



**DEVOLUTION UNDER THE THIRTEENTH AMENDMENT:  
EXTENT, LIMITS, AND AVENUES FOR REFORM**

**CPA Working Papers on Constitutional Reform No.10,  
November 2016**

**Asanga Welikala**

**About the Author:** Dr Asanga Welikala is Lecturer in Public Law at the School of Law, University of Edinburgh, and the Associate Director of the Edinburgh Centre for Constitutional Law. He is Research Associate of the Institute of Commonwealth Studies, University of London, and Research Fellow of the Centre for Policy Alternatives.

The Centre for Policy Alternatives (CPA) was formed in the firm belief that there is an urgent need to strengthen institution- and capacity-building for good governance and conflict transformation in Sri Lanka and that non-partisan civil society groups have an important and constructive contribution to make to this process. The primary role envisaged for the Centre in the field of public policy is a pro-active and interventionary one, aimed at the dissemination and advocacy of policy alternatives for non-violent conflict resolution and democratic governance. Accordingly, the work of the Centre involves a major research component through which the policy alternatives advocated are identified and developed.

This Working Paper is available for free download from [www.constitutionalreforms.org](http://www.constitutionalreforms.org). If cited or quoted, reference should be made to the Centre for Policy Alternatives, the name(s) of the author(s), the title and the number of the Working Paper.

© Centre for Policy Alternatives and the author(s)

## 1. Introduction

Most Sri Lankan public discussions of devolution and power-sharing tend to yield more noise than light. As the Constitutional Assembly addresses the issue of further devolution in the new constitution, there is still very little objective knowledge, unsullied by ideological partisanship, about the existing framework of devolution that we have practiced under the Thirteenth Amendment to the Constitution (1987) for nearly thirty years. Opponents of devolution overstate the extent of devolution we have. Opponents of the Thirteenth Amendment and of centralisation understate the extent of devolution. The truth is somewhere in the middle.

There are no doubt serious problems with the Thirteenth Amendment model, which need to be addressed in any future constitution. But no exercise in modern constitution-making has ever the luxury of writing upon a *tabula rasa*; it is invariably an exercise in rewriting a palimpsest. The following discussion is aimed at trying to outline, as precisely and as dispassionately as possible, the experience of devolution under the Thirteenth Amendment, in the hope that so understood, both its strengths and weaknesses can be borne in mind when we design what would hopefully be a better, fairer, and more durable model of multilevel government for Sri Lanka. From a practical point of view, many of the conclusions of this Working Paper are supported by the views of practitioners of devolution in Sri Lanka.<sup>1</sup>

## 2. The Framework of Devolution under the Thirteenth Amendment

The purpose of this section is to introduce the structure of devolution as established by the Thirteenth Amendment in outline, and to place it in its political context. This involves a consideration not only of the institutions established by the Thirteenth Amendment at the provincial level and their powers and functions, but also the way in which they relate to and interact with the central government institutions which pre-exist Provincial Councils. A more complete understanding of the Thirteenth Amendment also calls for a consideration of the constitutional principles and values that underpin the broader scheme of the Constitution of 1978, in particular the relationship between the principle of devolution and that of the unitary state. The political context of competing ethno-territorial claims, as an aspect of which devolution came to be introduced in Sri Lanka, including the rationale for the 'merger' and subsequent 'de-merger' of the Northern and Eastern Provinces, and how that context shaped the system embodied in the Thirteenth Amendment and its accompanying legislation, are central factors of a fuller understanding of devolution.

---

<sup>1</sup> See A. Welikala (Ed) (2016) *A New Devolution Settlement for Sri Lanka: Proceedings and Outcomes, Conference of Provincial Councils* (Colombo: Centre for Policy Alternatives): <http://www.cpalanka.org/a-new-devolution-settlement-for-sri-lanka-proceedings-and-outcomes-conference-of-provincial-councils/>

## 2.1 The Thirteenth Amendment: Devolution within the Unitary State

The second republican Constitution of 1978, like its predecessor the first republican Constitution of 1972, expressly provides in Article 2 that ‘The Republic of Sri Lanka is a Unitary State.’ While there are many definitions of ‘unitary state’, it is generally meant to describe a state, or category of constitution, that centralises sovereignty and power in a single institution or level of government. Federations, which involve the sharing of sovereignty and power between multiple orders of government, are traditionally understood by lawyers and political scientists as being the conceptual opposite of the unitary state. However, measures for the decentralisation of power are to be found in almost all unitary states nowadays, although the rationales for decentralisation differ between countries. They continue to be distinguishable from federations because the central government in unitary states remains the pre-eminent level of government in day-to-day administration and, critically, retains the power to revoke any devolution or decentralisation unilaterally. Thus unlike in federations, which typically require the consent of both central and provincial governments for constitutional changes affecting the distribution of powers between them, in a unitary state the central government has the power to do so on its own, and even against the wishes of the provinces. The Supreme Court dealt with these major constitutional questions in its determination on the constitutionality of the Thirteenth Amendment in 1987.

Prior to the Thirteenth Amendment, Sri Lanka was an archetypal unitary state, in which legislative power was exercised by Parliament, executive power by the President, and judicial power through courts.<sup>2</sup> While Sri Lanka has a long tradition of local government dating from the colonial period,<sup>3</sup> there had never been a tier of government established for the provincial level even for administrative purposes. Therefore, the principle of devolution, involving elected institutions of government at the provincial level empowered to exercise legislative and executive powers, was something that was novel to the centralised, unitary constitutional tradition in Sri Lanka.

The rationale for centralising power and authority was initially dictated by colonial policy considerations in the nineteenth and early twentieth centuries, and the unitary form of the state was continued after independence. However, soon after independence, the principal demand for the decentralisation of power came in the form of the desire of the Tamil people for territorial autonomy in the northern and eastern areas of the island within the framework of a federal Sri Lankan constitution. Throughout the post-independence years this issue dominated politics in Sri Lanka, and by the 1970s, in the absence of any success in securing federal autonomy, Tamil nationalism had taken to the espousal of a separate Tamil state in the North and East. By the 1980s, the unresolved claims to power-sharing reached a situation of serious armed conflict between the state and Tamil militant groups.

---

<sup>2</sup> Article 4 of the Constitution

<sup>3</sup> And indeed as it has been pointed out, an even older pre-colonial tradition of village level governance: see e.g., Report of the Commission of Inquiry on Local Government Reforms (1999), Sessional Paper No. 1 of 1999 (Colombo: Government of Sri Lanka), also known as the ‘Abhayewardhana Report’ after its chairman.

In one Indian facilitated initiative to find a political resolution to the conflict, in Thimpu, Bhutan, in July 1985, Tamil nationalist groups collectively articulated a set of four 'cardinal principles' as the basis of a new constitutional settlement. These were:

1. The recognition of the Tamils of Sri Lanka as a distinct nationality;
2. The recognition of a Tamil traditional homeland in the North and East;
3. Based on (1) and (2), the recognition of the inalienable right of self-determination of the Tamil nation; and
4. The recognition of the right to full citizenship and other fundamental democratic rights of all Tamils, who look upon the island as their country.

While these demands (which came to be known as the 'Thimpu Principles') were rejected by the government of Sri Lanka as constituting a negation of the sovereignty and territorial integrity of Sri Lanka, Indian facilitated initiatives involving both governments and Tamil groups aimed at a political resolution to the conflict continued. These Indian initiatives culminated in 1987 in the Indo-Lanka Accord between the two governments.

While the political pressure for devolution came from the dynamics of Tamil nationalism, when pursuant to the Indo-Lanka Accord devolution was introduced by the Thirteenth Amendment to the Constitution, it was felt by President Jayewardene's government that it would be politically more feasible to introduce devolution to all provinces rather than as a special arrangement for the Northern and Eastern Provinces alone. It was thus that Provincial Councils were established for all provinces, even though there had been no desire for devolution in areas outside the North and East. It is important to note, however, that the Provincial Council system has now become an accepted part of the structure of the state in all parts of the island. Even parties that are opposed to devolution participate in elections and governance at the provincial level. And while many of the Tamil nationalist parties including the Federal Party rejected the Thirteenth Amendment as too little too late in 1987, they now participate in the provincial councils system, and are actively engaged in current negotiations within the Constitutional Assembly process to go beyond it.

## **2.2 The Indo-Lanka Accord**

The 'Indo-Lanka Agreement to Establish Peace and Normalcy in Sri Lanka' was signed by the Prime Minister of India, Rajiv Gandhi, and the President of Sri Lanka, J.R. Jayewardene, on 29<sup>th</sup> July 1987 at Colombo. Commonly known as the Indo-Lanka Accord, this international bilateral agreement addressed a number of issues pertaining to the resolution of the conflict in Sri Lanka. In regard to constitutional reforms, it contained a joint declaration of the broad principles of a new settlement, and it committed Sri Lanka to establish a system of devolution to Provincial Councils. This was enacted by way of the Thirteenth Amendment to the Constitution and the Provincial Councils Act, No. 42 of 1987, on 14<sup>th</sup> November 1987, and other enabling legislation that followed.

Given that the Indo-Lanka Accord set out the political rationales and principles of the new settlement of devolution, it is useful to recapitulate what it contemplated. Clauses 1.1 to 1.5 set out the basic principles as follows:

1. To preserve the unity, sovereignty and territorial integrity of Sri Lanka;
2. Acknowledging that Sri Lanka is a multi-ethnic and multi-lingual plural society consisting, *inter alia*, of Sinhalese, Tamils, Muslims (Moors), and Burghers;
3. Recognising that each ethnic group has a distinct cultural and linguistic identity which has to be carefully nurtured;
4. Recognising that the Northern and Eastern Provinces have been areas of historical habitation of Sri Lankan Tamil speaking peoples, who have at all times hitherto lived together in this territory with other ethnic groups;
5. To strengthen the forces of unity, sovereignty and territorial integrity of Sri Lanka, and preserving its character as a multi-ethnic, multi-lingual and multi-religious plural society, in which all citizens can live in equality, safety and harmony, and prosper and fulfil their aspirations.

These principles taken together articulate a certain constitutional vision for Sri Lanka. It recognised the legitimate concern of the state, and indeed, the majority Sinhalese and even the Muslims, that Sri Lanka should remain a united country. However, it also recognised the fundamentally plural character of Sri Lankan society, comprised of diverse ethnicities, cultures, languages, and religions, which require protection on a basis of equality. Together with the proposed devolution of powers allowing for a measure of self-government in the North and East, the major concession to Tamil nationalism (although not all Tamil nationalists saw it that way) was in Clause 1.4 in which it was recognised that, 'the Northern and Eastern Provinces have been areas of historical habitation of Sri Lankan Tamil speaking peoples'. This was an attempt to accommodate the concept of the Tamil traditional homeland, but in a way which made it more acceptable to the Sinhalese and Muslims.

The Indo-Lanka Accord made official the various proposals that had already been under discussion between the two governments and Tamil groups in 1986 as to the shape and form of devolved institutions in the North and East, with a commitment to their expeditious finalisation. It also provided for the merger of the Northern and Eastern Provinces into one administrative unit, subject to the ratification of such merger by the people of the Eastern Province in a referendum. The two merged provinces would constitute the territorial basis of a single North-Eastern Provincial Council, with one Governor, one Chief Minister and Board of Ministers. This was the concrete institutional form by which the contiguous areas of historical habitation of the Tamil-speaking peoples was recognised.

While India secured the support of some of the Tamil parties and groups for this framework, it would soon become clear that the Liberation Tigers of Tamil Eelam (LTTE) was not committed to it. The LTTE subsequently militarily engaged the Indian Peace Keeping Force (IPKF) sent to guarantee the implementation of the Accord. While the main Tamil political party, the Tamil United Liberation Front (TULF) asked the Tamil people to participate in the forthcoming elections to the new North-Eastern Provincial Council, it did not itself participate in the process, and also pointed out various deficiencies in the proposed system. In particular, it was concerned about the impermanent nature of the merger of the Northern and Eastern Provinces, which was a fundamental principle of Tamil nationalism. In the circumstances, it fell to the Eelam People's Revolutionary Liberation Front (EPRLF, together with its ally, the ENDLF) to contest the elections and give leadership to the implementation of the new devolved institutions. Elections to the

North-Eastern Provincial Council took place on 19<sup>th</sup> November 1988, and the new Provincial Council assembled in Trincomalee on 17<sup>th</sup> December 1988, at which the first policy statement of the new EPRLF administration headed by Chief Minister A. Varatharajaperumal was presented.

The short experience of the EPRLF in seeking to implement devolution proved to be unsuccessful due to a variety of reasons, including the absence of political will on the part of the central government to meaningfully share power and implement the constitutional provisions of the Thirteenth Amendment, and a deterioration of the security situation and its political ramifications in Tamil politics, including in terms of pressures on the EPRLF provincial administration. On 1<sup>st</sup> March 1990, Chief Minister Varatharajaperumal, moved a resolution in the North-Eastern Provincial Council which sought in effect to convert the Council into a Constituent Assembly to draft a new constitution for an 'Eelam Democratic Republic'. The government of Sri Lanka regarded this as an attempt at a unilateral declaration of independence. In July 1990, Parliament passed an amendment to the Provincial Councils Act, which provided for the dissolution of a Provincial Council in which more than half its members had expressly repudiated or manifestly disavowed obedience to the Constitution, upon a communication to that effect from the Governor to the President.<sup>4</sup> With this the first elected North-Eastern Provincial Council stood legally dissolved.

Among the Sinhalese, it was clear that there was vehement opposition not only to the content of the proposals in the Indo-Lanka Accord, but also what was perceived to be Indian interference in Sri Lanka's internal conflict. Except for some Left parties and human rights organisations, all of the main political parties in the South including the principal parliamentary opposition, the Sri Lanka Freedom Party (SLFP), and the Janatha Vimukthi Peramuna (JVP) opposed both the Accord and devolution. Even within the governing United National Party (UNP), the Accord created deep divisions with senior members of the government including Prime Minister R. Premadasa and Minister of National Security Lalith Athulathmudali conspicuously dissociating themselves from the initiative. The SLFP led the legal challenge before the Supreme Court to the Thirteenth Amendment in October 1987.

## **2.2 *In Re the Thirteenth Amendment: The Supreme Court Determination***

The proposed scheme of devolution and other matters such as changes to the official language policy were embodied in two Bills: the Thirteenth Amendment to the Constitution Bill and the Provincial Councils Bill. The devolution framework and consequential amendments to the Constitution were set out in the Thirteenth Amendment Bill. The more detailed statutory framework of devolution was set out in the Provincial Councils Bill.

The jurisdiction of the Supreme Court to determine the constitutionality of the two Bills was invoked by the President and 48 other petitioners. Under Article 121 of the

---

<sup>4</sup> Section 5A, Provincial Councils (Amendment) Act, No. 27 of 1990. See also the Supreme Court determination in *Provincial Councils (Amendment) Bill*, SCM 14<sup>th</sup> June 1990, reported in L. Marasinghe & J. Wickramaratne (Eds.) (2010) *Judicial Pronouncements on the 13<sup>th</sup> Amendment* (Colombo: Stamford Lake): pp. 173 [hereinafter Marasinghe & Wickramaratne (2010)]

Constitution, the President or any citizen may invoke the constitutional jurisdiction of the Supreme Court to determine whether any Bill is inconsistent with the Constitution. Ordinary laws may be made, amended or repealed by a simple majority in Parliament. However, the amendment of the Constitution requires special majorities to be obtained. These special procedures exist to ensure that constitutional amendment is not taken lightly, and that a high degree of consensus is obtained before changes are made to the supreme law of the land.

Before the special procedure in Article 154G (2) was introduced by the Thirteenth Amendment, the Constitution of 1978 set out two procedures for its valid amendment. The first procedure requires a two-thirds majority in Parliament. The second procedure requires the approval of the people at a referendum in addition to a two-thirds majority in Parliament. In other words, all amendments to the Constitution require to be passed by a two-thirds majority, and some types of amendments also require a referendum (except the category of constitutional amendments now falling within the ambit of Article 154G (2) (a)).

In terms of Article 120, in the case of a Bill expressly seeking to amend the Constitution, the Supreme Court must determine whether the Bill requires to be approved by the people at a referendum, in addition to it being passed by a two-thirds majority in Parliament. The Supreme Court must determine whether the Bill has the effect of amending any of the 'entrenched' provisions mentioned in Article 83. If in the opinion of the Supreme Court the Bill affects any of those entrenched provisions, a referendum becomes necessary.

Among the provisions entrenched in Article 83 are Articles 2 and 3, which some petitioners in the Thirteenth Amendment case argued were affected by the provisions of the proposed Thirteenth Amendment and Provincial Councils Bills. Article 2 provides that 'The Republic of Sri Lanka is a Unitary State'. Article 3 states that 'In the Republic of Sri Lanka, sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.' Thus two of the main questions put to the Supreme Court in this case were whether devolution in the form set out in the two impugned Bills was inconsistent with Sri Lanka being a unitary state, and whether the devolution of legislative and powers to Provincial Councils was an unconstitutional alienation of the sovereignty of the people. If the Supreme Court determined that devolution in terms of the two Bills affected the unitary state and the sovereignty of the people in a material way, then a referendum would become necessary in addition to a two-thirds majority in Parliament to validly enact them.

In view of the political and constitutional significance of the matter, the Chief justice nominated a full bench of all nine judges of the Supreme Court to hear the case. Chief Justice Sharvananda and two other judges, Justices Colin-Thomé and Atukorale, held that the Thirteenth Amendment Bill did not require a referendum and once the Thirteenth Amendment was enacted by Parliament, the Provincial Councils Bill would also be constitutional. One judge, Justice Ranasinghe, agreed with this view, but held that two clauses of the Thirteenth Amendment Bill would require a referendum. Three other judges, Justices Wanasundera, de Alwis, Seneviratne, and de Silva, held that the two Bills required a referendum. The government deleted the two clauses which Justice Ranasinghe held to require a referendum, thereby securing a majority for the view that



neither Bill required a referendum, and proceeded to enact both Bills, which were both certified as validly enacted on 14<sup>th</sup> November 1987.<sup>5</sup>

Thus the requirement of a referendum was averted only with the narrowest of majorities in the Supreme Court. It was widely regarded that, given the hostility among the Sinhalese in particular to both measures as well as the Indian role, the devolution measures had a high possibility of being defeated in a referendum. The argument was that the introduction of such a fundamental restructuring of the state without consulting the people at a referendum was anti-democratic. Another factor that eroded the legitimacy of the Thirteenth Amendment was that the two-thirds majority that the government of President Jayewardene enjoyed in Parliament, which enabled it to pass the Thirteenth Amendment, was itself questionable. While the UNP had won a landslide five-sixths majority in the general elections of 1977 (under the previous first-past-the-post electoral system), the life of that Parliament had been extended in 1982 by way of a referendum rather than fresh elections in what was universally regarded as a wholly indefensible act of democratic manipulation.

In coming to their conclusion that the system of devolution sought to be introduced by the Thirteenth Amendment was consistent with the Constitution, the majority of judges had to interpret Articles 2 and 3 – and define the concept of the unitary state and the location of sovereignty – in view of the argument that the proposed structure was federal or quasi-federal in nature. The judgment of the majority provided the following definitions:

“The term ‘unitary’ in Article 2 is used in contradistinction to the term ‘Federal’ which means an association of semi-autonomous units with a distribution of sovereign powers between the units and the centre. In a Unitary State the national government is legally supreme over all other levels. The essence of a Unitary State is that the sovereignty is undivided, in other words, that the powers of the central government are unrestricted. The two essential qualities of a Unitary State are (1) the supremacy of the central Parliament and (2) the absence of subsidiary sovereign bodies. It does not mean the absence of subsidiary law-making bodies, but it does mean that, they may exist and can be abolished at the discretion of the central authority.”<sup>6</sup>

On the other hand, in a Federal State the field of government is divided between the Federal and State governments which are not subordinate one to another, but are co-ordinate and independent within the sphere allotted to them. The existence of co-ordinate authorities independent of each other is the gist of the federal principle. The Federal government is sovereign in some matters and the State governments are sovereign in others. Each within its own spheres exercise its powers without control from the other and neither is subordinate to the other. It is this feature which distinguishes a Federal from a unitary Constitution. In the latter sovereignty rests only with the central government.”<sup>7</sup>

---

<sup>5</sup> The Thirteenth Amendment to the Constitution; and the Provincial Councils Act, No. 42 of 1987

<sup>6</sup> *In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* (1987) 2 SLR 312 at 319

<sup>7</sup> *Ibid*

Considering the structure of devolution set out in the two Bills against this conceptual definition of unitary and federal constitutions, the majority judgment concluded that,

“The question that arises is whether the 13th Amendment Bill under consideration creates institutions of government which are supreme, independent and not subordinate within their defined spheres. Application of this test demonstrates that both in respect of the exercise of its legislative powers and in respect of exercise of executive powers no exclusive or independent power [is] invested in the Provincial Councils. The Parliament and President have ultimate control over them and remain supreme.”<sup>8</sup>

With regard to legislative power, the majority held that although there is a ‘sphere of competence’ in which Provincial Councils are empowered to legislate (i.e., in relation to the subjects set out in the Provincial Council List and the Concurrent List), this power is neither exclusive nor co-ordinate with that of the central Parliament. The legislative power that was devolved, as well as the subjects over which that power could be exercised, it was held, was entirely subordinate to the ‘sovereignty of Parliament’. Therefore, Parliament could at any time alter or take away the legislative powers devolved to Provincial Councils. Moreover, although Parliament had to follow certain special procedures in doing so, such as prior consultation with Provincial Councils,<sup>9</sup> these were held to be merely procedural restraints.

With regard to executive power, the majority held that the President remains supreme in regard to all executive functions. The Governor exercised executive powers in relation to subjects that were devolved as a ‘delegate’ of the President, and in consideration of all the functions of the Governor and the Board of Ministers, it was held that, “...the President remains supreme or sovereign in the executive field and the Provincial Council is only a body subordinate to him.”<sup>10</sup>

The majority also held that the Bills do not devolve judicial power on the Provincial Councils and that they, “...do not effect any change in the structure of the Courts or the judicial power of the People.”<sup>11</sup> They observed that the proposed High Courts of the Provinces have only limited jurisdiction, that the appellate authority of the Supreme Court and the Court of Appeal remain unimpaired, the administration of the judicial service remains with the centre and that, “Vesting of this additional jurisdiction in the High Court of each Province only brings justice nearer home to the citizen and reduces delay and cost of litigation.”<sup>12</sup>

The other major argument put to the Supreme Court by the petitioners was that devolution was inconsistent with Article 3 of the Constitution (which stated that sovereignty vested with the people and was inalienable) read with Article 4 (which provided the manner in which that sovereignty was to be exercised). Article 4 provides that legislative power shall be exercised by Parliament, executive power by the President

---

<sup>8</sup> Ibid at 320

<sup>9</sup> Article 154G (2) and (3)

<sup>10</sup> Ibid at 323

<sup>11</sup> Ibid at 323

<sup>12</sup> Ibid

and judicial power through the courts, which was argued as being the basic institutional structure of the state for the exercise of the sovereignty of the people.

It was contended that devolving legislative and executive powers to the proposed Provincial Councils would be an unconstitutional alienation of sovereignty contrary to Article 3, and a contravention of the basic structure of the Constitution, since Article 4 did not contemplate any institutions (such as Provincial Councils) other than Parliament, the President and the courts as being entitled to exercise sovereign power.<sup>13</sup> It should be noted that Article 4 is not one of the provisions entrenched by Article 83, and therefore the petitioners were asking the court to regard Article 4 as an inseparable part of Article 3 (which is entrenched).

The majority rejected this argument. It referred to the drafting history of Article 83 to conclude that the framers of the Constitution intended to exclude Article 4 from entrenchment, and therefore it was not open to the court to interpret Article 4 itself as an entrenched provision, or as a part of the entrenched Article 3, when the framers had expressly excluded it. The majority of judges also argued that it was possible to introduce new institutions for the exercise of legislative and executive power, other than those mentioned in Article 4, so long as this did not impinge on the sovereignty of the people as provided in Article 3. In the view of the majority, the Provincial Councils system proposed in the Bills, which exercised only powers delegated by Parliament and the President, did not affect the sovereignty of the people.

Drawing on the ‘Directive Principles of State Policy’ set out in Chapter VI of the Constitution, the judges in the majority defined devolution in the following way:

“Healthy democracy must develop and adopt itself to changing circumstances. The activities of central government now include substantial powers and functions that should be exercised at a level closer to the People. Article 27 (4) has in mind the aspirations of local people to participate in the governance of their regions. The Bills envisage a handing over of responsibility for the domestic affairs of each province, within the framework of a united Sri Lanka. They give new scope for meeting the particular needs and desires of the people for each province. Decentralisation is a useful means of ensuring that administration in the provinces is founded on an understanding of the needs and wishes of the respective provinces. The creation of elected and administrative institutions with respect to each province, that is what devolution means, gives shape to the devolutionary principle.

The concept of devolution is used to mean the delegation of central government powers without the relinquishment of supremacy. Devolution may be legislative or administrative or both. It should be distinguished from decentralisation which is a method whereby some central government powers of decision making are exercised by officials of the central government located in various regions.”<sup>14</sup>

---

<sup>13</sup> The Thirteenth Amendment Bill did not seek to add Provincial Councils as a separate category of (devolved) institution to those already mentioned in Article 4

<sup>14</sup> *In Re the Thirteenth Amendment* (1987) 2 SLR 312 at 326-327

The judges in the minority, especially the main dissenting opinion of Justice Wanasundera,<sup>15</sup> offered a powerful critique of these findings of the majority. In their view, the structure of devolution proposed by the two Bills would establish a federal or quasi-federal form of government that was contrary to the unitary state and the basic structure of the Constitution of 1978.<sup>16</sup> They therefore concluded that the approval of the people at a referendum was necessary to validly enact the two Bills. However, as noted above, the government made changes to the Thirteenth Amendment Bill so as to address Justice Ranasinghe's concerns, and thereby secured a majority in the Supreme Court for the view that a referendum would not be necessary.

In reconciling the devolution of power with the existing structure of a centralised unitary state as envisaged by the Constitution of 1978, the majority in the Supreme Court had to stress that ultimate power and supremacy continued to be vested with the central Parliament and the President. This meant that Provincial Councils came to be regarded from the outset as subordinate bodies to central institutions. This certainly had implications for the way in which devolution was implemented, with administrative practices and subsequently enacted central legislation clearly being based on a notion of central supremacy and superiority.<sup>17</sup> While perhaps at the level of constitutional interpretation the choices available to the judges in the majority in the *In re the Thirteenth Amendment* case were limited, it did not have to follow that the central government also had to act in ways that undermined the autonomy of the Provincial Councils. Unfortunately, this has largely been the case in the experience of all Provincial Councils since 1988.

### 2.3 The De-Merger of the Northern and Eastern Provinces

As noted above, the 'merger' of the Northern and Eastern Provinces into a single territorial, political and administrative unit was one of the undertakings of the Indo-Lanka Accord.<sup>18</sup> This commitment was reflected in Article 154A (3), introduced by the Thirteenth Amendment, which stated that Parliament may by law provide for two or three adjoining Provinces to form one administrative unit with one elected Provincial Council, one Governor, one Chief Minister and one Board of Ministers and for the manner of determining whether such Provinces should continue to be administered as one

---

<sup>15</sup> Ibid at 333-383

<sup>16</sup> It would seem with the benefit of hindsight, that in the experience of the implementation of the Thirteenth Amendment in the past two decades, the practice has largely reflected what the majority anticipated of the constitutional framework in abstract. The pervasive influence and presence of the central government within the provincial sphere has continued in spite of devolution. See *Provincial Councils: Operational Experience of Devolution* (1996) Report of the Committee to study the operation of Provincial Councils in Sri Lanka [hereinafter the Asoka Gunawardane Committee Report]; Centre for Policy Alternatives (2008) *Strengthening the Provincial Council System: Thematic Report of Workshop Deliberations* (Colombo: CPA) [hereinafter CPA (2008) *Strengthening Provincial Council System*]; A. Welikala (Ed) (2016) *A New Devolution Settlement for Sri Lanka: Proceedings and Outcomes, Conference of Provincial Councils* (Colombo: Centre for Policy Alternatives): <http://www.cpalanka.org/a-new-devolution-settlement-for-sri-lanka-proceedings-and-outcomes-conference-of-provincial-councils/>

<sup>17</sup> See for a fuller discussion of these issues, A. Welikala. 'The Sri Lankan Conception of the Unitary State: Theory, Practice, and History', CPA Working Papers on Constitutional Reform No.1, June 2016:

<http://constitutionalreforms.org/wp-content/uploads/2016/06/CPA-Working-Paper-1.pdf>

<sup>18</sup> See discussion in Section 2.1, above

administrative unit or whether each such Province unit should constitute a separate administrative unit.

The specific procedures for the merger of Provinces were set out in Section 37 of the Provincial Councils Act, No. 42 of 1987. The relevant essence of the provisions of Section 37 empowered the President to declare by Proclamation for two or three adjoining Provinces to be constituted as one administrative unit.<sup>19</sup> In a special provision applicable to the Northern and Eastern Provinces, however, it was stipulated that the President shall not issue such a Proclamation unless he was satisfied that arms, ammunition, weapons, explosives and other military equipment held by terrorist militant or other groups having as their objective the establishment of a separate state, have been surrendered to the government of Sri Lanka or to authorities designated by it, and that there has been a cessation of hostilities and other acts of violence by such groups in the Northern and Eastern Provinces.<sup>20</sup>

Thus the political agreement underlying these constitutional and legal provisions arrived at between the governments of Sri Lanka and India, and Tamil political parties and militant groups in the process of negotiations was as follows: that the Tamil nationalist claim to an area of historical habitation (or traditional homeland) would be accommodated, not explicitly as such, but by merging the Northern and Eastern Provinces into a single administrative unit for the purposes of devolution under the Thirteenth Amendment, with one Provincial Council and provincial executive representing and governing thereby the entire region. There would be an acknowledgement of the apprehensions of the Muslim and Sinhala communities in the (ethnically more heterogeneous) Eastern Province concerning the numerical superiority of the Tamils in a territorially merged North and East, by offering a referendum on continuing the merger or opting to 'de-merge.' However, as many commentators believe but never officially acknowledged, the intention seems to have been to indefinitely keep postponing the referendum in the East (allowed by Section 37 (2) (b)), in the hope that eventually, the North-Eastern merger would become a permanent feature rather than the interim measure suggested by the elaborate provisions of Section 37.<sup>21</sup> From the initial Proclamation in August 1988 to November 2005, the referendum was annually postponed by successive Presidents.<sup>22</sup>

President Jayewardene issued the Proclamation merging the Northern and Eastern Provinces on 8<sup>th</sup> August 1988 and elections to the North-Eastern Provincial Council were held on 19<sup>th</sup> November 1988. As we have seen, the elected Provincial Council and administration of Chief Minister Varatharajaperumal ceased to exist in March 1990.<sup>23</sup> Thereafter, until 4<sup>th</sup> June 2008 when the elected Provincial Council of the Eastern

---

<sup>19</sup> Section 37 (1) (a)

<sup>20</sup> Section 37 (1) (b)

<sup>21</sup> See R. Edrisinha, M. Gomez, V.T. Thamilmaran & A. Welikala (Eds.) (2008) *Power-Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008* (Colombo: CPA): p.741 [hereinafter Edrisinha et al (2008)]

<sup>22</sup> See the table setting out the successive Proclamations, their dates, and dates of postponement in the Supreme Court judgment on the de-merger in 2006, reproduced in Edrisinha et al (2008): p.748

<sup>23</sup> See discussion in Section 2.1, above

Province assembled for the first time, the North-Eastern Province was administered by the Governor.<sup>24</sup>

The legal challenge to the merger of the Northern and Eastern Provinces, the postponement of the statutorily stipulated referendum, and the consequent deprivation of a lawfully elected Provincial Council for the Eastern Province, was made by way of fundamental rights applications to the Supreme Court by three residents of the Eastern Province. The petitioners challenged the legality of the initial Proclamation of 1988 merging the two Provinces by relying on what had hitherto been a virtually unknown fact. As we saw earlier, Section 37 (1) (b) of the Provincial Councils Act required the President to be satisfied as to the existence of certain facts before issuing a Proclamation in the case of the Northern and Eastern Provinces. This was the satisfactory cessation of hostilities and the decommissioning of arms by separatist groups in those areas.

The petitioners revealed to court that President Jayewardene had, immediately prior to issuing the merger proclamation in August 1988, made an emergency regulation under the Public Security Ordinance, amending Section 37 (1) (b) of the Provincial Councils Act by adding to it the words 'or that operations have commenced to secure complete surrender of arms.'<sup>25</sup> This amendment was brought to take into account of the fact that a complete cessation of hostilities had clearly not occurred. As is well-known, the LTTE had rejected the terms of the Indo-Lanka Accord and, following a token surrender of arms, begun a military engagement with the IPKF.

The Supreme Court agreed with the petitioners' contention that the impugned emergency regulation was invalid because it was a statutorily unauthorised use of emergency powers by the President for a collateral purpose (i.e., *ultra vires* Section 5 of the Public Security Ordinance). Since the emergency regulation seeking to amend the relevant section of the Provincial Councils Act was invalid, there had been no legal amendment of the Provincial Councils Act. The President had therefore not satisfied the statutory requirement set out in that Section 37 (1) (b) regarding decommissioning, which rendered the subsequent Proclamation merging the two Provinces also invalid. This was the legal basis on which the Supreme Court 'de-merged' the Northern and Eastern Provinces.<sup>26</sup>

## 2.4 Institutional Structure: The Actors and their Functions

Before considering the distribution of powers between the centre and the provinces, it is useful to have a preliminary idea of the various institutions and their functions in the system of devolution embodied in the Thirteenth Amendment. The Thirteenth

---

<sup>24</sup> The Supreme Court judgment on the de-merger was delivered on 16<sup>th</sup> October 2006, pursuant to which the two Provinces commenced functioning as two separate entities from 1<sup>st</sup> January 2007. The Northern Province continued to be administered by the Governor, until 21<sup>st</sup> September 2013, when elections were held for a Northern Provincial Council. See also the Governor's Address at the second meeting of the Eastern Provincial Council, Official Report of the Debates of the Eastern Provincial Council, Vol.01, No.02, 11<sup>th</sup> June 2008.

<sup>25</sup> Article 155 (2) of the Constitution and Section 5 of the Public Security Ordinance empower the President to promulgate emergency regulations having the effect of overriding any law except the provisions of the Constitution.

<sup>26</sup> *Wijesekera v. Attorney General* (2007) 1 SLR 38, also known as the 'North-East Demerger Case'

Amendment, which introduced the new Chapter XVIIIA to the Constitution of 1978, provides the constitutional framework of these institutions and their roles. There is also a body of central legislation that governs devolution of which the two most important pieces of legislation for the present discussion are the Provincial Councils Act No. 42 of 1987 (as amended by Acts No. 27 and 28 of 1990), and the Provincial Councils (Consequential Provisions) Act No. 12 of 1989.<sup>27</sup>

The political institutions that play a role in this system of devolution are the President, Parliament, the Governors, the Chief Ministers and Boards of Ministers, and the Provincial Councils. Supporting these political institutions are the public service and the police, and the administrative bodies which regulate the public service, police, and public finance. The Thirteenth Amendment establishes a Finance Commission, which recommends allocations of funds to Provincial Councils to the central government, and Provincial Public Service Commissions and Provincial Police Commissions to work together with their national counterparts. The Supreme Court plays a central role in this framework as the final arbiter of disputes and in the authoritative, binding interpretation of the Constitution.

The Thirteenth Amendment establishes a Provincial Council for each of the nine Provinces of Sri Lanka that are listed in the Eighth Schedule to the Constitution.<sup>28</sup> The Provincial Council is the legislature of the Province, and enjoys law-making powers over the subjects enumerated in the Provincial Council List and the Concurrent List.<sup>29</sup> A Provincial Council has no power to legislate in respect of any subject in the Reserved List, on which only Parliament may legislate.<sup>30</sup> Provincial Councils are elected for a term of five years, unless sooner dissolved.<sup>31</sup> Unlike the central Parliament, the law-making power of Provincial Councils is circumscribed by the Constitution, and provincial statutes are judicially reviewable at any time. Within this constitutional and legal framework, 'law' means Acts of the Sri Lankan Parliament,<sup>32</sup> whereas laws made by Provincial Councils are referred to as 'statutes'.

Executive power at the provincial level is exercised by the Governor and the Board of Ministers, and in certain situations, directly by the President.<sup>33</sup> The Governor is appointed by the President and exercises his powers as an agent of the President within the Province.<sup>34</sup> The Governor exercises executive power within the Province in respect of the subjects in the Provincial Council List and the Concurrent List, generally with the advice of the Board of Ministers, except where he is required to act in his own discretion,

---

<sup>27</sup> Parliament is empowered to provide by law for all necessary measures to implement the Thirteenth Amendment by Article 154Q. With regard to the Provincial Councils (Consequential Provisions) Act, No. 12 of 1989, and the Provincial Councils (Amendment) Act, No. 27 of 1990, see the Supreme Court determinations in *Provincial Councils (Consequential Provisions) Bill*, SCSD No. 11 of 1989, and *Provincial Councils (Amendment) Bill*, SCM 14<sup>th</sup> June 1990, reported in Marasinghe & Wickramaratne (2010): pp. 138 and 173, respectively.

<sup>28</sup> Article 154A (1)

<sup>29</sup> Article 154G (1) and (5) (b)

<sup>30</sup> Article 154G (7)

<sup>31</sup> Article 154E

<sup>32</sup> Article 170

<sup>33</sup> Articles 154B (2), 154C and 154F

<sup>34</sup> Article 154B (2) and Section 15 (2) of the Provincial Councils Act

which is usually under instructions from the President.<sup>35</sup> In practice the Board of Ministers, who are the elected political executive representing a majority in the Provincial Council, exercise their powers through the Governor, for which they are collectively responsible to the Provincial Council.<sup>36</sup> However, the Governor possesses some significant powers and functions relating to day-to-day administration (for e.g., finance, the public service, assent to provincial statutes), which confine or restrict the powers and responsibilities of the elected Ministers. All executive action of the Governor, whether taken on the advice of Ministers or otherwise, are to be expressed as taken in the name of the President.<sup>37</sup>

The Thirteenth Amendment does not devolve judicial power to the Provinces, but in establishing a High Court for each Province, it decentralises the administration of justice.<sup>38</sup> Within the Province, the High Court exercises original criminal jurisdiction, appellate and revisionary jurisdiction over Magistrates Courts, and the power to issue prerogative writs. The judicial service at the provincial level continues to be administered by the central Judicial Services Commission.

As noted above, the structure of devolution established by the Thirteenth Amendment is very much within the framework of the unitary state. This means that the central government has overall pre-eminence or supremacy within the structure. Devolved institutions are subordinate to the central government,<sup>39</sup> and devolution can be suspended or revoked by the centre when the circumstances so require without consultation with or consent of the Province. This is clear from the special provisions of the Thirteenth Amendment and the Provincial Councils Act dealing with the various situations in which the central government can suspend devolution altogether or takeover devolved functions: states of emergency;<sup>40</sup> the failure of a Governor or a Provincial Council to comply with directions, and the failure of administrative machinery within the Province;<sup>41</sup> financial instability;<sup>42</sup> or where the majority of the members of a Provincial Council have expressly repudiated or manifestly disavowed obedience to the Constitution;<sup>43</sup> or if a Provincial Council has for all intents and purposes ceased to function.<sup>44</sup> Many of these special powers of the central government are vested in the President, with Parliament and the Governor also having certain functions in some cases.

The constitutional procedural safeguards built into protecting the provincial sphere in respect of legislative power are weak (with experience demonstrating that even those safeguards have been observed in the breach), and the framework for the exercise of

---

<sup>35</sup> Articles 154C and 154F

<sup>36</sup> Article 154F (6)

<sup>37</sup> Section 15 (2) of the Provincial Councils Act

<sup>38</sup> Article 154P

<sup>39</sup> The Supreme Court has described Provincial Councils, together with local government authorities, as 'organs of decentralised government': see the Supreme Court determination on the *National Transport Commission Bill* (1991), SCSD No. 8 of 1991, reported in Marasinghe & Wickramaratne (2010): p.195 at p.199. See also the Supreme Court determination in *Re Transport Board Statute of the North-Eastern Provincial Council* (1990), SC (Spl) No. 7 of 1989, reported in Marasinghe & Wickramaratne (2010): p.148

<sup>40</sup> Article 154J

<sup>41</sup> Articles 154K, 154L and 154M

<sup>42</sup> Article 154N

<sup>43</sup> Section 5A (a) of the Provincial Councils Act

<sup>44</sup> Section 5A (b) of the Provincial Councils Act



executive power weaker. While the exceptional circumstances under which the special powers of intervention (for e.g., to prevent attempts at secession) may seem unobjectionable and legitimate central government concerns that even federal states reflect, it is the particular manner in which the provisions are designed that permits an unrestrained scope for unilateral intrusion by the central government (and especially, the powerful office of the executive presidency). This is compounded by the absence of constitutional institutions at the central level for the representation of the provincial interest, such as traditionally provided through a second chamber of the central legislature.

### 3. Legislative Power

Prior to the enactment of the Thirteenth Amendment, the only law-making body in Sri Lanka was Parliament. Although local government authorities have powers to make bylaws, these are only rule making powers that are strictly limited in both scope and substance by the legislation governing them. The legislative powers devolved on the Provincial Councils are broader than those given to local authorities, but the Supreme Court in the *In re Thirteenth Amendment* case clearly described provincial statutes as ‘delegated legislation.’<sup>45</sup> Generally the power to make ‘delegated legislation’, or ‘subordinate legislation’, describes the power that is delegated by the legislature to the executive (or other subordinate bodies such as local governments) to make rules in the implementation of legislation.<sup>46</sup> Such regulations cannot exceed the authority given by Parliament as expressed in the relevant law. However, Provincial Councils, unlike local authorities, are legislative bodies established by the Constitution, the legislative powers of which are also enumerated in the Constitution. Therefore, they can be regarded as institutions that are subordinate to Parliament, but with a status higher than local authorities. Bylaws made by local government authorities and statutes made by Provincial Councils are subject to judicial review, but laws made by Parliament, once made, are not.<sup>47</sup> That is, central legislation is subject to a limited form of pre-enactment review by the Supreme Court for consistency with the Constitution, but once passed, Acts of Parliament cannot be challenged even if they are inconsistent with the Constitution, or have been passed in violation of procedures established by the Constitution.

The Ninth Schedule to the Constitution introduced by the Thirteenth Amendment contains three lists of subjects: the Provincial Council List (List I), the Reserved List (List II), and the Concurrent List (List III). The subjects over which Provincial Councils may make statutes are contained in the Provincial Council List and the Concurrent List (over which law-making power is shared, but with central pre-eminence), while the Reserved List contains the subjects over which Provincial Councils have no law-making power and on which only Parliament may legislate. The three lists of subjects in the Ninth Schedule should not be regarded as an exhaustive enumeration of the legislative powers of the

---

<sup>45</sup> *In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* (1987) 2 SLR 312 at 325

<sup>46</sup> For e.g., regulations made by the Minister for Transport under the Motor Traffic Act

<sup>47</sup> Article 124. The scope for pre-enactment judicial review for constitutionality is set out in Articles 120, 121 and 122. All provincial executive and administrative action is subject to the fundamental rights jurisdiction of the Supreme Court under Articles 17 and 126: *Parameswary Jayathevan v. Attorney General* (1992) 2 SLR 356

state, because Parliament retains the residual legislative power to legislate on any matter whatsoever.<sup>48</sup> While the three lists taken together delineate the scope and limits of the legislative power of Provincial Councils, they do not similarly restrict Parliament.<sup>49</sup>

### 3.1 Institutional and Procedural Framework: Parliament and the Provincial Councils

The legislative powers of the Provincial Councils are defined in territorial and functional terms. Legislative power is devolved on Provincial Councils to make statutes in respect of any matter in the Provincial Council List.<sup>50</sup> A Provincial Council may also make statutes in respect of matters in the Concurrent List, after such consultations with Parliament as it may consider appropriate in the circumstances of each case.<sup>51</sup> In both cases, the territorial jurisdiction of the Provincial Council is confined to the respective Province. The Provincial Councils have no power to make statutes in respect of the Reserved List.<sup>52</sup>

Where there is a pre-existing law made by Parliament concerning any subject in the Provincial Council List, a Provincial Council may make a subsequent statute which, if inconsistent with the law, suspends the operation of that law within the Province for as long as the provincial statute remains in force.<sup>53</sup> For it to have this overriding effect, the long title of the provincial statute must describe itself as being inconsistent with the relevant law. As the Supreme Court has held, the purpose of this requirement of an express description of inconsistency in the long title is to bring such inconsistency to the notice of Parliament.<sup>54</sup>

Where there is a pre-existing law made by Parliament concerning any subject in the Concurrent List, a Provincial Council may make a subsequent statute which, if inconsistent with the law, suspends the operation of that law within the Province for as long as the provincial statute remains in force.<sup>55</sup> However, with regard to the Concurrent List, Parliament has the power to pass a resolution to the contrary, so that pre-existing central legislation would prevail over any provincial statute. The exercise of statute-

---

<sup>48</sup> 154G (10)

<sup>49</sup> That is, its plenary legislative power is not affected although Article 154G (2) and (3) impose certain procedural requirements to be followed.

<sup>50</sup> Article 154G (1)

<sup>51</sup> Article 154G (5) (b). The Supreme Court has held that this duty of the Provincial Council to consult Parliament is mandatory: *Re Transport Board Statute of the North-Eastern Provincial Council* (1990), SC (Spl) No. 7 of 1989, reported in Marasinghe & Wickramaratne (2010): p.148 at pp.164-167. Article 154G (5) (a) provides that Parliament may make laws on subjects in the Concurrent List after such consultations with all Provincial Councils as it may consider appropriate in each case. In *Re Transport Board Statute of the North-Eastern Provincial Council* (1990), the Supreme Court did not expressly state whether the duty of Parliament to consult Provincial Councils was also mandatory since the issue was about the requirement of consultation with Parliament when a Provincial Council was making a statute in relation to the Concurrent List, but it seems implicit in the reasoning that the duty to consult is mandatory for both Parliament and Provincial Councils, given the identical wording of Article 154G (5) (a) and (b).

<sup>52</sup> Article 154G (7)

<sup>53</sup> Article 154G (8)

<sup>54</sup> The Supreme Court determination in *Re Transport Board Statute of the North-Eastern Provincial Council* (1990), SC (Spl) No. 7 of 1989, reported in Marasinghe & Wickramaratne (2010): p.148 at pp.165-166

<sup>55</sup> Article 154G (9)

making power on a concurrent subject by a Provincial Council is mandatorily subject to the requirement of prior consultation with Parliament.<sup>56</sup>

The importance of Articles 154G (8) and (9) must be underscored. Whereas the power-conferring Articles 154G (1) and (5) (b) set out the positive scope of the legislative powers of Provincial Councils, Articles 154G (8) and (9) constitute the essence of that legislative autonomy. Unless Parliament deliberately overrides a provincial statute,<sup>57</sup> these two provisions ensure provincial legislative autonomy to the extent Province Councils enjoy legislative powers under the Thirteenth Amendment. By exercising these powers, the application of central legislation is excluded within the Province. However, both the constitutional scope for intervention by Parliament, as well as the superior nature of central legislation, mean that this legislative autonomy is highly restricted.

By passing a resolution, a Provincial Council may request Parliament to legislate on any matter in the Provincial Council List.<sup>58</sup> Legislation passed by Parliament under this provision is only applicable within the Province making the request. A Provincial Council may also, by resolution, decide not to exercise its legislative power in respect of any matter, in whole or in part, in the Provincial Council or Concurrent Lists.<sup>59</sup> Where such a provincial resolution to renounce law-making power has been accepted by Parliament, Parliament assumes the power to legislate for that Province, in respect of the matters specified in such resolution.<sup>60</sup> In these circumstances, Parliament does not have to follow the special procedures set out in Article 154G to make law, and enacts laws by the ordinary simple majority.

The ways in which the devolution of legislative powers to Provincial Councils would restrict, if at all, the plenary and supreme quality of the legislative power of Parliament were strenuously argued in the *In re the Thirteenth Amendment* case. A main ground of argument in this regard was as to the extent to which the provisions of Article 154G (2) and (3) affected Parliament's supremacy. These two provisions set out special procedures for the exercise of Parliament's power of constitutional amendment,<sup>61</sup> and its continuing legislative power in respect of the subjects devolved on the Provinces by the Provincial Council List.<sup>62</sup> It is clear, however, that the procedural requirements of these provisions do not affect the ultimate supremacy of Parliament. As the judges in the majority in the *In re the Thirteenth Amendment* case opined, "...Articles 154G (2) and (3) do not limit the sovereign power of Parliament. They only impose procedural restraints."<sup>63</sup>

---

<sup>56</sup> Article 154G (5) (b); the Supreme Court determination in *Re Transport Board Statute of the Eastern Provincial Council* (1990), SC (Spl) No. 7 of 1989, reported in Marasinghe & Wickramaratne (2010): p.148

<sup>57</sup> In relation to a concurrent subject, by a resolution under Article 154G (9), or in relation to a provincial subject, by virtue of any of the provisions that empower Parliament to legislate in those areas, for e.g., legislation under the 'National Policy' clause of the Reserved List

<sup>58</sup> Article 154G (4)

<sup>59</sup> Article 154S (1)

<sup>60</sup> Article 154S (2)

<sup>61</sup> Article 154G (2)

<sup>62</sup> Article 154G (3)

<sup>63</sup> *In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* (1987) 2 SLR 312 at 320

In terms of Article 154G (2), Parliament cannot amend or repeal the Thirteenth Amendment or the three lists of competences in the Ninth Schedule unless the proposed amendment has been referred by the President to every Provincial Council for the expression of its views thereon. Where all Provincial Councils agree to the proposed amendment or repeal, Parliament may pass it with a simple majority.<sup>64</sup> Where one or more Provincial Councils do not agree to the amendment, Parliament is required to pass it with a two-thirds majority.<sup>65</sup>

In terms of Article 154G (3), a Bill (i.e., draft parliamentary legislation) in respect of any matter in the Provincial Council List must be referred by the President to every Provincial Council for the expression of its views thereon.<sup>66</sup> Where all Provincial Councils agree to the passing of the Bill, Parliament may pass it by a simple majority, whereupon the Act becomes applicable to all Provinces.<sup>67</sup> Where one or more Provincial Councils do not agree to the passing of the Bill, then Parliament must pass it by a two-thirds majority for the Bill to be validly enacted in all Provinces.<sup>68</sup> If the law is passed by only a simple majority rather than a two-thirds, then it becomes applicable only in the Provinces that have agreed to it.<sup>69</sup>

These crucial procedural safeguards for devolution were put in place to ensure that Parliament acts in a consultative and consensual manner in exercising its legislative power, both with regard to ordinary legislation and in the enactment of constitutional amendments affecting devolution. The applicable procedure, however, has unfortunately not been followed on the occasions in which Parliament expressly amended certain provisions of the Thirteenth Amendment and the Provincial Council List. When Parliament enacted the Seventeenth Amendment to the Constitution in 2001 which, among other fundamental changes to the Constitution affecting the central level of government, also made changes to the devolution framework by amending the manner of appointment of some members of the Finance Commission, the composition of the National Police Commission, and the replacement of the President with the National Police Commission in the exercise of provincial police powers.<sup>70</sup> Similarly, no consultation preceded the Eighteenth and Nineteenth Amendments which made changes to some of these same provisions.<sup>71</sup>

---

<sup>64</sup> Article 154G (2) (a). It should be noted that this is the only situation in which Parliament may amend the Constitution by a simple majority. This is presumably for the reason that the necessary rigidity of the procedure for constitutional amendment is supplied by the requirement of the agreement of every Provincial Council, rather than by a two-thirds majority in Parliament or a referendum. See also discussion in Ch. 2.2, above.

<sup>65</sup> Article 154G (2) (b)

<sup>66</sup> The Supreme Court has opined, *obiter*, that this requirement to consult Provincial Councils is mandatory in *Re Transport Board Statute of the North-Eastern Provincial Council* (1990), SC (Spl) No. 7 of 1989, reported in Marasinghe & Wickramaratne (2010): p.148 at p.164-165. See also *Ghany v. Dissanayake* (2004) 1 SLR 17 at 30, in which the Supreme Court indirectly expressed doubt as to the constitutionality of the Seventeenth Amendment to the Constitution (2001) which was passed in violation of this procedure. Both opinions were of Mark Fernando, J.

<sup>67</sup> Article 154G (3) (a)

<sup>68</sup> Article 154G (3) (b)

<sup>69</sup> Proviso to Article 154G (3)

<sup>70</sup> Article 154R amended by Section 19 of the Seventeenth Amendment Act, and Items 3, 6, 7 and 9:2 of Appendix I of List I of the Ninth Schedule amended by Section 19 of the Seventeenth Amendment Act.

<sup>71</sup> Article 154R (c) substituted by Section 37 of the Nineteenth Amendment Act

Due to its amendments of the provisions of the Thirteenth Amendment and the Ninth Schedule, the procedure to be followed in the enactment of the Seventeenth Amendment was plainly Article 154G (2), with its requirements of consultation with Provincial Councils. This important procedure was not followed, but rather, the procedure for Bills urgent in the national interest (likewise, the Eighteenth Amendment).<sup>72</sup> No Provincial Council challenged the procedure adopted, and in its special determination under Article 122 the Supreme Court also did not order that the Seventeenth Amendment Bill required to be passed by the procedure set out in Article 154G (2).<sup>73</sup> It can therefore be argued that the Seventeenth Amendment was passed by following a wrong procedure that was inconsistent not only with the provisions of the Constitution, but also the concept of devolution. In a subsequent case, the Supreme Court (indirectly) indicated that the failure to follow the procedure in Article 154G (2) rendered the constitutionality of the Seventeenth Amendment questionable.<sup>74</sup>

However, a later attempt to amend the law relating to local government authorities was successfully challenged in the Supreme Court under Article 121. The impugned Bill sought to establish 'Ward Committees' as a further tier of representation within existing local government bodies and to introduce a mixed electoral system at local government level. The Supreme Court held that the changes proposed in the Bill affected the legislative competence of the Provincial Councils as set out in Items 4:1 and 4:3 of the Provincial Council List. Therefore, the Bill could not become law unless it was passed by the procedure in Article 154G (3) and it had been referred by the President to every Provincial Council for the ascertainment of its views.<sup>75</sup> Pursuant to this decision by the Supreme Court, the central government did not proceed with the Bill.<sup>76</sup>

The procedure, however, gained notoriety following the *Divineguma* saga, which led to the impeachment of Chief Justice Shirani Bandaranayaka by the then Rajapaksa government.<sup>77</sup> In its first determination on the constitutionality of the *Divineguma* Bill, a bench headed by the Chief Justice held that the Bill impinged on a number of devolved subjects, and thus required prior reference to the Provincial Councils.<sup>78</sup> Having referred

---

<sup>72</sup> Article 122

<sup>73</sup> The Supreme Court determination on the Seventeenth Amendment Bill is unreported

<sup>74</sup> *Ghany v. Dissanayake* (2004) 1 SLR 17 at 30; see also the Supreme Court determination in SCSD No.1 of 1992 in relation to the Bill that was enacted as Greater Colombo Economic Commission (Amendment) Act, No. 49 of 1992 (unreported). It should be noted that the Constitution only allows pre-enactment judicial review of parliamentary Bills as provided under Articles 120, 121 and 122 (read with Articles 123 and 124), and Article 80 (3) prohibits any judicial review of validly enacted law for constitutionality. This means that unless the Supreme Court declares a Bill unconstitutional upon a reference by the President or Cabinet of Ministers, or such a Bill is successfully challenged prior to enactment, the validity of a law once made, may not be questioned in any court, even if it is wholly inconsistent with the Constitution.

<sup>75</sup> The Supreme Court determination on the *Local Authorities (Special Provisions) Bill*, SCSD Nos. 6 and 7 of 2008 reported in Marasinghe & Wickramaratne (2010): p.516. For a similar outcome, see *Local Authorities (Special Provisions) Bill*, SCSD No. 12 of 2003 reported in Marasinghe & Wickramaratne (2010): p.421

<sup>76</sup> *In re Town and Country Planning Ordinance Amendment Bill*, SC Special Determination 3/2011. See also Centre for Policy Alternatives, 'Note on the Divineguma Bill', January 2013: <http://www.cpalanka.org/wp-content/uploads/2013/02/Divineguma-Bill-Basic-Guide-updated-January-2013-E.pdf>

<sup>77</sup> On which, see N. Anketell & A. Welikala (2013) *A Systemic Crisis in Context: The Impeachment of the Chief Justice, the Independence of the Judiciary, and the Rule of Law in Sri Lanka* (Colombo: Centre for Policy Alternatives): <http://www.cpalanka.org/the-impeachment-of-the-chief-justice-the-independence-of-the-judiciary-and-the-rule-of-law-in-sri-lanka/>

<sup>78</sup> *In re a Bill titled Divineguma*, SC Special Determination 1-3/2012.

the Bills to the eight constituted Provincial Councils, in which the ruling United People's Freedom Alliance (UPFA) had controlling majorities, the President also referred the Bill to the Governor of the Northern Province (the ninth province in respect of which there was then no Provincial Council constituted or elected). The Bill was then placed on the Order Paper of Parliament a second time. It was challenged again by a number of petitioners on the basis that the substantive provisions of the Bill were inconsistent with the constitution. Some petitioners also contended that the Governor was not empowered to substitute himself in place of a Northern Provincial Council, and that his consent to the passage of the Bill was invalid. The Supreme Court's determination in respect of the second challenge held with the petitioners' argument that the *Divineguma* Bill was inconsistent with the constitution and that it could only become law upon being passed with a two-thirds majority in Parliament. The Court also held that the Governor could not consent to a Bill by assuming the powers of a Provincial Council.<sup>79</sup>

Article 154Q empowers Parliament to enact legislation to provide for the election of members to Provincial Councils and related matters,<sup>80</sup> the procedure for the transaction of business in Provincial Councils,<sup>81</sup> salaries and allowances of members of Provincial Councils,<sup>82</sup> and a general power to legislate for 'any other matter necessary for the purpose of giving effect to the principles of provisions [*sic*] of this Chapter [i.e., the Thirteenth Amendment], and for any matters connected with, or incidental to, the provisions of this Chapter.'<sup>83</sup> It is noteworthy that the Constitution contemplates the intervention of Parliament in such minute matters as salaries and internal procedure of Provincial Councils, but it is the general power in Article 154Q (d) that is even more significant. It has been relied upon in the enactment of two crucial pieces of legislation: the Provincial Councils (Consequential Provisions) Act, No. 12 of 1989,<sup>84</sup> and the Provincial Councils (Amendment) Act, No. 27 of 1990.

The Consequential Provisions Act, although enacted as a temporary measure, continues to be in force and has assumed an air of permanence in the context of the sparse legislative activity of Provincial Councils even in the more politically stable Provinces in the last two decades.<sup>85</sup> The basic purpose of the Act was to extend the discretionary powers of central Ministers and officials, conferred by existing legislation pertaining to matters in the Provincial Council List, to provincial Ministers and officials, so that executive powers at the provincial level could be exercised under those laws until such time as the Provincial Councils themselves made their own statutes. In its determination on the constitutionality of this law at Bill stage, the Supreme Court agreed with the submission of the Attorney General that Article 154Q (d) was meant to provide exactly

---

<sup>79</sup> *In re a Bill titled Divineguma*, SC Special Determination 4-14/2012.

<sup>80</sup> Article 154Q (a); provided for in the Provincial Councils Elections Act, No. 2 of 1988; Elections (Special Provisions) Act, No. 35 of 1988; Provincial Councils Elections (Amendment) Act, No. 55 of 1988; Provincial Councils Elections (Amendment) Act, No. 29 of 1990; Provincial Councils Elections (Amendment) Act, No. 7 of 1993.

<sup>81</sup> Article 154Q (b); provided for in Part II of the Provincial Councils Act, No. 42 of 1987

<sup>82</sup> Article 154Q (c); provided for in Provincial Councils (Payment of Salaries and Allowances) Act, No. 37 of 1988; Provincial Councils Pensions Act, No. 17 of 1993.

<sup>83</sup> Article 154Q (d)

<sup>84</sup> Also known as the Consequential Provisions Act.

<sup>85</sup> See discussion in Section 4, below. See also Centre for Policy Alternatives (2008) *Strengthening the Provincial Council System*: <http://www.cpalanka.org/final-report-of-the-cpausaid-programme-on-strengthening-the-provincial-council-systemmay-2008/>

for the kind of intervention proposed in the Bill, in order to promote the exercise of devolved executive power.<sup>86</sup>

The amendment to the Provincial Councils Act enacted in 1990, in the wake of the attempt at a unilateral declaration of independence in the North and East, has obvious political significance as an aspect of the broader political problem of the aspirations, and resistance, to an accommodation of ethno-political pluralism through devolution under the Thirteenth Amendment. In a charged political context of escalating antagonism, it reflected the political response of the central government by terminating the operation of devolution in the North and East.<sup>87</sup>

From the perspective of constitutional law, the Supreme Court's determination on the constitutionality of this amendment Bill reflected the importance of Article 154Q (d), and the wide possibilities for central intervention it allows. The Bill provided for both the disqualification from office of elected members of a Provincial Council, and for dissolution of a Provincial Council, upon a communication of the Governor that members of the Council had expressly repudiated or manifestly disavowed obedience to the Constitution.<sup>88</sup> The petitioners in the case argued that the Bill was in effect an amendment of the Constitution by augmenting the powers of the Governor, and that the existing constitutional provisions regarding the Governor's powers in the dissolution of a Provincial Council were sufficient to deal with the extraordinary situation that had arisen in the North-Eastern Provincial Council.<sup>89</sup> The Supreme Court did not agree, and instead focussed on the fact that one of the impugned clauses dealt with the oath of office of members of a Provincial Council, which being provided for in the Provincial Councils Act, was susceptible to amendment by ordinary procedure.<sup>90</sup>

In addition to the subjects in the Reserved List in relation to which Parliament has exclusive legislative powers (by virtue of Article 154G (7) expressly excluding any provincial competence over those matters), Parliament has the power to legislate on any matter on the Concurrent List, after such consultations with Provincial Councils as it may consider appropriate.<sup>91</sup> The procedural restraints of Article 154G (3) do not apply when Parliament legislates on any subject of the Provincial Council List in fulfilment or implementation of any international obligation undertaken by Sri Lanka.<sup>92</sup> Moreover, Article 154G (10) provides that nothing in Article 154G shall be read or construed as derogating from the powers conferred on Parliament by the Constitution to make laws (i.e., under Articles 75 and 76), in accordance with the Constitution, with respect to any

---

<sup>86</sup> Supreme Court determination on *Provincial Councils (Consequential Provisions) Bill*, SCSD No. 11 of 1989, reported in Marasinghe & Wickramaratne (2010): p. 138 at p. 140-141.

<sup>87</sup> See discussion in Section 2.1, above

<sup>88</sup> Sections 2 and 3 of the Provincial Councils (Amendment) Act, No. 27 of 1990, adding a new subsection (3) to Section 5 and a new Section 5A to the principal enactment, the Provincial Councils Act, No. 42 of 1987

<sup>89</sup> See also discussion in Section 4.1, below

<sup>90</sup> Supreme Court determination on *Provincial Councils (Amendment) Bill*, SCM 14<sup>th</sup> June 1990, reported in Marasinghe & Wickramaratne (2010): p. 173 at p.175

<sup>91</sup> Article 154G (5) (a); Parliament has laid down the procedure for consultation with Provincial Councils in Standing Order 46A (generally, that copies of the Bill are forwarded to Provincial Councils, which would report their views to Parliament within a month). See also the Supreme Court determination in *Re Transport Board Statute of the North-Eastern Provincial Council* (1990), SC (Spl) No. 7 of 1989, reported in Marasinghe & Wickramaratne (2010): p.148 at pp.164-166; discussed above.

<sup>92</sup> Article 154G (11)

matter, for the whole of Sri Lanka or any part of it. Laws validly enacted by Parliament prevail over any inconsistent provincial statute, which are void to the extent of the inconsistency.<sup>93</sup>

Parliament is also vested with certain functions in relation to the special situations contemplated by the Thirteenth Amendment when devolution may be suspended (or lesser forms of intervention imposed) by the central government.<sup>94</sup> These are mainly parliamentary oversight functions over the executive. Article 154J refers to the emergency powers of the President, which are subject to parliamentary control and oversight in terms of Article 155. Under Article 154L, if the President is satisfied that a failure of administrative machinery has occurred in a Province, he may declare that the legislative powers of the Provincial Council is to be exercised by, or under the authority of, Parliament. Article 154L empowers Parliament to confer on the President the law-making powers of the Provincial Council, and to authorise expenditures from the Provincial Fund. Article 154N empowers the President to control the finances of a Province through the Governor when it is necessary to do so in the interests of financial stability. Proclamations made by the President bringing into operation these provisions require parliamentary approval.

### **3.2 Legislative Procedure in the Provincial Council**

Unlike law-making at the central level where the President has no role in the parliamentary process, the Governor plays an important role in law-making at the provincial level through the requirement of his assent for provincial statutes.<sup>95</sup> The general procedure for legislation is by simple majority.<sup>96</sup> The rules with regard to assent are set out in Article 154H.

When a statute passed by the Provincial Council is presented to the Governor for assent, he may either give or withhold his assent.<sup>97</sup> If he assents, then the statute comes into force. However, the Governor may also withhold assent, in which case he must, as soon as possible, return it to the Provincial Council requesting it to reconsider the statute or any of its specified provisions. In doing so, the Governor may recommend specific amendments to the statute.<sup>98</sup> When the Governor returns a statute to the Provincial Council, it must reconsider the statute in the light of the Governor's communication. If it agrees with the Governor, it can pass the statute again with such amendments as are necessary to address the Governor's concerns. If not, the Provincial Council has the power

---

<sup>93</sup> Article 154G (6)

<sup>94</sup> Articles 154J, 154K, 154L, 154M and 154N

<sup>95</sup> Article 154H (1)

<sup>96</sup> Section 10 of the Provincial Councils Act

<sup>97</sup> A convention has developed that the Governor submits statutes presented for his assent to the Attorney General for an opinion on constitutionality. This is based on a Presidential Directive of 8<sup>th</sup> July 1991. While this may seem unobjectionable and even desirable, the experience in practice has been delays, conflicts of interest in the giving of legal advice (with a tendency for the Attorney General's advice to favour the central government), and at times even contradictory advice on the same matter. See the Asoka Gunawardane Committee Report: p.7.

<sup>98</sup> Article 154H (2)



to pass the statute again without any amendment and present it for assent by the Governor.<sup>99</sup>

When such a re-passed statute is presented to the Governor, he may assent to it, or reserve it for reference by the President to the Supreme Court to determine the constitutionality of the statute. The President must refer the statute to the Supreme Court within one month. If the Supreme Court determines that the statute is consistent with the Constitution, then the Governor must assent to the statute. If not, assent must be withheld and the statute cannot come into force.<sup>100</sup>

Section 10 of the Provincial Councils Act sets out the basic voting procedure including the quorum in Provincial Councils, and Section 11 empowers Provincial Councils to make their own rules of procedure for the conduct of business within the Council. The Act also provides a detailed framework of rules with regard to financial statutes in Part III.

Provincial statutes are subject to judicial review for consistency with the Constitution and other central legislation at any time. This is unlike central legislation which may be challenged only prior to enactment.<sup>101</sup>

### **3.3 Distribution of Subjects: Provincial, Reserved, and Concurrent**

As noted above, the distribution of subjects between the centre and the Provinces are listed in the Ninth Schedule to the Constitution introduced by the Thirteenth Amendment. The Ninth Schedule contains three lists of subjects: the Provincial Council List (List I), the Reserved List (List II), and the Concurrent List (List III). The subjects over which Provincial Councils may make statutes are contained in the Provincial Council List and the Concurrent List, while the Reserved List contains the subjects over which Provincial Councils have no statute-making power and on which only Parliament may legislate. Both Parliament and Provincial Councils may legislate on the Concurrent List.

The three lists of subjects in the Ninth Schedule should not be regarded as an exhaustive enumeration of the legislative powers of the state, because Parliament retains the residual legislative power to legislate on any matter whatsoever.<sup>102</sup> Parliament expressly retains the right to legislate on the Provincial Council List, albeit subject to the procedural restraints of Article 154G (3). Moreover, the first subject in the Reserved List – ‘National Policy on all Subjects and Functions’ – empowers Parliament to enact national policies even on those subjects in the Provincial Council List into law, which then bind Provincial Councils. This is altogether an easier method by which the central government may make inroads into the provincial sphere. This provision has been used by the central government to enact laws in relation to devolved subjects such as agrarian services and surface transport. These actions are clearly contrary to the principle of devolution.<sup>103</sup>

---

<sup>99</sup> Article 154H (3)

<sup>100</sup> Article 154H (4)

<sup>101</sup> Article 80 (3) read with Articles 120, 121, 122, 123 and 124.

<sup>102</sup> Articles 75, 76 and 154G (10)

<sup>103</sup> In *Kamalawathie v. Provincial Public Service Commission, North-Western Province* (2001) 1 SLR 1 at 5, the Supreme Court upheld the ‘national policy’ with regard to the transfer of teachers declared in an administrative circular issued by the central Ministry of Education, against a decision of a provincial

While the three lists taken together delineate the scope and limits of the legislative (and executive) power of Provincial Councils, they do not similarly restrict Parliament. Parliament's plenary legislative power is not affected, although Article 154G (2) and (3), and Article 154G (5) (a) impose certain procedural requirements to be followed in its exercise in relation to the subjects in the Provincial Council and Concurrent Lists and in constitutional amendments impacting on devolution. Likewise, the executive powers devolved to the provincial level and which are exercisable by the Governor, Chief Minister and the Board of Ministers are executive powers only in relation to those subjects in the Provincial Council and Concurrent Lists over which Provincial Councils are empowered to make statutes.<sup>104</sup> In addition to the specified powers of the President, and those of the Governor who acts under the President's instructions, the executive power of the state as exercised by the President are in no way constrained by this devolution of executive power.

It is important to remember that the Thirteenth Amendment does not contemplate a wholesale or plenary devolution of all legislative and executive powers over the subjects in the Provincial Council List to the provincial level. As discussed in the preceding section, the exercise of devolved powers is subject to institutional and procedural restrictions. In the interaction of central and provincial institutions in this devolution framework, the Provincial Council is clearly the subordinate player.

Similarly, the substantive subjects which are devolved (Provincial Council List), or shared (Concurrent List), are also framed in such ways as to define and confine the scope of provincial competence. In an early case, the Supreme Court observed that, "...the 'headings' in the three Lists are of different kinds...In Lists I and III, it is only where there is a 'heading' with no description that the entire subject can be regarded as devolved: in other cases, the 'heading' merely serves to identify the subject but not to define it. Thus several items in Lists I and III have the same 'heading', but different descriptions, and obviously the content of the devolved subject has to be determined from those descriptions."<sup>105</sup>

Another factor that has served to complicate the determination of reasonable boundaries of central and provincial competence is the imprecise and often conflicting manner in which subjects are distributed among the three lists. Of course it is not possible to avoid all doubt in designing lists of competences between multiple levels of government. Disputes about competence are always likely to arise in the implementation of devolved systems, and these require resolution through administrative processes at first instance, and finally through the courts. However, it can be said that the design of the three lists in the Ninth Schedules leaves much to be desired in terms of precision and clarity.<sup>106</sup> The

---

authority in violation of that circular. Compare *Ranjani Priyalatha v. Provincial Public Service Commission, Central Province* (2009), CA Writ App. No. 775/07, 3<sup>rd</sup> November 2009, reported in Marasinghe & Wickramaratne (2010): p.522, in which it was held by the Court of Appeal that a provincial statute on a matter in the Provincial Council List prevails over a central administrative circular on the same matter (in this case the regulation Ayurveda medical services). See also CPA (2008) *Strengthening the Provincial Council System* for the perspectives of Provincial Councils on the use of this reserved power.

<sup>104</sup> See discussion in Section 4, below.

<sup>105</sup> *Greater Colombo Economic Commission Law (Amendment) Bill* (1992), SCSD No. 1 of 1992

<sup>106</sup> It is perhaps a measure of the conceptual clarity which informed the design of the distribution of competences, and indeed the broader process of constitutional amendment with regard to the enactment of the Thirteenth Amendment, that what is clearly a drafting oversight appears at the end of the

result has often been that courts have resorted to the convenience of settling questions of competences by resolving them in favour of the centre.<sup>107</sup>

The Provincial Council List (List I) enumerates 37 subjects or 'items' (many of which contain 'sub-items' further specifying the scope and limits of the itemised subjects) over which legislative and executive powers are devolved on Provincial Councils. Three of the most important subjects are further elaborated in three appendices that form part of the Provincial Council List. These are Law and Order (Appendix I), Land and Land Settlement (Appendix II), and Education (Appendix III).<sup>108</sup> Powers over land and policing have prominently featured as areas over which Tamil nationalists in particular have claimed autonomy for the North and East.<sup>109</sup> However, now with the experience of over twenty years with functioning Provincial Councils elsewhere in the country, there is a clear desire at the provincial level across all Provinces for the full implementation of autonomy over policing, land, finance and other areas such as health, education and agrarian services.<sup>110</sup>

In addition to law and order, land and education, other important areas over which powers have been devolved include local government (Item 4),<sup>111</sup> housing and construction (Item 5), roads, bridges and ferries (Item 6, except national highways) social services and rehabilitation (Item 7), regulation of surface transport within the Province

---

Provincial Council List. The phrase 'Above based on the recommendations of Committee I of the Political Parties Conference' appears in parenthesis in the text of the Constitution. On the Political Parties Conference summoned by President Jayewardene, see Edrisinha et al (2008): Ch.15

<sup>107</sup> See for e.g., *Kamalawathie v. Provincial Public Service Commission, North-Western Province* (2001) 1 SLR 1; the Supreme Court determination in *Re Transport Board Statute of the North-Eastern Provincial Council* (1990), SC (Spl) No. 7 of 1989, reported in Marasinghe & Wickramaratne (2010): p.148. The latter was the first devolution case to come up before the Supreme Court, and arose from the exercise of legislative power by the North-Eastern Provincial Council. The case therefore had considerable political, historic, and symbolic significance. Both the Provincial Council List (Item 8) and the Reserved List contain entries relating to surface transport thereby raising questions as to the boundaries of provincial and central government competence on this subject. In this case, the Supreme Court decided that items in the Provincial Council List must be interpreted subject to those in the Reserved List, thereby clearly reinforcing the hierarchical constitutional framework of devolution. Notwithstanding that procedural flaws in violation of Article 154G would have made the statute unconstitutional in any case, the Supreme Court's attitude was politically significant, and was not lost on the North-Eastern Provincial Council and the broader Tamil political community.

<sup>108</sup> The three appendices envisage the establishment of several special bodies: the National Police Commission, Provincial Police Commissions, National Land Commission, and Provincial Boards of Education.

<sup>109</sup> See Verite Research (2016) *Devolution of Land Powers: A Guide for Decision-makers* and Verite Research (2016) *Devolution of Police Powers: A Guide for Decision-makers*.

<sup>110</sup> See CPA (2008) *Strengthening the Provincial Council System*, B. Fonseka & M. Raheem (2010) *Land in the Eastern Province: Politics, Policy and Conflict* (Colombo: CPA); Welikala (2016) *A New Devolution Settlement for Sri Lanka*.

<sup>111</sup> The extent of which competence was dealt with in the Supreme Court determinations on the *Local Authorities (Special Provisions) Bill*, SCSD No. 12 of 2003 reported in Marasinghe & Wickramaratne (2010): p.421, and *Local Authorities (Special Provisions) Bill*, SCSD Nos. 6 and 7 of 2008 reported in Marasinghe & Wickramaratne (2010): p.516. Item 4:1 gives legislative competence to Provincial Councils over local authorities except to alter their constitution, form and structure, which shall be determined by central legislation. Item 4:3 affirms the powers of local authorities according to existing law, and states that while provincial legislation may confer additional powers on local authorities, it may not take them away. See also the discussion of this case in Ch. 3.1, above.

(Item 8),<sup>112</sup> agriculture and agrarian services (Item 9),<sup>113</sup> health and indigenous medicine (Items 11, 12), co-operatives (Item 17), irrigation (Item 19), industrial development (Item 21, subject to national policy), regulation of mines and mineral development (Item 26, to the extent permitted by central legislation) and energy generation (Item 34). Provincial debt is a provincial responsibility (Item 31), and borrowing to the extent permitted by central legislation (Item 35). The range of fees and taxes that may be imposed by a Provincial Council is enumerated in Items 33 and 36 (36:1 to 36:20).

The Concurrent List (List III) enumerates 36 subjects, once again with some items further elaborated in sub-items. It includes planning (Item 1), education, educational services and higher education (Items 2, 3 and 4, except to the extent specified in Items 3 and 4 of List I), housing and construction (Item 5), acquisition and requisitioning of property (Item 6), social services and rehabilitation (Item 7), agricultural and agrarian services (Item 8), health (Item 9), co-operatives (Item 15), irrigation (Item 17), fisheries within territorial waters (Item 19), tourism (Item 22), food and drug standards (Items 30 and 31), and prevention of infectious diseases (Item 35).

The concept of concurrency in the Thirteenth Amendment is one of ‘central field pre-emption’. That is, central legislation over concurrent subjects prevails when Parliament unilaterally deems it so. Both Parliament and Provincial Councils are empowered to legislate in respect of concurrent subjects.<sup>114</sup> Provincial Council statutes on concurrent subjects may prevail over pre-existing central legislation, but Parliament can by resolution override the application of such statutes.<sup>115</sup> Any future central legislation on a concurrent subject has pre-eminence over a provincial statute.<sup>116</sup> This is obviously an extremely vulnerable framework that renders the notion of ‘concurrent’ competence virtually meaningless by allowing Parliament to legislate over Provinces at will. Even the weak safeguard in Article 154G (5) (a) that Parliament should consult Provincial Councils before legislating on the Concurrent List has almost entirely been observed in the breach.<sup>117</sup> It is for this reason that many provincial level officials feel that the Concurrent List should be abolished.<sup>118</sup>

However, it is important to bear in mind that while criticisms of the particular design of concurrent powers as reflected in the Thirteenth Amendment are valid, it does not follow that the concept of concurrency itself is something that is necessarily contrary to devolution. The question of pre-eminence in the concurrent field need not be resolved by

---

<sup>112</sup> See also the Supreme Court determinations in *National Transport Commission Bill* (1991), SCSD No. 8 of 1991, reported in Marasinghe & Wickramaratne (2010): p.195, and *Re Transport Board Statute of the North-Eastern Provincial Council* (1990), SC (Spl) No. 7 of 1989, reported in Marasinghe & Wickramaratne (2010): p.148

<sup>113</sup> See also the Supreme Court determinations in *Agrarian Services (Amendment) Bill* (1990), SCSD No. 9 of 1990, reported in Marasinghe & Wickramaratne (2010): p.148, and *Agrarian Services (Amendment) Bill* (1991), SCSD No. 2 of 1991, reported in Marasinghe & Wickramaratne (2010): p.177.

<sup>114</sup> Article 154G (5) (a) and (b)

<sup>115</sup> Article 154G (9)

<sup>116</sup> Article 154G (6), read with Article 154G (5) (a)

<sup>117</sup> The Supreme Court determination in *Re Transport Board Statute of the North-Eastern Provincial Council* (1990), SC (Spl) No. 7 of 1989, reported in Marasinghe & Wickramaratne (2010): p.148, upheld the mandatory duty of Provincial Councils to consult Parliament when legislating on the Concurrent List (Article 154G (5) (b) and Article 154G (9)), but it did not expressly say whether the corresponding duty on Parliament to consult Provincial Councils under Article 154G (5) (a) was mandatory.

<sup>118</sup> See CPA (2008) *Strengthening the Provincial Council System*

constitutionally privileging legislation of one or other tier of government (as in the case of the Thirteenth Amendment, where central legislation has pre-eminence over provincial statutes). A framework of genuine concurrence or shared competence would enable a decision on which tier should prevail to be made on a case by case basis, by reference to broad constitutional principles such as subsidiarity, effectiveness, efficiency and so on. Even if concurrent powers are not designed by reference to a federal logic, it is possible to build in better safeguards for provincial autonomy. Such safeguards may be both substantive and procedural (i.e., through a better articulation of concurrent responsibilities and a more balanced method of determining pre-eminence within the concurrent field), as well as institutional (for e.g., by providing for formalised roles for the provincial level in central legislative and policy-making processes such as through a second chamber and inter-ministerial councils). Within the framework of the Thirteenth Amendment, a more considerate attitude to provincial autonomy and devolution, and correspondingly a more circumspect and consensual approach to the exercise of its own powers, is required on the part of the central government.

The subjects in the Reserved List (List II), which are exercisable exclusively by the central level, are framed in noticeably more general and broader terms than the subjects in the two other lists. Presumably for the same reason, they are also not numbered. The Reserved List includes all the traditional powers, responsibilities and competences that are associated with the government of a sovereign state, including defence and national security; foreign affairs; financial powers over national revenue; monetary policy; external resources; customs; foreign and inter-provincial trade and commerce; national transport, ports and aviation; citizenship; and important natural resources.

It also contains, however, two unusual clauses which have been argued to be inconsistent with devolution, and which have in fact been used regularly by the central government to undermine devolution.<sup>119</sup> The first is the well-known 'National Policy on all Subjects and Functions' clause. The other is an adjunct of the vesting of residual power in the central Parliament by Article 154G (10), which states that 'All Subjects and Functions not Specified in List I or List III...' belong to the centre. Even in the context of a unitary state, it is possible to vest residual power in the centre without harming devolution, but the existence of this provision in the Reserved List buttresses the scope for interventions already provided for in the Thirteenth Amendment.

While it would seem that the national policy clause relates only to law made by Parliament, it has in practice been interpreted as conferring both a legislative and an executive power: 'policy' may be enacted as an Act of Parliament, but it is more commonly made in the form of executive orders, Cabinet decisions, Administrative Circulars, statutory instruments and so on.<sup>120</sup> This means that this provision in the Reserved List allows the central government to pre-empt the exercise of legislative power by Provincial Councils by executive fiat.

Moreover, it seems never to have been thought possible to interpret the national policy clause in the Reserved List as applying only to the Reserved List, rather than all three lists

---

<sup>119</sup> Another potentially problematic provision is Article 154Q (d), discussed in relation to the Provincial Councils (Amendment) Act, No. 27 of 1990 in Ch. 3.1, above.

<sup>120</sup> See Asoka Gunawardane Committee Report: Chs. 2, 3; Welikala (2016) *A New Devolution Settlement for Sri Lanka*

and thereby providing an avenue for a wholesale encroachment on the provincial sphere. Such a narrow interpretation would have been a crucial safeguard for devolution. In this way, the national policy clause allows the central government to, relatively effortlessly, usurp the competences of the Provincial Councils, and it has in fact been repeatedly used by the central government to denude devolution. From a devolution viewpoint, the national policy clause is without doubt one of the most prominent weaknesses of the Thirteenth Amendment.

While it was perhaps possible to interpret the national policy clause as only empowering the centre to impose ‘national policies’ in the form of an Act of Parliament rather than by executive or administrative action, the Supreme Court has endorsed the broader approach to the national policy clause. In *Kamalawathie v. Provincial Public Service Commission, North-Western Province* (2001), in which the competence at issue was over the subject of education and the measure purporting to be national policy was an administrative circular of the relevant central ministry, the Supreme Court stated that, “While powers in respect of education have been devolved to the Provincial Councils, those powers must be exercised in conformity with national policy. Once national policy has been duly formulated in respect of any subject, there cannot be any conflicting provincial policy on that subject.”<sup>121</sup>

### 3.4 Conclusions

The Thirteenth Amendment framework for the devolution of legislative power to Provincial Councils was novel at the time of its introduction because Sri Lanka had never before had experience with a devolved tier of government at the provincial level. However, the implementation of devolution has highlighted several impediments. As a constitutional principle, devolution must function in tandem with the principal foundational norm of the Constitution of 1978, the unitary state, which also underpins what is structurally an exceptionally centralised system of government at the central level. The structural framework of devolution therefore is firmly subordinate to the overarching supremacy of central institutions. This is reflected in both the distribution of

---

<sup>121</sup> *Kamalawathie v. Provincial Public Service Commission, North-Western Province* (2001) 1 SLR 1 at 5. Note that the relevant ‘national policy’ in this case was declared in a mere circular issued by the central Ministry of Education, which means that the central executive may make policy which will be upheld against an express provincial legislative competence in contravention of the national policy. Note, however, that in this case the issue was not of conflict between a provincial statute and the national policy in the central ministry circular, but a decision of a provincial authority acting under delegation from the Provincial Public Service Commission. Compare *Ranjani Priyalatha v. Provincial Public Service Commission, Central Province* (2009), CA Writ App. No. 775/07, 3<sup>rd</sup> November 2009, reported in Marasinghe & Wickramaratne (2010): p.522, in which it was held by the Court of Appeal that a provincial statute on a matter in the Provincial Council List prevails over a central administrative circular on the same matter (in this case the regulation Ayurveda medical services). On agrarian services, see the Supreme Court determinations in *Agrarian Services (Amendment) Bill* (1990), SCSD No. 9 of 1990, reported in Marasinghe & Wickramaratne (2010): p.148, and *Agrarian Services (Amendment) Bill* (1991), SCSD No. 2 of 1991, reported in Marasinghe & Wickramaratne (2010): p.177. Compare with the Supreme Court judgment in *Madduma Banda v. Assistant Commissioner of Agrarian Services* (2003) 2 SLR 80. On passenger transport, see the Supreme Court determination in *National Transport Commission Bill* (1991), SCSD No. 8 of 1991, reported in Marasinghe & Wickramaratne (2010): p.195; and *Re Transport Board Statute of the North-Eastern Provincial Council* (1990), SC (Spl) No. 7 of 1989, reported in Marasinghe & Wickramaratne (2010): p.148

substantive competences (or subjects) in the three lists, as well as in the scope of the legislative and executive powers that are devolved. Central institutions have the power to intervene in the provincial sphere in not only justifiable emergency situations, but are also cast in constitutional roles which entail, indeed require, central interference in the day-to-day functioning of Provincial Councils (including in illogically minute matters such the requirement of presidential approval for the rules of procedure of Provincial Councils).

In relation to legislative power specifically, the subordinate status of provincial statutes in the constitutionally recognised hierarchy of legislation, the weakness of the concurrent jurisdiction, the Reserved List 'national policy' power, the Governor's involvement in the statute-making process generally through the requirement of assent and specifically in relation to financial statutes, the lack of precision and clarity in the textual formulations of the three lists, and the refusal or failure of successive governments at the centre to implement some parts of the Thirteenth Amendment (for e.g., powers over police, state land), all contribute to a vulnerable system of devolution.

In addition, there is also the pervasive tendency to centralisation in judicial attitudes, and in the public service as well as in the broader political culture (for e.g., in the centralised internal organisation of political parties) that pre-dates devolution. These administrative and political cultures and practices have witnessed little or no change in the post-1987 constitutional context of devolution. There is no coherent pattern in the jurisprudence of the superior courts, which initially demonstrated extreme disinclination to promote and enhance devolution, but which more recently has been more willing to countenance conclusions supportive of devolution. However, due to the absence of a coherent theoretical foundation regarding devolution within the unitary state, either in the text of the Constitution or in the body of judicial pronouncements, there is no guarantee that the recent trend of 'pro-devolution' judicial attitudes may continue.

## **4 Executive Power**

As with the devolution of legislative powers, central institutions play a significant role in the exercise of executive powers in the provincial sphere. This is mainly through the office of the Governor, although the President also has certain direct roles. The elected part of the provincial executive is the Chief Minister and the Board of Ministers. While it would seem that by virtue of being democratically elected and accountable the Board of Ministers should be the pre-eminent executive body within the Province, this is not so straightforwardly the case in the system of devolution under the Thirteenth Amendment because of the substantive (rather than merely symbolic) powers of the Governor.

The basic scope of the provincial executive power is defined in Article 154C as 'executive power extending to the matters with respect to which a Provincial Council has power to make statutes.' This seems like a clear-cut devolution of executive powers in relation to the subjects over which legislative power has been devolved. However, it is in the manner prescribed for its exercise, and in the institutions empowered to exercise it, that it becomes clear that the devolution of executive power does not exactly match the extent of legislative devolution, and indeed is materially a lesser extent of devolution.

As Article 154C goes on to provide, provincial executive power shall be exercised by the Governor 'either directly or through Ministers of the Board of Ministers, or through officers subordinate to him, in accordance with Article 154F'. In terms of Article 154B (2), the Governor is appointed by the President and holds office, in accordance with Article 4 (b), during the pleasure of the President. Article 4 (b) which explicates the ways in which the sovereignty of the people of Sri Lanka enshrined in Article 3 shall be exercised, states that the executive power of the people shall be exercised by the President of the Republic. The clear implication of the reference to Article 4 (b) in Article 154B (2) therefore is that the office and powers of the Governor are an extension of those of the President.<sup>122</sup> Thus the effect of Articles 154B (2) and 154C is that there is no 'provincial executive power' as such, but an extension of the central executive power to the Provincial Councils, in the exercise of which the Board of Ministers has a role in accordance with Article 154F. This is made clear in Articles 154F (1) and (2) wherein a distinction is made in the functions of the Governor as between those in which he should act in accordance with the advice of the Board of Ministers, and others in which he is required to act in his own discretion. It is expressly provided that the exercise of the Governor's discretion shall be on the President's directions.<sup>123</sup>

The Provincial Councils (Consequential Provisions) Act, No. 12 of 1989,<sup>124</sup> extends executive discretions<sup>125</sup> and rule-making powers<sup>126</sup> conferred on central Ministers and public officers by existing laws, to the Governors, provincial Ministers, and provincial public officers. The Consequential Provisions Act only applies to laws that relate to matters in the Provincial Council List, and which were enacted before 14<sup>th</sup> November 1987 (i.e., the date on which the Thirteenth Amendment and the Provincial Councils Act were certified). The Supreme Court has affirmed that, in terms of Articles 154G (1) and (8) and the Consequential Provisions Act, provincial executive power may be exercised in accordance with pre-existing central legislation pertaining to subjects in the Provincial

---

<sup>122</sup> As the Supreme Court held in *re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill (1987)* 2 SLR 312 at 323, the Governor exercises executive powers as a 'delegate' of the President. It must be noted, however, that due to the Governor's actions being judicially reviewable (unlike the President under Article 35, the Governor does not enjoy immunity from legal action), and various judicial observations that the Governor's powers under the Provincial Councils Act in particular are specific statutory powers and duties independent of the executive power of the state (see *Podinilame v. Mathew* (1996) 2 SLR 82), the nature of Governor's powers should be considered to be both an extension of presidential power as well as including statutorily conferred specific executive functions.

<sup>123</sup> Article 154F (2), which has however been restrictively interpreted by the Supreme Court:

*Premachandra v. Jayawickrema* (1994) 2 SLR 90 (SC) and *Premachandra and Dodangoda v. Jayawickrema and Bakeer Markar* (1993) 2 SLR 294 (CA)

<sup>124</sup> See also the Supreme Court determination in the *Provincial Councils (Consequential Provisions) Bill (1989)*, SCSD No. 11 of 1989, reported in Marasinghe & Wickramaratne (2010): p.138 in which the constitutionality of this law was decided. It is also commonly known as the 'Consequential Provisions Act.' It seems to have been enacted as an interim measure to facilitate the exercise of provincial executive power under pre-existing legislation, until such time as Provincial Councils were able to enact their own statutes in relation to devolved competences (Long Title). Its interim nature is further underscored by the (unusual) provision in Section 1 that its operation may be terminated by a Ministerial Order. However, it continues in force.

<sup>125</sup> Section 2 (1)

<sup>126</sup> Section 2 (2)



Council List where a Provincial Council has not enacted its own statutes on those subjects.<sup>127</sup>

This is an 'extension'<sup>128</sup> of the application of the relevant laws to the provincial executive. It does not suspend the executive authority of central Ministers and public officers under the relevant category of laws. The resulting position is that both the central and provincial executives may exercise powers under these laws. The effect of the Consequential Provisions Act in relation to executive power is therefore more limited than, and not analogous to, the scope of provincial legislative power under Article 154G (8). It will be recalled that under this provision, a provincial statute on any matter in the Provincial Council List has the effect of suspending the operation of any inconsistent pre-existing central legislation.<sup>129</sup>

Notwithstanding what is provided in the Consequential Provisions Act, however, one of the criticisms made against the Thirteenth Amendment system of devolution has been that even the limited framework envisaged in the Constitution is further constrained by other pieces of underlying central legislation, particularly (but not exclusively) the Provincial Councils Act.<sup>130</sup> The validity of this criticism is amply illustrated in the additional powers of the Governor that are established by the Provincial Councils Act.

In Part III of the Act dealing with provincial finance, the role of the Governor is set out in such a way as to render him the finance minister of the Province.<sup>131</sup> In view of the fact that the Governor is an agent of the central government appointed by the President, and that he is not elected by the people of the Province, the vesting of financial powers crucial to the exercise of other provincial executive and legislative powers in the Governor is contrary to the principle of devolution. While of course it is the Provincial Council that has the authority to approve or reject public revenue and expenditure proposals recommended by the Governor,<sup>132</sup> it would be more consistent with democratic principles if the elected executive of the Province has the responsibility for public finances.

Likewise in Part IV of the Act, powers over the provincial public service is vested in the Governor.<sup>133</sup> Although provision is made for a Provincial Public Service Commission, this

---

<sup>127</sup> *Alawwa v. Katugampola Multi Purpose Co-operative Society* (1996) 1 SLR 278; see also *Wijewardana v. Director of Local Government* (2004) 1 SLR 179

<sup>128</sup> From a purely technical standpoint, an even narrower view of the effect of the Consequential Provisions Act is possible on the basis of its long title, which states that it is, 'An Act to make Interim Provision for the Interpretation of Written Law on Matters set out in List I of the Ninth Schedule to the Constitution.' It would seem therefore that the Act is merely an instruction to the courts given by Parliament that, in the interpretation of pre-existing laws falling within its ambit, they are enjoined to recognise the actions of provincial executive authorities.

<sup>129</sup> See discussion in Section 3.1, above

<sup>130</sup> Other attempts, outside the Thirteenth Amendment, at 'clawing back' devolution by the central government includes the system of Divisional Secretaries established in 1992 by the Transfer of Powers (Divisional Secretaries) Act, No. 58 of 1992. Divisional Secretaries, who function within the territorial jurisdiction of the Provinces, and whose functions are an extension of presidential power and directly impinge on or replicate provincial competences, are wholly unanswerable to Provincial Councils.

<sup>131</sup> Sections 24, 25, 26, 28 and 30 of the Provincial Councils Act

<sup>132</sup> Section 26 of the Provincial Councils Act

<sup>133</sup> The most senior public officer of the Province, the Chief Secretary, is appointed directly by the President with the concurrence of the Chief Minister: Section 31 of the Provincial Councils Act

body is merely delegated with the primary powers of the Governor, which erodes its independence and the independence of the provincial public service. This enables the Governor, if he is so inclined, to indirectly control the functioning of provincial ministries notwithstanding the wishes of provincial ministers who are elected by the people and are accountable to the Provincial Council.

This system of split executive powers and responsibilities is structurally incoherent viewed against objectives such as efficiency and accountability. It is inefficient because it creates tensions within the executive between the Governor and the Board of Ministers, and undermines the smooth functioning of the provincial administration. It is problematic from the perspective of accountability because it ruptures the relationship between responsibility and accountability. The Board of Ministers is collectively responsible and answerable to the Provincial Council, but they do not have the primary responsibility for the public finances of the Province. The Governor answers to the President only, and his conduct is largely above the scrutiny of the Provincial Council, except under the special procedure for his removal.<sup>134</sup> However, all provincial executive and administrative actions are subject to judicial review, including under the fundamental rights jurisdiction of the Supreme Court.<sup>135</sup>

The structure of public administration is also another, and extra-constitutional, basis on which the effectiveness of Provincial Councils has been consistently undermined. The introduction of devolution necessitated a major restructuring of the public service in the light of a multi-level system of government, which has never been done. On the contrary, the central government has continued with pre-devolution structures, procedures and practices, and even introduced new institutions of central government power at the sub-district level (Divisional Secretaries) after the establishment of Provincial Councils which seem designed to undermine the latter.<sup>136</sup> Aside from the role of the Governor in respect of the provincial public service, therefore, the resulting position is that the central government operates directly at the District, Divisional and Village levels through District Secretaries (i.e., the colonial Government Agents), Divisional Secretaries and *Grama Niladharis*, in a parallel, and often competing, administrative structure. The Provincial Councils have no comparable administrative structures at these lower levels.<sup>137</sup>

We have seen that the devolution of legislative power has been constrained by institutional, procedural, and substantive limitations in the Thirteenth Amendment. The framework for the exercise of devolved executive power is thus even more restricted under the Thirteenth Amendment and the Provincial Councils Act, because a substantial part of executive power within the Province is exercised by an officer of the central government: the Governor.

---

<sup>134</sup> Section 18 of the Provincial Councils Act read with Article 154B (4)

<sup>135</sup> *Parameswary Jayathevan v. Attorney General* (1992) 2 SLR 356

<sup>136</sup> Transfer of Powers (Divisional Secretaries) Act, No. 58 of 1992. See also Asoka Gunawardane Committee Report: Ch.4

<sup>137</sup> Although in terms of the Provincial Council List, local government authorities fall under Provincial Councils, they do not function under any administrative control of the Provincial Councils. Another complicating factor is the Decentralised Budget system under which Members of the national Parliament make decisions with regard to development programmes within their districts, administered by District Secretariats, further marginalising the Provincial Councils.

## 4.1 The Governor

Article 154B (1) provides that there shall be a Governor for each Province. The Governor is appointed by the President for a term of five years, which is renewable.<sup>138</sup> The Governor may not hold any other office.<sup>139</sup> In terms of Article 154B (2), the Governor holds office at the pleasure of the President, which means that the President has the power to dismiss him at any time. Aside from resignation,<sup>140</sup> the Provincial Council may also present an address to the President advising the removal of the Governor on the grounds of intentional violation of the Constitution,<sup>141</sup> misconduct or corruption involving the abuse of his powers of office,<sup>142</sup> or if he is found guilty of bribery or an offence involving moral turpitude.<sup>143</sup> A resolution for the presentation of such an address must be passed by a two-thirds majority in the Provincial Council,<sup>144</sup> and furthermore, such a resolution cannot be entertained by the Chairman of the Provincial Council or discussed in the Provincial Council unless notice of the resolution is signed by at least one half of the members.<sup>145</sup> Thus it is not merely the case that the elected legislature of the Province has no power to remove the dominant executive officer within the Province, but all of these provisions cumulatively demand the total loyalty of the Governor to the President.

In terms of the Thirteenth Amendment and the Provincial Councils Act, the Governor is vested with powers of a general nature as well as several specified powers. Both categories of powers are present in the day-to-day administration of the Province, as well as the extraordinary or emergency circumstances for which the Constitution has made provision.

As we have seen, the general executive power at the provincial level is set out in Article 154C and Article 154F, read with Article 154B (2) and Article 4 (b).<sup>146</sup> In terms of these provisions, the key to the exercise of executive power within the Province is the two distinctive methods described in Article 154C and Article 154F (1). That is, the Governor exercises executive power either directly in his discretion where he is required so to do by or under the Constitution<sup>147</sup> or on the advice of the Board of Ministers.<sup>148</sup> It is

---

<sup>138</sup> Article 154B (1) and (5)

<sup>139</sup> Article 154B (7)

<sup>140</sup> Article 154B (3)

<sup>141</sup> Article 154B (4) (a) (i)

<sup>142</sup> Article 154B (4) (a) (ii)

<sup>143</sup> Article 154B (4) (a) (iii)

<sup>144</sup> Article 154B (4) (a). For this purpose, the requisite majority is a two-thirds of the whole number of members of the Provincial Council including those not present

<sup>145</sup> Article 154B (4) (b). For this purpose, the requisite number of signatures is of one half of the members present

<sup>146</sup> See discussion in Ch. 4, above

<sup>147</sup> The phrase 'by or under the Constitution' in Article 154F (1) is important. In addition to the powers conferred by the Constitution itself, those that are conferred by central legislation are *under* the Constitution. This refers to, *inter alia*, Article 154Q. See also the Supreme Court determination in the *Provincial Councils (Consequential Provisions) Bill* (1989), SCSD No. 11 of 1989, reported in Marasinghe & Wickramaratne (2010): p.138 at pp.140-141.

<sup>148</sup> The circumstances in which executive power is exercised by the Governor on the advice of the Board of Ministers is discussed in Ch. 4.2, below

necessary to have a clear understanding of the circumstances in which the two methods for the exercise of executive power operate.<sup>149</sup>

The term ‘discretion’ must be understood in its legal sense. It may denote an action which is taken by the Governor upon exercising a choice from a range of options available to him within the powers conferred on him by law. It may also relate to the existence of a particular factual situation in which the law stipulates how the Governor should act. An illustration of both types of situation is the provision concerning the Governor’s function in the appointment of the Chief Minister. Article 154F (4) gives him a discretion to appoint as Chief Minister the member of the Provincial Council who, in his opinion, is best able to command the support of a majority of members of that Council. In a situation where no single party or group enjoys an absolute majority, the Governor is given a legal discretion to make a reasonable choice in the appointment of the Chief Minister. By contrast, where more than one-half of the members elected to the Provincial Council are from one political party, the proviso to Article 154F (4) expressly requires him to appoint the leader of that group as Chief Minister. Here he has no choice in the exercise of his discretion.<sup>150</sup>

In the ordinary course of the administration of the Province, the Governor is required to exercise power in his own discretion (i.e., independently of the advice of the Chief Minister and the Board of Ministers) in the following situations. In addition to the appointment of the Chief Minister described above, one of the most important roles of the Governor in this respect is the discretion of assent to provincial statutes. We have already considered the legislative process within the Province, whereby it was seen that the Governor’s assent was an integral element of it.<sup>151</sup> The Governor may assent or withhold assent to a provincial statute, he may return the statute for reconsideration by the Provincial Council with or without recommendations for amendment, and he may reserve the statute for reference by the President to the Supreme Court.<sup>152</sup> Without the Governor’s assent in accordance with the procedure in Article 154H, no provincial statute may be validly enacted.

The Governor acts in his own discretion to summon, prorogue, and dissolve the Provincial Council when the Chief Minister does not command the support of a majority of the Provincial Council.<sup>153</sup> The Supreme Court has clearly held that this power is only available to the Governor when the Chief Minister cannot command a majority; he cannot exercise his powers under Article 154F (8) against the wishes of a Chief Minister with a majority.<sup>154</sup> The Governor acts in his discretion if and when he decides to address the

---

<sup>149</sup> There is notionally a third method through which the Governor is empowered to exercise his powers under Article 154C, and that is through officers subordinate to him, although in practice in a situation in which there is no Provincial Council or Board of Ministers, the Governor exercises power alone but with the assistance of officers of the public services. This is what prevailed in the Northern and Eastern Provinces after the dissolution of the North-Eastern Provincial Council in 1990.

<sup>150</sup> See *Premachandra v. Jayawickrema* (1994) 2 SLR 90 (SC) and *Premachandra and Dodangoda v. Jayawickrema and Bakeer Markar* (1993) 2 SLR 294 (CA).

<sup>151</sup> See discussion in Section 3.2, above

<sup>152</sup> Article 154H

<sup>153</sup> Article 154B (8)

<sup>154</sup> *Mahindasoma v. Senanayake* (1996) 1 SLR 180 (CA); *Senanayake v. Mahindasoma* (1998) 2 SLR 333 (SC)

Provincial Council, or when he sends a message to the Provincial Council on any matter.<sup>155</sup>

Over and above this are the constitutional functions dealing with exceptional situations in which the Governor acts in his own discretion. Article 154J concerns states of emergency and it empowers the President to give directions to the Governor as to the manner in which his executive power is to be exercised in such circumstances. Article 154L pertains to the powers of the President in the context of a failure of administrative machinery within a Province. One of the ways in which the provisions of Article 154L are engaged is when a Governor transmits a report to the President that a situation has arisen in which the administrative of the Province cannot be carried on in accordance with the Constitution. It is implicit that the Governor arrives at such a conclusion through the exercise of his own discretion (which does not preclude the possibility that such a report to the President may also be initiated on the advice of the Board of Ministers). In terms of Article 154N, when the President has issued a Proclamation regarding a situation of financial instability in the country or in any part thereof, he may give directions to the Governor of a Province to observe such canons of financial propriety as may be specified. In such a situation, the Governor must exercise his powers in compliance with the directions of the President.

As noted above, Article 154F (1) contemplates the possibility of additional powers and functions being conferred on the Governor other than those expressly mentioned in the Constitution. Accordingly, the Provincial Councils Act has established an array of such powers and functions for the Governor, which further consolidates his integral role in the administration of the Province.

Section 5A<sup>156</sup> effectively empowers the Governor to dissolve a Provincial Council by a communication to the President in two extraordinary situations: where the Provincial Council has for all intents and purposes ceased to function,<sup>157</sup> or a situation in which more than one half of its membership has expressly repudiated or manifestly disavowed obedience to the Constitution or otherwise acted in contravention of their oath of office.<sup>158</sup> The Provincial Council stands dissolved upon the transmission of the Governor's communication to the President. Clearly, the apprehension as to the existence of the factual circumstances necessitating a communication under Section 5A is a matter for the Governor's exclusive discretion.<sup>159</sup>

---

<sup>155</sup> Article 154B (10)

<sup>156</sup> Introduced by the Provincial Councils (Amendment) Act, No. 27 of 1990, in the aftermath of events in the North-Eastern Provincial Council discussed in Ch. 2.1 and Ch. 3.1, above. See also the Supreme Court determination in *Provincial Councils (Amendment) Bill*, SCM 14<sup>th</sup> June 1990, reported in Marasinghe & Wickramaratne (2010): p.173

<sup>157</sup> Section 5A (b)

<sup>158</sup> Section 5A (a)

<sup>159</sup> Moreover, Section 5 (3), also introduced by Act No. 27 of 1990, provides that where the Governor communicates to the Chairman of the Provincial Council that a member of the Provincial Council has in his opinion expressly repudiated or manifestly disavowed obedience to the Constitution in contravention of the member's oath of office, such a member is disqualified from sitting and voting in the Provincial Council.

More generally, the Provincial Councils Act sets out a series of functions, which the Governor performs in the normal administration of the Province.<sup>160</sup> These provisions of the Act relate to three broad areas: the conduct of legislative business in the Provincial Council (Part II of the Act); finance (Part III); and the direction and control of the provincial public service (Part IV).

In addition to the function of assent,<sup>161</sup> the Governor makes the rules allocating business among the provincial ministries in the legislative process of the Provincial Council (other than business in respect of which he is by or under the Constitution required to act in his discretion).<sup>162</sup>

It is with regard to the procedure for fiscal and financial statutes in the Provincial Councils that the Governor's powers are most visible, and least compatible with democratic and devolution principles.<sup>163</sup> The Governor makes the rules governing all aspects of provincial finance, including the Provincial Fund<sup>164</sup> and the Emergency Fund of the Province.<sup>165</sup> No provincial statute involving revenue or expenditure may be introduced, moved or passed by the Provincial Council except on the recommendation of the Governor.<sup>166</sup> The Governor presents the annual budget of the provincial administration (called the 'annual financial statement') to the Provincial Council showing the estimates of receipts and expenditure,<sup>167</sup> and he must recommend all demands for grants made to the Provincial Council.<sup>168</sup> While the Provincial Council has the authority to approve the annual budget, the consequent Appropriations Statute is subject to the assent of the Governor.<sup>169</sup> Any demands for supplementary grants<sup>170</sup> or votes on account<sup>171</sup> during a financial year may only be initiated by the Governor. The Governor submits audited accounts of the provincial administration to the Provincial Council.<sup>172</sup> The cumulative effect of these provisions, in short, is that the Governor is made into the 'finance minister' of the Province.

Similar to the financial framework, the arrangements for the direction and control of the provincial public service also place the Governor at its heart.<sup>173</sup> The Nineteenth Amendment to the Constitution (2015), which introduced a new regulatory framework for the public service and its independence at the central level, made no express or

---

<sup>160</sup> Sections 15, 19, 20, 23, 24, 25, 26, 27 (subject to Article 154H), 28, 29 (read with Section 24 (3)), 30 (transitional provision, now lapsed), 32 and 33 of the Provincial Councils Act. See also Section 11 (c) prohibiting any discussion in the Provincial Councils of any matter concerning the discharge of the Governor's discretion in relation to which he is by or under the Constitution required to act on his own; Section 16 vesting in the Provincial Council all contractual rights and obligations entered into by the Governor; and Section 18 prohibiting discussion in the Provincial Council of the conduct of the Governor (except in terms of Article 154B (4)), the President, a Member of Parliament, or any judicial officer.

<sup>161</sup> Article 154H

<sup>162</sup> Section 15 (1)

<sup>163</sup> Part III of the Act

<sup>164</sup> Section 19 (5)

<sup>165</sup> Section 20 (3)

<sup>166</sup> Section 24

<sup>167</sup> Section 25

<sup>168</sup> Section 26 (3)

<sup>169</sup> Section 27 read with Article 154H

<sup>170</sup> Section 28

<sup>171</sup> Section 29 read with Section 24 (3)

<sup>172</sup> Section 23 (2); the Provincial Fund is audited by the Auditor General in terms of Article 154 of the Constitution

<sup>173</sup> Part IV of the Act

consequential changes to the procedures relating to the provincial public service.<sup>174</sup> The appointment, transfer, dismissal and disciplinary control of officers of the provincial public service are vested in Governor.<sup>175</sup> The Governor has the power to make rules in relation to all aspects of the public service.<sup>176</sup> The Governor may delegate these powers to a Provincial Public Service Commission,<sup>177</sup> the members and chairman of which are appointed and are removable by him.<sup>178</sup> The Governor has the power to override any decision or order of the Provincial Public Service Commission.<sup>179</sup> In the light of these provisions, the legal framework for the independence of the Provincial Public Service Commission, and thereby the provincial public service, cannot be regarded as effective.

An important issue here is whether, unlike in the extraordinary situations contemplated by Articles 154J, 154L, 154N, and Section 5A in which it is reasonable to presume that the Governor exercises his functions at his own discretion, the more general functions set out in the Act are also of that nature (i.e., that he is not legally required to seek or follow the advice of the Board of Ministers). A literal interpretation of the statutory provisions would seem to indicate that the Governor is not required to act in accordance with the advice of the Board of Ministers. On the other hand, a purposive interpretation of the statutory provisions, within the meaning of Article 154F (1), and consistent with democracy and devolution, suggests that the Governor should in practice act on the advice of the elected Board of Ministers. While the practical experience of Provincial Councils in the operation of the Thirteenth Amendment in past decades suggests that Governors have generally functioned harmoniously with their Ministers, there have been occasions in which conflicts have led to litigation.<sup>180</sup> The broader point to note in relation

---

<sup>174</sup> The Seventeenth Amendment did make two other changes to the Thirteenth Amendment: (a) the appointment of members of the Finance Commission established under 154R was brought within the ambit of Article 41B and its schedule (Section 2 of the Seventeenth Amendment). More specifically, the three members appointed to represent the three major communities (the other two being *ex officio*) are now appointed by the President on the recommendation of the Constitutional Council (Section 19 of the Seventeenth Amendment); (b) the removal of the functions of the President in the exercise of provincial police powers by the substitution of the National Police Commission for those functions (Section 23 of the Seventeenth Amendment, amending Items 3, 6, 7, 9:2 of Appendix I of List I of the Ninth Schedule to the Constitution). For the issues of constitutional amendment procedure arising from this, see discussion in Ch. 3.1, above.

<sup>175</sup> Section 32 (1)

<sup>176</sup> Section 32 (3)

<sup>177</sup> Section 32 (2)

<sup>178</sup> Sections 33 (1) and (3). For the manner in which these powers are exercisable by the Governor, see *Podinilame v. Mathew* (1996) 2 SLR 82. The Court of Appeal held that the powers under Section 32 are specific statutory powers established by the Provincial Councils Act, and that the executive functions set out in Articles 154B, 154C and 154F have no application to an exercise of powers under that section. This raises the question as to whether the Provincial Councils Act is an independent source of powers or whether it is a statutory extension of the executive powers vested by the Constitution. The effect of this decision insofar as the provincial public service is concerned at least is that the Board of Ministers has no right to tender advice to the Governor in the appointment of the Provincial Public Service Commission, in the exercise of his powers under Section 32. See also *Bandara v. Arawwawala* (1996), CA Writ App. No. 483/95, 24<sup>th</sup> May 1996 (unreported), and *Ranjani Priyalatha v. Provincial Public Service Commission, Central Province* (2009), CA Writ App. No. 775/07, 3<sup>rd</sup> November 2009, reported in Marasinghe & Wickramaratne (2010): p.522

<sup>179</sup> Section 33 (8)

<sup>180</sup> Governors' decisions to dissolve Provincial Councils on the instructions of the President but against the wishes of Chief Ministers enjoying majorities have been the subject of litigation: *Mahindasoma v. Senanayake* (1996) 1 SLR 180 (CA); *Senanayake v. Mahindasoma* (1998) 2 SLR 333 (SC). The courts have upheld the principle that the Governor must act according to the advice of the Chief Minister in regard to

to this statutory framework, however, is that the provisions of the Provincial Councils Act are framed in such a way that it opens the space for the Governor, if he so desires or upon the instructions of the President, to assert his will against the wishes of the elected executive in the form of the Board of Ministers even in matters of day-to-day administration.

## 4.2 The Chief Minister and Board of Ministers

Article 154F (1) provides that there shall be a Board of Ministers with the Chief Minister at the head and not more than four other Ministers to aid and advice the Governor of a Province in the exercise of his functions. It further provides that the Governor shall, in the exercise of his functions, act in accordance with such advice, except in so far as he is by or under the Constitution required to exercise his functions in his discretion. This then is the basis of the constitutional powers of the Chief Minister and the Board of Ministers. The powers of the Board of Ministers are in the nature of a general duty placed on the Governor to act according to their advice, except in the specified circumstances in which he should act alone. This in effect means that in most matters of administration in the Province, the Board of Ministers are free to determine policy and make decisions, which the Governor is enjoined to execute and implement. However, it is in the scope of the discretionary powers of the Governor that substantial limitations are placed on the autonomy of the Board of Ministers.<sup>181</sup> Elsewhere in the Thirteenth Amendment and the Provincial Councils Act, reference is made to specific functions, powers, and duties of the Chief Minister and Board of Ministers.

The Governor appoints as Chief Minister the member of the Provincial Council who is in his opinion is best able to command the support of a majority of the members of the Provincial Council,<sup>182</sup> provided that where more than one-half of the members of the Provincial Council are members of one political party, he is required to appoint the leader of that group as the Chief Minister.<sup>183</sup> The Governor appoints the other Ministers on the advice of the Chief Minister.<sup>184</sup> The Board of Ministers is collectively responsible and answerable to the Provincial Council.<sup>185</sup> The Governor is not a member of the Board of Ministers. While it is both necessary and desirable that the Board of Ministers, as the elected executive, is collectively responsible and answerable to the Provincial Council, as we have seen, the Governor not only exercises significant executive functions at his own discretion, but he is also responsible for the financial provision for the administration of the Province. Therefore, one of the major flaws in this structure is that the Governor himself is not bound by collective responsibility with the Ministers, nor is he answerable to the Provincial Council.

---

dissolution where the Board of Ministers enjoy the support of a majority in the Provincial Council, and have further, narrowed down the application of the ouster clauses in Article 154F (2) and (3). There has also been litigation on the appointment of the Chief Minister (*Premachandra v. Jayawickrema* (1994) 2 SLR 90 (SC) and *Premachandra and Dodangoda v. Jayawickrema and Bakeer Markar* (1993) 2 SLR 294 (CA); and the appointment of the Provincial Public Service Commission (*Podinilame v. Mathew* (1996) 2SLR 82)

<sup>181</sup> Discussed in Ch. 4.1, above

<sup>182</sup> Article 154F (4)

<sup>183</sup> Proviso to Article 154F (4)

<sup>184</sup> Article 154F (5)

<sup>185</sup> Article 154F (6)



One of the important powers of the Chief Minister and Board of Ministers is the power to advise the Governor on the summoning, prorogation, and dissolution of the Provincial Council.<sup>186</sup> That the Governor should exercise these functions only on the advice of the Chief Minister, especially in relation to a decision to dissolve a Provincial Council (triggering fresh elections), is an important safeguard for provincial autonomy. However, the Governor is bound to follow the advice of the Chief Minister only when the latter enjoys the support of a majority in the Provincial Council.<sup>187</sup> When the Chief Minister does not enjoy a majority, presumably, the Governor may act in his own discretion to summon, prorogue, or dissolve a Provincial Council.<sup>188</sup>

The Chief Minister is placed under a constitutional duty of co-operation with the Governor in terms of which he must communicate to the Governor all decisions of the Board of Ministers and any proposals for provincial legislation.<sup>189</sup> When the Governor so requests, he must furnish any information relating to provincial administration and draft legislation,<sup>190</sup> or submit for the consideration of the Board any matter the Governor requires to be considered.<sup>191</sup> Once again this buttresses the Governor's super-ordinate position in relation to the Chief Minister (and other Ministers) within the executive decision-making and policy formulation process of the Province.

By the requirement of consultation with him, or his authorisation or concurrence, the Chief Minister, nonetheless, is vested with functions in relation to three politically significant areas by the Constitution and the Provincial Councils Act: law and order and police, finance, and the public service.<sup>192</sup>

---

<sup>186</sup> Article 154B (8)

<sup>187</sup> Article 154B (8) (d)

<sup>188</sup> When the respective Governors dissolved the Sabaragamuwa and North Central Provincial Councils in June 2008 before the expiry of their terms, the dissolutions were challenged by members of the opposition in the two Councils in the Supreme Court. The basis for the dissolutions seemed to be that the respective Chief Ministers had lost their majorities in the Councils. On that basis, the Supreme Court dismissed the fundamental rights applications by refusing leave to proceed, and consequently the court did not make a proper determination. However, the factual situation in the two Provinces in June 2008 raised a number of important constitutional issues in the interpretation Article 154B (8), including the fact that both Chief Ministers had functioned without a majority for a period of time prior to the request for dissolution; that there did not seem to be an immediate political crisis necessitating a dissolution; and that the joint opposition had in writing informed the Governors of an opposition majority raising the possibility of an alternate administration. Thus an authoritative pronouncement by the Supreme Court would have been beneficial. These issues are canvassed in Rohan Edrisinha & Asanga Welikala (2008) *The Dissolution of the North Central and Sabaragamuwa Provincial Councils: The Constitutional Issues* available at <http://www.groundviews.org/2008/06/18/the-dissolution-of-the-north-central-and-sabaragamuwa-provincial-councils-the-constitutional-issues/>

<sup>189</sup> Article 154B (11) (a)

<sup>190</sup> Article 154B (11) (b)

<sup>191</sup> Article 154B (11) (c)

<sup>192</sup> Note also that Item 9 of Appendix III of List I, on Education, establishes Provincial Boards of Education with advisory functions. The appointments to these Boards are made by the central Minister of Education with the concurrence of the Chief Minister. Similarly, Item 3 of Appendix II of List I, on Land and Land Settlement, establishes a National Land Commission with responsibility for the formulation of national policy with regard to the use of State land. Item 3:1 states that this Commission will include representatives of all Provincial Councils. On this see B. Fonseka & M. Raheem (2010) *Land in the Eastern Province: Politics, Policy and Conflict* (Colombo: CPA); Verite Research (2016) *Devolution of Land Powers*.

The first is the Chief Minister's role within the framework for the exercise of police powers that is set out in Appendix I of the Provincial Council List. Appendix I establishes an elaborate structure of policing, comprising national and provincial divisions, together with a National Police Commission<sup>193</sup> and Provincial Police Commissions.

The Chief Minister nominates one member of the Provincial Police Commission.<sup>194</sup> The Inspector General of Police (IGP) must appoint the Deputy Inspector General of Police (DIG) in charge of the Province with the 'concurrence' of the Chief Minister. Where there is no agreement between the Chief Minister and the IGP in this respect, the matter is referred to the National Police Commission, which makes an appointment after 'due consultations' with the Chief Minister.<sup>195</sup> Subject to the powers of the President in a state of emergency,<sup>196</sup> the DIG of the Province is 'responsible to and under the control of' the Chief Minister in the maintenance of public order and exercise of police powers within the Province.<sup>197</sup> Where there is a grave internal disturbance requiring the deployment of the national police within the Province, but which does not require the declaration of a state of emergency, the President does so in consultation with the Chief Minister.<sup>198</sup> Where the Chief Minister seeks the assistance of the national police division in the preservation of public order within the Province, the IGP must deploy such personnel as are necessary for the purpose and place them under the control of the DIG of the Province.<sup>199</sup> The Chief Minister may request the assistance of the central Criminal Investigation Department (CID) or other unit of the national police in any investigation.<sup>200</sup> Where the IGP decides in the 'public interest' (and with the approval of the Attorney General), that an investigation requires the CID or other unit of the national police to be deployed in the Province, he must do so only after consultation with the Chief Minister.<sup>201</sup> While on the face of the text these are necessary and sensible provisions in what seems to be a careful balance of functions in regard to policing and law and order between the centre and the Provinces, they have never in any Province been ever implemented.<sup>202</sup>

As we saw before, the Governor is the central authority with regard to public finance in the Province.<sup>203</sup> However, no sum shall be withdrawn from the Provincial Fund<sup>204</sup> except under a warrant under the hand of the Chief Minister.<sup>205</sup> This is the sole power expressly conferred on the elected branch of the provincial executive in relation to finance.

---

<sup>193</sup> The provisions of the Thirteenth Amendment regarding the composition of the National Police Commission have been repealed and replaced, and references to the 'President' in Appendix I substituted by the 'National Police Commission' by Section 23 of the Seventeenth Amendment. These amendments however do not impinge upon the substantive structure of devolved policing provided for in Appendix I of List I.

<sup>194</sup> Item 4 (c) of Appendix I of List I of the Ninth Schedule to the Constitution

<sup>195</sup> Item 4 (6)

<sup>196</sup> Item 11:2 (a)

<sup>197</sup> Item 11 (1)

<sup>198</sup> Item 11:2 (b)

<sup>199</sup> Item 12:2

<sup>200</sup> Item 12:4 (a)

<sup>201</sup> Item 12:4 (b)

<sup>202</sup> See Verite Research (2016) *Devolution of Police Powers*.

<sup>203</sup> Part III of the Provincial Councils Act; discussed in Section 4.1, above

<sup>204</sup> That is, the 'consolidated fund' of the Province into which is paid the proceeds of provincial taxation, central government grants, loans and all other receipts: Section 19 (1)

<sup>205</sup> Section 19 (3)

Likewise, in relation to the regulatory framework of the provincial public service in which the Governor is the central figure,<sup>206</sup> a departure is where the most senior administrative officer of the Province, the Chief Secretary, is appointed by the President 'with the concurrence of' the Chief Minister.<sup>207</sup>

### 4.3 The President

The President's vicarious omnipresence in the provincial sphere is evident through the powers and functions of his agent, the Governor.<sup>208</sup> However, the Thirteenth Amendment framework also provides for several situations in which the President is directly involved in the affairs of the Province, although in the main, these are exceptional circumstances.<sup>209</sup>

Article 154J is an extension of the President's powers in relation to the declaration of a state of emergency and the exercise of emergency powers thereunder,<sup>210</sup> which empowers the President to give directions to the Governor as to the manner in which the latter's executive power should be exercised during the state of emergency. More directly, the President's power to make emergency regulations extends to any matter in the Ninth Schedule to the Constitution (i.e., including the Provincial Council and Concurrent Lists), and such emergency regulations may override, amend or suspend provincial statutes.<sup>211</sup> While this clearly undermines the legislative autonomy of the Provincial Councils, it is not untypical in the broader scheme of the Constitution of 1978 because emergency regulations have the same effect of overriding even the provisions of law made by Parliament (i.e., any law except the Constitution).<sup>212</sup>

Article 154K, Article 154L and Article 154M relate to the failure of administrative machinery within the Province, and in effect provide for the complete suspension of devolution within a Province. This imposing power of the President is checked only by Parliament, which must approve any presidential proclamation under Article 154L.<sup>213</sup> There is no constitutional procedure by which the elected institutions at the provincial level may ensure that this unilateral power is not exercised arbitrarily, capriciously or in haste.

---

<sup>206</sup> Part IV of the Provincial Councils Act, discussed in Section 4.1, above

<sup>207</sup> Section 31

<sup>208</sup> See discussion in Sections 4 and 4.1, above

<sup>209</sup> The two changes made by the Seventeenth Amendment to the Thirteenth Amendment both related to presidential functions. Firstly, the President's hitherto untrammelled power to appoint the three members representing the three major communities (the other two being *ex officio*) of the Finance Commission established under 154R is attenuated by Article 41B and its schedule (Section 2 of the Seventeenth Amendment), whereby they are now appointed by the President on the recommendation of the Constitutional Council. Secondly, the removal of the functions of the President in the exercise of provincial police powers by the substitution of the National Police Commission for those functions (Section 23 of the Seventeenth Amendment, amending Items 3, 6, 7, 9:2 of Appendix I of List I of the Ninth Schedule to the Constitution). See also discussion in Sections 3.1 and 4.1, above.

<sup>210</sup> Under Article 155 and the Public Security Ordinance No. 25 of 1947, both as amended. See also A. Welikala (2008) *A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka* (Colombo: CPA): pp.176-186, 204-205

<sup>211</sup> Article 155 (3A) introduced by Section 5 of the Thirteenth Amendment

<sup>212</sup> Article 155 (2)

<sup>213</sup> Article 154L (3) and (4)

The President may hold that there is a failure of administrative machinery if any Governor or Provincial Council fails to implement a lawful direction given to them.<sup>214</sup> On receipt of a report from a Governor, or on any other grounds, if the President is satisfied that the administration of a Province cannot be carried on in accordance with the Constitution, he may by Proclamation assume all or any of the provincial executive functions.<sup>215</sup> While in such a context, he has no power to directly assume the legislative functions of the Provincial Council himself, he may declare that the powers of the Provincial Council are exercisable by Parliament.<sup>216</sup> In this situation Parliament may either exercise the statute-making power in respect of the Province, or it may confer that power on the President, who may in turn, delegate that power on any other authority.<sup>217</sup> In addition, the President is given a residuary power to take all necessary measures to give effect to the objects of his Proclamation,<sup>218</sup> and he is only prohibited from assuming any judicial power.<sup>219</sup>

If the President is satisfied that a situation has arisen whereby the financial stability or credit of Sri Lanka (or any part its territory) is threatened, he may make a Proclamation to that effect.<sup>220</sup> The continuing validity of such a proclamation is subject to parliamentary approval,<sup>221</sup> but during its operation, the President may give directions to the Governor to observe specified canons of financial propriety or to take any other measure required.<sup>222</sup>

The Provincial Councils Act also makes reference to the President, the most important of which is that he appoints the Chief Secretary of the Province (with the concurrence of the Chief Minister).<sup>223</sup> Rules may be made by the Provincial Council regulating its procedure generally, but such rules concerning the conduct of its business on financial statutes and the prohibition on the discussion of the conduct of the Governor require the approval of the President.<sup>224</sup> All executive actions of the Governor, whether taken on the advice of the Ministers or in his own discretion, are expressed to be taken in the name of the President.<sup>225</sup> Any discussion on the conduct of the President is prohibited in the Provincial Council.<sup>226</sup>

---

<sup>214</sup> Article 154K

<sup>215</sup> Article 154L (1) (a)

<sup>216</sup> Article 154L (1) (b)

<sup>217</sup> Article 154M (1) (a). A provincial statute made by Parliament, the President, or other delegated authority would continue in force until subsequently repealed or amended by a statute made by the Provincial Council: Article 154M (2)

<sup>218</sup> Article 154L (1) (c)

<sup>219</sup> Proviso to Article 154L (1)

<sup>220</sup> Article 154N (1)

<sup>221</sup> Article 154N (2)

<sup>222</sup> Article 154N (3) and (4)

<sup>223</sup> Section 31

<sup>224</sup> Proviso to Section 11

<sup>225</sup> Section 15 (2)

<sup>226</sup> Section 18

#### 4.4 Conclusions

The foregoing analysis of the constitutional and legal provisions governing the devolution of executive power shows that, in terms of scope, a lesser extent of executive powers than legislative powers are devolved under the Thirteenth Amendment. This is mainly through positing the Governor in a central position within the Province vested with executive powers of day-to-day administration. From a devolution perspective, the powers of the Governor are intrusive and unnecessary.

Moreover, the manner in which these powers have been elaborated in the Provincial Councils Act demonstrates not only an attempt to further rein in devolution, but also that they are unacceptable from the perspective of constitutional design. The provisions concerning the Governor's powers and functions in relation to provincial finance and the provincial public service in particular have the effect of conferring power without responsibility, and the complete absence of democratic accountability for a substantial swathe of executive actions to the people of the Province via the Provincial Council.<sup>227</sup>

The Consequential Provisions Act, although enacted as an interim measure, still continues in force. It provides for provincial ministers to exercise delegated powers under pre-existing central legislation concerning matters in the Provincial Council List, together with their central government counterparts. At the time of its enactment, there was a concern expressed that this measure would serve to discourage provincial statute-making and thereby retard devolution. Although the record of statute-making in the Provincial Councils cannot be described as particularly robust, it is difficult to draw a causative connection between this and the Consequential Provisions Act; among many other factors, provincial capacity issues such as legal expertise and human resources have had and continue to have a bearing on the ability of Provincial Councils to fully exercise their statute-making powers.

The case law of the superior courts in relation to devolution matters is also somewhat incoherent, although it may be said generally that, from a beginning of extreme misgivings, the courts have tended to adopt a broadly more 'devolution-friendly' approach in later cases. Allowing for the ebb and flow of judicial attitudes over time, however, it is fair to say that it is difficult to discern a judicially articulated and developed core of coherent constitutional principles in relation to 'devolution within the unitary state' in the case law of the past 29 years. Individual cases seem to have been dealt with

---

<sup>227</sup> Sections 11 (c) and 18 of the Provincial Councils Act, No. 42 of 1987, prohibit any discussion of the Governor's conduct in the Provincial Council. Thus not only is the Governor the agent of the central government, appointed by and reporting only to the central government, but his executive actions which concern the Province cannot even be discussed in the Provincial Council. In other words, the people of the Province have not elected him, and he is not answerable to the democratically elected representatives of the people in the Provincial Council, which cannot even discuss his conduct. Even the role of the Provincial Council in the possible removal of the Governor in terms of Article 154B (4) is subject to two key weaknesses: (a) it concerns only an extreme political situation of crisis in which the removal of the Governor becomes necessary, and in any event, even where a Provincial Council has surmounted the political and legal challenges of engaging Article 154B (4), it is entirely possible that a presentation of an address advising the removal of the Governor would be treated as purely directory by the President (i.e., precisely the same argument as has been used in the non-implementation of the Seventeenth Amendment); (b) it does nothing to ensure the more mundane accountability of the Governor to the Provincial Council for his executive actions on a day-to-day basis.

on the facts, and the lacuna in the jurisprudence is the lack of reasoned out principles by which each case relates to others in the broader canvass of the body of case law on devolution.

More broadly, there is a pervasive assumption of central government superiority underlying this schema of executive power, which is incongruent with the spirit of devolution. In addition to the many substantive features discussed above, this is implicit in several legal provisions inviting central government or presidential involvement in the provincial sphere on what seems to be absurdly trivial matters.<sup>228</sup> This structural framework is buttressed by administrative rules and practices that pre-date devolution and which have never been comprehensively reviewed and restructured to support devolved governance. Moreover, informal political practices and party political structures continue to reflect and encourage centralisation. Reforming and adapting these political and administrative practices would contribute significantly to a more meaningful implementation of devolution under the Thirteenth Amendment, until such time as constitutional changes addressing its flaws and weaknesses are introduced.

## 5 Decentralisation of Judicial Power: The High Court of the Provinces

The Thirteenth Amendment establishes a High Court for each Province.<sup>229</sup> The territorial jurisdiction of each High Court is the Province for which it is established.<sup>230</sup> The Provincial High Court exercises the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province,<sup>231</sup> appellate and revisionary criminal jurisdiction within the Province, and other jurisdiction and powers (for e.g., appeals from Labour Tribunals and from decisions under the Agrarian Services Act, jurisdiction under the Companies Act, etc.) that have been vested in it from time to time.<sup>232</sup> The Provincial High Court also has the power to issue the writs of *habeas corpus*,<sup>233</sup> *certiorari*, prohibition, *procedendo*, *mandamus*, and *quo warranto*.<sup>234</sup> The

---

<sup>228</sup> For e.g., the requirement of presidential approval for the internal rules of procedure of Provincial Councils; that all provincial executive actions are to be taken in the name of the President; the payment of provincial salaries, allowances and pensions: respectively, Sections 11 and 15 (2) of the Provincial Councils Act, No. 42 of 1987, the Provincial Councils (Payment of Salaries and Allowances) Act, No. 37 of 1988, and Provincial Councils Pensions Act, No. 17 of 1993. These can all be dealt with at the provincial level without necessary involvement of the centre.

<sup>229</sup> Article 154P (1)

<sup>230</sup> Except for the matters falling under Section 2 (3) and enumerated in the Second Schedule to the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996

<sup>231</sup> Article 154P (3) (a)

<sup>232</sup> These additional jurisdictions and powers are set out in High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, High Court of the Provinces (Special Provisions) Act, No. 10 of 1996, and High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006. High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 sets out the detailed procedure in the High Court including appeals to the Court of Appeal and Supreme Court. The Seventeenth Amendment has conferred on the Provincial High Court the criminal jurisdiction to hear and determine the offences of interfering with the Public Service Commission and Judicial Service Commission: Article 61C and Article 111L (2), respectively.

<sup>233</sup> Article 154P (4) (a), in respect of persons illegally detained within the Province

<sup>234</sup> Article 154P (4) (b). These writs may be issued against any person, within the Province, exercising any power under a central law or provincial statute pertaining to a subject in the Provincial Council List

Judges of the High Courts are appointed by the President, on the recommendation of the Judicial Service Commission in consultation with the Attorney General.<sup>235</sup> They are removable and subject to the disciplinary control of the President on the recommendation of the Judicial Services Commission.<sup>236</sup> The power of transfer of High Court Judges is vested in the Judicial Services Commission alone.<sup>237</sup>

The establishment and physical location of High Courts in the Provinces together with the continuing control of the judicial branch by central institutions (i.e., the Judicial Service Commission) demonstrate that there is decentralisation of the administration of justice but not judicial devolution under the Thirteenth Amendment. The institutional framework of the courts and their powers, functions and jurisdictions would have been very different if a devolution of judicial power comparable to the devolution of legislative power was contemplated, including in a provincial judicial service (similar to the provincial public service and the provincial police division), a less integrated appellate process, and so on.

This understanding has been upheld by the Supreme Court on several occasions.<sup>238</sup> In *Madduma Banda v. Assistant Commissioner of Agrarian Services* (2003), the Supreme Court held that,

“At the time of the introduction of devolution of power in terms of the provisions of the 13th Amendment to the Constitution, the intention of the legislature was to empower the provincial centres to deal with the specific subjects devolved to such centres which included not only executive and legislative power, but also to devolve judicial functions to be carried out through the newly introduced High Courts of the Provinces... Provincial Councils were established to permit the people to deal with their day to day life within the provinces itself. A tenant cultivator in any area within the country therefore should have the opportunity to challenge an order relating to the payment of agricultural rent in the High Court of the Provinces, instead of having to come to Colombo to invoke the jurisdiction of the Court of Appeal.”<sup>239</sup>

---

<sup>235</sup> Article 111 (2) (a)

<sup>236</sup> Article 111 (2) (b)

<sup>237</sup> Article 111H (1) (a), as well as the power to make rules regarding the training of High Court Judges: Article 111H (2) (a)

<sup>238</sup> See *In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* (1987) 2 SLR 312 at 323; *Nimalaratne v. Assistant Commissioner of Agrarian Services* (2000) 3 SLR 184.

<sup>239</sup> *Madduma Banda v. Assistant Commissioner of Agrarian Services* (2003) 2 SLR 80 at 89, 90-91. Although Bandaranayake J., with Silva C.J., and Yapa J. agreeing, described the provision for the exercise of judicial power under the Thirteenth Amendment as one of judicial devolution, it is clear in the context of the substance of her opinion, that what she meant was in fact the decentralisation of the administration of justice, i.e., the physical location of competent courts in the Provinces so as to facilitate access to justice.

## 6 The Fiscal and Financial Framework

As discussed above, the substantive provincial competences are set out, primarily in the Provincial Council List, and secondarily over the subjects in the Concurrent List where a Provincial Council claims such competences by statute.<sup>240</sup> The central government competences are set out in the Reserved List and the residual legislative power of the state is vested in that level as well.<sup>241</sup> Thus the primary expenditure responsibilities of Provincial Councils are in relation to the competences in the Provincial Council List, and such other responsibilities as may be assumed by claiming concurrent competences. Powers under both the Provincial Council and Concurrent Lists, and therefore expenditure responsibilities in relation to them, are assumed when the Provincial Council legislates on any subject in the two lists. The indeterminacy of the position relating to executive powers exercised under the Provincial Councils (Consequential Provisions) Act, No. 12 of 1989, results in an unduly complicated situation regarding financial responsibility.<sup>242</sup>

With regard to revenue raising responsibilities, Items 33 and 36 (36:1 to 36:20) of the Provincial Council List enumerate the range of fees and taxes that may be imposed by a Provincial Council, and borrowing to the extent permitted by central legislation (Item 35).<sup>243</sup> These include:

- Fees in respect of any matter in the Provincial Council List (Item 33)
- Turnover tax on wholesale and retail sales to the extent provided by central legislation (Item 36:1; Provincial Council Turnover Taxes (Limits and Exemptions) Act, No. 25 of 1995)
- Taxes on betting and lotteries other than national lotteries (Item 36:2)
- License fees and taxes on liquor (Items 36:3 and 36:19)
- Motor vehicle license fees to the extent provided by central legislation (Item 36:4)
- Dealership license fees and taxes on drugs and chemicals (Item 36:5)
- Stamp duty on the transfer of movable and immovable property (Item 36:6)
- Toll collections (Item 36:7)
- Court fines and fees (Items 36:8 and 36:14)
- Fees and charges under specified existing legislation including the Medical Ordinance; Motor Traffic Act; Fauna and Flora Protection Ordinance; Land Development Ordinance; Crown Lands Ordinance; Weights and Measures Ordinance (Items 36:9, 36:10, 36:12, 36:13, 36:15)
- Departmental fees in respect of any matter in the Provincial Council List (Item 36:11)
- Land revenue and taxes on land and buildings including state property to the extent provided by central legislation (Items 36:16 and 36:17)
- Taxes on mineral rights to the extent provided by central legislation (Item 36:18)
- Any other taxes within the Province as authorised by central legislation (Item 36:20)

<sup>240</sup> Lists I and III of the Ninth Schedule to the Constitution, respectively

<sup>241</sup> List II of the Ninth Schedule to the Constitution and Article 154G (10)

<sup>242</sup> See discussion in Ch. 4, above

<sup>243</sup> Item 31 makes provincial debt an express provincial responsibility. See also Section 21 of the Provincial Councils Act.



Set against the provincial expenditure responsibilities, this limited set of revenue raising powers denote what is known as a 'vertical fiscal imbalance.' In other words, the Thirteenth Amendment devolves more competences to Provincial Councils (i.e., expenditure responsibilities) than it devolves powers of taxation and other means of income (i.e., revenue-raising powers). Since this means that Provincial Councils do not have the power to raise adequate revenue on their own to discharge the expenditure responsibilities arising from the exercise of their powers, the Constitution must provide for a system and mechanisms by which this 'vertical fiscal imbalance' may be 'equalised.' This is the function of the Finance Commission established under Article 154R.

The Finance Commission also performs what is known as the equalisation of horizontal fiscal imbalances, or simply 'horizontal equalisation.' In any country, there are regional disparities in economic development and wealth, arising from natural or geographical, economic or political factors. In a devolved system of government, addressing these regional disparities and uneven development, so that not only support for underdeveloped areas, but also the delivery of broadly the same standard of public services across the country is ensured, requires a system of wealth-sharing between the central government and the provincial governments. Making recommendations to the President as to this 'horizontal equalisation' is an important function of the Finance Commission.

Article 154R establishes the Finance Commission which consists of the Governor of the Central Bank, the Secretary to the Treasury, and three other distinguished persons as members appointed by the President on the recommendation of the Constitutional Council to represent the three major communities.<sup>244</sup> That there is neither direct provincial representation nor provincial involvement in the process for the appointments to the Finance Commission is a major weakness. The term of office of members of the Finance Commission is three years.<sup>245</sup> It is provided that the central government shall allocate funds adequate for meeting the needs of the Provinces from the annual budget, on the recommendation of and in consultation with the Finance Commission.<sup>246</sup>

The duty of the Finance Commission in the adjustment of the vertical fiscal imbalance is to make recommendations to the President as to the principles on which funds allocated annually by the central government budget to the provincial level should be apportioned between the various Provinces.<sup>247</sup> Since the entire system of devolution relies on central transfers, it would seem to make sense to have the Commission play the central co-ordination role in financial decisions regarding allocations. But in terms of the Constitution, the Commission has no role in the decisions of the central government with regard to the total allocation to Provincial Councils as a whole, but only in recommending the principles of apportionment of that sum among them. Moreover, in practice the central government does not treat the recommendations of the Commission as mandatory instructions regarding apportionment, but at best, only as guidance.

---

<sup>244</sup> Article 154R (1) as amended by Section 19 of the Seventeenth Amendment

<sup>245</sup> Article 154R (2)

<sup>246</sup> Article 154R (3)

<sup>247</sup> Article 154R (4) (a). The Commission may also make recommendations on any other matter of provincial finance referred to it by the President: Article 154R (4) (b)

In terms of horizontal equalisation, the mandate of the Commission is to formulate the principles necessary to achieve balanced regional development across the country. In doing so, the Commission is enjoined to take into account (a) the population of each Province, (b) the *per capita* income of each Province, (c) the need, progressively, to reduce social and economic disparities, and (d) the need, progressively, to reduce the difference between the *per capita* income of each Province and the highest *per capita* income among the Provinces.<sup>248</sup>

We have already noted the central control of provincial finances through the Governor's powers, the procedure and restrictions regarding financial statutes, and the President's power of intervention to prevent financial instability.<sup>249</sup> The Commission's recommendations are not justiciable, and should it arise in any litigation, it is unlikely due to the public policy and technical nature of its function, and the restrictive manner in which it is framed, that the courts would be inclined to interfere.<sup>250</sup>

Taken as a whole, the constitutional and legal framework of devolution finance is one of the weakest facets of the Thirteenth Amendment scheme.<sup>251</sup> There is nothing wrong *per se* in a system that is anchored on central transfers, provided that the mechanisms and procedures for equalisation are strong. However, the constitutional functions of the Finance Commission are inadequate for a system of devolution premised on central transfers, and as with every other aspect of implementation of the Thirteenth Amendment, the system of transfers is also affected by the administrative and political practices which undermine effectiveness, efficiency, and devolution.<sup>252</sup>

## 7 Conclusion

The experience of Provincial Councils in the past nearly three decades demonstrates that the full constitutional extent of devolution that is possible by an innovative and flexible approach to the implementation of the Thirteenth Amendment has not been realised. This is due to straightforward non-implementation of constitutional provisions, or because of attempts at clawing back the constitutional scheme through central legislation or administrative and political practices.

The Steering Committee of the Constitutional Assembly, as well as the Assembly's Subcommittee on Centre-Periphery relations, have been deliberating on the new, enhanced framework of devolution to be enshrined in the new constitution, consistent with the principle of 'maximum devolution within the unitary state' promised in the

---

<sup>248</sup> Article 154R (5)

<sup>249</sup> See discussion in Ch. 4.1 and Ch. 4.3, above

<sup>250</sup> Unlike, for example, in the case of the Governor's power of dissolution in which the courts were willing to extend judicial review: see discussion in Ch. 4.1 and Ch. 4.2, above

<sup>251</sup> See the reports of the respective Provincial Councils in CPA (2008) *Strengthening the Provincial Council System*, where a prominent ground of complaint is with regard to the fiscal and financial aspects of the Thirteenth Amendment. See also Asoka Gunawardane Committee Report: Chs. 5, 8.

<sup>252</sup> For an overview of the issues attending the design of fiscal and financial arrangements within a devolved constitutional framework, see A. Welikala (2003) *Fiscal and Financial Arrangements in a Federal Sri Lanka* (Colombo: CPA)

manifesto of the United National Front for Good Governance (UNFGG) at the parliamentary election in August 2015. In this exercise, the foregoing discussion of Sri Lanka's past experience with devolution points to many of the pitfalls to be avoided, if in the next constitutional iteration, we are to establish a genuine system of multilevel government within a strong and united state that can address our challenges of pluralism, democracy, and good governance.