appeal 58/2003, SC Minutes 20th January 2004, judgement of Justices Fernando, Ismail and Wigneswaran

the provisions of Chapter 111 or Chapter 1V by a party to such application, such Court shall forthwith refer the matter for determination by the Supreme Court.

23. Judicial reasoning articulating the link between the writ jurisdiction and fundamental rights is evident on page 14 of the Supreme Court judgement where it is stated that

> *"Thus, although this Court would still be exercising the writ jurisdiction, its powers of review and relief would not be confined to the old "prerogative" writs. These Constitutional principles and provisions have shrunk the area of administrative discretion and immunity, and have correspondingly expanded the nature and scope of the public duties amenable to Mandamus and the categories of wrongful acts and decisions subject to Certiorari and Prohibition, as well as the scope of judicial review and relief."*

24. However, despite engaging in the constitutional authority of the Court to 'grant such relief or make such directions as it may deem just and equitable', (emphasis added), the Court confined itself to a narrow finding holding only a violation of Article 12(1) of the Constitution ("All persons are equal before the law and are entitled to equal protection of the law') in terms of the right to be heard before the trace of the expressway was altered in a manner that affects their lands, followed by the ordering of compensation commensurate to the violation of that right alone. It did not address the violations of other rights occasioned by the actions of the Respondents.

IV. LEGAL ARGUMENTS IN TERMS OF THE ICCPR AS APPLIED TO THE FACTS

A. Right to Respect for One's Home, Article 17

Article 17

1. "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."

2. "Everyone has the right to the protection of the law against such interference or attacks."

25. The dwellings in issue in the impugned acquisitions constitute their sole dwellings, in many cases for generations. They clearly fall within the definition of 'home' for the purposes of Article 17.

The Margin of Discretion

26. Human rights bodies will tend to afford states a certain margin of discretion in the elaboration and implementation of socio economic policies. However, the margin afforded

must be appropriate to the nature and importance of the right at issue, the nature and degree of interference with such right and the context of the case.[7]

27. In particular, the jurisprudence of the European Court of Human Rights indicates that while more flexibility may be afforded to the state where the rights at issue are property rights, the degree of deference is narrowed where the individual rights are intimate, such as the right to a home.[8]

28. Likewise, the *degree* of interference with the right, or the extent of the 'intrusion into the personal sphere of the applicant', will be a relevant factor in assessing the degree of deference shown to the state's own assessment of what measures are necessary to give effect to its socio economic policies.[9]

29. These factors indicate the need for the Committee to take a rigorous approach to scrutiny of the measures adopted in the present case.

'Arbitrary or Unlawful Interference'

30. The right to a home is not absolute. It can be restricted provided certain criteria are met, which ensure that any interference is governed by the principle of legality. As Article 17 recognizes explicitly, any interference must be lawful and not arbitrary.

'Unlawful' Interference

31. Any interference must be provided for in law. No interference can take place except in cases envisaged by law, and in accordance with the procedure provided for in law.[10]

32. It may be noted in this regard that the Directive Principles of State Policy, as contained in Article 27(14) of Sri Lanka's Constitution, which require the State to protect, preserve and improve the environment for the benefit of the community, as well as the human rights protections under the constitution, represent a domestic law obligation on the Government to engage in careful and meticulous planning when putting into effect development projects, in a manner that balances competing ecological concerns and negatively affects members of the community as little as possible. The failure to meet this obligation and to conduct any meaningful proportionality exercise is addressed below.

33. Moreover, in this case there was a legal procedure laid down under the NEA and accompanying Regulations, which required a) that an EIA to be carried out prior to any decision to construct a major roadway and b) that all those affected to be given adequate consultation, information, notice and ability to make suitable representations prior to the acquisition of their homes. There was therefore law governing the potential interference.

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[7] *Connors v The United Kingdom*, No. 66746/01, Judgment of 27 May 2004, para. 82; and *Rasmussen v Denmark*, No. 8777/79, Judgment of 28 November 1984, para. 40.
[8] *Gillow v UK* ([1986] ECHR 14, para. 55; *López Ostra v Spain* ([1994] ECHR 46, para. 58)
[9] *Connors* (*op. cit.*, para. 82). See also *Hatton v UK* ([2003] ECHR 561, para. 103)
[10] Human Rights Committee General Comment 16, para. 3

34. However, in this case the State Party disregarded this procedure. Before selecting the final trace it did not consult with the affected property owners. It failed to provide them with sufficient information or to allow them to make representations despite the fact that they would be directly affected and lose her land and home. In addition, the State Party refused to conduct an EIA before implementing the final trace, contrary to the clear provision of the NEA and accompanying Regulations. There was, therefore, an unlawful interference with their right to a home.

Arbitrary interference

35. The prohibition on 'arbitrary interference' in Article 17 goes beyond strict lawfulness, in the sense of being provided for in law. As the Committee has noted, any interference must a) be in accordance with the provisions, aims and objectives of the Covenant and b) be reasonable and proportionate in the particular circumstances.

36. It is accepted that the building of roads and expressways often pursues a legitimate aim, being carried out in the public interest. However, the disregard of environmental, social and other relevant public interest factors, and the refusal to carry out an EIA, make it impossible for a thorough public interest assessment to be made in the present case. Despite this, these representations focus on the requirement that measures of interference are not only related to a legitimate aim but also reasonable and proportionate to it in all the circumstances.[11]

37. These submissions are that the ongoing evictions of the affected persons from their homes constitute an unnecessary, unreasonable interference, out of proportion to any legitimate aim pursued. Several factors are relevant to an assessment of whether the measures taken were reasonable and proportionate, which bear particular emphasis in the context of this case.

38. The first relates to process. It is submitted that a fair process - in determining whether measures that may interfere with one right's should proceed - is an integral component in the protection of the right itself, including the right to a home (see also in relation to Article 14 below).[12]

39. The forcible eviction of inhabitants from so-called informal settlements in certain parts of Kenya without prior consultation with the populations concerned and/or without adequate prior notification has been viewed as arbitrarily interfering with the Covenant rights of the victims of such evictions, especially their rights under article 17 of the Covenant.[13]

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[11] Human Rights Committee General Comment 16, para. 4

[12] *Buckley v UK* (1996, ECHR, para. 76 – "[W]hilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8;" *Taskin v Turkey* (2004, ECHR, para. 118)

[13] See Concluding Observations of the HRC in relation to Kenya, CCPR/CO/83/KEN, 29 April, 2005, HUMAN RIGHTS COMMITTEE, Eighty-third session

40. In this respect, the European Court of Human Rights has recognized that a governmental decision-making process that involves complex issues of environmental and economic policy must necessarily involve appropriate investigations and studies to ensure that a fair balance is struck between the conflicting interests.[14]

41. The European Court of Human Rights has also recognized that in seeking to protect their right to a home against potential threats people are entitled to receive relevant and timely information. The State Party is under a positive duty to provide this and failure to do so can violate the individual's right to respect for their home.[15]

42. The requirement of consultation, information and adequate procedural fairness as an inherent aspect of the right reflects the approach of other international bodies such as the UN Economic, Social and Cultural Rights Committee which has stated in relation to forced evictions that it is crucial that appropriate procedural protections are in place prior to any evictions from the home. These include (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all those affected persons prior to eviction and (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. In this respect the ESCR Committee has stated that the right under Article 17 to be protected against "arbitrary or unlawful interference" with one's home complements this protection against forced eviction.[16]

43. In the present case, Sri Lanka's domestic legal framework under the NEA requires that an EIA should be carried out prior to the construction of a 'prescribed project' such as the expressway, and that this should involve an assessment of the impact on the environment and the local community. This assessment is precisely to enable the state to make informed, responsible and fair decisions as to competing interests and the proportionality of the impact of the proposed activity upon individual rights. While it may be that a thorough EIA would reveal that proceeding with construction was a necessary and proportionate measure, the failure to conduct one in the present case is indicative of the lack of any genuine proportionality assessment. It suggests a determination to pursue construction irrespective of adverse impact on human rights. This is further indicated by the failure to fully consult, to provide with information and to give adequate notice and an opportunity to make representations to affected property owners, as acknowledged by the Supreme Court's judgment.

44. The villagers affected by the process of acquisition of lands for the Expressway have been instrumental in highlighting instances of severe corruption in relation to this process. As a result, lenders to the project have agreed that an environmental impact should be conducted for the changed trace and that a comprehensive resettlement audit also needs to be done before the said trace is proceeded with.

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[14] *Hatton* (*op. cit.*, para. 128); *Taskin v Turkey* (*op. cit.*, para. 119)

[15] *Guerra v Italy* (ECHR, para. 60); *Taskin v Turkey* (*op. cit.*, para. 119); *McGinley & Egan v UK* (ECHR, para. 97)

[16] ESCR Committee General Comment 7, paras. 8 and 15

45. A second factor bearing on proportionality relates to available alternatives. As part of the proportionality analysis, consideration must be given to whether there were any alternative, less restrictive measures that could have been applied to achieve the aim pursued, while minimizing the interference with rights.[17]

46. It is submitted that such alternatives existed in the present case, as indicated by the original EIA carried out in relation to the earlier proposed routes of the expressway which concluded that the combined trace offered the best solution in terms of minimizing damage to the environment and people's homes. This is not the case in relation to the final trace, which, if it proceeds, will cause significant environmental damage in a sensitive area as well as forcibly displacing hundreds of people from their homes. Despite this, no EIA will be conducted permitting the state to strike a fair balance between the competing interests at stake and ensuring that the rights of affected persons are accorded sufficient respect.

47. The decision of the Supreme Court not to halt the construction of the final trace, to order that an EIA be carried out or otherwise to adequately consider the question of appropriate remedy (as discussed below), despite making a finding of illegality, indicates a failure of the state to take positive measures to protect the right to a home. The result is that the affected property owners face forcible displacement from her home.[18]

B. Right to Due Process, Article 14(1)

Article 14(1)

> *"... In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."*

1. The failure to ensure that there was a fair process to enable the affected persons to protect their homes and properties amounts to a violation of Article 14.

'Rights and Obligations in a Suit at Law'

2. The concept of a 'suit at law' is based on the nature of the right in question or on the particular forum in which the right is to be adjudicated.[19]

3. The nature of the particular right in question does not need to be expressly protected by the Covenant but is determined according to whether it is capable of judicial supervision and control. Courts exercising control over proceedings whether at first instance or on appeal satisfy the forum test.[20]

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[17] *James v UK* ([1986] ECHR 2, para. 51) – the availability of alternative solutions constitutes a relevant factor for determining whether there is a reasonable relationship of proportionality between the means employed for interfering with the right and the aim sought to be realized.
[18] *Gillow v UK* (*op. cit.*, para. 47)
[19] *YL v Canada* (Comm. 112-1981 para. 9.2)
[20] McGoldrick, *The Human Rights Committee* (Clarendon Press, Oxford, 1994) 415; *YL v Canada* supra

4. The right to property is capable of judicial supervision and control. It has been the subject of adjudication and determination by courts in every national jurisdiction as well as regional bodies. It is well established, and has been recognized by this Committee, that while the right to property is not protected as such under the ICCPR, such rights may be considered where they raise issues under other provisions of the Covenant. Consequently, Article 14 protects the right to a fair hearing and due process in the determination of property rights under domestic law, and corresponding protection from arbitrary interference.[21]

5. The European Court of Human Rights has found that, although the deprivation of an applicant's property may have been provided for under law and be in the public interest, the failure of the State Party to ensure a fair hearing can result in a finding that it acted unlawfully or arbitrarily in violation of the provisions comparable to Art 14.[22]

6. In the present case, the affected persons were denied basic due process rights. They were not consulted or informed of the fact that the re-routing of the expressway may affect their homes. Specific requests for information met with no response from the state, even once information was readily accessible to it. They were not given an opportunity to challenge decisions as required by Article 14. The failure to provide information foreclosed the possibility of timely and effective challenge to protect their homes and properties before domestic courts.

7. When their petitions did proceed to the Supreme Court, it recognized that in seeking to protect their right to property, they had been denied due process. This was due to the failure of the State Party to consult with them, provide them with information, permit them to make representation and to conduct a further EIA. The Court therefore found that their right to equal treatment under the law had been violated, supporting the view that Article 14 was violated by the state in the present case.

8. In respect of the violation of their Article 14 rights, however, the Court only awarded the appellants compensation. It did not provide them with a remedy which would result in the proper consideration and protection of their rights pursuant to due process of law (see Article 2(3) below).

C. Right to Free Expression and to Information, Article 19(2)

Article 19(2)

> *"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*

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[21] *Adam v Czech Republic* (Comm. 586/1994, para. 6.2), *Des Fours v Czech Republic* (Comm. 747/1997, para. 7)

[22] *Hentrich v France* (18 E.H.R.R. 440, para. 56) – lawfulness or arbitrariness of deprivation of property is dependent upon a measure of procedural fairness being introduced into the decision-making process.

1. In the context of people seeking to protect their homes, the European Court of Human Rights has held that "the importance of public access to the conclusions of...studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question."[23]

2. This approach is reflected in Principle 10 of the UN Declaration on Environment and Development 1992 which states that *"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."*

3. This Principle has been subsequently reaffirmed by the Aarhus Convention.[24] This instrument seeks to promote public participation in decision-making concerning issues with an environmental impact. In particular, provision is made for encouraging public participation from the beginning of the procedure for a proposed development, "when all options are open and effective public participation can take place". Due account is to be taken of the outcome of the public participation in reaching the final decision, which must also be made public.

4. In relation to large-scale development projects which threaten both the environment and people's individual homes and property, such as the construction of the expressway, it is submitted that these Principles place the State Party under an obligation to consult with all those affected, provide them with relevant information and give them an opportunity to make representations at a public hearing. This, it is submitted, is in line with increasing acknowledgement of the right of individuals to have active, free and meaningful participation in the development in domestic systems and international instruments.[25]

5. Not only were the affected persons not consulted about the proposed expressway throughout this process, but they were denied any information about it or the fact that its altered route would result in the loss of their homes until after the decision had been taken by the RDA. In these circumstances, it may be submitted that by deliberately withholding - or omitting to provide - relevant information to the affected persons, the State Party violated their right to seek and receive information.

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[23] *Taskin v Turkey* (*op. cit.*, para. 119)

[24] Convention on access to information, public participation in decision-making and access to justice in environmental matters", ECE/CEP/43) adopted on 25 June 1998 by the United Nations Economic Commission for Europe and entered into force on 30 October 2001.

[25] See e.g. Article 2 of the UN Declaration on the Right to Development and *dicta* of Lord Walker (dissenting judgment) in *Belize Alliance of Conservation NGOs v Department of the Environment & Anor* (UKPC 2003, para. 120) - people of Belize were entitled to be properly informed about any proposals for alterations in a dam design before the project was approved and work continued with its construction.

D. Right to an Effective Remedy, Article 2(3)

Article 2(3)

> *"Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."*

1. For a remedy to be effective it must provide appropriate and satisfactory redress for the particular violation. Although compensation may often be sufficient the Committee has recognized that this will not always be the case and in particular circumstances other forms of reparation may be more suitable such as restitution.[26]

2. In particular, in the case of unlawful acquisition of property which leads to the loss of somebody's home, restitution should be the first consideration with compensation only being made available where this is not possible since, if the nature of the breach allows *restitution in integrum*, the State Party should effect it.[27]

3. In this case the rights of the affected persons to a home are under threat and it is submitted that the only effective remedy is one that protects these rights from unlawful interference. The affected persons should not be evicted from her home, pending satisfaction of the procedures required by law and a proper assessment of the necessity and proportionality of the interference with her rights. Specifically, the remedy that they sought before domestic courts was to prevent any attempt by the State Party to unlawfully acquire their homes, demolish it and begin construction work *pending the carrying out of an EIA*. Such an assessment, as recognized in domestic law, is an essential step in determining whether the interference with their homes were both necessary and proportionate and hence lawful.

4. This EIA would highlight both the potential cost to the local environment and to individual rights, including right to life, livelihood, healthy environment, home, information and due process. EIAs are provided for in legislation by many states as well as international and regional development bodies such as the World Bank, Asian Development Bank, Japanese Bank for International Co-operation, UNDP and the European Union, and constitute accepted international practice as a prerequisite to a large-scale project such as that in the case at hand which will have a significant impact on the environment and individual rights. In other contexts states have been found responsible for failing to conduct EIAs in relation

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[26] General Comment 31, para. 16

[27] *Papamichalopoulos and Others v Greece* (1996) 21 E.H.R.R. 439, para. 34) *Hentrich v France* (18 E.H.R.R. 440, para. 71) *Adam v Czech Republic* (Comm. 586/1994, para. 13.2)

to such projects, including in respect of changes which are more than a 'mere modification'.[28]

5. It is therefore clear not merely from Sri Lanka's own domestic law but international practice that an EIA should have been carried out prior to any significant change in the route of the expressway.

6. The Supreme Court recognized that the final trace constituted a significant change to the original and combined traces, and that it would have a major impact on the local environment and communities. However, the Court failed to substantially intervene to prevent the work from beginning or to ensure that the changed trace was justifiable. Despite this, and at odds with domestic law, the Supreme Court ordered only a payment of compensation for the infringement of their rights under Article 12(1) and the principles of natural justice.

7. In so doing, the Court failed to provide the affected persons with effective redress and effectively allowed the final trace to proceed without being subject to any inquiry, irrespective of the potential extent of the resulting damage to both the environment and individual rights. The court also failed to provide any form of interim measures such as injunctive relief in order to prevent the violations from unfolding.

8. Mere economic well-being is not sufficient to outweigh individual rights. An effective remedy would have addressed the failure to conduct a proper and complete study aimed at striking the correct balance and minimising interference with rights, and protected the home and property pending such an assessment.[29]

V. CONCLUSION

In the above context, it may usefully be contended that the actions of the State party in this instant case has led to the breaches of ICCPR rights, particularly Articles 2(3), 14, 17 and 19(2) of the Covenant where:

(i) the affected persons were denied an effective remedy when the Supreme Court refused to protect their homes by ordering that the acquisition process and construction of the final trace be halted pending the carrying out of an EIA in accordance with the State Party's domestic law requirements;

(ii) their right to respect for their homes is under imminent threat of being violated by the construction of the unlawful expressway; the State Party failed to take into

[28] *Commission v Kingdom of Spain* (ECJ C-227/01, paras. 49 and 50); *Commission v Federal Republic of Germany* (ECJ C-431/92, paras. 34, 36 and 39; *Commission v Italian Republic* (ECJ C-87/02, para. 50)
[29] Human Rights Committee General Comment 31, para. 19

consideration their rights in altering the expressway routes and how interference could be minimized;

(iii) the affected persons were denied their right to information about the proposed expressway and how its altered route would affect their homes;

The UN-HRC may be requested specifically that the State Party halt all construction work on the expressway immediately pending the carrying out of an adequate assessment of impact.

It may also be requested to urge the state to carry out a EIA as soon as is practically possible which comprehensively assesses the impact of the proposed final trace on the environment and right to a home and other related rights of the affected individuals, urge further that the State Party ensure that all future development projects comply with its own domestic law and procedures as well as its international obligations and indicate that the State party should make suitable reparation, including the payment of adequate compensation for the interference with their rights.

Forced Evictions: A Gross Violation of Human Rights

Bret Thiele[*]

The international community has repeatedly stated that "the practice of forced evictions constitutes a gross violation of human rights, in particular the right to adequate housing."[1] It has also urged all "Governments to undertake immediate measures, at all levels, aimed at eliminating the practice of forced evictions" and to "confer legal security of tenure to all persons currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced evictions, based upon effective participation, consultation and negotiation with affected persons or groups."[2] Notwithstanding the universal prohibition on forced eviction and this resounding condemnation of the international community, millions of persons around the world fall victim to this human rights violations each year. Such human rights violations illustrate that many governments are not taking their own pronouncements, and indeed their legal obligations, seriously.

The right to adequate housing is enshrined in the International Covenant on Economic, Social and Cultural Rights and similar housing rights protections are found in the International Covenant on Civil and Political Rights as well as other international treaties. Forced evictions are 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. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Human Rights Covenants."[3]

The Government of Sri Lanka, as a party to the International Covenant on Economic, Social and Cultural Rights, is legally obligated to respect, protect and fulfil without discrimination the right to adequate housing for everyone within its jurisdiction. It is obligated to respect the right to adequate housing by, for example, not carrying out forced evictions. It is obligated to protect the right to adequate housing by protected persons for forced evictions by non-State actors such as corporations or landlords. Finally, it is obligated to fulfil the right to adequate housing by, among other mean, provided a "degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."[4]

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[1] 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.

[2] *Ibid*

[3] Committee on Economic, Social and Cultural Rights, General Comment No. 7 on the prohibition on forced evictions.

[4] Committee on Economic, Social and Cultural Rights, General Comment No. 4 on the right to adequate housing.

Under international human rights law, persons threatened or victimized by forced eviction should be given legal redress and remedies by which they can challenge the lawfulness of such evictions as well as to hold their government accountable for human rights violations. International human rights law lays out a three part test that courts or other tribunals should apply. First, evictions "can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law." Second, government "must ensure that all feasible alternatives are explored in consultation with the affected persons." Only if these two parts of the test are satisfied can an eviction generally be considered lawful. However, even in cases where evictions are otherwise deemed lawful, they must be carried out is such a way as to ensure the due process rights of those affected. The third part of the test therefore requires that procedural protections be applied in relation to forced evictions and that these protections include: (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; (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; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.[5]

Finally, there is an exception to the general rule that evictions are deemed to be lawful if they meet the above test, that exception is that "evictions should not result in individuals becoming homeless or vulnerable to the violation of other human rights" and that "where those affected are unable to provide for themselves, the State Party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available."

By abiding by the legal obligations to respect, protect and fulfil the right to adequate housing, including the prohibition of forced eviction, governments will finally put an end to a human rights violation that affects literally millions of persons each year in all parts of the world. Such a result, however, will inevitably require broad, popular knowledge of the right to adequate housing as well as human rights advocates working in solidarity with victims of such violations in enforcing their rights. By doing so, we can all hopefully contribute to bringing such brutal practices to an end.

[5] Committee on Economic, Social and Cultural Rights, General Comment No. 7 on the prohibition on forced evictions.

A Framework for the agitation of a Right to Housing in Sri Lanka

Dr. J. de Almeida Guneratne, P.C.[*]

Lack of an Adequate National Housing Policy – the First Dimension

A Constitutional Right to Housing?

There is no Constitutional Right to Housing in Sri Lanka. Unlike some other Socio-economic rights such as the right to health, there is no statutory right either in regard to housing. However, the Directive Principles of State Policy enshrined in the Constitution recognizes the State's obligation to provide adequate housing, thus striking a common chord with well-established international norms.

Article 27(2) b

Viz. One of the objectives of the State:

> *"the promotion of the welfare of the people by securing and protecting effectively as it may, a social order in which justice (social, economic .....) shall guide all the institutions of the national life."*

Specifically:-

Article 27(2)(c)

> *"the realization by all citizens of an adequate standard of living ... including ... housing ..."*
> (cf: also Article 16 of the 1972 Constitution)

Notwithstanding the stated objectives above the Governments of the day have not formulated a definite positive housing policy. Instead, the approach has been (through legislation) only a non-affirmative one to afford protection to existing tenanted premises (albeit, not to provide housing for the homeless, which is undeniably an acute problem in the urban areas.[1]

The approach on the part of successive governments since independence has been to transfer the state's obligation to landlords through stringent Rent and Ejectment laws and Ceiling on Housing Property laws with the result that there is no broad housing policy in Sri Lanka.

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[1] viz: The Rent Restriction Ordinance of 1948 and the Rent Act of 1972 that replaced it and the Ceiling on Housing Property Law of 1973. The only occasion where a definite programme to address the Housing Problem was in the post 1978 period Re: Prime Minister Premadasa's (later President) the Million Houses Programme (which won him accolades at the U.N.)(1980).

What is reflected is only a negative policy pursued by the government of the day and a policy moreover that has inclined in favour of tenants or landlords depending on whether the government of the day happens to be socialist oriented or capitalist. This has had a further two fold negative impact on the housing problem in that, while conflicting schools of judicial thought or learning have emerged as a result of judges attempting to interpret the Housing legislation, some in a pro landlord sense and others in the pro-tenant sense. In the process, the development of vacant appurtenant land as well as tenanted premises also has been hampered. This is only the first dimension of the housing problem in Sri Lanka.

Apart from the lack of an adequate housing policy the State has also failed to address several other aspects which the concept of "housing rights" encompasses within its ambit. The first of these aspects, which must receive priority, is the problem of Forced Evictions.

Problem of Forced Evictions – the Second Dimension

Forced evictions may arise in several ways. It may arise:

(i) as a result of expropriation of land by the state for public purposes. Here the need arises to identify adequate or suitable relocation sites before eviction and to allocate such adequate or suitable land and homes for the displaced;

(ii) in consequence of Slum Clearance orders;

(iii) as a result of demolition (Court) orders or action (by local authorities) on the ground that a particular dwelling place is unfit for human habitation;

(iv) through the demolition of unauthorized structures;

(v) as a result of Court decrees in landlord - tenant cases particularly where the landlord's reasonable requirement forms the basis for such decrees (thus where no fault visits either party) and *rei-vindicatio* action (paper title) where claims based on prescriptive possession are defeated;

Subsidiary (or Incidental) Issues following from Housing Rights – the Third Dimension

(i) The payment of adequate compensation upon acquisition by the state of land (along with dwelling places) needs to be addressed. The point of time at which compensation ought to be paid must be clearly defined statutorily. At present there is lack of due process. Taking over possession must be stayed until compensation is paid and relocation is completed.[2]

The concept of "market price" also must be re-examined.

(ii) The concept of additional payment upon Slum Clearance, if the local authority is satisfied that a house has been well maintained, must be addressed. The Housing Act of 1985 in the United Kingdom[3] and similar statutes in other legal systems must be examined in this context;

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[2] Vide: *Mundy* v. *RDA and Others*, CA/688/2002, CA minutes of 1st April 2005, SC Appeal 58/2003 SC Minutes 20th January 2004

[3] Vide: the 23rd Schedule

(iii) The principle of injurious affection (Vide: Sections 1 and 10 of the Compulsory Purchase Act (UK) of 1965 which replaced the provisions of the Land Clauses Compensation Act, 1845) upon acquisition (expropriation) of land and specific issues such as rights of way and restrictive covenants (Vide: (1937) Ch. 525) must be examined. In this context, the 1869 decision of the House of Lords in *Hammersmith Ry. Co.* v. *Brand* and the 1981 decision in the Allen Gulf Oil Refinery Co. Case[4] need to be looked at afresh.

The 1973 Land Compensation Act of the United Kingdom also needs to be examined because even in the UK under this Act, "rateable values cannot exceed the prescribed sum" and the claim cannot be made until 12 months after the nuisance (through noise, smoke, lighting down period) have lapsed (described as a settling down period). Nevertheless, this Act provides for "home loss payments" and "disturbance payments"[5]

It is to be noted that, none of the aforementioned aspects have been addressed in Sri Lanka.

In the light of the above concerns, there is an urgent need to address the following;

- Engage in a comprehensive study of Housing legislation and other statutes such as the Debt Conciliation, Ordinance of 1941 (impacting on Housing in Sri Lanka) which study must include a brief historical analysis of the context within which such laws were implemented and the 'mischief' that they sought to remedy;
- Engage in an examination of the case law in order to discern whatever principles that may assist in formulating a socially and politically acceptable housing policy;
- Engage in comparative study of issues pertaining to housing and forced evictions in other Jurisdictions, particularly the UK, India and South Africa;
- Engage in Empirical Research (collection of statistical data) in regard to Urban as well as Rural Housing and pertinent legal problems;

Thereafter, the study on housing (and the land issues in so far as the same impact on housing) issue may be taken forward in practical terms through lobbying via the media and public awareness strategies (with the active participation of other public interest groups) with the objective of securing an unqualified admission by the State in regard to the existence of a positive duty to address the Housing and Displaced persons issues.

This process may be also gradually built up towards litigation at which stage *inter alia* the following options may be considered;

1. Urging the recognition of a constitutional Right to Housing as well as a rights based Housing Policy in Sri Lanka through litigation in terms of Article 126(1) utilising Article 12(1) read with Articles 3, 27(12)(C) and Article 33 of the Constitution in the light of

[4] 1981 AC 1001

[5] **Vide**: *G.L Council* v. *Holmes* (1986 QB 989) and *Joliffe* v. *Exeter Corporation* (1983) Ch. 333 respectively

international norms ratified by the state of Sri Lanka (the proposed argument would be based on the emerging doctrine of incorporation of International law by Judicial recognition[6]

2. Urging judicial responses in this regard through Article 140 of the Constitution read with the now well established doctrine of public trust[7] in the context of the judicial acknowledgement of the constitutional link between "orders in the nature of writs" (Article 140) and fundamental rights jurisdiction (Articles 17/126)[7a]

3. Using original Court (Declaratory) actions under Section 217 (G) of the Civil Procedure Code. (Although this would be a long drawn process it may be useful from the point of view of keeping the issues within the public forum for a longer time)[8]

Formulation of a National Housing Policy for Sri Lanka

In addition to the issues highlighted above, the process whereby the formulation of a National Housing Policy is urged for Sri Lanka may also have to take into account, the following considerations;

(i) An island wide survey of urban areas i.e. unutilised land in excess of 6 Perches.[9]

(ii) Need for legislation to expropriate such lands (with pre-paid compensation on market value[10]

(iii) In the proposed legislation, provision must be made enabling the government valuer to determine what is market value (already criteria exist in this respect in the Land Acquisition Act as judicially interpreted) and commercial value (for which new criteria would have to be provided);

(iv) Consideration of problems arising from tenanted – unauthorized premises is also moot in this context.[11]

(v) Finally, the impact of the Rent (Amendment) Act No. 29 of 1999 and the Ceiling on Housing Property Law (Amendment) Act of 1988 on existing tenancies must be assessed in term of the basic conflict of interests theory in law between competing stakeholders (landlords/property owners and tenants) – on an inter se personal basis

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[6] Vide: *Bulankulame v. Secretary, Ministry of Industial Department* (2000(3) SLR 243) and *Weerawansa v. A.G.* (2000(1) SLR 387)

[7] Bulankulame's Case, *supra* and other decisions Vide: *Heather Mundy v. CEA* SC/58/03, supra n2

[7a] Vide: *Perera* v. *Prof. Edirisinghe* (1995 (1) SLR) etc: could be employed to buttress this optional argument or strategic approach to litigation)

[8] N.B. whatever the judicial forum in issue or the nature of litigation contemplated, concepts such as *locus Standi*, public interest etc. may have to be examined.

[9] See: the relevant provisions of the Rent Act (1972) and the Ceiling on Housing Property Law (1973).

[10] The approach adopted by the Malaysian government in this regard may be usefully considered where the payment of compensation is paid before acquisition of the land)

[11] see the discussion below.

and the constitutional duty imposed on the State in term of Article 27(2)(b)/(c) which, given all the facts and issues articulated above, imposes a duty on the State to formulate a Housing Policy for Sri Lanka.

Problems of Un-authorised Structures in the context of the Right to Housing – Is there any possibility for the Judiciary to play a more positive role in the Context of the Directive Principles of State Policy?

Prior to the enactment of the Rent Act No 7 of 1972, 95% of permanent buildings in the urban areas and 87.5% in Colombo fell under Rent Restriction. According to a Housing Census taken some years back, a total of 273,934 rented housing units had been estimated. Out of this total, 172.855 were in the urban sector, 96.976 were in the rural sector and 4.103 were in the estate sector. It is reasonable to assume that these numbers have increased today at least by another 50%. But the number of unauthorized structures given on rent by landlords are not included in these figures.

Despite the prohibition contained in Section 9 of the Rent Act of 1972, large sums of money are extracted as "key money" of "advances" by landlords when "letting" even these structures to "tenants" who would otherwise be without a roof over their heads. Alive to the acute housing shortage in the country, the local authorities are hardly seen taking action to demolish these structures on the basis of provisions contained in the Housing and Town Improvement Ordinance and the several Local Authorities Ordinances.

In *Badurdeen Vs Rent Board Kadugannawa*[12] it was argued that, in as much as the building which had been lent was an unauthorized structure, there could not have been lawful letting of the same and consequently the Rent Board had no jurisdiction to make a determination as to an "authorized rent" as contemplated by the Rent Act.

The argument was based on the Supreme Court decision in *Malwattege Vs Dharmawardene*[13] which had affirmed the ruling of the Court of Appeal [14] In that case, the Supreme Court had held that there cannot be a valid legal contract of letting in respect of an unauthorized structure. Consequently, the protection afforded to a tenant under the Rent Act would not be available to a tenant of such a structure.

Responding to Counsel's argument, Justice Ranaraja held as follows:

> *The reasoning of Malwattage would only encourage unscrupulous landlords to inveigle unwary tenants into paying big sums of money as rents in advance, and throw them to the wolves on the basis off statutes which have no bearing on contracts of tenancy. Invariably, the persons who would suffer most are the weak and the needy for whose benefit the Rent Act was mainly enacted*"
>
> per Ranaraja J. at page 4 of the judgement

[12] C.A. 614/89 – C.A. Minutes of 7.5.96
[13] 1991 (2) Sri L.R. 141
[14] 1987 (1) Sri L.R. 57.

Judicial reasoning therein is referable to a wider constitutional context as well that is framed by the Directive Principles of State Policy. [15] Although no express reference was made in that case to the Directive Principles, the underlying philosophy in the reasoning of the Court of Appeal reflects an intuitive response to an important provision contained in Article 27 of the Constitution, namely Article 27(2)(C). This provision lays down as one of the objectives of the State "the realization of all citizens of an adequate standard of living.....including adequate....housing..." It is in this background that the decision in *Badurdeen Vs Rent Board Kadugannawa* demands to be assessed.

However, in as much as the decision by the Court of Appeal represented, in effect, a refusal to follow the Supreme Court in *Malwattege's Case*, it offended the established principle of *stare decisis* and for that reason, the Supreme Court granted Special Leave to appeal against the decision of the Court of Appeal [16] and eventually *pro forma* set it aside in appeal [17] Nevertheless, the Court of Appeal decision in *Badurdeen Vs Rent Board, Kadugannawa* focussing as it does on the housing problem in this country warrants consideration, even to the extent of affecting amendments to the Rent Act with the object of regularizing "lettings" in respect of unauthorized structures.

Prior to the passing of the Rent Act in 1972, the Special Committee on Housing in its Interim Report had observed that "Haphazard and ad hoc legislation has been passed from time to time without considering its overall impact on the country's housing problem....."

That observation receives a new impetus on account of the judicial initiatives taken in Badurdeen's Case which no doubt reflects a positive response to the Directive Principles of State Policy contained in the Constitution of Sri Lanka.

Conclusion

The formulation of a National Housing Policy and the inclusion of a Right to Housing in Sri Lanka's constitutional structures is needed in order to give effect to the balance of conflicting interests between landlords and tenants (in the private law realm) on the one hand and, on the other hand, between the State and (i) the homeless (ii) who run the risk of being rendered homeless, on account of pro-capitalist (as opposed to pure socialist) legislative policies of previous governments.

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[15] Article 27(1) states that "The Directive Principles of State Policy herein contained shall guide 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" Article 29 states that "the Provisions of this Chapter do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal" It is clear that the principles enunciated in Article 27 of the Constitution are not justiciable or enforceable in any court or tribunal. Nevertheless, their significance has been judicially noted on many occasions as has been elaborated by this writer elsewhere. See publications in the *Moot Point,* Centre for Policy Alternatives, Colombo

[16] S.C. Spl. LA//284/96 – S.C. Minutes of 13.9.96

[17] S.C. Appeal 125/96 – S.C. Minutes of 18.12.96

This analysis has drawn attention to the process whereby the burden (notwithstanding the constitutional duty reflected in Article 27(2)(b) and (c) of the Constitution), has been demonstrably passed on legislatively to the landlords/property owners, thus bringing the State directly in conflict with a 'disadvantaged'' segment of society (tenants-homeless in a proprietary sense), consequently forcing the issue constitutionally into the public realm.

Given the above, it is imperative that, in the minimum, a Housing Policy needs to be formulated by the government through a Cabinet paper addressing itself to the issues reflecting the competing interests articulated above

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