The Possibility of Adopting the Proportionality Test as a Balancing Tool between Development Needs and Individual Rights: A Critical Review in respect of Recent Development Projects in Sri Lanka

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Abstract- *In 2014, Sri Lanka has closely marked five years since the conclusion of the armed conflict. During the same period, considerable economic and social progress was hindered because Sri Lanka is assertively reshaping its development as a modern economic and industrial hub. Prioritising the vision which is "Emerging Wonder of Asia", it has designed and implemented several mega projects to expand infrastructure facilities.*

As a welfare State, it is necessary to develop such type of facilities and create a better living environment for its citizens. That is the ultimate responsibility of the government under the social contract created between citizens and the government. Achieving this goal, it has completed several mega development projects such as Colombo- Katunayake Expressway, Southern Expressway and Maththala Airport. Some of are still under completed.

However, the adverse impact of this is that physical displacement and alienation of local communities from related process and it leads to violate their human, social and economic rights. This paper advocates for reviewing the possibility of adopting "Proportionality Test" as a balancing tool between development needs and individual rights. In a situation where public interest exists and individual rights are at a risk in the same time the benefit that they gain from this development should be proportionate to violating rights.

Proportionality facilitates more intense scrutiny of government decisions compared to other traditional grounds of judicial review. Therefore, this principle of proportionality requires a reasonable relationship between an administrative or legislative objective and particular legislative or administrative means. In this regard, the major function of the administration is that of adopting and implementing effective policies to realize collective goals through programmes of state actions. Inevitably, when the executive does so, the interest of individuals may be adversely affected. In this situation, proportionality would be an effective principle to examine the effectiveness of action taken by the executive and administration ensuring that the executive's interference to the individual's interests is necessary and proportionate.

In this backdrop, the objective of the research is to promote applicability of the doctrine of proportionality where the confronting context of individual's rights is at a risk in development projects. Mainly, it is intended to test the hypothesis that the proportionality test can be used as a tool of balancing between development needs and individual interest. In order to prove this hypothesis, the researcher wishes to find out the scope and applicability of the doctrine in Sri Lanka. Effort will also be made to look at the applicability of proportionality as a ground of judicial review in English Law and usefulness of this doctrine in a hypothetical situation.

The qualitative approach of analysing the existing literature on the subject has been employed by the author in this paper.

Keywords- *Proportionality Test***,** *Individual Interest, Development Projects*

I. INTRODUCTION

Development and human rights are intrinsically linked and it is impossible to consider one without the other. They both share the same goal: guarantee and enshrined human freedom, wellbeing and dignified life if its citizen. Therefore, principle of social justice constitutes an inseparable part of the development process. Considering the scope of mega development

projects in Sri Lanka, it is expected to 'provide benefits to every segment of society in a 'justifiable manner' while 'promoting investments on infrastructure based on commercial and economic returns' and creating 'equitable access to such infrastructure development to enable people to engage in gainful economic activities' (Mahinda Chinthana, 2010). Achieving this goal ending after three decades of civil war, the country has begun to initiate and implement several mega development projects for enhancing the infrastructure facilities of the country. Since 2009 to date, Southern Transport Development Project, Colombo- Katunayake Express Way , Hambantota International Harbour, The Maththala Rajapaksha International Airport are some of them contributed to economic development trajectory in Sri Lanka.

However, among many other positive outcomes, the adverse impacts of these are infringed individual's human rights, substantive freedoms and economic vulnerability and exclusion of them from a meaningful participation of social and cultural sphere of the development (Vindya, 2013). It is imperative that prevailing socio economic inequalities and fragmentation as a result of mega development projects. But, it is possible to reconcile economic and social development with realisation of individual and collective rights and freedoms. The solution for that is conceptualised 'human development' to broadened individual's opportunities to participate and getting benefits from the development process.

In this backdrop, the paper advocates for reviewing the possibility of adopting 'Proportionality Test' as a balancing tool between development needs and individual rights . The test means that, in a situation where public interest exists and individual rights are at a risk in the sometime the benefit that they gain from this development should be proportionate to violating rights. He Ultimately, the paper attempts to justify that if there is a possibility of adopting the 'Proportionality Test' in such situations , it paves the right path to established a Human Rights Based Approach (HRBA) to development.

II. RECENT DEVELOPMENT PROJECTS AND ITS IMPACTS ON SRI LANKA

To offer a brief definition, mega development projects are ventures that are enormous in scale, technically complex and that require extremely high investments. This type of projects tends to attract significant public attention and political interest on account of the massive impacts they have, both directly and indirectly, on society, the environment and public and private spending.

Concerning mega development projects in Sri Lanka, Mahaweli Development Programme was the first expanded programme. It gained the benefits of new settlements, hydropower generation and provides employment. In addition, it helped to control flood water, development of agriculture based products and industries. Under the project, it was aimed to complete the Victoria, Kotmale Randenigala and Rantambe Dams and four principle trans basins diversions with a short period of time.

However, these areas were enriched with fruits, mixed crops and Cocoa and were destroyed due to the project. It was because the absence of the study on the cost of biological resources. Many people who migrated to project areas had to live in under developed areas with serious threat to their health and wellbeing with the less availability of drinking water, hospitals and roads. Another adverse impact was that famers were not getting an opportunity to adopt their traditional knowledge based methods for cultivating. Recently, Southern Transport Development Project and Colombo Katunayaka Expressway Project had initiated a public discourse. These two projects were aimed to provide a fast transport link in the country. In addition, there were long-term objectives such as the promotion of tourism especially through the project of Colombo Katunayake Expressway.

(a) Violation of Individual's Rights Through Mega Development Projects

It is no debate that expansion of infrastructure facilities is a core of development process in the country. The major issue is that development driven induced displacement. Impacts of displacement were multifaceted and it is not only about physical displacement and it connects with economic vulnerability due to loss their livelihood. Further, it leads to create a threat of food security, resulting from loss of lands. Lack of access to their community due to highway has become another issue and in the process of relocation it is not addressed. It was affected by their social integration process due to separate their villages.

Therefore, it is highlighted that, economic vulnerability due to the disruption of their livelihoods, social disintegration and environmental degradation also be considered. In this scenario, it is necessary to address physiological stress of people it is because compulsory land acquisition loss their lands. Making aware and assisted to affected people on available redress of grievances and granting adequate compensation are important similarly. The underpin concept should be the duty bearers meet their obligations to right holders. With regard to ensuring this concept, the people who affected by development projects are fully compensated, successfully resettled and re-established and standard of living improved.

A case in point is the Southern expressway which led to one of the many judgements in recent years where the court stressed certain cautionary principles regarding the manner in which development ought to take place vis a vis the rights of people who are affected (Mundy vs CEA and Others, SCM 20/1/2004 per judgement of Mark Fernando) .

'if individuals or a community must lose all or part of their land, means of livelihood, or social support systems, so that a project might proceed, they will be compensated and assisted through replacement of land, housing, infrastructure, resources, income sources, and services, in cash or kind, so that their economic and social circumstances will be at least resorted to the pre-projected level' (Operational Manual, Involuntary Resettlement, ADB, P.2)

III. PROPORTIONALITY TEST AS A BALANCING TOOL BETWEEN DEVELOPMENT NEEDS AND INDIVIDUAL RIGHTS

(a) Definition of the Principle in Administrative Law

Proportionality is based upon the premise that 'a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure' (Jowell, 1996). The classical definition of proportionality has been given by Lord Diplock who has stated 'you must not use a steam hammer to crack a nut if a nut cracker would do' (R. vs. Goldsmith). Before this definition, there was a discussion about this principle in several cases. In the case of *GCHQ* (1985 AC 374), Lord Diplock has stated that at some future date the principle of proportionality might be adopted as a ground of review in English Administrative Law. While Millet J described the principle as 'a novel and dangerous doctrine' (Allied Dunber Case), Jowell and Lester counter argued that proportionality is 'neither novel nor dangerous' (Jowell, 1988).

However, the greatest advantage of proportionality as a tool of judicial review is its ability to provide the objective criteria for analysis. It is evident from the following test introduced by Craig and Burcaa (Craig & Burcaa, 1998).

i. Whether, the disputed measure is the least restrictive in the applicable circumstances;
ii. Whether there is a correspondence between the importance attached to a particular aim and the means adopted to achieve it and whether such means are necessary for its achievement;
iii. Whether the impugned act is suitable and necessary for the achievement of its objective and whether it does not impose excessive burdens upon the individual;
iv. Whether there is any balance between the costs and benefits of the measure under challenge

In addition, there are three elements in this formulation which are;

i. State measures concerned must be suitable for the purpose of facilitating or achieving the pursued objectives.
ii. The suitable measures must also be necessary, in the sense that the authority concerned has no other mechanism at its disposal. Thus, it is not the method used which has to be necessary, but "the excessive restriction of freedom involved in the choice of method".
iii. The measure concerned may not be disproportionate to the restrictions which it involves. The principle of proportionality has been characterized as "the most important general legal principle in the common market law" (Ellis, 1999).

These criteria of proportionality reflect that many scholars have tried to provide indicators to measure the balance between administrative means and ends rather than to define the concept.

(b) History of the principle under the English law

It is fair to say that the decision of the ECHR in *Lusting-Prean* (1999 ECHR 71) softened up the English courts for proportionality. However in contrast there is a suggestion that the principle being adopted in English law might goes back to 1985 when Lord Diplock raised the possibility directly. In *Council of Civil Services vs. Minister of State for the Civil Service* (1985 AC 374) he acknowledged this principle as a further ground for judicial review of administrative action. The other grounds were Illegality, Irrationality and Procedural Impropriety.

When examining earlier decisions it is evident that the English courts relied on the concept of Proportionality from time to time without making any specific reference to the principle itself. In cases such as *Rex vs. Barnesly ex parte Hook (*1976 1 WLR 1052*), R vs. Secretary of state for the Home Department ex. parte Benwell* (1984 1 CR 723) this principle was used. However, in the case of *ex parte Brind* (1991 1 AC 696) the court was reluctant to adopt the doctrine. Though this case shows the unwillingness of the judiciary to incorporate this, the House of Lords to adopt this doctrine as a ground for judicial review, in some cases judicial attitude was positive towards the doctrine (Wheeler vs. Leicester City Council). When scholars like Millet J criticized the doctrine as a novel and dangerous concept, Jeffery Jowell and Anthony Lester strongly defended these arguments by saying 'proportionality is neither novel nor dangerous'(Jowell, 1988).It is worth reading the following evaluation of the concept by them.

> The use of proportionality under so many different labels and in so many different contexts in English Law demonstrates its general acceptance as a general principle of law. Like all grounds of judicial review it cannot be mechanically applied. Its application requires judgment in the light of the circumstances of the particular case. However, its application would affirm an important principle of justice by which all administrative action should be expected to be judged: that the decision maker must exercise a proper sense of proportion in making a decision, and that individuals affected by decisions should not be required to bear a burden that is unnecessary or disproportionate to the ends being pursued (Jowell, 1988).

However this confusing situation was resolved after the enactment of Human Rights Act (HRA) in 1998.HRA requires the Proportionality Principle to be taken into account when a court or tribunal gives a judgment or decision.

In this background it is argued that the principle is only applicable strictly in cases related to the convention rights. This issue has been addressed in chapter III which is on the development of the concept under the English and Sri Lankan law.

(c) Theoretical justification to adopt the principle of proportionality in Sri Lanka

In the Sri Lankan context, the introduction of the Second Republican Constitution in 1978 gave birth to a new principle, namely constitutionalism. 'One of the most salient features of constitutionalism is that it describes and prescribes both the source and the limits of government power' (Hamilton, 1931). Both aspects of the rule of law (everything must be done according to the law and equality before the law) have been enshrined in the constitution. But the only exception to this rule is the immunity given to the executive president of the state by constitution (Art. 35, Constitution of 1978, Sri Lanka).Interestingly, in present scenario, this immunity was subjected to judicial review(Senarath vs. Kumaratunga).

When comparing this with the Sri Lankan context, having a written constitution helps in laying down the writ jurisdiction and fundamental right jurisdiction as two separate grounds. Therefore, one may argue that there is no necessity to protect fundamental rights through writs. This is not a valid argument. When we compare it with India and USA, or for that matter the present UK scenario, the writ jurisdiction is made use of enforcing fundamental rights. The complicated situation in Sri Lanka is that it creates difficulties for litigants to choose one or the other forum to obtain redress and vindicate their rights due to two jurisdictions.

However regarding the developments of Administrative Law, even in Sri Lanka it is a trend that courts try to follow a right based approach. The UK got the HR Act in 1998; but Sri Lanka got enforceable FR in 1978. Secondly, the SL position is that the doctrine of Sovereignty of Parliament is not part of the Constitutional Jurisprudence of the country; Sovereignty is with the People-Parliament enjoys the power to exercise one aspect of People's Sovereignty, viz., the legislative power. So there is no conflict with regard to implementing the Rule of Law. Examining this situation, it can be argued that there is a room to adopt the doctrine of proportionality to ensure citizen's rights and secure the balance between administrative objectives and affected rights of people.

(d) Applicability of the principle of proportionality under the Sri Lankan law

The doctrine of proportionality has used prominently in several judicial pronouncements from time to time. However, there is no consistency is adopting the doctrine and those judgments too lack an analysis of the scope of the doctrine. The case of *Premarathne vs. U.G.C (*1993 3 SLR 395) has referred the idea of proportionality pointing out the relationship between offence and punishment. Here, the problem was an expulsion of a student from The University of Ruhuna. The petitioner had made a declaration that she had not been previously registered to follow a course of study in any other University .This declaration had been proved to be false. Referring the case *R v. Barnsley ex. p. Hook* court stated that if any action or measure is considered to do more harm than good in reaching a given objective it is liable to be set aside for the court has to consider whether ends justify the means. The opinion of Justice Gunawaradana demonstrated a use of the idea of proportionality. As per him, 'Thine eye shall not pity: but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot - does not represent the perfect system of justice, a perfect system of punishment is based on neither the reattribute nor the deterrent principle excluding but is the result of a compromise between them' (Premarathne vs. UGC)

The same notion of the doctrine has been followed by the case of *Caldera vs. University of Peradeniya* (CA Writs 572/2004) Justice Sri Skandarajah, took the view that in the circumstances of the case, the punishment of a three year suspension of studentship is too long a period and it will affect his further studies .Moreover, he stated 'considering these factors and gravity of offence, this court is of the view that one year suspension is appropriate in the given circumstances.'

In the case *Premawathie vs. Fowzie*(1998 2 SLR 373) Fernando J made a reference that the punishment is grossly disproportionate. The petitioner who was a telephone operator in the Ministry of Health was interdicted and charged with several acts of misconduct. The inquiring officer exonerated her of all the serious charges. However, on the Director General of Health Services held without adducing any reason, that all the charges had been proved and dismissed her from service. Finally court held that "there is no doubt that the petitioner's fundamental right to the equal protection of the law has been infringed by the Public Service Commission by reason of an arbitrary, unreasonable and grossly disproportionate punishment…."

Niedra Fernando vs. Ceylon Tourist Board and Others (2002 2 SLR 69) Again Gunawardana J adopted the doctrine. In terms of his own words,

> …there has been and remains some uncertainty as to the extent to which the notion of "proportionality" may or should be considered to be a ground of review. It is a regularly used tool of legal reasoning in the European Court of Justice. In essence the doctrine of proportionality provides that a Court of review may intervene if it considers that harms attendant upon a particular exercise of power are disproportionate to the benefits sought to be achieved. The petitioner had not committed any serious act of misconduct adumbrated in the schedule to the rules (discipline) framed under the Ceylon Tourist Board Act. In fact, it is extremely doubtful whether she had committed any act of misconduct, identified or described in the rules, at all. The idea of proportionality is, I think, embedded or ingrained in those memorable lines in which Bassanio made the plea to Portia: "wrest once the law to your authority, to do a great right, do a little wrong. And curb this cruel devil of his will . . ." (Merchant of Venice). The impression is irresistible that the petitioner had been punished for a

strongly worded letter written by somebody else to whom she had confided. (Niedra Fernado vs. Ceylon Tourist Borad)

Another important case in this regard, *Abeysekara vs. Competent Authority* (2000 1 SLR 314) Amarasinghe J stated the restrictions imposed were not disproportionate to the legitimate aim of the regulations, namely the furtherance of the interest of national security in terms of Article 15(7).The petitioner challenged the legality of certain regulations which sought to impose censorship of the transmission of sensitive military information and she challenged that her freedom of expression which was guaranteed under Art. 14(1) (a) of the constitution was infringed by this regulation. But, unanimously dismissing the petition, courts held that 'The courts generally have the power to strike down over-broad administrative censorship on communication. Restrictions on freedom of speech and expression must be predicated on a legitimate aim and proportional to the purpose for which the restriction is made. However, the restrictions imposed by the Public Security Ordinance Order were not disproportionate to the legitimate aim of the regulation, which is the furtherance of the interests of national security within the meaning of Article 15(7) of the Constitution. The restrictions corresponded to the pressing national security and social needs which when juxtaposed with the complaint far outweigh the petitioner's fundamental right guaranteed by Article 14 (1) (a) of the Constitution of Sri Lanka' (Abeysekera vs. Competent Authority).

Recent development of the judiciary is *N.V.Gunarathe vs. Sri Lanka Land Reclamation and Development Corporation and Others* (CA Writs 412/07) .In this case, the petitioner an engineer, who worked as a general manager of Sri Lanka Land Reclamation and Development Corporation, had been sent a letter on his compulsory retirement. The main issue was a deed of transfer being executed without prior approval where the petitioner had placed his signature on same. Case was argued based on several principles and two of them are compulsory retirement of petitioner was unreasonable and arbitrary and it offends to the principle of proportionality.

Justice Anil Gunarathne accepted the applicability of the doctrine and cited 'the Petitioner's submission on proportionality is a recognized Principle in Administrative Law. I have no hesitation with the development of law in this direction, to apply the doctrine of proportionality to the facts of this case. I am in full agreement with the submissions of learned President's Counsel for the petitioner regarding applicability of the above principle' (N. V. Gunarathne vs. Land Reclamation and Development Corporation)

The above discussed cases reveal the fact that Sri Lankan court does not use the doctrine of proportionality as a separate ground for judicial review. Due to Fundamental Right jurisdiction and well established ground of unreasonableness, proportionality inquiry has been used to decide the decision was reasonable or not (Felix, 2006). Therefore, it is hardly to see the analysis of the applicability and scope of the principle within the context of controlling discretionary power.

(e) Analysis of constitutional foundation under the Sri Lankan law

'Judicial review is a great weapon in the hands of the judges; but the judges most observe the constitutional limits set by our parliamentary system on their exercise of this beneficent power'(R vs. Nottinghamshire Counti Council)

Judicial review of administrative action in Sri Lanka has moved towards a rights based approach. But the significant feature is that there are two separate jurisdictions for judicial review of administrative action (Art.140 & 154(p) 4 (b) of the Constitution). Due to this reason, judges have discretion to select any jurisdiction depending on the circumstances. However, many of the recently decided cases of Sri Lanka have shown the willingness of the superior courts to expand the scope of the control of administrative action to areas of fundamental rights.

There are many reasons for this. One reason is that under the fundamental rights jurisdiction and article 12(1), the judge can uphold the principle of rule of law via equality before the law. It is an essential feature of good and fair administration. Even since 1978 Sri Lankan judges have followed traditional theories of interpretation and not progressive theories like the purposive theory or the judicial free theory. In such a context, their role is very limited to the plain meaning of words of the Constitution. But Constitutional

interpretation should reflect the objectives of the constitution.

Furthermore, according to the article 3 of the Constitution, "in the republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, fundamental rights and franchise. Article 4(d) of the constitution also states that ' the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided.'

To fulfil these objectives a fundamental rights chapter has been included in chapter III and a remedy is given via article 126.But article 126 (3) of the constitution stipulates that:

> Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of *habeas corpus, certiorari, prohibition, procedendo, mandamus* or *quo warranto,* it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.

Article 126 (4) of the constitution provides that: 'The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundament right or language right.'

In terms of this provision judges see this as an obstacle to upheld fundamental rights through writs. Therefore, here we are not accommodated to cross fertilization of these two jurisdictions.

In my opinion, when reading article 3, 4(d) and 140 with proviso of the Constitution there is no limitation to expand the doctrine of proportionality as a ground of judicial review because constitutional provision of article 140 has granted the full power and authority to the Court of Appeal to issue writs 'according to law'. Not only has that, the directive principles of the constitution facilitated this argument also. Specially Article 27 (4) which speaks of obligation of a state to broaden the democratic structure of the government and democratic rights of people. In the *CPA vs. Dayananda Dissanayake*(2003 1SLR 277) used this Article 27(4) to interpret a statute.

A fundamental right jurisdiction does not reduce the scope of writ jurisdiction because it is very wide. 'The standing rules applicable to applications for prerogative writs have to be considered in the light of the developments taking place in this sphere of relevant law' (Jayathilake vs. Jeewan Kumarathunga). The problem is that judges try to keep this difference. Functionally, Administrative Law in UK has developed and if the private sector also exercises their power in the nature of public act, they should also subject to judicial review. Even in the Sri Lankan case of *Harjani vs. Indian Overseas Bank*(2004 BASL Reports) Justice Saleem Marsoof has granted a certiorari to review a resolution passed by an overseas private bank.

If judges can move on to this attitude it can be argued that it would enhance the access to justice of citizens since in writ jurisdiction there is no time bar and *locus standi* is very wide (up to now *Locus Standi* on FR has expanded through PIL). But under Article 140 "sufficient interest" is enough to come before the court to seek a remedy in the nature of a writ (Premadasa vs. Wijewardena & others). It is agreed that traditional ultra vires has undergone many difficulties .But the principle of proportionality has created a significant arena to include many developments under its shade. So, under the present constitutional provisions discussed above can be interpreted in a creative manner to uphold the principle of good administration. In this context, the modern extended doctrine of ultra vires can be considered as a ground for judicial control in administrative actions.

(f) Analysis of case law under the Sri Lankan law

The Wednesbury standard was a well-established ground of review and contributed towards being a key component of arbitrary action and engaging an equality claim in Sri Lanka (Felix, 2006) Cases of *Gunarathne vs. Commissioner of Election (1987 2 SLR 165)*, *Karunathilake vs. De Silva (*2003 1 SLR 35) and *Thiranagama vs. Commissioner of Labour*

(2003 1 SLR 238) are based on the ground of unreasonableness. Those three cases have been discussed in the context of article 12 (1).

Regarding the principle of proportionality, chapter 03 discussed that many cases used the term to pointing out balance between the offence and punishment. Accordingly, a very restrictive version of proportionality is applied in the area of punishments imposed by administrative authorities. Both *Premarathne* and *Caldera* cases were dealt with the same notion. When assessing the cases discussed in the above chapter, it is interesting to see that Gunawardana J, used this principle in two cases. However, there is no consistency of using the principle.

In the case Fernando vs. Ceylon Tourist Board has applied the principle in the context of the punishment of dismissal imposed on workmen by their employers have been quashed on the ground that the same is grossly disproportionate to the nature of the charges held proved against the workman concerned.

Comparing with other cases, in *Abeysekara vs. Competent Authority* discussed the principle in a different context. Court held that restrictions were imposed on transmission of military sensitive information were not disproportionate with Art.14 (1) of the constitution. This case is important on the basis that it tried to balance fundamental rights and statutory restrictions lying on it. On the other hand this was the case which tried to reconcile the conflict between public interest and individual interest. On the one hand national security of the country is at a risk. On the other hand individual's right of freedom of expression is affected. Finally court sorted out the problem considering that the public interest is higher than individual rights.

In the course of search of case law, the common problem that exists in our jurisdiction is lack of deep conceptual discussion or reasoning on applicability of the principle as a ground for judicial review. It is postulated that there is a necessity of cases with conceptual validity to expand the scope of the doctrine under Sri Lankan Administrative Law.

IV. CONCLUSION

Above discussed mega development projects have not effectively addressed the issue of adequate compensation and interim measures for assessing anticipated benefits of projects and cost of human lives due to the lack of cohesive development oriented policy. Therefore, there is an urge necessity of establishing a transparent mechanism with adhering to the international human rights standards to minimise and mitigate all forms of marginalisation and exclusion of poor majority due to development process. For filling the gap between these two aspects of individual rights and development needs, the proportionality test can be effectively utilised as a balancing tool. In such situations proportionality would be an important principle rather than other grounds because it can be used to reconcile both administrative efficacy and individual rights. Being a welfare state it is essential to provide services for the benefit of public.

This fact was discussed in the case of *Mundy vs. Central Environmental Authority* (SC Minutes 2004).But the case did not use the doctrine. Emphasizing the necessity of balancing public and individual interest, Court of Appeal cited as follows.

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

In a situation where public interest exists and individual rights are at a risk at the same time, the benefit that they gain from this development should be proportionate to the violation of rights.

> Proportionality provides a method of achieving an optimal balance between the securing of collective goals and the protection of individual interests. Proportionality does not detract from the

fulfilment of public goals. But insist that public authorities pay sufficient regards to the interest of individuals in resolving the method of attaining their objectives (Thomas, 2000).

Finally, it is interestingly to cite the comment made by Tom Hickman.

"We are at a cross road…proportionality can either become (a) fig leaf…or it can become a powerful normative and predictive tool in public law" (Hickman, 2008).

REFERENCE:

Craig PP (1999). *Administrative Law*, *4th Edi*, Sweet & Maxwell

Ellis E. (Ed) (1999), *The Principle of Proportionality in Laws of Europe*, Hart Publishing

Felix S. (2006). "Engaging Unreasonableness and Proportionality as Standards of Review in England, India and Sri Lanka", Acta Juridica: Comparing Administrative Justice across the Commonwealth, JUTA Publications

Gomez M. (2007). "Blending Rights with Writs: Sri Lankan public Law's New Brew", ACTA JURIDICA, Juta Publication

Hickman, T., "The Substance and Structure of Proportionality", Public Law 694, 2008, pp.694-716

Jowell J & Lester A (1988). "Beyond Wedenesbury: Substantive Principles of Administrative Law", Public Law 368, Sweet & Maxwell

Jowell, J (1996). "Is Proportionality an Alien Concept", European Public Law, Vol.2, Kluwer Law International

Jowell, JL. & Lester QC (1988). *New Directions in Judicial Review*, Stevens & Sons Ltd

Thomas R (2000). *Legitimate Expectation and Proportionality*, Hart publishing

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