

Insight to the 13th Amendment to the Constitution: Better way of Power-sharing?

NKK Mudalige

Lecturer in Law, Faculty of Law

General Sir John Kotelawala Defence University

Power-sharing is a political arrangement in which, all different ethnic, linguistic and cultural groups take part in government together. Three types of power sharing arrangements can be identified namely Decentralization, Devolution of powers and Federalism.

These power sharing arrangements have their own identical features which can distinguish from one another. Decentralization refers to devolving administrative powers by an ordinary Act in the legislature. The concept of devolution is used to mean the delegation of Central Government power without the relinquishment of supremacy (In Re Thirteenth Amendment to the Constitution (1987) 2 SLR 312). Devolution may be legislative, executive and administrative which has gone beyond from decentralization but falls behind federalism. In Federalism the field of government is arranged between centre and periphery, which are not subordinate to one another, but are coordinate and autonomous within the given sphere of powers.

The 13th Amendment to the Constitution of 1978 and Provincial Councils Act 42 of 1987 were introduced as a result of the Indo-Lanka Accord. The prime objective of the 13th Amendment was to establish a regime for devolution of power to "units of devolution" referred to as "provinces" within that structure. Features of 13th Amendment and the said Act do manifest characteristics or features of substantial devolution of powers which is the objective of the Amendment itself.

But when considering about substance of the 13th Amendment it is controversial whether it has provided meaningful devolution and autonomy to devolved units because 13th Amendment itself contains provisions which hinder such meaningful devolution of powers. The centre continues to be legally supreme over legislative and executive powers that have been devolved to provinces (In Re Thirteenth Amendment to the Constitution (1987) 2 SLR 312).

It is noteworthy that different people have different positions with regard to the achievement of meaningful devolution provided by the 13th Amendment. Herein after in this report it is expected to examine the features of the 13th Amendment in which may be substantial devolution is feasible, causes and factors which hinder such devolution as well as the ways and means of addressing the obstacles identified by the field research.

It is pertinent to analyze whether 13th Amendment has provided for substantial devolution of powers. Features of the 13th Amendment in which substantial character of devolution is feasible can be examined from statutory provisions provided by it. Devolving legislative, executive as well as administrative powers to the units with the objective of enabling people of the several provinces to participate in the national life and government can be pointed out as identical characteristics of "Substantial devolution of powers"

Devolution of Legislative power is an establishment and institutionalization of one of governance role and function at the provincial level. Article 154 G (1) enacts that 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. It can be identified that Provincial Councils were given a sphere which they can exercise their exclusive legislative power. With regard to above mentioned section it is evident that Provincial Councils are autonomous within the given sphere of legislative powers through List I. Under the meaning of substantial devolution of power the devolved bodies must acquire a plenary power to legislate within those powers which have been devolved to them. Such plenary or absolute power is entrusted by Article 154 G. (1), therefore it can be identified as a feature which substantial character of devolution is feasible.

Article 154 G (4) enumerates that where one or more Provincial Councils request Parliament, by



resolution, to make law on any matter set out in the Provincial Council List, Parliament may make law on that matter, applicable only to the Provinces for which those Provincial Councils are established, by a majority Members of Parliament present and voting. It recognizes that each unit (each Provincial Council) as a separate constitutional unit when exercising its devolved legislative powers which can be pointed out as a feature of substantial devolution of powers. Because Provinces are given the discretion to request the centre to make laws specifically applicable to its own periphery, with regard to subjects which have devolved by List I.

When Provincial Council passes a statute under any subject allocated to Provincial Councils in Ninth Schedule of the Amendment, the Governor can refer it to Supreme Court to determine the consistency of that legislation. If the Supreme Court determines the statute as consistent with the Constitution, Governor must on receipt by him of the Court's determination, assent to the statute by virtue of Article 154 H (4) of the Constitution. It can be said that Article 154 H (4) had deliberately undermined the discretion of the Governor after Supreme Court determination and it confirms the absolute legislative power of Provincial Councils up to a certain extent. This can be regarded as a characteristic of substantial devolution of powers which is feasible from the Thirteenth Amendment.

Plenary Legislative power of Provincial Councils within the given sphere of subjects can be identified in Article 154 G (8) to the Constitution as well. It states that when a Provincial Council passes a statute with respect to List I of the Ninth Schedule which is inconsistent with a law, that law shall remain suspended with effect from the date on which that statute receives assent and so long only as that statute is in force. In this situation Provincial Councils were given the legislative autonomy with regard to devolved subjects to them which is a substantial character of devolution of powers under 13th Amendment.

Although the substantial devolution of Executive power is not a frequent character to the 13th Amendment in certain areas, there are some features which can be pointed out as features of substantial devolution with regard to Executive function of Provinces.

Article 4 (b) refers that President is empowered to exercise the Executive Powers of the state as an agent or trustee of the people (In Re Thirteenth Amendment to the Constitution (1987) 2 SLR 312). Under Article 154 B (2) Governor is appointed by the President. Authority of the Governor is derived from the President and he/she shall exercise the executive power vested in him as a delegate of the President. It is clear that the sole executive power exercised by the President has devolved to the periphery as it delegated to the Governor. Therefore it can be regarded as an identical feature of devolution of state's executive power to the periphery which is substantial devolution of executive power.

Repository executive power vests in Governor of the Province who is the appointee of the President at the centre. It is often criticized that by the repository power of the Governor, it hinders effective devolution of powers. But Chief Minister and other Ministers have some executive power with regard to operation of Provincial Councils where the discretion of the Governor is undermined. Therefore periphery (provincial councils) has the delegated authority of executive in some matters.

Article 154 B (8) (a), (b) and (c) envisages about Governor's power with regard to summon, prorogue, and dissolve the Provincial Council. Article 154B (8) (d) enumerates that Governor shall execute above powers in accordance with the advice of the Chief Minister (See Mahindasoma vs. Malithripala Senanayake and Another (1996) 1 SLR 180) which upholds the idea of devolution. As Chief Minister and the Board of Ministers are elected members of Provincial Council, it can be said that they have an inherited power of interfering with the matters which effect on given sphere of powers. Therefore Provincial Ministers' powers which control over Governor's discretion can be regarded as a feature of substantial devolution of powers.

According to Article 154 F (4) Governor is empowered to appoint a member of Provincial Council as the Chief Minister. When more than one-half of the members in Provincial Council are members of one political



party, the Governor shall appoint the leader of that Political Party as the Chief Minister. Although Governor has the discretion of appointing the Chief Minister of the Provincial Council, discretion can be controlled in some situations which emphasize real devolution of powers to the periphery by the 13th Amendment (Premachandra and Dodangoda vs. Jayawickrema and Bakeer Marker and Others (1993) 2 SLR 294)

Elected members of the periphery must be given the autonomy of executing powers within the given sphere, because they are the real stake holders of sovereignty of people. When such power is delegated to them, it is the real meaning of substantial devolution of powers.

Devolution of Administrative power - Provinces have their own administrative institutions which handle government services and delivery system apart from exercising legislative and executive functions. Therefore it is evident that 13th Amendment has institutionalized the substantial devolution of administrative power also. Provincial Public Service Commission is authorized to execute their functions with regard to administration of the Public Service within the Province. Administrative autonomy was confirmed with the transference of "Local Government units" under List I which is "the provincial council list". Local authorities were introduced in order to local government and village administration. Devolving local authorities to the periphery can identify as a feature in which the substantial devolution of administrative power is feasible.

It is evident from the above mentioned data that 13th Amendment has provided room for substantial devolution of powers by establishing legislative, executive and administrative autonomy within the given sphere of powers. But it is essential to examine the practicality of such devolution and obstacles of the devolution system under 13th Amendment.

Factors and causes that hinder the substantial devolution of powers...

With regard to provisions of the 13th Amendment, it can be said that powers which were devolved through the periphery has undermined by some other provisions of the same document. Such provisions can be referred as causes and factors which hinder the substantial devolution of powers to the provinces.

Although it was mentioned in this report that legislative powers were devolved substantially over Provincial councils, some provisions of the 13th Amendment had undermine the legislative competence of these units which can be identified as a factor of hindering substantial devolution.

Scope of legislative power of Provincial Councils subject to the legislative power of Parliament
Article 154 G (1) empowers Provincial Councils to make statutes with respect to any matter set out in List I of Ninth Schedule. But no exclusive or independent power vested in the Provincial Councils in respect of exercise of legislative powers. Article 154 G (2) and Article 154 G (3) conserves the sovereignty of the Parliament in the legislative field. The Provincial Council is dependent for its continued existence of and validity and for its legislative competence in respect of matters in the Provincial List (List I) and in the Concurrent list on Parliament (In Re Thirteenth Amendment to the Constitution (1987) 2 SLR 320). Although it was argued in the case of "In Re Thirteenth Amendment to the Constitution" that procedures which must be followed in accordance with Article 154 G (2) and Article 154 G (3) restrict the legislative powers of the Parliament in respect of matters in the Provincial Council List and the Concurrent List, the court was in the position that those Articles impose only procedural restraints not the sovereign power of the Parliament. Therefore it is evident that powers vested in the Parliament by 13th Amendment hinder the substantial devolution of legislative power which has confirmed by the document itself.

Article 154 G (11) elucidates that Parliament can pass laws with a simple majority with respect of any matter devolved under Provincial Council List if the objective of the Parliament is to implement any treaty, agreement or convention with any country or any decisions at an international conference, association or other body. This provision hinders the devolved legislative power through the List I and List III by empowering Parliament to make laws without even consulting Provincial Councils.



Within the meaning of substantial devolution of power Parliament must be powerless at legislating for the devolved units. But 13th Amendment makes the distinction between itself and substantial devolution of powers clear, as in many specific ways the 13th Amendment allows Parliament to legislate for the Provinces under devolved areas and under concurrent list. This undermining character of devolution of powers has been confirmed by the Supreme Court as well by recognizing Parliament's ability under above mentioned matter (Provincial Councils (Amendment) Bill, Supreme Court decisions on Parliamentary Bills, Vol. VI (1990)). This leaves Parliament a wide area of legislative competency over Provincial Councils which hinders substantial devolution of powers.

It can be said that Article 154 Q (d) provides with a large area of legislative competency to Parliament in the affairs of the Provinces. It states that Parliament is empowered to make laws for any other matter necessary for the purpose of giving effect to the principles of provisions of this Chapter, and for any matters connected with, or incidental to, the provisions of this Chapter. It emphasizes a limitless constitutional terrain over which Parliament may freely roam in the execution of its legislative skills that undermines the meaningful devolution of powers.

There are many Articles in the 13th Amendment which can be pointed out as undermining characteristics of substantial devolution of powers.

Under concurrent list which is "List III", centre can legislate after consultation of Provinces as well as Provinces can make statutes with regard to shared matters. But by virtue of Article 154 G (6) if any provision of any statute made by a Provincial Council is inconsistent with the provisions of any law made in accordance with the preceding provisions, such provisions of the statute shall be void. It is evident that the domination of law making power of the Parliament in the mentioned Article has hindered the substantial devolution of power which does not provide legislative autonomy within the given sphere of powers to the units.

Article 154 G (7) refers that Provincial Council shall have no power to make statutes on any matter set out in List II, which is the "Reserved List". First subject of List II of the Ninth Schedule is "National Policy on all Subjects and Functions". In "The Agrarian Services (Amendment) Bill" (Supreme Court decisions on Parliamentary Bills, Vol. VII (2004)) determination it was said that the Act was designed to regulate the rights and duties of tenant-cultivators. Supreme Court was in the opinion that Bill contained a restatement of intended National Policy, therefore Parliament was entitled to regulate on that subject.

It is evident that not only provisions itself in the document, but also the judicial interpretations also had become a cause which hinders the substantial devolution of powers.

Governor's power over the statutes passed by Provincial Councils can be identified as another factor which impedes substantial devolution of powers. Under Article 154 H the Governor can refuse to assent to a statute passed by Provincial Council and return it to the Provincial Council with the request of reconsideration. If the Provincial Council passes the statute a second time, the Governor may either assent or reserve it for reference by the President to a determination of the constitutionality. By these means, the Governor can delay or influence the statute making powers of Provincial Councils and this constitutes an unwarranted intrusion by the central government into the affairs of Provincial Councils (Power-sharing in Sri Lanka: Constitutional and political documents 1926-2008, Berlin: Centre for Policy Alternatives)

It was mentioned in above also that there are many causes and factors which hinder the devolution of executive power under 13th Amendment. Those factors which negate substantial devolution of executive powers can be summarized under two headings; Interference by the Governor and Interference by the President

Interference by the Governor into the execution of "Executive Power" of the Provincial Council can be regarded as a hindering factor of devolution.



The Provincial Councils Act No. 42 of 1987 dealt with the financial powers of Provincial Councils. Financial powers of Provincial Councils were mainly vested in the Governor. Section 25 (1) of the Act requires the Governor to prepare a statement of the estimated receipts and expenditure of the Province to be laid down before Provincial Council. It is provided that demand for expenditure has to be made on the recommendation of the Governor, who possess veto power over any expenditure incurred from the Provincial Fund. Vesting such sphere of powers under an appointee of the centre can be regarded as an impediment to substantial devolution of executive power.

Apart from financial power which is vested on Governor, general position has been another cause which hinders the substantial devolution of powers. In accordance with Article 154 B (2) Governor is appointed by the President, by warrant under his hand, and shall hold office, during the pleasure of the President. The Governor can be regarded as the mechanism by which the centre establishes control over the Provincial Councils as the above mentioned Article states that Governor holds his office by warrant under President's hand. As the Governor in the each province is the repository holder of executive powers such control over the Governor by President will impact on execution of executive power by the periphery that hinders the meaningful devolution of powers.

Provincial Council cannot remove the Governor from office but only advice the President to remove. (Article 154 B (4) of the Constitution) Also with regard to summoning, proroguing and dissolution of Provincial Councils, the Governor is required to act on the advice of the Chief Minister, but only so long as the Board of Ministers commands, in the opinion of the Governor, the support of the majority of the Provincial Council (Article 154 B (8) (d) of the Constitution). Also Although the former part of Article 154 B (8) (d) makes substantial devolution of power feasible by empowering the Chief Minister to advice on the said matter, later part of the Article has provided a condition which is a factor which hinder the substantial devolution of power by establishing a condition.

Article 154 F (1) states that Governor shall act on the advice of the Chief Minister and Board of Ministers, except so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion. It can be pointed out many provisions which authorize Governor to act in his discretion without the advice of the elected members of the Provincial Council which hinder the devolution of executive power. Governor is empowered to give assent to statutes passed by Provincial Council in his discretion. His power to report the President stating that the administration cannot be carried out in accordance with the provisions of the Constitution can be another area that the Governor can act in his discretion (Article 154 L of the Constitution). Also under Article 154 F (4) the Governor is empowered to pose the discretion when appointing the Chief Minister of the Provincial Council, where it doesn't have more than one-half of members from one political party.

According to Article 4 (b) of the Constitution the executive power of the People, shall be exercised by the President. President's power to interfere into devolved power of Provincial Councils can be regarded as a factor which hinders the substantial devolution of powers. Mechanism which is used to interference is the office of Governor. According to Article 154 H (4), President, after reference of the Governor, can refer statutes passes by Provincial Councils. Also under Article 154 L if the president is satisfied that the administration of a Province cannot be carried out in accordance with the provisions of the Constitution, the President can by Proclamation, take over the administration of the Province and functions except Provincial Council which hinder the substantial devolution of powers.

Under Article 154 N President can take corrective measures with regard to financial matters of Provinces in times of financial instability of the country which enables President a discretionary power over Finance of Provinces that hinder the substantial devolution of powers.

Devolution of administrative power to the periphery has many obstacles. Similar to legislative power and executive power, administration powers of Provinces have undermined by the Central control as well.



Although 13th Amendment has encouraged establishing the Provincial Public Services Commission, it didn't provide the required level of authority. Provinces were not given the autonomy over administration, which can be regarded as a crucial factor. It is evident that the Pre-devolution system of de-concentrated administration through Districts and Divisions continue to function concurrently with Provincial Administration which impedes the administration planning of Provinces.

It can be summarized the analysis of dejections over the operation of 13th Amendment and the Provincial Councils Act such as lack of financial autonomy devolved to Provincial Councils, overriding powers given to central government with regard to devolved legislative as well as executive powers and political non-willingness or non-readiness to devolve power to the periphery. It is noteworthy that powers vested on the Centre by 13th Amendment can cause unnecessary control over matters which should be actually devolved over Provincial Councils. Subject 01 of the Reserved List which is "National Policy over all matters" as well as Article 154 Q (d) will provide a limitless control over units which establish a foundation to interfere in the matters of Provinces, by stating such control as "National Policy or principles of 13th Amendment". It can be said that 13th Amendment itself has provided with factors which hinder the substantial devolution of powers. Many of the devolved areas are under the control of Parliament and the executive President. Therefore the requirement of finding ways and means in order to address these issues will emerge.

Ways and means to address obstacles identified...

Devolution of power to be meaningful, it must be less problematic in its legal framework as well as in its implementation. Though 13th Amendment was introduced in order to provide such meaningful devolution of powers by devolving certain amount of legislative, executive and administrative power over Provincial Councils, the document itself negate the execution of such autonomy within the Province. Therefore it is pertinent to analyze ways and means to address the obstacles identified.

Stake holders provided many different perspectives according to their vision of identifying the situation under 13th Amendment. It is noteworthy that recommendations are clearly based on the idea of accommodating multi-cultural society in Sri Lanka with greater National integrity among all ethnic groups which prevent secessionist movements, by establishing a substantial devolution arrangement.

It is proposed by a stake-holder that identification of the plural nature of the Sri Lankan society will be an answer to many obstacles to substantial devolution of power. It can be pointed out that Sri Lanka is a multi-ethnic, multi-lingual, multi-religious, and a multi-cultural state (Gomez, Mario, Thamilmaran V. T., Welikala, Asanga, 2008). Therefore every person must be given a constitutional right to develop its own culture, language, religion etc. Such identification will be an indication of establishing autonomous periphery which has a set of sphere of powers within its territory.

Devolving powers among sub-units must be subjected to certain conditions, by which the meaningful devolution is confirmed. Centre must recognize Provinces as coordinates not subordinate. It is import to ensure true legislative, executive as well as administrative autonomy within the territory of units. Intervention of the Parliament to the scope of legislative power of Provincial Council must be minimal which emphasize the meaningful devolution. Under 13th Amendment Parliament can intervene over devolved powers under List I as well. It must be corrected in a way which enables Provinces' legislative autonomy within the given sphere of powers. Further the President shall not be given such enormous power to intervene in many ways to Provincial Council system which discourage substantial devolution of powers.

Apart from general recommendations it can be pointed out crucial factors which were proposed by stake-holders in order to make 13th Amendment as an arrangement which establishes meaningful devolution. Financial autonomy must be established within the sphere of powers delegated to Provinces, if the objective is to provide them the recognition as constitutional units. It can be said that Finance is the founding resource of many subjects, devolved to the units under List 1 of the Ninth Schedule. Current 13th Amendment does not



provide room for financial demands made by Provincial Council which can be identified as a vitiating factor of the system. Therefore alteration of the current legal framework is necessary which establishes certain financial autonomy over units.

It was proposed that Governor must be a ceremonial official within the territory. Although the initial object was to introduce the Governor as an interaction between the Centre and the periphery, unfortunately he was given overwhelming power to interfere with devolved functions which undermine the overall objective of 13th Amendment.

Three Lists which have devolved power over the periphery and centre must be altered in order to make power sharing more practical. One stake-holder was in the view that there must be a clear demarcation of devolved powers. Where List I is provided with certain subjects, those subjects must not be conflict with List II. Further the limitless interference by the Centre over the subjects of the periphery must be controlled by expressed provisions.

Many criticisms arose with regard to concurrent list. In practice it can be identified that Centre has an upper-hand with regard to shared matters. 13th Amendment has provided such control over Provinces. Although it is named as a concurrent list, it is enforced as another "Reserved List". Therefore most of the stake-holders proposed to do away the concurrent list.

National policy is yet another remarkable area which provided room for criticisms. Many of the subjects devolved under List I (Provincial List) have been taken back under the influence of "National Policy". Therefore it should be established a clear interpretation regarding "National Policy" which controls the intervention of the Centre.

It is recommended that there must be a mechanism to resolve conflicts between Centre and the periphery. One of the stake-holders recommended the ideal mechanism would be a constitutional court as proposed in APRC Majority Report.

Provincial judicial power can be delegated with regard to certain matters although some of the stake-holders did not recognized establishing judicial autonomy as an essential constitutional reform. The 13th Amendment can be identified as a document which provided with a power-sharing arrangement namely, Devolution of powers. There are several identical features in the 13th Amendment, where substantial devolution of powers is feasible. But it is noteworthy that the 13th Amendment has also provided with some dejections which hinder such devolution.

Ways and means to avoid such negative features and pessimisms over the implementation of the 13th Amendment can be proposed, in order to provide Sri Lanka, with a meaningful devolution which enables National integrity.

But some of the stake-holders were with the view that 13th Amendment is not the solution to build National Integrity which is the main object of power-sharing arrangement in Sri Lanka. Therefore does away with 13th Amendment and initiating steps which goes beyond 13th Amendment will be a solution to materialize the effective power-sharing according to them.

Reference

- Lakshman Marasinghe and Jayampathi Wickramaratne (ed.), 13th Amendment: Essays on Practice
Asoka S. Gunawardena, Beyond Legal and Administrative Constraints Confronting Provincial Councils: Issues in devolution and governance change
Mario Gomes, Rohan Edrisinha, Asanga Welikala and V.T. Tamilmaran (ed.), Power Sharing In Sri Lanka -: Constitutional and Political Documents 1926 – 2008
Rohan Edrisinha and Jayadewa Uyangoda, Essays on Constitutional Reform
Jayampathy Wickremaratne, Twenty Two Years of Devolution – An Evaluation of the Working of Provincial Councils in Sri Lanka
Agrarian Services (Amendment) Bill of 1991
In Re Thirteenth Amendment to the Constitution (1987) 2 SLR 312
National Transport Commissions Act of 1991
Premachandra and Dodangoda vs. Jayawickrema and Bakeer Marker and Others (1993) 2 SLR 294
All Party Representative Report 2006
Mangala Moonasinghe Proposals 1993
13th Amendment to the Constitution
Provincial Council Act No.42 of 1987

