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CONTENTS

EDITORIAL

Land and Space: Law, Politics and the Human Cost.....	02
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ARTICLES

A Failing Search for Justice, Fairness and Equity in Eminent Domain Deanne Uyangoda, Ermiza Tegal and Iromi Perera.....	04
Interrogating National Development: A Critical Geographical Perspective Nalani Hennayake.....	14
Land Rights and Reparations in Sri Lanka: Influencing the Reform Agenda Bhavani Fonseka.....	27
Land Bank :The Government's Guise in Setting the Stage for Large Scale Land Grabs <i>Development over dispossession -farmers, fisher folk, rural communities and the urban poor at risk</i> The Peoples' Allance for Right to Land (PARL) - February 2017.....	34
Mega Development Projects in the Light of (Principles of) Administrative Justice Nillasi Liyanage and Sindhu Ratnarajan.....	38
Re-Assessing Maya's Queer Politics: A Response to Ibrahim & Kuru-Utumpala Andi Schubert.....	49

Land and Space: Law, Politics and the Human Cost

Land is inescapably intertwined with nearly all aspects of Sri Lankan life – political, economic, developmental and cultural, and the State owns between 70-80 percent of land. Additionally, the Land Acquisition Act enables the State to acquire further land for what is deemed a ‘public purpose’. This has led to a tendency for land to haphazardly fall prey to political, economic and development agendas of the ruling regime of the time. Examples include the Port City Project of the Rajapakse government, numerous areas of land being declared as ‘High Security Zones’ during the war, and the Land Reform Law as far back as 1972, which sought to establish a Commission to fix a ceiling on the extent of agricultural land that may be owned by individuals in keeping with the political and economic philosophy of the Government of the day.

Land has also become a central issue in the present Government’s attempts at development and economic reforms. Serious concerns have been expressed however, concerning some of these initiatives which threaten to sacrifice the rights of Sri Lanka’s poorest and most vulnerable communities for the cause of economic ‘development’. Discussing the rapid urban development projects in Colombo and the status of urban evictees, Iromi Perera, Ermiza Tegal and Deanne Uyangoda highlight how the concept of eminent domain privileges the power of the State over land, and is predisposed against concepts of justice, fairness and equity. Whether it be urban evictees or war affected communities agitating for the right to return to their lands, the authors point out similarities in the ‘framework that displaces and excludes these claims before they can be made.’

They point out that despite the change in government, there appears to be no change in the approach of the State to land acquisition and evictions. In the student contribution in this Issue, undergraduates Nillasi Liyanage and Sindhu Ratnarajan discuss the Western Region Megapolis Planning Project and highlight the importance of adhering to principles of administrative law, particularly of projects of such magnitude, to ensure that citizens are not adversely affected.

Discussing how a critical geography perspective could shape our understanding and view of ‘development’ projects, Dr. Nalani Hennayake calls for more critical geographical scholarly engagement that challenges dominant representations that otherwise ignore the lived realities and experiences of those directly affected by such projects. Discussing socio-political and environmental impacts of the Southern Development Project, the Uma Oya Project and the (re)settlements in Wilpattu National Park, Dr. Hennayake questions why it is always the poor who have to forego their rights for ‘development’, and questions who will take responsibility for their plight.

The People’s Alliance for Right to Land (PARL) reflect on the Government’s proposal in the 2017 budget of establishing a Land Bank. The position paper discusses major concerns of this initiative, primarily that it would set the stage for large scale land grabs leading to the dispossession of farmers, fisherfolk, rural communities and the urban poor.

In her article Bhavani Fonseka discusses the concept of land reparations in light of Sri Lanka’s

transitional justice commitments, and highlights the importance of addressing these issues in the context of the Government's promises of reforms on devolution of power and human rights protection. The delay in releasing lands occupied by the military, whether in Paanama or Keppapilavu, is a significant factor in the growing disillusionment and disappointment in the present government, particularly in the North of the country, and does not bode well for reconciliation.

While this Issue has focused predominantly on land, housing and livelihoods, the critical link to natural resources and the environment should also be noted. As suggested by PARL in their position paper, one way to avoid arbitrary use of land could be to introduce a national land use policy that takes into consideration the plethora of land laws in use in Sri Lanka today, and the far reaching role land plays in Sri Lanka's political, economic, development, environmental and cultural life. Given that the government's use and treatment of 'land' as a political and economic commodity will have a bearing not only on the government's future but also the country's, a land use policy could ensure that land does not fall prey to short term political agendas. Most importantly such a policy must ensure that poor and otherwise vulnerable communities are safeguarded from being unfairly victimized in land use. Challenges to the use and ownership over land as a result of events such as the decades long war and the tsunami of 2004 should also be given due consideration when creating such a policy.

A policy on land use will by no means be the panacea for Sri Lanka's challenges concerning this. With limited land resources, it is of course inevitable that some needs will be prioritized over others when it comes to the use of land. A policy will, however, ensure some degree of certainty and coherence concerning use and ownership of land, and there can be no doubt that there is a serious need for that today.

The recent Meethotamulla tragedy brings the need for such a policy into harsh focus, clearly reflecting the various factors concerned with the issue of land and space, including the law, politics, and perhaps most importantly, the human cost.

A Failing Search for Justice, Fairness and Equity in Eminent Domain

DEANNE UYANGODA, ERMIZA TEGAL AND IROMI PERERA

The article discusses one of the fundamental powers in the legal framework that perpetuates exclusion - eminent domain. The authors trace how the inherent privilege enjoyed by the State over land, including private land, which is the essence of the concept of eminent domain, is fundamental to understanding existing laws and State practice as well as the attitude of State authorities towards land acquisition in Sri Lanka.

1. Introduction

This article has been developed from a body of work of the authors working in collaboration since June 2015. Iromi Perera has been documenting and writing on evictions in Colombo since 2013 and liaises with communities affected. On Iromi's interest to explore the socio-legal aspect of post-war evictions, Deanne and Ermiza joined her on what has been a startling experience of exclusion, of years of uncertainty and a slow and painful decimation of a right to life, dignity and the opportunity to develop.

This article will attempt to shed light on one of the fundamental powers in the legal framework that perpetuates exclusion - eminent domain. We interrogate the legal framework of State power in relation to land by attempting to locate the concepts of justice, fairness and equity within the power of eminent domain. We find the power of eminent domain to be predisposed against these concepts, exposing a critical need for incorporating these concepts into the legal framework that governs State power and land.

In previously published work we have explored the process and experience of making Colombo a 'world class city' (Perera, Uyangoda and Tegal 2017). In this article we highlight some of the lived experiences of urban evictees and displaced persons, promises made and the failure, even under the current yahapalanaya Government to make good on the commitment to ensure a transparent process for urban development which guarantees the rights of those affected. The example of families from Station Passage in Kompanyaveediya, also known

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as Slave Island (Colombo 1) is used as an entry point to understanding the practical issues raised by the recent spate of urban development in Colombo and how eminent domain plays out in lived experience. The Station Passage residents' experiences traverse the change in government which was to bring about change. However, the yahapalanaya government has failed to tangibly impact their lived reality for the better and their dire situation continues. In the Station Passage experience and in the experiences of those across this country agitating against land acquisition, evictions and the right to return to their lands (mainly in the case of persons displaced in former conflict affected areas), there are similarities in the framework that displaces or excludes these claims even before they can be made.

2. Lived Experiences from Station Passage

When the Slave Island Redevelopment Programme (Stage 2) of the Urban Development Authority began in late 2012, the area known as Station Passage was acquired for the 'Destiny Mall and Residency' by Imperial Builders, a Pakistani company. Significantly, the gazette notification for the land acquisition only stated that the land was being acquired for a 'public purpose' and nowhere indicated that the acquisition was for a private development of a luxury living and retail space. The families who occupied 119 houses down Station Passage had been living there for generations and all had title deeds to their land. Following a Fundamental Rights case (No. SC FR 294/2013) filed by the community, they were promised new housing at the site itself, and all but 15 families left their homes in 2013 until their new housing was completed - which was said to be in 18 months. However, more than 3 years later, the housing for the residents is still not completed. It is only due to the perseverance of the housing society, (formed by the residents themselves even prior to the

eviction) that construction got back on track, with completion promised by end 2017. The housing society has held the UDA accountable to all that was promised and consistently demanded every promise to be given to them in writing.

As aforesaid, the "public purpose" project that their land was acquired for - the Destiny Mall and Residency complex - is a 45 storey Twin Tower apartment complex, which will consist of 200 apartments with the price ranging from Rs. 15 million to Rs. 230 million. The shopping mall will consist of 27,000 square feet of retail space, a supermarket, two 3D cinemas, bowling alleys, food courts; a kiddies play area, and 7 guest rooms. Apartment amenities include an infinity pool and deck on the 6th level, a business centre, a 'his and her' gymnasium and a 200 capacity banquet hall. This development envisages an elitist space for a small section of the public and will not be accessible to the majority unlike a public park, community centre, bus stand, school etc. As such, extending 'public purpose' to this project is not defensible. Also included in the plans is the rebuilding of railway quarters and new houses in situ for residents. While these purposes could be argued as being 'public' in nature, it is important to evaluate the sentiments expressed in relation to each purpose. The state has stated that they do not have money to improve railway housing. For the in situ housing of the residents, the proposed units are projected as being smaller in anticipation of the value of land increasing. This means that an exchange value concept is applied recognizing that the commercial value of land will increase and residents who previously owned larger housing will be compensated with smaller but "valuable" housing.

Home owners who continued to live at Station Passage, say that they decided to remain on their land in order to be better positioned to exert pressure on the Government. Construction for

the second tower of the Destiny Mall (to be built in the area where their houses are located) was only to start after they had moved into their new apartments. Since these apartments have yet to be built the remaining residents have refused to succumb to pressure exerted on them by the developers and the Urban Development Authority (UDA) to move. While initially the relations with the UDA were good and the people of Station Passage benefitted from an unusually sensitive and consultative process, this has changed over time with the delay in the completion of their new housing.

The case of Station Passage is one of eviction and relocation for the public purpose of a residency complex. However the only positive feature of public consultation was the result of the subjective approach adopted by individuals within a public institution (in this case the UDA) and not to any procedure, process or law in place. The three and a half year wait for housing originally promised in 18 months demonstrates the normalisation of delay and a lack of accountability for the suspended lives of citizens.

The case of Station Passage reflects a culture of governance that continues regardless of the change of government. It is therefore necessary to understand what changed and what continues in relation to governance in the area of land acquisition and evictions.

3. Changes in Government but Continuity in Governance of Land Acquisition and Evictions.

In January 2015 President Maithripala Sirisena defeated the reigning regime on a platform of good governance. In August 2015 a coalition government secured power under the same platform signaling a change or break from the policies and practices of the previous regime. With the largest ethnic minority

party securing leadership of the opposition, the political agenda includes reconciliation and transitional justice.

The good governance platform saw attempts to investigate several high profile incidents of corruption, constitutionally embedded Commissions regaining their independence and limits introduced to the powers of the executive presidency. Institutional reform was initiated mainly in the form of constitutional reform which has been the subject of public consultation and is currently under negotiation at the level of the Steering Committee appointed by the Constitutional Assembly.

As far as public institutions governing powers of eminent domain are concerned, there has been superficial change and significant continuance of practice. Development continues to occupy the political agenda regardless of the change of government. The formal delinking of the Urban Development Authority with the Ministry of Defence has been a significant change. However, some military personnel continue to serve at the UDA. The structure and mindset of the UDA reflected in the approach to evictions and land acquisitions have remained largely the same and demonstrate the taint of militarisation. There continues to be a lack of information, a lack of notice to and engagement with residents being evicted, non-recognition of legal and social connectedness to land and non-recognition of the element of self-determination involved in evictions. In this sense the Rajapaksa drive on development that has been linked to self-gain for those involved, is only more efficient under the Sirisena-Wickremasinghe regime. There has been the unveiling of a Western Region Megapolis Plan, a policy that has seen implementation even though the Megapolis Act itself has yet to be tabled before the Cabinet. Substantively there has been no change in the experience of the people affected by land acquisition

and eviction. In this sense the introduction of a discourse of good governance, accountability and even human rights has meant little to the people of Station Passage and other communities in Colombo who have lost land or stand to lose land in the name of development. The legal framework and administrative practice continues the pattern of failed redress and aggravated vulnerability.

Another site of continuity is the legal framework governing state power to acquire land and evict persons living in it. The laws on land acquisition and eviction have not changed substantially since they were introduced by the British. The State in Sri Lanka owns 82% of land by virtue of colonial laws such as the Crown Land Ordinance of 1840 and Waste Lands Ordinance of 1897. The legal framework is established on the exclusionary nature of these laws and there onwards advantages the state by its vague formulations of “public purpose” as grounds for acquisition, by failing to articulate State obligations to inform, consult and engage with affected communities, by failing to design and implement schemes of compensation and by failing to recognise investments and ties to the land of those affected. Regardless of policy and political vision, the fundamental legal framework does not recognise or support fairness, justice and equity in land acquisition and eviction. In the face of neoliberal economic policies, the lack of these safeguards are all the more evident as in the protests in Hambantota in response to a proposed investment zone. Although Prime Minister Ranil Wickremasinghe in 2011 (then Leader of the Opposition) while critiquing the development plans and activities of the UPFA government stated that:

The citizens of Colombo deserve a better deal than a land scam under the guise of development. Firstly, all of them must be taken into confidence and consulted in preparing plans. Secondly, there must be

a place for everyone including the low-income earners as well as the Sinhalese, the Tamils, the Muslims, the Burghers and other minorities. Thirdly, the wishes of the residents must be respected.

one is hard pressed to find these aspects in land acquisition today.

4. Eminent Domain

As alluded to above, the approach of the law and State practice in Sri Lanka to the issue of land acquisition is better understood through the concept of eminent domain which privileges the power of the State over land. ‘Eminent domain’ refers to the power of the state to take over privately held land on the grounds of public interest, subject to payment of compensation. The doctrine, which travelled extensively through colonialism, has influenced jurisprudence across many different contexts and legal/political terrains.

Gelbspan and Nagaraj (2010) identifying the doctrine of eminent domain as one of the most significant obstacles to advancing a human rights approach to land comments:

The principle of eminent domain signifies the authority vested in the State to exercise its role as a guardian of larger public interest. For instance, the doctrine provides a legal foundation for expropriation of lands in the context of land reforms, land redistribution or restitution, such as in Brazil, India or South Africa, in ways that acknowledge people not as subjects but rights-holders and conceives of the State as a guarantor of rights and not as absolute sovereign. However, a

notion of eminent domain that links the power of expropriation solely to the exercise of sovereign authority sits at odds with a human rights-informed understanding of the relationship between the State and people (one of duty-holder and rights-bearers.) Overall, there exists a real tension between the full spectrum of human rights safeguards and principles (including equality before the law; participation; accountability; free, prior and informed consent; access to remedies etc.) and the way that eminent domain has generally been understood.

5. A Brief Examination of Eminent Domain in Sri Lanka

Eminent domain is linked to monarchic power or 'great power' as denoted by the use of the word 'eminence'. In Sri Lanka eminent power in relation to land was exercised historically by kings based on the assumption that the king maintains control over all land. The king's prerogative to waste and jungle lands is described as serving the vital purposes of developing new areas, extending settlements, and the rehabilitation of settlements devastated by war or natural disaster (De Silva 1981, 37). There was no recognition of an antecedent right to private property by an individual. In fact a form of absolute ownership was only recognised in relation to monastic holdings of property. There was also recognition of grants of land as conferred by the king. The eminence of the power exercised is rooted in autocracy.

The question of legal possession of property is a product of colonised rule. The concept of 'crown land' is introduced using the language of encroachment by the Crown Lands Encroachment

Ordinance of 1840 and the Waste Lands Ordinance of 1897. The Crown Lands Encroachment Ordinance has the effect of establishing as Crown lands all forest, waste, unoccupied and uncultivated lands (Section 7) and sets out a process by which all occupied lands are deemed encroached unless proof of title can be established (Sections 2 and 3 read together with Sections 9 and 10). This effectively dispossesses and deems occupied lands as crown land unless otherwise proved which is not a burden easily discharged. Simply put, these pieces of legislation create landlessness; legalises or recasts in law the eminence of power of the crown over land.

Since this time and in recognition of the problems caused by landlessness, there have been attempts to reverse the impact of these colonial laws. The first Land Commission report of 1929 led to the Land Development Ordinance of 1935 that introduced the notion of government alienation of Crown land. The alienation of land too became embroiled in governmental agenda and policies that for example favoured Dry Zone areas to improve irrigation works, increasing security of tenure for paddy cultivators and from time to time programs for 'rural upliftment'. Alienation of state lands today is primarily through grants or permits.

Looking at the power of eminent domain with historic specificity reinforces an understanding of the continued eminence of the power of the state in relation to land. This continued eminence was described as:

Traditionally there were two parties, and only two, to be taken into account; these parties were the ruler and the subject, and if a subject occupied land, he was required to pay a share of its gross produce to the ruler in return for the protection he was entitled to receive. It will be observed that under this system the question of ownership

of land does not arise; the system is in fact antecedent to that process of disentangling the conception of private right from political allegiance which has made so much progress during the last century, but is not even now fully accomplished ... (Codrington 1938, 5-6)

Therefore although Sri Lanka claims a practice of democratic rule, and constitutionally recognises that sovereignty lies with the people of this country - the question is whether the exercise of eminent domain reflects this. The Constitution is explicit on the question of sovereignty, which is recognised as the sovereignty of the People as exercised by the Legislature. The power of eminent domain must therefore also necessarily be recast from its traditional notions of eminence to a power drawing legitimacy in democracy. The socialist ideology also attaches to this power by virtue of Sri Lanka identifying itself as a socialist republic.

The commodification of land together with the fact that the State holds to itself this commodity by virtue of colonial legislation intensifies the magnitude of the power of the State in relation to land. The Sri Lankan Constitution currently does not recognise the right of an individual to property. At the time this report was drafted the Fundamental Rights Sub Committees appointed by the Constitutional Assembly to propose reforms to the Constitution had proposed that the fundamental right to property be guaranteed, thereby constitutionally recognising the commodity of land. In this landscape, eminent domain must be interrogated with the understanding of the power imbalance in relation to land. The power of eminent domain is recognisable in many laws, mainly the provisions of the Land Acquisition Act¹. The power itself has not been the subject of judicial scrutiny to understand how its exercise has been evaluated against democratic practice. It is the concept of public purpose and the connected concept of the doctrine of public trust that have received some judicial attention and therefore will be examined next.

6. Public Purpose and the Doctrine of Public Trust

In the exercise of the power of eminent domain in Sri Lanka the requirement of public purpose is the only criteria discussed. The requirement of public purpose draws legitimacy from the notion of democratic governance. Jurisprudence in Sri Lanka does not consider other requirements such as efficiency and justice, which have been highlighted in academic works² on eminent domain in the United States.³ The requirement of public purpose is a duty to disclose the public purpose and to uphold the doctrine of public trust in interpreting 'public purpose'. The "Public Trust Doctrine" is "based on the concept that the powers held by organs of government are, in fact, powers that originate with the People, ... and with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka".⁴

In locations acquired under the Land Acquisition Act (LAA) public notice merely states that they are under acquisition for 'public purpose' and the practice is that the Gazette notification publicly announcing intent to acquire only states the reason for acquisition as 'public purpose'. There is no instance where the purpose is disclosed. Accountability and transparency are not prerequisites for state acquisition. The evictees interviewed all echo sentiments of uncertainty of the purpose when the acquisition was first made known. Speculation and manipulation of information, particularly by state officials, is a common experience. Often, there is little or no information on which any challenge to the acquisition process can be made. Judicial pronouncements have held non-disclosure of the public purpose to be fatal to the acquisition. The decision in *Manel Fernando v. D M Jayarathne*⁵ was upheld in 2008 by a judgment which stated "*the failure to specify a public purpose is fatal to the acquisition proceedings and the subsequent vesting of the land in the Urban Development Authority*

does not cure the defect in the notice given under Section 2 of the Land Acquisition Act.⁶ This has been followed by later decisions.⁷

What constitutes public purpose is a separate question. For Station Passage, it later came to light that the ‘public purpose’ was the building of a luxury condominium and mall complex. The fact that a luxury condominium and mall complex are justified as public purpose means that public purpose is interpreted widely. When the purpose is for the direct benefit of the public at large, such as public highways or public marketplace, public purpose has a clear narrow scope. When the intended purpose is a luxury mall that is not accessible by the public at large, the interpretation of public purpose is overly broad.

The Water’s Edge judgment⁸ specifically refers to the purpose of a golf course as distinct from serving the general public and instead serving the:

elitist requirements of the relatively small segment of society in Sri Lanka. The judgment goes on to state that The enactment of laws to allow for such land acquisition was only done because of a legislative belief that private ownership in Sri Lanka is subject to the paramount, essential and greater need to serve the general public, a significant segment of who lack even basic living amenities like running water, electricity, and housing, thereby upholding a narrow interpretation of ‘public purpose’.

By this judicial standard, acquiring land for the building of a luxury mall could not be defended. The acquisitions of land in the Northern Province of Sri Lanka in 2013 (Fonseka and Jegatheeswaran 2013) provide yet another example of an overly broad understanding of public purpose and a lack of a policy and legal framework by which such

purpose can be evaluated. In practice the trend of exercising eminent domain for commercial purposes has been increasingly observed under this regime. In September 2016, it was reported that the UDA had acquired land identified by Cargo Board Development Company, a public listed company, for a multi-storey car park. In November 2016 Daily Ceylon reported that State officials measuring large tracts of residential and paddy lands in the Hambantota District for the development of an investment zone had alarmed residents. In early January 2017, a protest by hundreds of residents in Hambantota against the acquisition of 15,000 acres of land in the projected industrial zone for Chinese investors turned violent with police using tear gas and water cannons and 21 people being injured and 52 arrested (Kumara 2017). The residents were against the acquisition on account of it being their agriculture land and land that was the most fertile. The situation was exacerbated by the fact that there was very little information available to the villagers about the Government’s plans or why the land was being surveyed (Perera 2017).

7. Favouring Procedural Propriety over Substantive Concerns

Case law demonstrates that Courts in Sri Lanka have been willing to recognise the infringement of fundamental rights where procedure has not been followed. The Supreme Court in *Mundy v. Central Environmental Authority*⁹ held that:

If it is permissible in the exercise of a judicial discretion to require a humble villager to forego his right to a fair procedure before he is compelled to sacrifice a modest plot of land and a little hut because they are of “extremely negligible” value in relation to a multi-billion rupee national project, it is nevertheless not equitable to disregard totally the infringement of his rights: the smaller the value of his property, the greater his right to compensation.

This attitude of completely failing to acknowledge the resultant hardships, sacrifices and the connections people build with their surroundings in their chosen place of residence is reflected in the manner in which executive decisions and administrative actions are carried out before and during displacements caused by state acquisition.

However facts relating to the actual impact of dispossession or eviction have not been recognised. The judgment in *D.F.A. Kapugeekiyana Minister of Lands and Others*¹⁰ States:

Yet, in the process of carrying out greater good for the public of the country, one must not unduly neglect the owner of the land. It would be overly harsh to forget the ties a landowner has to his property. Therefore, it is necessary for the Minister and/or any authority acquiring the land, to have a clear and distinct public purpose for which the acquisition is commissioned. In *Mundy v. Central Environmental Authority*¹¹ the Court of Appeal held “...While development activity is necessary and inevitable for the sustainable development of a nation, unfortunately it impacts and affects the rights of private individuals, but such is the inevitable sad sacrifice that has to be made for the progress of a nation. Unhappily there is no public recognition of such sacrifice which is made for the benefit of the larger public interest which would be better served by such development. The Courts only minimize and contain as much as possible the effect to such rights...”

The unjust results of the exercise of eminent domain are reflected in this lack of consideration of the real hardship and loss faced by affected persons. The loss of investment in the land, loss of ties to social networks including schools, employment and places or communities of worship, the loss of opportunity to plan and develop their lives

and homes, the lack of information and resultant uncertainty, the delays in providing meaningful alternative lands or accommodation are all factors that result in inefficiency and injustice. Efficiency and justice ought to be goals in the proper exercise of eminent domain.

8. Conclusion

The inherent privilege enjoyed by the State over land, including private land, which is the essence of the concept of eminent domain, is fundamental to understanding existing laws and State practice as well as the attitude of State authorities towards land acquisition in Sri Lanka. While the issue was brought into sharp focus in light of the previous regime’s development drive and resultant mass displacement of the urban poor, the concept of eminent domain has been playing out in State practice for centuries as borne out by the case law and discussion above. By tracing the understanding of eminent domain, public purpose, and public trust in the Sri Lankan context, it is evident that debates on powers pertaining to land acquisition, the objectives that drive these powers and the controls exercisable on such power are very much in its developmental stages. Even from the brief investigation of the current legal framework, it is evident that the law pertaining to this area is in urgent need of review and development for the benefit of those affected.

The crisis of understanding stems also from the fact that all stakeholders including State actors as well as activists and lawyers have failed to respond to the phenomenon of evictions through the lens of eminent domain and by questioning the sites of State privilege in the manner in which it plays out in State practice. Failure to do so may in fact unwittingly perpetuate the underlying structures that fundamentally displace rights of persons. For instance by calling for due process, transparency and accountability in the process of urban development,

there is a problematic tendency to fail to articulate a concept of justice and equity that rises above existing law and its presumptions. The provisions of the Land Acquisition Act and compensation and the laws preventing prescriptive title from being

claimed against the State for instance must also be reviewed. While this is a larger body of work, through this article the authors introduce and link the concept of State privilege in the context of eminent domain to the vulnerability of the poor and their connection to land.

NOTES

¹ *De Silva v. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another* 1983 1 SLR 283 at p. 291.

² The requirements of efficiency and justice are discussed as two most important goals of a proper eminent domain regime by Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 998 (1999) (“In a vast and otherwise contentious literature, whether judicial opinions or scholarly books and articles, there appears to be virtual consensus that the purposes of just compensation are essentially two[:]. . . ‘efficiency’ and ‘justice[]’”); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV.

L. REV. 1165, 1214–24 (1967) (Michelman, in this enormously influential work on the subject, preferred the terms “utility” and “fairness”)

³ *Manel Fernando and another v. D.M Jayarathne, Minister of Agriculture and Lands*. In this case Justice Mark Fernando held that “*The minister cannot order the issue of a Section 2 notice unless he has a public purpose in mind.*

Is there any valid reason why he should withhold this from the owners who may be affected? Section 2(2) requires the notice to state that one or more acts may be done in order to investigate the suitability of that land for that public purpose: obviously that public purpose cannot be an undisclosed one. This implies that the purpose must be disclosed. From a practical point

of view, if an officer acting under Section 2(3)(f) does not know the public purpose, he cannot fulfill his duty of ascertaining whether any particular land is suitable for that purpose”

⁴ SC (FR) No. 352/2007

⁵ SC(FR)No.797/97 Judgment dated 20th August 1999.

⁶ *Mahinda Katugaha v. Minister of Lands and Land Development and Others* 2008 1 SLR at page 285 at page 291

⁷ *Horana Plantations Ltd. v. Hon. Minister of Agriculture and 7 Others* 2012 1 SLR at page 327 and *Namunukula Plantations Limited v. Minister of Lands and 6 Others* 2012 1 SLR at page 365

⁸ *Mendis et al. v. Perera et al.* SC (FR) No. 352/2007

⁹ SC Appeal No. 58/2003

¹⁰ SC Appeal No. 161/2010

¹¹ CA Application No. 688/2002

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Interrogating National Development: A Critical Geographical Perspective

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Discussing the socio-political and environmental impacts of the Southern Development Project, the Uma Oya Project and the (re) settlements in Wilpattu National Park from a critical geography lens, this article questions why it is always the poor who have to forego their rights for ‘development.’ It highlights the need for critical geographical scholarly engagement that challenges dominant representations and narratives of ‘development’.

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1. Introduction

As I was sitting down to compile this essay in the first weekend of the New Year (2017), I read the headlines of *The Sunday Times*, which reported violent clashes between demonstrators and the police regarding the ‘Southern Development Project’ (SDP), resulting in nearly 22 injuries. The SDP involves, as it reports, leasing the Port and about 10,000 hectares of land in the area (some of which are cultivated land) to a Chinese company for 189 years. The protest began as the government was inaugurating the “Sri Lanka-China Logistics and Industrial Zone” within the Ruhuna Economic Development Area. A Sri Lankan-Chinese meta-space is to be created, through the dynamics of geo-politics now turned into geo-economics. This project will adversely affect individual homes, communities, temples, villages and previous resettlements under irrigation schemes. Ironically, in the name of modern development, inhabitants and communities have to move out (“development induced displacement”) for nearly 1000-1500 Chinese factories/industries to move in.

The same newspaper reported little hope for the Uma Oya ‘homeless’ as a result of the much-maligned Uma Oya Hydro power and irrigation project (UOP) launched in 2011 with an Iranian loan and construction partners. The objective of the project has been to divert water to the drier southern region for agriculture along with the hydro power generation of 120 megawatts. This has certainly turned into a site of despair and embodies the irony and tyranny of development. The government has simply opted for a nominal rental of Rs. 15,000 and to provide 500 litres of water every week as a temporary measure so that the victims can

'find a home.' Discussion is simply focussed on the cracked land, crumbling houses and wells and dried paddy fields, with little attention being paid to human feelings, emotions and attachments to homes and land, built and developed with many difficulties. Older individuals are despondent over uncertainties of their future.

The third news item reported in the same newspaper was about resettlement activities 'in and around' or adjacent to the Wilpattu National Park in the North-Western Province of Sri Lanka. Environmentalists and forestry officials are divided over the issue, while competing ethno-nationalist discourses emerge highlighting issues of ethnic identities, rights and interests of those who may have encroached and/or remain to be resettled, and their ideological adversaries. Wilpattu can be considered a classic case of political ecology, given the competing interests of resettled Muslims who have been affected by war induced displacement and the sustainability of a natural forest in one of the driest parts of the island.

These three controversies together (published in the same newspaper on the same day) from three corners of the country is a reflection of how the dominant discourse of development and the hegemonic social order proceeds towards oppressive ends, and produce and reproduce social injustice; they also highlight the need for critical scholarship. Such controversies are frequently reported and discussed in the media, perhaps because they are large scale projects that produce political news in such a way as to strengthen the hegemonic order. Tensions and controversies that result in victims and oppressed people at micro scale (who are frequently referred to in the news as protestors and/or demonstrators) may be overlooked precisely because it takes place on a smaller scale and creates less political impact; for example, post-war development issues in the Northern and Eastern provinces receive less attention. Urban development projects,

centred on Colombo, Kandy and Galle¹ together with the Megapolis Project of the Western Province are all celebrated as pinnacles of development, disregarding those who are displaced, re-placed and marginalized, whose rights are violated and dignity overlooked.

Ongoing social transformations such as the three discussed above, urban renewal projects, infrastructural projects such as the northern expressway, and development projects in the North and East are all considered as natural events under the spell of globalization and neo liberalism. Such changes are naturalized and normalized as part of development to such an extent that they are rarely questioned despite significant legal and ethical issues.

All these development projects concern issues related to social justice over land rights and disputes, access to natural resources, involuntary displacements and resettlements, post-war returnees, refugees and even the rights over people's emotions, attachments and identities which are rarely verbalized. Such issues may simply appear as matters of legality to the neglect of their complicated geographies. How we frame, problematize and understand (or, as is often the case, not understand) these contentious issues often determine the remedies and solutions proposed and will inform our future actions. Social science in Sri Lanka is mostly governed by empiricist and positivist inquiry with value-free science and scientific laws aimed at research outputs with quantitative, diagnostic and predictive value, flavoured with policy implications. Such scholarship becomes the uncritical devotees of the state, hegemonic representations, discourses and more precisely the status quo: in the Sri Lankan academic domain such scholarship is recognized as 'national contribution.'²

2. Possibilities towards a Critical Geographical Perspective

Undoubtedly, the issues discussed above make Sri Lanka a 'hot spot' - to borrow a term from the bio-environmental discourse - for critical geography. What can a critical geographical perspective possibly offer at this juncture in framing and understanding such issues, in order to provide a space for those who are 'unspoken of', whose voice is less heard, and questions that are seldom raised? Blomley argues that, "*the world cannot represent itself (and that) it must be represented*" (citing Edward Said, that "*the intellectuals have politico-ethical responsibilities, attendant upon his or her privilege, relative freedom and social standing*") (2008,92). Thus, the intention behind this essay is to argue for the need and open a space for, a critical geographical scholarship to ensure that the hegemonic representations dominating at different scales (global to local) are challenged and interrogated, in order to pragmatically make sense of social transformations with a fragment of self-consciousness and awareness, granting the victimized and the oppressed an opportunity to be represented. I would attempt to lay out what a critical geographical perspective may offer in this regard to address the emerging social issues in Sri Lanka, by using three controversial issues at macro scale and two examples from micro scale which are pursued from such a perspective. The reader is cautioned here that the three issues at macro scale are merely used to make the argument for a critical perspective, the author being fully aware of the fact that they need to be studied in detail and depth.

Critical geography has come a long way since the 1980s. Originally it was associated more with radical (Marxist) geography and the leftist work with its strict class-based analysis, and later on expanded and widened itself with theoretical articulations such as post-colonialism, feminism,

anti-racism, governmentality, cultural studies, and cultural politics etc. (Blomley, 2008). Being aware that my task is not to review or critique critical geography but to see how it can be useful and meaningful in creating a productive and critical dialogue on current issues relating to land, geography and space, and related social injustices and 'ill-legalities' in Sri Lanka, I will not attempt to define critical geography in a conventional sense except to declare what attracts and interests me towards critical geography.³ As most other brands of geography and social science, critical geography is also predominantly anglophonic and the debates on critical geography have also primarily taken place within such a context, although attempts have been made to include the South by holding the Critical Geography Conference in India, Mexico, New Zealand, and through discussions of the open access e-journal of critical geography - ACME: An International e-journal for Critical Geographies, which has resisted being classified as an "impact journal" despite its large readership.

As rightly stated by Bauder and Engel-Di-Mauro (2008,1), I identify critical geography to be "*both an approach to scholarship and a practice of scholarship*" which is fundamentally committed to social change (hence, implicated in social justice), and trust in the contribution of academic scholarship towards that aspiration. I sense that the universal logic and the centripetal force of critical geography are defined by this, though interpreted in various ways. Thus, one can very often see references to the famous clarion by Karl Marx, "*Heretofore the philosophers have only interpreted the world, in various ways: the point, however, is to change it*" in the discussions on critical geography. Johnston, Gregory, and Smith recognized critical geography as "*a shared commitment to emancipatory politics within and beyond the discipline, to the promotion of progressive social change and to the development of a broad range of critical theories and their application in geographical research and political practice*" (1994,126).

How can critical geography accomplish this task to stand for social change ensuring justice and equality, and create space for transformative actions and progressive change? Hubbard et al. elucidated that critical geography, though diverse in theoretical orientation, is committed “to expose socio-spatial processes that (re) produce inequalities between peoples and places” (2002,62).⁴ Many scholars have argued that critical geography ought to contest, challenge and question ‘hegemonic representations’. This entails a moral responsibility since the academia itself may be responsible for producing discourses that camouflage the positions of the oppressed and victimized, normalizing the dominant and the powerful. Thus, one of the tasks of critical geography is to contest, denaturalize and alter existing imaginative worlds; thereby contesting hegemonic representations to be a function of such scholarship, as clearly expressed in the review of critical geography by Blomley (2006).

This further raises the question of the nature of critical scholarship. How can critical geographers expose social and spatial processes that breed injustice and inequality? Critical geographers are committed to theory moving away from empiricism, equipped with critical conceptual frameworks such as post colonialism, feminism, queer theory, political ecology, governmentality, and anti-racism which, in essence, confront and question hegemonic discourses (Hubbard et al. :2002). Critical geographers are constantly driven by “why”, examining the possible underlying causes for surface manifestations, rather than finding ways to manage them.

What is the use of exposing such social and spatial disparities? Would it make a difference? While the transformative actions and social change and the theoretical inclination of the anti-hegemonic lexis of critical geography are inspiring, one needs to elucidate the academic/activist dualism in order to

grasp its full prospect. As with any other dualism, camping in one or the other contradicts the very spirit of critical geography and therefore one needs to look out for the possibilities and probabilities it exposes, thus moving beyond an either/or scenario. In my view, a critical geographical perspective depends on, more than anything else, a balanced understanding of the academic/activist dualism, and the multitude of possibilities it offers with the engagement of the empirical world.

Don Mitchell (2004,23) argues that radical scholarship itself is a form of activism, (and) in order to engage in radical scholarship one may need to delink with activism, possibly to escape the biases. Don Mitchell argues that:

This lesson is simple: sometimes the best thing we can do as radical scholars is radical scholarship – that sometimes what activists and other non-academics most need is thorough academic analysis. To make a difference beyond the academy, it is necessary to do good and important, and committed work, within the academy (23 and repeated in page 30).

Don Mitchell’s argument tells us that what the academics should worry about is not whether they are giving voice to the oppressed or whether you are “for” or “with” them, but whether you are engaging in radical scholarship through the “force of abstraction”.⁵ Don Mitchell here does not reject the engagement of the academics in activism, but only shows how radical scholarship itself can be contributory towards progressive change. Blomley (2006, 2008) also argues that critical scholarship taken as ‘rigorous, compelling and persuasive’ social science itself is a form of activism. Thus, even discussing the un-discussed, and questioning the un-questioned, are forms of activism in the

sense of “*academic practices and work that produce dissentient thoughts and norm-challenging information*”, as argued by Hubbard et. al. (2002). Uribe-Ortega (Katz 1998) makes the point that “*a critical geographer is to be a political intellectual, but this does not mean that you have to integrate with a political party (or perhaps with activism)*”. Uribe-Ortega maintained that teaching itself as particularly an important form of activism and changing the minds of (our) students is a critically important aspect of changing the world, thus broadening the scope of academic/activist dualism.

All these interpretations specify the possibility of an array of multiple roles of a critical geographer – in a continuum of radical scholarship completely detached from any form of activism to a radical scholarship fully engaged with activism. Paul Routledge (1996), encouraging a more nuanced (and a contextual) reading of location and identities of critical geography argued that one can be an “activist within the university” and “an academic within the activist settings”; very interestingly, none of these positions compromise the fundamental thrust of critical scholarship. Considering these interpretations, one can begin to understand the academic/activist role in terms of a continuum that opens up a range of different possibilities, which could only be unravelled in relation to particular contexts, events and contingencies: however, one can neither presuppose nor prescribe the nature of the possibilities, until engaged with such contexts.

3. Ironies and Tyrannies of Social Transformations in Sri Lanka

Viewed from a critical geographical perspective many issues related to contemporary social transformations appear to be overlooked: it is very customary to view such change through what I call a “regime approach.” Certain changes during a particular regime are exclusively attributed to the interests, agendas, and ideologies of that

regime and its political leaders, to the neglect of underlying structures and processes such as state, capital, globalization, regional geo-politics, and nationalism and especially the embedded power, and social relations. Identifying the Hambantota Port merely as a project premeditated by southern, nationalist cum provincialist rhetoric of the Rajapaksha regime⁶ is a case in point. The mere fact that this project is furthered with a Southern Development Zone with exclusively industrial development by the successive regime, with contrasting political and ideological interests, clearly indicates the logic of capital and geo-political realities that govern the development discourse in contemporary Sri Lanka.

Demonstrations and protests against the Uma Oya Project and now Southern Development Zone, and stakeholders, interest groups and war returnees involved in the Wilpattu issue and many similar issues at local scale are manifest sites of critical geography. These are sites from which to learn from, to engage with and even to collaborate, and also interrogate the possibilities of critical geography. Again reminded by Edward Said’s ‘ethical-political responsibility of an intellectual’ and Herbert Marcuse’s idea “*to investigate the roots of (social) developments and examine their historical alternatives is part of the aim of critical theory, a theory which analyzes the society in the light of its used and unused or abused capacities for improving human condition*”(1964:x), I would like to engage with and interrogate the imperative necessity of a critical geography perspective at the moment.

Why and how did we end up with the Hambantota Port? Who wanted the Port? Are people of the area benefitting by this? Is this merely the nationalist cum provincialist politics of the former regime, reconciled with the emerging regional super powers and thus geo-political interests of China? How did society in general and opposition political

parties respond and receive the project under the former regime? The present regime alleges that, due to the inability to service and pay the debt incurred as a result of the Port and the policies of the former regime, it was compelled towards such an agreement. It has become a controversial matter between global and national power relations versus the preservation of individual livelihoods managed with much difficulty, notwithstanding the potential environmental calamities in terms of deforestation and threat to wild life.

In the case of the Uma Oya Project, there seems to be a group of victims defined by the Environmental Impact Assessment (EIA) as the ‘displaced and to be resettled’ as well as unintended victims who are losing their homes, and livelihoods in the early process of project implementation. The fundamental question remains: who takes the responsibility for these lives and their agony, and the compromise they make for national development? Is there any notion of social justice? Sense of place is hardly a matter for those who recommend policy measures: their emotional responses to the calamity of shattered homes and lives are rarely heard of. Weerasinghe et al. (2015) shows how the legal standards of the EIA procedure are not properly and adequately adopted and how the general principles of international environmental law are violated, thus unveiling the loopholes of standard procedure adopted by the State to ensure sustainable development. Displacements, loss of livelihood, violations of human rights, land dispossession are all reported as social impacts of the project. Yet, the attitude towards them is one of nonchalance – complying with the goal of national development, ideologies of the State and the political regimes and more importantly the globalizing forces of capital.

REDD⁷ identifies political interference as one of the major contributors to deforestation in Sri Lanka. At a time when reforestation should

be a priority, the Wilpattu⁸ issue has generated a serious debate about the plight of the displaced due to war, [ir]responsible State policy towards them, and alternating environmental ethics based on peculiar nationalist discourses, whether it is Sinhala-Buddhist or Muslim politics. On one hand, Hasbullah (2016), in his hastily compiled report, makes a case for the right to return (of those who were displaced due to the war), arguing that the resettlement activities have not taken place inside the Wilpattu National Park and they are only ‘returning home,’ thus challenging the extremist (Buddhist) nationalist arguments executed by a specific group, paying little or no attention to the environmental concerns. On the other hand, several credible environmental organizations clearly indicated that the resettlement project, felling of trees and new roads have all occurred within the adjacent reserved forests, which provides ecological fortification to the Wilpattu National Park on the northern boundaries - a fact that is also clear from Hasbullah’s report itself. The environmental organizations argue that there has been irreparable environmental damage by the clearing of nearly 3000 acres of land and the interruption to wild life. Further, they argue that the resettlement induced human activities in the reserved forest area would possibly ignite a future human-wild life conflict scenario. There are also unresolved issues regarding displaced persons from other ethnic communities (e.g. Tamils in Mullikulam) and the occupation of civilian land by the Navy (e.g. Mullikulam).

There are two fundamental issues to be raised in the context of these three issues. First, who takes the responsibility for these lives disturbed by the Uma Oya and Sourthern Development Projects, their agony and the compromise they make for national development and the tremendous environmental cost? In the case of Wilpattu, poor war displaced people are being paddled by competing discourses of environment and nationalism, creating a far-out moment of environmental justice versus social

justice based on the argument of ‘right to return to the original lands’ for resolving displacement. Undoubtedly, the issues of the displaced must be amicably and justly resolved. However, the issue at hand should centre on the viability of resettlement projects in terms of the impact on fauna and flora, and the social benefits to the displaced in ensuring secure livelihood and security, without it being ethnicized. Importantly, however, responsibility for the deteriorating environmental conditions and the interruptions caused to wild life due to deforestation cannot be overlooked either in the case of Wilpattu or Hambantota. These are unavoidable questions in the local context of ongoing human-elephant conflict and the global context of climate change.

Secondly, why is it that poor people always have to compromise their livelihood, dignity, emotions and most of all their rights on behalf of ‘national’ development? Why is it that development hurts, victimizes and makes the poor vulnerable, contrary to the objectives of development? And why do they have to protest and demonstrate to ensure their rights against the powers of the State? It is most likely that it is the poorest of the poor that will face adverse impacts by such large areas of land (mostly forest in the case of Hambantota and Wilpattu) being solicited for development activities. Large scale projects are proposed for national development undermining the interests of its citizenry on one hand, and on the other the very same State uses its power to silence that citizenry when people exercise their agency to protect their rights; ironically, the State seems to have forgotten that ownership of land is vested in the State on behalf of its own citizens.

Furthermore, the Uma Oya Project is proposed to provide water to the drier area of the south-eastern quadrant of the island in addition to hydro-power generation. A large number of people in the Uma Oya catchment who have made this their home for

generations have become victims. Their right to land and water has been violated, leaving aside the adverse impacts to the bio-physical environment. While this being the case on the south-eastern side, we argue for the ‘right to return’ of the war-displaced people to their original land over the trees that nature gifted in the reserved forests adjacent to the Wilpattu National Park. Hasbullah’s report itself clearly shows that the resettlement activities have taken place within the reservation forests. If so, are we not taking a vulgar approach to nature to say that “we” (war displaced) were here before you (forest), while demanding the Uma Oya catchment residents to sacrifice their right to original land for the sake of national development. This is only meant to reflect the ironies of modern development and should not be misread as a comparison.

In the same vein, the wells in the Bandarawela area have dried up as a result of water ingressions due to the tunnelling activities caused by the Uma Oya Project, making the residents victims of a man-made drought. Yet, responsible officials claim that *“usually, when water seeps through fractures, it means that all the wells located above the tunnel are dried up as the water table goes down. This is a natural phenomenon”*⁹ and audaciously report that, there *“is no solid evidence that the latest water shortages suffered by villagers are linked to the construction work.”*¹⁰ Such anthropomorphic arrogance, displayed in both cases of the Uma Oya Project and the Wilpattu issue needs to be challenged in an era of environmental crisis driven by serious issues of climate change, as much as by the rights to land. A radically critical scholarship ought to unravel these ironies and tyrannies of national development!

I have only raised certain fundamental issues that emanate from the above three cases that have been in discussion in the recent past, from a critical geographical perspective, to highlight the ironies and tyrannies of national development. Here, the

reader is cautioned that I have done only an overview of the issues and not engaged in an in-depth study. In order to expose this tyranny of the State along with capitalism, bound with peculiar regime politics governing national development in violation of all principles of environmental sustainability, critical, detailed and in-depth studies employing creative methodologies are needed, bearing in mind that critical scholarship itself is a form of activism. This paper only pinpoints to the urgent need to confront such hegemonic representations, raising unquestioned issues and exposing the tyrannies as well as ironies so that the injustices to the poor and environment will be exposed.

4. Ironies and Tyrannies at Micro Scale

Such ironies and tyrannies are not limited to the national but abound at micro scale. These issues are rarely publicized and spoken of, unless they amount to protests and demonstrations that would attract media attention and gain political mileage. Through a critical geography approach, two studies unravel the story of Keppapilavu in the Mullaitivu District, and the recent catastrophic landslide in Mawanella.¹¹

The study on Keppapilavu in the Mullaitivu District analyzes the complexities and ironies of resettlement in the aftermath of the war, by evaluating the relationship and attachment of people to their places, through a comparative study of the old village and the new model village. Moving beyond the conventional vocabulary of resettlement, this study examines the instrumentality of place (their village) in defining their life and identity. Using John Agnew's place theory (1987) which argues that place is a process,¹² this study emphasizes the identity of the place and the living experiences of everyday life to be extremely important.

In the old village, the northern part was occupied by settlements while the southern part was primarily agricultural lands; the eastern part opened up to the Nanthikadal lagoon. This location defined the community's economic life; paddy farming on fairly large land lots using ground water, home gardens and fishing were the main economic activities. It naturally evolved as a village encompassing traditional values. During the war, it was more or less controlled by the Liberation Tigers of Tamil Eelam (LTTE). However, the new model village is artificially structured with fairly small, clustered settlements, economically transforming the villagers into wage labourers, although equipped with adequate modern infrastructure facilities. The study reveals that the people had a very strong sense of attachment to the old village, and that was never considered in the establishment of the new model village. In terms of location (a determining factor of access to resources), sense of place (emotional attachment to the place), and the locale (overall living experiences of everyday life), the new resettlement appears to be less normal in the resident's mind. What this study reveals, in my view, is how the State and the policy makers on resettlement, reinforce and impose upon the community an increasingly rigid and meaningless system of organizing space. This is a serious issue in Sri Lanka given the extent of resettlement due to war and other development projects.

The second case draws upon a different type of study - a local level disaster which received national attention. The Elangapitiya landslide disaster in Mawanella occurred on the 17th of May 2016, recording about 130 people possibly dead: three villages were directly affected by the overflow of the debris and nearly 1900 villagers were displaced. The National Building and Reconstruction Organization (NBRO) established in 2010 by the Sri Lankan government to oversee the risk areas and authorize building construction had already declared Elangapitiya to be in a high risk area. Then, why is it that we

were unable to avoid such a disaster? The study fundamentally raises the question whether such landslide disasters are mere natural phenomenon or are they politically instigated natural disasters, pointing out the need of critical approaches such as political ecology to unravel the politics behind such disasters. Customarily, most of the landslide studies carried out by either the geologists or the physical geographers tend to focus more on biophysical factors combined with improper land use patterns (Jayathilake 2017). The political processes and actions behind such land use patterns are rarely discussed although they are a direct result of land and settlement policies governed by regime ideologies and articulated within local politics in the context of rural poverty.¹⁵

Originally, it was a virgin forest that was transformed into a tea plantation (known as Elangapeli) as a result of the colonial economic policy. Only a handful of people (estate labourers) had lived in the landslide area and they were sent off to the up country in the late 1960s. These lands were subsequently distributed by a powerful local political leader, among Sinhalese landless labourers who worked in this estate.¹⁴ Thus, it was converted to a settlement with small tea holdings and home gardens, diversifying the land use pattern. Conversion into small tea holdings with private ownership itself seems to have had a negative impact because land management practices and efforts became more individualized and did not focus on the entire area as a whole. The study shows that the inhabitants have been relatively unaware of the high risk in the area and the need for community land management practices.

The basic geological report submitted by NBRO in the aftermath of the landslide disaster indicated that quick water seepage due to irregular land use patterns of tea cultivation had caused this landslide, and recommended that this be declared as a conservation area without any human activities. The report further Stated that the upper boundary

of the landslide was the natural forest remaining intact, while the portion with the tea and home-gardens had slipped. With these findings, this study encourages us to understand how natural disasters are socially constructed and the need to critically examine the political processes and actions (at national as well as sub-national levels) that lead to such ecological calamities. Lack of recognition on the part of academia as well as policy makers towards social and political factors surrounding such 'natural' disasters in Sri Lanka is a major hindrance towards avoiding such disasters. Both these studies at micro scale show that such theoretically informed critical empirical research ought to be considered as a form of 'academic' activism.

5. Some Final Thoughts

The above cases clearly demonstrate an urgency for critical scholarship that would interrogate the discourse on national development in Sri Lanka, in order to unravel the underlying dynamics and structures of people-environmental relations and understand the adverse effects on both people and nature. They also expose the fact that our role as academics does not necessarily have to be one of rallying with the protestors and activists, but we need to critically engage with them in raising awareness among the public, and more importantly in our teaching. Further, they also mark the need to enlighten politicians, political leaders, policy makers, and especially to remind the academics who contribute to ironies and tyrannies of national development as advisors, consultants and experts, that their responsibility is to open avenues for progressive change by framing, understanding and treating development issues in a critically and socially responsible manner. A critical geographical perspective would certainly expose issues that are not yet discussed or reluctantly discussed; this itself would be a progressive change in the context of Sri Lanka.

In the context of the above cases, it is very clear that there are problems with the ways in which we look at the relationships between people and their places of origin, the land they developed and cultivated and the natural environment. Furthermore, serious consideration should be given to how the poor are constantly victimized in the process of national development and affected by political and ideological stalemates. There is a clear need to challenge the mechanical and utilitarian handling of people and reflect upon the kind of value we attribute to the human life of poor people: certain material values (e.g. ½ acre of land, 500 liters of water, Rs. 10,000 as monthly rent and so on) are overlaid on a 'unit' of victim, thus almost negating how their lives are their own making in a particular place, bound with a piece of land surrounded by not only the environmental conditions but also specific social and cultural relations and sensibilities developed over time. Most of the new settlements seem to blindly follow modern grid patterns without paying any attention to the nature of evolved spatial structures, discounting the fact that social structures shape social relations. Who plans for whom is a long overdue question in the realm of planning in Sri Lanka.

It further requires thinking that transcends and questions the taken-for-granted notions and concepts rather than uncritically working with them to support hegemonic representations of the State, other institutions or ethnic ideologies. Converted to conceptual categories within policy and/or ideological discourses, poor people are metamorphosed into objects that need to be served on, thus de-entitling them from their agency. The entire vocabulary of 'displaced,' 'resettled,' 'war returnees,' 'refugees,' all imply a sense of sub-humanness, to the neglect of structures and processes that produce and reproduce them. This narrow-thinking is well illustrated when scientists claim that 'droughts are natural phenomena

created by lack of rain on time'- regardless of the photographic and descriptive evidence of the inhabitants that their wells have dried up after and during the tunnel activities of the Uma Oya project and even after discovering the leaks in the tunnel. Moreover, when discussions and debates are articulated in terms of the binary of pro or against, the progressive spirit of critical scholarship tends to evaporate as it is blinded by vested interests and ideological positions which hide alternative possibilities. For example, the Wilpattu issue ought not to be distracted by whether these activities are taking place within the Wilpattu National Park or not on one hand, and on the other as an issue of environmental conservation versus resettlement of Muslim refugees. The aim of critical geographical perspective must be, not simply to bring attraction or sympathy towards the affected and the unspoken of, but to support their agency through critically researching and studying the particular issues. Its objective must be to expose how poor people become victims (ideologically or materially) of politics and power relations – be they party politics, power politics or ethnic politics. For example, the manner in which the power relations between a Sinhalese and a Muslim political leader prompted the Wilpattu issue and the fact that the displaced people are caught in between are rarely noted or highlighted.

Concerns for social justice, equality and environmental justice, the conviction that most of the issues relating to environment, space and place are politically and socially embedded and constructed, and the understanding of how poor people become victims of politics and power relations at all levels, place the critical geographical perspective at the forefront. As argued above, there is an urgent need to critically interrogate the ironies and tyrannies of national development in Sri Lanka, bearing in mind that 'a critical intellectual is a political intellectual.' An effective critical geographical perspective is not one

of making judgments or pursuing arguments on a binary logic, but one of challenging the hegemony, and revealing the power structures and relations that silence the poor and the oppressed. However, one should bear in mind that giving voice to the oppressed does not necessarily entail whether one is for or with the oppressed, as well argued by Don Mitchell (2004).

Most importantly, the examples briefly discussed above challenges the conventional scholarship established within the Sri Lankan academia. The kind of disengagement between academia and rapid social transformations currently notable in Sri Lanka provide a critical space for self-reflection and evaluation of academia. I have referred to two different issues at micro-scale only

to direct attention towards a critical geographical perspective, but there may be many more examples in the island. The three issues at national scale, together with such micro-level cases reveal an urgent need for critical reappraisal of the entire discourse on national development, paying special attention to the issues relating to people-environmental relations - displacement, resettlement, man-made 'natural' disasters and most importantly environmental sustainability. There is a dearth of serious academic scholarship on these issues in Sri Lanka and therefore, this paper is only meant to be an eye opener, pointing out the immediacy for radically critical scholarship, which would frame, problematize and understand the relationship between people and nature, place, and space (which is the terrain of geography) in a reasonably sensible and socially responsible manner.

Notes

¹ Sri Lanka Strategic Cities Development Project, the World Bank.

² It does not mean that there is no critical scholarship in Sri Lanka, but the point I make here is that what is generally considered as mainstream academia is that which caters to the interests of the state and dominant discourses and not at all questioning them. This tends to marginalize the critical scholarship as theoretical and lacking an applied value. See Sunil Bastian's work (2009, 2013) for some critical scholarship in the area of development.

³ For a good review of critical geography and for more information, see Blomley (2006, 2008), Gibbons (2001) and ACME: An International e-journal for Critical Geographies - <http://www.acme-journal.org>.

⁴ Bauder and Engel-Di Mauro also comments that critical

geographical scholarship is applied to 'a wide range of problems and inspire readers to address geographical problems in fresh and creative ways,... representing multiple ways of understanding and interpreting similar issues and concerns' (2008,5)

⁵ Mitchell explains this as follows: "Part of what I do best is to sit in the library or my study and think, read, and uncover or develop evidence to put together arguments, to make what I hope will be convincing arguments about how (some part of) the world is, and therefore why it must be changed. My power resides precisely in the time that I have to think and to read and to write - to engage in the 'force of abstraction' - and then to use all that to teach, both in the classroom and through writing and lecturing". (2004: 26)

⁶ Former President of the country

who was instrumental in ending the war with the LTTE and who initiated the Hambantota development project.

⁷ The Report on, 'Drivers of Deforestation and Forest Degradation in Sri Lanka,' done by Sri Lanka + UN-REDD program.

⁸ I use the term "Wilpattu" merely to refer to the issue as it is usually known and publicized.

⁹ See the Engineer, Dr. Rohan Fernando reporting so in the 'Daily Mirror' (January 3, 2017).

¹⁰ See David Lees, Amberg's chief site supervisor on the project reporting in 'The Island' (November 12, 2016).

¹¹ Both these studies were carried out as a partial requirement of the Bachelor of Arts Degree Examination (Geography Hons).

¹² John Agnew explains a place to be constituted by locale (as setting for social interaction -

informal as well as institutional), location (place as located in geographical space) and sense of place (attachment between places and people) (see Agnew, 1987). This provides a contextual and process-oriented perspective towards places moving away from a container view of places as

merely measurable and bounded spaces.

¹³ Bastian, Sunil in his article, "The politics of land reform and land settlement in Sri Lanka," attempts to deal with the issue of the process of state formation and land and settlement policy in Sri Lanka, unravelling the

connection between the ruling classes and Sinhalese rural population (See the article in www.sunilbastian.com).

¹⁴ Based on the interviews with the inhabitants of the area at the aftermath of the landslide disaster. They reported that about 60 Indian Tamils had lived there

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Land Rights and Reparations in Sri Lanka: Influencing the Reform Agenda

BHAVANI FONSEKA

This article briefly examines key challenges in terms of land and reparations in Sri Lanka and implications for proposed reforms, while highlighting the necessity and urgency for such reforms in the reconciliation process.

1. Introduction

Much has been written on land issues in Sri Lanka, from trends during the war to challenges in the post war context. Despite the end of hostilities in 2009 and promises of reconciliation and reforms by the present government of President Maithripala Sirisena, numerous challenges remain including thousands across Sri Lanka being unable to return to their homes and finding durable solutions. Although promises were made to return lands to legal owners and some progress has been made in this area, a significant number of both private and state lands continue to be occupied by security forces in the North and East of Sri Lanka. Furthermore, decades of conflict, displacement and lost documentation have also resulted in a range of other issues including competing claims and contestation of ownership for particular plots of land, ethnic and political dimension of land alienation schemes, tenure security, loss of livelihood and poverty (Fonseka and Raheem 2011).

Land was a key driver in the near three-decade war and is a critical issue that requires attention and action, if the reform agenda of the present government is to have tangible impact on ordinary citizens across Sri Lanka. Recent protests in the North such as those around the continued occupation of lands in Keppapilavu in the Mullaitivu district¹ demonstrate a multitude of challenges: from years of displacement to challenges with ownership and control of lands, problems due to lost/lack of documentation to the role of the civilian administration and military. The protests around the Keppapilavu occupation also demonstrates the

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political dimension, with the central government unable to make tangible progress of returning lands even after promises made to that effect. Counter to the dynamics of the central government, this particular case also highlights local dynamics and issues around the Tamil polity.²

This article briefly examines key challenges in terms of land and reparations in Sri Lanka and its implications towards the promised yet elusive reforms. It must be noted at the outset that this article is not an exhaustive study of land issues in post war Sri Lanka but references existing studies to demonstrate key trends and challenges. Despite the delays and increasing disillusionment, the article highlights the necessity and urgency for reforms if reconciliation is to be realised.

2. Land Issues in the Present Context

Sri Lanka's recent history has witnessed several events and developments impacting land issues in Sri Lanka, including the war, 2004 tsunami, development agenda and transitional justice commitments, among many others. The war brought with it a range of issues, from displacement to militarization to land grabs. Displacement was experienced by most communities in the North and East of Sri Lanka, with responsibility attributed to a range of actors including the State, the LTTE and other non-state actors. The cycles of hostilities resulted in waves of displacement, with some communities experiencing multiple displacements (Raheem 2013). For example, thousands were displaced from their lands in the 1990s in Valikamam North, with many still unable to return home (Fonseka and Raheem 2011). The eviction of the Muslim community in the North by the LTTE also bears an ethnic dimension (Raheem 2013). Sinhalese communities too were displaced as a result of the war, having to move from areas in the North, East and border areas due to active hostilities and threats (Raheem 2013).

Previous work also documented the ethnic dimension of land issues in the North and East, ranging from allegations of land grabs, to alienation schemes to land disputes, to the politicization of land (Fonseka and Raheem 2011). The waves of displacement are too many to note here but the diversity in terms of affected communities, the multiple displacements and the ethnic and political dimensions, demonstrate the complexities involved and the deep divisions created as a result. Therefore, reforms are timely and necessary and can include a range of initiatives. There must be a genuine attempt to understand ethnic and religious tensions, examine gender, caste and class issues, initiate legal and administrative reforms, address capacity issues and the lack of awareness, among many others. Equally important is to ensure powers are fully devolved to the provinces; ensuring decision-making is with actors who know the history of land and issues in the areas.

A fundamental issue witnessed during the war and confronting many in post war Sri Lanka is tenure security. As a result of numerous conflicts, a tenure system can be deeply affected, with the marginalized groups such as minorities and women suffering more with numerous curtailments to owning, controlling and accessing land and livelihood options. There is also the issue of existing frameworks that exacerbate tenure insecurity including legal and policy dimensions. In Sri Lanka, the legal framework provides for land to be acquired for a 'public purpose' with wide implications, discussed in the next section. Moreover, there are limited safeguards for those affected by a potential legal acquisition. This must be remedied urgently. But as highlighted below, judicial pronouncements over the years provide for some safeguards and this must be noted when undertaking reforms, ensuring robust steps are taken to provide for tenure security.

3. Present Framework, Judicial Pronouncements and the Need for Reforms

Several pieces of legislation provide for land to be acquired for specific purposes as well as for the zoning of areas that can impact tenure security (Fonseka 2014). The Land Acquisition Act No 9 of 1950 (LAA) is possibly the most frequently used statute to acquire lands across Sri Lanka. Section 2 of the Act provides for land to be acquired for a ‘public purpose’ but does not provide a definition as to what the public purpose entails, leading to unfair and arbitrary dispossession and displacement. In this absence, the Judiciary has stepped in. In *Mendis et al v. Perera et al* S.C. (FR) No. 352/2007 (known as the Waters Edge case), the Supreme Court defined public purpose to mean that the purpose of acquiring land as the primary object, public utility and benefit of the community as a whole. Furthermore, the community to be directly benefited must include the local community to be affected, not just the community as a whole. Thus, public purpose must directly benefit the local community and the government must show that the purpose of the land acquisition directly benefits the local community. In addition, *Manel Fernando v. D.M. Jayaratne, Minister of Agriculture and Land and others* 2000 (1) S.L.R. 112 states that a notice issued under Section 2 of the Act must state the public purpose for which land is being acquired. These standards have been used to challenge recent attempts to acquire land. For example, in *Arunasalam Kunabalasingham and 1473 others v. A. Sivaswamy and 2 others* CA (Writ) 125/2013, the Petitioners are landowners in the Jaffna District whose land continues to be occupied by the security forces. In this particular case, the Petitioners challenged steps taken to acquire over 6000 acres of private lands for a purported public purpose of establishing a ‘Defence Battalion Headquarters’. The case is presently before court.

In addition to the judicial pronouncement on public purpose, Sri Lankan courts have also developed the Public Trust Doctrine aimed to prevent the abuse of power and exploitation of public resource. Justice Mark Fernando speaks of the powers conferred on the Government by the LAA in *De Silva v. Atukoral* and says: “*It was a power conferred solely to be used for the public good, and not for his personal benefit; it was held in trust for the public; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest.*”³

Justice Fernando goes on to discuss the role of the judiciary vis a vis the Public Trust Doctrine in *Mundy and Others v. Central Environmental Authority and Others*

...this Court itself has long recognized and applied the ‘public trust’ doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes... Besides, executive power is also necessarily subject to the fundamental rights in general, and to Article 12(1) in particular which guarantees equality before the law and the equal protection of the law...⁴

Thus, the Public Trust Doctrine is critical in light of the large scale development work undertaken and the continued military occupation of lands, and whether land required for such are in the public benefit and meet the standards provided by courts.

An added dimension provided by legislation is the urgency in which some lands are to be acquired. Section 38 and 38A of the LAA provide for lands to be urgently acquired. Section 38 (a) states where it becomes necessary to take immediate possession of any land on the ground of any urgency, at any

time after a notice under Section 2 is exhibited for the first time in the area in which that land is situated or at any time after a notice under Section 4 is exhibited for the first time on or near that land. As held in *Marie Indira Fernandopulle and Another v. E.L. Senanayake, Minister of Land and Agriculture* 79 (II) NLR 115, the burden of proof concerning urgency lies with the government. Ambiguities remain as to what 'urgent' land acquisitions means and what constitutes a genuine need for which land must be urgently acquired. Therefore, the government must exercise its powers with great care and circumspection since urgent compulsory acquisition of land is likely to make the landowner landless and lead to unfair and arbitrary decisions with long term implications.

Many other gaps remain in the use of the LAA and as to what amounts to 'public purpose'. A significant problem is the lack of transparency in the process of acquisition of land. In several instances affected parties were unaware acquisition notices were issued as many had no access to their lands, for example in situations where the land was in high security areas. There have also been instances where the notices issued were in a language where affected parties were unable to understand. Such procedural discrepancies can result in many being unaware of being dispossessed of their lands. In addition, the compensation provided by the LAA is very low and this must be reviewed to ensure they meet present day standards.

In addition to the LAA, several other statutes provide the State with the power to acquire private lands. The Urban Development Authority Act No 41 of 1978 provides broad appropriation powers over land to the Urban Development Authority (UDA). The Act grants the UDA the power to acquire lands belonging to local authorities or private lands. Under Section 3 of the Act, the Minister has the power to identify any area suitable for development and declare to be 'an urban development area'

which initiates economic and physical development of said area by Order published in the Gazette, providing wide powers of zoning that can impact tenure security of citizens. In addition to the UDA Act, the Urban Development Projects (Special Provisions) Act No. 2 of 1980 provides an advanced method of land acquisition. Declaration of lands urgently required for urban development projects is set out in Section 2 of the Act.⁵ This broad power can have wide implications with a person's right to own and control one's land. In addition, the Act provides for the restriction on remedies available upon a declaration which prevents an affected person from challenging an acquisition to obtain an injunction or stay order or any other order to restrain the acquisition or carry out work on the said land. The Act further restricts action by affected parties to only action in the Supreme Court to those of obtaining compensation or damages.

The above are some examples of legislation that can impact tenure security and provides the State and its agents with broad powers for acquisition and limits redress.⁶ Although judicial pronouncements provide some safeguards, these only go so far. At a time when the present government has promised reforms including devolution of power and human rights protection, it is inherent to address these areas and ensure that broad terms such as 'public purpose' and 'welfare of the people' do not unfairly dispossess people of their lands, and that any benefit is directly for the people. The continuing occupation of lands in Jaffna, Mullaitivu, Mannar and other areas in Sri Lanka, and in some instances amounting to illegal occupation and allegations of land grabs, demonstrate a complete disregard to the existing legal framework and the rights of the citizen. It is in this context that urgent reforms are required, both in terms of legislative amendments and the implementation of safeguards provided. In terms of the transitional justice context and promises made by the Government of Sri Lanka, immediate steps must be taken to assess land

occupation and release lands to legal owners, with alternative lands provided in particular cases where the original land cannot be returned. Such measures must be done in a transparent manner with due process safeguards, ensuring that land alienation meets with the Constitutional and legal framework. Amendments to legislation are also needed from the LAA to others which provide broad powers of acquisition and zoning with limited safeguards. There should also be consideration in terms of administrative practices, ensuring that there is transparency and information provided in terms of proposed initiatives and affected communities are aware of their rights and remedies available. It is paramount that if reform is to be beneficial for the citizens of Sri Lanka, there must be a focus on the rights framework with the individual's right to own, control and access one's land given due attention and not be undermined in the name of security and development.

In addition to the legal framework and judicial pronouncements, attention should also focus on the policy framework. In the absence of legal reforms at the time, the then government introduced in 2001 the National Involuntary Resettlement Policy (NIRP) which applies to all development induced land acquisitions and also provides for the preparation of a Resettlement Action Plan when 20 or more families are affected.⁷ NIRP also provides for affected persons to be adequately compensated, relocated and rehabilitated and to address community relations, among others. Despite calls for legislative reforms, successive governments have yet to transform NIRP into a legally binding document.

4. Land Reparations

The right to reparation is one of the four pillars of transitional justice and include five forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (Fonseka 2015). The process to be followed when

providing reparations can be important to victims, sending a message to the victims and the larger public acknowledging the suffering of the past. The impact of reparations can be multifaceted; from building confidence among affected persons and communities of the government's ability to move past abuses and act upon remedying them, to building trust within and among communities. These are all essential in a post war Sri Lanka.

Reparations can be either judicial or administrative (De Greiff 2008). They can also be individual, collective, symbolic and material forms of reparations. Individual reparations may take the form of compensation, rehabilitation and restitution. The return of land and property, as well as financial compensation, are some forms of individual reparations. In Sri Lanka, a combination of individual, collective, material and symbolic reparations is required. The Government of Sri Lanka committed in 2015 to establishing an Office of Reparations.⁸ Despite the passage of time, there is no tangible implementation in this regard with no information publicly available on the mandate of such an office and what is planned in terms of reparations. What is proposed must be the product of careful planning and consultations, ensuring that the process is inclusive and transparent. The design process must also address the question as to who is to provide reparations, the role of the proposed Office of Reparations and whether the subject is to be devolved and ensure there is attention on issues such as equity.

The Sirisena government has committed to an ambitious set of transitional justice measures but the delays in implementation have resulted in disillusionment (Fonseka, Ganeshathasan & Daniel 2017). If fully implemented, reparations and other transitional justice commitments, can make a useful if modest contribution to achieving the broader aim of reforming land tenure systems in a more just direction, recognise past practices that

resulted in marginalization and discrimination and provide redress. Several months into promising reforms, pressure must be on full implementation in keeping with international standards, requiring consultation, transparency and victim centrality. In designing a reparations programme, it is critical to ensure that equity and the dignity of affected persons are respected.

In the design stage of reparations, key issues such as how to define a victim will likely come up (Fonseka and Naples-Mitchell 2017). Kimberly Theidon refers to the contentious politics of victimhood, arising more often than not in contexts where it is unclear how reparations packages will be designed, what criteria will be chosen for reparations and how much resources will be allocated (Theidon 2012). While a framework is essential, the design of a reparations programme must also ensure it reaches the most vulnerable and marginalised communities. There is also a gender dimension that requires consideration, ensuring that the design and implementation of reparations provides an opportunity to bring in gendered perspectives to ensure such initiatives do not reproduce gender inequalities and unjust practices (Rubio-Marín 2009). Thus, the design of a reparations package should factor in the present framework, identifying legislation, policies and practices that result in or exacerbate discrimination and ensure amendments are made and steps taken to mitigate harm.

In Sri Lanka, some work has been done in terms of land documentation and dispute resolution, attempting to resolve issues related to war as a result of the war and natural disasters. However, these initiatives have been ad-hoc and in some instances come about out of mere political necessity. A comprehensive land-mapping exercise, documenting ownership and control of state and private lands and compiling a list of potential owners or those in control are clear requirements

yet to be comprehensively pursued by the State. A thorough assessment of land occupied by the military, police and others will need to be done to compile a list of lands and affected individuals and entities. Land that can be returned to the legal owner and areas where alternative lands will have to be substituted need to be identified. Moreover, there must be political will to fully implement constitutional obligations and initiate legal and policy reforms.

5. Next Steps

2017 is likely to be a crucial year for Sri Lanka. A new constitution has been promised. Transitional justice commitments made in 2015, including the establishment of an Office for Reparations and the release of lands, are likely to receive a new lease of life. It is also hoped that the constitutional reform and transitional justice processes can be sequenced and a transitional justice clause is included in the new constitution.⁹ The government's promise of a new Human Rights Action Plan for 2017-2022 is likely to contain specific provisions relevant to land, reparations and resettlement which can also be another indicator to influence reforms.

NOTES

- ¹ 'Jubilant Keppapilavu residents return to their lands', Sunday Times, 2 March 2017.
- ² P.K. Balachandran, Tamil factionalism a key factor in Kepapilavu, Vavuniya agitations in Sri Lanka, *The New Indian Express*, 19 February 2017.
- ³ *De Silva v. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another* SC.Appeal No. 76/92., para 297.
- ⁴ *Mundy v. Central Environmental Authority and others* (SC Appeal 58/2003)
- ⁵ 'Where the President, upon a recommendation made by the Minister in charge of the subject of Urban Development, is of opinion that any particular land is, or lands in any area are, urgently required for the purpose of carrying out an urban development project which would meet the just requirements of the general welfare of the People, the President may, by Order published in the Gazette, declare that such land is, or lands in such area as may be specified are, required for such purpose.'
- ⁶ For more information on the legal framework, refer to Bhavani Fonseka, *Legal and Policy Implication of Recent Land Acquisitions, Evictions and Related Issues in Sri Lanka*, CPA 2014
- ⁷ In case where less than 20 families are displaced, the NIRP still requires a Resettlement Action Plan with lesser level of detail.
- ⁸ UNHRC Resolution, 'Promoting Reconciliation, Accountability and Human Rights in Sri Lanka', A/HRC/RES/30/1, 1 October 2015
- ⁹ For more information, see the submission made by the Centre for Policy Alternatives- <http://tjsrilanka.org/2016/08/02/cpa-submission-to-the-consultation-task-force-on-reconciliation-mechanisms/>, last accessed 1st March 2017.

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Land Bank: The Government's Guise in Setting the Stage for Large Scale Land Grabs

Development over dispossession -farmers, fisher folk, rural communities and the urban poor at risk

THE PEOPLES' ALLIANCE FOR RIGHT TO LAND (PARL) - FEBRUARY 2017

This position paper discusses the proposed Land Bank in relation to the impact it may have on rural and urban poor, fisher folk and farmers. Viewed as an extension of neo liberal economic policies that dispossess small scale farmers and food producers, the position paper calls for a national land policy to ensure the rights of communities, and environmental sustainability

PARL is a voluntary coalition of civil society organisations and individuals, working together against land-grabbing, and for the housing, land and property rights of poor and marginalised communities in Sri Lanka, since 2011. The PARL network brings together environmental, social justice, human rights, and community-based organisations of women, small-scale farmers, fishers and plantation workers, and civil society activists opposed to the dispossession of the poor from their lands, fishing waters, and homes; and in solidarity with the struggles of the affected peoples.

1. Introduction

In the presentation of the 2017 budget, the Sri Lankan Government submitted the proposal of establishing a land bank. This announcement was further substantiated through a cabinet decision made on 31 January 2017 affirming the establishment of a land bank in Sri Lanka by March 2017. There is very little information available publicly on the nature of the land bank. Generally, however, a land bank refers to a public or community-owned entity created for a single purpose: to acquire, manage, maintain, and repurpose vacant, abandoned, and foreclosed properties.

Among the list of reasons given by the government to expedite the process of establishing a land bank, their most salient is to simplify the country's land governance system in an effort to make it easier to release lands for development and investment projects.

At first sight, in a country where more than 70% of its land is owned by the state and is administered by a set of diverse and complex laws and regulations, the idea of a simplified and uniform system of land governance can be deemed as a positive move.

However, when we place this proposal in the context of the country's current development agenda, this raises serious concerns over the land rights of poor rural and urban communities in Sri Lanka whose lives and livelihoods are closely tied with their land and natural surroundings.

In the budget proposal for 2017 and the mid-term economic plan presented by the Prime Minister in 2015, the Government is planning to completely change the country's agricultural sector. Labeling the existing agricultural sector as inefficient and low income yielding, the government aims to promote the production of large scale commercial crops targeting global value chains. This is yet another strategy for the government to attract foreign investors and large scale agricultural corporations.

The government is already preparing to provide large extents of land used by farmers and local communities to private companies. Plans for allocating 15,000 acres of land for Chinese companies is one major step towards this. The budget also proposes that an area of 20,000 acres be released from the Maduru Oya right bank for large-scale commercial agriculture. Over 3000 acres of forest and cultivation will be used for the foreign funded Heda Oya water supply scheme valued at 20 billion rupees. This has the potential to displace hundreds of farmer families. Land plots of a minimum of 1000 acres are set to be leased to large scale agrarian farms. The government also intends to encourage both local and foreign investors to invest in sugar mills in Monaragala, Batticaloa, Kilinochchi and Ampara for which the government will be providing land for large scale sugar cane cultivations.

According to the World Bank's country assistance framework for 2017 to 2020, current property rights and land use regimes were identified as barriers to encouraging foreign direct investments in Sri Lanka. Hence the proposal of a more liberalized land market in Sri Lanka as a major requisite for economic growth (World Bank 2006).

The World Bank in its recent report (launched in 2015) named "Sri Lanka – Ending Poverty and Promoting Shared Prosperity" has also proposed

the relaxing of labour laws and opening up of natural resource markets in Sri Lanka in order to attract foreign investments. Discussing the relationship between the private sector and the public sector, it identified property rights and land use regimes as existing constraints. It recommends that the land market in Sri Lanka should be liberalized. This would inevitably lead to rural, vulnerable small scale producers being forced to sell their lands to big corporations and migrate to cities. The report also recommends that land use regimes which introduce restrictions in outright selling of land by the farmers lead to the fragmentation of land parcels, a serious constraint for businesses and economic progress. Similarly the World Bank states that licensed permits to land are another obstacle, especially permits that impose a prohibition on farmers selling their lands.

In addition to calling for the liberalization of land, the World Bank also points out that labour market regulations in Sri Lanka act as a constraint on the growth of employment in the country. It is recommended that labour markets are opened and liberalized. This would inevitably lead to a severe exploitation of labour. Sri Lanka, as a developing country, in the absence of possessing substantial financial capital, possesses natural resources and labour resources. As mentioned above, the World Bank report on Sri Lanka, recommends the liberalization of both natural resources and labour in Sri Lanka. This has always been the core component of structural adjustment programs International Financial Institutions (IFIs) have been pushing for, to allow the exploitation of labour and natural resources for the profit accumulation of private companies.

The proposed megapolis development plans also raise serious concerns related to land and housing rights of urban poor communities living in those areas (Nagaraj 2016).² The rapid promotion and development of tourism have had

a substantial impact on the right and access to land and sea of coastal communities, especially fisher folk. It is clear that the government is making policy changes in the country in order to have a "clear land policy" in place to be able to attract foreign investors and grant the right for companies to own large areas of land in Sri Lanka.

2. Our Stance as PARL

The government has been continuing to give land to private companies on grounds that lands being occupied by small scale farmers and fisher folk are not economically viable. However, it must be noted that this is not a new strategy. As early as 1977, this has been a core element of the neo-liberal economic agenda of successive governments. Four decades of neo liberal economic policies in Sri Lanka have failed to achieve sustainable and equitable development in the country and is often the primary reason for increasing inequality and marginalization.

Reduced government support and increased market liberalization had a severe impact on the agriculture-based rural economy, putting the livelihoods of more than 40% of the country's population in danger. Small scale food production was seen as unproductive, and water, land and other resources used by small scale food producers were acquired and handed over to large scale private companies for industrial agriculture, tourism and infrastructure development.

Undermining the significance of small scale food production does not only have a negative impact on the livelihoods of rural communities, but also the status of food security of the poor. More than 20% of Sri Lankan children suffer from malnutrition and around half of the population in the country do not receive minimum daily dietary requirements. With decreasing local food production, the country has to depend on food imports to fulfil its food requirements. Although paddy cultivation is

deemed to be one of the most integral components of the local agriculture sector and food system in Sri Lanka, in 2014 Sri Lanka imported 50,000 tons of rice from Bangladesh.⁴ One of the requirements of the neo liberal economic agenda is to make the local currency competitive by depreciating it. Being a net food importer, devaluation of the rupee has resulted in sharp increases in the price of essential food items in the local markets (B. Skanthakumar, 2013). The need to keep private sector wages low in order to be more competitive in global markets has made the workers and their families more vulnerable to increasing living costs.

More than 40% of Sri Lanka's population still live in rural areas and are engaged in agriculture and fisheries as their primary or secondary livelihood. The level of access and control over their resources is a key component in ensuring the sustainability of their livelihoods whilst fulfilling the food security requirements of their families and communities. Land is not a mere livelihood resource for these communities, but also a part of their identity and dignity. The thirty-year long civil war in Sri Lanka has shown that the violation of people's right to their land and undermining their right to make decisions over the use and control of land and other resources can lead to other ramifications and disastrous conflicts.

Large scale land acquisition and conversion of land into mono cropping cultivations and industrial zones will also have a serious negative impact on the sustainability of environmental systems. Increasing human elephant conflict due to large scale clearing of forest land, environmental and health impacts due to the usage of agro chemicals in industrial farms, destruction of water catchment areas and other sensitive eco systems are examples of some of the most prevalent impacts of unsustainable land use practices.

The Peoples' Alliance for Right to Land (PARL) opposes the establishment of a land bank as we foresee the consequences of liberalizing natural resources in the country. We do not support the government's new development proposals outlined in the 2017 budget, as they do not uphold the right to land of farmers, fishers and rural communities. We ask the Government to develop a national land policy through an extensive consultation process with communities, academia and civil society to come up with a comprehensive land policy which ensures the rights of local communities and environmental sustainability.

We call for pro-poor development initiatives in place of pro-investor neoliberal economic agendas. PARL is in support of sustainable development mechanisms which do not involve development over dispossession. We recognize the need to fortify food sovereignty for urban and rural communities and thereby support the right to land and natural resources of small scale food producers island wide.

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Mega Development Projects in the Light of (Principles of) Administrative Justice

NILLASI LIYANAGE AND SINDHU RATNARAJAN

This article explores the Western Region Megalopolis Planning Project through the lens of principles of administrative justice.

1. Introduction

Mega development projects are construction projects that involve a high investment of capital, major changes in the landscape, and a significant impact on the community; which are undertaken with the main objective of economic development.

The concept of 'Megalopolis' was outlined by Jean Gottman as "clustered networks of metropolitan areas." (Short 2007, 1-4) Drawing inspiration from that concept the 'Western Region Megapolis Planning Project' (WRMPP) seeks to interlink the cities of the Western Province in a pre-planned and sustainable manner within fifteen years at the cost of Rs. 40 Billion. (Lanka Business Online 2016)

The WRMPP consists of 10 'mega projects' which includes the creation of specific zones for different activities such as industrial and tourist cities, the relocation of administration and the installation of a Light Rail Transit system (Ministry of Megapolis and Western Region Development 2016, 27,37) which hark of far-reaching changes to the land, geography and space of the region. Other projects include energy and water, aero maritime trade hub, industrial and tourist cities- Mirigama, Horana, Negombo, Aluthgama, science and technology city, smart nation, eco habitat and plantation city etc.

The first phase of the 'Techno City' consisting of several Technical zones from Malabe to Homagama, which was launched in September 2016, and the Colombo Port City are projects that are currently underway.

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2. Expectations of the Megapolis Project

The WRMPP proceeds on the three broad national goals of easing the congestion pressure exerted by ‘messy urbanization’, transforming the physical and institutional infrastructure and the national economic structure in order to propel the nation to the status of a high income developed country, and optimally harnessing the benefits of a knowledge-based innovation-driven global economic environment. (Ministry of Megapolis and Western Region Development 2016, 3).

It seeks to build on the assets of the Colombo region to create ‘a platform for growth that is consistent with social justice.’ The WRMPP is conceptualized as the prudent Grand Strategy for achieving two decisive inter-dependent transformations of ‘A High Income Developed Country’, which are the spatial transformation of urban agglomerations in the Western Region of the country and the structural transformation of the National Economy as a whole. (Ministry of Megapolis and Western Region Development 2016, 3).

The WRMPP expects to cater to people from all spheres of life. For example under the area of transport, the Megapolis plan says “*When planning for a transportation system to serve the existing and future townships and growth centers, it is vital to take into consideration the requirements of all the socio economic classes.*”

The objectives of the Megapolis project are based on the four fundamental pillars of economic growth and prosperity, social equity and harmony, environmental sustainability and individual happiness. (Ministry of Megapolis and Western Region Development 2016, 4). While these objectives appear visionary, it is questionable whether the proposed projects can in actuality help achieve these ends.

Case law has had much to say regarding the benefits of such projects. The Eppawela Case speaks of overall economic benefits; Amerasinghe J. quoting David Korten, the Founder President of the People-Centred Development Forum said, *Money is a number. Real wealth is food, fertile land, buildings or other things that sustain us... Squandering real wealth in the pursuit of numbers is ignorance of the worst kind. The potentially fatal kind.*

The judgment in the *Sugathapala Mendis v. Chandrika Bandaranaike Kumarathunga*, SC FR 342/2007 (*Water’s Edge Case*), critically reviewed the public purpose of a ‘beautification’ project, which would result in an acquisition of private land. Courts considered “The alleged “beautification” of an area [as] simply too abstract and indirect a benefit to suffice as a reason to approve a project to alienate the land at issue, in light of the potential detriment that such beautification can bring.

The Court went the extra mile to take into consideration that the beautification of the land would make it even more difficult for the lower-income segment of the people to obtain affordable housing due to the increase in market value of the land area. Therefore these development projects simply perpetuate the gap between the rich and the poor and do not serve any public purpose, which “*connotes as its primary object, public utility and benefit of the community as a whole.*” It is questionable if these development projects actually work towards the benefit of the community as a whole or simply benefit certain classes of people. Balanced development is essential and as to whether beautification projects result in balanced development is indeed questionable.

The Court also held that they were unable to identify any “*significant benefit of a sufficiently direct nature to the community of the people of Batteramulla,*” and simply leaving the land alone which would have “*retained it as a wetland*

would have prevented flooding.” It is noteworthy that courts questioned the very purpose of beautification saying “*apart from having to assume that beautification is something to be objectively achieved- we for example do not consider untouched wetlands to be ugly.*” The Megapolis project seems to be eager to interfere with the natural wetland ecosystems and preserve them. It is questionable whether the attempts to preserve and showcase to the public the beauty of our resources, would adversely affect our ecosystem.

Further, in the *Galle Face Green Case (Environment Foundation Limited v Urban Development Authority SC (FR) 47/2004)* the Government of the time was criticized for having formed a secret deal in respect of the Green, and that the dedication made by Sir Henry Ward to preserve this seaside promenade as a place of quiet leisure for the people of Sri Lanka was now being commercialized. Most importantly there was a concern that the lease of this sacred site to a private entity to build a mega entertainment and leisure park with a hawker style theme would wipe out small time traders and also prevent free access to the Green. It is worthwhile noting that even though this lease of the Green would have generated a greater income to the country, Courts still favoured the Petitioner’s interests. The Port City Project may indeed alter the culture of the Green, and it is possible that the rapid increase in high end hotels around the region may unintentionally restrict the general public from frequenting the area, and then fail to meet the ends of social equity.

Therefore, it is important to ensure that there is a nexus between the objectives of the megapolis and the projects suggested. While capital development is essential to get out of the cycle of underdevelopment, the environmental impact could cause irreversible harm. Further development ought to be carried out in accordance with principles of administrative justice if the

rights of the people affected by the projects are to be protected. Any such project should be *intra vires* the law, and the creation of new authority and new bodies of administration should not usurp the existing mechanisms and make them redundant. The rules of natural justice such as the right to be heard and the rule against bias give validity to such development projects, provide legitimacy and hold public authorities accountable. As per prior experience in Sri Lanka development projects have involved forced arbitrary evictions, insufficient compensation and lack of transparency. It is thereby essential that principles of administrative justice are respected in order to avoid repetition of the injustices of the past.

3. Principles of Administrative Justice

“The primary purpose of administrative law is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse.”(Wade and Forsyth 2009, 4). A decision taken in the exercise of public power can be said to be within the contemporary notions of administrative justice if it is in accordance with the law, is rational, is fair and is intelligible by provision of reasons (French 2010, 1-2). Any development project will entail the exercise of public power in the making of decisions and taking of action that will ultimately affect the citizens of the country. As emphasized in the excerpt from the *Eppawela Case*, it is difficult to term a project as a ‘development’ project when it is carried out at the cost of disrupting the tranquillity of the lives of the people thus cancelling out whatever benefit that is gained in monetary terms. Adherence to the principles of administrative justice set out in administrative law is invaluable in that context, in order to ensure that the exercise of public power does not infringe on the rights of the people. These principles preserve the sanctity of the social contract where the people have entrusted their sovereign power to the government, to be exercised on behalf of them, for their benefit.

Therefore it is necessary that any development project undertaken by the government should respect the principles of administrative justice. A successful project is simply not just one that brings in economic growth, but also follows due process. If a government is unable to conduct any project legitimately then the government has failed to duly exercise the trust of the public vested in them. The case of *Mundy v. Central Environmental Authority SC Appeal 58/ 2003* while acknowledging that the Southern Expressway project is “of national importance and benefit” also affirmed the failure of the RDA to comply with prescribed procedures. Courts refused the writ of *certiorari*, but compensation was granted for the failure of the State to abide by principles of natural justice. This sets a precedent that however ambitious the economic venture, the State ought to follow due process since the proportions nor the objectives of a project justify the infringement of rights.

Intra vires the law

The Ministry of Megapolis and Western Development was established in terms of the provisions published in the Extraordinary Gazette No.1933/13 dated 21st September 2015. In order to implement the Megapolis project, a Western Region Megapolis Development Bill has been proposed. This Bill intends to connect authorities at the local, provincial and national level and incorporate the workings of these separate entities into one system (Western Region Megapolis Laws & Regulations, 4).

The Western Region Megapolis Development Authority of Sri Lanka Bill was to be presented to Parliament early this year (Marasinghe and Mudalige 2016). However, until the Act is passed, the Urban Development Authority and the Sri Lanka Land Reclamation Authority have been empowered to carry out the projects under it (David 2016).

Section 1(4) of the Megapolis Bill states that the Development of the Western Region shall be a national policy under Item 1: List 2 of the 9th Schedule of the Constitution, and that the President would declare the Western Region a special development area.

Section 16 of the Bill explains the powers of the Megapolis Authority, which is to be formed under the Act. The Authority has powers to secure and obtain technical and financial assistance from local and foreign sources to fulfil their objectives. Section 20 permits land to be acquired for purposes of the Megapolis under the Land Acquisition Act. Subsection (7) (b) holds that the State Lands Ordinance shall not prevent the powers of alienation granted to the authority.

Section 38 provides a list of all laws that the Megapolis Bill would supersede, such as the Urban Development Authority Act, National Physical Planning Act, Board of Investment Act, and the Low Lying Area Development Corporation Act. Subsection(ii) states that *Any law, regulation or rule made under any Act as far as is inconsistent with this Act or any rule or regulation made under this Act, shall be null and void.*

Further, the Town and Country Planning Act is sought to be repealed through this Bill.

The scope of power being granted to this Authority is very wide, also considering that members are to be appointed by the President on the recommendation of the Minister of Megapolis and Western Development (Megapolis Bill, Section 4). Further the, Minister is also empowered to obtain foreign assistance in financing and administration, which would have adverse effects. Entering into foreign investments and negotiations cannot be done at the whims and fancies of a person. Today, with the increase in sovereign wealth funds, it is not solely profit that investors are looking for but

also strategic benefits. It is important to note that economic instability in itself is sufficient to bring down a nation. Entering into Bilateral Investment Treaties, without sufficient debate on such matters will lead to the exploitation of a country. The terms on which investors are allowed to enter should be carefully analysed by economic experts. Simply empowering the Minister to engage in such negotiations at his discretion could be detrimental to the country.

With regard to foreign relations, the Provincial Councils Act No 42 of 1987 in comparison says, *Foreign aid negotiated by the Government, for a project or scheme in a Province shall be allocated by the Government to such project or scheme (Section 22)*. Even Provincial Councils which were created for the purpose of power sharing have not been devolved with such extensive power, unlike that bestowed upon the Megapolis Authority.

In Sri Lanka, the principal demand for decentralization appeared in the form of territorial autonomy in the North and East under a federal model (Welikala and Guruge 2010, 12). The Indo-Lanka Accord was signed amidst such pressure for devolution. It introduced the 13th Amendment which instituted Provincial Councils for all Provinces (Welikala and Guruge 2010, 13). Under the 13th Amendment to the 1978 Constitution of Sri Lanka, the 9th Schedule in List 1 sets out the areas which have been devolved to Provincial Councils exclusively, such as planning and provincial economic plans (Item 22), provincial housing and construction, (Item 5) roads and bridges and ferries other than national highways (Item 6), agriculture and agrarian services (Item 9). While the National Policy includes matters related to ports and harbours, airports and aviation, National Transport (List II), Regional Projects under the National Policy may overlap with the functions of Provincial Councils. While the Urban Development Authority, Sri Lanka Land Reclamation and

Development Corporation and Colombo Municipal Council are Project Implementation Agencies incorporated into the WRMPP (Ministry of Western Megapolis and Western Development website), there is a danger that their functions could take over those of the Provincial Councils, leaving the Councils unable to exercise real powers in this regard.

Provincial Councils were established for purposes of devolving power to the Provinces and enabling power sharing at a time when federalism as a form of governance was under intense debate. In the 13th Amendment, Item 1.3 of the 9th Schedule states that the power to alienate 'State Land' which is vested with the President- per Article 33(d) of the Constitution-has to be exercised on the advice of the Provincial Council. It was stated in *Vasudeva Nanayakkara v. Choksy and others* 2008 1 SLR 134 that by the above requirement the 13th Amendment had created an 'interactive' regime of State Land alienation. However, the court rejected this stance in *Solaimuthu Rasa v. Superintendent, Stafford Estate* (SCM 26. 09. 2013) on the basis that it did not say that alienation could be done "only" with the advice of the Provincial Councils. The functioning of Provincial Councils have not been properly integrated with the state mechanism, and the introduction of other state bodies which are vested with greater power, will further usurp the Provincial Council mechanism of the 13th Amendment.

Principles of Natural Justice

There are some essential rules of procedure in administrative law. Decisions or action taken in violation of these rules are rendered invalid on the basis of 'procedural ultra vires' - or doing the right thing in the wrong way. Impropriety in procedure should be avoided since it can negatively affect the final outcome of an administrative action or a decision. Natural Justice is a fundamental procedural requirement.

The essence of natural justice is the notion of “fair play in action” - that an administrative official or tribunal exercising a quasi- judicial power must adhere to its two rules, namely 1) in a dispute both parties must be given a hearing (*audi alteram partem*) and 2) no person can be judge in his own cause (*nemo iudex causa sua*). (Peiris 2013, 171,226)

a. Audi Alteram Partem Rule

In *Mundy v Central Environmental Authority and Others* (SC App 58/ 2003) where the appellants were adversely affected by the deviations from the original trace of the Southern Expressway the court recognized that the appellants were therefore “entitled to a hearing, under the *audi alteram partem* rule as well as Article 12(1).” It was stated that:

If it is permissible in the exercise of a judicial discretion to require a humble villager to forego his right to a fair procedure before he is compelled to sacrifice a modest plot of land and a little hut because they are of “extremely negligible” value in relation to a multi-billion rupee national project, it is nevertheless not equitable to disregard totally the infringement of his rights: the smaller the value of his property, the greater his right to compensation.

In carrying out development activities it is essential that the authorities keep in mind the emphasis on the right to be given notice of land acquisition. As per Sections 2 and 4 of the Land Acquisition Act No 9 of 1950, notice must be given in instances of land acquisitions for a public purpose. Section 38 Proviso (a) emphasizes that even in instances of urgent acquisitions, notice under either Section 2 or Section 4 must be given. The relative importance of the land acquired in comparison to the purpose it seeks to serve, should not be a cause for not providing notice.

Public consultation is indispensable when undertaking projects such as the WRMP, which have the potential to affect the lives of the people irreversibly.

Participatory democracy” is founded on the direct action of citizens who exercise some power and decide issues affecting their lives; “deliberative democracy”, instead, is founded on argumentative exchanges, reciprocal reason-giving, and on the public debate which precedes decisions.” (Florida 2013, 6)

Hence, public consultation should be an on-going process in which the public are able to engage meaningfully with the process, not only by providing input but also by requesting for reasons.

The WRMP website contains a Master plan of the project as well as a complete outline of the vision, goals, strategies, and initiatives of the Megapolis Master plan in the format of downloadable documents providing a general understanding of this project. However, no mention is made of a methodology of obtaining input from the public and utilizing it in a meaningful way. It is important to consult both experts and also members of the public when designing regional development projects. Even if public meetings are held, they can be effective only if the attendance and the input of those who will be directly affected by such development projects is gathered. The input thus obtained should be given due consideration during implementation, and should not be for mere show.

b. Transparency/ Rule against bias

The rule that no person can be judge in his own cause, *Nemo iudex in causa sua* “is inherent in the requirement of impartiality and objectivity which characterizes the discharge of all quasi- judicial and judicial functions.” (Peiris 2013, 216)

Zoning is one area where the rule against bias is important. Zoning involves the creation of an orderly pattern of land development which separates incompatible land uses such as industries and homes by allocating specified areas for each purpose. (NYC Department of City Planning website) The proposed zoning system under the WRMPP will inevitably interfere with individual property rights since there may be persons within the newly created zones carrying out activities incompatible with the purposes designated to these zones. The dispossession of such people and the acquisition of their land has to be carried out according to the rule against bias.

Currently, the Land Acquisition Act No 9 of 1950 allows the Minister to decide at his discretion, whether any area is needed for any public purpose so that the Government can legally acquire 'privately owned' land. Clause 20(1) of the draft Megapolis Bill states that land acquired under the Authority is to be deemed as having been acquired under the Land Acquisition Act. It is a matter of concern since the Act has not been updated to meet the demands of acquisition under the WRMPP and also since it bestows the Minister with unfettered discretion.

In the case *Manel Fernando and Another v D. M. Jayarathne, Minister of Agriculture and Lands* 2000 (1) SLR 112 the Court emphasized that acquisition by the State entails the payment of compensation to the market value of the land acquired. It is heartening to see that Schedule E of the Bill introduces a comprehensive compensation scheme. It allows those affected to make representation on what they believe is the appropriate value of compensation to the Land Acquisition and Resettlement Committee.

Clause 21(9) also states that persons living in underserved communities shall be treated in a fair and equitable manner and not be impoverished due to development processes which clause if respected

would ensure that unfair forced evictions such as those in Java Lane and Bakery Watte (Perera 2015, 13,17) during previous development projects would not take place.

Judicial review of administrative action also ensures that development projects adhere to common law rules and principles as well. In the *Galle Face Green Case (Environment Foundation Limited v Urban Development Authority, SC FR 47/2004)* the purported lease of the Green to a private company for development was quashed by the court recognizing that the Green had been vested with the Colombo Municipal Council only for the purpose of public use. However, Clause 32 of the Megapolis Bill precludes judicial review or scrutiny of the decisions of the authority, which would not help advance administrative justice.

Further, the 1978 Constitution provides only for pre-enactment judicial review i.e. any proposed legislation can be challenged on the ground of unconstitutionality (Article 121). Since Parliament has the power to pass any Bill that is unconstitutional, (Article 84) it is important to scrutinise development related bills such as the Megapolis Bill before they are enacted by Parliament. The public should be vigilant and challenge such Bills, which could engage better discourse and help formulate better solutions.

The Right to Information (RTI) Act No 12 of 2016, in section 43 (g) imposes obligations on 'public authorities' (as broadly defined in the Act) to provide information to any citizen who requests information provided that it is not exempt from the Act. Considering that the past experience of development projects involved a great deal of secrecy spreading a culture of fear (Sunday Times, 2014), the UDA having been taken over by the Ministry of Defence, the RTI Act could obtain public engagement in implementing such projects, by making them aware of the purposes they

intend to achieve. The RTI is an important statute that citizens can utilize to access information about development projects narrowing down the possibility of arbitrary undertakings.

c. Justice and fairness

The year 2015 initiated a new era of good governance, against the corruption and nepotism of the past regime. However while the situation may have been alleviated, corruption still reigns freely. “Power corrupts and absolute power corrupts absolutely”. Thus it is important that in situations where abuse of power may occur easily, stringent processes are taken to prevent such abuse.

Bribery and corruption may prevail in the context of development projects if strict preventive measures are not put in place. For example, tender processes may be carried out in fraudulent ways, officials may receive commissions and compensation may be withheld until a bribe is paid.

Provisions of the Megapolis Bill are susceptible to corruption. In Section 30 it states that the Megapolis Authority is considered a scheduled institution within the meaning of the Bribery Act, and Section 39 provides for an appeal board under the Authority, to hear appeals for grievances caused in the execution of the powers of the Authority. It is uncertain as to how effective this board may be, and might be a case of a person being judge in his own cause. If bribery and corruption are to be protected against, it should be by way of an external source.

Case law reflects many instances of corruption in development projects. In the *Water’s Edge Case*, while land was acquired for “water retention purposes” it was being leased to Asia Pacific for a golf course and to thereby “harmonize the existence of a golf course with the flood retention purposes.” The case of *Manel Fernando v. DM Jayaratne*, (SC Application No. 797/97) too reflected an instance

where the personal dislikes of the members of the public created an acquisition which was “unlawful, arbitrary and unreasonable”.

The Urban Development Project (Special Provisions) Act No 2 of 1980, in Section 2 paves the way for the President upon a recommendation made by the Minister to acquire land. Section 3 further says that no person shall be entitled to “any remedy, redress or relief in any other court other than by way of compensation for damages,” or to “a permanent or interim injunction.” If any aspect of the Megapolis Project is taken under this scheme it would be dangerous for citizens, because it would promote unquestioned abuse of power. If structurally speaking our existing laws in this sphere do not provide adequate checks, private property rights will not receive the protection that they should.

While the Commission to Investigate Allegation of Bribery or Corruption (CIABOC) is yet another institution to monitor bribery and corruption, other mechanisms should be implemented to strengthen protection. Courts should be vigilant in exercising their judicial review.

The public trust doctrine has been defined to mean that “those who are charged with upholding the Constitution- be it a police officer of the lowest rank or the President- are to do so in a way that does not violate the Doctrine of Public Trust.” Further, “the powers held by the organs of Government are in fact powers that originate with the people, and are entrusted to the Legislative, the Executive and the Judiciary.” The *Water’s Edge Case* emphasizes that “public power must only be used strictly for the larger benefit of the people, the long term sustainable development of the country and in accordance with the rule of law”. The purpose of a golf course was distinguished as serving the “elitist requirements of the relatively small segment of society in Sri Lanka.” The judgment goes on to state that;

The enactment of laws to allow for such land acquisition was only done because of a legislative belief that private ownership in Sri Lanka is subject to the paramount, essential and greater need to serve the general public, a significant segment of who lack even basic living amenities like running water, electricity, and housing.

Many economists are proponents of the trickle-down effect, which states that there is an eventual downward percolation of wealth to the lowest strata (Dictionary of Sociology 1998). Therefore development which is centered in the Western Province is expected to flow towards the lower classes. This theory can be contested, in its applicability to Sri Lanka, which would be likely to lag behind in development, if not for state interventions such as free education and health policies which are enjoyed by all. The Megapolis project may simply enhance the gap between the rich and poor and create further regional disparities, increasing problems of urbanization.

d. Intelligible, by the provision of reasons

Principles of administrative justice, suggest that the State should be willing to provide reasons to justify and explain why a particular decision was made.

In conducting research for this article the writers became aware that the information resources available on this subject were limited. In order to maintain accountability the government cannot be silent and should be able to justify its various initiatives to the general public. When reasons are provided then the people will decide for themselves if it was worth the cost, particularly the human cost involved.

The Port City Project is one such project, which can be questioned in this light to identify if the expected outcome of the Megapolis project is worth the cost. This is not merely in terms of finances, but it includes effects of displacement and resettlement, environmental damage and cultural impact. In *Mundy v. Central Environmental Authority* (SC Appeal 58/2003) the Expressway was justified as an “absolute necessity” not only by courts but by all the Appellants as well, who conceded that “the project itself [was] of national importance and benefit.”

The Colombo Port City project can be explored in this light. Environmental Experts have expressed their concerns regarding the Port City Project. (Nizam 2017) This venture requires nearly 70 million cubes of sand. Due to the extraction of high volumes of sand, wave patterns, current patterns and tidal flow patterns are expected to be affected. There is also ambiguity and contradiction regarding the extent of environmental impact this project is likely to cause. Extracting rocks from interior rock crop areas would result in earth slips at accelerated rates and also sharply reduce ground water (Nizam 2017).

The coastal fishing communities have been seriously affected by erosion caused by sand mining. The Government has acknowledged this fact and offered Rs. 500 million as compensation for three years, which they have rejected. This allocation of money as compensation proves that the authorities have considered the Port City worthy of uprooting these families from their livelihoods. It is questionable if there is any sort of long term compensation plan (Nizam 2017).

Another question is how to dispose of the solid waste that is generated in the proposed port city, since the Colombo Municipal Council does not have a proper garbage disposal facility and are using various open dumps.

The Port City intends to rely on the Greater Colombo Waste water Management Project (GCWMP), which is intended to modernize and expand the Colombo sewer network over the next 5-7 years and also completely curtail the thousands of metric tonnes of raw sewer annually discharged to sea (Sunday Times 2016). While this may be our Saviour, all these ambitious plans may never see fruition. It is questionable whether the government should implement projects that are not feasible for Sri Lankan infrastructure.

4. Conclusion

The WRMPP which intends to achieve ideal objectives of development is nevertheless a highly ambitious project with an irreversible impact on the land, space and geography of the Western Province of Sri Lanka which also happens to generate 40% of the income of the country. Hence, it is important that the projects under the WRMPP are implemented in a manner that does not negate the end results by adversely impacting citizens. For that purpose, respecting the principles of administrative justice is essential, since it regulates the relationship between the Government and citizens, thereby preventing abuse of power.

Therefore, although the WRMPP appears to be more progressive than many development projects undertaken by past governments, there are a number of areas which need fine tuning if the WRMPP is to adhere to principles of administrative justice.

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Re-Assessing *Maya*'s Queer Politics: A Response to Ibrahim & Kuru-Utumpala

LAW & SOCIETY TRUST

This article is a response to Zainab Ibrahim and Jayanthi Kuru-Uthumpala's review of the movie 'Maya' carried in the previous Issue, and focuses on the queer masculinity of the straight main character.

Zainab Ibrahim and Jayanthi Kuru-Utumpala's review of Donald Jayantha's film *Maya* (2016) contends that the film "keeps reverting to discriminatory stereotypes in its efforts to be entertaining" (2016, 56). This observation is premised on several shortcomings that the authors observe including that queerness continues to be treated as abnormal in the film, that it emphasizes the association between queerness and spirits, and that it continues to push transwomen to the margins by staging them as "grotesque, animalistic and blood thirsty" (2016, 55). Ibrahim and Kuru-Utumpala also highlight what they see as "problematic racial overtones" in the film, drawing particular attention to the role played by the Buddhist monk who has the power to control the queer, Tamil spirit, Maya. Their critique of *Maya* is important because it draws our attention to a number of important queer thematics that are central to the film. However, I want to suggest that their reading of the film is partial because it focuses almost exclusively on the transwoman, Maya. In this short response, I hope to demonstrate how a deeper reading of the queer politics of *Maya* is possible. I will focus my critique on the queer masculinity of the straight main character, Malan, examining the relationship between heterosexuality and queerness, exploring the significance of Malan's missing father in the film, and re-assessing the staging of ethnic relationships in the film.

Approaching the film as a meditation on the queer masculinity of straight men allows for a significantly different reading of the film to the one presented by Ibrahim and Kuru-Utumpala. As Robert Heasley points out the queer masculinity

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of straight men lacks “legitimacy as a form of masculinity” (2005, 310). Heasley goes on to point out that “we do not have a language or framework for considering the ways straight men can disrupt the dominant paradigm of the straight-masculine nor a language that gives legitimacy to the lived experience” (2005, 311). Focusing on the queer masculinity of the straight male protagonist, Malan is important because the audience only meets Maya, the transgender woman, after 80% of the film is complete. Up to that point, we only understand her character through the performance of Malan. Therefore, it would be impossible to read the queer politics of the film without considering how the character of Malan foregrounds the need to think through the queer masculinity of straight men.

The “atypical” and “non-normative masculinity” (2016, 53) of Malan (brilliantly portrayed by Pubudu Chathuranga) is discussed by Ibrahim and Kuru-Utumpala almost in passing in their review of the film. Malan’s atypicality however, requires far more discussion. For Ibrahim and Kuru-Utumpala, Malan’s non-normativity is staged through his fear of ghosts, his comical over-dependence on his mother, and his willingness to show fear to his girlfriend. A closer examination of the film reveals the far deeper ways in which Malan’s masculinity is constantly brought into focus. It is worth remembering that the film was advertised as a ‘comic-horror’ film. Quite surprisingly, the comedy in the film is rooted in Malan’s ‘lack’ of masculinity, typified through his fear of the dark, ghosts, and queer behavior rather than through the character of Maya. This in and of itself marks the film out as worthy of far more careful consideration since the transwoman is often the source of humor in many popular Sinhala films.¹ From the beginning of the film, the queerness of Malan’s masculinity is made visible in his interactions with his girlfriend, Shaini. For example, the staging of his masculinity through the beating up of a group of thugs trying to harass Shaini, is immediately juxtaposed with

his fear of the dark, fear of ghosts, and pleas to be dropped home by Shaini. The subversion of Malan’s stereotypical masculinity is also visible in the fact that it is Shaini who pursues him on her bike and then also takes the initiative to give him her number. In short, from the very beginning of the film the audience is forced to confront the ways in which the character of Malan queers the stereotypical performance of masculinity in popular romantic films.

The relationship between heterosexuality and queer masculinity is central to the plot development of the film. For example, despite Maya’s numerous attempts to possess the various inhabitants of the house, she is only able to possess Malan when he is lured out of the house by Shaini on the grounds that she wants to be the first to wish him for his birthday. In fact, the prelude to Malan’s possession by Maya follows a deeply heterosexual script. Following Shaini’s demand for a ‘reaction’ (a kiss) to her gift and the subsequent romantic song number that confirms their relationship, the couple snuggle together discussing Shaini’s wish that they could be like this forever. Malan points out that people may begin to whisper if they are found this way in the morning. It is soon after this joke about heterosexual love and propriety made by Malan that the spirit of Maya possesses him for the first time. In fact, this is the last time that Shaini plays a significant role in the film because, I would argue, her work in the film is now complete. What the interaction between Malan, Shaini, and Maya lays bare however, is the importance of the heterosexual couple to the queer politics of the film. In short, Ibrahim and Kuru-Utumpala’s discussion of the treatment of queerness as abnormality in the film is unfortunately silent on the way in which Maya also employs heteronormativity to further its queer agenda. Therefore, in contrast to many other popular films, what is distinct about Maya is the way in which it employs heteronormativity to foreground queer performativity.

Apart from Malan's queer masculinity, the apparent lack of a father figure in Malan's household is another key facet of the film that Ibrahim and Kuru-Utumpala do not address. The film emphasizes Malan's intense relationship with and dependence on his mother. He is unable to go to the toilet, or sleep in his bed without her presence. The deeply Freudian dynamics between mother and son are also visible on Malan and Shaini's first date when Malan (who brings the entire family along for support) is only able to express his love for her after expressing his desire for Shaini to his mother. But to approach this from a psychoanalytical perspective must also force us to ask how to account for the apparent lack of a father figure for Malan and his family in the film.

A close examination of the film reveals that the father figure is not actually absent from the film. A garlanded portrait of a man hangs on the same wall which has portraits of all the other members of the family. The fact that this picture is the largest of all the portraits, is garlanded and given a place of prominence suggests that this is a picture of the missing father figure in the film. Most interestingly, this picture hangs above the store room, the room in the house most associated with the spirit of Maya. The wickets with Maya's blood are banished to the store room, the movement of the toy rocking horse which wakes up Malan's sister-in-law is kept in the store room, and it is also the room from which Maya emerges in response to the spells to determine whether there is a spirit in the house. The location of the father's portrait above the room associated with Maya's spirit is hardly an accident. One way of reading this positioning is as an indication that the inanimate spirit of the father is unable to exercise his power as patriarch to protect his family from the spirit of Maya. However, the father's inability to exercise his patriarchal power becomes an important condition for achieving justice and promoting tolerance through the spirit of Maya. Malan's absent father figure also

resonates with Maya's own father who disowns her on the grounds of her queer masculinity. In fact, in the scene in which he kicks her out of the house, the father's most prominent concern is with how his masculinity is shamed by his queer son. We must also consider the fact that the only real father figure in the film is the Tamil man, Ramu. However, as Ibrahim and Kuru-Utumpala point out, Ramu's family challenges the normative heteropatriarchal family institution. As these examples suggest, the lack of a father figure in Malan's household is hardly without significance. In short, the linking of the absent father figure to the store room associated with Maya, further highlights how the film lays bare the limits of the heteropatriarchal order in achieving justice, preserving the family, and promoting tolerance.

It is also important to address what Ibrahim and Kuru-Utumpala identify as the "problematic racial overtones" of the film. They premise this assessment on the role that the Buddhist monk plays in subduing the Tamil transgender woman, Maya. However, I would argue that the Buddhist monk's role in this film is far more nuanced and problematic. While it is true that the Buddhist monk is the only one who has the 'power' to subdue Maya's spirit, it is also true that he chooses to imprison Maya by completely ignoring her pleas for justice. The story of the injustice meted out to Maya and her family by the local politician is only narrated when the monk is able to 'free' Malan from Maya's hold on him. In other words, there is no longer a need to extract revenge on the spirit of Maya since Malan has been freed. However, as Chinthana Dharmadasa points out, in the face of overwhelming evidence of corruption, murder, violence, and injustice, the monk's only response is to bottle up Maya's spirit and hurl her to the bottom of the ocean.² This is hardly a sympathetic portrayal of Buddhist monks. Furthermore, Ibrahim and Kuru-Utumpala's assertion that the film's representation of Tamil Hindu priests as "incompetent swindlers"

is only partially true. This is because even the Buddhist monk's Sinhala acolytes are also susceptible to Maya's violence and manipulation thereby suggesting a far more nuanced approach to ethnic relationships in the film. Ibrahim and Kuru-Utumpala's reading of the ethnic tensions in the film also elides the fact that the young, Sinhalese, male protagonist Malan, decides to put aside his fear of ghosts and spirits in the interest of justice for the trans Tamil woman, Maya. Malan's queering of his ethnic affiliation by his claim of kinship with Maya ("Maya akka") affords a fundamentally different reading to the one suggested by Ibrahim and Kuru-Utumpala. Therefore, in contrast to the reading proffered by Ibrahim and Kuru-Utumpala, it is possible to recognize a much queerer staging of ethnic relationships in the film *Maya*.

What this brief essay has attempted to demonstrate is the possibility of a completely different queer reading of Donald Jayantha's film, *Maya*. It is hoped that the comments sketched out above would not be read as an attempt to gainsay many of the important insights into the film that are articulated by Ibrahim and Kuru-Utumpala. There are indeed a number of problematic issues with the film which they have rightly pointed out. However, to limit ourselves to these issues, is to fail to see the rich, textured readings that are also possible through the film. One such reading is how the character of Malan makes a nuanced conversation around the queer masculinity of straight men possible. Concomitantly, *Maya* also suggests the possibilities of employing hetero normative romantic relationships to further a queer agenda and bring about justice. The film also asks us to consider how the hetero patriarchal order of the father is often incapable of ensuring justice, preserving the family, or promoting tolerance and understanding for queer figures on the fringes of a society. Finally, the film also encodes a resounding critique of the collusion of Buddhism with the injustice and corruption that is rampant in local

political culture. The fact that this film poses such important critiques by centering a trans gender, Tamil woman character is even more remarkable. Therefore, one of the most critical takeaways from the film for me is its importance to conversations about queer performativity and politics in Sri Lanka today. To miss these dynamics is to fail to appreciate the major contribution that *Maya* makes towards mainstreaming queer sexual identities in conversations about popular culture in Sri Lanka today.

NOTES

- ¹ See for example the portrayal of trans characters in other mainstream Sinhala films such as *Bahuboothayo* (2001) and *Sikuru Hathe* (2007)
- ² See Chinthana Dharmadasa's review of the film here titled "ගැහැණු පිරිමි මල් පළතුරු වික්‍රමය" [com/2016/09/blog-post_23.html](http://www.lankadevota.com/2016/09/blog-post_23.html)

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Fairness and Equity in Eminent Domain

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Mega Development Projects and Administrative Justice

Andi Schubert

Re-assessing Maya's Queer Politics

The governance of land and its social, political and economic relations is in many ways amongst the 'original' pre-occupations of law. Be it measures like land reform or legal principles like eminent domain, the law is central to the governance of land itself. The law is also integral both to processes of accumulation and dispossession and to struggles of those on the margins to assert claims and secure rights to natural resources, livelihoods, and ways of life.

Discussing the status of urban evictees, Iromi Perera, Ermiza Tegal and Deanne Uyangoda highlight how the concept of eminent domain privileges the power of the State over land, and is predisposed against concepts of justice, fairness and equity; while undergraduates Nillasi Liyanage and Sindhu Ratnarajan, discuss the Western Region Megapolis Planning Project and highlight the importance of adhering to principles of administrative law. Dr. Nalani Hennayake calls for more critical geography scholarship that challenges dominant representations of 'development', and calls for greater emphasis on how development projects affect communities. Bhavani Fonseka discusses the concept of land reparations in light of Sri Lanka's transitional justice commitments, and stresses the importance of addressing these issues in the context of the Government's promises of reforms on devolution of power and human rights protection. The Issue also carries a position paper by the People's Alliance for Right to Land (PARL) discussing the proposed Land Bank and implications for the rural and urban poor.

Additionally, Andi Schubert writes a response to Zainab Ibrahim and Jayanthi Kuru-Uthumpala's review of the movie 'Maya' carried in the previous Issue, and focuses on the queer masculinity of the straight main character.