

Devolution of Legislative Power to the Provincial Council of Sri Lanka

Miss. N. Piyuji Rasanja Mendis

(BA, MA Political Science (University of Peradeniya, Sri Lanka) Master of Public Policy and Governance-MPPG (North South University)).

Abstract

The objective of the study is to examine the states of legislative devolution in Sri Lanka under present constitution of 1978. The 'Indo-Lanka Accord' committed Sri Lanka to establish a system of devolution to Provincial Councils (PCs). Consequently with the aim of devolving power, the PCs were established in each of the nine Provinces of Sri Lanka under the Thirteenth Amendment to the Constitution. In a system where devolution of power exists, power is divided between the national and sub national level. In case of Sri Lanka such a division takes place between the central government which is the government at national level and the provincial council which is the government at sub national level. The legislation is the framework by which governments of whatever persuasion seek to achieve their purposes. Under a truly devolved system, the unit to which the power is devolved can exercise its autonomy in the implementation of the devolved functions. This autonomy should have been ensured, in the PC system as expected in the 1987 Indo-Lanka Agreement. It was found that the PCs are elected bodies which were given power to pass statutes applicable to their respective Provinces, with regards to certain specified matters. The legislative power of the PCs is not exclusive theirs. Issues related with legislative power also contributed to the weak capacity basis of the Provincial Council.

Key words: Provincial Council, Devolution, Legislative Powers, Thirteenth Amendment, Constitution

Introduction

In 1987 the Indo-Sri Lanka Accord generated the two Bills, via. the Bill titled the Thirteenth Amendment to the Constitution and the Provincial Councils Bills. The Thirteenth Amendment to the Constitution of 1978, enacted in 1987, sets out the framework for the devolution of political power through a system of Provincial Councils (PC) in Sri Lanka. Thus PCs were established under the Thirteenth Amendment to the Constitution, which came into effect on 14 November 1987 along with the Provincial Council Act No.42 of 1987 (Jayampathi 2010, p.1). The Thirteenth Amendment to the Constitution provides for: the establishment of Provincial Councils, the appointment and powers of the Governor of Provinces, membership and tenure of PCs, the appointment and powers of the Board of Ministers, the legislative powers of the PCs, alternative arrangements where there is a failure in the administrative machinery, the establishment of the High Court of the Province, and the establishment of the Finance Commission (www.priu.gov.lk/ProvCouncils/ProvincialCouncils.html).

Each PC consists of members elected by the voters of the Province, on the basis of the List System of Proportional Representation, the number of members for each PC being determined by its area and population (Leitan 2001, p.2). Meaning the system seeks to provide for a structure of devolved

power-sharing through the creation of popularly elected PCs, each lead by a Chief Minister (CM), who commands a majority in the PC. Each Provincial Council has a Chief Minister and Board of Ministers. There is also a Governor for each Province, who is appointed by the President. The Board of Ministers is to aid and advise the Governor in the exercise of his functions.

A Provincial Council, unless sooner dissolved, shall continue for a period of five years from the date appointed for its first meeting, with the expiration of the said period of five years by itself operating as dissolution of the Council (Hussain 2010, p.143). The dissolved PC gets constituted only upon the holding of an election under the Provincial Council Election Act No. 2 of 1988 where fresh slates of members are elected to constitute it.

Legislative Powers of the Provincial Council

The Law (Statute) making power of Provincial Councils, for what they make is law, although different from the law passed by Parliament. With the coming into effect of the thirteenth Amendment to the Constitution in 1987, a body other than Parliament was given legislative powers for the first time.

Provincial Councils are elected bodies which were given power to pass statutes applicable to their respective Provinces, with regards to certain specified matters. Indeed validity of a 'statute' can always be canvassed in a court of law, even years after its passage. If it is ultra vires for a Provincial Council to enact such a statute, it is a nullity and is void ab initio (Uditha and Mahen 2009, p.32). The Statutes made by Provincial Councils have to be consistent with the other provisions of the Constitutions. They (statutes) will validity only within the territory over which the Council has Jurisdiction (Amarasinghe 2010, p.91). The devolution of powers in respect of Provincial Council is specified under the 9th Schedule of the 13th Amendment to the Constitution, under 3 lists viz.

1. List I, the Provincial Councils List, which specifies the powers and functions under which provincial councils may pass statutes in relation to their respective provinces;
2. List II, the Reserved List which indicates the powers which belong exclusively to the central government;
3. List III, the Concurrent List, under which both the centre as well as the provinces are able to legislate (Leitan 2000, p.7).

Provincial Council List

Article 154G enables the Provincial Council to make Statutes. Hence Provincial Councils have statutes making powers over the subjects named in List I of the Ninth Schedule to the Constitution (Provincial Council List). Article 154G(1) of the Constitution Reads: 'every Provincial Council may, subject to the provisions of the Constitution, make statutes applicable to the Province for which it is established, with respect to any matter set out in List I of the Ninth Schedule' (1978 Constitution, Article 154G(1)). This power is subject to the provisions in the Constitution including Article 75 and Article 154(G)(10). However, legislative power of the Provincial Council is not exclusive. Parliament may also legislate on matters in the Provincial Council List but under certain conditions (Jayampathi 2010, p.24).

The Provincial Council List mainly cover those areas of activity where decisions affect primarily persons living in the Province and are applicable to the Province only. (Uditha and Mahen 2009,p.39). Also the subjects allocated to the Provincial Councils cover a range of items which are of particular relevance to regional development and provincial governance (Amarasinghe 2010, p.92).

The Constitution has provided for the Provincial Council to pass statutes on all subjects in List I irrespective of whether laws already passed by Parliament are in existence. A provincial Council may by a resolution decide not to exercise its statute-making powers. Upon the acceptance of this resolution, the Parliament is thereafter empowered to make laws applicable to that Province. Article 154G(3) provides that Parliament could by a majority legislate in respect of the matters specified in Provincial Council List I with the consent of some of the Provincial Councils in which event the Bill shall become Law applicable only to those provinces. But if Parliament passes by a two-third majority, such Law would become applicable to all Provincial Councils whether they agreed to such Law or not.

The Provincial Council List (List I) enumerates 37 subjects or 'items' (many of which contain 'sub-items' further specifying the scope and limits of the itemized subjects) over which legislative and executive powers are devolved on Provincial Councils. Three of the most important subjects are further elaborated in three appendices that form part of the Provincial Council List. These are Law and Order (Appendix I), Land and Land Settlement (Appendix II) and Education (Appendix III) (CPA 2010, p.36). Some of the subjects listed in the Provincial Council list (List) are following: Police and Public order, Planning, Education and Educational services, Local government, Provincial housing and construction, Roads and bridges and ferries thereon within the province, Social services and Rehabilitation, Regulation of road passenger carriage services and the carriage of goods by motor vehicles within the Province and the provinces of inter-provincial road transport services, Agriculture and Agrarian Services, Rural Development, Health, Food supply and distribution within the Province, Co-operative, Land, Irrigation, Animal husbandry and transport (Ninth Schedule of the 1978 Constitution).

So, it is plain and simple that the Parliament is not precluded from making laws in respect of a subject in the Provincial Council List, but it has to follow a special procedure prescribed by Article 154G. The Provincial Council is a however subordinate law-making bodies. Parliament remains supreme and can be exercise of its legislative powers determine the scope of the powers of the Councils. Also the statute of a Provincial Council applies only within the Province. Therefore the sphere of jurisdiction of the Provincial Council though significant it is by no means an exclusive one.

The Reserved List

There is no ambiguity with the Reserved List. Those subjects and functions are exclusively reserved for the Central Government only. Means the Reserved List contains the matters in respect of which the Parliament is empowered to make laws. These cover areas of national importance. The provincial Council shall have no power to make statutes on any matter set out in the Reserved List II of the Ninth Schedule.

The Matters set out in the Reserved List II are: National Policy on all subjects and functions relating to: Defense and Security with Internal security, law and Orders and prevention and detection of crimes. Foreign Affairs, Post and Telecommunication, Justice placed in relation to the Judiciary and Courts

Structure, Finance in relation to National Revenue, Monetary policy, external resources and customs, Foreign trade, Inter Provincial Trade and commerce, Ports and Harbors, Aviation and Airports, National Transport, Rivers and waterways, Shipping and Navigation, Maritime Zones including historic waters, territorial waters, Exclusive economic zone, State land a foreshore, Mines mineral, Immigration and Emigration and Citizenship, Election including Presidential, Parliament, Provincial Council and Local Authorities, Census and Statistics etc (Ninth Schedule of the 1978 Constitution).

The first item in the Reserved List is the 'National policy on all subjects and functions. Notably the Provincial Councils have no powers in respect of National Policy, even on subjects and functions included in the Provincial Council List. It is for the Parliament to lay down National policy. The statute of a Provincial Council is subject to such policy. It is therefore clear that Parliament retains its control on all matters and where appropriate may dictate to the Provincial Councils. For instance; The National Transport Commission Act No.37 of 1991. Some of the provisions of this Act are in conflict with items 8 of the Provincial Council List. However, since it relates to National policy, its constitutional validity was upheld by the Supreme Court and it was passed by a simple majority (Uditha and Mahen 2009, p.40).

Concurrent List

The Concurrent List contains the matters in respect of which both the Parliament and the Provincial Council may make laws and statutes respectively. The Concurrent List (List III) enumerates 36 subjects, once again with some items further elaborated in sub-items. The following are some of the subject listed in Concurrent List. Namely; Higher Education, national Housing and Construction, Social services and rehabilitation, Agricultural and Agrarian Services, Health, Registration of births, marriages and deaths, Renaming of Town and villages, co-operative, co-operative Banks, Irrigation, Social forestry and protection of wild animals and birds, fisheries, Animal Husbandry, Employment, Tourism, Drugs and Poisons etc (Concurrent List, 13th Amendment to the 1978th Constitution).

Every Provincial Council may subject to the provisions of the Constitution, make Statutes applicable to the respective Province, with respect to any matter on the concurrent List III of the Ninth Schedule after such consultation with Parliament as it may consider appropriate in the circumstances of each case (Article 154G (5) (a)). Also any matter on the Concurrent List the Central Government can legislate after consultation with the Provincial Council. If any provision of any statute made by a Provincial Council is inconsistent with the provisions of any such law made by Parliament, such law shall prevail and the provisions of the statute shall, to the extent of such inconsistency be void (Article 154G(5)).

Assessing the Legislative Power of Provincial Council

According to the majority determination in the Thirteenth Amendment case is that the Provincial Councils do not exercise sovereign legislative power and are subsidiary bodies exercising limited legislative powers (Uditha and Mahen 2009, p.38). The power given to the Provincial Council to make statutes in respect of the matters set out in the Concurrent List is restricted (Selvakumaran 2010, p.74-75). Here, the devolution clearly flows from Parliament. A Provincial Council ought not to take upon itself responsibilities that it

cannot handle. On the other hand, if it has the capacity to discharge its responsibilities in respect of the matters in the Concurrent List, provisions is made for the Council to do so, provided that, where there exists a conflict between the National Government and the Provincial Council, the Parliament could effectively obstruct the Council by firstly objecting to the making of any statutes in respect of the said matters and thereafter by enacting legislation based on National Policy (Uditha and Mahen 2009, p.44).

As said earlier a Provincial Council can make a statute which will apply only within its provincial limits. No Provincial Council can claim to have authority to make statutes having application extra provincially or territorially. The exercise of power to make statutes is subject to other provision of the Constitutions. This, of course, would have been an inherent limitation of any authority or body which is a creature of a constitutional or legislative document, even if it has not been stated expressly. Further there is a procedural prescription which a provincial Council is expected to follow if it were interested in making a statute on a matter on the Concurrent List. The Provincial Council is expected to carry out such consultation with Parliament as it may consider appropriate in the circumstances of each case (Ibid 2010, p.74-75).

However, a statute made by a Provincial Council may be void if the statute is inconsistent with a law passed by Parliament which was enacted following the provisions of paragraphs (2), (3), (4) and (5) of Article 154G of the Constitution. This is due to paragraph (6) of Articles 154G, which reads as follows:

“if any provision of any statute made by a Provincial Council in inconsistent with the provisions of any law made in accordance with the preceding provisions of this Articles, the provisions of such law shall prevail and the provisions of such statute shall, to the extent of such inconsistency, be void.”

Therefore any statute made by a Provincial Council, the provisions of which are inconsistent with any law passed by Parliament in terms of paragraphs (2),(3),(4) or (5)(a) of Article 154G will be void to the extent of their inconsistency (Selvakumaran 2010, p.75-76).

The subjects and functions allocated in the Provincial Council List are not exclusively theirs. In terms of Article 154H a Statute enacted by a Provincial Council (as opposed to Law enacted by Parliament) comes into force only upon receiving the assent of the Governor. A Governor could assent or return same to the Provincial Council together with a message requesting the Council to reconsider it or consider the desirability of introducing amendment as may recommended in the message.

Thereafter the Governor may assent to the Statute or reserve it for reference by the President to the Supreme Court within one month of the passing of the statute for the second time, for a determination that it is not inconsistent with the provisions of the Constitution. Depending on the determination of the Supreme Court the Governor shall either assent or withhold his/her assent (Article H (4)). The above provisions place several effective obstacles in the passage of a statute before it comes into force. It is open to a Governor temporarily obstruct a statute for various reasons, yet a permanent obstacle may be placed, only if the statute is inconsistent with the Constitution (Uditha and Mahen 2009, p.33-34).

The Thirteenth Amendment also provides for the procedure for the amendment or repeal of Chapter XVIIIA of the Constitution or the Ninth Schedule. If all the Provincial Council agrees to the amendment or repeal, such a Bill in Parliament could then be passed with a simple majority. If one or more Councils do not agree then it requires a two thirds majority to be passed.

In 1988, when the Provincial Council system started functioning, it was found that there were about 300 laws in force pertaining to subjects in the Provincial and Concurrent list (Wickramaratna 2010). All these referred to the functions and powers of Ministers in the Central Government. Therefore, the PCs should make the necessary statutes to transfer such powers and functions to the provincial ministers and officials. For this purpose 'Statute Drafting Unit' with the necessary human and material resources is pre-required. But, the biggest challenge is unavailability of qualified personnel (legal draftsman) in some of the provincial councils. For instance the Eastern Provincial Council is not properly equipped to the specialized task of making statutes.

It was noted that the Provincial Council (Consequential Provisions) Act, No.12 of 1989 was passed by the Parliament. The Act was passed in order that even in the absence of statutes, provincial authorities may exercise powers using pre-1987 laws a legal basis. A pre-1987 parliamentary law on a matter in the Provincial Council List will be inoperative in a Province only if a statute is made. The Provincial Council (Consequential Provisions) Act enables the provincial councils' authorities to exercise powers in respect of matter set out in the Provincial List. The proposal of the Provincial Council (Consequential Provisions) Act was brought by Mr. Bernard Soysa. He was a member of the Western Provincial Council, and was the prime mover of this proposal (Wickramaratne 2010, p.65). So, the initiative was taken by a member of the sub-national government. Despite the fact the central government showcased its unwillingness. However, the government reluctantly agreed to make such a provision (Ibid).

Conclusion

With the aim of devolving power, the Provincial Councils were established in each of the nine Provinces of Sri Lanka under the Thirteenth Amendment to the Constitution. Despite the PC System of Sri Lanka is an example of devolution, which has been formulated strictly following the power arrangement within a unitary system of government. Despite the Amendment the Central Government would continue to hold supreme power. The Parliament retains a variety of ways in which it can also pass laws on the subjects assigned to the Provincial Council (Amarasinghe 2010, p.91). Also the President remained supreme in the Executive field; the Governor is a figurehead who is subject to the control and directions of the Executive President and the Provincial Council in terms of the Thirteenth Amendment would only be a body subordinate. If the President gives directions to any Provincial Council they have to be complied with. Failure can entail Parliament declaring the taking over of the functions of the Council and the President thereafter would take over functions by issuing a Proclamation.

The Ninth Schedule to the Thirteenth Amendment contains three Lists. These Lists set out the subjects and the legislative functions allotted to the centre and the periphery (Provincial Council). List I enumerated the Provincial Council List, List II the Reserved List or subjects allocated clearly to the Central Government and List III the Concurrent List. There is no ambiguity with the Reserved List. Those subjects and functions are exclusively reserved for the Central Government. But the subjects and functions allocated in the Provincial Council List are not exclusively theirs. It was found that the Provincial Council has no power in respect of National Policy, even on subjects and functions listed in the Provincial Council List. The legal framework which deals with Provincial Council system allows the central government to intervene day to

day affairs of the Councils. The weakness of the concurrent jurisdiction, the Reserved List “national policy” power, the Governor’s involvement in the statute-making process generally through the requirement of assent and specifically in relation to financial statutes, the lack of precision and clarity in textual formulations of the three lists all contribute to a vulnerable system of legislative devolution. So it clear that the devolution of legislative power attempted by the 13th Amendment was done within the constraints of a ‘Unitary State’ and a “Centralized Executive Presidency”. The scenario is inappropriate meaningful devolution and practicing principles of subsidiarity as well as.

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