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# LAND RIGHTS AND JUSTICE IN SRI LANKA

*LEGAL LACUNAE, POLITICAL ABUSE AND THE PEOPLE'S PLIGHT*

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*Editor's Note... ... ...*

This Issue contains excerpts of a collaborative work product of the **Civil & Political Rights Programme** (CPR) of the Law & Society Trust on protection of land rights in the context of acquisition of private land/evictions from state land in Sri Lanka.

Constitutional provisions, legislative history as well as the ambit and reach of legislation such as the Land Acquisition Act and the Land Grants Act are analysed. Relevant judicial initiatives taken thereon are critiqued on the basis of their adequacy or lack thereof. These are matters of serious concern with accelerated development in the post-war years in all parts of the country and particularly critically in the context of overpowering militarization of the North and East.

A particular focus is to ascertain whether Sri Lanka's old laws relating in particular to land acquisition presented a fairer and more equitable legal framework to protect land rights as opposed to the present day legislation. The analysis of existing legal provisions is buttressed by field studies engaged in by the LST/CPR team in the South, Uva, Central, Northern and Eastern Provinces in regard to ongoing state practices of land acquisitions.

There is little doubt that apart from black-letter law, broad, generally accepted equitable principles should govern acquisition and eviction procedures. Examples of such principles include 'fair compensation;, 'no forced displacement' and 'free, informed consent'. Although all these principles may not serve as legal provisions that are enforceable in courts of law, they should play an important role in interpreting legal stipulations and in creating a framework that supports the interests of the affected displaced persons. Additionally, an agreed set of principles will aid the court in interpreting provisions beneficially when the law is either silent or ambiguous.

Yet in practice, implementation of the law and applicable regulatory policy in regard to land rights in the context of post-war development raises several concerns. As examined in this Issue, legal lacunae in this regard as well as new regulations and circulars have resulted in the protection of land rights being significantly minimized. Government policy has remained insensitive to the plight of persons being dispossessed from their lands.

In particular, the National Physical Plan (approved on 03/07/2007 by the national physical planning council chaired by the President as per Section 3 (1) of the Tourist Country Planning (Amendment) Act No 49 of 2000) to be implemented over a period of 20 years (2011-2030) forms an important part of these concerns. The Tourist Development Act No 14 of 1968 read with the Strategic Development Projects Act, No.14 of 2008 as amended by Act No.12 of 2011 are particularly pivotal laws in the implementation of the Plan. Used very frequently in the formerly war affected areas, these laws enable the acquisition of properties of private landowners without prior payment of compensation citing strategic development purposes such as the development of tourism.

At this juncture, it is pertinent to question whether there is any viable solution to the predicament that Sri Lankan citizens are currently facing regarding protection of their rights to land. There are several methods by which land acquisition/evictions can be made more acceptable and sensitive to those citizens who are most affected. Several such policy and legal measures are proposed in this paper. Equitable legal provisions ensuring protection of land rights of property holders as well as provisions guaranteeing payment of fair compensation needs to be effected.

While the Study will be published in its fuller and more comprehensive version later on, it is hoped that its findings will stimulate public debate on what surely must remain a most pressing - and common issue - for the Sri Lankan people, regardless of their ethnicity and place of residence,

***Kishali Pinto-Jayawardena***

# LAND RIGHTS AND JUSTICE IN SRI LANKA

## *LEGAL LACUNAE, POLITICAL ABUSE AND THE PEOPLE'S PLIGHT*

*Jayantha de Almeida Guneratne,* Kishali Pinto-Jayawardena** & Radika Guneratne****

### 1. Introduction[1]

Possessing rights to land is an indicator which demonstrates an individual's socio-economic, political, cultural and ethnical identity, signifying an emotive and highly symbolic value in respect of the construction of that identity. Post-war Sri Lanka has seen major scale development where the influx of local and foreign capital has led to unprecedented development drives, particularly in the former war affected areas. Yet lacunae in the law, lack of progressive judicial thinking, and political motivations behind acquisitions/evictions have led to tensions within communities across the country.

A careful analysis of the Sri Lankan experience in the present context clearly demonstrates a strategy where brute government power is increasingly being used in order to acquire land for development purposes or (as in the North and East) in the context of militarisation. The question of High Security Zones and forced acquisition by the military continues to be a pertinent concern in the North and East, even four years after the ending of war.[2]

The absence of transparency in the functioning of state organs in regard to acquisition/eviction procedures has resulted in the process becoming less participative and clearly arbitrary. In order to establish a democratic system, amendments that empower the persons affected to have a greater say in the acquisition/eviction process and in the resettlement, compensation and rehabilitation process subsequent to the acquisition/eviction are necessary. The lack of transparent procedures can be seen most evidently in the former war affected regions of the North and East. In this light, maximum protection should be given to the voices of vulnerable groups. This includes those tenants without security of tenure, women and children who do not have title documents to land and marginalised ethnic groups as these groups are most likely to be adversely affected by arbitrary acquisitions.

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[1] This collaborative effort forms part of a larger forthcoming Study conducted during the year 2012 with the objective of examining the role and actions of the State in regard to acquisitions of private land as well as evictions from state land in the context of Sri Lanka's post-war development/militarisation drive. The authors are grateful to attorney-at-law/researcher, Civil & Political Rights Programme, LST, Mathuri Tamilmaran for her assistance in that regard. Attorney-at-law and former head, Sarvodaya Legal Services Movement, Shevon Guneratne and his team facilitated field visits to the North and East and compiled case studies thereto. The co-operation extended to this exercise by Provincial Lands Commissioners and land officers is placed on record.

[2] As evidenced by the field visits carried out by the LST/CPR team to the North and East, the reports of which are referred to in brief in this Issue and are carried in full in the later comprehensive publication.

From a comparative perspective, it may be relevant to note that for around a century, colonial land acquisition legislation in India was not accompanied by corresponding legally enforceable resettlement and rehabilitation norms. Today, there is a drafted bill pending before the Indian Parliament that concerns resettlement and rehabilitation. Nepal too has no concrete law concerning rehabilitation. In Sri Lanka, ministry bodies and task forces vested with the pre-eminent duty to provide a equitable framework for resettlement of internally displaced persons, do not perform satisfactorily. Much like India and Nepal, Sri Lanka too requires a separate law governing resettlement and rehabilitation which, in addition to being comprehensive, must also be period-neutral so as to be pertinent even to acquisitions that take place in the future. In order to make this process more accurate, a social impact assessment, in addition to the environmental impact assessment should be made mandatory.

Justice indeed must be done according to law. But as this paper asks, is justice currently being done according to law in the context of acquisition of privately owned land. Granted, the State is entitled to make inroads to that concept in the larger public interest for purposes of development as against a private land owner's right to property. The same question applies in regard to hasty evictions from state lands occupied by individuals whose families have been living in those lands for generations. This trend is now seen in rural communities all over the country as evidenced by the field visits carried out by the LST/CPR team to the Uva, Central and Southern Provinces.

What indeed is contemplated by the concept of sustainable development? Would that concept be satisfied if a landowner is required to vacate his/her land without first being at least monetarily adequately and reasonably compensated? While the more privileged enjoy expressways should the less privileged live in hope that someday, they could be compensated for their lost lands and residing houses? Should the said less privileged, marginalized *per se* be kept to their fate, further surrendering their fate to State action with the real risk that the State would submit that it has no financial resources in the state coffers to compensate them for their lands?

This accentuates the theme pursued in this Study as to how a segment of society would be rendered marginalized in the formerly war affected areas of Sri Lanka as well as in other parts of the country where the Government's development thrust is prioritized at the expense of the individual right to property and land. This may very well lead to such marginalized persons in society revolting against what they see rightly as supreme injustice. Such an eventuality must be prevented at all costs by appropriate legislative and policy reform implemented as a matter of urgency. The following analysis is engaged in with that objective in mind.

## 2. Constitutional Framework Relating to Land, Relevant Statutory Provisions, Legislative History and Case Law

### 2.1. Overview of the Constitutional Regime Relating to Land Rights

The Constitution of Sri Lanka does not recognize the right to own land as an expressed fundamental right. However, an acquisition by the State may be challenged on the ground of arbitrary action postulated by the concept of the Rule of Law, flowing from the right to equality under Article 12 (1) of the Constitution. Although this development forms part of the jurisprudence of the country, in the context of the right to equality in general applied to the acquisitions of land as well, a rival school of judicial thought that bases the right to equality on the "equally circumstanced" doctrine still persists, as would be discussed later. This rival thinking proceeds on the basis that a landowner's fundamental rights application can only succeed on the basis of the fundamental right violation if he / she is able to show particular discrimination as against another equally circumstanced landowner who has been treated differently and with more favour.

Apart from that, an acquisition could be challenged under Article 140 of the Constitution through an application for an order in the nature of a Writ of Certiorari, prohibition and / or Mandamus on the basis of the well known doctrines of *ultra – vires* ( substantive and procedural ) and error of law on the face of the record in Administrative Law, subsumed in the later established doctrines of illegality, irrationality, proportionality and procedural impropriety, acknowledged by the Sri Lanka judiciary. The doctrine of reasonableness established in the English Law was also absorbed into our legal jurisprudence as an extended arm of the doctrine of *ultra – vires*, subsumed in the subsequently developed doctrine of Proportionality.

Finally, by way of remedies open to a landowner whose land is proposed to be acquired by the State, there is remedy by way of a declaratory action that it is not liable to be acquired in terms of Section 217 (G) of the Civil Procedure Code. But, such a course of relief would be hardly expedient on account of the fact that, a landowner is not entitled to institute action to prevent his / her land being acquired through injunctive relief in view of the Interpretation (Amendment) Act, No.18 of 1972 read with the Amendment Law No.28 of 1974. This explains why an aggrieved landowner will not be inclined to pursue that remedy but would rather opt to pursue an application by way of fundamental rights and / or by way of an application for an order in the nature of Writ under Article 140 of the Constitution.

Thus, although the constitutional regime provides certain remedies to an affected landowner, the jurisprudence evolved through years have set even those slim reliefs largely at nought, apart from some notable exceptions. This paper discusses these decisions in full in succeeding segments but developments thereto may be summarized at this point. First, our appellate courts have consistently held that, when the Minister of Lands declares by Gazette under the provisions of the Land Acquisition Act that, any land is required for a public purpose, such executive fiat cannot be questioned in any court. This has been departed from by the higher judiciary only in addressing a procedural aspect wherein the Supreme Court has held that, the public purpose reflected in the gazette in question must be stated. In effect therefore, the Minister's action, by a subsequent Gazette, to state the public purpose, was ruled as not proper.

On the other hand, the Court of Appeal has held that, although, the gazette fails to disclose the public purpose, such may be inferred from correspondence between the affected land owner and the authorities. Thus, if there was no doubt as to the purpose for which the land in question was proposed to be acquired, the procedural flaw would stand circumvented on the fact that no prejudice is deemed to have been caused to the landowner. These decisions will be discussed in full later.

In the background of the aforesaid judicially swinging attitudes in the context of private land proposed to be acquired by the State, judicial advances have been few. In one interesting instance however, the concept of sustainable development has been acknowledged by the Supreme Court in the context of acquisition of massive expanses of land for the construction of the Southern – Expressway, where thousands of villagers were rendered landless. This seminal case would be discussed later in this paper. In that case, the Supreme Court was reluctant to quash the acquisition which was found to be flawed procedurally thus upholding in effect, the State's action to launch an expressway as against an individual's right to property. However, it modified the Court of Appeal ruling in decreeing that, compensation must be paid to the landowner (the petitioner in the case), who had resisted vacation until then and who eventually vacated only upon compensation being paid on the strength of the ruling of the Supreme Court on a subsequent order of the Court of Appeal.

This instance illustrates the case of a landowner, who had the financial resources to challenge State action in acquiring her land and who ultimately was able to obtain monetary compensation from the State before vacating her privately owned land. But what about those people marginalized in society for want of financial resources who have had to vacate their lands along with residential houses and are unable to challenge the acquisition for that reason without any compensation for their expropriated land before vacating?

In the instance of the Southern expressway, some landowners received compensation by the State but without further question as to the reasonableness or adequacy of compensation paid under the provisions of the Land Acquisition Act. Though the Act provides for a mechanism to appeal against acquisition to a Board of Review and thereafter to the Appellate Courts, this relief provided by statute is rendered a dead letter on account of the lack of financial resources of poor litigants to indulge in litigation, at any rate, beyond a point, being persons marginalized in society.

## 2.2. Laws, Legislative History and Case Law relating to Land Ownership, Possession and Ancillary Rights

### (1) Some Preliminary Reflections

There are two principal statutes in pursuance of which a privately owned land could be acquired by the State *viz* the Land Acquisition Act and the Urban Development Authority Act. While it is the Minister of Lands who is empowered to acquire a privately owned land under the Land

Acquisition Act, the President of Sri Lanka could sanction an acquisition under the Urban Development Authority Act. There are other statutes impacting on the said principal statutes, the Provincial Council Act and other several statutes in the context of local government namely, the Municipal Councils Ordinance, the Urban Councils Ordinance, the Pradeshiya Sabha Act. To these may be added several statutes where statutory authorities may require to acquire a privately owned land including line Ministries which may propose to acquire privately owned land for stated purposes of education, (for school development); health (for the purpose of putting up a hospital) etc.

However, the point to make is that, any such proposed acquisition must receive the sanction of the Minister of Lands under the Land Acquisition Act in the generality of cases and in specific contexts, the sanction of the President under the Urban Authority Act. While the Minister's said power has not been held to be immune from judicial review, even the President's power itself has not been regarded as being beyond the reach of judicial scrutiny, notwithstanding Article 35 of the Constitution relating to the concept of Presidential immunity.

While that may represent the strict legal regime, in practice, as the empirical data compiled by the LST/CPR team reveals, there is an extra – legal parallel regime that is in operation. The overall pattern of how privately owned land is being acquired by State authorities reveals that, on the presentation of bogus deeds coupled with brute force, owners of land possessing *prima facie* valid deeds are being told to vacate on the strength of such bogus deeds, and *ad nauseam*.[3] This plight is being particularly faced by Tamil citizens due to the militarization of the North and East in the post-war period. Those who had been compelled to vacate their lands during the war are now faced with frauds that are perpetrated on them. In the Southern regions meanwhile, Sinhalese citizens are facing similar problems due to the state policy of acquiring private properties for development, thereafter selling them to private companies. [4]

We now proceed to a discussion of the legislative history as well as examination of the numerous statutes relating to Land in Sri Lanka.

In brief the relevant statutes would include;

a. The Land Grants (Special Provisions) Act, No 43 of 1979[5]

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[3] Field visit by the LST/CPR team to Kalkudah/Pasikudah, Palugamam and Thiruppalugamam, Batticaloa, (August 2012) and Kalawanchikudi and Mandur, Batticaloa in September 2012. Discussions conducted with Grama Niladharis, development officers, land officers and community leaders.

[4] Field visit by the LST/CPR team to Hambantota and Tangalle during November 2012. Discussions conducted with community leaders.

[5] Confers authority upon the President to grant agricultural or estate land to any citizen of Sri Lanka who is landless. Transfer of state land in terms of this Act is subject to *inter alia*, prior written consent of the Land Commissioner, survey is done of the land and the instrument of disposition is registered with the Government Agent (GA) and the title is subject to any servitudes attaching to the land. There is provision for the land to revert back to the State if

b. The State Lands Ordinance No 8 of 1947 (as amended)[6]

c. The Land Resumption Ordinance No 4 of 1887 (as amended) [7]

d. The Land Acquisition Act No. 9 of 1950 (as amended) [8]

e. The State Lands (Recovery of Possession) Act No 7 of 1979[9]

f. The State Lands Encroachments Ordinance No 12 of 1840[10]

g. The Prescription Ordinance No 22 of 1871 (as amended by Ordinance No 2 of 1889)[11]

h. The Land Development Ordinance No 19 of 1935[12]

In addition to the above, other laws in this regard would include the State Land Marks Ordinance No. 9 of 1909, the Definition of Boundaries Ordinance No. 1 of 1844 (as amended), the State Land (Claims) Ordinance No. 21 of 1931, the Nindagama Lands Act, No. 30 of 1968, the Land Settlement Ordinance No. 20 of 1931 (as amended) and the Land Reform Law No. 1 of 1972 (as amended).

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any of the prescribed conditions are not met. Its provisions regarding intestate succession in the absence of a nominated successor are gender discriminatory as explained below.

[6] Provides for grants, leases and other dispositions of state lands as well as management and control of such lands. The President is empowered to make absolute or provisional grants of land/sell or dispose of state land. The Ordinance allows permits to be issued for occupation of land in addition.

[7] Provides for the State to take back land (after due notification to the owner) that it has alienated which has then been abandoned for a minimum of eight years.

[8] This is the primary law applying to the acquisition of lands. Generally, it stipulates that once the Minister of Lands decides on his own initiative (or upon some other statutory authority such as the Urban Development Authority or a local authority or some other line ministry, for example the Education Ministry requiring land to construct a school building, making a request to the Minister) that a land may be acquired for a public purpose, due notification is given of this decision to the owner by publication in the gazette consequent to which any objections may be raised. Earlier, the ministerial authority in the determination of 'a public purpose' was not judicially looked upon as being circumscribed by any necessity to state what that purpose was. However, as discussed in greater detail in the following segments of this paper, the Minister's 'power' as conceived at that time, has been significantly narrowed down by creative judicial interpretation in recent times on the basis that 'power' which implies discretion necessarily imposes a duty upon the Minister to reveal to the person whose land is sought to be acquired, the purpose for which it is being acquired.

[9] Provides for the recovery of possession of state lands from unauthorized possessors or occupiers.

[10] A generally unutilized law which empowers the District Court to make orders in respect of encroachments upon state lands.

[11] Provides for acquisition of private property through proof of undisturbed and uninterrupted possession for ten years by title adverse to or independent of that of the owner/claimant. Adverse possession would mean the absence of any right accruing to the owner/claimant including obviously the payments of rents. This law has had special impact in the case of post conflict or post disaster situations as discussed below

[12] Provides for the grant of state land vested with the Lands Commissioner to develop the land. Permits must first be obtained for the occupation of the said land subject to strict conditions including a prohibition on disposal of the land and erection of structures only as specified in the permit with additional structures needing the approval of the GA. The permit holder can also mortgage the land only with the prior consent of the Government Agent (GA) and is liable to have his permit cancelled if the conditions are not met. Upon further conditions being met, including residing on the land (for three years if it is farmland and one year if it is for housing) and developing the land in a satisfactory manner, the permit may be converted into a grant. However, even after such a conversion, the grantee cannot subdivide the land and cannot transfer the ownership thus converted.

## 2.3. Early Legislation on Land Acquisitions in Sri Lanka

At this point it may be pertinent to reflect on the early statutes relating to land acquisitions in Sri Lanka, and their features. The first statute in this regard was Ordinance No 16 of 1843, later replaced by Ordinance No 2 of 1863[13]. However, since no case law precedents could be unearthed on the said initial statutes, the following reflections will be made on the Ordinance of 1876[14] with the objective of discovering whether the old laws provided a more equitable framework for protecting land rights as contrasted to present-day legislation.

*Re: The proposed acquisition*

Section 3 of this Ordinance provided that,

> "Whenever it shall appear to the governor that land in any locality is likely to be needed for any public purpose, it shall be lawful for the governor to direct the surveyor general to examine, or cause to be examined, such land and report, or cause a report to be made as to, whether the same is fitted for such purpose. And it shall thereupon be lawful for the Surveyor – General or for any officer of his Department or any surveyor authorised by the Surveyor – General and for the servants and workmen of the Surveyor – General or of any officer or surveyor so authorised as aforesaid –
>
> a) To enter upon and survey and take levels of any land in such locality;
> b) To dig or bore into the sub-soil;
> c) To do all other acts necessary to ascertain whether the land is adopted for such purpose;
> d) To set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon;
> e) To make such levels, boundaries, and line by placing marks and cutting trenches;
> f) And, where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence, or jungle:
>
> Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling house (unless with the consent of the occupier there of without previously giving such occupier or leaving on the premises at least seven days' notice in writing of his intention to do so."

This power of the governor was made subject to delegation by the year 1931, to what was called at the time the Executive Committee of Local Administration.[15] A brief reflection that needs to be made at this point on that aspect of the matter is how, the governor (the Queen's representative at the time, Sri Lanka

[13] See, Karunaratne Herath, Law Relating to State Land (2009,Vijaya Publishers)
[14] No 3 of 1876
[15] See Gazette no 7885 of 2nd October, 1931

being a crown colony) had direct control over land acquisitions. The case law up to the present Act of 1950 does not reveal one single instance of a *mala fide* acquisition during that time.

*Re: Payment of Compensation*

Section 6 of the Ordinance decreed as follows:-

> "The Government Agent shall thereupon cause public notice to be published in the Government Gazette, and to be posted at convenient places on the land to be taken, or as near thereto as practicable, stating that the Government proposes to take possession of the land, and that claims to compensation for all interests in such land may be made to him. Such notice shall be published in the English, Sinhalese, and Tamil languages respectively, and shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent before the Government Agent at a time and place therein mentioned ( such time not being earlier than twenty- one days after the date of publication of the notice), and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests."

This provision shows the requirement to tender compensation before taking over possession of a land that is sought to be acquired.

*Re: Taking over possession in case of urgency*

Section 12(2) qualified Section 6, which read thus;

> "in cases of urgency, whenever the Governor so directs, the Government Agent, though he has made no award or reference to the court as aforesaid, may, on the expiration of twenty-one days from the publication of the notice mentioned in section 6, take possession of any land needed for public purposes. Such land, upon the Government Agent signing a certificate substantially in the form A in the Schedule shall vest absolutely in His Majesty free from all encumbrances." And further qualified by Section 12(3) " Whenever, owing to any slip or other accident happening or being apprehended to any cutting, embankment, or other work connected with any railway constructed or being constructed by or on behalf of the Ceylon Government, it becomes necessary to acquire to immediate possession of any land for the maintenance of traffic or for repairing or preventing the accident, the Government Agent may, immediately after the notice mentioned in Section 6, and with the previous sanction of the Governor, enter upon and take possession of such land, which, upon the Government Agent signing such certificate as aforesaid, shall vest absolutely in His Majesty free from all encumbrances: provided that the Government Agent shall not take possession of any building or part of a building under this subsection without giving the occupier at least forty-eight hours' notice of his intention so to do, or such longer notice as may be reasonably sufficient to enable such occupier to remove his movable property from such

building without unnecessary inconvenience" and further qualified by Section12(4) " In every case under either of the preceding subsections the Government Agent shall, at the time of taking possession, offer to the persons interested compensation for the standing crops and trees (if any) on such land and for any other damage sustained by them caused by such sudden dispossession and not excepted in Section 22; and in case of such offer is not accepted the value of such crops and trees in the amount of such other damage shall be allowed in awarding compensation under the provisions in the Ordinance contained."

The terms of those provisions in requiring at least 21 days' notice in terms of section 12(2), at least 48 days' notice in the proviso to 12(3) and moreover, the requirement to offer compensation at the time of taking over possession in terms of 12(4), show the essential balance which the said Ordinance sought to maintain between the state's interest and an individual landowner's rights.

In contrast, the present Land Acquisition Act of 1950 which stood amended in the year 1964 brought in the requirement of urgent acquisitions and/or possession which reads as follows:-

"provided , however, that the costs ( if any) payable to the Government Agent by the person interested shall be deducted from such amount and percentage; provided also that in cases where the decision of the District Court is liable to appeal, the Government Agent shall not pay the amount of compensation or the percentage, or any part thereof, until the time for appealing against such decision has expired and no appeal shall have been presented against such decision, or until any such appeal shall have been disposed of. "

It needs no comment that, the law as it presently stands fails to strike a reasonable balance between the State's interest and a private landowner's interest, both of which are important considerations that need to be treated with equity.

*Re: Matters to be considered in determining compensation*

Section 21 was phrased in the following terms:

"In determining the amount of compensation to be awarded for land acquired under this Ordinance, the District Judge and assessors shall take into consideration -

(a) firstly, the market value at the time of awarding compensation of such land;
(b) secondly, the damage (if any) sustained by the person interested at the time of awarding compensation, by reason of severing such land from his own land;
(c) thirdly, the damage (if any) sustained by the person interested at the time of awarding compensation, by reason of the acquisition injuriously affecting his other property, whether movable or immovable, in any other manner, or his earnings; and

(d) Fourthly, if any consequence of the acquisition he is compelled to change his residence, the reasonable expenses (if any) incidental to such change."

*Re: Matters to be neglected in determining compensation.*

Section 22 decreed that:-

"But the judge or assessors shall not take into consideration -

(a) firstly, the degree of urgency which has led to the acquisition;
(b) secondly, any disinclination of the person interested to part with the land acquired;
(c) thirdly. any damage sustained by him, which if caused by a private person, would not render such person liable to a suit;
(d) fourthly, any damage which, after the time of awarding compensation, is likely to be caused by or inconsequence of the use to which the land acquired will be put;
(e) fifthly, any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired;
(f) sixthly, any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put; or
(g) seventhly, any outlay or improvements on such land made, commenced, or effected with the intention of enhancing the compensation to be awarded therefore under this Ordinance."

*Re: Payment of compensation, to whom made, percentage on market value to be allowed and interest when payment delayed.*

These aspects were addressed in sections 36 to 38 of the said Ordinance. Since it is proposed to compare these provisions with the present Act, it would be appropriate to refer to them at this point.

Section 36 – "payment of the compensation shall be made by the Government Agent according to the award to the persons named therein or, in the case of an appeal, according to the decision on such appeal, and after such payment has been made according to such award or such decision no further claim against the Government in respect of compensation for the land so taken shall be allowed at the instance of any person whomsoever:

Provided that nothing herein contained shall affect the liability of any person who may receive the whole or any part of any compensation awarded under the Ordinance, to pay the same to the person lawfully entitled thereto"

Section 37 – "when the land taken is subject to any entail, settlement, or *fideicommissum* the compensation payable in respect thereof shall be subject to the same entail, settlement, or

*fideicommissum*, so far as the different nature of the property will admit; and such compensation shall be paid into court to abide its further orders as to the disposal or investment thereof. It shall also be lawful for the District Judge in any case to require the compensation payable in respect of any land to be paid into court to abide its further orders, if the court shall think such course just or expedient"

Section 38 – "in addition to the amount of compensation finally awarded, the Government Agent may, in consideration of the compulsory nature of the acquisition, pay ten per centum on the market value mentioned in S. 21. When the amount of such compensation is not paid either to the persons interested or into court on taking possession, the Government Agent shall pay the amount awarded and the said percentage with interest on such amount and percentage at the rate of six per centum per annum from the time of so taking possession:

Provided, however, that the costs (if any) payable to the Government Agent by the person interested shall be deducted from such amount and percentage; Provided also that in cases where the decisions of the District Court is liable to appeal, the Government Agent shall not pay the amount of compensation or the percentage, or any part thereof, until the time for appealing against such decisions has expired and no appeal shall have been presented against such decision, or until any such appeal shall have been disposed of"

Apart from the many salutary features in the said sections, Section 38 needs special mention where:-

a) in consideration of the compulsory nature of the acquisition 10% on the market value (though prima facie was payable at the discretion of the Government Agent) on account of the use of the word "may" referred to in the earlier part of that section, the section provided a classic illustration of how "may" shall mean "shall" in view of the latter part of the section which decreed that (b) when the amount of such compensation is not paid..... on taking possession, the Government Agent shall pay the amount awarded and the said percentage with interest on such amount and percentage at the rate of six per centum from the time of so taking possession:

This provision showed how the Crown was sensitive to the subjects' land rights where land was to be acquired urgently. The amending Act of 1964 to the Act of 1950 which replaced the 1876 Ordinance, (though amended several times thereafter), was brought into operation after the island nation gained independence in the year 1948. The British Crown remained sovereign but only in form. No similar provision as contained in the 1876 Ordinance found expression in the 1950 Act as amended in 1964. Even after the 1st Republican Constitution which in Article 3 vested sovereignty in the people, (though paying lip service only to the said concept), and after the 2nd Republican Constitution which in Article 3 vested sovereignty in the people converting the said concept to a justiciable one, the 1950 Act as amended in 1964, failed to redress that lacunae.

This aspect needs to be addressed in the context of the present Constitution which vests sovereignty in the people. Property (land) rights of a citizen ought not to be sacrificed in the name of sustainable development. A balance must necessarily be struck in a sensitive manner to such rights. If this was done at a time when sovereignty resided in a foreign monarch, *a fortiorari*, it must be done where sovereignty is declared to be vested in the people. This would then be an instance where the concept of sovereign power of the people could be given material and meaningful content. For the said reasons, the provisions contained in Section 38 of the 1876 Ordinance should be restored in cases where possession is taken over on the grounds of urgency with appropriate modifications to the percentage and interest rates referred to therein. An amendment to Section 46 of the present Act is required for this purpose which is more fully dealt with in the concluding part of this Study.

*Re: Matters to be neglected in determining compensation.*

This aspect was referred to earlier. Section 22(e) of the 1876 Ordinance decreed that:- "the judge shall not take into consideration any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired" The same provision is contained in section 48(e) of the present Act.

*Relevance of motives in acquiring land.*

It was noted earlier that, there was not a single case where improper motives had been alleged in respect of land acquisitions under the Ordinance of 1876. There is judicial precedent under the present Act of 1950 to the effect that, even if in contrast, proposed acquisition is prompted by political cum personal motives, this would stand removed from the pale of judicial review.[16] That judicial attitude perhaps stood consonant with the fact that, the courts had been taking the view that, "public purpose" is not reviewable. That view has been persisted with by the Court even in some recent instances. Yet the competing judicial stand (as would be discussed later) is to be preferred, given the logical reasoning contained therein and followed thereafter[17].

Undoubtedly there may be situations where a local authority, a public corporation or a statutory authority may be prompted by a financial motive in requiring land to be acquired on the basis of a *prima facie* "public purpose". A classic illustration of such a situation arose in the English case of *Municipal Council of Sydney v. Campbell*[18] . In that case, the council had power to compulsorily purchase land required for "carrying out improvements in or remodelling any portion of a city". The English courts held that, it was an abuse of that power to acquire land to obtain for itself an expected increase in the value of that land as the result of development of adjoining land. Therefore, in the interest of good governance, the Sri Lankan legislature must respond to the said dictate by introducing an amendment to Section 48(e) of the present Act, by way of a proviso in the following terms (*viz*:).

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[16] *Mallika Ratwatte v. Minister of Lands* (76 NLR 128 )

[17] See:later.

[18] 1925 (AC) 338

"provided that, in determining under Section 46 the compensation to be paid for the acquisition the fact that, the land was so acquired in addition for the stated public purpose, to obtain for the authority an expected increase in the value of the land as a result of development of any adjoining land or some other collateral motive, shall be a matter that shall be taken into consideration in determining such compensation".

It will be noted that, the suggestion is not to annul the acquisition as the English courts did but, on equitable considerations to compensate the landowner, but for the acquisition, would have fetched an enhanced market price if he/she desired to sell it to a willing buyer.

## 2.4. Acquisition of Private Lands - A Major Issue for Consideration under the Land Acquisition Act of 1950 (as amended)

It has come to be accepted that, a government's eminent domain power is its right to take or acquire private property for "a public purpose' on payment of just compensation. Thus, the requirement of any private property being required for a public purpose and the payment of "just compensation" operate as conditions precedent to the actual "taking' of a private land by the government (or State). The Land Acquisition Act of Sri Lanka confers power on the Minister to set in motion the exercise of acquiring private land for "a public purpose' by merely declaring that by gazette notification he is empowered to state that, a private land is required for a 'public purpose". The Act does not require the Minister to state the public purpose for which such private land is required. In a series of decisions of the Appellate Courts of Sri Lanka discussed below, it had been consistently held that, the Minister is not obliged to state 'the public purpose.'

This judicial trend as impacting on a private landowner's rights has been further compounded by the Courts of Sri Lanka holding that, at the stage of the Minister so declaring that, a private land is required for a public purpose, the said declaration is not challengeable, apparently on the reasoning that, the affected landowner's interests are not affected at that stage, inasmuch as the land still remains privately owned land. That judicial attitude completely fails to address the economic impact of such a ministerial declaration (that, the land is required for a public purpose) on the owner and the extent to which such a declaration interferes with investments on the security of his property based on his legitimate expectations regarding the future use of his property. In that background, coupled with the constitutional law in not containing any provision relating to due process in the context of acquisition of privately owned property, even if a proposed acquisition is prompted by political cum personal motives, this would stand removed from the realm of judicial review.[19]

*Whether the notice under Section 2 and Section 4 read with Section 5 and/or 7 by the Minister that, a land is required for a 'Public Purpose' is reviewable by Court*

[19] *Mallika Ratwatte* v. *M/Lands* (72 NLR 60).

It may be apt to refer to the first reported decision in that context namely, the then Supreme Court decision in 1963 in the case of *Gunasekara v. Minister of Lands and Agriculture*[20] which held that, the requisite notices under the Act are not reviewable. This was followed by the succeeding Supreme Court after the 1972 (1st) Republican Constitution (which in effect became the apex Court of the country in place of the Privy Council) in *Gamage v. Minister of Lands and Agriculture*[21] and thereafter coming to more recent times in *Kingsley Fernando v. Dayaratne*[22] by the present Court of Appeal.

This judicial trend continued until the present Supreme Court decision in *Manel Fernando v. Jayaratne*[23] departed therefrom by requiring the minister to state the "public purpose" in the said notices. Here, the Supreme Court sought to respond to due process where a private owner's land was sought to be acquired by the State, wherein it was held (per Justice Mark Fernando) that, where a Minister declares that, a land is required for a public purpose he must disclose **what that purpose is**[24](emphasis ours). That decision posed certain vital questions; why should not someone whose land is sought to be taken be told the purpose for which it is being taken? If he is not told how would he be in a position to demonstrate that the purpose for which it is to be taken is not viable?

The said decision brought in a welcome element of ministerial accountability into the process of land acquisitions. However, this judicial thinking is by no means uniform as evidenced by a later Court of Appeal decision which sought to distinguish *Manel Fernando's Case* on the basis that even if the public purpose is not disclosed in the Minister's declaration, if circumstances (gathered from the correspondence between the landowner and officials) showed that the aggrieved party in fact knew what that purpose was, he could not be said to have been prejudiced.[25]

This reasoning sought to return to the old position that a Minister's intention *ipse dixit* as appearing in his statutory declaration as mandated by the Land Acquisition Act, that, a land is required for a public purpose (without having to disclose the particular purpose) would be conclusive. However, the effect of the Court Appeal decision would be that, if a landowner is aware of the purpose for which the land, (as revealed from correspondence and representations), is ostensibly intended to be taken, the Minister's mere declaration that the land is required for a public purpose, (without disclosing the purpose), would be sufficient although the public purpose which the landowner thought it was to be taken for, could be changed by the Minister at any time subsequently. It is this kind of eventuality that was judicially circumvented in the Supreme Court decision in *Manel Fernando's Case* which strikes a responsive chord with due process when a person's land rights are sought to be taken away.

More recently, we have had the Court of Appeal opting to follow the aforesaid thinking of the Supreme Court, in comparison with the earlier decision of the appeal court already discussed which sought to

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[20] (1963) 65 NLR 119
[21] 76 NLR 25
[22] 1991 (2) SLR 129 (per S N Silva, J)
[23] 2000(1) SLR 112 ( per Mark Fernando, J)
[24] *Manel Fernando* v. *Jayaratne* 2000(1) SLR 112(SC).
[25] *Seneviratne* v. *Urban Council, Kegalle* 2001(3) SLR 105 (CA)

distinguish the decision in *Manel Fernando.* [26] The two decisions of the Court of Appeal evidence a difference of opinion within the Court in this regard. In the interests of maintaining accountability in ministerial decision- making where property rights are concerned, it is hoped that an approach which keeps to the spirit as well as the letter of the decision of the Supreme Court in *Manel Fernando's Case* will be preferred.

Mention must also be made of a Court of Appeal decision which invoked the principle of due process in the context of an occupier of land which had been acquired thirty years ago under the Land Acquisition Act. No steps had been taken under the Land Acquisition Act to take over possession of the portion of the said land of which the aggrieved party had continued to be in possession. After a lapse of thirty years the State sought to eject him by invoking the provisions of the State Lands (Recovery of Possession) Act of 1979 on the basis that he was in unauthorised possession of State land.

In that context, Justice U. de Z. Gunawardena in *Edwin v. Tillekeratne*[27]after recalling those "historic words which the Courts adopted as a general rule of conduct, "That no man of what estate or condition that he be, shall be put out of land or tenement ..... without being brought in answer by due process of law" held that, "to seek to eject the petitioner under State Lands (Recovery of Possession) Act, when in fact, he ought to be ejected, if at all, ..... under the Land Acquisition Act" was violative of due process. It may be pertinent to note that, (in contrast to the several cases in issue in terms of the present law), the conclusiveness or otherwise of the governor's declaration under the Ordinance of 1876, that a land is required for a public purpose, had not been the subject of litigation as reflected in the decision of the Appellate Courts.

*The question of possession of land being required urgently under Section 38 (a) proviso of the present Act*

Again, in *Gamage v. Minister of Lands et al*[28] the Supreme Court under the 1972 (1st) Republican Constitution held in unequivocal terms that, an order by the Minister under the said provision cannot be questioned in a court of law as being a matter of policy[29]. The first departure from that judicial stance was seen in the present Supreme Court's decision in *Fernandopulle v. Minister of Lands et al*[30] wherein it was held that, such an order can be reviewed by the courts but subject to the qualification that, the burden to prove that there was in fact no urgency would be on the petitioner seeking relief.

There is another aspect that needs to be mentioned in the context of land acquisitions. That is, the law of Sri Lanka does not set a time frame within which compensation for expropriated land has to be paid to a land-owner who has been deprived of his land. This is a matter that continues to be ignored by the legislature notwithstanding recommendations made by the Law Commission of Sri Lanka to address the issue. Sometimes landowners have had to wait several years without payment of compensation. In this

[26] See Sripavan J. in 2004 (2) Appellate Law Recorder (ALR).
[27] 2001(3) SLR 34
[28] 76 NLR 25
[29] *Id.*, p.26
[30] (1978-79), 79(2) NLR 116 (per Samarakoon C.J)

regard mention may be made of the Malaysian law and practice which decrees that, compensation must be paid before a land which has been expropriated is utilised for the public purpose for which it was so expropriated. Such a provision would certainly accord with due process.

*Acquisition of Lands for the Southern Expressway - Heather Therese Mundy v. Central Environmental Authority and Others*[31]

Property owners whose lands in Akmeemana and Bandaragama were sought to be acquired by the government for the purposes of constructing the Southern Expressway appealed to the Supreme Court from a dismissal of their writ petition by the Court of Appeal. They preferred an appeal on the basis that the Court of Appeal misdirected itself and/or erred in law in not finding that the decision of the Road Development Authority to change the final route of the Expressway without noticing the affected property owners was contrary to the National Environmental Act (NEA) No.47 of 1980, as amended by Acts No.56 of 1988 and 53 of 2000 and its regulations.

The Expressway had first been scheduled to run on the Original Trace, which had been environmentally studied, and then changed to a Combined Trace which was also environmentally studied and assessed, as mandated by law. Its further deviation to the Final Trace, which had not undergone a thorough mandated impact assessment either in terms of its environmental consequences or human resettlement issues, was sought to be challenged by the appellants.

The State contended that the deviation from the Combined Trace to the Final Trace, was occasioned by the directions of the CEA, which had indicated that the Combined Trace should be moved on to the Original Trace at one point in order to avoid the recreation area of the Weras Ganga/Bolgoda Lake wetland. However, in counter opposition, the appellants argued that this deviation by the Road Development Authority (RDA) went far beyond the deviation directed to be done by the CEA and, as a consequence, affected property owners who had not been even remotely aware that the Expressway might affect their properties. The Supreme Court gave judgement in favour of the appellants but restricted itself to an award of compensation for the violation of the right not to have been given adequate notice that their lands were going to be acquired as a result of the changed trace.

The judgment of the Court is notable in two primary respects. Firstly, it is distinguished for its strong articulation of 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. Accordingly, executive power is also necessarily subject to fundamental rights review 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

[31] *Heather Mundy v. Central Environmental Authority and Others* SC Appeal 58/03, SC Minutes of 20.01.2004. SC Appeal 58/2003, judgment of Justice Mark Fernando with Justices Ismail and Wigneswaran agreeing, at page 13.

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.

Secondly, the judgment is important for the reason that the application to the Supreme Court was on appeal from the judgment 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) of the Constitution in order to determine the violation of the rights of the petitioners under Article 12(1) of the Constitution 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. Article 12(1) provides for the equality of all persons before the law and the entitlement to equal protection of the law.

Specifically, the Court ruled that:

a) The deviation of the route at Akmeemana and Bandaragama constituted "alterations" within the meaning of section 23EE of the NEA, Regulation 17(i)(a), and CEA condition III. The changes were substantial, as a committee of judges appointed by the Court of Appeal to conduct an empirical study of the affected areas also 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;

b) The affected villagers, as persons affected, 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, which entitled them to notice and a hearing. Even if the deviations were not alterations, they were adversely affected thereby and were therefore entitled to a hearing, under the *audi alteram partem* rule as well as Article 12(1);

c) Section 23EE of the NEA and Regulation 17(i)(a) further required the RDA to notify the CEA of alterations and obtain CEA approval; and so did CEA condition III. A "supplemental report" in terms of Regulation 17(ii) was necessary;

d) Having regard to the purposes and procedure, 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;

e) In any event, CEA 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.

Evaluating the approach of the Court of Appeal, the Supreme Court held that although the Court of Appeal seemed to agree in regard to certain considerations (i.e. that the rights of the affected villagers had been infringed in respect of the proposed acquisition of their lands, 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 had felt obliged to choose between two options only: to grant relief or to dismiss the applications. This approach did not, however, take note of the impact of the fundamental rights on its writ jurisdiction. Thus:

a) While the circumstances were such that the Court of Appeal 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. Accordingly, if a judicial discretion was exercised in favour of the State, *inter alia*, to save costs, it was only equitable that the affected villagers should have been compensated for the injury to their rights;

b) Had the matter been referred to the Supreme Court under Article 126(3), the villagers would have been held entitled to compensation in lieu of further Environmental Impact Assessment procedures. It is only right therefore that compensation for the violation of rights is ordered.

Though as stated earlier, the *Mundy Case* has since then come to be noted for its cogent articulation of the applicable principles both in relation to the public trust doctrine as well as in regard to the interlinking of the fundamental rights jurisdiction of the Supreme Court with the writ jurisdiction of the Court of Appeal. the judges did not go so far as to order a supplementary environmental assessment in respect of the final trace, which was, in actual fact, the substantive basis of the villagers' case.

In addition, despite engaging in its constitutional authority to 'grant such relief or make such directions as it may deem just and equitable' (emphasis ours), the Court appears to have confined itself to a narrow finding of the violation of the right to natural justice. Consequently, it did not address the violations of other rights occasioned by the actions of the respondent, particularly the blatant denial of information regarding the acquisition of their lands.

While on the one hand, affording the petitioners a measure of monetary relief for the violation of their rights, the judgment also affirms the fragile nature of the protection afforded to landowners where major

development projects are in issue. Unless the particular landowner has financial means and possesses the requisite initiative to question lacunae in 'due process' requirements of the acquisition process (as indeed, Heather Mundy was able to do not only in the case discussed above but also in a later petition in the Court of Appeal which successfully challenged attempts by the government thereafter to acquire her property without paying her adequate compensation), his/her grievances, substantial though they may be, are swept under the carpet.

The impact of the Mundy decision on government officials in so far as compelling them to observe norms of fairness and equity in land acquisitions, has been negligible. This has dangerous ramifications that go beyond the specific cases for the reason that the Southern Expressway is only the first of the mega expressways contemplated in Sri Lanka; others are to follow, including the Kandy-Colombo Expressway and the Colombo-Katunayake Expressway. A continuing failure to meet the requirements of due process in land acquisitions in respect of all these highways would present a nightmare scenario of forced evictions in their thousands.

### 2.5. The Requisitioning of Land Act[32]

Apart from the Land Acquisition Act where privately owned land may be acquired for a "public purpose" as discussed above, some reflections may be appropriate on this Act which authorize the taking of possession and the use of privately owned land for certain essential purposes such as;

a) The maintenance of supplies or service essential to the life of the community;
b) The storage or distribution of essential commodities;
c) The use or occupation by the armed forces or any visiting force[33]

This Act must be read with Section 5 of the Public Security Ordinance[34] (as amended) which confers power on the president to proclaim emergency regulations. Following the July, 1983 riots, there have been several occasions where although the provision of the Requisitioning of Land Act ought to have been put into motion, requisitioning of land was continuously done under emergency regulations.[35]

One does not see the provisions of the Act being resorted to in regard to privately owned land in the post conflict times even though such state land are being used and occupied by the armed forces as envisaged in Section 2(c) of the Requisitioning of Land Act of 1950. Instead, the applicability of this Act is limited

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[32] No. 33 0f 1950 (as amended)
[33] Section 2(1)
[34] Vol III, (Chap. 51), (LESL 1980 Revised)
[35] Section 19 of the Emergency (Rehabilitation of affected property, business or industries) Regulations (REPIA Regulations) provides one such instance.

to state lands where permits and grants had been issued under the Land Development Ordinance[36], State Land Ordinance[37] and the Land Grants (Special Provisions) Act[38] by and large.

Some of these lands, though state lands, had been occupied by people in some parts in the North and the East and had been subsequently abandoned owing to the war. As illustrated in the field visits carried out for the purposes of this Study, these internally displaced persons now desire to be resettled and resume their use and occupation of their lands but have been left with no relief. Should the provisions of the Requisitioning of Land Act had been resorted to, at least they would have been entitled to some monetary compensation as contemplated by the said Act.[39] As this Study reveals, the following perspectives arising out of the field studies engaged in by the CPR team which would be elaborated in detail later, highlights the immensity of their plight.[40]

**(A) In the Trincomalee District**

(a) the deeds (grants or permits ) families had possessed prior to the abandonment of their occupied lands had been lost owing to the *Tsunami of 2004*, and new persons were now found to be in occupation when they had attempted to regain their occupation.

(b) supposedly, under the Land Acquisition Act, government departments had taken over the use and occupation of the Lands in question for "development work." [41].

( c ) 'X' who had been occupying the land in question under a presidential grant under the Land Development Ordinance, on seeking to return finds that 'Y' has also been given a grant who has been developing the land thereafter.

**(B) In 'Vaharai'**

Before the war situation arose, a particular enclave in 'Vaharai' had been occupied by persons of Tamil ethnicity. It was revealed that, even as they had been prevailing on the government to allow them to return to their abandoned lands, as recent as January – February, 2013, as many as 600 persons of Muslim ethnicity along with seven Tamils had been re – settled in fifteen houses. On being questioned by the resource persons when these facts were brought out, one participant observed that "this is the work of politicians" the lands involved, it was revealed were pre – dominantly 'pasture land'[42].

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[36] Vol XI (Chap. 300), (LESL, 1980 Revised)
[37] Vol XI (Chap. 286), (LESL, 1980 Revised)
[38] No 43 of 1979
[39] *Vide*: Sections 5 to 7 of the said Act
[40] *Vide*: Field visits made by the LST/CPR team to parts of the Eastern Province during 2012 as elaborated in the fuller version of this Study.
[41] *Id.*
[42] *Id.*

**(C) In 'Amparai'**

A similar situation was reported to be taking place. "Some of these issues are now pending in Court", said a participant[43].

**(D) In 'Muthur'**

The lands in question were paddy land – neglected by the cultivators and abandoned. 1500 families seeking to return after the war had found-

i) in the case of 400 families, "Grama Arakshaka batayos" [44] and their families were running a 'govipola'[45] paying to the government "a stipend." [46]

ii) in the case of 1100 families, again these so called "Grama Arakshakayos" had used force in preventing those former occupiers from regaining possession, notwithstanding, the fact that these occupiers had been listed in a "land list" maintained by the Divisional Secretary.[47]

**2.6. Land Resumption Ordinance and Forest Ordinance**

There is not one single reported precedent addressing the workings of the said Ordinance directly. However, there is the Supreme Court decision in *The Attorney General v. Arnolis*[48]which warrants reflection. In that case, the issue was, under and in terms of the Forest Ordinance[49], whether, ' X ' had cultivated a field which The Crown (State) had bought when sold for non-payment of the grain tax as envisaged in the said Ordinance. The following observations are appropriate in the context of the objective of this Study. Forest lands "are state lands", alienated to a person and therefore, by simple logical reasoning was not needed to be bought by the State, for the title would have still remained in the state or "at the disposal of the State" as contemplated in Section 3 of the Forest Ordinance:

As Lascelles A.C.J. observed:

> "…. Land at the disposal of the (Crown) includes, *inter alia*, all lands which the Crown is lawfully entitled, for example land which has been resumed by the Crown under the provisions of the Land Resumption Ordinance, 1887".[50]

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[43] *Id.*
[44] Meaning civil security guards formed from the community.
[45] Meaning a village fair.
[46] Field visits made by the LST/CPR team to parts of the Eastern Province during 2012 as elaborated in the fuller version of this Study.
[47] *Id.*
[48] 1911 (14NLR159)
[49] No. 10 of 1907
[50] Vol 11, (Chap 290)(LESL 1980 Revised)

This shows that while a certain land may not come within the strict language sense of Forest Land, yet, for the purposes of the Ordinance such land may well be in the occupation of a person but sought to be resumed by the State under the Land Resumption Ordinance. Looking at and analyzing the issue in the context of an earlier factual situation discussed in this Study relating to *"Grama Arakshaka Batayos"*[51] who have now taken possession of the said previously occupied lands by persons belonging to Tamil ethnicity in certain formerly war affected areas, it must be questioned as to the manner in which such possession has occurred-

(a) Not through any action or initiative taken by the President under Emergency Regulations or otherwise,
(b) Not through the setting in motion of the Requisitioning of Land Act (1950) but
(c) Apparently, through Defence Ministry directives.

The above leads us to the conclusion that, by the mere strength of administrative directives/ circulars, the law of the country is being subverted and a new regime is being created, through administrative directives under the aegis of the Ministry of Defence reducing the rule of Law to a rule of Administrative Discretion.

*Reversion to the Past? - the Proclamation of May 3rd. 1800 - Malapala Lands*

A further consideration becomes pertinent here. Traditionally the historic definition of "Malapala Lands" means 'lands which revert to the State owing to the failure of heirs.' In olden times, such land was given on certain conditions to minor or petty headmen to be possessed by them as remuneration for their services or to cultivators upon terms that they gave a share of the produce to the state. In both cases the lands had remained the property of the State. By a Proclamation of 1800, the occupiers of such lands had been permitted to appropriate the same upon terms that they proved material facts before the Land Raad[52] and contained in former occupiers' lists, supposed to be in the hands of Divisional Secretaries but due to the absence of such lists presently had not been able to resolve claims.

*Is current State practices relating to possession of land, a return to the phenomenon of 'Malapala Lands'?*

01. To repeat, what are 'Malapala Lands'? They are lands, which stand reverted to the Crown (State) owing to the failure of heirs, lands, which were given on certain conditions to minor headmen to be possessed by them as remuneration for their services or to cultivators upon terms that they gave a share of the produce to the Crown, though, in both cases, the lands remained the property of the Crown (State) but, by a Proclamation of 1800 the occupiers of such lands to whom they were given as remuneration for services so rendered.

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[51] See immediately preceding discussion in this Study.

[52] A village tribunal set-up during the Dutch times – see : T.Nadaraja, The Legal System of Ceylon in its Historical Setting (E.J. Brill, Leiden:1972), p.5 on the functions of this tribunal.

02. Applying this concept, vividly brought out in one single reported judicial precedent[53] in the judicial annals of Sri Lanka, the following reflections may be apt to make.

(a) for the said lands to revert to the State there is no issue regards failure or the part of "heirs". The occupiers had been forced to abandon their lands owing to the war at the time.

(b) The occupiers in question had no condition attached to their occupation as minor headmen but who were cultivators, and, who had paid certain monetary dues to the requisite cultivation committee (as it transpired in the discussion had with the CPR research team).

(c) Consequently then, the terms of the 1800 Proclamation not being breached, what provision of law prevents them from regaining possession of their lost (abandoned) lands, owing to the North - East conflict?

*Is it reasonable to require these claimants to produce documentary evidence of their claims?*

It is to be noted that these claimants do not hold permits or grants under any of the statutes that provide for the same such as the State Lands Ordinance, Land Development Ordinance or the Land Grants (Special Provision Act). These claimants fell into two categories.

(a) Those who were able to show payments made to Cultivation Committees.
(b) Those who were not able to show any such payments but who claimed to have been cultivating for generations before they were forced to abandon the lands.

Could they be considered to be squatters? Or would it not be realistic to assume that they had been in occupation such as under the 1800 Proclamation if by secondary evidence they are able to establish that they had been in occupation and cultivating from time immemorial? There is yet another category to which these claimants fall, namely those who have managed to get into occupation without any documentary proof to establish their previous occupation. Although prescription cannot be pleaded against the State, should they be in a position to establish prescriptive possession against third parties[54] they should be restored to possession. It would amount, to say the least, unreasonable, to invoke the State Lands (Recovery of Possession) Act,[55] to have them evicted as was unearthed in several instances by the LST/CPR during field visits to the East.

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[53] See : *Uparis v. Robert* (1934) 36 NLR 322
[54] *Palisena v Perera,* 56 NLR 407
[55] No. 7 of 1979

## 2.7. The State Lands (Recovery of Possession) Act, No.7 of 1979[56]

The preamble to this Act declares that it is "An Act to make Provision for the Recovery of Possession of State Lands from persons in Unauthorized Possession or Occupation."

*Rival Judicial Schools of Thought*

The State Lands (Recovery of Possession) Act has resulted in two clear distinct judicial schools of thought, one adopting a state friendly approach and the other seen to have adopted a rights friendly stance.

*Farook v. Gunewardena, Government Agent, Amparai*[57]

This was one of the earliest cases decided under the Act, on that case, the petitioner had complained that the land in question was not state land but private land of which he was in possession on deeds ranging for the years 1934-1967 and that he was not given an opportunity of placing those facts before the government agent prior to the notice to quit being served on him, which he alleged amounted to a violation of natural justice and the principle of *audi alteram partem.*

Section 3(1) of the Act provides thus:-

> "Where a competent authority is of opinion that any person is in unauthorized possession or occupation of any State land the competent authority may serve a notice on such person in possession or occupation thereof, or where the competent authority considers such service impracticable or inexpedient, exhibit such notice in a conspicuous place in or upon that land requiring such person to vacate such land with his dependents, if any, and to deliver vacant possession of such land to such competent authority or other authorized person as may be specified in the notice on or before a specified date. The date to be specified in such notice shall be a date not less than thirty days from the date of the issue or the exhibition of such notice" .

Relying on this provision the Court of Appeal having held that, "the functions of the competent authority was not quasi – judicial, but administrative,"[58] went to the extent of even in holding that, the structure of the Act would also make it appear that "where the competent authority had formed the opinion that, any land is state land, then the magistrate is not competent to question his opinion."[59]

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[56] Vol XI (Chap 289), (LESL (1980 Revised)
[57] 1980 (2) SLR 243
[58] *Id.* at p.246
[59] *Id.*

Suffice it to say, not only did the Court fail to address precedents beginning with *Ridge v. Baldwin*[60] which in 1964 had rejected the distinction between quasi - judicial and administrative functions, the effective criterion being whether rights of an aggrieved party had been affected as a result of a functionary purporting to exercise statutory power and approved in Sri Lanka by the Supreme Court[61] but also statutory interpretation principles relating to whenever an opinion is formed the same must be formed on objective grounds but can never be accepted as a subjective power.[62]

Yet again the most astounding feature in the judgment is when the Court of Appeal relys on Section 12 of the Act which empowers any person claiming to be the owner of a land to institute action against the State for the vindication of title within six months from the date of the order for ejectment and Section 13, where it decrees that, in such action, "if a decision is made in favour of that person, he will be entitled to recover reasonable compensation for the damage sustained by reason of his having been compelled to deliver possession of the land". Interpreting these sections of the Act, the Court of Appeal held that:-

> "It is significant that there is no provision in these two sections to place the person ejected in possession of the land when the action has been decided in favour of the person ejected, even though that person has vindicated his title to the land. It appears, therefore, that the intention of the legislature was that once the competent authority had decided that any land was State land even after the person claiming to be the owner vindicates his title to the land, he was not to be restored to possession of the land, but only entitled to recover reasonable compensation for the damage sustained including the value of the land by reason of his having been compelled to deliver up possession of such a land."[63]

*Reflections on the said decision of the Court of Appeal*

01. The upshot of this ruling is that, the *ipse dixit* of the competent authority that, the land in question:-
    a) Is state land,
    b) It is required as a matter of urgency, is conclusive except at the ensuing magisterial inquiry where an affected person " may establish....rendered invalid"[64]

02. So, on the terms of that Section 9 (1), an affected person cannot even place in evidence at such magisterial inquiry, the deeds he is relying on to establish that it is private land. Only a valid permit or other written authority of the State granted in accordance with any written law.[65]

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[60] 1964 AC 40
[61] *Fernandopulle v.Minister of Lands and Agriculture*, 1979 (2) NLR 115
[62] Wade & Fosythe, Administrative Law, (9th Ed)
[63] 1980 (2) SLR 243
[64] Section 9 of the Act
[65] Presumably under the State Lands Ordinance, Land Development Ordinance or Land Grants (Special Provisions) Act

Yet how could an affected party place in evidence such permit or grant which he does not possess? And , why should he rely on such evidence where in, his claim is on the basis of the land being a private land, but, which he is prevented from placing in evidence? And when he places the same in a civil action and vindicates his title, still he is told he is only entitled to compensation but not a right to regain possession, notwithstanding, such action being a *rei-vindicatio* action

*Senanayake v. Damunupola* (Supreme Court)[66]

That case involved, principally, a dispute between two claimant private landowners. A small portion of land (1-4 purchases in extent) appears to have belonged to the State. Two neighbours complained to the Government Agent (who was the competent authority) under the Act, that the petitioner had encroached on state land, by building on it. The competent authority issued notice under the Act requiring him to quit

On the petitioner seeking an order in the nature of certiorari to quash the said notice, and the Court of Appeal refusing the same, the Supreme Court held its ratio thus:- "That the State Lands (Recovery of Possession) Act was not meant to obtain possession of land which the State had lost possession of by encroachment or ouster for. a considerable period of time by ejecting a person in such possession. Section 3 should not be used by a competent authority to eject a person who has been found by him to be in possession of a land where there is doubt whether the State had title or where the possessor relies on a long period of possession."[67]

*Reflections on the ruling of the Supreme Court*

Several features of the ruling are noteworthy and several recommendations are made in this Study in consequence thereof.

*(A) Scope of the Act – a matter of Judicial Interpretation*

That, the Act was not meant to obtain possession of land which the State had lost possession of

(a) by encroachment

(b) by ouster.

(B) *Need for the amendment of the Prescription Ordinance*[68] *per se*

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[66] 1982 (2) SLR 621

[67] *Id.* at p.622

[68] Vol IV, (Chap 81), (LESL, 1980) (Revised Edition)

This interpretation of the Act demands an amendment to the Prescription Ordinance,[69]though it may look controversial, the same stands justified on the basis of the judicial intervention in the ruling under consideration-for even if a private party is found to have encroached, if long possession by such party could be established, the State not taking any steps to effect resumption or regain possession, that would constitute ouster, a well established principle in the realm of private land law between private persons but never being thought as being applicable against the State in view of Section 3 of the Prescription Ordinance which decrees that:-

> " Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs: Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

(C) *The scope of Section 3 of the Act – a matter impacting on the jurisdictional competence of the competent authority*

The Court had ruled, that, Section 3 should not be used by a competent authority to eject a person who has been found by him to be in possession of a land where:-

(a) there is doubt whether the State possesses a title or
(b) where the possessor relied on a long period of possession[70]

(D) *Ground breaking aspect in the ruling*

01. What is significant in the ruling is its reference to the alternative basis for its said ruling, that, where, possession relies on a long (considerable) period of possession, Section 3 of the Act cannot be regarded as being conclusive of the matter even if there would appear to be no doubt as to whether the State possesses title.

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[69] See later the section on recommendations in this Study
[70] Which of course, must necessarily be at least 10 years if not more.

02. The Supreme Court went on to hold that, "The opinion to be formed is not whether the property is 'state land' but, whether the occupation or possession of such state land as defined in the Act is authorized, 'State Land' being defined in the Act as "land to which the State is lawfully entitled or which may be disposed of by the State with any buildings"[71]
03. The aggrieved party in the said case had established that, in fact, he had constructed a house (building) with approval from the Municipal Council[72]

(E) *The Relevance or Otherwise of the Land Surveys Ordinance and the Crown Lands Encroachment Ordinance in this regard*

Plans prepared under the Land Surveys Ordinance and the evidence that, there had been an encroachment in putting up the building in issue by the aggrieved party stood relegated to the background, for in those circumstances, even if any doubt existed as to whether, the land in question was 'State Land', and even if it could have been resolved in favour of the State. the occupation and possession of the land by the aggrieved party could not have been regarded as being unauthorized.

(F) *The Final Impact of the Ruling*

(a) In the facts and circumstances of the case, the possession or occupation by the aggrieved party could not be regarded as being unauthorized.

(b) In failing to take into consideration the relevant background facts and circumstances, the competent authority had acted *ultra vires* in seeking to have the said occupier/possessor ejected.

(c) Consequentially, the competent authority has assumed jurisdiction, which assumption *was ultra – vires*, and his opinion, submitted to court was not immune from being reviewed. Its *ipse dixit* was not to be acted upon *per se.*

*The Amending Act No 29 of 1983*

Within a few months of the Supreme Court decision in *Senanayake v. Damunupola* [73] which had interpreted the powers of the State restrictively in resorting to the procedure laid down in the Act, the law was amended in 1983 and the opinion of the competent authority in the notice that, the land was state land (it was stated) could not be questioned. As has been observed a definition of "unauthorized occupation or

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[71] 1982 (2) SLR 621 at p.628, per Victor Perera J
[72] *Id.* at p.623
[73] 1982(2) SLR 621

possession" was also introduced which limited the available defences (covering in its wake) encroachments as well."[74]

*Examination and Analysis of Judicial Precedents after the 1983 Amendment*

*Kandiah v. Abeykoon*[75] (Court of Appeal)

In this case, though acknowledging the purport of the Amending Act of 1983, which negated the ruling of the Supreme Court in the *Damunupola Case* in declaring legislatively that, the conclusiveness that was to be attached to the opinion of the competent authority was not only in regard to that whether any land was State land but also that the person sought to be ejected is in unauthorized occupation or possession of such land.

Nevertheless, the Court of Appeal proceeded to hold that, the affidavit, containing the competent authority's opinion was not in accordance with the legislatively decreed provision by the said Amending Act of 1983. The Court held that, "The operation of the Act and its provisions could well have a serious impact upon proprietary rights. Upon a time construction of the statute as a whole, the form of notice, application and affidavit had therefore to be in strict compliance with those which the legislature has thought important enough to set out in the schedules before the jurisdiction of the Magistrate to eject a person in possession or occupation could be exercised."[76]

*Ihalapathirana v. Director General, UDA*[77]

The petitioner who was Manager of a rest house vested in the Urban Development Authority[78] had fallen into arrears regarding his monthly payments due to the UDA. Upon failure to make good the said arrears his agreement with the UDA was terminated and was informed possession would be taken over of the Rest House on a specified date. The Petitioner invoked the provisions of the Primary Courts (Procedure) Act, No28 of 1979 with a quest to remain in possession for there was no dispute that, he had been in possession for more than two months from the date he invoked the provisions of the said Act of 1979.

However, the UDA soon there-after initiated proceeding in the Magistrate's Court in terms of the State Lands (Recovery of Possession) Act having sent a notice to quit as contemplated by the said Act. The petitioner then sought a writ of *certiorari* to quash the said notice to quit issued by the UDA in the Court of Appeal. The Court formulated the issue involved as follows:- that,

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[74] See: R.K.W. Goonesekere, Select Laws on State Lands, (Law and Society Trust), 2006
[75] 1986 (3) CALR 141.
[76] *Id.* at p. 141, Gunawardena,J.(Siva Selliah, J agreeing).
[77] 1988 (1) SLR 416.
[78] Established by Law, No.41 of 1978 (as amended)

"The only question was whether the machinery of the state lands (Recovery of Possession) Act could be invoked against the (petitioner) Manager of a Rest House who was there on the basis of a contract and could be evicted only by a civil action."[79]

It was thereafter held that land vested in the UDA is State land. A Rest House is state property. Possession of it without a permit or written authority[80] is unauthorised possession. The "Act" can thus be used to secure eviction without recourse to a civil action. Goonesekere,[81] impliedly, seems to agree with that judicial approach, when he opines that:-

"Originally state land for this purpose meant land to which the State was lawfully entitled to or land under the control of any authority charged with the function of developing state land or land vested in a local authority. The definition of state land was extended by a series of amendments to Section 18 and now includes lands vested in or under the control of corporate bodies established by law." Section 18 after these amendments presently reads as follows:-

"In this Act, unless the context otherwise requires " competent authority " used in relation to any land means the Government Agent, an Additional Government Agent or an Assistant Government Agent of the district in which the land is situated and includes;

(a) the General Manager of Railways, where such land is under the control of the Railway Department;

(b) the Commissioner for National Housing, where such land is under the control of the Department of National Housing ;

(c) the Commissioner of Local Government, where such land is under the control of a local authority ; and

(d) any other public officer authorized by the Government Agent in respect of any matter or provision of this Act;

" Dependant", in relation to a person in possession or occupation of State land, means any person who is dependent on the person in possession or occupation, whether as spouse, child or otherwise, and includes any other person who is permitted by the person in possession or occupation to hold or occupy such land; " local authority " means any Municipal Council, Urban Council, Town Council or Village Council and includes any Authority created and established by or under any law to exercise, perform and discharge powers, duties and functions corresponding to or similar to the powers, duties

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[79] 1988 (1) SLR 416

[80] The only defences permitted under the Act and the petitioner was over-holding even after his written contract had been terminated by the UDA (the State)

[81] See: R.K.W. Goonesekere. Select Laws on State Lands, (Law and Society Trust), 2006

and functions exercised, performed and discharged by any such Council; "Mahaweli Development Board" means the Mahaweli Development Board established under the Mahaweli Development Board Act, No. 14 of 1970 ; "police officer" means a member of the Police Force established by law and includes any Grama Seva Niladhari empowered in writing by the Government Agent to perform police duties ; "River Valleys Development Board" means the River Valleys Development Board established under the River Valleys Development Board Act; and " State land " means land to which the State is lawfully entitled or which may be disposed of by the State together with any building standing thereon, and with all rights, interests and privileges attached or appertaining thereto, and includes land vested in or under the control of the River Valleys Development Board and the Mahaweli Development Board or any other authority charged with the function of developing State land or any local authority.

The authoritative view has been taken that after these amendments, Section 18 has given corporate bodies power to appoint competent authorities and law to send out quit notices under the Act, No.7 of 1979.[82] Be that as it may, the amendments to the Act, culminating in the 1983 Amendment being clearly to get over the *Damunupola Case*[83] of the Supreme Court, the resulting position as at the time of the Court of Appeal decision in *Ihalapathirana's Case*[84] was that, unless a person is able to show a valid permit or written authority such person is liable to be evicted under the Act upon the *ipse dixit* of the competent authorities appointed by the several corporate bodies by several laws.

However, the facts of *Ihalapathirana's Case* may have justified the Court of Appeal's approach in as much as, the Rest House Manager (the petitioner in that case, was clearly an over holding contractual party and the court was not called upon to comment on a situation where (i) a party has been in occupation for a long (considerable) period, the State not taking any steps in the meantime to regain possession or claiming title *per se* or (ii) even where, such occupants had abandoned their occupied lands, due to the North - East war but who were now desirous of regaining their lost rights.

*Nirmal Paper Converters (Pvt) Ltd v. Sri Lanka Ports Authority & Another (SLPA)*[85] (Court of Appeal)

The facts revealed that, although, the petitioner had claimed to be a tenant under the SLPA, he had failed or refused to pay the enhanced rent though demanded which therefore had reduced his status to a licensee. The premises in question were business premises which the Court found as being not governed by the Rent Act. In those circumstances, the Court found that, the need for the Respondent Authority to seek ejectment in the District Court, "which ordinarily take at least 5 to 6 years"[86] was not feasible and the recourse the Respondent Authority pursued through the State Land (Recovery of Possession) Act was justified. Thus, on above facts, the Court's approach stood perfectly justified.

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[82] See: R.K.W. Goonesekere, Select Laws on State Lands, (Law and Society Trust), 2006
[83] 1982(2) SLR 621
[84] 1988 (1) SLR 416
[85] 1993(1) SLR 219
[86] *Id.* at p. 222 per observations of Wijeratne, J

However, the only negative feature in the said ruling came from its pronouncement that, the petitioner would have been entitled to remain on the land only upon a valid permit or other written authority of the State as laid down in the Act[87], thus following the previous precedents of the court as referred to earlier, with no reference to the Supreme Court approach in *Damunupola's Case*.[88] However, the Court's reference to there not being "a semblance of such permit or authority" may be regarded as a positive feature in the said ruling[89].

*Alwis v. Wedamulla, Additional Director General, UDA* (Court of Appeal)[90]

This was a case where, the Court held that, proceedings under the 1979 Act had not been properly instituted in that:-

(a) Having regard to the definition of the term "Competent Authority" – the Urban Development Authority Act, the Additional Director general who had issued the quit notice was not a "Competent Authority" it had to be issued by the Director – General and there were no averments in his affidavit/ documents that showed the powers of the Director – General had been delegated to him.

(b) Moreover, proceedings though could be instituted by the UDA, had to be properly authorized and had to have the written approval of the Minister of Housing proof of which was a condition precedent to the institution of proceedings in ejectment.

Thus, the application for ejectment failed but the court reviewed the right of the properly constituted authority, who is the legal competent authority, as defined in the Act to file a properly constituted application.[91] Consequently, the Court of Appeal[92] is seen upholding the petitioner's case, though by way of a preliminary objection to the quit notice issued under the Act, which up to that time, after the 1983 Amendment to the present Act, appeared to be judicially acknowledged as being immune from any judicial review. At least to a limited extent this ruling along with the earlier decision *in Kandiah v. Abeykoon*[93] constituted a judicial discontent with the *ipse dixit* of the purported competent authority who would seek ejectment of a person on the basis of his opinion that,

a) The land concerned is state land and,

b) The person sought to be ejected is in unauthorized occupation or possession.

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[87] *Vide:* Section 9(1) of the Act (as amended)
[88] 1982(2) SLR 621
[89] Which will be developed and commented hereinafter.
[90] 1997 (3) SLR 417
[91] See *id.* at p. 420
[92] Per Jayasuriya, J
[93] 1986 (3) CALR 141

*The Supreme Court in Appeal against the Court of Appeal decision in Wedamulla's Case*[94]

Reversing the Court of Appeal decision the Supreme Court[95] gave a wide interpretation to the term "Competent Authority" envisaged by the Act (as amended) to include an officer generally or specially authorized by a Corporate Body in whom the state land has vested to seek ejectment of a person who, in that officer's opinion, is in unauthorized occupation of possession of such land. It need not be the Director – General of that corporate body[96] or any Additional Director General under delegation.

Furthermore, whether insofar as the Minister's prior approval was concerned, which had weighed with the Court of Appeal, as to whether the same had been obtained or not, the maxim o*mnia praesumuntur rite et solemniter esse acta*[97] could be invoked. This ruling of the Supreme Court virtually endorsed the earlier State friendly precedents following the amendments that had been effected to the Act referred to earlier in this paper which had nullified the decision of the Supreme Court in *Senanayake v. Damunupola.*[98]

This is how the state of the law had stood *viz* once the competent authority forms an opinion that, the land in question is state land and the person in occupation or possession is in unauthorized occupation or possession, the magistrate would have no option but to order the ejectment of such person unless, the person is able to show that, he is in occupation or possession under a permit or some written authority,

*The Supreme Court ruling in Karunawathie Jayamaha & others v. Janatha Estate Development Board & Others*[99]

This was on an appeal to the Supreme Court against the decision of the Court of Appeal which refused to issue a writ of Certiorari to quash the notice to quit on the basis that, acting on part precedents, the Appellants (petitioners in the Court of Appeal) had failed to show any valid permit or written authority to claim to be in lawful occupation or possession. Thus, *prima facie*, the decision of the Court of Appeal appeared to be in order[100], while holding that, the competent authority (in issuing the quit notice) exercised a power that lacked a public element (for a writ of Certiorari to be issue). That added factor was unfortunate. It was common ground that, the land was state land and the person issuing the quit notice was a competent authority to have issued the same.

The facts revealed that, the Appellants had been paying rentals to the respondent authority which the said authority had accepted for a long period of time. The Supreme Court having noted that, "Section 3(1) of the Act contemplates a situation where the person who is noticed to vacate the land is in unauthorized

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[94] 1999 (3) SLR 26
[95] Per Justice Amarasinghe (with Gunewardane, J, and Gunasekara, J agreeing)
[96] The UDA in the instance under consideration
[97] That all official steps had been taken could be presumed to have been taken
[98] 1982(2) SLR 621
[99] 2003 (1) ALR 10
[100] CA/174/95, Court of Appeal Minutes of 14.05.1996 per Ranaraja, J

possession or occupation of the said land,"[101] but "having regard to the important fact that, namely, the payment and acceptance of rentals,"[102] the Court held that, "it cannot be said that, the appellants are in unauthorized possession or occupation of the said land"[103] and accordingly set aside the Court of Appeal decision and issued certiorari quashing the "quit notice" holding that, they were *ultra vires*, invalid and void in law[104]

*Final reflections on the Supreme Court Decision in Senanayake v. Damunupola and Karunawathie Jayamaha v. JEDB and the Comments/Recommendations ensuing thereon*

(A) General Reflections

a) To begin with, the earlier Court of Appeal decision in *Fernando v. Gunawardena et al* must be regarded as being bad law.

(b) Where, a party is able to establish that-

i) Whether or not there is doubt that, the land from which the ejectment is sought is state land, is land, which he has been in occupation for a long (considerable) period, the state not taking any steps in the meantime to regain possession or claiming title per se, thus constituting the nature of "ouster"

Or

ii) Where, there being no doubt that, the land in question is state land, but, where, the state through its agents and/or functionaries have acquiesced in his possession or occupation by the acceptance of rents or other payments, the State or its functionaries ought not be permitted to invoke the provisions of the Act to have such a person ejected.

Therefore, immediate amendments to the State Lands (Recovery of Possession) Act and the Prescription Ordinance need to be introduced towards that end.

*(B) Re: State Officials resorting to the State Lands (Recovery of Possession) Act – Strictures by the Court of Appeal on Officialdom.*

It would be appropriate at this juncture to refer to what the Court of Appeal said in the case of *Mohamed v. Land Reform Commission* [105] where the Court of Appeal quashed by way of Certiorari the Quit Notice.

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[101] 2003 (1) ALR 10 at p. 12
[102] *Id.*
[103] *Id.*
[104] *Id.* per S.N. Silva (C.J)
[105] 1996 (2) SLR 124

affidavit and report filed by the relevant statutory authorities under the State Lands (Recovery of Possession) Act. The Court stated:

> "A Court of law is the only bastion and forum to which a humble and innocent litigant could resort to obtain redress against tyrannical officialdom of this nature which is actuated by improper motives generated by persons having at their disposal political influence"[106]

In so stating, the Court of Appeal invoked the principle of unreasonableness[107] , a principle well entrenched in the area of Public Law as a ground to impeach an unreasonable decision on the part of public authorities in resorting to the provisions of the State Lands (Recovery of Possession) Act, rendering such decision *ultra – vires*. The said judicial stricture so passed should apply with more force to the plight of internally displaced persons.

(C) *Re: Relevance of the aforesaid recommendations in regard to problems of land ownership faced by internally displaced persons in Sri Lanka*

The plight of persons, who had been cultivating state land for time immemorial (at least for a long period) but who had had to abandon the lands and to flee from the same owing to the decades long conflict in the North and East is a main focus of this Study. As observed, these internally displaced persons are faced with difficulties put in their way, mostly technical in nature in that, they are unable to produce documentary evidence as to their previous possession, prior to their abandoning lands due to the war situation. Notwithstanding the absence of documentary evidence (as being primary evidence), this issue must be addressed by the State in making provisions for such persons to establish their long possession, in order to regain their lands, though they had been compelled to abandon the same due to the war situation by secondary evidence towards which objective,

a) Not only, amendments as suggested above to the State Lands (Recovery of Possession) Act 1979 and the Prescription Ordinance but also, special legislation may be warranted, given the fact that, insistence on a permit or written authority by other precedents has been jettisoned.

**2.8. Acquisition of Private Land for Planning Purposes**

The acquisition of private land for public purposes involved an examination principally of;

(a) The Land Acquisition Act, 1950 (as amended)

(b) The Land Redemption Ordinance (No 61 of 1942)

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[106] Per F N D Jayasooriya, J, (vide: at P 125 of the Report)
[107] At P. 129 ibid

Yet a distinction may be appropriately drawn between

(a) Acquisition of private land for public purposes and

(b) Acquisition of private land for planning purposes.

Several statutes are relevant for the purpose of (b) above.[108]

**(i) Re: The Thoroughfares Ordinance No. 10 of 1861**

01. This Ordinance which empowers the particular Minister in charge of the subject to declare principal thoroughfares for which purpose he is vested with statutory authority to order any road to be stopped or diverted, and substitute shorter or more commodious course and order any such road to be widened and enlarged[109] for which purpose private land may be taken and building or part of it, any boundary wall or gateway may have to give way[110].

02. If agreement cannot be reached between owners of such land and the authorities regarding the acquisition or compensation payable the provisions of the land acquisition Act would be required to be set in motion.

However, the field research carried out in the present Study revealed that, in the Batticaloa district for example, nearing the main city, road widening has been and is being done with just a notice being sent to the landowners without recourse to the Land Acquisition Act. While those residents in the Batticaloa district have not gone into litigation for fear of governmental reaction, those in the Dambulla town however have resisted the same in facing a similar process. Following letters sent by the Urban Development Authority/Ministry of Defence ordering them to leave their historical lands on the basis that the lands formed part of a newly defined 'Sacred Area' (an aspect that will be commented on later in this paper), the affected villagers of Sinhala, Muslim and Tamil ethnicity have commenced protesting, picketing and lobbying. [111]

**(ii)The Flood Protection Ordinance No.4 of 1924**

This Ordinance carries similar provisions to the Ordinance of 1861

**(iii) Special Areas (Colombo) Development Ordinance No. 40 of 1947**

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[108] See: R.K.W. Goonesekere, Select Laws on State Lands, (Law and Society Trust), 2006.
[109] *Vide*: Section 5 & 6 of the said Ordinance taken cumulatively.
[110] Section 27 (a)
[111] Follow-up field visits carried out in the East and in Dambulla during December 2012.

Section 2(1) of this declares that:-

> "Where the Minister is satisfied any area within the town of Colombo, consisting of one or more lands on which demolition operations have been carried out under emergency powers or of one or more such lands together with any road or roads adjacent thereto and any other land or lands contiguous to any such land or any such road, should, in the interests of the public health or safety or of the amenities of the neighbourhood, be laid out and developed afresh, he may, by Order published in the Gazette, declare the area to be a special area for the purposes of this Ordinance."

Section 3(1) decrees that, upon such a special area being identified by gazette the same shall be deemed to be land needed for a public purpose and be liable to compulsory acquisition and accordingly the (Divisional secretary) shall - "forthwith take order for the acquisition of the land or each of the lands in that special area on which demolition operations have been carried out under emergency powers;" and

Section 5(1) makes the land acquisition act provisions applicable save for the exemption that, the acquisition may be postponed upon the owner undertaking to carry out any development scheme that is contemplated by the ordinance[112].

**Issue of Compensation**

In so far as compensation payable under the above mentioned Ordinances is concerned, the fact that, there is no pre-requirement to pay compensation before land is acquired or possession thereof is taken over, an observation made in this study under the analysis done in relation to the land acquisition Act (as Amended) would be relevant although the special areas (Colombo) Development Ordinance No.40 of 1947 in section 5(1) does make reference to

> "any sum of money which may, under this Ordinance or under such provisions, be required to be paid or deposited"

Suffice it to say at this point that, similar provisions are contained in, and the same consideration and concerns experienced earlier in relation to the aforesaid statutes would be relevant in the context of the below;

(a) The Sri Lanka Reclamation and Development Corporate Act No 15 of 1968

(b) The Town and Country Planning Ordinance No. 18 of 1946 (as amended) and,

(c) The Road Development Authority Act, No. 73 of 1981.

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[112] Section 10

**(iv) Recent Governmental Initiatives - The impact of the Tourist Development Act No 14 of 1968 read with the Strategic Development Projects Act, No.14 of 2008 as amended by Act No.12 of 2011 on land rights of private owners.**

The Board of Investment of Sri Lanka established by Law No.4 of 1978 is conferred with the power to identify, in consultation with the relevant line ministries, proposed strategic development projects.[113] Butressing this provision is the Strategic Development Projects Act, No.14 of 2008. The objectives behind the Act, as spelt out in Section 6, cannot *prima facie*, be faulted. However, the following critique looks at particularly problematic provisions of this Act set against its increased utilisation in the formerly war affected areas.

*Re: Acquisition of private land for purposes of strategic projects vis a vis the Tourism Statutes.*

1. Section 6(b) of the Act No. 14 of 2008 identifies "The substantial inflow of foreign exchange to the country."

2. Tourism has always been a pet subject of successive governments over decades which has gathered momentum since the war ended as a source of earning foreign exchange to the country. Section 30 of the Ceylon Tourist Board Act No. 10 of 1966 specially empowers the Tourist Board.

   "to acquire, hold, take or give on lease or hire, mortgage, pledge, and sell or otherwise dispose of. any immovable or movable property."

3. Needless to say, the Tourist Board thus would be expected, in order to promote Tourism require land for the purpose of -

   (a) Setting up Rest Houses to be given on lease or hire to individuals or companies

   (b) Granting of land for the purpose of building hotels by way of sale.

4. The several ordinarily applicable statutes but which have been exempted in relation to strategic projects under the Strategic Development Project Act makes sense in this context. The Tourist Development Act, No. 14 of 1968 exemplifies this where in Section 2 (1) of the said Act decrees thus:-

"Where the acquisition of any land is necessary so as to make it available to the Board for the purpose of any tourist development project, whether such project is to be carried out by the Board or by any other person under the general direction and control of the Board,, and the Minister by

[113] Section 3(1) of the parent Act.

Order published in the Gazette approves the proposed acquisition so as to make such land so available,-

(a) the purpose of that project shall be deemed to be a public purpose, and such land may be acquired under the Land Acquisition Act for the purpose of that project, and may be subsequently vested in the Board in the manner provided by subsection (2);and

(b) accordingly, no such Order, acquisition and subsequent vesting shall be deemed to have been, and to be, invalid by reason only of the fact that such land is subsequently alienated by the Board to any other person for the purpose of carrying out that project under and in accordance with the provisions of this Act."

5. Although, the Land Acquisition Act must be involved for such compulsory acquisition[114], what is interesting to note is when Section 6 of the said Act decrees that, no compensation is payable by the board in respect of such compulsorily acquired land. The proviso to the section states that, an affected private owner of land however could claim compensation from the State or any other person...."

*Development as against private rights*

This brings into the focus of discussion the fact that development in the national interest *per se* to the exclusion of private rights is not what is required by good governance and the Rule of Law. A balance ought to be struck. "Sustainable Development" is what is required. The land so acquired for a tourist development project as being a Strategic Development Project may well have been land that the private owner might have been using for business purposes which he/she would find deprived of. The Tourism Authority Act, No 33 of 2008, vests such lands, in the Tourist Board. Importantly meanwhile, the President is empowered to give outright grants of even state land for such projects.[115] Yet these state lands may well have been in the occupation of citizens for long years who would find that, they are left with no remedy given the immunity afforded to the President's actions under Article 35 of the Constitution of Sri Lanka[116]

[114] Section 6 of Act No. 14 of 1968

[115] See: Section 27(3) of the said Act

[116] Note in this context, as examined in the comprehensive version of this Study;
a) The Sampoor land acquisitions and
b) The Oluvil acquisitions

*The National Physical Plan*[117]

This plan (NPP) is to be implemented over a period of 20 years (2011-2030) in relation to the project proposals envisaged therein.[118]Project proposals contemplate development areas for

a) Road development including four expressways (one being the extension of the southern express way)

b) The Tourist industry

c) Two new international airports (the Mattala airport being already built) and a second runway in Katunayake; 10 runways expanded and 6 New Domestic Airports.

d) Agricultural development in (identified as) high productive commercial plantation and agricultural areas.

e) Disaster management by directing the development of coastal towns to the inland areas.

f) Reforestation

g) Industrial development creating industrial estates and export processing zones.

h) The North Central Metro Region physical plan

i) Uva Regional plan which include new urban settlements under a new plan, agriculture Development, tourism development, a new northern entrance to the Yala National Park on the same or similar lines as (h) and (i) above.

j) Sabaragamuwa Regional plan which is on the same or similar lines as (h) and (i) above.

k) The Eastern and Northern Regional plans similar to (h), (i) and (j) above.

No doubt on paper, hardly could one find any fault in the plan. But, for all these projects and the development drive, the State would surely need land and the available land resources at the disposal of the State would certainly not be adequate. Those owners and/or occupiers of land would inevitably be affected. These persons would broadly speaking fall into two categories.

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[117] Approved on 03/07/2007 by the national physical planning council chaired by the President as per Section 3 (1) of the Tourist Country Planning (Amendment) Act No 49 of 2000

[118] Approved on 11th January, 2011

a) Private land owners in regard to whose lands, the Land Acquisition Act and related statutes would have to be resorted to.

b) Those who are (i) on state lands on permits, written authority or on some basis which may not be construed as unlawful occupation or on the basis of expectant rights such as those who have had to abandon their lands on account of the North – East conflict.

*Proposed Settlement/ Resettlement Plan*

Comparing the ancient settlement pattern and the existing population distribution pattern as at the year 2008 (and not even at 2013) the projected settlement pattern in 2030 is based on several presuppositions that :-

a) There are "fragile areas"

b) For which the population will voluntarily migrate to

c) What have been identified as metro – regions.

*Fragile Areas*

What are fragile areas? Have they been scientifically established as such? Does it mean that, these are infertile land? Is the proposed plan to re – forest land to include such lands in the central region as well? Would the effect of it be to replace the tea plantations as well for purposes of commercial projects? The British colonial rulers made these same decisions in regard to replacing the rich coffee plantations of Sri Lanka by tea plantations. Would the same kind of strategic plan be justified to replace the existing tea plantations with a new industrial and commercial proposal as apparent from the NPP?

*Voluntary migration for the so called fragile areas to proposed metro regions*

What if such voluntary migration is not forthcoming? This brings into focus what has been dealt with in this Study in the context particularly of the State Lands (Recovery of Possession) Act, 1979, the Land Resumption Ordinance and other related legislation. It needs no imagination to ponder over the fact that, notwithstanding the people's friendly judicial precedents encountered in this Study, the State would submit that, these projects under (the NPP) being for planning and/or public purposes in the national interest for development. The courts would then have no role to play to subject the same for review whether under Article 140 of the Constitution by way of orders in the nature of writs; under Article 126 by way of a fundamental rights applications or under section 217 (g) of the Civil Procedure Code in the context of civil actions. The State would no doubt rely on the contrary precedents which have held that, "public purpose" cannot be judicially reviewed.

Moreover, when compensation for such acquired land is claimed against the State, where a considerable period of time may have also ensued, the State may well submit, that, the Treasury has said and the Cabinet of Ministers has expressed regret that, there are no funds to defray such compensation. Would the judiciary in the country be able to compel the State to pay such compensation? The answer to such a question (going by recent judicial precedents) appears unfortunately to be in the negative.

*Metro – Regions – Metro Projects*

The North Central metro region as shown in the maps referred to in the NPP is composed of 100% of the Anuradhapura/Polonnaruwa Districts, 30% of Dambulla and 100% of the Trincomalee District. Item No 10 identified as a metro project is an amendation of the North – Central Metro Region (of the Eastern Province) as well as the North – East Boundaries.

*A clear plan to obliterate and/or re – define Administrative Districts*

In the context of what is being reflected upon in regard to land rights and/or expectations of the people of this country, to whatever, ethnicity or area of residence they belong to, (the NPP) as it presently stands ought not to be implemented in its present form without modification, addressing the aforesaid concerns.

These are reasonable apprehensions given current initiatives taken by the Defence Ministry, the military (muscle) power that goes with it and the government's more than 2/3 majority in Parliament where even special legisiation could see the light of day with the apprehension that, even the Supreme Court in the exercise of its constitutional jurisdiction may not decree a Referendum, such as what happened in relation to the Divineguma Bill which cost a Chief Justice her right to office.

*Constitutional Impact of the NPP*

The 13th Amendment to the Constitution would be rendered a dead letter in as much the involvement of the provincial councils appear to be destined to be circumvent in regard to the subject of land use. Agricultural and agrarian services, land settlement,[119] etc. As long as the said 13th Amendment stands, could it be circumvented obliquely through administrative initiatives termed an NPP?

*Relevance of the Recommendations made in this Study in regard to (a) The Land Acquisition Act in the context of private lands and (b) state land occupied and possessed by citizens' of this country*

If all the projects contained in the said NPP are to be gone through, those citizens who are expected to, for the said purposes, migrate within the country to other areas giving up their statutory rights under such laws such as the Land Development Ordinance etc. and the expectant rights to regain possession, after the end of the war, then there must be an adjunct plan to be put in to order which the NPP, does not

[119] See: 9th Schedule, List I. items No 9 and Appendix II thereof of the Constitution

appear to make even a token reference thereto. The NPP must necessarily be modified addressing the settlement/re – settlement factor without leaving it to possible litigation but to be addressed as a compensation issue which would be in consonance with such persons being deprived of their lands, having to move out from presently occupied lands, state lands, (no doubt), but being the only formula the government could offer in that regard in its quest for development in the context of its purported plan in development projects. Indeed, towards that objective, strong civil rights organizational initiatives would be necessary.

### 3. Evictions from State Lands

#### (A) Under the Forest Ordinance and the Irrigation Ordinance

There are many situations where any person is liable to be evicted from State occupied lands. There are the situations where any such person is found to have no right whatever to be in state land. For instance, under the Forest Ordinance,[120] "any person ..... Who in a reserved forest - erects any building whether permanent or temporary, or occupied any building so erected shall be guilty of an offence and be liable on conviction to .....(*inter alia*) imprisonment which may extend to one year or to a fine or both.[121]

At the other end of the spectrum one sees where under the Irrigation Ordinance[122] an irrigation rate is imposed for state land that has been given for cultivation by a grant, lease, held or occupied by an instrument Under the requisite legislation such as under the State Lands Ordinance[123], the Land Settlement Ordinance[124], the Land Development Ordinance[125], Land Grants (Special Provision) Act No. 43 of 1979 and where such 'allottee' (meaning an owner of a holding or a permit holder under any such statute) or a tenant cultivator is found to be in default, the land is liable to be seized. These two Ordinances, it is to be noted, appear to have functioned without difficulty for the terms of the said statutes and the legislative intent behind them.

#### (B) The State Lands Ordinance and the Land Development Ordinance[126]

By and large, the disputes that have arisen in the context of these two statutes have been between private parties. Where, the particular State functionaries have taken decisions affecting either party, the same have been put in issue in the appropriate courts to be resolved.[127] There have been instances however, where the Courts themselves have not been able to resolve due to the intricacies and technicalities of the

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[120] Vol 11 (Chap. 283), (LESL,1980) (Revised Edition)
[121] Section 7 (g)
[122] 2A. Vol 11 (Chap 285) (LESL, 1980) (Revised Edition)
[123] Vol 11 (Chap 286), (LESL,1980) (Revised Edition)
[124] Vol 11 (Chap 299), (LESL,1980) (Revised Edition)
[125] Vol 11 (Chap 300) (LESL, 1980) (Revised Edition)
[126] Vol 11 (Chap 286) (LESL,1980) (Revised Edition), Vol 11(Chap 300) (LESL,1980) (Revised Edition)
[127] See – the study by R.K.W. Goonesekere, Select Laws on State Lands, (Law and Society Trust),2006

law and consequently these problems have been retransferred to the administrative authorities. One such illustration may be cited as transpired in a recent Supreme Court decision.

*Kurukuladeniya and Another v. Ramasamy Balan*[128]

In that case 'X' who had a valid permit, purportedly, under the States Lands Ordinance had given an informal lease to 'Y' for three years but without obtaining prior approval from the Divisional Secretary. X was therefore in breach of the conditions stipulated in the permit. Before the said three year period lapsed, 'X' became deceased. After the expiry of the said three year period, 'X's heirs (children) sought ejectment of 'Y' on the basis that 'Y' was an overholding licensee and therefore was a trespasser. The District Court as well as the High Court of Civil Appeals dismissed the action on the ground that, in terms of Section 16 of the State Lands Ordinance, a permit being a personal right conferred, it stood extinguished upon the death of the permit holder and the heirs of 'X' could not have therefore maintained an action to eject 'Y'. The Supreme Court affirmed both the District Court and the High Court of Civil Appeal's judgments, deriving support from a Court of Appeal ruling in *Dharmalatha v. De Silva.*[129]

**The Impact of the Supreme Court Ruling**

The Supreme Court held that, the informal leave given by 'X' to 'Y' was illegal (because it was contrary to the conditions of the permit – the said lease being given without prior approval from the Divisional Secretary[130]). As noted earlier, 'X's heirs also could not maintain an action to eject 'Y' for, with the death of 'X', the permit stood extinguished.

**What was the impact of the Decision of the Supreme Court?**

Was then, 'Y', who was also a party to an informal lease, obtained in breach of the conditions contained in the permit 'X' had obtained to remain in occupation? What was the status of 'Y'? a definite positive aspect of the ruling is seen when the court is seen holding that, ".....the Respondent (Y) is an unauthorized occupant of state land, the District/Divisional secretary or any other competent authority of the State could take steps to recover the possession of state land which is the subject matter of this case."[131]

**How then are the authorities to act?**

On the rationale employed by the Court in all probability, should 'X's heirs seek a writ of mandamus, it may well be held that, they lack *locus standi* to maintain such an application under Article 140 of the Constitution. If so, and should the heirs of 'X' not seek a *mandamus,* are the authorities to condone the

[128] SC/Appeal/153/11 – SC Minutes of 21.02.2013

[129] 1995 (1) SLR 259

[130] For which reason the Supreme Court, rejecting Counsel's argument held that *Palisena v. Perera* (56 NLR 407) stood distinguished.

[131] At p.7 of the judgment, per Priyasath Dep, J (Thillekewardene, J and Imam, J agreeing)

continued unlawful occupation of 'Y' perhaps even regularising his occupation by granting him a permit? Ought not the heirs of 'X' be given consideration notwithstanding Section 16 of the State Lands Ordinance and its interpretation?[132]

Perspectives emerging from LST/CPR discussions conducted with Land Commissioners and land officers in the Badulla and Kandy Districts are also relevant in this regard. When the above question was put to the functionaries present, the response was most salutary and commendable. Led by the Assistant (Provincial) Commissioners, it was opined by the land officers that "in such a situation[133], we would recover possession from 'Y' and act according to the legislative intent reflected in the State Lands Ordinance and the Land Development Ordinance contained in the schedules of the said enactments, as being the more equitable decision because, the way we see it, it is a dispute between a trespasser as against the heirs of the original permit holder. Of course, this is in our District and how the authorities in other Districts would act, we cannot say."[134]

**Need for Legislative Reform**

That view expressed by the participant land officers in the Badulla and Kandy Districts illustrated the possible inconsistencies that may arise in regard to decisions relating to State Land alienation in the several provinces. It may be salutary therefore to introduce provisions to the State Lands Ordinance in situations where, an original permit holder as well as an informal lessee are found to be in breach of the law, the heirs of the original permit holder must have a preferential right over a person who is in un authorized occupation of State land subject to the authorities' discretion to hand over the land to neither.

**(C) The Land Resumption Ordinance[135]**

Section 2(1) of this Ordinance states as follows.

"When any land in Sri Lanka which has been or which may hereafter be alienated by or on behalf of the State shall appear to the Government Agent to have been abandoned by the owner thereof for eight years or upwards, and such owner or any person lawfully claiming under him cannot be ascertained, notwithstanding all reasonably diligent inquiry made by such Government Agent, it shall be lawful for such Government Agent, with the sanction of the Land Commissioner, to declare by a notice to be published and to be posted on such land in the manner provided in subsection (2), that if no claim to such land is made to him by or on behalf of any person able to establish a title thereto within the period (not being less than twelve months) specified in such notice, such land shall be resumed by the State."

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[132] 1995 (1) SLR 259

[133] The reference was to the facts and circumstances of the Supreme Court case under discussion

[134] This was a commonly agreed point of view by the participant land officers.

[135] Vol 11 (Chap 290), (LESL, 1980) (Revised Edition)

**Was this Ordinance used in the post conflict years in the North and East?**

Relevantly, Sri Lanka's Lessons Learnt and Reconciliation Commission (LLRC) has recommended, in its 2011 report, several measures to the government to resettle those people who had lost the lands that they had been in possession of. The government itself has issued official statements that several thousands have been resettled. However, as this Study would reveal, from the fieldwork carried out by the research team, many still find themselves unable to return to their previously occupied lands. Apart from those lands that have been requisitioned for security purposes[136] or development purposes[137] where different consideration may apply there are several lands which fall outside those categories. What meaningful and practical measures ought the government to take in regard to the same? In his study on "Select Laws on State Land", R.K.W. Goonesekere[138] has noted thus:

> "the Land Commission (1958) commented that the Ordinance is not being used although there are large extents of land in the Kandyan provinces which are being in Patna or forest or are abandoned coffee estates without any apparent cultivation or the exercise of any right of ownership."[139]

The same observation would apply to those lands which thousands of people lost or were forced to abandon due to the three decade long war in the North and the East. The fieldwork carried out by the research team in the context of this study has revealed that, the Ordinance has not been used. It is recommended that, the government must be prevailed upon to set in motion the Land Resumption Ordinance with suitable amendments particularly in regard to the time limits contemplated in the present Section 2(1), ideally, by the enactment of new legislation titled "The Land Resumption (Special Provisions) Act" to deal with the situation that arose some thirty years ago.

### i. Where owners of abandoned lands prefer claims

How are they to establish such claims? The best evidence no doubt would be title deeds. The fieldwork carried out by the research team pertaining to the present study revealed that, thousands find themselves without any such title deeds or permits owing to the fact that, the relevant Kachcheries or land registration offices had been destroyed. Procedure as contemplated by Section 4 as the Ordinance presently stands needs to be amended for the establishing of any such claim. Evidence by *Grama Seva Niladharies*, present and past together with whatever other supporting documents or oral evidence must be entertained by the government agent (contemplated in the said section, to be read as the divisional secretary) (and the reference to the land commission being amended to read as the Provincial Land Commissioner).[140] Where, there are no rival claimant's strict proof should not be required in the context of Section 5 of the

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[136] Several High Security Zones are still in operation in the north and the east.
[137] See: For example "the Sampoor" issue discussed dealt later in this document.
[138] See: R.K.W. Goonesekere, Select Laws on State Lands, (Law and Society Trust), 2006
[139] See: R.K.W. Goonesekere, Select Laws on State Lands, (Law and Society Trust), 2006
[140] In consequence of the 13th Amendment to the Constitution of Sri Lanka

Ordinance. *Prima facie* proof under the said section should suffice which should result in a deed of disposition being given to any such claimant.

**ii. Where there are rival claimants**

It is recommended that, only where (the Divisional Secretary) finds there are rival claimants that, and where a doubt is (after he reports to the land commissioner) entertained as envisaged in Section 5 that, the invocation of the courts should be required as stipulated in the subsequent provisions of the Ordinance.

**iii. Where no claim is made by any**

Section 3 envisages this situation which should not therefore pose a problem to the authorities and the acts contemplated therein could be put in motion.

**iv. Abandoned lands which presently stand requisitioned for Defence (security) purposes.**

One other matter needs to be addressed in this context, namely where,

a) (abandoned) lands have been requisitioned for defence (security) purposes.
b) (abandoned) lands have been put to use for public purposes.

**Re. (a)**

The government must be prevailed upon to make available alternative land to such claimants (and upon failure to do so) to pay adequate monetary compensation, where after inquiry by the Divisional Secretary, the claimant has established prima facie proof of such claim. This would have to be done by amendment to the Ordinance or, ideally through new legislation in the form of a special provisions enactment.

**Re. (b)**

Where land in question is taken over by the State for public purposes and even where such acquisition has not been challenged, th State must offer alternative land or upon such failure, pay adequate compensation.

## 4. Ancillary Statutes; The State Landmarks Ordinance[141], the Definition of Boundaries Ordinance,[142] The Land Surveys Ordinance[143] and the Land Settlement Ordinance[144]

The preamble to the State Landmarks Ordinance states:- it is "an Ordinance to provide for the eviction and maintenance of permanent landmarks to define the boundaries of the land alienated by the State." Section 4 of this Ordinance decrees that :-

> "It shall be the duty of the owner or the person for the time being in possession or occupation of any land, the boundaries of which have been defined by State landmarks, to keep such landmarks in good repair, and also to define the boundary line connecting the several landmarks by keeping the same clear of vegetation."

Section 5 (1) in its terms exemplifies further this duty which reads thus:-

> "Whenever it appears that any State landmark has been removed, or is out of repair, or that the owner or occupier has failed to define or keep defined the boundary line between the landmarks, the Government Agent may call upon the owner or occupier to replace or repair such State landmark or to define the boundary line"

The question may be asked, how could a person who has had to abandon the land in question owing to the war, be expected to have complied with those provisions? Consequently, therefore, whether through amendment to the Land Resumption Ordinance or new legislation by a special provision enactment, a provision must necessarily be added to the effect, that;

> "Notwithstanding the provisions of the State Landmark Ordinance (as amended) ...." The said proposed amendments or new (special) legislation would apply"

It is also apt to note the terms of Section 9 of the said Ordinance which reads as follows:-

> "The person on whom a notice to replace or repair State landmarks or to define boundaries is served may request the Government Agent to cause such landmarks to be set up or repaired, and the Government Agent may require the Surveyor-General to have such landmarks set up or repaired, and the cost shall be certified and recovered as hereinafter provided"

It is clear therefore, where there had been obliteration of the State Landmarks or definition of boundaries, the statutory duty primarily falls on the Government Agent (or the Divisional Secretary) to put that right.

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[141] Vol 11, (Chap 291), (LESL, 1980), (Revised Edition)
[142] Vol 11 (Chap 292), (LESL, 1980 ) (Revised Edition)
[143] Vol 11 (Chap 293) (LESL, 1980 Revised)
[144] Vol. 11 (Chap 299) (LESL 1980), (Revised Edition)

*The innocence or ignorance of the community*

During the war in the North and East, obliteration of the State Landmarks and/or the definition of boundaries had necessarily come into play. No official request, up to date, had been advanced by an affected land owner on the said issue though numerous such questions were encountered by the LST/CPR team during their field visits to the North and East. The question is, could such a person in the former war torn areas have made such a request? Even if such a request had been made, where a dispute would have arisen as to the portion in which any State Landmark shall be placed, during the war time conditions, would it be rational to expect an aggrieved person to have called upon and expected the Surveyor General of Lands to intervene as contemplated by Section 10 of the said Ordinance? which decrees thus:-

> "If any dispute shall arise as to the position in which any State landmark shall be placed, the same shall be settled by the Surveyor-General, who may direct the land to be resurveyed. The expense of any such survey shall be borne by the landowner, and shall be recovered in manner provided by section 12"

Thus, the imperative need to, bring in new legislation by way of a Special Provisions enactment, not only, amending the Land Resumption Ordinance but also the State Landmarks Ordinance.

Section 2 of the Definition of Boundaries Ordinance (as amended) decrees thus:-

> "It shall at any time be lawful for the Government Agent of the administrative district to demand in writing of any person claiming to be the owner of any land within the same the production of every deed, document, and instrument upon which such person founds such claim; and if the occupier or person having the superintendence or management of any such land, not being himself the alleged owner thereof, shall refuse to give full information respecting the name and residence of such alleged owner, upon being requested so to do by the Government Agent, or if such alleged owner shall refuse to produce to the Government Agent, within ten days after being requested so to do, every deed, document, and instrument upon which he founds his claim to the said land, and which shall be in his possession, or if any such deed, document, or instrument shall not be in his possession, shall refuse fully to inform the Government Agent, upon application, in whose possession they are, or if any person having in his possession any such deed, document, or instrument shall refuse to produce the same within ten days after having been requested so to do in writing by the Government Agent, every such occupier, superintendent or manager, alleged owner, and person so refusing shall be guilty of an offence, and be liable, on conviction thereof, to any fine not exceeding fifty rupees."

Suffice it to say that the same considerations that were articulated in regard to the Land Resumption Ordinance and the State Landmarks Ordinance would be relevant in the context of the Ordinance under

discussion as well. Similar considerations would apply in the context of the Land Surveys Ordinance as well read together with the State Land (Claims) Ordinance[145]

Before parting with this segment, it is apt to reflect on yet another statute in this context which is the Land Settlement Ordinance. This Ordinance, in its preamble boasts as being an Ordinance to amend and consolidate the law relating to land settlement. Section 4 of this Ordinance ascribes a statutory role to who are referred to therein as "Settlement officers" to call for notice of claims by Gazette. Section 5 thereof refers to the powers and duties of settlement officers when any claim is or is not made. This part of the Study will focus on when a claim is made. This Ordinance was brought in to operation in 1931 at a time when the Definition of Boundaries Ordinance (1844), Land Surveys Ordinance (1866), Land Resumption Ordinance (1887), were all in operation. Accordingly, the exercise of 'settlement officers'' powers and duties contemplated by the land settlement ordinance must be viewed as a preliminary stage inquiry before the other hierarchically higher functionaries such as the Divisional Secretary, Surveyor General, the Provisional Land Commissioner and the Minister are required to take decisions under those other enactments.

A fresh look needs to be taken as regards the role and functions of the said "settlement officers" in the present hierarchical structure particularly in consequence of the 13th Amendment to the Constitution bearing particularly in mind this issue is raised in the context of those persons who have lost their occupied lands due to abandonment on account of the war that prevailed for three decades in the North and the East.

*Judicial Precedents in the context of the Land Settlement Ordinance – Available (Reported) Case Law.*

*Hethuhamy v. Botheju*[146]

It was held in this case that, under Section 8 of the Ordinance, the effect of a Settlement order is to declare the Crown (State) or any person to be entitled to a land or such share of interest in the land free from all encumbrances and to the exclusion of all "unspecified interests". In interpreting the words 'unspecified interests' it was laid down that, the said words refer to unspecified interests in the title and they do not deprive the right of a *bona fide* possessor of the land to compensation for improvements.

*Need to amend the Ordinance to restore persons who are found to have abandoned lands due to the war situation*

This Study documents the plight of thousands of persons who have had to abandon possession of the lands they had been possessing or had been in occupation due to the conflict period. They are not claiming title in as much as the lands no doubt are State Land. They are not claiming any compensation by way of improvements either. Even if they had effected any improvements they would not be able to

[145] Vol 11 (Chap 294) (LESL.,1980 Revised)
[146] 43 NLR 83 (1941)

show the same. The war would have wiped out any evidence. They are merely re – claiming the lands they have had to abandon. Are they not entitled to regain possession? If due to State intervention, they are to be denied such possession ought not they be at least entitled to some monetary compensation on the basis that, their interests could not be regarded as "unspecified interests" within the meaning of Section 8 of the Ordinance at least as an alternative option? It is recommended that, the Ordinance be amended in the context under consideration to treat a person who has had to abandon land due to a conflict situation (being a cause not within such person's control or beyond such person's control) as being not an "unspecified ground" entitling such person to, as the first option, regain possession of the land or if through State intervention, the land in question has been resumed by the State, at least entitling such person for adequate monetary compensation.

### 5. *Relevance of the Town and Country Planning Ordinance No. 13 of 1946- The Amendment Bill*

The objects of the parent statute, passed prior to Independence, read as follows in its preamble:-

> "An Ordinance to authorize the making of schemes with respect to the planning and development of land in Sri Lanka, to provide for the protection of natural amenities and the preservation of buildings and objects of interest or beauty, to facilitate the acquisition of land for the purpose of giving effect to such schemes, and to provide for matters incidental to or connected with the matters aforesaid."

The following principles featured in the statute are noteworthy.

1st Principle - For the purpose of the Town and Country Planning in concordance with the preamble as afore-noted the towns compositing the country are clarified into

(a) Urban Development Areas

(b) Truck Road Development Areas

2nd Principle - Any town, would come under such areas upon the Minister issuing a gazette to that effect.

3rd Principle - Schemes to Gazette are open to objection by the majority of owners or occupants or persons having inheritance over land affected by the said proposed Schemes sanctioned by the minister by gazette, and if the minister still considers the schemes with proposed modification or alteration as being necessary to be proceeded with, the decision would be kept open for judicial challenge by virtue of an application for a fundamental rights violation in term of Chapter 3 of the Constitution and/or Article 140 of the Constitution by the way of an order in the nature of the Writ and/or under Section 217(g) of the Civil Procedure Code by the way of a declaratory order. The Proposed Amending Bill merely states that it is a Bill to amend the Parent Statute. In Clause 2 of the Bill, it states thereof,

'An Act to provide for the formulation and implementation of a National Physical Planning Policy with the objectives of promoting, preserving, conserving and regulating a system of integrated planning in relation to the economic, social, historic, environmental, physical and religious aspects of land in Sri Lanka; for the preparation of a national physical plan for the purpose of giving effect to the objectives; and to provide for matters connected therewith or incidental thereto."

*Formulation and implementation of a National Physical Planning Policy (NPPP) and Preparation of a National Physical Plan (NPP)- The Objectives*

Clause 2 mentions the main legislative intention which is for the stated objective therein, namely the promoting, preserving, conserving and regulating a system of integrated planning in relation to the economic, social, historic, environmental, physical and religious aspects of land.

*Acquisition of Land*

The said clause further revealed as would be obvious, that, in order to achieve the said objective, land would be required and therefore the formulation and the consequent implementation of the said policy and plan would be dependent on facilitation of the acquisition of land.

*Land with buildings and the Minister's powers to declare Protection, Conservation. Agricultural (or Historic) and Sacred Areas*

The power to declare by Gazette defined areas within any Municipal, urban development or trunk road development area was to be conferred on the Minister whether or not there were buildings therein (*vide:* Clause 3(2))

*'Sacred Areas' – Some initial observations*

(1) The 'Minister' contemplated in Clause 3(2) is not defined. This problem stands further evidenced in Clause 5, in so far as the declaration of 'Sacred Areas' is concerned, the Minister of Buddha Sasana and Religious Affairs is to be conferred with power to declare by Gazette 'Sacred Areas' after notifying the Minister of Physical Planning.

(2) The Bill does not state how such land is to be acquired for the stated objective. However, it must be reminded that it would have to be done under the provisions of the Land Acquisition Act of 1950 (as amended) or the Urban Development Authority Act 1978 (as amended).

(3) Formulation of Policy and Plan to implement the same would not require legislation. It is at the implementation stage that right of individuals would be affected for which purpose the Land Acquisition Act or the Urban Development Authority needs to be activated.

(4) Accordingly, by mere declaration of a specified 'area', any attempt by whatever Statutory functionary without activating the machinery of either the Land Acquisition Act or the Urban Development Authority Act to take over possession of privately owned land (the Bill stated with or without buildings therein) would be arbitrary and not in accordance with the Law and consequently would have been obnoxious to Article 12 of the Constitution as well Article 14 (1)(9) and (h).

(5) Apart from the aforesaid aspects, the Minister of Buddha Sasana and Religious Affairs alone was to be conferred with powers to declare 'Sacred Areas'. If he were to declare in pursuance of an undisclosed plan calling it a National Plan for ethnic integration or such, such a plan would be obnoxious to Article 9 of the Constitution.

(6) On the other hand, had that Bill, for purposes of declaring areas as 'sacred areas' sought to confer power on, for example, the other ministers assigned with the subject of Muslim, Hindu and Christian Affairs, there would have dawned the day where the whole country would have had to be designated as a 'Sacred Area' quite apart from pointing the way for religious rights.

(7) Consequently, the Bill contains several provisions inconsistent with the Constitution and relevant Statutes, the upshot of it being, the attempted taking over possession of privately owned land without having recourse to existing legislation, a specific plan and without stating a specific purpose such as constructing a temple or the like by the mere declaration of an area of land as being a 'Sacred Area'.

*The Supreme Court Determination and the Reasons Stated Therein*

The premises on which the Supreme Court based its determination may be summarized as follows:-

(a) That, on an examination of the Contents of the Bill, although the words 'National Physical Planning Policy" and 'National Physical Planning' had been used, the purpose and objective of the Bill was used to establish a National Physical (Planning) Council in order to prepare the National Physical Plan with no mention regarding a National Policy for the subject of Town and Country Planning which therefore brought the Bill under the Reserved List of the Ninth Schedule of the Constitution (that is, a subject reserved for parliament *per se* to legislate on).

(b) That, consequently, the objective of the Bill was to deal with the subject of land for the stated purpose which in terms of item 18 List 1 of the Ninth Schedule fell within the purview of the Provincial

Council's (vide; the Provincial Council List), in regard to right in or over land, land tenure, transfer and alienation land, land use, land settlement and land improvement etc.

(c) Accordingly, having regard to the concept of devolution of power brought by the 13th Amendment of the Constitution, in as much as it was evident on the material placed on record that, the proposed Bill appearing on the Order Paper had been referred to the Provincial Council as required by Article 154 (G) (3) of the Constitution, the Court determined that, the Bill shall not become law until due compliance is first made to that effect.

*Reflections on the Supreme Court Determination*

It is to be noted that the Supreme Court, in its Determination refrained from making any determination on the other grounds challenging the Bill and the provisions contained in Articles 9, 12(1) and 10 of the Constitution. Should there be another attempt to place the said Bill before Parliament, after compliance with Article 154(G)(3) as 'advised' by the Court, still, there would be the procedural requirement that would have to be complied with in term of Article 154G(3)(b) which requires the proposed Bill to be passed by the special majority by Article 82 of the Constitution.

The ground realities and perspectives in that context and perspective are that,

(1) The government of the day presently commands that special majority in parliament to enact such Bill in to Law;

(2) But, there is no Provincial Council in the Northern Province without whose concurrence the Bill (if it was to be brought again and placed on the Order Paper of Parliament) could not have found its passage in to law in the first instance, explaining the reason why the president in the abortive Bill did not refer the same to the Provincial Councils.

(3) Assuming the Northern Provincial Council is established and its concurrence with the other council is obtained, nevertheless. (some if not all) those other constitutional grounds of challenge referred to above would remained to be determined on, which, if found to be in favor of anyone coming forward to challenge the Bill would then require not only a special majority (under Article 82) but also a referendum (under Article 83 (a)).

(4) Consequently, on a constitutional analysis, the reason why the abortive Bill (withdrawn) was not restored to the Order Paper of Parliament stands explained.

## 6. Emperical Data as revealed by Field Studies - Case Studies in the Eastern and Northern Provinces[147]

The civil war in North and East resulted in the loss of thousands of innocent lives (Sinhala, Tamil, and Muslim),brutalized communities and cased a generation of the displaced. Communities in the North and East lost legal documents relating to lands due to many reasons including;

- Loss of personal title documents to private property or lands due to document destruction, arson or looting
- Loss of institutional copy of title documents to property or land by District Registrars or Notaries due to document destruction or arson
- Loss or destruction of state held title documents due to fire or loss during transfers between government agencies (FN)

During the period of conflict between the military and the LTTE, the military established many High Security Zones (HSZs) in key strategic areas which resulted in lands been taken over without or with short notice. The largest land areas under HSZs were in the Northern and Eastern Provinces. Even those who possessed legal documents of their lands and homes that were taken over for HSZ, were not provided with legal remedies as elaborated in this report. The following segment comprises excerpts of the findings of field visits conducted by LST/CPR in the North and East during the relevant period.

### 6.1. Case Studies in the Eastern Province

The Eastern Province of Sri Lanka consists of 9,996 square 'kilometres[148] comprising three Districts Ampara, Trincomalee and Batticaloa with an approximate 1.5 million mixed population of Tamils, Muslims and Sinhalese[149]. During the conflict, many of these areas were under the control of the Liberation Tigers of Tamil Ealam (LTTE). Sri Lankan forces regained control of the land in varying stages from 2007 onwards. Most of the lands in the Eastern Province are state lands and the population comprised of descendants of the communities who had been granted lands under the colonial system. Some had been granted title or licenses/permits while others remain in possession of state lands. As the Sri Lankan military gained control over the Eastern Province in 2007, many issues emerged in relation to land entitlements overshadowing the benefits that may have come about as a result of the cessation of active fighting.

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[147] Emperical data in regard to acquisitions/evictions collected in other regions in Sri Lanka, (the Uva, Central and Southern Provinces), is contained in the comprehensive version of the Study. Due to constraints of space, the data and analysis thereto is not included in this Issue.

[148] http://en.wikipedia.org/wiki/Eastern_Province,Sri_Lanka

[149] Department of Census and Statistics, 2007

These issues remained unsolved for many years with little or no relief granted by the state authorities. Among the issues encountered are questions relating to resettlement areas where people have started to return to their original lands while some have been offered new lands. A notable feature in this regard is the role of the military in civil administration and the restrictions of movement in the High Security Zones. Moreover, even after eight years, in some areas in the East, the land issues faced by people devastated by the 2004 tsunami remain unsolved. These issues faced by people have not only caused loss of properties, but also livelihood losses resulting in many psycho-sociological effects. The following is an analysis of key issues relating to land displacement faced by the people in Ampara, Batticaloa and Trincomalee.[150]

**(1)Trincomalee District**

Trincomalee is a major port city in the Eastern Province, Sri Lanka and lies on the east coast of the island. It is located 257 km North-East of Colombo and is also the administrative capital of the Eastern Province and has a population of 99,135[151] with mixed communities of Tamils, Sinhalese and Muslims. Fishing is the main livelihood of these communities. Since the cessation of war, the Eastern province has undergone a transformation process in the lives of the communities. However, land issues in Sampoor (Establishment of HSZ)and Thiriyai (Establishment of Sacred Zone) are prominent case studies which have attracted public attention.

**A. Sampoor**

Sampoor is a traditional Tamil village in the Muthur Divisional Secretariat. It has plenty of natural resources and is strategically situated. The colloquial meaning of Sampoor is 'perfect living habitat, with all of the basic things for a good life.[152] Sampoor has 4 Grama Niladari divisions with a population of 4000 (112 families). The traditional livelihoods of the people of Sampoor are fishing, agriculture and animal husbandry. They provide grain, fish, milk and firewood to neighbouring communities and to local markets. The majority of the farmers have been mainly cultivating paddy, vegetables, corn and peanuts. The fishing community has been engaged in lagoon fishing as well as marine Fishing. Cattle

[150] The information related to the Trincomalee district was extracted from the following sources, gathered during field visits, 09-12-2012:
1. Villagers of Muthur and Sampoor
2. Divisional Secretary of Muthur (Refused to comment on Sampoor issue)
3. Assistant Commissioner General of Lands –Eastern Province
4. Assistant Divisional Secretary – Kuchchaveli
5. Villagers from Thiriyai Village
6. Discussion and consultation with Mr. Gurunathan - Retired Assistant Land Commissioner for East..

[151] http://en.wikipedia.org/wiki/Trincomalee

[152] http://www.jdslanka.org/index.php/2012-01-30-09-31-17/human-rights/171-sampoor-facts-vs-hype-on-sri-lankas-post-war-recovery

have been raised by the residents engaged in animal husbandry.[153] These people were cultivating over 3500 acres of paddy fields and there are over 600 acres of residential lands in this area.[154]

Sampoor is predominantly occupied by the Tamil community who were badly affected by the war. They have been living in these areas for many decades and for generations. The villagers of Sampoor have been displaced several times as a result of the conflict. Their final displacement was in 2006. Although hostilities ended in 2007, the people continued to be displaced and lived in transitional sites for over five years. Since 2006 Sampoor was declared a High Security Zone (HSZ) and villagers were restricted from returning, to original places by government officials and the military. It was expected that returning residing and using their respective properties were an integral part of reconciliation and that they could commence their livelihoods since the hostilities in the area ended in 2007 and with the war ending in 2009.[155]

Since then there were many attempts by villagers to resettle in their original lands. However they were prevented from doing so by the Sri Lankan Navy as they claimed that these communities had no approval to enter these locations since this area has been declared a HSZ. Today, the people of Sampoor live in permanent displacement. However, they were unable to return to their lands and rebuild their lives, despite assurances of economic development under the theme 'Eastern Reawakening', which was the main propaganda slogan of the government for the Eastern province.[156]

These people were residing in the areas of Sampoor North, Sampoor South, Navarathnapuram and Poonathivu. Ninety percent of them were living in private lands and have title deeds. The remaining 10 % had lived in state lands for many decades and the government has issued permits to them.[157] In 2007 regulations were issued under Section 5 of the Public Security Ordinance published in Gazette Extraordinary No. 1499/25 of 30th May 2007 effectively declaring the areas of land as a High Security Zone.[158]

According to official sources, the Trincomalee – Sampoor HSZ /SEZ, the biggest of the HSZs, was reduced from 110 sq. km. to 38 sq. km. by Gazette Extraordinary on 30th October, 2008. According to the Director, Planning, of the Trincomalee District, 2,717 families comprising 9,526 persons have returned to their own land, after the reduction of the HSZ. However 4,100 persons belonging to 1,272 families from within the DS Division of Muthur, Trincomalee district are still displaced, and are either living with friends and relatives or are housed in transit camps in Kiliveddy, Padiththidal, and Manalchenai. Some of them expressed reservations about the suitability of lands identified by the District authorities for their

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[153] Field Notes Sampoor 09-12-2012 Discussion with the community in IDP camps
[154] http://www.bbc.co.uk/sinhala/news/story/2009/09/090908_sampur_idps.html
[155] Field Notes Sampoor 09-12-2012 Discussion with the community in IDP camps
[156] *Id.*
[157] *Id.*
[158] Petition of FR Application No: 309 /2012

future residence.[159] The people of Sampoor are living in camps as illustrated by the following statement by a villager:

> *"The people of Sampoor are being herded in four camps at present. I like to emphasize the word 'herded.' For, there is no sanitary, water, educational or health facilities in the camps. About 1700 people have been herded at Kiriwatti camp"* [160]

The people of Sampoor were rendered helpless deprived of many of the basic necessities including shelter, clothing and food and everything that they had earned or acquired before. Residents of the area who were previously engaged in agriculture, fisheries and animal husbandry have lost their livelihood as a result of establishing a high security zone. Agricultural land and lands used by fishermen have been abandoned. Consequently, the resources providing food production have been lost which may affect the food production of the country.[161]

When affected villagers inquired from the Divisional Secretary, he responded that the decisions were taken by high-ranking government officials, and that these issues are beyond their control.[162] The Divisional Secretary said the area has been demarcated for new industries and added that people cannot return to those lands. The government has handed over this area to an Indian firm which is building a thermal power plant there. The agreement signed between the two parties clearly indicates that this zone will never be handed back to the displaced persons of Sampoor.[163]

### B. Thiriyai

Thiriyai is a small Tamil village in the Trincomalee District of Sri Lanka. It is situated in Kuchchaveli District Secretary Division, about 25 miles north of Trincomalee town. The area is known as Pallampattuva by the Tamil community. Thiriyai is among the ancient Tamil villages in the district and had over 700 families. Their livelihood was farming and they had plenty of agricultural lands. They cultivate red onions, chillies and brinjal.

Subsequently with ethnic violence reaching its peak, the Sinhala population living in that area along with the priest left the area in 1982.[164] During the conflict period families living in Thiriyai left their villages and were living in different parts of the district while some have gone overseas. Most of the remaining

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[159] Paragraph 6.37 (p.214) of the Report of the Lessons Learnt and Reconciliation Commission (LLRC) (December 2011)

[160] Lanka Views, Sunday, 15 May 2011 - Sampoor residents agitate demanding their lands given to India.

[161] Field Notes Sampoor 09-12-2012 Discussion with the community in IDP camps

[162] *Id.*

[163] http://www.lankatruth.com/english/index.php?option=com_content&view=article&id=776:sampur-lands-not-for-their-genuine-owners--government&catid=42:smartphones&Itemid=74

[164] http://www.sundayobserver.lk/2009/06/07/spc16.asp

people were Tamils. For nearly twenty years the area remained under LTTE control. During the ceasefire in 2000 several Tamil refugees returned to the village.[165]

Most of them had state permits to possess and enjoy the land and some have lost their title documents as a result of the war. This is a highly remote area with difficult lifestyles encountered by communities. However, after government forces regained control of this area, people started returning to their original lands. They have found 3000 acres of their lands which were used for agricultural purposes have been taken over by a group lead by the clergy. Although the villagers had permits for their lands, which have been issued in 1974, the government is not permitting these people to resettle in their original lands. According to villagers among reasons for preventing them from resettling are claims by the forest department to their lands. However, villagers refute these claims as they had permits issued many years ago under the Land Development Ordinance.

Another claim is the declaration of a Sacred Zone. The famous Buddhist temple Girihadu-Seya is also located close to this village. Girihadu seya is considered as the first pagoda in Sri Lanka, built by Thapassue - Balluka Merchants. It is located in Thiriyai close to the Trincomalee Pulmoddai road. It has been long regarded as a site of historical and religious importance. Due to the ancient value of Thiriyai village, a powerful group led by a Buddhist priest is attempting to establish a sacred zone in the area by acquiring land occupied and cultivated by the villagers. These villagers had lived in these lands for several decades. Although they are not private lands they had lived in these areas during their lifetime. The villagers are living in fear as they could be evicted in anytime.

*"We have been in these lands during our life time. Our parents and their forefathers also lived here. Even during the war, we lived with great difficulty. Now we hear that our lands are to be declared as sacred area and that we may have to leave. Where can we go? We have no other place to go."*[166]

*"It's OK for us, even if a sacred zone is established as long as we are not evicted. Government can acquire part of the land.. We have no place to go. Even our livelihood practices will be interrupted. How can we survive then?"* [167]

## (2) Batticaloa District

Batticaloa district has an area of 2,854 square kilometers. The district accounts for 3.8% of the country's total land area. Batticaloa District is divided into 14 Divisional Secretary (DS) Divisions and 346 Grama Niladhari Divisions. The population was 525,142 in 2012 and most of them are Sri Lankan Tamils.[168] The main livelihoods are farming and fisheries. The district has about 30,000 families engaged in agriculture

[165] Field Notes Thiriyai 09.12.2012 Discussion with villagers of Thiriyai at a community centre and discussion with Mr. Gurunathan, Retired Deputy Commissioner of Lands, Batticoloa

[166] Comment by Shivakumar, Field Notes Thiriyai 09.12.2012

[167] Comment by Nadaraja (43 year old villager), Field Notes Thiriyai 09.12.2012

[168] http://en.wikipedia.org/wiki/Batticaloa_District

and 16,300 engaged in fishing.[169] The following case studies are elicited from field trips that the CPR programme conducted in the relevant areas.[170]

### A. Pavachchikudiyena

Pavachchikudiyena is a small rural village located in the Batticaloa district. This is also known as Paduvankarai. It is situated in a thick remote area about one and half hours drive from Batticaloa town and was fully controlled by the LTTE earlier. The main livelihood of the villagers was farming and cultivation and they led a simple life. Prior to the conflict, all ethnic communities of Sinhalese, Muslims and Tamils were living in this village in close harmony.[171] However, with the escalation of violence and frequent attacks by the LTTE, Muslims and Sinhala communities were compelled to leave Pavachchikudiyena and the entire area came under the control of the LTTE. Muslims and Sinhala communities moved to town areas of Batticaloa. Before they left, they sold their lands to Tamil people and left the village. However, they were neither formal transactions nor notarially executed. It was mereiy a monetary transaction.[172]

Tamil communities remaining in the village were controlled by the LTTE and there was no civil administration. Some of the villagers left their villages while others volunteered to stay. However, as the entire village was isolated from the rest of the district, these communities had to live on their basic livelihoods and with less expectations amidst the harassment by the LTTE. When the ceasefire agreement was in operation, the people who moved out of the village returned to their villages looking for their previous lands although some had already sold them to Tamil people who were living there. However, it led to a major crisis among ethnic groups in the villages and the LTTE too was influencing the villagers to prevent other ethnic groups from resettling in the area. There were many instances where the children of the Muslim communities were reclaiming these lands as they had inherited them from their parents while the Tamil people based their claim on the basis that they had paid money to their parents when they

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[169] http://www.recoverlanka.net/data/SLDF05/Batticaloa.pdf

[170] The information was extracted from the meetings that the CPR programme had with the following on 25/26-11-2012:

1. Discussion and consultation with Mr. Gurunathan - Retired Assistant Land Commissioner of East.
2. Discussion with lawyers from Kalmunei Bar. (M S.M. Razzaaq and ALM Rifas).
3. Discussion with DS Kalmunei.
4. Discussion with Land Officer of DS Ampara.
5. Discussion with communities in Walathapitiya in Amapara who have been relocated from Kalmunei after Tsunami. These were on their previous properties and non - availability of title documents for their new houses and related matters.
6. Discussion with communities in Maradamunei (Kalmunei) who are still living in refugee camps. Issues were mainly on their original properties and also on failure on the part of the DS to provide them new houses although the houses are aleady built and they remained closed.
7. Project Co- ordinator of Norwegian Refugee Council Veeresan Thiyaheswaran.
8. Discussion with President of Farmers Association in Pavachchikudiyena 200 VIL R. Mohan Sudanandan.

[171] Field Notes Pavachchikudiyena 26-11-2012. Interview with Mohan Sudanandan, President of Farmers Association, 200 VIL and discussion with Mr. Gurunathan Retired Deputy Commissioner of Lands.

[172] *Id.*

left the area. It has become a serious issue in the village as generations have changed and Muslims were reclaiming their lands which were sold by their parents.[173] With the end of the conflict, the government began awarding compensation to the occupants of the lands in order to commence their livelihood practices. However, there is a tussle between Tamils and Muslims to obtain such compensation. Some had even prepared bogus deeds to prove their title to make them eligible to claim compensation.[174]

According to the Lessons Learnt and Reconciliation Commission (LLRC), the Federation of Mosques and Muslim Institutions of Kattankudy explained that landlessness among Muslims living in areas such as Kattankudy in the Batticaloa district, is a significant problem. The LTTE compounded the problem by forcibly taking over State lands traditionally cultivated by Muslims (on permits) most of which are located in Tamil majority DS Divisions, in the Batticaloa district. The LTTE redistributed these lands, as rewards, to their cadres and sympathizers. The LLRC was informed that 58,486 acres of agricultural land belonging to about 15,000 families were thus expropriated by the LTTE. A number of witnesses informed the LLRC that some Muslims were also persuaded to sell lands for absurdly low prices to LTTE nominees under threat of violence.[175]

### C. Ampara District

Ampara district is situated about 360 km away from Colombo. The land area of Ampara district is around 4,400 km[176]. It is divided into 20 Divisional Secretary (DS) Divisions and has a population of 610,719[176]. The Majority of them are Muslims with Tamil and Sinhala inhabitants also present. The main livelihood of people living in Ampara district is agriculture, farming and fishing. After the conflict many people who were displaced returned to their original lands to restart their original life styles. Majority of the lands are state lands and comprise villages which were formed as a colony before Sri Lanka gained its independence in 1948.

#### 1. Panama

Panama is situated in the Eastern tip of Ampara surrounded by the sea and the neighboring districts of Batticaloa and Monaragala. The Panama area has several villages following traditional methods of cultivation. The main livelihood of the people living in Panama is cultivation and fishing. Sinhalese form the majority of the population with 80% and the balance 20% being Tamils and Muslims. Panama is surrounded by the villages of Shastrawela, Ragamwela and Ulpassa.

The first settlement of Panama Shasthrawela took place in the 1960's. With the increased LTTE threats in the 1990's, the Special Task Force occupied a land containing 5 acres from Shasthrawela village and

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[173] *Id.*
[174] *Id.*
[175] Paragraph 6.14 (pp. 205-206) of the Report of the Lessons Learnt and Reconciliation Commission (LLRC) (December 2011)
[176] http://en.wikipedia.org/wiki/Ampara

established a camp. Later, they extended their camp to a training base occupying over 50 acres. Considering the threat and fear of possible LTTE attacks, the villagers did not object to the establishment of camps despite the fact that they had to undergo many hardships and difficulties as a result. After the Sri Lankan military took control over the LTTE controlled areas, these communities had many hopes and much to look forward to as they expected to return to their original lands. However, these villagers were not allowed to access their native places. Their lands have been forcibly taken over by the Sri Lankan military. Their repeated attempts and requests have not been adequately addressed by the authorities for various reasons, which are sometimes in contradiction to each other as set out in this report. The communities live in frustration and fear as they are unable to confront the forces and authorities as they do not have the means and finances to challenge them legally.

The villagers in Ragamwela also faced similar experiences. These communities have been living in Ragamwela for many decades. Their livelihood was agriculture. However, after the cessation of LTTE activities they were directed by the authorities to leave their lands. Villagers refused to leave as some had valid permits while others had documentary proof to prove their possession for generations. On 17th July 2010, they were chased away by an armed group and had to escape leaving everything behind. Even women were beaten by this armed group. Despite many complaints, no justice had been meted out and they remain helpless and voiceless as little or no progress has been made during investigations over the attack. Presently, Shashthrawela and part of Ragamwela have been forcibly acquired by the military.

> *"On 17-07-2010, an armed group with guns and their faces covered in dark clothes had come in the middle of the night and attacked a group of villagers and had destroyed the houses by setting them on fire. This was not merely a physical attack. There was a threat for us to leave these places."*[177]

> *"Samudranatha temple of Shashtrawela and Valukaramaya temple of Ragamwela which we used to live and meditate in, were totally destroyed by the same gang and a Police barrier was established later in the temple premises"*[178]

> *"It was speculated that the government is going to establish a centre of international relations in Ragamwela. We have some doubts as such a project will not require 158 acres. We know that from time- to- time they come up with various reasons when they want to evict these people. But there are no such projects taking place. All what we see is military camps being set up and we are not allowed to enter these lands."*[179]

Villagers together with the chief incumbent Panama Chandrarathana had complained to police regarding the attacks and illegal evictions in Ragamwela. But the police do not entertain the complaints. Instead of

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[177] Interview with chief incumbent of Panama Temple Chandrarathana Thero, Field Notes Panama 25-11-2012

[178] *Id.*

[179] Field Notes Panama 25-11-2012 - Focus group discussion with villagers of Panama, Ragamwela and Shashthrawela , Structured Questionnaires filled by respective villagers, Interview with chief incumbent of Panama Temple Chandrarathana Thero

entering the complaints or acting on them, they have become the regulators and they refute allegations stating that the lands belong to the government and that the villagers have occupied these lands illegally without valid deeds.

But villagers claim they had valid permits and documents for lands and they were handed over to Lahugala AG office many years ago to claim compensation for destroyed cultivation by cattle. In the meantime, those documents were destroyed by an LTTE attack on the AG's office.

> *" Young farmers, Panama Mudiyanselage Bandara and Upali Abeyrathne (a retired soldier) had to run and escape into the jungle when they were attacked by an unknown gang with weapons."*[180]

> *"While my house was set on fire there were seven sacks of ground nuts, cycles, two torches and fishing equipment inside. They were totally destroyed. I have put much effort during my whole life to earn them. Now we are helpless."*[181]

> *"The aforesaid area extends from Arugam Bay to Okanda where Muslims and Sinhalese live. The evictions have started from Hada Oya which is placed in between Arugam Bay and Okanda."*[182]

> *"We were able to carry out the two occupations and maintain a good income level to live happily. But now I'm doing only labor work. Therefore we have faced lot of difficulties due to poverty."*[183]

This is the land where villagers of Ragamwela carried out their livelihoods by engaging in cultivation. The affected villagers have permits and documents pertaining variously to ownership/long possession to that land. Some had permits under the Land Development Ordinance. They face hardships as a result of the loss of the aforesaid lands. In addition lagoon fishing was threatened and fishermen are complaining of another serious problem they face. They fear losing the Panama lagoon where their livelihood for centuries has been fishing.[184] "We have been living in this lagoon. Now for a few weeks the Navy has not allowed us to come to the lagoon" says a fisherman. "Even our lands were forcefully grabbed. We were

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[180] *Id.*

[181] Somanadan (70 years old) , Field Notes Panama 25-11-2012 - Focus group discussion with villagers of Panama, Ragamwela and Shashthrawela , Structured Questionnaires filled by respective villagers

[182] Field Notes Panama 25-11-2012 - Focus group discussion with villagers of Panama, Ragamwela and Shashthrawela , Structured Questionnaires filled by respective villagers, Interview with chief incumbent of Panama Temple Chandrarathana Thero

[183] Gunawardene Hinni Nilame, Villager from Ragamwela,. Field Notes Panama 25-11-2012 - Focus group discussion with villagers of Panama, Ragamwela and Shashthrawela , Structured Questionnaires filled by respective villagers

[184] http://www.nafso-online.org/2012/01/peoples-tribunal-on-land-grabbing-and.html

beaten and chased away from our lands," he added. "They have built an electric wire surrounding our lands. All our lands were captured," said another resident.[185]

Villagers together with the chief incumbent, Panama Chandrarathana Thero have complained to the Human Rights Commission regarding the evictions. Although they had intervened, due to their limited enforcement authority, there is no progress made. Now the government has adopted a new practice by implementing various constructions in these areas and has hired villagers and youth for high salaries for construction work. The chief incumbent, Panama Chandrarathana Thero stated it is a strategic move to prevent the villagers from protesting. In the year 2007, forest conservation officers claimed that the land where the Ragamwela is located belonged to the Forest Conservation Department and tried to mark the boundaries with stones. [186] Instead of the Divisional Secretary as the regulator of the lands, it appears that the military has carried out the job of ousting these people from their villages without following due legal process. These communities were evicted from their lands and have settled down with their relatives in Panama village. The Divisional Secretary has informed the villages that the lands for these people will be given from the west side of the Panama-Pottuvil road. Having collected money for the survey which was later carried out; these people have not received their lands to date.

### 6.2. Case Studies in the Northern Province

The Northern Province comprises the Jaffna Peninsula and the Vanni, covering the districts of Jaffna, Kilinochchi, Mullaitivu, Mannar and Vavuniya. This Study would reflect an overview of land issues in the Jaffna district, which has a population of 88,138. Jaffna is Sri Lanka's 12th largest city[187] and the entire land area of the Jaffna district is 1,025 km². Prior to the civil war, it was Sri Lanka's second most populated city after the commercial capital of Colombo. The people living in Jaffna were engaged in fisheries and agriculture as their livelihood. Since 1980s, the military has occupied the Jaffna district until the end of civil war in 2009 when refugees and internally displaced people began to return to their homes. The Northern Spring known as 'Uthuru Wasanthaya' or 'Wadakkin Wasantham', planned for a mega development drive by the Government, was launched after the mass exodus of the displaced civilians. Identifying priorities was the key factor in properly implementing such a mega project. [188] However, in the process, unresolved land issues does not appear to have drawn much attention from the State.

In Jaffna, more than 95% of the lands are private lands. On the other hand, large numbers of lands are owned by people living abroad and remained idle and unoccupied or unlawfully occupied by third parties. High Security Zones in Sri Lanka evolved from buffer zones around military installations from the 1980s onwards and were first instituted in Jaffna. They were mainly set-up to protect military camps and security forces from LTTE attacks.

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[185] *Id.*
[186] *Id.*
[187] http://world-gazetteer.com/wg.php?x=&men=gcis&lng=en&des=wg&geo=127&srt=pnan&col=abcdefghinoq&msz=1500
[188] Sunday Observer of 11th July 2011

*"In a minority of cases, forest areas abutting settlements in threatened villages, although not declared HSZs, were restricted areas to civilians. One such restricted area is in Weli Oya. Due to the restrictions, some settler families were not given the full quota of land they were entitled to in the 1980s. The largest number of people who were displaced due to the establishment of HSZs are Tamil people. It is estimated that about 41 sq km of land in Jaffna came under the HSZs, at the height of the conflict"* [189]

A number of agricultural lands continue to be affected due to HSZ zones resulting in loss of livelihood of many farmers. Conducting field visits in the North is filled with difficulty due to intensive security surveillance. However, meetings with villagers confirmed that even outside the so-called High Security Zones (HSZs) the SL military has appropriated acres of land in the peninsula from civic bodies and private owners. It is a somewhat unique phenomenon that members of local government bodies have been threatened in the process. In Karainagar for example, the SL Navy has appropriated lands from the local government bodies. Other targeted areas are Point Pedro and Valikaamam North. After discussions and interviews that the CPR programme had with villagers, community based organizations and (confidential) local government officials, the issues identified related to encroachment, unclear deeds, acquisitions made without following proper guidelines for expansion of roads and development projects and limitation of free movement due to High Security Zones (HSZs).[190] The following are specific case studies detailed subject to the condition that they provide examples of the serious problems relating to land rights faced by the people of the North and on no account, can be considered to be an exhaustive account of the relevant disputes in that regard.

The issue of access to land is further heightened by caste politics and have become increasingly contentious in the context of the displaced Muslims returning to their native soil who struggle to identify their original lands and have to deal with encroachment and/or new owners as a result of their vacant land being resold prior to the final offensive. A growing anti-Muslim feeling amidst the Tamil community has also been observed which finds its roots in the clamour for resources and opportunities.[191] There is a perception among Muslims in the Northern Province that people and Government officers in the North do not welcome the return of Muslims. After all, the North has been a mono-ethnic place for twenty years and integration may take longer than many Muslims anticipated. Some speak of how when they return (to

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[189] Paragraph 6.12 (p. 205) of the Report of the Lessons Learnt and Reconciliation Commission (LLRC) (December 2011)

[190] Field Notes, Northern Province, 04-12-2012. The information was extracted from the following sources who are not named on their specific request.

1. A Senior official from the Registrar General's Department, Northern Province
2. Villagers of Maathagal
3. Villagers of Koddady
4. Retired Magistrate
5. NRC – Coordinator
6. Villagers of Poompur
7. Villagers of Karainagar
8. Lawyer from Jaffna

[191] Caste and Social Exclusion of IDPs in Jaffna Society1 Paramsothy Thanges, Department of Sociology, University of Colombo, Sri Lanka

Jaffna), some Tamil neighbours ask them, "why did you come?" According to Muslims in the Northern Province, the State must assist, and facilitate Muslims to return "in order to ensure that the ethnic cleansing that occurred in 1990 is overturned."[192]

## A. Maathagal

Maathagal is a village in Valikaamam divisional secretariat in Jaffna district located 16 km away from Jaffna town, in the north of Sri Lanka. It is surrounded by the villages of Pandatharippu, Sillalai and Senthankulam. Maathagal with its natural surroundings of the paddy fields, sea, and palmyrah trees, along with the coconut farms and has plenty of natural vegetation.

The communities in Maathagal area have been displaced for the last 20 years. Most of their homes were destroyed as a result of the fighting as they were compelled to leave their native lands due to heavy shelling and gunfire. In 1992, this area was declared a High Security Zone (HSZ). Since then the people who have been living there for decades were prevented from entering the area. The lands reserved as HSZ belonged to private owners in Maathagal. This is the single largest HSZ in Jaffna and is also referred to as Tellipallai/Valikammam HSZ which covers 43 GS divisions in several DS divisions including Tellipallai, Chankanai, Sandilipay, Uduvil and Kopay. Tellipallai was the most affected DS division in Jaffna when the Mathaagal HSZ was established.

There were some concerns whether the due legal process had been followed in establishing HSZ's.[193] After the cessation of war in 2009, there were many expectations and hope on the part of the people that they would be able to return to their own native places to experience peace and prosperity and also that their own lands will be restored to them. However, after the military victory of the government, the people have not been able to move to their original lands. The right of free movement and access to their own properties has been denied to them even after the war. The livelihood of the communities in the coastal stretch between Ponnalai and Maathagal were fishing and this particular area is within the HSZ. As a result, their day –to- day activities were totally restricted for several years. However, recently this situation changed as a powerful minister in the area invited them to return to their lands.

Logesh is a young boy who lives in Maathagal. He was born in 1986. He is the youngest in his family with his brother and sister. His father, Thangaiya, was the sole breadwinner of the family and was managing their small income. In 1992, as a result of the escalation of violence, they had to leave their home and land with their belongings and were living in a small hut built in a rural area of the Vanni district.

[192] Paragraph 6.21 (p. 208) of the Report of the Lessons Learnt and Reconciliation Commission (LLRC) (December 2011)

[193] There are no publicly available gazettes setting out the boundaries and applicable restrictions for HSZs in the North. Instead, it appears that through the broad powers of the Emergency Regulations, restrictions were enforced to prevent civilian access and establish de facto HSZs.

*"I'm 26 years now. Although this is our ancestral land, I lived in Maathagal only for six years. We were harassed alot during that time. Although my sister, brother and I were of school going age, we couldn't go to school. I have never been to school. My childhood was a nightmare for me. When I was six, I can remember how we left the village, leaving our valuables. Thereafter we were living in a temporary hut for ten years. Even after the dawn of peace three years ago, we were not allowed to come back to our houses. Very recently, we were asked to come back to our lands by a minister in this area. I am happy to be back in my native place after 20 years. Now I am 26- years- old and want to start a new life"* [194]

There was no initiative or plans for a resettlement scheme for villagers of Maathagal. Some of the displaced people of Maathagal have gone abroad while they were living with their relatives. Others had lived in temporary shelters for the past 10 years. These villagers were not formally informed about the establishment of HZS even after the end of war. Therefore, they were trying to access their home and lands several times and the military had prevented them from doing so. It is the duty of the local government authorities and the divisional secretary to help them settle into their communities.

One commentary phrased the dispute in this manner;

> *"The Sri Lankan Navy in Valikaamam West near Thiruvadinilai has acquired 100 acres of land belonging to a private owner in order to build a Navy Camp. The Navy in Maathagal have acquired lands forcefully in three Grama Niladari Divisions (J/150, J/151, J/152), blatantly violating the rights of 258 families who owned the lands. Despite the fact that the people have demonstrated their will to return to their native areas by making repeated appeals to the government officials, no decision has been made to grant them their lands".* [195]

Further, it was observed separately that;

> *"Residents living within the Valikamam North High Security Zone held a protest today demanding that permission be given to resettle in their original lands. They started their procession from Durgai Amman Temple Tellippalai. They had planned to go to the Divisional Secretariat but Police stopped the procession."* [196]

These people were displaced from their original lands in 1992. During the post war period, the government attempted to force the people to sell their lands to outsiders but villagers refused to do so. Although these people requested to settle in their original lands, their resettlement process was delayed for many years. De-mining was one of the main reasons given for the delay. People were forced to keep away from these areas as they tried to enter this area and the military had verbally replied to villagers that

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[194] Field Notes, Maathagal 05-12-2012. Discussion with the community.

[195] http://www.jdslanka.org/index.php/2012-01-30-09-31-17/politics-a-economy/136-sri-lanka-militarizing-the-land-and-terrorizing-the-mind

[196] http://www.sundaytimes.lk/index.php?option=com_content&id=20594:protest-in-jaffna-over-land-issue, Sunday Times of 19 June 2012

landmines are planted in the proposed HSZ even after the de-mining programmes were concluded. These people allege that they were not allowed to enter areas even outside the HSZs.

The largest number of people who were displaced due to the establishment of HSZs are Tamil people. It is estimated that about 41 sq km of land in Jaffna came under the HSZs, at the height of the conflict and some have had to forego their ancestral land - a traumatic experience. [197]

The villagers of Mathathagal have however been promised by a government minister that they will be resettled in the near future Yet, these promises seem to be of little use. When establishing HSZs, security concerns override interests of the general public. Sometimes, political interests influence the acquisition of lands for the purpose of their utilization. Practically, the procedures in the Land Acquisition Act are not followed in certain cases. On the other hand, a gazette notification is also not effected.

### B. Koddady

Approximately 5% of the land belongs to the State in Koddady. People have been given lands 35 years ago with the permission of the DS office. There was a housing scheme in Koddady, which was constructed in 1973 by the Sri Lankan government. In 1986, 29 families of Koddady were settled there. In 1995, they had to leave their belongings. Since then the military has been controlling those lands. Most of the houses were destroyed due to the war and the military had established HSZ within that area. In 2010, the HSZ was removed and people began to return to their lands. Although everything was destroyed by war, villagers were very keen on rebuilding their lives as they were able to return to their original places. As in any other village, there were many expectations from the villagers of Koddady and the villagers were enthusiastically engaged in upgrading their lives. Suddenly, they were agitated with the announcement of local government authorities.

> *"Military people came to our houses and warned us to vacate. We were so helpless and scared. But we all agreed to continue to stay."*[198]

Since 2010, the villagers of Koddady have been asked to vacate their houses thrice. Further, they have been promised to be compensated.

> *"As we did not vacate during the last two years, recently a minister came with a group of officers and asked us to vacate all of a sudden. Further, he insisted that if we do not give our lands this time we would not be compensated And we will never be provided with any assistance."*[199]

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[197] Paragraph 6.12 (p. 205) of the Report of the Lessons Learnt and Reconciliation Commission (LLRC) (December 2011)

[198] Comments by Santhiran, a villager of Koddady, 06-12-2012

[199] Discussions at Kodaddy, Field Notes, 06-12-2012.

Ultimately, they had to vacate those lands on the 28th of November 2012. They are yet to be compensated or given alternative lands although they had valid deeds to prove their ownership. Villagers were aware that they have a right to challenge illegal eviction. However, they believe that the Minister will find an alternative land as the Minister had informed the villagers that he is the only person who has the power to control everything in that area. So the villagers expressed hope and expectations that the Minister will intervene on their behalf. They were of the view that since they are powerless to fight the government, it is better to obtain the Minister's support and receive compensation by obeying him.[200]

### C. Poompur

Poompur is a remote village located in the Nallur DS division about 10km away from Jaffna town. It is near the Punarine camp. Villagers have been living here for 35 years. Some have valid permits while others have proof of payment to local authorities and it was their native place. Most of the villagers were engaged in cultivation and manual work as a means of livelihood. In October 1995, they had to leave the village due to the war. They had to move to Jaffna town, Vavuniya and the Vanni. Some had lived in camps and some had lived in their relatives' places.[201]

Once the war was over, villagers were seeking restoration of their lands. But they could not access their lands as the HSZ was not removed even after the war was over. Displaced people continued to live in camps and relative's places until 2011. They were invited to their home and lands by a minister of the particular area. As the resettlements were in progress, housing schemes were being built in the neighboring villages. But as they had no legal documents to prove the ownership of lands, they were desperate. The loss and destruction of documentation suffered by both the owners and relevant state actors is a key problem. Proper documentation is critical to prove both ownership and control of land. If a person does not have a legally valid document, their ownership can be challenged. Ownership of the relevant property is often a requirement for most housing assistance programmes. The need to prove ownership is a key pre condition to access housing in many permanent housing projects. [202] The inability of displaced persons to possess the required documentation and the consequent plight that they face is a recurring theme in this exercise.

## 7. CONCLUSION AND RECOMMENDATIONS

In this paper, pertinent decisions of the courts of law in Sri Lanka (such as the *Manel Fernando Case*)[203] were looked into, wherein the disclosure of the nature of public purpose and the justiciability of the decision of the State in acquiring land for a public purpose was questioned. The *Heather Terese Mundy Case*.[204] was analyzed in- depth for its expansion of the jurisprudence in the field through its propagation

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[200] *Id.*

[201] Discussions at Poompur, Field Notes, 07-12-2012.

[202] Discussions at Poompur, Field Notes, 07-121-2012.

[203] 2000(1) SLR 112

[204] *Heather Mundy v. Central Environmental Authority and Others* SC Appeal 58/03, SC Minutes of 20.01.2004. SC Appeal 58/2003.

of the public trust doctrine and for the Supreme Court's unique position in deciding a question of rights on appeal.

In *the Mundy Case*[205], the Supreme Court limited itself to either granting relief or dismissing the petition, there are no concrete due process requirements in the jurisprudence today. This has been the grievance in regard to several countries. We have observed this in the case of India and Nepal. Even in Malaysia, there has been a practice of acquisitions being conducted on an *ad hoc* basis because the wording of the legislation is too wide.[206] However, the rights of those whose lands are acquired can be protected if compensation offers are made to landowners prior to the acquisition taking place. This has been the case in Australia.[207] Such provisions should be considered in Sri Lanka as well as recommended below

The issue of whether due process must be followed in land acquisition procedures must be determined in the affirmative at the earliest. This will resolve important issues concerning when acquisition is permissible, whether the discretion of the relevant officer in determining public purpose is justiciable and in ensuring timely and adequate compensation for those most deeply affected by the acquisition. In addition, as has been pointed out in India, it is necessary to develop principles for arriving at a suitable procedure of calculating compensation. In Indian jurisprudence, several problems have been identified with utilising market price as the basis of calculation. It is important for this issue to be debated in the Sri Lankan context as well.

Beginning with the Land Resumption Ordinance of 1887, the State Landmarks Ordinance of 1909 preceded by the Definition of Boundaries Ordinance of 1844 and the Land Surveys Ordinance of 1866, leading to the State Land (Claims) Ordinance in 1931 culminating in an amendment to the Land Resumption Ordinance in the year 1955, shows a clear legislative philosophy in addressing the question of those persons to whom state land had been alienated but who had abandoned them for whatever reason over the years. Consequent to the North – East war, the problem of those who had left (abandoned) their lands needs no further mention. The problem needs to be addressed with a genuine commitment towards finding a solution thereto.

**General Concluding Reflections**

Granted, the laws impacting on the land rights of individuals are presently governed by statues dating back more than a 1 ½ century, and therefore perhaps could be described as archaic. Nevertheless, the legal regime as constituted by the existing legal framework still carries potential, with appropriate

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[205] *Id.*

[206] *Land Grab, Malaysian Style* [online] Available at: http://www.freemalaysiatoday.com/category/opinion/2012/10/06/land-grab-malaysian-style/ [Accessed on 13 January 2013].

[207] *Chapter 6 – Acquisition and Compensation* [online] Available at: http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0003/41277/Chapter_6_-_Acquisition.pdf [Accessed on 13 January 2013].

modifications and/or amendments to cater for those who have lost their lands in the post – war conflict as suggested earlier in this part of the paper.

a) The LLRC has come and gone. A National Land Commission, which undoubtedly will result in further delays and may not be the ideal solution to address the problem.
b) Rather, looking at the statutory functionaries vested with power in the context of the problem, it would be more expedient, to constitute an *ad hoc* committee on the initiative of the minister of lands or better, at the aegis of the president himself, comprising the divisional secretaries, the Provincial Land Commissioners and the surveyor general to entertain and inquire into claims of those who have lost (or abandoned) their lands in consequence of the 30 year old war situation.
c) Such inquiries should be conducted sans upon the insistence of deeds or other comparable instruments or documents in the nature of primary evidence. Secondary evidence must suffice given the background to the problem as articulated earlier in this paper as constituting Prima facie proof of claims in question unless, there are rival claims *inter se* in which event, after inquiry, the said committee could be advised to refer the matter to the courts for resolution.
d) In conclusion, therefore, these reflections and concerns show the need for special legislation perhaps in the form of and titled a Land Resumption (Special Provisions) statute, taking in the several aspects surfacing, being out of step with the existing provisions of the Land Resumption Ordinance itself read with the State Landmarks Ordinance, the Definition of Boundaries Ordinance, the Land Survey Ordinance and the State Lands (Claims) Ordinance.

It is consequently recommended that, a special law be enacted consolidating the said enactments for which purpose, strong, public awareness initiatives be taken by civil society groups in the public interest to prevail upon the government to do so.

**Proposed Amendments to the Constitutional and Statutory Regime**

*Amendments to the Constitution*

It is proposed that the below be included as components of a new fundamental right in the Constitution;

1) Every citizen has a right to own property alone or in association with others. Everyone has the right to own property alone as well as in association with others.

2) Any person shall not be arbitrarily deprived of the person's property except as permitted by law for a public purpose or in the public interest and subject to the payment of fair compensation secured before eviction of an individual from the land

3) The State must take appropriate and reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

4) No person shall be evicted from the person's property except as by permitted by law. No legislation may permit arbitrary evictions from property.

*Amendments to Statutes*

**1. Imperatives for Rehabilitation and Resettlement in the former conflict areas**

In view of the fact that thousands of people in the North and East had been compelled to abandon lands earlier possessed by them owing to the war situation and who are now desirous of resuming their possession that special pro – active legislation is enacted on account of present provisions of the Land Resumption Ordinance, the Forest Ordinance and other allied statutes which appear to stand in their way (as analysed in this Study). added to the fact that, new parties are now found to have gained possession or occupation of the said lands condoned by State Authorities. Those displaced thousands have lost whatever documents they may have had earlier in their possession. They must be allowed to establish their earlier possession prior to abandonment by other extrinsic evidence such as through *Grama Sevekas'* records, registers of residence, in the absence of which even by oral evidence, acceptable to a court in the event of litigation. Appropriate provisions must be made in such proposed special legislation to that effect.

It is recommended that, in keeping with the Supreme Court ruling in *Senanayake v. Damunupola*[208], the Prescription Ordinance be amended. Section 3 of the State Lands (Recovery of Possession) Act, No:7 of 1979 (as amended by Act No: 29 of 1983) be further amended taking in the terms contained *in the Supreme Court decision* in *Karunawathie Jayamaha v. JEDB et al.*.[209]

**2. Requirement of Public Purpose**

The Land Acquisition Act as it presently stands could pave the way for abuse of power[210] due to the fact that until recently the Appellate Courts have been consistently holding that, whether it be under Section 2, Section 4 or Section 5, the "Public Purpose" referred to in those sections cannot be the subject of judicial review. In other words the Minister's ipse dixit was to be accepted as being in the area of policy and therefore not questionable with the further judicial view that "Public Purpose" could change at any time with the consequential judicial acceptance that, though acquired for purpose A, the land could in fact be utilized for purpose B

While in a context where there is no constitutional guarantee of the right to property, the said judicial attitude *per se* might have been defensible, but where sovereignty is declared as residing in the citizen under the present Constitution of Sri Lanka[18d] read with the right to equality[211] which in its wake implies

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[208] 1982 (2) SLR 621
[209] 2003 (1) ALR 10 .
[210] *Ratwatte v. Minister of Lands* (72 NLR 60) per the observations of Samarawickrema J
[211] Article 12 of the Constitution.

non-arbitrariness and the Rule of Law[212], a more "due process" oriented judicial response became the need of the times. The following amendments are suggested consequentially. The requisite notices under the Land Acquisition Act must state the public purpose and it shall be no defence for the Minister to plead that, connected correspondence may reveal the purpose of acquisition. Payment of compensation must be made a condition precedent to the state taking over possession of any land whether in pursuance of a 38(a) proviso notice or otherwise.

Even at the stage of the publication of a Section 2 notice, if a particular land has been identified as being required for a public purpose which would then make such notice, in effect, a Section 4 notice, an affected person shall not be precluded from invoking the jurisdiction of the appropriate Court to have the same annulled through an appropriate remedy on appropriate grounds. Even in a case of a need of taking over possession on the ground of urgency, the term of Section 12(2),(3) and (4) of the Ordinance of 1876 should be incorporated by way of amendment to the present Land Acquisition Act 1950 (as amended).

Given the fact that the Court of Appeal, has, within the framework of the provisions of the Lanc Acquisition Act, gone on the form of a Section 2 notice *per se* in holding that." The direction of the Minister under Section 2 or the act of the acquiring officer under this Section is not a decision affecting the rights of a person "[213] (which if one stops there) with the highest respect the proposition would be beyond complaint. However, legislative intervention is imperative to address the apparent contradiction in issuing a Section 2 notice in form but which amounts to a Section 4 notice. As observed in *Bandula v Almeida and Others*[214] once a Section 2 notice under the Land Acquisition Act is published in respect of a particular person " It was always possible for the State to acquire the land immediately utilizing the proviso to section 38. Given the conflicting nature of the judicial precedents as would be apparent, it is imperative that, the legislature intervenes to resolve the same by amending the Land Acquisition Act.

> Suggested Amendment - A provision after Section 4A in the following terms viz: " Notwithstanding the preceding Sections, whenever a notice under Section 2 is issued identifying a particular land belonging to a particular person it shall be deemed to be a notice under Section 4," may suffice to resolve the issue.

In the absence of such a provision, an affected person would either have to wait until a Section 5 notice or as it usually happens a Section 38 (a) proviso notice is issued, to challenge a proposed acquisition. This is all the more imperative given the fact that, at a future date, our appellate Courts could well hold that, though in form a notice purports to be a Section 2 notice, but in effect being a Section 4 notice, (and therefore property rights being affected), the affected party had delayed in invoking the jurisdiction of the court in challenging the proposed acquisition.

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[212] *Premachandra v. Jayawickrema* (1994 ) 2 SLR 90
[213] At page 5 of the judgment, ibid
[214] [1995] 1 SLR 309

## 3. Payment of Compensation for Expropriated Land

*Need for Amendment of Section 7*

At present, the relevant date for the computation of compensation payable under and in terms of the provisions of the Land Acquisition Act[215] cumulatively work out as being the date on which the government valuer makes his valuation. In the meantime, the owner of the land (and other persons interested) are made to state not only the nature of his/her interests but also the particulars of his/her claim for compensation the amount of compensation and the details of the computation of such amount."[216]

The award of the acquiring officer follows thereafter at the conclusion of the inquiry conducted by him.[217] In order to provide the said particulars and details, the landowner (and other persons interested) would have to incur considerable expense in procuring the services of valuers and lawyers in the said exercise of having to value his property, whereas, it may well be that, at least in some cases, the property owner may be satisfied with the government valuation, particularly those property owners who may fall into the less financially affluent category. In such cases unnecessary expenses as articulated above could be obviated if the acquiring officer is made to obtain the government valuation prior to the inquiry contemplated by Section 9 and indicate the offer of compensation in the Section 7 notice Itself.

The procedure contained in the Act for objections, inquiry and then the appeal to the Board of Review[218] followed by further appeal to the Court of Appeal[219] and to the Supreme Court therefrom as provided by the Constitution of Sri Lanka[220] would be meaningful only to those persons dissatisfied with the award of the acquiring officer[221], which, given the procedure adopted by him/her, is invariably the government valuation, reducing his/her inquiry to look into the market value of the land to a mere farce, a fact judicially noted and commented upon in no uncertain terms.[222]

For these reasons Section 7 of Land Acquisition Act needs immediate amendment in requiring the acquiring officer to obtain the government valuation prior to the Section 9 inquiry and to indicate in the Section 7 notice, the quantum offered as compensation.[33a]

*Relevant date in regard to the assessment of Compensation*

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[215] Section 9 read with Section 17
[216] Section 7
[217] Section 9
[218] Section 22
[219] Section 28
[220] Article 28
[221] Section 17
[222] See Weeramantry J. In *Suriyabandara v. Defransz*(73 NLR 134) and Sirimanne J. in *Gunasekera v.A.G.A. Kurunegala* (73 NLR 263)
[33a] See Further Report on Land Acquisitions of the Law Commission of Sri Lanka (1980) by M.D.H. Fernando (Commissioner, as he then was, later Supreme Court Judge)

Although neither title nor possession passes to the State as at the date of the Section 7 notice, the cumulative effect of the several provisions in the Act[223] reveals that, the assessment of compensation is with reference to the said notice but the award itself[224] is made only after the order for taking possession of the land is made[225] when the land would vest in the State, with the consequence that the quantum of compensation the owner receives for his land would be less than at the time he actually loses title to it.

Perhaps, this reveals the reason why the State more often than not resorts to the provisions contained in the Act to take over immediate possession of land on the ground of urgency[226]which has been judicially upheld[227], although the Supreme Court in that case noted the shortcomings in the working of the administrative machinery of the State in the context of Land Acquisitions in general. Consequently, it is imperative that a *via media* be struck, given the state of affairs which the existing Act paves the way for, which may impact negatively on the rights of property owners.

It is imperative that the existing Act be amended providing for the assessment of compensation with reference to the date on which the owner of the land is divested of his title given also the fact that, as the Act presently provides, once a notice is issued in terms of Section 2 or Section 4, his/her right to deal with the property stands encumbered. [228]

*Date on which payment of compensation takes place*

Quite apart from the aspects highlighted above, payment itself of any compensation could take place only after the inquiry held under Section 9 by the acquiring officer, quite apart from a possible reference to the District Court where the title of the claimant of the land Section 4A is disputed[229] followed by an appeal to the Court of Appeal therefrom[230] and a further appeal to the Supreme Court after obtaining leave.[231] This would be independent of an appeal to the Board of Review, (where there is no dispute in regard to the title of the owner of the land), [232] and thereafter further appeals to the Court of Appeal[233] and to the Supreme Court.[234] During this period, the owner of the land is prevented from dealing with his property.

The several provisions of the Land Acquisition Act as they are presently structured would, in addition, disentitle him from invoking the appellate procedure in the latter context highlighted above although

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[223] Section 7 read with Sections 9 and 17 particularly section 45 (1)
[224] Section 17
[225] Section 38
[226] Proviso (a) to Section 38
[227] *Fernandopullle v. Minister of Lands and Agriculture* 79 (II) NLR (SC)
[228] Section 4A
[229] Section 10 read with section 628 of the Civil Procedure Code which provides for interpleader actions.
[230] Section 14
[231] Article 128 of the Constitution of Sri Lanka
[232] Section 22 of the Land Acquisition Act
[233] Section 28 of the Act
[234] Article 128 of the Constitution of Sri Lanka

under Article 140 of the Constitution, through the jurisdiction vested in the Court of Appeal to grant "orders in the nature of writs " the same is being presently tested.[235]

Given these provisions, contained as they are in the Land Acquisition Act as it presently exists, it is necessary from a socio-economic perspective, (bearing in mind that the expropriated land may sometimes be the only land owned by the affected person, sometimes with his or her residing house thereon),[236] that compensation must be paid to a statutorily provided fund upon the publication of a notice under Section 2 or Section 4 with adequate provisions for interest to be accrued thereon which the landowner would be entitled to receive in the event of any challenge on his part to pending acquisition of his land in court fails and in any event, if the landowner has been made to relinquish possession under Section 38 proviso (a) to the Act.

*The Concept of Market Value*

Section 45 (1) of the Land Acquisition Act provides thus:

> "for the purposes of this Act, the market value of a land in respect of which a notice under Section 7 has been published shall, subject as hereinafter provided, be the amount which the land might be expected to have realised if sold by a willing seller in the open market as a separate entity on the date of publication of that notice in the gazette....."

*Willing Seller*

As noted above, the moment that a Section 2 or a Section 4 notice is issued, the owner of the land which is sought to be acquired is prevented from dealing with his/her property.[237] Being mindful of the fact that his/her land is sought to be acquired, the owner would be sanguine of selling this land as an unencumbered property, but would be prevented from doing the same for the lack of a willing buyer as well. It is only then that, the reference to "the open market" could be regarded as being realistic. Is it conceivable that, there would be a willing buyer of a land that is imminently in danger of being acquired by the state? This makes the present Section 45 (1) a mockery and even could very well influence the government valuer in his valuation, although he is ideally required to take into account comparable contemporaneous sales[238]. As articulated earlier, this exposes the provisions in the present Act relating to the date of payment of compensation.

Thus, it is imperative that, Section 45 (1) and consequentially Section 46 be amended to bring into the concept of market value, the dual elements of "willing seller and a willing buyer" regarding the land as

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[235] *Vide* CA/969/99 and the interim orders issued by the Court of Appeal

[236] *Heather Mundy v CEA and Others* (SC/58/03 –S.C Minutes, 20-01-2004).

[237] Section 4A

[238] See *Public Trustee v.Rajaratnam* (75 NLR 391)

"being unencumbered " at the time the government valuation is made subject to the other considerations highlighted above.

**Reflections on *Stevens v. Munasinghe*[239]**

It would be pertinent at this point to recall the judicial reasoning in a pre – 1950 Supreme Court decision on the determination of the concept of "market value" In that case, it was held that, where it is claimed that the market value of a land acquired by the (State) should be determined by the best use to which it could be put (but) there must be evidence to that effect, that, there would be a demand for the land when put to such use having regard to its nature and situation.

Two important issues warrant reflection arising from the said decision (viz:) –

1) The entitlement of the land owner to demand enhanced payment for compensation for the land he/she is going to be deprived of on the basis that, he/she could have put into better use having regard to the nature and situation of the land, though, not put to such use at the time of the acquisition by the state.

2) Procedurally, such a landowner would be required to place evidence to the said effect as envisaged in (1) above.

**Need for Amendment to the Land Acquisition Act**

There is a need to amend the Land Acquisition Act as it presently stands incorporating therein the elements articulated in concerns (1) and (2) above.

*Concepts of Severance and Injurious Affection*

The compensation package offered to an owner of expropriated land finds expression in Section 46 of the Land Acquisition Act and comprise *inter alia* (a) the market value of the land[240] (b)compensation for any damage sustained by reason of the severance of the land from his other land[241] and (c) compensation for any damage sustained by reason of acquisition of the land injuriously affecting , in any manner, other than (b) , his adjoining land or any immovable property thereon.[242] Thus, a clear distinction is drawn between compensation payable for severance from any land (in effect) held with the land acquired whether that land was adjoining or not and compensation for injurious affection being payable only if the land acquired was a land adjoining the acquired land.

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[239] 42 NLR 446 (1941)
[240] Section 46 (1) (a)
[241] Section 46 (1) (i)
[242] Section 46 (1) (ii)

The rationale for drawing such a distinction is not clear.[243] In any event, if a landowner's other land could be shown to have been affected on account of his now State acquired land "in any manner."[244] such as his bargaining power to avail himself of bank loans or other credit facilities or investments that he had been contemplating on account of his ownership of all the lands prior to the acquisition, would not his other land, whether adjoining the acquired land or not, be injuriously affected?

Such possibilities or contingencies would stand covered in the English Land Clauses Consolidation Act.[245] by its reference to "other land" in the context of both the concept of "severance" and "injurious affection" without drawing any distinction between them which the Land Acquisition Act of Sri Lanka has departed from.

The said English Act gives expression to the "unit of ownership" held by a land owner with all lands owned by him as a whole which would carry the potential of commanding his bargaining power, whether it be in regard to credit assurances ,investment making ability or as security for bank loans. It is that bargaining power which he stands to lose on account of the acquisition by the state of a particular land whether his "other land" is adjoining to it or not.[246] The Land Acquisition Act demonstrably fails to take in the scope and content of the concept of "injurious affection."[247]

Accordingly, Section 46 (1) (ii) needs to be amended by deleting the words "other than that mentioned in Paragraph (i), his adjoining land" and substituting therefor immediately after the words "in any manner" appearing in the said provision the words "his other land" which in the result, to read as follows , *viz*:

> "Compensation for any damage sustained by reason of the acquisition of the land injuriously affecting in any manner his other land or any immovable property thereon.. ....."

Section 48(e) of the Act be amended adding a proviso in the following terms:-

> "provided that, if it can be shown that, the acquisition was motivated by an expected increase in the value of the land as a result of development of any adjoining land that fact shall be taken in to consideration in determining such

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[243] See the reasoning of M.D.H.Fernando (Law Commissioner (1980), later Supreme Court Justice) in the observations on the Report submitted to the Law Commission of Sri Lanka on Land Acquisitions.

[244] As envisaged by section 46 (1) (ii) it self

[245] See Section 7 of the English Land Clauses Consolidation Act , 1845

[246] See the English cases of *Hold v. Gas Light & Coke Co.* (1872 ) (LR (QB) 728 and *Cowper Essex v. Action Local Board* (1889 ) 14 A.C. 153

[247] *Cf:* and *Contra* the first Land Acquisition Statute of Sri Lanka, *viz:* Ordinance No.3 of 1876 which appears to have struck a more meaningful chord with the said concepts, presumably deriving inspiration from the English Land Clauses Act of 1845.

compensation which shall however not annul the acquisition *per se.*"

Finally, it may be suggested that the provisions of Section 38 of the 1876 Ordinance be incorporated in cases where possession is taken over on the grounds of urgency with appropriate modifications to the percentage and interest rates referred to therein.

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