

A POLICY BRIEF

DEVOLUTION IN THE NORTHERN PROVINCE:
SEPTEMBER 2013 – FEBRUARY 2015

LUWIE GANESHATHASAN & MICHAEL MENDIS

CENTRE FOR POLICY ALTERNATIVES
MARCH 2015



CENTRE FOR POLICY ALTERNATIVES
විකල්ප ප්‍රතිපත්ති කේන්ද්‍රය
மாற்றுக் கொள்கைகளுக்கான நிலையம்

The Centre for Policy Alternatives (CPA) is an independent, non-partisan organization that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

Address : 24/2 28th Lane, off Flower Road, Colombo 7, Sri Lanka
Telephone : +94 (11) 2565304/5/6
Fax : +94 (11) 4714460
Web : www.cpalanka.org
Facebook : www.facebook.com/cpasl
Twitter : www.twitter.com/cpasl | @cpasl
Email : info@cpalanka.org

Activity supported by the
Canada Fund for Local Initiatives
Activité réalisée avec l'appui du
Fonds canadien d'initiatives locales

Canada 

Acknowledgements

This policy brief is based on desk and field research conducted by CPA from November 2014 to February 2015. The principle authors of the present policy brief are Luwie Ganeshathasan and Michael Mendis. The authors are grateful to Shehara Athukorala, Thyagi Ruwanpathirana and Subhashini Samaraarachchi for assisting with the research and compilation of the brief. The authors also wish to thank Rohan Edrisinha for his suggestions on the substance and form of the final report. To Mirak Raheem and Dr. P. Saravanamuttu who provided comments on previous drafts. Special thanks to Dr. Asanga Welikala, whose support in the project formulation stage was invaluable.

CPA would like to thank the Canadian Department for Foreign Affairs, Trade and Development (DFATD), which funded this project through the Canada Fund for Local Initiatives. The views expressed in this report are those of the authors and do not reflect the views of the DFATD.

The research and policy brief would not have been possible if not for the support and insights provided by numerous individuals. CPA is deeply indebted to all these individuals, including Justice C.V. Wigneswaran, Chief Minister, Northern Provincial Council (NPC); C.V. Kandiah Sivagnanam Chairman, NPC; Thambirasa Kurukularasa, Minister, NPC; and Aruppillai Sinnathurai Thavarajah, Opposition Leader, NPC; Mr. S. Rangarajah former Chief Secretary to the North Eastern Provincial Council; Mr. Asoka Gunawardena Chairman, Governing Council, MARGA Institute, as well as Senior Officers of the Finance Commission.

Table of Contents

| | |
|---|-----------|
| Table of Contents | 2 |
| 1. Introduction | 3 |
| 1.1. Background: Pre-Elections, NPC..... | 4 |
| 1.2. A Brief Overview of the Governor’s Office..... | 5 |
| 2. Rhetoric, Realpolitik, and Power Dynamics in the NPC | 7 |
| 2.1. Background: Pre-Election, Post-Bifurcation..... | 7 |
| 2.2. Background: NPC Elections, September 2013..... | 8 |
| 2.3. Rhetoric Obstructive to Devolution: Provincial Politicians..... | 9 |
| 2.4. Rhetoric Obstructive to Devolution: Central Politicians..... | 11 |
| 2.5. Central Administrative Practices Obstructive to Devolution..... | 13 |
| 2.6. Conclusion..... | 15 |
| 3. The Provincial Public Administration | 16 |
| 3.1. Background..... | 16 |
| 3.2. The Administrative Structure in the Northern Province..... | 17 |
| 3.3. Institutional Weaknesses within the Provincial Council..... | 17 |
| 3.4. Centre-Province Conflicts in Public Administration..... | 19 |
| 3.5. The Culture of Centralisation..... | 22 |
| 3.6. The Role of the Governor in relation to the Provincial Public Service..... | 23 |
| 3.7. The Chief Secretary..... | 26 |
| 4. The Fiscal and Financial Framework | 29 |
| 4.1. Powers and Capacity to Raise Revenues within the Province..... | 29 |
| 4.2. Fiscal Equalisation: the Work of the Finance Commission with the NPC..... | 32 |
| 4.3. Central Control of Provincial Finance..... | 39 |
| 4.4. Conclusion..... | 44 |
| 5. Judicial Pronouncements relating to the Northern Provincial Council | 45 |
| 5.1. In re the Twenty First Amendment Bill..... | 45 |
| 5.2. The Superintendent, Stafford Estate v. Solaimuthu Rasu..... | 46 |
| 5.3. The Chief Secretary’s Fundamental Rights Application..... | 48 |
| 5.4. Conclusion..... | 49 |
| 6. Conclusion | 51 |

1. Introduction

Though the Thirteenth Amendment is intended as the solution to the “national question”, that of accommodating minority ethnicities’ autonomy within a pluralist Sri Lankan state, it was those very communities who were deprived longest of the recourse to its provisions. The Eastern Province elected its first Provincial Council after eighteen years of direct central rule. The Northern Province was not as fortunate, forced to wait five years longer than the East to test finally, in September 2013, the mechanisms of the provincial council system that, by its original design, were to settle their problems of majoritarian marginalisation and discrimination. That the election came after a four-year delay since the end of the armed struggle only added insult to injury.

From the statements by the TULF dismissing it in the late Eighties, to those calling on the TNA to boycott the Eastern Provincial Council elections in 2008, a majority of the rhetorical pronouncements on the Thirteenth Amendment are connected by the underlying theme that it does not meet the aspirations of the Tamil people living in Sri Lanka. By contrast, the argument that the Thirteenth Amendment gives too much power to Provincial Councils – particularly in relation to land and police powers, and the merger of the provinces – and is, thus, a stepping stone for secession has been articulated in the South for decades in order to justify renegeing on the Amendment’s promises.

At the root of this stark divergence of opinion lay the reality that there is a fundamental disagreement about the nature of the Sri Lankan state (how it was and how it should be), between different ethnic communities. It has to be acknowledged that this divide colours the manner in which different groups will perceive certain realities relating to devolution of power, and that this divide cannot be easily bridged. However, part of the problem has also been the lack of an understanding of how much or how little autonomy the Thirteenth Amendment actually allows, even when stretched to its limits. Accordingly, this policy brief attempts to provide a commentary on the Northern Provincial Council, contextualising the theoretical foundations of devolution with the actual experiences of the Council during its first year and half of existence.

The study limits itself to this period, spanning September 2013 to February 2015, in terms of fact-finding. However, commentary on the broader political issues that undergird those experiences, of necessity, reached beyond that period. Furthermore, the shifts in the ground situation of the Northern Province after the change of regime in January 2015, whilst important and worthy of analysis, were generally avoided in this publication for two main reasons: firstly, officials, both old and new, are in the process of acclimatising themselves to the changing political environment. Secondly, there were practical limitations of time.

The rest of the policy brief is separated into five chapters: an analysis of the impact of political rhetoric on devolution; the experiences of the provincial public service; issues relating to provincial finance and fiscal devolution; judicial pronouncements relating to devolution that affected the NPC; and, finally, the conclusion, with the recommendations arising therefrom.

In terms of the legal and constitutional background of the Thirteenth Amendment, we note the abundance of literature available on the subject of devolution in Sri Lanka, including a number of publications by CPA, that focus on the theoretical aspects of the Sri Lankan system in great detail. Accordingly, most legal provisions are recapitulated here only to the extent they are necessary and relevant to the understanding of the unique, practical experiences of the Council

and related institutions. The same is true of the recommendations found in those publications.

A general overview of two aspects not directly related to the Northern Provincial Council as it existed during the period under review is necessary to contextualise the content that follows in the successive chapters. These are, firstly, an overview of the run-up to the NPC elections in September 2013 and, secondly, an overview of the powers of the Governor, whose presence and powers were the most prominent, in comparison with all other institutions of the Northern Provincial Council. However, it must be noted that, where possible, the discussion of the features of the Governor's powers were incorporated into the larger analysis taking place in each chapter, at its own level. In that sense, the overview below restricts itself to the features not discussed elsewhere in the brief.

1.1. Background: Pre-Elections, NPC

Until their bifurcation in 2007, the Northern and Eastern Provinces were jointly administered through the North-East Provincial Council (NEPC) set up pursuant to the merger of those provinces in 1988.¹ The NEPC was administered under one Governor, one Provincial Council, and one provincial public service. The election for the North-East Provincial Council was conducted on the 19 November 1988, after which The Eelam People's Revolutionary Liberation Front (EPRLF) and the Eelam National Democratic Liberation Front (ENDLF) formed a coalition "Provincial Government".² However, in response to a resolution of the Council widely considered to be an attempt at a "unilateral declaration of independence" (moved in the NEPC on 01 March 1990), the Government passed the Provincial Councils (Amendment) Act, No. 28 of 1990, which had the effect of dissolving the North-East Provincial Council in July 1990.³

Thus, from July 1990, the administration of the North-East Provincial Council was, in the absence of an elected Provincial Council, under the Governor, and continued to be so, until October 2006, when the Supreme Court declared null and void the merger of the two provinces⁴. The judgment led to an almost immediate process of bifurcation of the North-East Provincial Council, with the two provinces (Northern and Eastern) separating their operations as the Northern Provincial Council and the Eastern Provincial Council, respectively.⁵ As part of the bifurcation process, the assets of the NEPC as well as its public service officers were divided between the two Provincial Councils. According to the then Chief Secretary of the NEPC, this redistribution was carried out hastily in a short period of time and, therefore, the apportioning of staff officers between the two new provincial administrations was done without a rational methodology.⁶ The complications arising from that lapse still persist to date.⁷

¹ Proclamation of President J.R. Jayawardena 2&8 September 1988.

² Ketheshwaran Loganathan, *Sri Lanka: Lost Opportunities*, p.142.

³ Ketheshwaran Loganathan, *Sri Lanka: Lost Opportunities*, p.160.

⁴ *Wijesekera v. Attorney General* (2007) 1 SLR 38; S.C (FR) Application No. 243 - 245/06.

⁵ See Asanga Welikala, 'Devolution within the Unitary State' in *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2010: CPA): p.76p 21

⁶ Interview with former Chief Secretary S. Rangarajah, 17 December 2014, in Jaffna.

⁷ Many of the staff of the North-East Provincial Council was from the Eastern Province. During the bifurcation, many of the public servants who lived and had family ties in the Eastern Province were forced to move to Jaffna.

While elections for the Eastern Provincial Council were held in May 2008⁸, the Northern Provincial Council continued to be administered solely by its Governor⁹ until September 2013, when the Northern Provincial Council elections were finally held, predominantly due to the significant amount of pressure on the Central Government to implement the Thirteenth Amendment in the Northern Province, in the context of the situation in Geneva as well as the Commonwealth Heads of Government Meeting that was to be held in November of that year.

1.2. A Brief Overview of the Governor's Office

The institution of the Governor is established under Article 154B(1), and is appointed by the President for a term of five years. Since there is no term limit attached to the office, the Governor's term may also be renewed by the President, at the expiration of each five-year period. Similarly, the Governor remains in office at the pleasure of the President. While the Provincial Council does not hold a corresponding disciplinary power over the Governor, it may, on the basis of one or more of the predefined grounds in Article 154b(4)(a), present to the President an address advising his removal, provided the resolution approving such an address to the President is passed by a two-thirds majority in the Provincial Council. However, in order for such a resolution to be entertained by the Chairman of the Council, the notice of the resolution must be signed by at least one half of the members.¹⁰ As Welikala notes, the cumulative effect of these provisions is that they "demand the total loyalty of the Governor to the President"¹¹.

Under Articles 154C, the Governor is charged with the executive powers that extend from the statute-making powers devolved to the Provincial Council. Further, such executive powers are to be exercised by the Governor, either directly, or through the Board of Ministers, or through officers subordinate to him, provided such exercise is consistent with Article 154F. Article 154F, in relevant part, provides that the Governor shall act in accordance with the advice of the Board of Ministers, when exercising his functions, "except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion".¹²

However, in the event of any dispute on whether the Governor may exercise his functions in his discretion by or under the Constitution, the decision of the Governor, also made in his discretion, is final and, at least textually, immune from judicial review. Be these as they may, the Governor's discretions are to be exercised on the directions of the President.

The Governor's discretionary powers are particularly relevant in relation to three areas: in the assent given to statutes passed by the Provincial Council; with regard to the special procedures

⁸ Asanga Welikala, 'Devolution within the Unitary State' in *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2010: CPA): p. 22

⁹ See Keynote Address of Hon. Governor, Northern Province Major General GA Chandrasiri, the Second Session of First Council Assembly of the Northern Provincial Council, 11th November 2013, available at http://www.np.gov.lk/pdf/hg_keynote_eng.pdf

¹⁰ Articles 154B(4)(a) and (b), the Sri Lankan Constitution.

¹¹ Asanga Welikala, 'Devolution within the Unitary State' in *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2010: CPA): p. 49.

¹² Article 154F(1), the Sri Lankan Constitution.

relating to financial statutes; and the control of the provincial public service. While the first of these areas is discussed briefly below, the latter themes are dealt with in relevant detail in the subsequent chapters of this publication.

The Governor's assent to provincial statutes is a desideratum for the statute's validity. However, such assent is purely within his discretion. Upon receiving a statute passed by the Council for his consideration, the Governor may give assent, withhold assent, return the statute for the Council's reconsideration with or without recommendations for amendment, or reserve the statute for reference by the President to the Supreme Court. With regard to the latter option, it must be noted that the President cannot be compelled to refer the draft statute to the Supreme Court, under his immunity from suit, per Article 35(1). Accordingly, such referrals can be used as a means of stalling the enactment of a provincial statute.

2. Rhetoric, Realpolitik, and Power Dynamics in the NPC

The assembly of the first ever Provincial Council in the North brought with it a significant shift to the paradigms of political power of the region. Not only is this shift a product of some of the inherent flaws of the devolutionary setup in Sri Lanka, it is also the inevitable corollary of the particular political ethos in our country that is dominated by both ethnic power struggles and electoral power struggles (even though the two are not always discrete from each other). The former consists of the struggles of Tamil nationalism against Sinhala-Buddhist nationalism and, by extension, the State. The latter consists of the respective political parties and their individual members, whose ultimate goal is to gain power and then to retain it.

The experiences of the Northern Provincial Council during its first year and half of existence, when contextualised in this way, provide policymakers and government officials with a set of lessons that do not bear categorisation elsewhere in this publication, even if they undoubtedly have a bearing on the matters discussed there. Essentially, we analyse here the effect of interest-driven political impulses on the feasibility of devolution under the extant framework of the Thirteenth Amendment. The guiding presumption underlying the analysis is that, all other factors (especially those pertaining to legal structures) held constant, devolution still requires a minimum degree of commitment on the part of its patrons to ensure feasibility. Furthermore, this commitment must not only transform the administrative affairs of each institution of the devolutionary framework, it must also inform the deployment of political rhetoric in the public sphere.

In analysing the rhetoric heard from both sides of the political divide, this chapter is separated into three main themes: context and background; the rhetoric of provincial politicians; the rhetoric of central politicians. In following the analysis, it must be borne in mind that the discussion does not attempt, neither chronologically nor exhaustively, to narrate key events during the NPC's time in power. Instead, certain examples are used to contextualise the primary argument made in the chapter: that the rhetoric and public behaviour of the patrons of devolution has an impact on the feasibility of the present framework.

2.1. Background: Pre-Election, Post-Bifurcation

As former Northern Provincial Council Chief Secretary S. Rangarajah explained, the paradigm shift seen at the commencement of the first NPC was preceded by another, far more understated shift, taking place in 2006. Before that year, at the level of administration, devolution-unfriendliness was a veiled phenomenon: successive governments had at least to pretend that they were pro-devolution. President Mahinda Rajapaksa's stated commitment to the preservation of the unitary state, with the surge in Sinhala nationalist rhetoric to drum up support for the war effort, necessitated that the disregard to devolutionary imperatives was far more overt. The trend of reversal began with the bifurcation of the North-East Province and grew more prominent, especially in the East, where an Eastern Provincial Council was elected soon after the demerger. Its experiences were dominated by the overbearing control of the Governor upon the day-to-day functions of the Council, particularly in terms of his obstruction

of the Board of Ministers' attempts to exercise any meaningful power.¹³ In this regard, it is particularly significant that the Eastern Provincial Council was run by the political coalition that was in power at the Centre, which fact ought to have engendered a better sense of trust between the Centre and the EPC. On the other hand, in the de-merged North, provincial administration continued to be carried out from the Centre, vicariously through the offices of the Governor and the Chief Secretary. Post-bifurcation, a number of things were re-centralised, beginning from minor matters such as provincial cadre approval, to extend to more significant issues such as project implementation. Bilateral projects with the Asian Development Bank and the World Bank, where the provincial administration had appointed project directors, undertaken project planning etc., were taken over by the centre by simple administrative rulings, and the provincial officials were no longer allowed any space for involvement.¹⁴ This trend persisted post-war, in the continued absence of an elected Council, with a stream of centrally appointed Governors and Chief Secretaries acting as agents of the central government, with no requirement on their part to balance central interests with those of the province (due to the lack of elected provincial representatives).

2.2. Background: NPC Elections, September 2013

The Central Government was clearly reluctant to conduct elections for the Northern Provincial Council, with key figures in the Government openly stating that elections should not be held or, if they are, that they should be preceded by the revocation of police and land powers by the Centre.¹⁵ Despite contesting for the Eastern Provincial Council a year earlier, the decision to contest for the Northern Provincial Council would have been a difficult one for the Tamil National Alliance – since Tamil nationalist parties have always condemned the North-East demerger, contesting in the Northern Provincial Council elections could have been seen as an endorsement of the bifurcation.

These facts, among others, constituted the context in which the NPC elections took place in September 2013. It is perhaps unsurprising that the elections saw not only a clash of rhetoric between the parties that vied for provincial power in the Council, but also between the proponents of devolution and those already in power at the Centre. In a very fundamental way, it is this competition, vitriolic at best and disruptive at worst, that continued over a year after the first Council's commencement. Attempts from both sides to delegitimise the other ensured that

¹³ Asanga Welikala, 'Devolution within the Unitary State' in *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2010: CPA): pp.59-64; A.N. Siddic Kariapper (Interview with MHM Hisbullah in Tamil), 'The Governor intervenes to the detriment of the functioning of the Eastern Provincial Council' *Virakesari*, 12 July 2009; 'Samakala Arasiyal', p. 5 as cited by Kumaravadivel Guruparan, 'The Irrelevancy of the 13th Amendment in Finding a Solution to the National Question: A Critical Note on Sri Lanka's Post-War Constitutional Discourse' *Junior Bar Law Review*, 2013, at p. 37

¹⁴ Interview with former Chief Secretary S. Rangarajah, 17 December 2014, in Jaffna.

¹⁵ Anthony David, 'Remove police and land powers before holding northern elections: Weerawansa' *The Sunday Times*, 12 May 2013, at <http://www.sundaytimes.lk/130512/news/remove-police-and-land-powers-before-holding-northern-elections-weerawansa-44172.html> (last accessed 07 March 2014); Shamindra Ferdinando, 'Gota opposes NPC polls' *The Island*, 23 May 2013, at http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=79696 (last accessed 07 March 2014); P.K. Balachandran, 'Lanka can't toe India line on 13th Amendment: Gotabaya' *The New Indian Express*, 27 May 2013, at <http://www.newindianexpress.com/world/Lanka-cant-toe-India-line-on-13th-Amendment-Gotabaya/2013/05/27/article1607688.ece> (last accessed 07 March 2014).

centre-periphery relations would soon frost, and render the two sides irreconcilable at a number of junctures. Of course, though these hostilities arguably transcend party lines and tier boundaries in a wider sense, a fuller discussion of the phenomenon is beyond the scope of this chapter. Indeed, the following analysis confines itself to issues immediately relevant to the experiences of the Northern Provincial Council, since the time of its inception.

2.3. Rhetoric Obstructive to Devolution: Provincial Politicians

2.3.1. The Removal of the Governor

The tussle to have replaced the then-incumbent Governor Maj. Gen. (Retd.) G.A. Chandrasiri is a demonstrative example of the conflict between the centre and the periphery. Governor Chandrasiri, before his appointment by President Rajapaksa as Governor in July 2009, served as the Chief Commanding Officer in Jaffna from 2006 until the end of the war. At the end of the war, he was also appointed the Competent Authority for the Internally Displaced Persons in the North and was, therefore, responsible for Manik Farm Relief Village, the largest of the IDP camps that attracted the ire of the Tamil National Alliance, who described them as “detention camps against all civilised and international norms” in their provincial elections manifesto¹⁶. In those capacities, the former Governor is implicated in the numerous human rights violations alleged to have taken place in the North.¹⁷

Although the manifesto does not explicitly mention a promise of his removal, the replacement of the Governor with a civilian official was a key and integral element of the TNA agenda from the outset.¹⁸ However, notwithstanding the Alliance’s landslide victory at the elections, and despite assurances from the Centre to the contrary after the election, the Governor continued his incumbency until President Rajapaksa himself was voted out of office in January 2015.

The hostile campaign against the Governor, in addition to being unsuccessful, also had its part to play in the cool relations that evolved between the Governor and Chief Secretary on the one side, and the Chief Minister and the Board of Ministers on the other. The campaigners did not either foresee the possible failure of their campaign (even if it ought to have been predictable by most estimates, given the nature of the Governor’s office and its security under the President’s influence), or they chose to prioritise the popularity of their stance during the election period, over and above the adverse effects it would have on centre-periphery relations, in the event it failed.

¹⁶ Tamil National Alliance, ‘Northern Provincial Council Election Statement’, at http://tnapolitics.org/?page_id=1845 (last accessed: 22 February 2015)

¹⁷ ‘Field Report: Jaffna and Kilinochchi Districts’ *Centre for Policy Alternatives*, 06 May 2013, at <http://www.cpalanka.org/field-report-jaffna-and-killinochchi-districts/> (last accessed 07 March 2015); ‘Country Summary: Sri Lanka’ *Human Rights Watch*, January 2010, at http://www.hrw.org/sites/default/files/related_material/Sri%20Lanka.pdf (last accessed 28 February 2015); ‘Sri Lanka’s Human Rights Crisis’ *International Crisis Group*, 14 June 2007, at <http://bit.ly/1EKUDJP> (last accessed 07 March 2015).

¹⁸ See Chris Kamalendran, ‘TNA wants President in Jaffna for CM oaths’ *The Sunday Times*, 29 September 2013, at <http://www.sundaytimes.lk/130929/news/tna-wants-president-in-jaffna-for-cm-oaths-64359.html> (last accessed 22 February 2015); K.T. Rajasingham, ‘Beginning of TNA’s Confrontation – Swearing before whom?’ *Asian Tribune*, 29 September 2013, at <http://www.asiantribune.com/node/64783> (last accessed 22 February 2015); S. Selvakumar, ‘Opposition politicians should wait for gazette proclamation’ *The Sunday Observer*, 16 June 2013, at <http://www.sundayobserver.lk/2013/06/16/pol01.asp> (last accessed 22 February 2015)

On the other hand, considering the context in which the NPC came into power, and the overwhelming majority by which the TNA won its mandate, the centre showed characteristic insensitivity in not only refusing to replace the Governor, but also reappointing him in July 2014, upon expiration of his first term, for a further five years. This insensitivity is further compounded by the fact that, in retaining him in office, the centre chose to disregard the Northern electors' approval of the idea that the war-time Chief Commanding Officer of Jaffna, and the Competent Authority for the IDPs in the North, was patently unsuitable to the office that oversaw the functions of their elected representatives.

2.3.2. The Chief Minister's Oaths-taking

A purely rhetorical clash over the Chief Minister's taking of oaths seemed to elicit the same effect. While the Constitution does not specify before whom newly elected Chief Ministers must take their oaths, it is the general practice that it is taken before the Governor unless the elected Chief Minister and the President are of the same political party. As is well known, in the present case, the President and the Chief Minister were from oppositional parties; however, the TNA's election stance against the incumbent Governor had, by then, saturated to the point that taking the oath before him would have been a bitter concession of defeat.¹⁹ At the same time, the Governor was but a mere representative of the "bigger enemy" in the President: the alternative of taking oaths before the President was not, therefore, a solution. The compromise eventually struck among the Northern disputants was that, while the rest of the Board of Ministers would take oaths before the Chief Minister, he himself would take oaths before the President, in Jaffna, as opposed to the usual practice of calling on Temple Trees. After days of standoff in Colombo, owing to the Centre's dissatisfaction with this compromise, it was announced, subsequent to a special meeting between TNA Party Leader R. Sampanthan and President Rajapaksa, that the Chief Minister would be taking oaths before the President, at Temple Trees.²⁰ In a statement after the oaths-taking, Chief Minister C.V. Wigneswaran said, "It is the need of the hour that we remove the misunderstandings and doubts that have crept into the minds of various communities. It is as a part of such an exercise that we decided that I take oaths before the President of this Country. We believe our decision would convey to our brethren our desire to settle our differences within a united Sri Lanka."²¹

It is submitted that, as in the previous example of the campaign against the Governor, this disagreement also contributed to the inimical relations between the Centre and the Province. However, unlike before, where the removal of the Governor constituted a substantial political interest of the people, even if practically counterproductive, this latter conflict was as facile as it was unnecessary, especially to the extent its pursuit was a failure to prioritise centre-province relations (in the interests of devolution feasibility) over mere symbolic victories.

¹⁹ K.T. Rajasingham, 'Beginning of TNA's Confrontation – Swearing before whom?' *Asian Tribune*, 29 September 2013, at <http://www.asiantribune.com/node/64783> (last accessed 22 February 2015)

²⁰ K.T. Rajasingham, 'Sampanthan meets Sri Lanka President: Finalize Swearing of Wigneswaran Before President Rajapaksa' *Asian Tribune*, 04 October 2013, at <http://www.asiantribune.com/node/64824> (la

²¹ 'Full Text of Statement issued by the Chief Minister, Northern Provincial Council, after taking Oaths of Office' *dbsjeyaraj.com*, 09 October 2013, at <http://dbsjeyaraj.com/dbsj/archives/26313> (last accessed 25 February 2015)

2.3.3. CBG Allocation to the Governor

The fierce opposition, during the Council's budget debates in 2014, to the Governor's allocation from the NPC's Criteria-Based Grant reflected the ethos dominating centre-periphery relations. Firstly, the incident points to, as the Chairman pointed out²², the strategic disadvantages faced by the Council due to the lack of cooperation between the Council and the Chief Secretary's Cluster. The impugned allocation was contrary to regulations: the Finance Commission Guidelines pertaining to the discretionary use of the Criteria-Based Grant²³ (the grant from which the Governor's allocation was to be made) limited its allocations to elected representatives. However, the allocation was included by the Chief Secretary and Deputy Chief Secretaries of Finance and Planning, who are charged with the formulation of the budget estimates before their approval is sought in Council through vote. Accordingly, had the Chief Secretary cooperated with the Council at the stage of budget preparation, the inclusion of an illegitimate allocation (as well as the unproductive debate that it invariably gives rise to) could have been altogether avoided.

However, at the stage of debating the budget in the Council, revisions to the allocation were both inexpedient in terms of the approvals required by the Governor²⁴, and unproductive in terms of potentially affronting him over a relatively insignificant sum. However, according to the Chairman of the Council, the incentives of populist heroics, which included the appearance of antagonising the Governor's powers at every turn possible, ensured that certain members objected to it vigorously. The consequences of amending the draft statute, or further inconveniencing Council relations with the Governor seemed irrelevant. In this sense, the contention amounted to a test of the Councillors' priorities.

2.4. Rhetoric Obstructive to Devolution: Central Politicians

2.4.1. Falsified Aspersions on the NPC's Institutional Viability

As discussed in greater detail below in Chapter 4, the overarching principle of fiscal devolution is the idea that the powers devolved to a peripheral unit result in corresponding expenditure responsibilities. Outside theoretical fiscal devolution, this idea has a profoundly political aspect: the success of devolution inheres in the performance of each tier of government within the devolved structure. Thus, the distortion through subterfuge of the voting public's expectations of provincial output, in the absence of resources commensurate to such expectations, seriously undermines the system of devolution itself.

Members of the Government (such as former President Mahinda Rajapaksa, former Minister Douglas Devananda) and the Provincial Council's Leader of the Opposition S. Thavarajah were reported stating that the Northern Province was the recipient of the largest capital expenditure allocation from the central government. This was because, of all the capital expenditure allocations to provincial councils in the Appropriation Act, No. 36 of 2013, the sum of Rs. 5,831mn allocated to the Northern Provincial Council was the highest. In fact, former Minister

²² Interview with Chairman of the Council S.V.K. Sivagnanam, 19 December 2014, at the Assembly premises.

²³ Finance Commission Circular FC/PSDG&CBG/CIRCULAR/2011/1 (26 July 2011).

²⁴ See below, Section 4.3.1 of this publication.

Devananda is on record making such a statement in Parliament.²⁵

“This is how the Northern Provincial administration is run today. [Hon. Speaker], the Government has allocated Rs. 5,831 million for capital expenditure for the Northern Province for the year 2014, which is the highest out of all the provinces. But the financial progress report up to September 30th 2014 reveals that they have spent only 25.17 percent of this allocation. This is how they are running the provincial administration. *They are like the ‘dog in the manger’. They won’t do anything good for the people and they will not allow the others also to do [sic].*”²⁶

The NPC Leader of the Opposition S. Thavaraja was also associated with a similar statement.

“During Budget 2014 the government allocated Rs. 5831 million for the NPC as capital expenditure. This would be the highest allocation when compared with other provinces... When allocations are provided they must carry out development projects, ask for the money and pay it. Either the money may come from the NPC or the government may pay directly. So far, up to 30 September the progress of the Provincial Council has been 25.17%.”²⁷

Independent calculations, based on the NPC’s Financial Progress Report as at 30 September 2014, indicate that the above percentages are calculated against the total capital expenditure allocation, Rs. 5,831mn. Thus, the statements can only be made sense of if they are interpreted as holding the NPC responsible for the spending of that total allocation. However, as explained below in Section 4.3.4, the Council only had control over Rs. 1,876mn. The implication, therefore, that the low burn rate of the *total* capital expenditure allocation somehow suggested a failure on the part of the Council is either deliberately misleading or negligently ignorant. Moreover, the actual burn rates (calculated as percentages of the Rs. 1,876mn figure) still return correspondingly low results.²⁸ Thus, the same arguments quoted above could have been made by those politicians, albeit with a more accurate representation of the facts. However, that alternative would have included a concession that the NPC was not allocated, despite multiple claims to the contrary, the largest capital expenditure amount of all the provinces.

The fiscal limitations imposed on the NPC must be seen in light of the upper hand enjoyed by the centre, and abused by its ruling political parties. While repeatedly accusing the Council of not fully utilising a large sum of money, politicians at the centre controlled 68% of that very sum, barring provincial access to it, and utilising it themselves to compete electorally with the province by implementing various projects.²⁹ In every sense, the centre wilfully debilitated the province and reaped its political capital through subterfuge.

²⁵ ‘Speech Delivered by Douglas Devananda on 31.10.2014 in Parliament on the Budget Estimates for 2015’, *dbsjeyaraj.com*, 02 November 2014, at <http://dbsjeyaraj.com/dbsj/archives/34581> (last accessed 11 November 2014). Note that, while the original speech was made in Tamil, the English translation published on *dbsjeyaraj.com* was sourced as an official translation from the Media Unit of Douglas Devananda’s Ministry at that time.

²⁶ *ibid.*, ¶15.

²⁷ Mirudhula Thambiah, ‘Northern Chief Minister is Crying for more Powers and Money Without Utilizing what he already has’, *dbsjeyaraj.com*, 06 September 2014, at <http://dbsjeyaraj.com/dbsj/archives/34631> (last accessed 27 February 2015). Emphasis added.

²⁸ 22.27% at the end of August 2014; 28.18% at the end of September 2014.

²⁹ See further, below, Section 4.3.4.

2.5.-Central Administrative Practices Obstructive to Devolution

2.5.1. Non-Engagement as a Means of Subjugation

A curious aspect of the centre's approach with the Council was the continued silence on matters of contention. Consider some concerns raised by the Chief Minister in a public letter addressed to President Rajapaksa, dated 10 October 2014:

“On 2nd January 2014, Your Excellency very amiably undertook to do certain things beneficial to the smooth running of the NPC, which unfortunately did not materialise. I had sent a synopsis of what took place on the 2nd of January this year in a letter addressed to Your Excellency on 26th January 2014, though no response has been received in relation thereto. The NPC was made to believe that the Military Governor would be replaced and kept waiting till July only to be disappointed again. On 26 July 2014 I reminded Your Excellency of the duty and responsibility to take necessary action to follow through on matters discussed and agreed upon on the 2nd of January this year, particularly in view of the Chief Ministers' Meeting, which was then scheduled for late August 2014. In my communication, I raised three important matters which related directly to the effective conduct of the civilian administration in the Northern Province, namely, the change of Governor and Chief Secretary, transfer of Presidential Task Force programmes to the NPC and the importance of a Multilateral Needs' Assessment of NP ... for the sustainable reconstruction and development of Northern Province. Please find attached my communication for your kind reference. I also place on record that to date I have not had a response from Your Excellency in that regard.”³⁰

A similar approach was reported in terms of the Board of Ministers' orders to the provincial administration through the then Chief Secretary Ramesh Wijialudchumi. According to some Ministers, the Chief Secretary was in the practice of ignoring requests emanating from the Board if they were inconsistent with the views of the centre. By the same reports, she also instructed subordinate provincial officials to do the same. These obstructions, in addition to the President's stoic inaction, rendered the powers of the Board of Ministers (BOM) and, by extension, the NPC, completely hollow and illusory. However, the realities notwithstanding, politicians at the centre, including the President and the then Minister of Economic Development, lost no time in capitalising on the Council's inabilities from their political platforms.

For example, it was reported that “the President, while speaking at Kilinochchi, [...] said the Government had allocated money for a water supply scheme under which water was to be diverted from the South to the Iranamadu Tank and from there to Jaffna, but the TNA leaders had scuttled the project. ‘What can I do,’ he asked. He said not even 10 per cent of the funds allocated for the development of the North had been utilized by the TNA-run provincial administration and added that the TNA leaders like the proverbial dog in the manger neither

³⁰ Chief Minister's Letter, No. NPC/CM/01/3837/2014, dated 10 October 2014, to the President. Available at, <http://www.lankasrinews.com/view.php?22cMC402JOAce25mAda2ZYZAad3m5pec3OBz043Aln2236Ao3> (last accessed 5 March 2015).

carry out these projects nor do they allow the Government to do it.”³¹ Similarly, it was also reported of Minister Basil Rajapaksa as follows: “Meanwhile Economic Development Minister Basil Rajapaksa had said recently that the Northern Provincial Council (NPC) should work with existing powers before demanding further devolution. Speaking on the Northern Provincial Council’s role in development projects in the island’s former war zone, Basil Rajapaksa said the government’s development work in the north had slowed down because of little cooperation from provincial government...”³²

The invidious effect of this approach is that its silence renders untraceable the centre’s hostility. Consider the following statement by Governor Chandrasiri, while denying the rumoured “imbroglio” between him and the Chief Minister: “On the very first day, honourable Chief Minister and I both went there and declared open the Northern Provincial Council. Instead of taking his oath before me the Chief Minister said he would prefer to do so before President Mahinda Rajapaksa. So on October 7, 2013, the Chief Minister was sworn in before the President with I am [*sic*] at the side of the President. Now the Northern Provincial Council is functioning smoothly.”³³ The covertness of the centre’s hostilities, strategically hidden behind a façade of magnanimous cooperation, made the apportionment of blame to the Council rhetorically powerful, and the false characterisation of its officials as unproductive, complaining busybodies significantly easy.

2.5.2. The Governor’s Attempts to Eclipse the Council

In addition to the centre’s utilisation of the funds it purportedly allocated to the Provincial Council, the centre-appointed Governor was also seen carrying out, on his own initiative, certain initiatives that arguably promoted the central government. For instance, *news.lk*, the Government’s online news outlet at the time (and, often, one of its main propaganda channels), reported that the Governor “commenced a tri-lingual training centre *based on the concept of His Excellency the President*”³⁴. Examples of other such programmes include the organisation of the Governor’s Trophy Chess Championship 2014³⁵ and Kite Festival 2014³⁶. Although these programmes clearly come within the provenance of the provincial Ministry of Education, Cultural Affairs, Sports and Youth Affairs, its Minister was not involved in their design or

³¹ ‘Yal Devi, gold and title deeds for northern people’ *Daily Mirror*, 14 October 2014, at <http://www.dailymirror.lk/53684/editorial-yal-devi-gold-and-title-deeds-for-northern-people> (last accessed 17 November 2014).

³² ‘Northern Province Is Most Favored In Sri Lanka: NPC Opposition Leader’ *Asian Mirror*, 06 September 2014, at <http://www.asianmirror.lk/news/item/3263-northern-province-is-most-favored-in-sri-lanka-opposition-leader> (last accessed 27 February 2015).

³³ ‘Jaffna is reawakening to its former glory’ *news.lk*, 04 January 2014, at <http://www.news.lk/features/item/5682-jaffna-is-reawakening-to-its-former-glory> (last accessed 05 March 2015).

³⁴ *ibid.* Emphasis added.

³⁵ ‘Awarding ceremony of Governor’s Trophy Chess Championship 2014’, NPC Governor’s Secretariat, 26 April 2014, at http://www.np.gov.lk/index.php?option=com_content&view=article&id=2915:awarding-ceremony-of-governor-s-trophy-chess-championship-2014-24-april-2014&catid=8&Itemid=114 (last accessed 05 March 2015).

³⁶ ‘Kite Festival 2014 of Northern Province’ NPC Governor’s Secretariat, 23 June 2014, at http://www.np.gov.lk/index.php?option=com_content&view=article&id=2978:kite-festival-2014-of-northern-province-21-june-2014&catid=8:min-gs&Itemid=114 (last accessed 05 March 2015).

implementation in anyway.³⁷ The Governor was able to carry out these amongst other programmes, which amount to the exercise of “real” executive power, because of the financial and human resources at his disposal, the latter encompassing not only central and provincial public servants but also the security forces stationed in Jaffna.³⁸ It is submitted that, irrespective of the legal position of the Governor’s capacity to carry out such programmes, in the context of the Northern Provincial Council, these initiatives were insensitive to the imperatives of devolution feasibility, particularly to the extent they compounded the marginalisation and alienation of the elected representatives of the province. The Governor should, ideally, restrict himself to the oversight of the Provincial Council’s affairs or, at the maximum, in initiating programmes which go beyond that role, construct them in a manner that bridges the centre and the periphery, as opposed to driving them further apart.

2.6. Conclusion

As the examples above demonstrate, the feasibility of devolution in Sri Lanka is obstructed by deeply rooted flaws in the behaviours of the so-called patrons of devolution. However, the same examples also demonstrate that these flaws are nourished by the political realities dominant in the country. In this sense, the compartmentalisation of one from the other serves no coherent purpose – *except* to the extent that the isolation of the former provides a convenient starting point to solving what is undoubtedly a structural and systemic problem. This latter characterisation bears emphasis. It is an injustice to the nature of our national problem to dismiss it as a product of a behavioural flaw in our political collectives. Instead, we limit ourselves to the notion that the flaws in those who work devolution will invariably affect devolution.

Political parties fundamentally are collectives of individuals and, accordingly, we contend that political parties must work in internal unity, where opinions and behaviours are moderated and realigned in the interests of devolution feasibility. In the context of our particular brand of polarised, populist politics, the tendency on both sides of the divide to satisfy electorates in the short-term has dominated the need for long-term reconciliation. In this sense, devolution, which is both a prerequisite for, and a product of, realistic reconciliation, ought not to be abused by politicians, but treated with integrity – with always the larger imperatives in sight.

³⁷ Interview with provincial Minister of Education Thambirasa Kurukularasa, 13 February 2015, at Ministry premises.

³⁸ See “Non-Communicable Diseases Medical Camp for Members of Governor’s Senior Citizens’ Club”, np.gov.lk, 1 November 2014, available at http://www.np.gov.lk/index.php?option=com_content&view=article&id=3187:non-communicable-diseases-medical-camp-for-members-of-governor-s-senior-citizens-club-01-november-2014&catid=8:min-gs&Itemid=114; “Governor inaugurates the Maviddapuram ‘Raja Gopuram’ Renovation Work”, np.gov.lk, 17 July 2014, available at http://www.np.gov.lk/index.php?option=com_content&view=article&id=3027:governor-inaugurates-the-maviddapuram-raja-gopuram-renovation-work-17-july-2014&catid=8&Itemid=114

3. The Provincial Public Administration

The provincial public service is tasked with converting into executable actions, the policies formulated by the political leadership of the Provincial Council, particularly the Board of Ministers. Thus, a healthy hierarchical relationship between the provincial public service and the Board of Ministers, Properly defined lines of communication are essential for the administration of the province to be carried out in a manner that fulfils the needs of the people of the Province.

The present chapter will focus on the administrative system in the Northern Province, which together with finance, has been the most contentious aspect of the functioning of the Northern Provincial Council over the past year and half. The chapter will examine the strains within the provincial administrative system as well as its relationship with other levels of government, and the impact of these issues on its effective functioning.

3.1. Background

Despite being under the administration of the Governor (or perhaps because of it), the provincial administration in the North-East Provincial Council was allowed considerable autonomy in governing the province. In identifying priority areas, planning projects and project implementation, the provincial public service played an important role, with very little intervention from the central government. One example of this autonomy is the “twin agreement system”³⁹ relied on for donor-funded projects.⁴⁰ Under this system, responsibilities pertaining to loan repayment and implementation were dichotomised into two respective agreements: with regard to the first type of responsibility, the donor agency would sign an agreement with the central government, whereas the second type of responsibility was covered by a different agreement, entered into with the Provincial Council directly. This arrangement allowed the NEPC greater involvement in the planning and designing of such donor-funded projects, since those phases take place before the signing of the agreement, between the implementers and the donors. The North-East Irrigated Agriculture Project (NEIAP), funded by the World Bank, was one such project, where the “twin agreement system” was resorted to.⁴¹ The project, while identifying the Republic of Sri Lanka as the “Borrower of a Loan or Recipient of a Grant”, also identified the North-East Provincial Council as the “implementing agency”.⁴²

With the de-merger of the North-East Province, many of the functions previously carried out by the NEPC administration were recentralised, imposing requirements of approval from central governmental agencies for most facets of project implementation.⁴³ Even though many of the NEPC’s projects, pre-bifurcation, were to be carried out in both provinces, the separation of the

³⁹ Interview with former Chief Secretary S. Rangarajah, 17 December 2014, in Jaffna.

⁴⁰ Such projects include North East Community Restoration and Development Project (NECORD) funded by the Asian Development Bank, The North East Housing Reconstruction Program (NEHRP) funded by the World Bank.

⁴¹ ‘North East Irrigated Agriculture Project (NEIAP): *World Bank*, at <www.worldbank.org/projects/P058070/north-east-irrigated-agriculture-project?lang=en> last accessed 9 March 2015.

⁴² *ibid.*

⁴³ Interview with former Chief Secretary S. Rangarajah, 17 December 2014, in Jaffna.

provincial administration allowed for central governmental intervention in the guise of coordinating the projects in each province.

3.2. The Administrative Structure in the Northern Province

The administrative structure of the Northern Provincial Council, which is similar to the nearly uniform pattern seen in all Provincial Councils, consists of the following “administrative centres”.⁴⁴

1. Office of the Governor
2. Office of the Provincial Council
3. Office of the Chief Secretary
4. Office of the Provincial Public Service Commission
5. Office of the Chief Minister
6. Offices of the Provincial Ministers⁴⁵
7. Offices of Provincial Departments⁴⁶
8. Offices of the Provincial Statutory Authorities

Two main problems have been identified with regard to the provincial administration: firstly, in terms of its overall design and, secondly, its place in the governance hierarchy of the State.⁴⁷

3.3. Institutional Weaknesses within the Provincial Council

In relation to the overall design of the provincial administration, it should be remembered that, when the Provincial Council system was established, neither was there an organizational design, nor was there an attempt to understand, what resources would be needed by the new Councils to function.⁴⁸ Provincial Councils outside the Northern and Eastern Provinces functioned consistently from 1988, and many of the issues relating to the organizational structure and administration have been highlighted in the past.⁴⁹ Whilst many of these problems still persist,

⁴⁴ A.M. Navaratna-Bandara, ‘Provincial Council Public Administration’ in Lakshman Marasinghe & Jayampathy Wickramaratne (eds), *13th Amendment: Essays on Practice* (ICS 2010).

⁴⁵ The Northern Provincial Council consists of the following 5 ministries (including the portfolios held by the Chief Minister); Ministry of Agriculture, Livestock Development, Lands, Irrigation & Fisheries; Ministry of Education, Cultural Affairs & Sports; Ministry of Health & Indigenous Medicine; Ministry of Infrastructure Development & Reconstruction; Ministry of Local Government, Relief & Rehabilitation, Co-operative, Rural, Industries, Social services and Probation & Childcare.

⁴⁶ The Northern Provincial Council consist of the following 16 departments; Department of Agriculture, Department of Animal Production and Health, Department of Land Administration, Department of Irrigation, Department of Education, Department of Sports, Department of Health Services, Department of Indigenous Medicine, Department of Local Government, Department of Cooperative Development, Department of Industries, Department of Rural Development, Department of Road Development, Department of Social Services, Department of Buildings, Department of Probation & Childcare.

⁴⁷ A.M. Navaratna-Bandara, ‘Provincial Council Public Administration’ in Lakshman Marasinghe & Jayampathy Wickramaratne (eds), *13th Amendment: Essays on Practice* (ICS 2010): p.173.

⁴⁸ *ibid.*

⁴⁹ See *Strengthening the Provincial Council System* (Colombo, 2008: CPA): pp.44-59.

they are particularly acute in the Northern Province because of the political context in which it operates.⁵⁰ These administrative stresses will only continue manifest themselves more prominently, as the Northern Provincial Council's continues to assert itself, while pushing the Thirteenth Amendment's framework in the pursuit of greater devolution of power.

One such issue relates to the lack of an institutional mechanism to support the Council in drafting statutes. At present, the Chief Secretary's Secretariat of the Northern Province allows a cadre-allocation for a legal officer charged with "providing legal consultancy services [on] provincial matters"⁵¹. However, this office is limited by scope to advising the Chief Secretary's Secretariat on issues relating to contracts and lease agreements routinely entered into for, and on behalf of, the Provincial Council. Thus, the Council itself relies on the support of its members who are lawyers, the Chief Minister, the Chairman, and other senior lawyers and academics who volunteer their services to the NPC.⁵² This reliance on *ad hoc* assistance from various individuals leads to considerable delays and drastically reduces the number of statutes that are enacted.⁵³

Drafting provincial statutes, which is on one hand a specialised skill not part of general legal training, also requires on the other hand a unique understanding of the relevant constitutional provisions, judicial pronouncements, national policies, and other administrative arrangements.⁵⁴ Accordingly, any statute-drafting mechanism should have the capacity and resources to undertake research into such areas. In addition, for reasons of efficiency and accessibility, the mechanism must also be structured within the institution of the provincial assembly secretariat itself.

Recommendations

The Northern Provincial Council should establish a dedicated unit to support the Council in drafting Statutes. The unit would act as the provincial equivalent to legal draftsman's department in the central government. The unit should also include staff to assist the Board of Ministers on research for issues. The unit can be established by a Provincial Council Statute in terms of Section 17(2) of the Provincial Councils Act.⁵⁵ Employees of this unit should be insulated from political pressure and should not be allowed to engage in the political activities of any political party for a stipulated period

⁵⁰ See further Chapter 2.3 above.

⁵¹ Governor's Secretariat, 'Operational Information- Northern Provincial Council' (n.d.): p.22 <www.np.gov.lk/pdf/OperationalInformation.pdf> last accessed 9 March 2015; Also See 'Key functions of Chief Secretaries Secretariat' <www.np.gov.lk/index.php?option=com_content&view=article&id=2659&Itemid=160> last accessed 9 March 2015.

⁵² Interview with Justice Wigneshwaran, 18 December 2014, at the Chief Minister's residence; Interview with Chairman of the Council S.V.K. Sivagnanam, 19 December 2014, at the Assembly premises

⁵³ Interviews with several officials in the Northern Provincial Council indicated that there is considerable delay in the drafting process. Since beginning functioning in October 2013 until February 2015 the Northern Provincial Council had only passed 5 Statutes.

⁵⁴ See discussion in Finance Chapter relating to the challenges faced by the Northern Provincial Council in drafting the finance statute.

⁵⁵ In terms of Article 154Q(d) of the Constitution such a unit could be set up by an act of Parliament, however setting it up through a Statute is more advisable as it gives the Northern Provincial more control over the process which would allow them to design a unit which best meets their needs in a short period of time.

after leaving the service of this unit (a cooling off period).

The Central Government should provide technical and financial assistance to maintain this unit.

Bi-lateral donors and local civil society organizations provide financial and technical assistance for the initial setting up of this unit.

3.4. Centre-Province Conflicts in Public Administration

It has to be borne in mind that the provincial council system was a later addition to a pre-existing administrative structure divided between national and district levels. After the establishment of the provincial councils, the central government did not restructure its own administrative structure to accommodate the newly established tier. The result is an overlap in functions between the central government and Provincial Councils, which inevitably leads to central government institutions continuing to exercise influence in the provincial sphere.⁵⁶ In fact the central government continued to enact laws⁵⁷ that set up parallel structures within the provinces which gives it control over subjects that are within the competence of Provincial Councils. The most proximate and prominent example of this is the Divi Neguma Development Department.⁵⁸

The Divi Neguma Department, in its most recent phase will conduct programmes in subject areas, which ostensibly come within the competence of Provincial Councils, including Agriculture, Livestock and Fisheries, and Cottage Industries.⁵⁹ Under these programme areas, specific projects such as distributing seed packets of food crops during crop season, distributing chicks and bee boxes, setting up ponds to carryout ornamental fish breeding, setting up model home gardens are scheduled to take place.⁶⁰ In the past year and a half the Divi Neguma department has provided foreign employment opportunities, housing loan facilities for those who work in Middle East Countries⁶¹ and a special credit scheme with a concessionary re-

⁵⁶ A.M. Navaratna-Bandara, 'Provincial Council Public Administration' in Lakshman Marasinghe & Jayampathy Wickramaratne (eds), *13th Amendment: Essays on Practice* (ICS 2010): p.178

⁵⁷ Setting up Divisional Secretaries by the Transfer of Powers (Divisional Secretaries) Act, No. 58 of 1992, is the most prominently used example of how the Central government reinforced its power at the sub-provincial level.

⁵⁸ See 'Note on the Divi Neguma Bill' (CPA, January 2013) <www.cpalanka.org/wp-content/uploads/2013/02/Divineguma-Bill-Basic-Guide-updated-January-2013-E.pdf> last accessed 9 March 2015.

⁵⁹ The programmes will be conducted across Sri Lanka with special emphasis being on the Northern Province. The former Governor was a particularly involved in the activities of the Divi Neguma programme. See 'Governor planted tree to mark the launch of the sixth phase of the Divi Neguma National Programme' (NPC, 20 October 2014) <www.np.gov.lk/index.php?option=com_content&view=article&id=3166:governor-planted-tree-to-mark-the-launch-of-the-sixth-phase-of-the-divineguma-national-programme-20-october-2014&catid=8:min-gs&Itemid=114> last accessed 9 March 2015.

⁶⁰ *ibid.*

⁶¹ 'Press Conference held at Governor's Secretariat', (NPC, 11 September 2014) <http://np.gov.lk/index.php?option=com_content&view=article&id=3099:press-conference-held-at-governor-s-secretariat&catid=8&Itemid=114> last accessed 9 March 2015.

payment terms in the Northern Province.⁶²

Since agencies such as Divi Neguma have been entrusted functions that cut across the powers of the Provincial Councils, unless the personnel of the respective agencies agree to collaborate and co-ordinate activities, provincial administrative organisations would face severe difficulties in performing their functions. Because of central departments' ability to mobilise resources faster, by the time administrative agencies of the Provincial Council identify the needs of a community, plan a project, obtain funding from the central government, the former would have already provided the services planned by the province. In such instances, the provincial administration would have either to re-deploy resources elsewhere or, failing which, return them to the central government at the end of the financial year. This reinforces the perception that the Council is ineffective, placing an added stress on provincial departments, the planning sectors of which are already considered to be weak.⁶³

Recommendation

The Central Government should review laws, policies, and practices which undermine the control of Provincial Councils of subjects that are within the provincial list.⁶⁴

The central government is also at an advantage in being able to provide services directly through District Secretariats, Divisional Secretaries and Grama Niladhari officers. The District Secretary oversees all development activities in the district, including Government activities and, to some extent, non-governmental projects.⁶⁵ While Provincial Councils have no comparable mechanisms to speak of, interviews across the Northern provincial administration and officers of the District Secretariat indicate that there is very little interface between each other, outside the District Co-ordinating Committee Meetings.

The District Coordinating Committee (DCC) is an *ad hoc* committee set up to co-ordinate activities within the district.⁶⁶ The DCC is central as an advisory body to the districts. It is chaired by a Member of Parliament⁶⁷ appointed by the President with the District Secretary acting as secretary. It is the major decision-making body in the district, sanctioning all development projects and programmes.⁶⁸ The agenda of the DCC meeting is formulated by the

⁶² 'Sahana Aruna loan scheme launched in Jaffna, More than 2000 enrollments on the first day' (NPC, 2 September 2014) <www.np.gov.lk/index.php?option=com_content&view=article&id=3079:sahana-aruna-loan-scheme-launched-in-jaffna-more-than-2000-enrollments-on-the-first-day-01-september-2014&catid=8&Itemid=114> last accessed 9 March 2015.

⁶³ Claus Kruse, *State Structure in Sri Lanka* (Centre For International Migration And Development, 2007): p. 7.

⁶⁴ Asanga Welikala, 'Devolution within the Unitary State' in *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2010: CPA): p.76.

⁶⁵ *ibid.*, p. 9.

⁶⁶ The District Coordinating Committee does not have a statutory underpinning; interviews with senior public servants suggest that it was a mechanism that evolved through a cabinet decision in the 1960's. The District Road Development Coordinating Committees established by S. 7 of Thoroughfare Act No. 40 of 2008 has a similar composition.

⁶⁷ This could be a Minister or a Senior Member of Parliament.

⁶⁸ Claus Kruse, *State Structure in Sri Lanka* (Centre For International Migration And Development, 2007): p. 9.

District Secretary with contributions of the District Planning Secretariat.⁶⁹

Barring the DCC, the Sri Lankan experience, in comparison to systems of multi-level government elsewhere, suffers from the near-total absence of co-ordination mechanisms: no devolved system can work without such support mechanisms, which include political bodies for the making and coordination of policy and mechanisms that coordinate public administration.⁷⁰ Therefore, a mechanism is required to ensure co-operation between the provincial administration and the central government on projects implemented by the latter at the provincial and sub-provincial level. In the present context, the absence of such a mechanism leads to the provincial administration being overwhelmed by the central government, its departments, and functionaries.

The political realities in the Northern Province prior to the presidential election of January 2015 meant that the DCC meetings were not able to deliver on their full potential. It was yet another arena in which the political tensions in the Northern Province played out⁷¹, with its meeting agendas being developed with next to no input from the Board of Ministers or the Provincial Council. It remains to be seen whether, after the central regime-change, the DCC can function as an effective co-ordination mechanism between the provincial and central administration.⁷² It has to be noted that utility of DCC is limited and will have very little influence on “National Policy” developed by the central government. As national policy is the most commonly used mechanism to re-centralise subjects allocated to provincial councils, there is an urgent requirement to formulate political and administrative arrangements to ensure input from the provincial government in the formulation of national policy.⁷³

Recommendations

The President should instruct the Government Agent/ District Secretary to include input from the Provincial Board of Ministers in formulating the agenda for DCC meetings.

Use said DCC meetings as a forum to discuss how central government and provincial councils can co-operate at the district and sub district level.

⁶⁹ Meeting with Director Planning, 12 December 2015, District Secretariat Jaffna.

⁷⁰ Asanga Welikala, ‘Devolution within the Unitary State’ in *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2010: CPA): p. 75

⁷¹ Ananth Palakidnar & Mirudhula Thambiah, ‘EPDP-TNA Clash in the North Seven Injured in the Melee’ *The Ceylon Today* (17 December 2014) <www.ceylontoday.lk/51-80122-news-detail-epdp-tna-clash-in-the-north-seven-injured-in-the-melee.html> last accessed 9 March 2015.

⁷² The term central administration should be understood to include central administration at the national level and its representatives at the district and divisional level.

⁷³ See Asanga Welikala, ‘Devolution within the Unitary State’ in *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2010: CPA): p. 75

“A general ‘concordat on executive power’ between the central government and the provincial administrations seems advantageous for a number of reasons. First among these is that such a concordat can articulate broad principles in the exercise of governmental power as between multiple levels of government. These principles reflect political, not legal undertakings. Broadly such a concordat should seek to regularise and ensure mutual respect for constitutionally assigned spheres of activity by ensuring adherence to such principles as devolution (autonomy of the provincial sphere), co-operation, legality, transparency and democracy.”

The minutes of each DCC meetings should be made public in order to ensure greater transparency and accountability for the undertakings by different stakeholders.

3.5. The Culture of Centralisation

There exists a pervasive culture of centralization across political, administrative and even judicial actors within the Sri Lankan state,⁷⁴ which is, in terms of effective devolution of power, counterproductive. Ministers and officers of the central government limit Provincial Councils' effectiveness either by not cooperating or by recentralising its powers through administrative decisions.⁷⁵ There is a perception of inferiority or inadequacy at the provincial level, which results in career administrators and politicians gravitating towards the centre, starving the provincial administration of competent personnel.⁷⁶ This results in low levels of public expectation and an unhealthy inferiority that permeates the ethos of the provincial civil service.⁷⁷

The situation is particularly critical in the Northern Province because of the "Governor's rule" it was under from July 1990 to September 2013 and, where after the end of armed hostilities in May 2009, the central government found even more cause to consolidate its presence within the provincial administration. The central government through the "Uthuru Wasanthaya/Wadakkinn Wasantham/Northern Spring" Programme set in motion by the Presidential Task Force for Northern Development (PTFN) carried out, *inter alia*, the resettlement of Internally Displaced Persons, demining and infrastructure development projects.⁷⁸

The PTFN comprised almost completely of central government actors including the military and secretaries to Ministries.⁷⁹ The only representative from the provincial administration was the Governor. Though the PTFN continued to function even after the Northern Provincial Council elections, it did not envisage any role for the provincial administration.⁸⁰ All projects within the

⁷⁴ *Strengthening the Provincial Council System* (Colombo, 2008: CPA): p.20; A.M. Navaratna-Bandara, 'Provincial Council Public Administration' in Lakshman Marasinghe & Jayampathy Wickramaratne (eds), *13th Amendment: Essays on Practice* (ICS 2010): p.180; Asanga Welikala, 'Devolution within the Unitary State' in *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2010: CPA): p. 74.

⁷⁵ *Strengthening the Provincial Council System* (Colombo, 2008: CPA): p.20; A.M. Navaratna-Bandara, 'Provincial Council Public Administration' in Lakshman Marasinghe & Jayampathy Wickramaratne (eds), *13th Amendment: Essays on Practice* (ICS 2010): p.181.

⁷⁶ *Strengthening the Provincial Council System* (Colombo, 2008: CPA): p.20

⁷⁷ *ibid.*

⁷⁸ Bhavani Fonseka & Mirak Raheem, *Land in the Northern Province: Post-war politics, policy and practices* (Colombo, 2011: CPA): pp.27, 116.

⁷⁹ Ministry of Foreign Affairs, 'Presidential Task Force on Northern Development' (n.d.) <www.mea.gov.lk/index.php/en/media/news-archive/1730-presidential-task-force-on-northern-development> last accessed 9 March 2015.

⁸⁰ Anthony David, 'Task Force abolished: New bureau for reconciliation' *The Sunday Times* (20 July 2014) <<http://www.sundaytimes.lk/140720/news/task-force-abolished-new-bureau-for-reconciliation-107788.html>> last accessed 9 March 2015.

province were channelled through the PTFN, including those projects administered by the provincial public service, thus feeding the perception of an all-powerful central government and an inferior, powerless Provincial Council. The tussles between the Governor, Chief Secretary on one side and the Board of Ministers on the other which stifled the provincial administration only reinforced this perception.

Recommendation

The Central Government has the responsibility to place the Provincial Council, if not as the primary institution, at least as an equal partner with the Centre, in the delivery of reconstruction and development programmes in the Northern Province. In doing so, it must also ensure that officials under its control (including Ministers and officials of central Ministries, the Governor, District Secretaries and Divisional Secretaries) exercise their functions in a manner that is consistent with the letter and spirit of devolution.⁸¹

3.6. The Role of the Governor in relation to the Provincial Public Service

In terms of the text of the Thirteenth Amendment, the Governor is vested with the full control over the provincial public service and has the final say regarding its direction and workings. Accordingly, under the PCA, the appointment, transfer, dismissal and disciplinary control of officers of the provincial public service are vested in Governor.⁸² The Governor has the power to make rules in relation to all aspects of the public service.⁸³ The Governor may delegate all or any of these powers to a Provincial Public Service Commission⁸⁴, which the Governor retains control over by virtue of powers to appoint and remove its members and chairman.⁸⁵ However, this power this is not unrestricted: the members of the Provincial Public Service Commission can only be removed by the Governor if reason dictates such removal, and where such reasons are made known by him.⁸⁶ In any event, the Governor has the power to alter, vary or rescind any appointment or order of the Provincial Public Service Commission.⁸⁷ Thus, he can change the decisions of the Commission if he wishes to do so. However, this power too should not be exercised in an arbitrary or capricious manner.

The Northern Province Governor G.A Chandrasiri delegated his powers of appointment, transfer, dismissal and disciplinary control of the following provincial public service officers to the Provincial Public Service Commission:⁸⁸

⁸¹ See Asanga Welikala, 'Devolution within the Unitary State' in *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2010: CPA): p.44.

⁸² Provincial Councils Act, s 32 (1).

⁸³ Provincial Councils Act, s 32 (3).

⁸⁴ Provincial Councils Act, s 32 (2).

⁸⁵ Provincial Councils Act, s 33 (3).

⁸⁶ See *Podi Nilame (Chief Minister Sabaragamuwa Provincial Council) V Mathew* (1996) 2 SLR 82 at pp. 86-88.

⁸⁷ Provincial Councils Act, s 33 (8).

⁸⁸ See Governor's Memorandum – 2013/01, 'Delegation of powers concerning to Provincial Public Service of the Northern Province' (7 August 2013): para 1.

1. The Secretaries to the Ministries of the Northern Province
2. Secretary to the Governor of the Northern Province
3. Secretary to the Provincial Public Service Commission
4. Secretary to the Assembly Secretariat of the Northern Province
5. Deputy Chief Secretaries of the Chief Secretary's Cluster
6. Heads of Departments of the Northern Provincial Council
7. Municipal Commissioners of the Northern Province
8. Secretary to the Co-Operative Employees Commission.

The Governor had also authorised the Provincial Public Service Commission of the Northern Province to re-delegate these powers to the Chief Secretary, except in the case of employees of the Special and Supra Grade Combine Services.⁸⁹

At least two entries in the above list are problematic in terms of the existing legislation, administrative circulars and judicial proceedings. Firstly the inclusion of the Secretary to the Assembly Secretariat of the Northern Province is problematic in terms of the Provincial Councils Act, which provides that Provincial Council can regulate the recruitment, and conditions of service, of persons appointed to its secretarial staff by statute.⁹⁰ Secondly it has been argued that in terms of a Circular issued by the Presidential Secretariat, the Governor has to adhere to the decision of the Board of Ministers when appointing or transferring a Provincial Ministry Secretary.⁹¹

It was alleged that the Governor appoints individuals to the Provincial Public Service of the Northern Provincial Council as he sees fit and without consultation with the Board of Ministers.⁹² As a consequence, the BOM was not able to control staff in the Ministries and departments. It was noted that this was mainly due to the intimidation amongst public servants of the Governor, due substantially to the control the Governor exercised over the Provincial Public Service.⁹³ Thus, though the Tamil National Alliance obtained the overwhelming support

⁸⁹ *ibid.*, para 2 read with Paragraph 4 (ix) of Appendix I.

⁹⁰ Provincial Councils Act, s 17(2).

⁹¹ See Austin Fernando, 'Making Provincial Administration Work in the North' *Groundviews* (2 July 2014) <<http://groundviews.org/2014/02/07/making-provincial-administration-work-in-the-north/>> last accessed 9 March 2015. "From the information shared it appears that the Governor's Office believes that he can appoint or transfer a Provincial Ministry Secretary of his own whim and fancy. It is not so. I may bring to the notice of stakeholders that the Presidential Secretariat Circular (No: 30/27 of 22- 6-1988- paragraph 3) has guided these appointments. My inquiries show that this circular has not been amended, revised or cancelled. Many are unaware of this guideline. *Elkaduwa vs: Governor Stanley Tilakaratne case* (SC Application 657/98) ruling upheld that the PC BOMs decision has to be adhered in this regard."

⁹² "The Governor gives jobs, promotions to people as he pleases, he simply writes to the PSC and they do what he asks to do". Interview with Justice Wigneshwaran, 18 December 2014, at the Chief Minister's residence. CPA, on several occasions, sought meetings with Governor G.A. Chandrasiri to query his views on the accuracy of these allegations. He initially declined our request and later refused to respond.

⁹³ "The Governor told the officers of the Provincial Council that they must take orders from him". Interview with Justice Wigneshwaran 18 December 2014, at the Chief Minister's residence.

of the public servants during the Provincial Council election for the Northern Province⁹⁴, the same public servants were wary of being seen as supportive of them in the day to day operation of the Provincial Council.

In December 2013, a few months after the commencement of the Northern Provincial Council, the Tamil National Alliance (TNA) complained that a Secretary posted to serve the Chief Minister was transferred by Governor Chandrasiri. Furthermore, two successive secretaries assigned to the Provincial Ministry of Fisheries were also removed.⁹⁵

While Governor Chandrasiri contended that he acted consistently with the Constitution⁹⁶, the Board of Ministers accuses Governor G.A. Chandrasiri of having exercised his discretion in a wanton manner.⁹⁷ In fact, the Board is of the opinion that, in keeping with the spirit of the Thirteenth Amendment and the reason for which it was introduced (i.e. to devolve power), the Governor should act in consultation with the Board of Ministers when exercising his powers relating to the provincial public service.⁹⁸

The Constitution does not clearly state which of the Governor's powers are to be exercised in his own discretion, and which of them are to be exercised on the advice of the Board of Ministers.⁹⁹ Thus when an issue arises it has to be resolved by the Supreme Court, as a matter constitutional interpretation. The judgments (insofar as they concern the provincial public service) seem to suggest that the Board of Ministers has no right to tender advice to the Governor or the Provincial Public Service Commission on the appointments of officers to the Provincial Public Service.¹⁰⁰ In fact, section 34 of the PCA precludes interference in such appointments of the Public Service Commission, by any outsider, including a Minister of the Provincial Council.¹⁰¹ As was seen above, the position is different when appointing or transferring a Secretary of a Provincial Ministry.¹⁰²

⁹⁴ The TNA contested under the name and symbol of the Illankai Tamil Arasu Kachchi (ITAK), who obtained 86.30% of the postal vote in the Jaffna District, 82.26% of the Postal vote in the Kilinochchi District, 81.26% of the Postal vote in the Mullaitivu District, 70.18% of the Postal vote in the Mannar District and 66.94% of the Postal vote in the Vavuniya District. See Department of Elections- Sri Lanka, Results of the Northern Provincial Council Elections 2013 <<http://www.slelections.gov.lk/2013PPC/nppc.html>> last accessed 9 March 2015.

⁹⁵ The Political Column, 'Govt. continues extravagant borrowing and spending spree' *The Sunday Times* (1 December 2013) <www.sundaytimes.lk/131201/columns/govt-continues-extravagant-borrowing-and-spending-spre-75146.html> last accessed 9 March 2015.

⁹⁶ *ibid.*

⁹⁷ Interview with Justice Wigneshwaran 18 December 2014, at the Chief Minister's residence.

⁹⁸ *ibid.*

⁹⁹ See Section 1.2.

¹⁰⁰ See discussion in Asanga Welikala, *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2011: CPA): pp.51- 53; See also *Ranjani Priyalatha v. Provincial Public Service Commission, Central Province* (2009), CA Writ App. No. 775/07.

¹⁰¹ *Podi Nilame (Chief Minister Sabaragamuwa Provincial Council) v. Mathew* (1996) 2 SLR 82 at p. 89.

¹⁰² See Austin Fernando, 'Making Provincial Administration Work in the North' *Groundviews* (2 July 2014) <<http://groundviews.org/2014/02/07/making-provincial-administration-work-in-the-north/>> last accessed 9 March 2015.

It must be noted, however, that the above discussion is illustrative of how the provisions of the PCA allows 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. This is reminiscent of the experience of the first elected Eastern Provincial Council.

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. This dichotomisation of accountability and control has-according to Board of Ministers- caused severe hardships and delay in terms of the delivery of service to the people in the province.

3.7. The Chief Secretary

The Chief Secretary is the senior most public officer of the Province and is appointed directly by the President with the concurrence of the Chief Minister.¹⁰³ Despite being described as the “hub of provincial administration”, the functions, responsibilities and powers of the Chief Secretary are not specifically laid down in legislation.¹⁰⁴ General administrative guidelines from the Cabinet, Presidential Secretariat, Prime Minister’s office, Directives of the Secretary to Parliament, directives of the Ministry of Public Administration, judicial pronouncements etc., all define the functions and responsibilities of the Chief Secretary in concert.

Under Provincial Financial Rules framed by the Governor¹⁰⁵, the Chief Secretary is the Secretary to the Provincial Treasury and, as such, is effectively the chief accounting officer of the Province. As seen in the preceding section, the Chief Secretary also exercises power over members of the Provincial Public Service to the extent delegated by the Provincial Public Service Commission or the Governor. Additionally the Chief Secretary is tasked with a variety of important functions spanning from providing guidance for the formulation, implementation and monitoring of annual development programmes to co-ordination with other provinces and line ministries.

The Northern Provincial administration took issue with the former Chief Secretary¹⁰⁶, who was appointed to the position during a time when there was no elected Provincial Council.¹⁰⁷ The

¹⁰⁴ There is no mention of the Chief Secretary in the Constitution. The few references to the Chief Secretary in the Provincial Councils act are in relation to appointment (Section 31) and the Provincial Public Service (Section 32 (2A), 32(2B), 33(8) and 34).

¹⁰⁵ Provincial Financial Rule 5.3. See also, Section 4.3.2.

¹⁰⁶ A new Chief Secretary for the Northern Province was appointed by the President and assumed office on the 2 February 2015. See ‘New Chief Secretary, Pathinathan assumed office’ (NPC, 2 February 2015) <www.np.gov.lk/index.php?option=com_content&view=article&id=3265:new-chief-secretary-pathinathan-assumed-office&catid=10:min-cs&Itemid=117> last accessed 9 March 2015.

¹⁰⁷ See ‘New Chief Secretary assumes office – 08 December 2011’ (NPC, 10 December 2011) <http://np.gov.lk/index.php?option=com_content&view=article&id=1498%3Anew-chief-secretary-assumes-office-08-december-2011&Itemid=1> last accessed 9 March 2015.

primary contention was that in appointing her, the “concurrence” of the Chief Minister was not obtained as required under the Provincial Councils Act. As such, the Chief Minister requested the President to make a fresh appointment. The Board of Ministers was of the view that the loyalties of the officer functioning as the Chief Secretary was with the Governor, and as such she by-passed the Board of Ministers to undermine the decisions taken by individual ministers and the Board of Ministers. It was further stated that the former Chief Secretary would stall the execution of decisions by the Board of Ministers, as well as, under the authority of the Governor, refuse to execute policy decisions.¹⁰⁸ Furthermore provincial officials stated that the Chief Secretary would impose administrative guidelines, which obstructed the smooth functioning of the provincial administration.¹⁰⁹ As a countermeasure, the Chief Minister issued a circular¹¹⁰ specifying, *inter alia*, the channels of communication between Chief Secretary and the Governor, and providing for the day-to-day functions relating to the provincial public service. The Chief Secretary filed a fundamental rights application against this circular¹¹¹, claiming that it violated her right to equal protection of the law and freedom to engage in a lawful occupation.¹¹²

The close nexus between the Governor and the Chief Secretary, as well as the tension between them and the Provincial Council, led to a stalemate in the functioning of the provincial administration. The Chief Minister stated that the former Governor and former Chief Secretary ran a parallel administration to that of the Board of Ministers, and that Secretaries to provincial Ministries had indicated that they could not act beyond the Governor and Chief Secretary.

As noted above, the PCA affords the Governor ultimate control over the provincial public service. Consequently, the policy agenda of the elected Board of Ministers can be stalled or even overridden by the Governor’s fiat. Therefore, as has been argued, the powers and functions vested in the Governor under Part IV of the PCA in relation to the provincial public service and Provincial Public Service Commission need significant reductions.¹¹³ The role of the Governor is a political one (at least in the context of the Northern and Eastern Provinces); allowing such an office to exercise very real executive powers, at the expense of elected provincial representatives, undermines the principles of devolution, and requires urgent attention.

¹⁰⁸ At a meeting with former President, the Chief Minister of the Northern Province stated that he had compiled a list of appointments and transfers of Provincial Council officials and given it to the chief secretary for implementation. The chief secretary had rejected his list on grounds of alleged administrative impropriety. (See D.B.S.Jeyaraj, ‘TNA Targets Northern Province Chief Secretary R. Wijiyaludchumi Demanding her Immediate Removal’ (31 January 2014) <<http://dbsjeyaraj.com/dbsj/archives/27611>> last accessed 9 March 2015.)

¹⁰⁹ Officials who wanted to remain un-named stated that the Chief Secretary instructed all Provincial Ministry secretaries to clear with her all official letters before dispatch.

¹¹⁰ Administrative Standing Instructions No 1/2014 See ‘Full Text of Administrative Circular Issued by Northern Chief Minister CV Wigneswaran that has been Challenged in Courts’ (25 March 2014) <<http://dbsjeyaraj.com/dbsj/archives/28996>> last accessed 9 March 2015.

¹¹¹ SC FR 82/2014.

¹¹² See Chapter 5.

¹¹³ Asanga Welikala, *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2011: CPA)

Recommendation(s)

The Provincial Council should pass a Statute in order to regulate the recruitment, and conditions of service, of persons appointed to its secretarial staff.

The Governor should amend Memorandum – 2013/01, “Delegation of powers concerning to Provincial Public Service of the Northern Province”. The appointment, transfer, dismissal and disciplinary control of the Secretary to the Assembly Secretariat of the Northern Province should be in accordance with the Statute passed by the Council. The appointment, transfer, dismissal and disciplinary control Secretaries to the Ministries of the Northern Province should be on the advice of the Board of Ministers.

4. The Fiscal and Financial Framework¹

Devolution of power envisages the sharing of power among multiple tiers of government. This necessitates the clear demarcation of areas of power to be devolved to each tier. From a fiscal standpoint, such demarcation of power results also in the apportionment, among those tiers, of expenditure responsibilities: each devolved competency gives rise to a corresponding expenditure responsibility. Accordingly, the object of financial arrangements in devolutionary mechanisms should be to *enable* the successful discharge of such expenditure responsibilities by each tier of government. A discussion of the extent to which this objective is achieved under the Sri Lankan Constitution's Thirteenth Amendment, particularly vis-à-vis the experiences of the Northern Provincial Council during the period under review, can be carried out under the following thematic heads: the revenue raising capacities of the Council, the functions of the Finance Commission, and the central control of provincial finances. Each thematic issue will be discussed in turn in the paragraphs to follow.

4.1. Powers and Capacity to Raise Revenues within the Province

A necessary corollary of the creation of expenditure responsibilities is the provision of adequate financial resources to support the fulfilment of those responsibilities. Accordingly, the most obvious means by which Provincial Councils are empowered to accumulate revenues under the Thirteenth Amendment are the levying of taxes and other fees.

4.1.1. Legal and Constitutional Framework

The matter of provincial revenue-raising power is addressed under Items 33, 36 (36:1 to 36:20), and 35 of the Provincial List. The first two Items enumerate the range of fees and taxes that may be imposed by a Provincial Council, while Item 35 permits provincial borrowing to the extent allowed by central legislation.

In terms of Item 36, where twenty-one types of fees, fines, and taxes are listed as within the provenance of the Provincial Council, only five taxes "may yield revenues of any significance"². Of these, turnover taxes on wholesale and retail sales (Item 36:1), and motor vehicle license fees and fees charged under the Motor Traffic Act (Items 36:4, 36:10) can only be imposed within such limits and subject to such exemptions as may be prescribed by law made by Parliament. The other three levies yielding reasonable revenues are stamp duties on transfer of properties such as land and motor vehicles (Item 36:6), court fees and fines (Item 36:14), and excise duties

¹ Previous publications of CPA have explored issues surrounding devolutionary financial arrangements in substantial degree and depth. Therefore, in this chapter, theoretical underpinnings of such arrangements in devolution are recapitulated from those works. This is done only to the extent that it is necessary to understand the practical experiences of financial devolution in the Northern Provincial Council. Source texts, in general, are: Asanga Welikala, *Fiscal and Financial Arrangements in a Federal Sri Lanka: Some Issues for Discussion* (Colombo, 2003: Centre for Policy Alternatives); Asanga Welikala, 'Devolution within the Unitary State' in *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2010: Centre for Policy Alternatives), pp. 67-70; *Strengthening the Provincial Council System* (Colombo, 2008: Centre for Policy Alternatives), pp. 21-25. See, additionally, *The Operational Experience of Fiscal Devolution and Provincial Finance in Sri Lanka* (Colombo, 2007: Institute of Professional Public Administrators)

² Welikala 2003, *supra*, note 1, p. 15.

on liquor (Items 36:3 and 36:19).³ Of these, however, stamp duty on the transfer of property and court fees are earmarked for local government expenditures by law.

A Nation Building Tax was introduced in 2009 by way of Budget Proposal, and came into effect 01 January 2011⁴. Under Fiscal Policy Circular No. 01/2010, dated 29 December 2010, the then Treasury Secretary introduced a revenue-sharing system that seems to have superseded the provincial collection of Business Turnover Tax, under Item 36:1.⁵ The effect of this Circular over the Northern Province's competence to collect turnover taxes remains unclear, on the basis that, while the Province has included turnover taxes in its Finance Statute⁶, the failure to establish the Provincial Revenue Department makes ambiguous its practical implementation.

Be that as it may, Parliament has, by law, restricted provincial powers of raising turnover taxes as follows. The Provincial Councils Turnover Taxes (Limits and Exceptions) Act, No. 25 of 1995, imposes restrictions on the rate of tax imposed by a provincial council: turnover taxes shall not exceed five per cent of the turnover (see s.2(2)), and provincial councils must mandatorily exempt wholesale or retail sales by the manufacturers of goods, wholesale or retail sales by co-operative societies, or wholesale or retail sales to buyers outside Sri Lanka (see s.2(3) read with the schedule to the Act).⁷

4.1.2. Limitations to the NPC's Revenue-Raising Capacity

The exercise of the above mentioned fiscal powers, however, must be preceded by the enactment of relevant statutes by the Council, detailing the procedures, definitions, administrative aspects, etc., relevant to the tax or fee in question. However, in the Northern Provincial Council, the Finance Statute of the Northern Province No. 1 of 2014 was brought into operation on 10 November 2014, over a year after the first assembly of the Council. While the NPC passed the Finance Statute on 05 August 2014, the Governor's assent to it was given on 17 September 2014. It is learned that the Governor's interventions to the Statute required five rounds of amendments, the incorporation of which, for practical reasons, caused further delay. The only other statutes passed by the Council are: the Appropriation Statute No. 1 of 2013, the Transfer of Stamp Duty Statute of the Northern Provincial Council No. 02 of 2014, the Supplementary Provision for Appropriation Statute No. 03 of 2014, and the Appropriation Statute No. 4 of 2014.

As was discussed in Section 3.3 of this publication, where passing statutes and incorporating amendments are concerned, the lack of an entity analogous to the centre's Legal Draftsman's Department imposes a significant hindrance. In status quo, most statutes are drafted with the informal assistance of senior legal academics and lawyers. Not only does this prolong the debates on the draft statutes themselves, where opposition members rightly point out at length the errors resulting from such inexpert drafting, it also complicates the Council's amendment

³ *ibid.*

⁴ Interview with Finance Commission Senior Officials, 02 March 2015, at Commission premises.

⁵ See Finance Commission, 'Recommendations to the President under Article 154' (01 March 2013), p. 25: "According to a policy decision made by the government the BTT was abolished and a new system of sharing nationally collected revenue was introduced with effect from 2011."

⁶ Finance Statute of the Northern Provincial Council, No. 01 of 2014, Chapter II.

⁷ Welikala 2003, *supra*, note 1, pp. 15-16.

procedures. The lack of technical expertise on the part of most councillors, particularly in the absence of professional legal draftspeople, regarding the general legal framework within which provincial legislative powers are accommodated, further hinders the process.

Meanwhile, even though Part A of the Finance Statute provides for the much needed Northern Provincial Revenue Department, as of March 2015, this mechanism has still not become a reality. This is despite the fact that the necessary cadre for the department has been approved by the Management Services Department of the Central Government. The cause for delay in this regard remains unclear.

Accordingly, the delays in passing both the crucial Finance Statute and other finance-related statutes, as well as the establishment of the Revenue Department, have imposed significant limitations on the revenue-raising capacity of the Province. These weaknesses compound the difficulties faced by the Northern Province since before the election of the Council. For instance, according to the Finance Commission, the North recorded the lowest provincial revenues in all three years between 2011 and 2013. In each of those years, the revenue figures for the NPC, as a percentage of the second lowest provincial revenue of that year (i.e., of the Uva Province in 2011 and 2013, and Eastern Province in 2012), were 12.20% (2011)⁸, 21.42% (2012)⁹, and 54.34% (2013), respectively¹⁰. These percentages demonstrate the degree to which the Province has trailed behind even the worst of its counterparts in the rest of the Island. However, note that the statistics reflect the position *before* the election of the NPC. Details pertaining to Provincial Councils' revenues for 2014 are, as of March 2015, unavailable.

Accordingly, it bears emphasis that, while the Constitution empowers the provinces with a number of revenue-raising powers, the practical reality follows that these powers are, as a matter of yield, inadequate to support the province's expenditure responsibilities. These inadequacies are a result of various socio-economic disparities experienced generally by all provinces.¹¹ However, in addition to those disparities, the NPC's revenue-raising capacities were further aggravated in 2014 by certain structural flaws: the delay to enact statutes, the delays encountered in incorporating the amendments of the Governor and acquiring his assent, the failure to implement mechanisms provided for in the enacted statutes (i.e. the Revenue Department) in a speedy manner are examples of such flaws.

Recommendations

Implement, as a matter of urgency, the provisions for the Provincial Revenue Department, as provided under Part A of the Finance Statute.

Provide consultations and technical trainings to Provincial Council members on the confluences of nationally levied taxes and provincial taxation power, including insights

⁸ Finance Commission Recommendations 2013, p. 27. (Note that some figures are provisional.)

⁹ *ibid.*

¹⁰ Finance Commission, 'Recommendations to the President under Article 154' (20 May 2014), p. 9. (Note that some figures are provisional.)

¹¹ For instance, in all three years between 2011 and 2013, the revenues raised by the Western Province as percentages of total provincial revenue were 58.43% (2011), 57.31% (2012), and 56.84% (2013). In comparison, the revenue of the second highest province of each year as a percentage of total provincial revenue was, on average, 10.61%. See, *infra*, Tables 1, 2, and 3.

on choosing the best revenue-raising options from all mechanisms available.

4.2. Fiscal Equalisation: the Work of the Finance Commission with the NPC

An important facet of fiscal devolution is the apprehension of horizontal and vertical fiscal imbalances through an effective equalisation model. The Finance Commission, established under Article 154R of the Sri Lankan Constitution, was arguably devised to carry out this function. This section considers the practical issues arising in, and with, the Commission, in relation to its work concerning the Northern Provincial Council. However, such an analysis must, of necessity, be accompanied with explications on the concepts of fiscal imbalances and equalisation.

4.2.1. Vertical and Horizontal Fiscal Imbalances: Concepts and Statistics

It was identified above that a province's discharge of its expenditure responsibilities is dependent on the revenue resources available to it. However, though all provinces work under the same devolutionary mechanism and therefore inherit the same set of expenditure responsibilities¹², there are unavoidable differences in various socio-economic factors that affect respective provinces' revenue-raising capacities. These differences are identified as 'horizontal fiscal imbalances', the existence of which, within a devolved framework, gives rise to discrepancies in the way citizens living in different provinces enjoy the delivery of public services there. Accordingly, the equalisation of horizontal fiscal imbalances is an inextricable facet of *equitable* devolution.

The existence of such horizontal fiscal imbalances among the provinces of Sri Lanka is indisputable. Consider the tables below.

Table 1: Provincial Revenue Collection by Source – 2011 (Rs. '000)

| Province | BTT* | Motor Vehicle license Fees | Excise Duty | Stamp Duty | Court Fines | Others ** | Total |
|------------|-----------|----------------------------|-------------|------------|-------------|-----------|------------|
| Western | 2,186,050 | 2,573,020 | 263,620 | 6,354,370 | 571,370 | 1,936,320 | 13,884,750 |
| N. Western | 193,607 | 551,466 | 69,136 | 899,307 | 309,164 | 247,035 | 2,269,715 |
| Southern | 381,374 | 428,622 | 63,420 | 828,365 | 166,487 | 291,542 | 2,159,810 |
| Central | 417,388 | 492,551 | 184,817 | 607,923 | 67,754 | 211,875 | 1,982,308 |
| Sabaraga. | 129,659 | 351,105 | 44,037 | 304,804 | 112,351 | 178,506 | 1,120,462 |
| N. Central | 116,525 | 284,387 | 24,110 | 50,150 | 193,097 | 239,840 | 908,109 |
| Eastern | 112,216 | 215,508 | 28,684 | 133,313 | 74,127 | 128,011 | 691,859 |

¹² It is conceded that, though expenditure responsibilities are the same across the board, provincial units are allowed to vary their priorities in discharging them. However, if the financial arrangement for devolution does not incorporate a presumptive need for equalisation, discrepancies in revenue resources would predetermine the modalities of such prioritisation for the province. This sort of predetermination is antithetical to the idea that provincial units should, within the devolved sphere, have the freedom to determine their own priorities based on factors intrinsic to their regions' concerns and aspirations, as a matter of internal self-determination.

| | | | | | | | |
|--------------|------------------|------------------|----------------|------------------|------------------|------------------|-------------------|
| Uva | 115,311 | 143,481 | 53,750 | 125,550 | 96,156 | 129,357 | 663,605 |
| Northern*** | - | - | - | - | - | 80,983 | 80,983 |
| Total | 3,652,130 | 5,040,140 | 731,574 | 9,303,782 | 1,590,506 | 3,443,469 | 23,761,601 |

Source: Finance Commission Recommendations to the President under Article 154R 2013

*Collection of due BTT up to 2010 **Others include rents, interests, examination fees, sale of capital assets, betting tax etc. ***No provincial revenue collection mechanism available

Table 2: Provincial Revenue Collection by Source - 2012* (Rs. Mn)

| Province | BTT** | Motor Vehicle license Fees | Excise Duty | Stamp Duty | Court Fines | Others*** | Total |
|--------------|---------------|----------------------------|---------------|-----------------|-----------------|-----------------|------------------|
| Western | 65.27 | 2,407.19 | 108.79 | 5,184.66 | 486.58 | 1,208.79 | 9,461.28 |
| Southern | 25.74 | 386.82 | 20.62 | 1,169.75 | 185.90 | 173.43 | 1,962.25 |
| N. Western | 52.00 | 647.69 | 42.97 | 671.91 | 243.69 | 8.26 | 1,666.52 |
| Central | 39.70 | 464.89 | 107.57 | 645.96 | 49.36 | 140.28 | 1,447.76 |
| N. Central | 9.40 | 295.64 | 21.03 | 36.73 | 139.33 | 93.85 | 595.99 |
| Sabaraga. | - | 211.64 | 25.20 | 87.00 | 92.41 | 155.01 | 571.27 |
| Uva | 2.18 | 152.86 | 27.04 | 98.88 | 57.51 | 127.96 | 466.42 |
| Eastern | - | 99.75 | 18.31 | 0.02 | 51.55 | 106.74 | 276.38 |
| Northern*** | - | - | - | - | - | 59.22 | 59.22 |
| Total | 194.30 | 4,666.48 | 371.53 | 7,894.91 | 1,306.33 | 2,073.54 | 16,507.08 |

Source: Finance Commission Recommendations to the President under Article 154R 2013

*Provisional

Collection of due BTT up to 2010 *Others include rents, interests, examination fees, sale of capital assets, betting tax etc. ****No provincial revenue collection mechanism available

Table 3: Provincial Revenue Collection by Source (Up to June) - 2013 (Rs. '000)

| Province | BTT** | Motor Vehicle license Fees | Excise Duty | Stamp Duty | Court Fines | Other*** | Total |
|-------------|--------|----------------------------|-------------|------------|-------------|-----------|-----------|
| Western | 34,960 | 1,631,470 | - | 3,342,970 | 285,030 | 1,023,900 | 6,318,330 |
| N. Western | 656 | 398,895 | 34,224 | 433,917 | 121,638 | 166,098 | 1,155,428 |
| Central | 7,500 | 368,934 | 68,714 | 422,738 | 47,107 | 108,346 | 1,023,339 |
| Southern | 7,769 | 293,000 | 29,174 | 431,321 | 88,419 | 135,270 | 984,953 |
| Sabaraga. | - | 226,687 | 16,936 | 94,293 | 31,305 | 94,394 | 463,615 |
| Eastern | - | 128,369 | 15,974 | 119,378 | 39,120 | 71,102 | 373,943 |
| N. Central | 1,608 | 198,874 | 13,652 | 32,546 | 38,443 | 58,400 | 343,523 |
| Uva | 4,780 | 112,479 | 18,202 | 50,297 | 25,163 | 81,758 | 292,679 |
| Northern*** | - | 106,293 | - | - | - | 52,772 | 159,065 |

| | | | | | | | |
|--------------|---------------|------------------|----------------|------------------|----------------|------------------|-------------------|
| Total | 57,273 | 3,465,001 | 196,876 | 4,927,460 | 676,226 | 1,792,040 | 11,114,876 |
|--------------|---------------|------------------|----------------|------------------|----------------|------------------|-------------------|

Source: Finance Commission Recommendations to the President under Article 154R 2014

*Provisional

Collection of due BTT up to 2010 *Others include rents, interests, examination fees, sale of capital assets, betting tax etc. ****No provincial revenue collection mechanism available

Horizontal fiscal imbalances arise from discrepancies in the revenue actually raised by each peripheral unit, even when the powers to raise revenue are uniform among all the units. In other words, horizontal imbalances result from flaws in *the capacity to exercise* revenue-raising powers, as opposed to resulting from *flaws* in the powers themselves. 'Vertical fiscal imbalances', on the other hand, result from the inadequacies of revenue-raising powers when compared with the burdens of units' expenditure responsibilities.¹³ The situation in Sri Lanka, where the Thirteenth Amendment devolves more expenditure responsibilities to Provincial Councils than can be sustained by the devolved revenue-raising powers, is an example of vertical imbalance.¹⁴ Accordingly, a mechanism is required to guide the transfer of funds from the centre to the provincial unit in a way that would equalise such imbalances.

4.2.2. The Role of the Finance Commission in Equalising Fiscal Imbalances

4.2.2.1. The Constitutional Framework

Under Article 154R, the Government must allocate funds to the provinces as are adequate to their needs.¹⁵ In doing so, however, the Government is required¹⁶ to consult with and act on the recommendations of the Finance Commission.¹⁷ In turn, it is the Finance Commission's duty to make recommendations to the President with regard to the principles on which the funds annually allocated by the central government to the provinces should be apportioned among the various provinces.¹⁸ Such recommendations are required to be caused by the President to be laid before Parliament.¹⁹ In formulating its principles on the apportionment of funds to the provinces, the Commission must be guided by the objective of achieving balanced regional development in the country, and shall accordingly take into account: the population of each province; the per capita income of each province; the need, progressively, to reduce social and economic disparities; and the need, progressively, to reduce the differences between the per capita income of each Province and the highest per capita income among the Provinces.²⁰

4.2.2.2. Equalisation of Vertical Imbalances

Although the equalisation of both vertical and horizontal imbalances is an imperative of equitable fiscal devolution, the Commission is not empowered to make recommendations with

¹³ Welikala 2003, *supra*, note 1, p. 19.

¹⁴ Welikala 2010, *supra*, note 1, p. 68; also, see below a brief discussion on recent statistics.

¹⁵ Article 154R(3), The Constitution of Sri Lanka.

¹⁶ See, *infra*, text accompanying notes 21 to 22.

¹⁷ Article 154R(3), The Constitution of Sri Lanka.

¹⁸ Article 154R(4), The Constitution of Sri Lanka.

¹⁹ Article 154R(7), The Constitution of Sri Lanka.

²⁰ Article 154R(5), The Constitution of Sri Lanka.

regard to equalising *vertical* imbalances.²¹ However, considering the large discrepancies between central appropriations of government revenue and the allocations made to the periphery, the Commission's current constitutional mandate bears revisiting.

The National Budget for 2014 is an instance of such vertical fiscal imbalances in Sri Lanka. Although Rs. 1,348,398,520,000 was forecasted as total recurrent expenditure, only Rs. 114,191,497,000 of that sum was allocated as recurrent expenditure to the Ministry of Local Governments and Provincial Councils (MPC). This amounts to 8.46% of total recurrent expenditure. Similarly, of the Rs. 661,739,480,000 forecasted as total capital expenditure, only a sum of Rs. 39,252,200,000 was allocated as capital expenditure to the MPC. That is 5.93% of the total capital expenditure of the government. Therefore, the total (i.e. recurrent and capital) allocation to the MPC as a percentage of total government expenditure is 7.63%. These amounts, minus the allocations for the Ministry's own recurrent and capital expenditures, are redistributed among the nine provinces as each province's recurrent and capital expenditures respectively.²² Thus, the sums that ultimately reach most provinces are even smaller fractions of the National Budget.

4.2.2.3. Equalisation of Horizontal Imbalances

Under Article 154R(3), the equalisation of horizontal imbalances is addressed through the transfer of funds annually allocated from the central government's budget. For the purpose of determining matters of adequacy, the Finance Commission employs a process that incorporates inputs from provincial agencies as well as consultations with the General Treasury. For this purpose, provincial agencies provide information pertaining to their needs to the Commission²³, which the latter processes into provincial needs-assessments. Based on the findings of those assessments, the General Treasury, after further consultations with the Commission, agrees upon the "bulk amount"²⁴ to be allocated for all the provinces. The Commission apportions this bulk amount, based on various criteria and considerations developed by it, among the different provinces.²⁵

The funds accordingly apportioned are generally transferred to the provinces under a grants structure through the MPC. There are three main grants under this structure.²⁶

²¹ See Articles 154R(3), 154R(4), and 154R(5), The Constitution of Sri Lanka.

²² See 'Summary of Expenditure by Category and Object Code' in *Budget Estimates 2014*, Department of National Budget, the Ministry of Finance and Planning. Available at <http://www.treasury.gov.lk/images/depts/nbd/docs/budgetestimates/2014/nationalexpenditure/3.ExpenditureMinistryObjectcodewise.pdf> (last accessed 28 February 2015). See also Appropriation Act, No. 36 of 2013, p. 23.

²³ cf. *The Operational Experience of Fiscal Devolution and Provincial Finance in Sri Lanka* (Colombo, 2007: Institute of Professional Public Administrators), p. 18: "The provinces present their needs in two parts, a *financial overview* presenting the province's medium-term expenditure strategy and *estimates of expenditure* presenting planned recurrent and capital costs of service provision."

²⁴ Finance Commission Recommendations 2013, pp. 32, 37.

²⁵ Finance Commission Recommendations 2013, p. 32.

²⁶ With regard to the following, see Finance Commission Recommendations 2013, pp. 9-13, 32; Financial Rules of the Northern Provincial Council, p. 14; and *The Operational Experience of Fiscal Devolution and Provincial Finance in Sri Lanka* (Colombo, 2007: Institute of Professional Public Administrators), p. 20.

Block Grant: This is to meet the recurrent expenditure needs of the provinces. The estimated revenue of the province for a particular year is deducted from the estimated recurrent needs for the same year and the balance is recommended as Block Grant. It includes salaries and other allowances paid to the staff and the allowances to the elected members of the provincial councils and local authorities.

Criteria-Based Grant: This grant is for the capital needs of the province in improving its socio-economic conditions. It is apportioned based on criteria such as population, area, per capita income, needs of the province, etc., and is allowed as discretionary spending by the provincial councils. However, provinces are required to exercise this discretion within the guidelines issued by the Commission.²⁷

Province-Specific Development Grant: The PSDG is mainly provided for investments in capital type development projects, particularly in terms of socio-economic infrastructure needs of the provinces.

Under the head of PSDG, the Finance Commission's Recommendations for 2013 mention, *inter alia*, one other allocation of note:

"Foreign and locally funded projects designed and agreed at national level: Allocations are provided under this category, for special projects to be included in the provincial budget, designed by and agreed on at national level. These projects are implemented by using assistance from bilateral and multilateral donors and local funds."²⁸

This study limits its focus to the capital expenditure grants from the centre. Accordingly, the analysis of issues will largely surround the allocations of CBGs, PSDGs, and another category of funds labelled "Projects"²⁹ in the publicly available monthly Financial Progress Reports of the Northern Provincial Council, which corresponds with the category of grants identified by the Commission as "Foreign and locally funded projects".

As mentioned above, the provincial needs-assessment is carried out with the cooperation of the provinces. However, provincial consultation in terms of capital expenditure take place only with regard to the PSDGs. CBGs are allocated based on common socio-economic factors that are independent of provincial consultations. In terms of PSDGs, however, provinces provide information through a framework identified as the Agency Results Framework, which requires the preparation of a Medium-Term Development Plan by the provincial agencies, and the referral of that information to the Commission through six forms. Of these, the descriptions and functions of the four forms relevant to the present matters are reproduced, from the 2013 FC Recommendations, below.³⁰

²⁷ Such as the guidelines found in Finance Commission Circular FC/PSDG&CBG/CIRCULAR/2011/1, dated 26 July 2011.

²⁸ Finance Commission Recommendations 2013, pp. 12-13

²⁹ See, for instance, Serial No. 3, 'Financial Progress Report as on 31st December 2014' Ministries & Departments of Northern Provincial Council, available at http://www.np.gov.lk/pdf/treasury_circular/2015/Financial%20Progress%20Report%20-%20Upto%20Dec%202014.pdf (last accessed 1 March 2015).

³⁰ See Finance Commission Recommendations 2013, p. 41.

1. Form 1: Agency Results Framework – This form has been designed to submit a provincial medium term development programme with provincial resource profile, vision, Mission, thrust areas, goals and outcome indicators.
2. Form 2: Annual Provincial Needs – PSDG – This form is to submit the expected budget under different sectors and agencies for the forthcoming fiscal year.
3. Form 3: Annual Development Plan – PSDG – This form is to submit the annual provincial investment plan prepared in terms of the available budget under PSDG.
4. Form 4: Amounts required for Continuation Work and Bills in Hand – This form is to submit the required amount for the continuation work and bills in hand.

It is noted that the primary source of feedback to the Commission in this regard are the provincial agencies, as opposed to the Provincial Council. Nevertheless, the Commission considers these requests for finances “thoroughly”, in light of the fact that “all provincial agencies prepare their annual budgets and submit them for the approval of the provincial councils”.³¹ However, since the FC’s Recommendations for 2013 were communicated to the President on 01 March 2013³², the larger part of provincial correspondence with the Commission in this regard took place in 2012.³³ Accordingly, even though 2013’s recommendations were with regard to the National Budget affecting the year 2014, in which year the Northern Provincial Council was in power, the latter was only *elected* into power in September 2013 and, therefore, had no opportunity to participate in the Commission’s process of assessing its province’s needs. While this is the inevitable consequence of certain logistical realities, it must still colour the interpretation of the circumstances discussed below.

Accordingly, a comparison of funds requested by the province, results of the needs-assessment, funds recommended for apportionment by the Finance Commission, and funds actually allocated by the National Budget are provided below. (Note that this table is a collation of data specifically relevant to the Northern Province from a number of different, and more general, tables found in the FC Recommendations 2013 document.)

Table 4: Comparison of Provincial Transfers at Various Stages (Rs. Mn)

| Type of Capital Grant | Requested by Province | Need, as Assessed by FC | Apportioned by FC | Allocated by Central Govt. |
|-----------------------|-----------------------|-------------------------|-------------------|----------------------------|
| CBG | – | 583 | 195 | 280 |
| PSDG | 4,521 | 3,699 | 1,030 | 1,035 |
| Projects | – | – | 2,663 | 3,955 |
| Total Capital | 4,521 | 4,282 | 3,888 | 5,270 |

Sources: Finance Commission Recommendations 2013, pp. 33-39; Financial Progress Report as on 31st December 2014

The above comparison raises some questions with regard to the evolution of the PSDG figures:

³¹ *ibid.*, p. 37.

³² *ibid.*, covering letter to the President.

³³ See also, *ibid.*, pp. 32-33. Confirmed during Interview with Finance Commission Senior Officials, 02 March 2015, at Commission premises.

the FC's recommended PSDG apportionment of Rs. 1030mn is drastically lower than both the Province's request (Rs. 4,521mn) and the Commission's own assessment of need (Rs. 3,699mn). Nevertheless, the figure recommended for apportionment is nearly equal to the amount actually allocated by the Government (Rs. 1035mn).

Though the commission leaves unexplained the significant gap between its assessment and apportionment, it is recalled that the Commission carries out its needs-assessment independently of the "bulk amount" the Treasury agrees to allocate for all the provinces. In fact, that agreement takes place *after* the needs-assessment, and the final recommendations are apportionments of *that* agreed amount. This detachment between the assessments and the apportionments is symptomatic of the Commission's narrow mandate, which is limited to the equalisation of horizontal imbalances. Accordingly, the disregard shown to the need for vertical fiscal equalisation is blatant and disconcerting.

Furthermore, it is disturbing to note that, despite what appears to be an abject failure on the part of the Commission and the Treasury to come to a reasonable compromise on the "bulk amount", the Secretary to the Treasury is, *ex officio*, a member of the Finance Commission³⁴.

An out-of-context glance at the last two columns of Table 4 may imply that not only has the Government complied with the Commission's recommendations, it has also, in terms of each single capital grant, transferred amounts greater than those the Commission had recommended. However, it is clear that the non-compliance, upon close analysis, has taken place at an intermediate stage of the Commission's proceedings: that of negotiating the bulk amount with the Treasury. Accordingly, in giving effect to the mandate of the Commission or, indeed, reforming it, it is imperative to consider the different stages at which the Government interacts with the Commission. While it is undesirable to develop an expectation of rigid governmental compliance, a reasonable degree of cooperation between the institutions is still necessary to give effect meaningfully to the devolutionary mechanisms contemplated by the Constitution.

Furthermore, the Government is constitutionally impelled, at the very least, to justify vigorously its deviation from the needs of the Province to the extent the latter is assessed and communicated to the Government by the Commission. Article 154R(3) reads, "The Government shall, on the recommendation of, and in consultation with, the Commission, allocate from the Annual Budget, such funds as are adequate for the purpose of meeting the needs of the Provinces."³⁵ In fact, it could even be argued that this obligation of the Government is mandatory based on the use of the word "shall". Indeed, though there is authority for the proposition that "shall" ought to be seen in contradistinction to "may", where the former implies "mandatory" and the latter implies "permissiveness"³⁶, there is also authority supporting the rather unfortunate position that it is possible to interpret "shall" as "may", and vice versa. However, the Supreme Court judgment most often cited in this connection, *Kamkaru Sevana v. Kingsley Perera*³⁷, seems to premise its holding on the idea that its interpretation was, in the circumstances of that case, consistent with "the public good and [the] advancement of justice". Therefore, though a comprehensive analysis of the cases is beyond the scope of this publication, it is sufficient to state that the question whether the Government's compliance with the Finance

³⁴ Article 154R(1)(b), The Constitution of Sri Lanka.

³⁵ Emphasis added.

³⁶ See, for example, *Blanka Diamonds v. Coeme* [1996] 1 Sri.L.R. 200.

³⁷ (2012) SC. H.C.(L.A) 86/12

Commission's needs-assessment is mandatory or not is far from settled.

The security of tenure of the members of the Commission is an element intrinsic to its independence. However, the Eighteenth Amendment to the Constitution introduced changes to the appointment procedures of the Commission, to the extent that the Chairman and members of the Commission, under Article 41A(1), are effectively appointed by the President. The President is only required to seek "observations" of the Parliamentary Council established under the same Article. The lack of independence brought about by these reforms have arguably had their role to play in the negotiations between the Commission and the Treasury on the bulk amount to be allocated to the provinces.

Recommendations

Reconsider the Finance Commission's mandate in terms of balancing vertical inequalities. The Commission's jurisdiction is based on questions of "adequacy", under the Article 154R(3) of the Constitution. The term is broad enough to encompass both vertical and horizontal fiscal imbalances. However, it is recommended that a measures are taken to ensure institutional commitment from both the Finance Commission and the General Treasury on giving effect to this interpretation, including, if necessary, legislative reform.

Alternatively, reassess the legal framework that allows the General Treasury disproportionate power in negotiating the bulk amount allocated to all provinces.

Change the provincial feedback frameworks such as the Agency Results Framework to give Provincial Councils more influence in consulting with the Finance Commission, as opposed to merely approving the provincial agencies' submissions to the Commission.

Amend the Constitution to ensure the security of tenure of the members of the Finance Commission. (For example: repeal the 18th amendment, and reintroduce the 17th amendment.)

4.3. Central Control of Provincial Finance

In the Sri Lankan context of devolution of power, finances provide an axis of control over the provincial councils. This is evinced by the number of misshapen legal provisions relating to finance included in the Provincial Councils Act, No. 42 of 1987 (PCA). As a senior member of the Provincial Council pointed out, Pradeshiya Sabhas are allowed more financial autonomy than is a Provincial Council: a cursory comparison of budget-related provisions in s.168 of the Pradeshiya Sabha Act, No. 15 of 1987, with, for example, s.24 of the PCA would demonstrate that this is true. However, s.24, which provides for "special procedures as to statutes relating to financial matters", is but one example of a number of legal implements the centre employs to control provincial units' financial power.

Due to the abundance of literature on the general aspects of this theme, this section of the chapter will not repeat the PCA's provisions relating to finances. It is proposed, instead, to narrate and analyse some of the unique experiences of the Northern Provincial Council in its financial relations with the centre, particularly through the institutions of the Governor and the Chief Secretary.

4.3.1. Brief Overview of the Governor's Financial Powers

The Governor's discretionary powers with regard to provincial financial statutes are significant, particularly to the extent he is able to preempt or curtail the judgment of the democratically elected members of the Council: all statutes involving revenue or expenditure can only be introduced, moved or passed by the Provincial Council on the prior recommendation of such a statute by the Governor; all demands for central grants to the Provincial Council require the Governor's recommendation; the annual budget of the provincial administration is presented to the Provincial Council by the Governor. Although the latter requires the Council's final approval, the Appropriation Statute required to give effect to the budget not only requires the Governor's recommendation to be introduced in the Council for debate, it also requires his assent, after its passage in the Council, in order to be validly enacted. The audited accounts of the provincial administration are submitted to the Provincial Council by the Governor, while demands for supplementary grants or votes on account during a financial year are also only initiated by him. The Governor makes the rules governing all aspects of provincial finance, including the Provincial Fund and the Emergency Fund of the Province.

4.3.2. Custody of the Provincial Fund

Although s.19(3) of the PCA states that "No sum shall be withdrawn from the Provincial Fund of a Province except under a warrant under the hand of the Chief Minister of the Province", the same section, at 19(5), reads, "The custody of the Provincial Fund of a Province, the payment of moneys into such Fund, and all other matters connected with, or ancillary to, those matters shall be regulated by rules made by the Governor." Accordingly, former Northern Provincial Council Governor Victor Perera, on 14 August 2008, promulgated new Financial Rules for the Northern Provincial Council, which superseded the Financial Rules of the North-East Province that had operated in the Province since the latter's bifurcation in 2006.

According to Rule 5.1 of the Provincial Financial Rules (or PFRs), the Chief Secretary is the "custodian" of the Provincial Fund, which is defined broadly enough under s.19(1) of PCA to encompass all moneys officially received by, transferred to, donated to, etc. the Northern Provincial Council. Furthermore, PFR 5.1 also states that the "Provincial Fund is vested with the Provincial Treasury", and establishes the Chief Secretary as the "Secretary to the Provincial Treasury". The operational functions of the Provincial Treasury, according to the same rule, are vested with Deputy Chief Secretary of Finance.

As custodian of the Provincial Fund, the Chief Secretary is to maintain under her name all the bank accounts of the Provincial Fund, to which all the Provincial Council receipts are to be deposited.³⁸ While the accounts are to be operated by the Chief Secretary, either directly or through officers directed by her³⁹, all cheques issued for authorised payments from the Provincial Fund are to be signed by the Chief Secretary and an officer authorised by her, or two such officers authorised by her.⁴⁰

The Rules state that, "The Chief Minister is *responsible* for all matters connected with the

³⁸ Provincial Financial Rule 5.2.

³⁹ *ibid.*

⁴⁰ Provincial Financial Rule 5.3.

receipts and payments of the Provincial Council. The responsibility of the *general* supervision of the financial operations of the Provincial Council is vested with the Chief Minister as Minister in charge of the subject of finance.”⁴¹ However, the sub-rule immediately following this provision states, “The responsibility and accountability vested with the Chief Minister in terms of the above paragraph is delegated to the Chief Secretary and his staff”⁴².

Note that, under s.31 of PCA, “The *President* shall appoint the Chief Secretary of each Province, with the concurrence of the Chief Minister of that Province.” Emphasis added.

The provisions mentioned above are reproduced in some detail since Provincial Financial Rules are not publicly available. Due to the same limitation of access, a comparison of the NPC’s financial rules with those of other provinces, although arguably a useful exercise, was beyond the scope of this publication. Furthermore, though the wording of these rules foreshadow with tragic irony the debacle of the relations between Chief Minister Wigneswaran and the then Chief Secretary Ramesh Wijialudchumi⁴³, it must be borne in mind that the rules themselves were promulgated during a time a Northern Chief Minister seemed a distant reality. This would perhaps explain PFRs 5.5 and 5.6. However, the rules themselves, whatever intentions inspired their original promulgation, are fundamentally flawed to the extent they provided an environment conducive to centre-province conflict.

4.3.3. The Chief Minister’s Fund

To circumvent the fiscal emasculation of Provincial Council as a result of the Chief Secretary’s near-absolute control over the Provincial Fund, the Chief Minister sought the establishment of a Chief Minister’s Fund. Such funds are not unknown: reportedly, four other Provincial Councils administer such special funds.⁴⁴ However, as mentioned above, statutes relating to financial matters cannot be introduced in the Council unless on the recommendation of the Governor. Accordingly, on the basis that the establishment of such a fund would be unconstitutional, the Governor refused his recommendation. Incidentally, it is learned that, this was despite the fact that the Governor himself carries out a Governor’s Trust Fund, which was established after the bifurcation of the North-East Provinces.

Although it is clear that the terminology used by the Governor, i.e. “unconstitutional”, was inappropriate, since matters relating to the Provincial Fund are provided in ordinary legislation and not the Constitution, the Chief Minister did not seek to challenge the Governor in court. The eroding faith in the judiciary’s independence and, by extension, its fairness, meant that seeking redress in court was futile at best and politically counterproductive at worst.⁴⁵

⁴¹ Provincial Financial Rule 5.5. Emphasis added.

⁴² Provincial Financial Rule 5.6.

⁴³ See above, Section 3.7 of this publication.

⁴⁴ Mirudhula Thambiah, ‘Northern Chief Minister is Crying for more Powers and Money Without Utilizing what he already has’, *dbsjeyaraj.com*, 06 September 2014, at <http://dbsjeyaraj.com/dbsj/archives/34631> (last accessed 27 February 2015).

⁴⁵ See below, Chapter 5.

4.3.4. The Ambiguities of Central Transfers to the Province

Members of the central government (such as former President Mahinda Rajapaksa, former Minister Douglas Devananda) and the Provincial Council's Leader of the Opposition S. Thavarajah were frequently reported making statements in 2014 that the Northern Province was the recipient of the largest allocation for capital expenditure from the central government. This claim was ostensibly because, under capital expenditure allocations to the provincial councils in the Appropriation Act, No. 36 of 2013, the sum of Rs. 5831mn allocated to the Northern Provincial Council is the highest among the respective capital expenditure allocations to all the Provincial Councils in that Act. In fact, former Minister Devananda is on record making such a statement in the Parliament.⁴⁶

However, in reality, although Rs. 5,831mn is allocated to the Northern Provincial Council in the Appropriation Act, it is important to be mindful of the grants structure under which the transfer of these funds take place: Rs. 280mn as the CBG, Rs. 1,035mn as the PSDG, Rs. 561mn for some minor development projects, and, finally, Rs. 3955mn under Projects. While, these figures are reflected in all of the monthly NPC Financial Progress Reports for 2014, their total amounts to Rs. 5,831mn. The same reports also indicate that the 'Imprests Released to the Ministries and Departments' column is inapplicable with regard to the Projects allocation, which is clearly the largest portion of the capital expenditure allocated to the NPC. The fact that no imprests are released from "Projects" to the provincial ministries and departments is consistent with the definition of that grant, which was reproduced above from the Finance Commission's Recommendations for 2013.⁴⁷ Furthermore, according to the Finance Commission⁴⁸, the Projects allocation is determined by the Treasury based on consultations with various line ministries, e.g. the Ministry of Economic Development, and the figure thus apportioned for Projects from the Treasury's "bulk amount" for provinces is not influenced by the needs-assessments carried out by the Commission in consultation with the provinces. Ergo, by logical extension, the amount allocated under Projects is extraneous to the principles developed by the Commission for apportioning the "bulk amount", even if the allocation is from that bulk amount. Thus, this narrative is consistent with the statements of the Chief Minister that, "Although the government claims NPC had been allocated six billion rupees, it had in fact allocated 1.8bn...". The figure 1.8bn, it is noted, is approximate to the total of the capital expenditure allocated to the NPC, minus the Projects allocation.

Accordingly, it is clear that the central government has been purposely ambiguous with regard to the sums allocated to the NPC. This ambiguity has made a significant contribution to the rhetoric surrounding the NPC's viability as a political institution. While that aspect of the phenomenon is discussed elsewhere in this publication, it bears emphasis here that the centre's control over fiscal allocations to the Northern Provincial Council can be (and, in this instance, was) abused by the centre for its own political advantage.

⁴⁶ 'Speech Delivered by Douglas Devananda on 31.10.2014 in Parliament on the Budget Estimates for 2015', *dbsjeyaraj.com*, 02 November 2014, at <http://dbsjeyaraj.com/dbsj/archives/34581> (last accessed 11 November 2014). Note that, while the original speech was made in Tamil, the English translation published on *dbsjeyaraj.com* was sourced as an official translation from the Media Unit of Douglas Devananda's Ministry at that time.

⁴⁷ See, *supra*, text accompanying note 28.

⁴⁸ Interview with Senior Officials of the Finance Commission, 02 March 2015, at Commission premises.

4.3.5. Project Ownership at the Provincial Level

It is noted, moreover, that the implementation of the projects coming under the Projects allocation was carried out exclusively by the central government, under Project Directors unilaterally appointed by the centre. While these Project Directors were answerable only to the relevant line ministries, any queries from the Board of Ministers were refused, during President Rajapaksa's ruling period, unless such request was made through the line ministry itself.⁴⁹

Project ownership and project implementation is an intrinsic requirement of meaningful devolution. The usurpation by the centre of the province's right to implement projects falling within the sphere devolved to the province, in this sense, is not only a disturbance of the political rights of the voting public, it is also an aggression against the integrity of the system of devolution itself.

Among the justifications for central implementation of these projects is the fact that the projects are funded by foreign donor agencies, to whom the centre has the ultimate responsibility. However, it is argued that this fact need not foreclose meaningful provincial involvement in project implementation. In fact, it is recalled that before 2005, the North East Integrated Agricultural Project (NEIAP) and North East Emergency Reconstruction Project (NEERP), funded by the World Bank, as well as the North East Housing Reconstruction Project (NEHRP), funded by the Asian Development Bank, were all carried out under a 'twin agreement' system that dichotomised financial responsibilities and implementation responsibilities. The agreements pertaining to the latter was signed between the donor agency and the Chief Secretary of the North-East Province, whereas the agreements pertaining to the former were signed by Treasury Secretary. In fact, the World Bank has noted that NEIAP was the "first [World] Bank financed project in Sri Lanka with a [Provincial Council] as main implementation agency"⁵⁰. Those projects, though funded through the work of the central government's ERD, were still developed and implemented by the North East Provincial Council, with the assistance and consultation of the donor agency. Such approaches are healthy arrangements in which devolutionary aspirations can be accommodated within a wider framework of central accountability.

Recommendations

Revisit the Provincial Financial Rules to bring them up to speed with the new circumstances of the North.

Commission a comparative study of Provincial Financial Rules to identify strengths, weaknesses, and best practices.

The introduction of legislative reform to ensure that all grants transferred to the provinces under Article 154R shall be limited to the control of the provincial machineries accountable to the Provincial Council.

⁴⁹ Interview with Chief Minister C.V. Wigneswaran, 18 December 2014, at the Chief Minister's residence.

⁵⁰ 'North East Irrigated Agriculture Project (NEIAP): Environmental management framework', *World Bank*, 31 March 2004, at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/04/13/000160016_20040413130647/Rendered/PDF/E9290voll0110paper.pdf (last accessed 03 March 2015).

4.4. Conclusion

Accordingly, the feasibility of devolution in the Northern Provincial Council is largely constrained by its financial difficulties. This is affected both by its own revenue-raising capacities, as well as by the amount of funds transferred to it by the Centre. Furthermore, while finances remain a prominent domain in which the Centre maintained a stranglehold on the Council, the work of the Finance Commission, due to its own institutional weaknesses, could do little to curtail the Centre's dominance. Solving these issues necessarily require institutional reforms that transform the way they interrelate, in order to ensure cooperation with each other as well as mutual commitment to devolutionary imperatives.

5. Judicial Pronouncements relating to the Northern Provincial Council

The judiciary plays a key role in the implementation of devolution, in terms particularly of giving effect to the demarcations of the respective spheres of each tier of government, through the interpretation and enforcement of the locations of power in the Constitution, and giving them meaningful effect within the wider political trappings of power-sharing.

However, this chapter does not attempt a detailed discussion of the judicial attitudes that prevail on matters of power devolution. Nor does it broach the more general question of how constitutional and legal provisions on devolution have been interpreted. Instead, the following is limited to key decisions by the Supreme Court on the Thirteenth Amendment, handed down in the lead up to the Northern Provincial elections, analysing them in light of relevant legal principles, political realities, and factual circumstances that implicated their cases. Finally, that discussion will result in the analysis of the decisions' impact on the functioning of the Northern Provincial Council.

Accordingly, the following cases will be discussed: *In re the Twenty First Amendment Bill*¹, *The Superintendent, Stafford Estate v. Solaimuthu Rasu*² and, finally, *Wijialudchumi Ramesh v. C.V. Wigneswaran Chief Minister Northern Provincial Council*³. These cases have been selected because of the timing and political context in which they were determined and because the importance of the subject area they cover.

5.1. In re the Twenty First Amendment Bill

A Bill titled "The Twenty First Amendment to the Constitution", a Private Member's Bill presented by a member of the Jathika Hela Urumaya (JHU), was placed on the Order Paper of Parliament on 18 June 2013. The Bill sought to repeal parts of the Thirteenth Amendment to the Constitution. The presentation of this Bill clearly targeted the impending Northern Provincial Council elections, based on the fear that the Tamil National Alliance (TNA) would secure a majority victory and thus consolidate its political presence in the North through the Provincial Council.⁴

Under Article 154G(2) of the Constitution, no Bill for the amendment or repeal of the provisions of Chapter XVIII A (i.e. the Thirteenth Amendment) can become law, unless the President refers it to every Provincial Council, after its publication in the Gazette and before it is placed on the Order Paper of Parliament. The Petitioner contended that, since none of the Provincial Councils had been consulted in respect of this Bill, it cannot be enacted into law until there was due compliance with the mandatory provisions of Article 154G(2).

However, Chief Justice Mohan Peiris, writing the Opinion of the Court, held that the examination of Parliament's compliance with the procedure in Article 154G(2) was beyond its jurisdiction.

¹ *Centre for Policy Alternatives (Guarantee) Limited v. The Attorney General* SC SD No: 17/2013.

² SC Appeal No 21/2013.

³ SC FR Application No. 82/2014.

⁴ Kapila Punchimanna, 'JHU proposal embarrasses President, Ranil' *The Ceylon Today* (18 May 2013) <www.ceylontoday.lk/16-32682-news-detail-jhu-proposal-embarrasses-president-ranil.html> last accessed 9 March 2015.

This was so because, firstly, in terms of s.3 of the Parliament (Powers and Privileges) Act, which is incorporated to Article 67 of the Constitution, the placement of the Bill on the Order Paper was part of parliamentary proceedings, which the Supreme Court was denuded of jurisdiction to impeach, as a proceeding in Parliament. Secondly, the Court stated that, under Article 124, it was debarred from considering due compliance in the legislative processes, other than on the grounds set out in Articles 120 to 122 of the Constitution. The Court further stated that Article 120(a) only empowered the Court to consider whether a bill amending the Constitution needs only a two-thirds parliamentary majority or whether it requires an additional referendum. That Article, in the Court's opinion, did not extend to the consideration of compliance with Article 154G(2).

However, the Court's analysis is completely at odds with a line of judicial authority that specifically require parliamentary compliance with Article 154G(2).⁵ Those judgments sought to give Article 154G(2) an interpretation consistent with the purpose of the Thirteenth Amendment, recongising that not doing so would render it meaningless.

In the instant case, the Court attempted to distinguish the abovementioned line of authority on the basis it is faced with a bill to amend the Constitution. However, its reasoning is broad enough to apply to all bills, including those proposing ordinary legislation. Thus, the argument employed by the Court to distinguish the previous cases is problematic.

The argument that the parliamentary privileges preclude the Supreme Court from examining whether a Bill was validly placed on the Order Paper was dealt with in the *Divi Neguma* case.⁶ There, while holding that Article 154G(2) placed an obligation on the President, as opposed to the Parliament, the Court located its inquiry vis-à-vis procedural compliance as an examination of the President's discharge of his obligation. The Court asserted its exclusive jurisdiction to inquire into or pronounce upon the constitutionality of a bill as also extending to matters of procedural compliance, including those related to the placing of such a bill on the Order Paper of Parliament.

Article 154G(2) establishes an important procedure designed to encourage consultation and co-operation between Provincial Councils and the central government, and as a crucial safeguard for provincial autonomy under the scheme of devolution introduced by the Thirteenth Amendment. If the views expressed by the Supreme Court in the present case are followed, it would render ineffective this safeguard.

5.2. The Superintendent, Stafford Estate v. Solaimuthu Rasu

In the lead up to the elections, the idea that a TNA-run Northern Provincial Council would pursue the exercise of the police and land powers devolved to them under the Thirteenth Amendment, and that succeeding in this regard would be detrimental to the "national interest"

⁵ See Water Services Reform Bill – SC (SD) No. 24/2003 and No. 25/2003; Local Authorities (Special Provisions) Bill - SC (SD) No. 6/2008 and No. 7/2008; Town and Country Planning (Amendment) Bill – SC (SD) No.3/2011); Divi Neguma Bill – SC (SD) No. 1/2012 and No. 2/2012 and No.3/2012.

⁶ *Chamara Madduma Kaluge and others v. The Attorney General* (In re the Divi Neguma Bill II) SC. SD. 4 – 14/ 2012 Where the court stated that: "It has to be borne in mind that this Court does not inquire into the due compliance of the legislative process of the Bill in Parliament. The Court is only concerned with the due process that has to be observed by His Excellency the President before the Bill is placed on the Order Paper."

of Sri Lanka, was a cause for concern in multiple quarters.⁷ In this context, it is significant that the judgment of the instant case was delivered on 26 September 2013, a mere few days after the Northern Provincial Council elections, and went on to deal with the question of provincial land powers. The judgment consisted three separate but concurring opinions.⁸

The question immediately before the Supreme Court was whether the power to issue quit notices was within the powers devolved to Provincial Councils. The Court needed to resolve that matter in order to decide whether the Provincial High Court had the power to issue writs in these circumstances. However, in deciding this issue, Chief Justice Mohan Peiris held that it was required to determine the extent to which land powers were devolved to the Provincial Councils and the extent to which they were retained by the Centre. The outcome of this analysis in Chief Justice Peiris's reasoning was that land continued to vest with the central government, as such the power to issue quit notices was with the Central Government and was, therefore, beyond the jurisdiction of the Provincial High Court.⁹

However, many considered that the judgment resolved conclusively the extraneous question of the extent to which land powers were devolved to the provinces.¹⁰

Moreover, it has to be noted that the judgement of Chief Justice Mohan Peiris was particularly strong in its reassertion of central supremacy over the periphery in a unitary state such as Sri Lanka. The opinion made two strong statements of law regarding the demarcation of land power between Government and Provincial Councils.

Firstly, it was held that the advice of the Provincial Council was not an essential prerequisite for the disposition of State Land within a province. This was because, though Item 1:3 in Appendix II to the Ninth Schedule reads, "Alienation or disposition of the State land within a Province to any citizen or to any organisation shall be by the President, on *the advice of the relevant Provincial Council*, in accordance with the laws governing the matter" (emphasis added), the

⁷ Anthony David, "Remove police and land powers before holding northern elections: Weerawansa", The Sunday Times, 12 May 2013, available at <http://www.sundaytimes.lk/130512/news/remove-police-and-land-powers-before-holding-northern-elections-weerawansa-44172.html> ; Shamindra Ferdinando, "Gota opposes NPC polls", The Island, 23 May 2013, available at http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=79696; P.K. Balachandran, "Lanka can't toe India line on 13th Amendment: Gotabaya", The New Indian Express, 27 May 2013, available at <http://www.newindianexpress.com/world/Lanka-cant-toe-India-line-on-13th-Amendment-Gotabaya/2013/05/27/article1607688.ece>

⁸ The judgment of Chief Justice Mohan Peiris is available at <https://www.colombotelegraph.com/wp-content/uploads/2013/09/Supreme-Court-29-09.pdf> ; The judgment of Justice S. Sripavan is available at <https://www.colombotelegraph.com/wp-content/uploads/2013/09/SC-Appeal-Sripavan.pdf> ;The judgment of Justice Eva Wanasundare is available at <https://www.colombotelegraph.com/wp-content/uploads/2013/09/SC-appeal-Eva-W.pdf>

⁹ Kishali Pinto-Jayawardena , "No tectonic shift in 'State Land being vested in the Republic'", The Sunday Times, 6 October 2013, available at <http://www.sundaytimes.lk/131006/columns/no-tectonic-shift-in-state-land-being-vested-in-the-republic-64811.html>

¹⁰ "Attorney at Law Gomin Dayasiri says that the Supreme Court has provided a strong verdict on land powers", Sri Lanka Broadcasting Corporation, 27 September 2013, available at <http://www.slbc.lk/index.php/component/content/article/1-latest-news/16466---attorney-at-law-gomin-dayasiri-says-that-the-supreme-court-has-provided-a-strong-verdict-on-land-powers> ; Sarath Malalasekera, "Settled: Land Powers With State", The Daily News, 27 September 2013, available at <http://www.dailynews.lk/?q=local/settled-land-powers-state>

absence of the word ‘only’ meant that consultation with the Council was not mandatory. However, this holding diverges from previous case law¹¹.

Secondly, rejecting the idea that Provincial Councils have the power to make statutes in relation to State Land within the province, Chief Justice Peiris stated that Provincial Councils had power to make statutes to administer, control and utilise State Land, only if the Government makes such State Land available to the Provincial Councils for a Provincial Council subject.

Questions have been raised on the legal validity of Chief Justice Peiris’s argument¹² and whether his judgment operates to change the law relating to the disposal of State Land¹³. However, in practice the judgment has been cited as authority for the proposition that “the competent authority in issuing a quit notice for ejection does not fall within the extents of matters specified in the provincial Council list and therefore the provincial High Court would have no jurisdiction to exercise writ jurisdiction in respect of quit notices issued under State Lands (Recovery of Possession) Act”¹⁴. This interpretation of the judgment also means that would-be litigants have to now invoke the jurisdiction of the Court of Appeal to obtain writs in respect of quit notices issued under the State Lands (Recovery of Possession) Act.¹⁵

5.3. The Chief Secretary’s Fundamental Rights Application

The fundamental rights application by the former NPC Chief Secretary claimed that Administrative Standing Instructions No 1/2014¹⁶ issued by the Chief Minister violated her right to equal protection of the law and freedom to engage in a lawful occupation. As discussed above¹⁷, the Chief Minister stated that he issued these Administrative Standing Instructions (referred to as the “circular”) in the context of the former Chief Secretary stalling the execution of decisions by the Board of Ministers under cover of the Governor’s authority. The circular specifies, *inter alia*, the channel of communication between Chief Secretary and the Governor, as well as providing for the day-to-day functions of the provincial public service.

The Supreme Court, while granting leave to proceed in this matter, issued an interim order

¹¹ In re the Land Ownership Bill “(SC. SD. No. 26/2003 - 36/2003); Vasudeva Nanayakkara v. K.N Choksy and Others (John Keells case) (2008) I S.L.R 134

¹² See S.N. Silva, Ramifications Of 13A Governing State Land, Colombo Telegraph, 9 October 2013.

¹³ M. A. Sumanthiran, “Land powers and the Supreme Court”, The Ceylon Today, 6 October 2013, available at <https://www.ceylontoday.lk/78-44262-news-detail-land-powers-and-the-supreme-court.html>

¹⁴ See Justice A.W.A Salaam’s judgment in Bandusena Dissanayake v. P.B. Siripala, Divisional Secretary, Kebithigollawa CA PHC 256/06

¹⁵ Seelawathie Perera v. Municipal Commissioner of the Colombo Municipal Council HC. RA 84/2014

¹⁶ See ‘Full Text of Administrative Circular Issued by Northern Chief Minister CV. Wigneswaran That has been Challenged in Courts’ (25 March 2014) <<http://dbsjeyaraj.com/dbsj/archives/28996>> last accessed 9 March 2015.

¹⁷ See Chapter 3.

suspending the circular.¹⁸ Thereafter, the Chief Minister filed his affidavit in Court, in which, as stated in the Supreme Court's order, he informed Court of the withdrawal of the circular.

In his order, Chief Justice Mohan Peiris opined that a statement in the Chief Minister's affidavit indicated to the Court that he would not implement the said circular, thus debarring the Chief Minister from representing anything to the contrary at a later point of time. The Court, while supposing that "the [the Chief Minister] stepped outside the four corners of his powers in issuing the said circular", held that, in the circumstances of the Chief Minister's withdrawal of the circular, a determination of its legality was unnecessary. However, the Court's assumption of the circular's illegality also had the effect, in its opinion, of preventing the Chief Minister from acting upon the circular in the future.

Chief Justice Mohan Peiris cites the judgment in *Abeywicrema v. Pathirana*¹⁹ to support his proposition. While the link between that case and the above proposition remains unclear, the former states that, "No amount of waiver can extend a public authority's power or validate action which is ultra vires."²⁰ However, in the circumstances of the instant case, the Chief Minister cannot be said to be attempting to extend the ambit of his own powers by the waiver (i.e. the withdrawal of the circular). If at all, his attempt could only have precluded the Court from making a determination on the validity of his actions.

The determination as to whether a particular act is within the limits established by a statute is a determination to be made solely by a court of law. In this situation, the Court has avoided such a determination; thus, the validity of the above circular is moot.²¹

5.4. Conclusion

The most striking aspect of the above judgments is that Chief Justice Mohan Peiris authored all three of them. In light of the controversial circumstances in which he was appointed as Chief Justice²², and the allegedly close links between him and key actors of the central government²³,

¹⁸ However, the suspension was subject to three conditions. These include that the petitioner being an officer appointed by the President in terms of Section 31 of the Provincial Council Act continues to be under the President and his directions on all matters including her transfer, approval of leave, disciplinary control. The appointment, transfer and disciplinary control, of officers belonging to the National Public Service is subject to the direction and control of the National Public Service Commission and in the case of provincial public officers appointment, transfer and disciplinary control are subject to the Provincial Public Service Commission in terms of the Provincial Councils act and the rules and regulations framed thereunder.

¹⁹ (1986) 1 S.L.R 120, *per* Sharvananda, CJ.

²⁰ *ibid.*, at p.153.

²¹ See for a detailed discussion on the applicable standards with regard to matters contained in the Chief Ministers circular Austin Fernando, 'Administrative Failure In The North' *The Sunday Leader* (20 April 2014) <www.thesundayleader.lk/2014/04/20/administrative-failure-in-the-north/> last accessed 9 March 2015.

²² Dharisha Bastians, 'The end game' *Daily Mirror FT* (17 January 2013) <<http://www.ft.lk/2013/01/17/the-end-game/>> last accessed 9 March 2015.

²³ Saman Indrajith, 'JVP asks for presidential commission to investigate judgments of CJ Mohan Peiris' *The Island* (2 February 2015) <www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=118847> last accessed 9 March 2015.

the perception that the Court was used as a tool in the tussle between the central government and the TNA-led Northern Provincial Council is reinforced.

There are varying assessments regarding judicial attitudes towards devolution of power in general, and the coherence of the body of case law developed by superior courts in relation to the Thirteenth Amendment.²⁴ However, the near unanimity in the decisions in favour of the Centre at the expense of the Northern Province is an empirical fact that is hard to ignore. This is consistent with the historical fact that Courts have in the past sought to curtail devolution arrangements offered to the Northern and Eastern Provinces.²⁵ Accordingly, there was a demonstrable reluctance on the part of the members of the TNA to resort to the Courts to resolve disputes arising between them and the Governor and Chief Secretary.²⁶ This lack of faith in the independence of superior courts on matters of devolution further exacerbated the stalemate that existed within the provincial administration.

²⁴ See Kumaravadivel Guruparan, 'The Irrelevancy of the 13th Amendment in Finding a Solution to the National Question: A Critical Note on Sri Lanka's Post-War Constitutional Discourse' (2013) *Junior Bar Law Review* 38; Uditha Egalahewa, 'Judicial Approach to the Devolution of Power; Interpretation of the Thirteenth Amendment' in Lakshman Marasinghe & Jayampathy Wickramaratne (eds), *13th Amendment: Essays on Practice* (ICS 2010): p.163; Asanga Welikala, *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2010: CPA): p.64.

²⁵ See Kumaravadivel Guruparan, 'The Irrelevancy of the 13th Amendment in Finding a Solution to the National Question: A Critical Note on Sri Lanka's Post-War Constitutional Discourse' (2013) *Junior Bar Law Review* 37-39 for discussion on in *Re the Transport Board Statute of the North - Eastern Provincial Council SC (Spl) No. 7/89; Wijesekera v. Attorney General* 2007 1 SLR 38, *Weerawansa v. Attorney General*, SCM, 15 July 2005.

²⁶ Interview with Justice Wigneshwaran, 18 December 2014, at the Chief Minister's residence; See also M. A. Sumanthiran, 'Land powers and the Supreme Court' *The Ceylon Today* (6 October 2013) <www.ceylontoday.lk/78-44262-news-detail-land-powers-and-the-supreme-court.html> last accessed 9 March 2015 (in light of the Supreme Court's judgment on land powers): "The Amendment has always been understood by politicians, civil servants, lawyers, judges and the international community to devolve land powers to the Provincial Councils. Various circulars issued by the Ministry of Land and Land Development attest to the fact that the devolution of land was never in doubt. This view was strengthened by a number of judgments of the Court of Appeal and Supreme Court. Now, in a sudden instant, the Supreme Court tells us that these powers were in fact never devolved.... The timing of the judgment is critical. The fact that it came two days after the historic election for the Northern Provincial Council where the people overwhelmingly voted for devolution and self-governance, but before the Council became functional ... More critically however, the judgment arrives at a juncture where the government has explicitly committed to denying the Northern Provincial".

6. Conclusion

The purpose of this document was to identify the main issues relating to operation of the Thirteenth amendment in the Northern Province. The larger structural problems with regard to the Thirteenth amendment and the Provincial Councils act have been discussed previously and there exists a substantial body of recommendations with regard to how its full potential can be realised and how it can be properly implemented.¹ Reference was made to these larger structural issues in so far as they relate to the experience of the Northern Provincial Council.

As was seen in the proceeding chapters, the main experiences in the Northern Provincial Council were in relation the role of the Governor in the day-to-day administration of the Provincial Council. Specifically his direct role in the exercise of provincial finance and the provincial public service proved to be particularly problematic in the context of the Northern Province. As such the provisions of the Provincial Council's Act regarding the role of the Governor in the day-to-day administration should be transferred to the Provincial Council and the Board of Ministers, as the context requires.

Several other issues generally associated with the functioning of Provincial Councils were not adverted to not because of their lack of importance but more because they were overshadowed by the power struggle between the Northern Provincial Council and the former Governor. A holistic review of the provincial council system would require a consideration of these issues and the relevant recommendations previously made.

In one and half years under review, the Northern Provincial Council did not attempt to exercise land powers, police powers or any of the powers on the Concurrent List. In fact other than the statutes for appropriation, the Council only passed a Finance Statute and a Statute to provide for the transfer of Stamp Duty. That the Council operating within the confines of seemingly non contentious powers of the Thirteenth amendment was obstructed-or was allowed to be obstructed- in this manner, does not board well for the hope that the Thirteenth amendment can deliver any meaningful devolution of power. Therefore the reform of at least the Provincial Councils act should be done as a matter of urgency.

The following is the summary of recommendations made in the substantive chapters. It includes recommendations regarding interim measures that can be adopted until more substantive legal and constitutional reform can take place.

Provincial Public Service

1. **The Northern Provincial Council** should establish a dedicated unit to support the Council in drafting Statutes. The unit would act as the provincial equivalent to legal draftsman's department in the central government. The unit should also include staff to assist the Board of Ministers on research for issues. The unit can be established by a Provincial Council Statute in terms of Section 17(2) of the Provincial Councils Act.² Employees of this unit should be insulated from political pressure and should not be

¹ See *Strengthening the Provincial Council System* (Colombo, 2008: CPA); Asanga Welikala, *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010* (Colombo, 2010: CPA).

² In terms of Article 154Q(d) of the Constitution such a unit could be set up by an act of Parliament, however setting it up through a Statute is more advisable as it gives the Northern Provincial more control over the process which would allow them to design a unit which best meets their needs in a short period of time.

allowed to engage in the political activities of any political party for a stipulated period after leaving the service of this unit (a cooling off period).

The Central Government should provide technical and financial assistance to maintain this unit.

Bi-lateral donors and local civil society organizations provide financial and technical assistance for the initial setting up of this unit.

2. **The Central Government** should review laws, policies, and practices which undermine the control of Provincial Councils of subjects that are within the provincial list.³
3. With regard to the District Coordinating Committee (DCC)
 - a. The President should instruct the Government Agent/ District Secretary to include input from the Provincial Board of Ministers in formulating the agenda for DCC meetings.
 - b. Use said DCC meetings as a forum to discuss how central government and provincial councils can co-operate at the district and sub district level.
 - c. The minutes of each DCC meetings should be made public in order to ensure greater transparency and accountability for the undertakings by different stakeholders.
4. **The Central Government** has the responsibility to place the Provincial Council, if not as the primary institution, at least as an equal partner with the centre, in the delivery of reconstruction and development programmes in the Northern Province. In doing so, it must also ensure that officials under its control (including Ministers and officials of central Ministries, the Governor, District Secretaries and Divisional Secretaries) exercise their functions in a manner that is consistent with the letter and spirit of devolution.⁴
5. **The Provincial Council** should pass a Statute in order to regulate the recruitment, and conditions of service, of persons appointed to its secretarial staff.
6. **The Governor** should amend Memorandum – 2013/01, “Delegation of powers concerning to Provincial Public Service of the Northern Province”. The appointment, transfer, dismissal and disciplinary control of the Secretary to the Assembly Secretariat of the Northern Province should be in accordance with the Statute passed by the Council. The appointment, transfer, dismissal and disciplinary control Secretaries to the Ministries of the Northern Province should be on the advice of the Board of Ministers.

Provincial Finance

The Central Government

1. Reconsider the Finance Commission’s mandate in terms of balancing vertical inequalities. The Commission’s jurisdiction is based on questions of “adequacy”, under the Article 154R(3) of the Constitution. The term is broad enough to encompass both vertical and horizontal fiscal imbalances. However, it is recommended that a measures are taken to ensure institutional commitment from both the Finance Commission and

³ Asanga Welikala, Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010 (Colombo, 2010: CPA): p. 76.

⁴ See *ibid.*, p. 44.

the General Treasury on giving effect to this interpretation, including, if necessary, legislative reform.

2. Alternatively, reassess the legal framework that allows the General Treasury disproportionate power in negotiating the bulk amount allocated to all provinces.
3. Change the provincial feedback frameworks such as the Agency Results Framework to give Provincial Councils more influence in consulting with the Finance Commission, as opposed to merely approving the provincial agencies' submissions to the Commission.
4. Amend the Constitution to ensure the security of tenure of the members of the Finance Commission. (For example: repeal the 18th amendment, and reintroduce the 17th amendment.)
5. Revisit the Provincial Financial Rules to bring them up to speed with the new circumstances of the North.
6. Commission a comparative study of Provincial Financial Rules to identify strengths, weaknesses, and best practices.
7. The introduction of legislative reform to ensure that all grants transferred to the provinces under Article 154R shall be limited to the control of the provincial machineries accountable to the Provincial Council.
8. Provide consultations and technical trainings to Provincial Council members on the confluences of nationally-levied taxes and provincial taxation power, including insights on choosing the best revenue-raising option from all mechanisms available.

The Provincial Council

9. Implement, as a matter of urgency, the provisions for the Provincial Revenue Department, as provided under Part A of the Finance Statute.