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The Devolution of Power and the Executive Presidency

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The system for the devolution of power, as provided for in the Thirteenth Amendment to the Constitution (1987), is a curious constitutional accessory retrofitted on the unitary structure of the Sri Lankan state, at the heart of which is the powerful executive president. Despite its close textual similarities to the framework of devolution in India, operationally, Sri Lanka is still significantly different. The primary reason for this difference is the strong centripetal pull exerted by the executive president on the political and legal dynamics of Sri Lanka's power-sharing framework. The President's power over the Provincial Councils can be analysed in terms of, firstly, the powers exercised by the President through the office of the Governor and, secondly, in terms of the powers directly exercised by the President. This chapter examines the scope and impact of presidential powers in both those aspects.

Provincial Executive Power

Executive power within the Provincial Council is exercised by the Governor (who is appointed by the President) and the Board of Ministers, which comprises of representatives, including the Chief Minister, directly elected by the people of the given province. The Thirteenth Amendment is not clear in its single reference to provincial executive power in Article 154C,¹ although the latter purports to define the parameters of the power as "Executive power extending to the matters with respect to which a Provincial Council has power to make statutes." However, as Asanga Welikala argues, "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

¹ Which reads as "Executive power extending to the matters with respect to which a Provincial Council has power to make statutes shall be exercised by the Governor of the Province of which that Provincial Council is established, either directly or through Ministers of the Board of Ministers, or through officers subordinate to him, in accordance with Article 154F."

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.”²

The relationship between the Governor and the Board of Ministers is both complex and confusing. The Governor is to exercise executive power as defined in Article 154C either directly, through the officers subordinate to him, or through the Board of Ministers. The structure of Article 154C, thus, establishes the pre-eminence of the Governor in the exercise of provincial executive power. However, Article 154F(1)³ provides that, unless the constitution requires the Governor to exercise his functions in his own discretion, the Governor should exercise his functions on the advice of the Board of Ministers. The result is that the Board of Ministers, which is sometimes a tool through which the Governor channels executive power, also acts, in certain instances, as the determinant of the Governor’s exercise of provincial executive powers.

The Governor as the agent of the President

In order to understand the President’s power within Provincial Councils, it is necessary to understand the relationship between the President and the Governor, and the extent of the latter’s dependence on the former. Article 154B(2) of the constitution provides that the Governor is to be appointed by the President, and is to

² A. Welikala (2011) *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010*, (Colombo: The Centre for Policy Alternatives) at p. 45.

³ Which reads as, “There shall be a Board of Ministers with the Chief Minister at the head and not more than four other Ministers to aid and advise the Governor of a Province in the exercise of his functions. 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 or any of them in his discretion.”

hold office during the pleasure of the President. Article 154B(2) further provides that the Governor shall hold office in accordance with Article 4(b)⁴ which provides for the way in which the executive power of the people is to be exercised. This provision must be understood in light of the fact that the Article 4 is an enumeration for the manner in which the sovereignty of the people of Sri Lanka is to be exercised and enjoyed.

Accordingly, reference to Article 4(b) in relation to the Governor is significant, since Article 4(b) provides that the President is the sole repository of the executive power of the state. In the context of a unitary state, this authorisation to the Governor to wield executive power in terms of Article 4(b) – to the extent of the powers the Provincial Council has jurisdiction to legislate upon – implies that the office and powers of the Governor are an extension of those of the President.⁵ The Governor is merely an appointee/delegate of the President. Because the President retains the power to give directions to the Governor and to oversee the manner in which the Governor exercises his executive powers, the President retains pre-eminence in the exercise of provincial executive power.⁶

Furthermore, the construction of Articles 154B(2) and 154C, as explained above, has lent itself to the proposition that there is no ‘provincial executive power’ *per se*.⁷ It is the executive power reposed in the President that manifests itself at the level of Provincial Councils. Moreover, since it is impossible to infer a link between the President and the Board of Ministers, similar to that between the President and the Governor, particularly since the Board of Ministers comprises of representatives

⁴ Article 4(b) provides that “the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People.”

⁵ Welikala (2011): p. 45.

⁶ See Article 154F(2) “...The exercise of the Governor’s discretion shall be on the President’s directions”; See also, *infra*, fn.9.

⁷ See Welikala (2011): p. 45.

directly elected by the province, the Board of Ministers merely has a role in the manner the President's executive power is exercised, and such role is defined in Article 154F.

This position is consistent with the determination of the Supreme Court in *In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* (1987).

“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 vested in the Provincial Councils. The Parliament and President have ultimate control over them and remain supreme.*”⁸

In the same case, a plurality of the judges of the Supreme Court said of the relationship between the Governor and the President that,

“The Governor is appointed by the President and holds office in accordance with Article 4(b) which provides that the executive power of the People shall be exercised by the President of the Republic, during the pleasure of the President (Article 154B(2)). *The Governor derived his authority from the President and exercises the executive power vested in him as a delegate of the President.* It is open to the President therefore by virtue of Article 4(b) of the Constitution to give directions and monitor the Governor's exercise of this executive power vested in him.”⁹

⁸ Per Sharvananda, C.J., *In Re the 13th Amendment to the Constitution* (1987) 2 SLR 312 at p.320. Emphasis added. Hereinafter, ‘*Thirteenth Amendment Case.*’

⁹ Ibid: p.323. Emphasis added.

The fact that the Governor remains under the control of the President and is completely subject to his power is further made clear when analysing the provisions regarding the removal of the Governor: the Governor holds office during the pleasure of the President. The concept of holding office at pleasure suggests, *prima facie*, that dismissal may be for a reason good, bad, or indifferent, or without any reason.¹⁰ Therefore, the President can remove the Governor at any time, without the obligation to provide any reason. Moreover, such a removal would not be subject to judicial review due to Article 35(1) of the constitution.¹¹ The person holding the office of Governor is therefore placed in a precarious position. The Supreme Court has opined, therefore, that as a matter of self-interest, it is desirable for a Governor to consult the President in matters of importance pertaining to the Provincial Council.¹²

The constitution also provides that a Provincial Council may by a resolution *advise* the President to remove the Governor on the ground that the Governor has either intentionally violated the provisions of the constitution, or is guilty of misconduct or corruption involving the abuse of the powers of his office, or is guilty of bribery, or an offence involving moral turpitude. Such a resolution can only be passed by a vote of not less than two-thirds of the whole number of members of the Council (including those not present).¹³ It remains to be seen whether the President is mandatorily required to remove the Governor upon receipt of such an address from the Council. Considering the relationship between the President and the Governor, and the overall nature of the

¹⁰ See *Bandara v. Premachandra* (1994) 1 SLR 301 at p.312.

¹¹ Which reads as, “While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.”

¹² See *Maithripala Senanayake v. Mahindasoma and Others* (1998) 2 SLR 333 at p.369. Hereinafter, the ‘*Mahindasoma case*.’

¹³ Article 154B(4a).

relationship between the President and the Provincial Council, it is unlikely that the decision of a Provincial Council would be considered as binding on the President.

In any case, speculating on the legal validity of the argument that such resolutions bind the President is a fruitless exercise because, as mentioned above, the President's decision on the issue will be immune from judicial review under Article 35.¹⁴ Furthermore, unlike Parliament, Provincial Councils do not possess alternative avenues of checking the President, or influencing his decisions, for its lack of any powers similar to Parliament's ability to impeach the President. As such the Governor is completely dependent on the President to ensure the security of his office.

The Powers of the Governor in relation to the Provincial Council

As seen above, the linking of the Governor's power to Article 4(b) and the complete control the President exercises over the appointment and removal of the Governor, is indicative of the fact that the Governor is merely an agent who animates, within the province, the executive power that vests solely in the President. However, in an attempt to give some meaning to the power devolved, the Thirteenth Amendment provides that the Governor exercises executive power either directly in his discretion where he is required to do so 'by or under'¹⁵ the constitution, or in the absence of such a

¹⁴ It is submitted that the exception to Article 35, carved out in *Karunathilaka and another v. Dayananda Dissanayake, Commissioner of Elections and others* (2003) 1 SLR 157 at p.177, would not apply in this situation as in order to remove the Governor, the President would have to be compelled to do a positive act (i.e. issue a warrant under his hand), which it is respectfully submitted is not within the limits of the said exception.

¹⁵ Welikala argues that "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

requirement, on the advice of the Board of Ministers.¹⁶ The provisions of law are not always clear-cut and, as has been pointed out by the Supreme Court, “It is not inconceivable that a genuine doubt or difficulty may arise, in regard to a particular function, whether the Governor must act on advice, or in his discretion. *Normally any such question of interpretation would have to be judicially determined.*”¹⁷

Be that as it may, having an understanding of the circumstances in which the Governor has to exercise his power on the advice of the Board of Ministers, and the circumstances in which he is required by the constitution to act in his own discretion, is essential to understanding the role of the President with regard to Provincial Councils. This is because where the Governor is required to act in his own discretion he is essentially acting on the President’s directions.

The key term in Article 154F, ‘discretion’, is often used in law, but rarely is its meaning defined with any degree of specificity. The following definition is particularly useful in understanding the meaning of the word as it has been used in the context of Article 154F(1):

“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

also the Supreme Court determination in the Provincial Councils (Consequential Provisions) Bill (1989), SCSD No. 11 of 1989, reported in L. Marasinghe & J. Wickramaratne (2010) *Judicial Pronouncements on the 13th Amendment* (Colombo: Stamford Lake): pp.138, 140-141.

¹⁶ Article 154F(1) of the constitution.

¹⁷ *Premachandra v. Montague Jayawickrema* (1994) 2 SLR 90 at p.114.

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."¹⁸

The Governor's Role in the Legislative Procedure and the Administration of the Provincial Council

Whilst the President has a limited role to play in terms of the legislative procedure in Parliament, his agent in the province is more involved in both the legislative procedure of the Provincial Council as well as in controlling its legislative agenda. One of the most important roles of the Governor is in respect of the discretion on whether to grant assent to provincial statutes. A statute made by a Provincial Council will only come into force after it receives the assent of the Governor.¹⁹ However, if he does not assent, he must return the statute to be reconsidered by the Provincial Council with or without recommendations for amendment.²⁰ In such a situation, the Provincial Council will reconsider the statute, having regard to the Governor's message. The Provincial Council may pass the statute with or without amendment and re-present it

¹⁸ See Welikala (2011): p.49.

¹⁹ Article 154H(1).

²⁰ Article 154H(2).

to the Governor for his assent.²¹ After the statute is presented for the second time, the Governor may either assent to it, or reserve it for reference by the President to the Supreme Court, for a determination on whether it is consistent with the provisions of the constitution. The Governor can assent to such a statute only if the Supreme Court determines that the statute is consistent with the provisions of the Constitution.²² Ostensibly the Governor is expected to act as a check on the way a provincial council exercises its legislative power. Therefore the Governor exercises his own discretion in deciding whether to assent or to refuse to assent to a statute. To assume otherwise would render the relevant provision superfluous and meaningless.

However, it must be noted that the level of scrutiny imposed on a statute is exceptionally high in comparison to legislation passed by Parliament, especially because the scrutiny takes place after the statute's affirmation by the majority of a democratically elected Provincial Council. Furthermore, the Governor's right to return the statute to the Provincial Council without his assent, at least in the first instance of refusal, is not circumscribed (by, for example, questions of constitutionality). The Governor can simply return the statute for the Provincial Council 'to reconsider the statute or any specified provision thereof and in particular, requesting it to consider the desirability of introducing such amendments as may be recommended in the message.' It is only after the Provincial Council passes the statute for a second time does the question regarding constitutionality become relevant.

In any event, statutes of Provincial Councils are not exempted from judicial review and, as such, can be struck down by courts at any time.²³ Therefore the utility of the

²¹ Article 154H(3).

²² Article 154H(4)

²³ Article 80(3) states that no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of a law (i.e. after the bill has been certified by the President or the Speaker, as

above provision in ensuring the constitutionality of statutes is questionable.

However, through this procedure, the Governor is able to create considerable delays in the legislative process of a Provincial Council. It is theoretically possible for the Governor, together with the President, to obstruct the passage of a statute and stall its progress. This is so because nothing suggests a legal/constitutional compulsion upon the President to refer to the Supreme Court a statute that was reserved for him by the Governor. Assuming such a compulsion existed, Article 35 still shields the President from any action brought against him to compel referral of the statute to the Supreme Court. It is not unlikely that a Governor would resort to these provisions to delay the passage of statutes in a Provincial Council. Moreover in the absence of redress for abuse, by the mere threat of refusing to grant his assent a Governor can have a significant impact on the Provincial Councils legislative agenda. In this context the refusal of assent (or the threat thereof) is not merely a checking mechanism, but is also a source of political for the Governor.

Furthermore, 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.²⁴ 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 this powers against the wishes of a Chief Minister who commands the support of a majority in the Provincial Council. In the *Mahindasoma Case*, Amerasinghe, J., held that;

“I find no reason adduced in the matters before us to give Article 154B(8)(c) read with Article

the case may be). Statutes passed by Provincial Councils enjoy no such immunity from judicial review.

²⁴ Article 154 B(8).

154B(8)(d) any meaning other than that the Governor will have to or must, if the Board of Ministers commands, in the opinion of the Governor, the support of the majority of the Provincial Council, exercise his powers of dissolution in accordance with the advice of the Chief Minister. Wade and Forsyth, *op. cit.*, p. 245 observe that: Powers confer duties whether to act or not to act, and also in many cases, what action to take, whereas duties are obligatory and allow no option. De Smith, Woolf and Jowell, *op. cit.*, p. 296, observe that: if only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. Since the Board of Ministers in the opinion of the Governor commanded the support of the majority of the Provincial Council, there was only one, uniquely right course of action prescribed – to follow the advice of the Chief Minister in deciding whether to exercise his power of dissolution. There was no discretion. By his failure to act in accordance with the duty imposed on him by law, the Governor acted illegally.”²⁵

The Chief Minister is also required to communicate to the Governor all decisions of the Board of Ministers relating to the administration of the affairs of the Province and any proposals for legislation. Furthermore, the Chief Minister is required to furnish such information relating to the administration of the affairs of the Province and proposals for legislation as the Governor may call for.²⁶ Thus, even though the Governor is physically removed from the chamber of the Provincial Council, he is still required to be kept apprised of its administration.

²⁵ See the *Mahindasoma* case, *supra*, fn.12, at pp.365-366.

²⁶ Article 154 B(11).

The Governor's Role During Exceptional Situations

Over and above the previously examined powers are the constitutional functions dealing with exceptional situations in which the Governor acts in his own discretion. Article 154J concerns situations where a state of emergency has been declared in terms of the Public Security Ordinance. This 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 triggered 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 would be incongruous if the Governor were expected to follow the advice of the Board of Ministers in such a situation. As such it goes without saying that the Governor arrives at such a conclusion through the exercise of his own discretion. 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.²⁷

In addition to the provisions of the constitution, the Provincial Councils Act in Section 5A makes provision for the Governor to deal with an exceptional situation. This

²⁷ Article 154 N(3) provides that "During the period any such Proclamation as is mentioned in paragraph (1) is in operation, the President may give directions to any Governor of a Province to observe such canons of financial propriety as may be specified in the directions, and to give such other directions as the President may deem necessary and adequate for the purpose."

provision authorises the Governor to dissolve a Provincial Council where the Provincial Council has for all intents and purposes ceased to function, 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. The Provincial Council stands dissolved upon the transmission of the Governor's communication to the President. In such a situation, whether factual circumstances necessitating a communication under Section 5A actually exists is a matter for the Governor's exclusive discretion.

The Governor and Provincial Finance

The Governor enjoys extensive powers as regards the procedure for financial statutes in the Provincial Councils. The source of this power is not the Thirteenth Amendment but the provisions of the Provincial Councils Act. The Governor makes the rules governing all aspects of provincial finance, including the Provincial Fund²⁸ and the Emergency Fund²⁹ of the Province. No provincial statute involving revenue³⁰ or expenditure³¹ may be introduced, moved, or passed by the Provincial Council except on the recommendation of the Governor.³²

The statutory provision regarding the 'annual financial statement' is somewhat confusing. Section 25(1) of the Provincial Councils Act provides,

“The Governor of a Province shall in respect of *every financial year*, at least three months before the expiration *of such financial year*, cause to be laid before the Provincial Council of that Province, a statement of the estimated receipts and

²⁸ Provincial Councils Act: Section 19.

²⁹ Ibid: Section 20.

³⁰ Section 24(1) (a) and (e).

³¹ Section 24 (1) (b), (c) and (d).

³² Provincial Councils Act: Section 24.

expenditure of the Province *for that year*, in this Part referred to as, the ‘annual financial statement’.” (emphasis added)

A plain reading of the Act suggests that what the Governor is having placed before the Provincial Council is the estimated receipts and expenditure of *that same financial year*. This is contrary to the general principle that an appropriation bill/ budget will be submitted for the following financial year.³³ Be that as it may, Provincial Councils seem to be adhering to the general principle and submitting appropriation statutes for the following year, in spite of how the statutory language is worded.³⁴

The Governor must recommend all demands for grants made to the Provincial Council.³⁵ While the Provincial Council has the authority to approve the annual budget, the consequent Appropriations Statute is subject to the assent of the Governor.³⁶ Practically, though, the ‘annual financial statement’/budget is prepared by the officers of the Chief Secretary’s Secretariat, specifically through the Deputy Chief Secretary of Finance.³⁷ The Chief Secretary is appointed by, and serves at the pleasure of, the

³³ In comparison, Pradeshiya Sabhas Act, No.15 of 1987, in Section 168(1) states that, “The Chairman of every Pradeshiya Sabha shall each year on or before such date ... prepare and submit to the Pradeshiya Sabha, a budget *for the next succeeding year*, and containing an estimate of the available income and details of the proposed expenditure for the ensuing year.” Emphasis added.

³⁴ See Southern Province Provincial Council, Appropriation Statute No.03 of 1999, (attestation noted on the 30th day of November 1999), which provides estimates for beginning 1st January 2000 and ending on 31st December 2000; Available at http://www.lawnet.lk/docs/statutes/prov_stats/htm/Appropriation%20statute%20No_%2003%20of%201999.html

³⁵ Provincial Councils Act: Section 26(3).

³⁶ Article 154H.

³⁷ The role of the Chief Secretary and Deputy Chief Secretaries are not defined by statute. It is regulated by a plethora of circulars and administrative guidelines. See ‘Key Functions, Deputy Chief Secretary of Finance’, available at http://www.np.gov.lk/index.php?option=com_content&view=article&id=190&Itemid=151

President. As such, there is a possibility of a Governor and the Chief Secretary taking control of the finances of the Provincial Council and creating an environment in which it becomes impossible for the Provincial Council to function.³⁸

Any demands for supplementary grants or votes on account during a financial year may only be initiated by the Governor.³⁹ The Governor submits audited accounts of the provincial administration to the Provincial Council.⁴⁰ The cumulative effect of these provisions, in short, is that the Governor is essentially the ‘finance minister’ of the Province.⁴¹

The Governor and the Provincial Public Service

Similar to the framework regarding provincial finance, the arrangements for the direction and control of the provincial public service also provides the Governor with ultimate control over its workings. The appointment, transfer, dismissal and disciplinary control of officers of the provincial public service are vested in Governor.⁴² The Governor has the power to make rules in relation to all aspects of the public service.⁴³ The Governor may delegate these powers to a Provincial Public Service Commission⁴⁴, the members and chairman of which are appointed and are removable by him.⁴⁵ The Governor has the power to alter, vary or rescind any appointment or order of the Provincial Public Service Commission.⁴⁶ In the light of these provisions, the legal framework for

³⁸ See Appropriation Statutes of the Northern Provincial Council for the years 2013 and 2014, where provision was made to allocate to the Governor a sum of money from the Criteria Based Grants (CBGs).

³⁹ Provincial Councils Act: Sections 28 and 29.

⁴⁰ Ibid: Section 23.

⁴¹ See Welikala (2011): p.52.

⁴² Provincial Councils Act: Section 32 (1).

⁴³ Ibid: Section 32 (3).

⁴⁴ Ibid: Section 32 (2).

⁴⁵ Ibid: Section 33 (3).

⁴⁶ Ibid: Section 33 (8).

the independence of the Provincial Public Service Commission, and thereby the provincial public service, cannot be regarded as effective.

This is particularly problematic as the Board of Ministers is ultimately responsible to their electors (i.e. the people of the Province). However, they have no authority regarding disciplinary control over the Provincial Public Service. Therefore, in a situation where a provincial public servant refuses to carry out lawful orders of a minister, the Board of Ministers is not empowered to take any disciplinary action. The Provincial Public service is ultimately responsible to the unelected Governor, who, although in an abstract sense is responsible to 'people of Sri Lanka,' is not responsible to the people of the Province. This dichotomisation of accountability and control has the potential in the some circumstances to render the Provincial Council useless in terms of the delivery of service to the people in the province.

Furthermore, the Chief Secretary, the most senior public officer of the Province is appointed directly by the President with the concurrence of the Chief Minister.⁴⁷ While the Chief Secretary's his role lacks statutory definition, it includes varied tasks from providing guidance for the formulation, implementation, and monitoring of annual development programmes, to ensuring the smooth functioning of the provincial public service. This control enables the Governor, if he is so inclined, and if the presidentially-appointed Chief Secretary is supportive, to indirectly control the functioning of provincial ministries notwithstanding the wishes of provincial ministers elected by and accountable to the people in the province.

As noted above, whether by design or otherwise the relationship between the President and the Governor and the Board of Ministers is complex and confusing. On the one hand in terms of Article 154B(2), read together with

Article 4(b), the Governor becomes the animator of President's executive power in the Province. On the other hand, Article 154F(1) subjects the Governor to the advice of the Board of Ministers, except in situations where the constitution requires him to act in his own discretion. However, an examination of the nature and extent of the powers exercised by the Governor in his own discretion – and by extension the directions of the President – unveils the broad and overwhelming role envisaged for the Governor. It has to be noted that the role envisaged for the Governor is by no means a titular one. To the contrary, with the powers provided to the Governor in terms of the Thirteenth Amendment and the Provincial Councils Act, he has the potential to run a parallel administration within a Provincial Council. Therefore to a large extent the success or failure of Sri Lanka's scheme of devolution is dependant upon the how much of his potential power, a Governor is interested in/ requested to exercise.

Having analysed the central role of the Governor within the provincial administration, let us now move onto the role directly exercised by the executive President in relation to Provincial Councils.

Executive Power Directly Exercised by the President

As explained above, the President exercises substantial power within the provincial sphere through his agent, the Governor. However, the Thirteenth Amendment framework also provides for several situations in which the President is directly involved in the affairs of the Province.

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, 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),⁴⁸ and such emergency regulations may override, amend or suspend provincial statutes.⁴⁹

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 fettered only by Parliament, which must approve any presidential proclamation under Article 154L.⁵⁰ There is no constitutional procedure to safeguard the interests of the elected institutions at the provincial level to ensure that this unilateral power is not exercised arbitrarily, capriciously, or in haste.

The President may hold that there is a failure of the administrative machinery if any Governor or Provincial Council fails to implement a lawful direction given to him.⁵¹ 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.⁵² However, 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. 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. In addition, the President is given a residuary power to take all necessary

⁴⁸ See Welikala (2011): p.57

⁴⁹ Article 155 3A.

⁵⁰ Article 154L (3) and (4).

⁵¹ Article 154 K.

⁵² Article 154 L(1a).

measures to give effect to the objects of his Proclamation,⁵³ and he is only prohibited from assuming any judicial power.

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. The continuing validity of such a proclamation is subject to parliamentary approval, 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.

The President also exercises powers regarding the alienation of State Land. In terms of the Ninth Schedule to the Constitution, alienation or disposition of state land within a Province to any citizen or to any organisation is to be done by the President, on the advice of the relevant Provincial Council.⁵⁴ Several previous judgements of the Supreme Court stated that the Thirteenth Amendment has created an 'interactive' regime with regard to state land alienation and that state land can only be disposed with the advice of the Provincial Council.⁵⁵

However, in the case of *Solaimuthu Rasu Vs. Superintendent, Stafford Estate*,⁵⁶ Mohan Pieris, stated that the view previously held that a precondition laid down in paragraph 1:3 that an alienation of land or disposition of State Land within a province shall be done in terms of the applicable law only on the advice of the Provincial Council, is not supportable. This was because the word 'only' was absent in Item 1.3 in the Appendix on Land in the Ninth Schedule, which referred to the need to consult the Provincial Council. The legal basis for this judgement

⁵³ Article 154L(1c).

⁵⁴ See Item 1.3 of Appendix II (Land and Land Settlement) in the Ninth Schedule to the Constitution.

⁵⁵ See *Vasudeva Nanayakkara v Choksy & Others* (2008) 1 SLR 134; *In re the Bill titled 'Land Ownership'*, SC SD. No. 26/2003 - 36/2003.

⁵⁶ SC Appeal 37/2001.

is questionable.⁵⁷ However, at least for the present moment the President retains complete control over alienation of state land.

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.⁵⁸ 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.⁵⁹ 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. Furthermore any discussion on the conduct of the President is prohibited in the Provincial Council.

The Judiciary: A Limitation on the President and his Agent?

As was seen in several instances in the preceding discussion, the judiciary proved to be an inconsistent check on the exercise of powers by the President either directly or through the Governor. The main problem in relation to the judicial control of the President's functions was the immunity of the President enshrined in Article 35 of the constitution.

Presidential immunity, however, does not apply where the President has a direct role in the legislative process *before* a bill is placed on the order paper of Parliament. In terms of Article 154 G (3), no bill in respect of any matter set out in the Provincial Council List shall become law unless such bill has been referred by the President to

⁵⁷ See S.N. Silva, 'Ramifications Of 13A Governing State Land', *Colombo Telegraph*, 9th October 2013.

⁵⁸ Provincial Councils Act: Section 31.

⁵⁹ Ibid: Proviso to Section 11.

every Provincial Council for the expression of its views before it is placed in the order paper of Parliament. The question arose during the determination of the constitutionality of the Divineguma Bill as to whether, due to Article 35, the Court was precluded from examining if the President had failed to refer the bill to all Provincial Councils prior to it being placed on the order paper of Parliament.⁶⁰ The Supreme Court stated that,

“It has to be born in mind that the matter that has to be determined arises out of legislative process based on the constitutional jurisdiction and not out of an executive act... The Supreme Court has the sole and exclusive jurisdiction to inquire into or pronounce upon the Constitutionality of a bill and its procedural compliance before it's placed on the order paper of Parliament.”

The determination of the Supreme Court provided a purposive interpretation to the provisions of the Constitution, specifically to those provisions introduced by the Thirteenth Amendment. However, in the subsequent determination of the Supreme Court,⁶¹ the Court for the first time opined that it did not have jurisdiction to examine what the Court in the Divineguma determination described as “procedural compliance before it's (a bill is) placed on the order paper of Parliament”.⁶² In light of these conflicting opinions of

⁶⁰ *Chamara Madduma Kaluge and others v. The Attorney General* SC. SD. 4 – 14/ 2012

⁶¹ *The Centre for Policy Alternatives v. The Attorney General* SC. SD. 17/2013

⁶² In this determination the Supreme Court opined that in terms of Section 3 of Parliament (Powers and Privileges) Act which is incorporated into Article 67 of the constitution, the placement of the bill on the Order Paper was part of parliamentary proceedings and that the Supreme Court is denuded of jurisdiction to impeach proceedings in Parliament. The court further stated that the petition is misconceived in law and was in contravention of the jurisdiction conferred on the Supreme Court by proviso (a) to Article 120 read with Article 124 of the constitution.

the Supreme Court, it is unclear whether the President's obligations in terms of Article 154 G (3) are enforceable by the Court.

In terms of the Governor, Article 154 F (2) operates as an ouster clause which provides that any question on whether the Governor is by or under the constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question in any court. Furthermore it stated that the exercise of the Governor's discretion shall be on the President's directions. On the face of it this provision seems ridiculous as it supposes 'unlimited discretion' vests with the Governor.

Welikala responds to the ouster in terms of Article 154 F (2) as follows;

“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.”⁶³

⁶³ See Welikala (2011): p.53.

This is descriptive of the approach adopted by several judgments of the Supreme Court and Court of Appeal. On several occasions where the tension between the Governor and the Board of has led to litigation the court has taken great pains to give a purposive approach the constitution, which promotes the provisions of devolution and interprets narrowly the provisions of Article 154 F (2).⁶⁴

The broader point to note in relation to this statutory framework, however, is that the cumulative results of the provisions of the Thirteenth Amendment and 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 representatives in the form of the Board of Ministers even in matters of day-to-day administration.

Whilst creative judicial interpretation has attempted to promote the purpose of the Thirteenth Amendment (i.e. devolution of power), as has been seen, there has not been a coherent development of this jurisprudence. Even when there has been a line of ‘devolution friendly’ determinations, the flaws in the statutory structure lends itself to a judge, who so desires, to turn back decades of jurisprudence.

Conclusion

As has been reiterated several times, the President both directly and through his agent the Governor wields extensive power over the Provincial Council system. The

⁶⁴ *Bandara v. Premachandra* (1994) 1 SLR 301; *Maithripala Senanayake v. Mahindasoma and Others* (1998) 2 SLR 333; *Premachandra v. Major Montague Jayawickrema and another* (1994) 2 SLR 90; *Vasudeva Nanayakkara v Choksy & Others* (2008) 1 SLR 134; *In re the Bill titled ‘Land Ownership’* SC SD. No. 26/2003 - 36/2003; *Chamara Madduma Kaluge and others v. The Attorney General* SC. SD. 4 – 14/ 2012.

nature and extent of power so exercised by the executive president undermines the limited devolution of power afforded by the Thirteenth Amendment.

The main problem in this regard is the provisions of the Provincial Councils Act, which allow the Governor to infiltrate and control the day-to-day operation of the Provincial Council. However, it should be noted that peculiar characteristics – both legal and political – of the executive presidency as it exists, also contribute to the undermining of the Thirteenth Amendment. Foremost among these is the legal immunity conferred upon the President in terms of Article 35 of the constitution. Whilst there is nothing to suggest that there is widespread political support for the Thirteenth Amendment, the immunity so conferred on the President has facilitated successive Presidents since 1987-88 to not wilfully implement parts of the Thirteenth Amendment. The absurdity of the proposition that a creature of the constitution, could effectively suspend parts of the very same constitution that gives it legitimacy, is captured by the following statement:

“How on earth could parts of the 13th Amendment to the Constitution, part of the Supreme Law of the country, NOT be implemented for over 20 years? What does this say about the Supremacy of the constitution and the Rule of Law in Sri Lanka? *Indeed the fact that there was no legal remedy available to the ordinary citizen or a person committed to devolution of power to demand such implementation makes the situation even more reprehensible.* Constitutions that permit non-implementation of its provisions and do not provide for an appropriate legal remedy in such situations, are flawed constitutions. *Constitutions cannot rely on political will or the goodwill of the people in power for success.* Indeed the basis of Constitutionalism is suspicion and scepticism

about those who wield power.”⁶⁵ (emphasis added)

The executive presidential system that exists in Sri Lanka promotes the notion of unfettered power and actively undermines the notion of constitutional governance. Moreover, the executive presidency promotes the centralisation of power which is contrary to the very purpose of the Thirteenth Amendment which is devolution of power.⁶⁶ In such a constitutional order, which is overwhelmingly stacked in favour of the executive president, it is no surprise that the Thirteenth Amendment will continue to be undermined.

⁶⁵ R Edrisinha, ‘*The APRC Process: From Hope to Despair*’, *Groundviews*, available at <http://groundviews.org/2008/02/03/the-aprc-process-from-hope-to-despair/>

⁶⁶ See *Madduma bandara v. Assistant Commissioner Agrarian Services* (2003) 2 SLR 80. At p.83 the Court states that “The 13th Amendment to the Constitution, which came into effect in November 1987, was chiefly introduced for the purpose of devolving power from the Central Government to the Provincial Councils.” See also *Town and Country Planning (Amendment)* SC. SD. No.03/2011.