

**Adayaalam Centre for Policy Research
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The Sub-Committee on Centre-Periphery Relations and the Unitary State

On November 19, 2016, the Prime Minister and Chairman of the Constitutional Steering Committee, Mr. Ranil Wickremasinghe, tabled the reports of the six sub-committees of the Steering Committee in the Constitutional Assembly. Formally, these reports combined were presented as the first interim report of the Steering Committee to the Constitutional Assembly. However it has been expressly clarified that the Steering Committee was merely forwarding the reports of the sub-committees to the Constitutional Assembly and would only consider them in detail following their release¹. The Steering Committee's own interim report (formally styled as the second interim report of the Steering Committee) is expected to be released on December 10, 2016, and will report on more than 40 rounds of meetings on issues that the Steering Committee has reserved for itself. The six areas that come directly under the purview of the Steering Committee are as follows: Matters covered by Chapter 1 and 2 of the present Constitution², Nature of the State, Sovereignty³, Religion, Form of Government, Electoral Reforms, Principles of Devolution and Land⁴.

The Steering Committee has assigned to itself the most important and contentious questions of the constitutional reform debate. However as will be evident on a cursory review, some of the issues assigned to the steering committee are matters that also could fall under the general purview of the Sub-Committee on Centre-Periphery Relations (CPR); particularly those subject matters of the Steering Committee titled, 'Principles of Devolution' and 'Land'. The CPR Sub-Committee was aware of this overlap but still

¹ Constitutional Assembly, 'Third sitting of the Constitutional Assembly', <http://english.constitutionalassembly.lk/media/press-releases/130-third-sitting-of-the-constitutional-assembly2> Last accessed on 30 November 2016

² Chapter 1 of the 1978 2nd Republican Constitution deals *inter alia* with sovereignty (Article 3 and 4) and the 'nature of the state' question (Article 2 defines it as a unitary state), the sole article in Chapter 2 of the constitution is Article 9 that gives Buddhism foremost place in the Constitution.

³ There is an overlap between what the steering committee identifies as 'chapter 1' subjects and the subject of sovereignty and nature of the state for reasons state in footnote 1 above.

⁴ Constitutional Assembly, Steering Committee, <http://english.constitutionalassembly.lk/index.php/steering-committee/> Last accessed on 30 November 2016

considered these subject matters in their recommendations so as to present a complete picture of their overall mandate. The report of the CPR Sub-Committee thus has recommendations on subjects including land, police powers, the constitutional court, and subjects on the concurrent and reserved lists which it has included as an 'addendum' to their report.⁵ Members of Parliament appointed to the CPR Sub-Committee from the 'Joint Opposition' and the JVP did not sign up to the report.

ACPR is cautiously optimistic about the report of the CPR Sub-Committee which contains recommendations that have the potential to positively contribute to a genuine restructuring of the State that accommodates the concerns of the numerically smaller communities *vis a vis* the current state of the provincial council system and more broadly the desire of the Tamil people for a genuine form of self-government within a united Sri Lanka. The CPR Sub-Committee recommends *inter alia* that:

- the office of the Governor of the Province be reduced to a ceremonial office with no real executive powers;
- the appointment of the Governor is made by the President acting in concurrence with the Chief Minister of the Province;
- the powers of Governor to provide assent to ordinary legislation and powers to initiate financial legislation be stripped;
- the Public Service of the province function under the control of the elected executive of the province;
- the Public Service apparatus in the Province be rearranged in such a way that the current duality in the power structure is eliminated;
- the concurrent list be abolished;
- the reserved list subject in the 13th amendment providing the of enacting 'national policy' on all subjects be abolished;
- State Land and Law and Order be predominantly a subject for the Provinces; and
- a fair fiscal arrangement that provides fiscal autonomy to the provinces be adopted.

⁵ See 'preface' by the Chairman of the Committee to the report, pages 1-2 Report of the Sub-Committee on Centre, Periphery Relations, <http://english.constitutionalassembly.lk/images/pdf/06-CenterPheripheryR-ste.pdf>
Last accessed on 30 November 2016

This brief does not seek to analyse each of the recommendations that have been made by the CPR Sub-Committee, but as noted earlier, the spirit of these recommendations have the potential of untangling the unitary hold on the Provinces under the current constitution. However it is important to note that in the absence of information regarding the larger political framework within which these institutional arrangements will be located, it is too early to comment on the actual reach of these recommendations. The larger framework of the constitution, is a matter for the Steering Committee to address under the heading of the 'nature of the state'. The reach and impact of the recommendations in the CPR Sub-Committee report even if they find place in the final constitution, will be demarcated by the manner in which the constitution settles the 'nature of the state' question. Hence much will depend on (a) how much of the sub-committee report ends up in the draft constitution; and (b) how the steering committee deals with the 'nature of state' question.

ACPR notes with concern that the approach taken by the CPR Sub-Committee towards power sharing is not fully shared by the other sub-committees, particularly by the Sub-Committee on National and Public Security, Public Order and Police and Law Enforcement ("Law and Order"). The recommendations of the Law and Order Sub-Committee make very little progress towards a genuine assignment of real law and order powers to the provinces. Many of its provisions are deliberately ambiguous, which as the experience with the 13th amendment informs, always benefits the centre. For example, the report recommends tasking the National Police with the 'function' of protecting the 'national security and defence of Sri Lanka' and the protection of the security of the people of Sri Lanka',⁶ while the provincial police are tasked with 'provincial security'.⁷ Another example is found among the investigative powers of the National Police which provide for the National Police in consultation with the Provincial Police Commissioner to take over investigations where the Provincial police lack capacity and willingness to investigate. Experience from the 13th amendment reminds us that such 'consultative' requirements are of no real force and in reality are a gloss for the central takeover of what otherwise appears to be on paper, powers assigned to the province. A comparison of the list of powers of the National Police and the Provincial Police also reveals a system that is

⁶ Report of the Sub Committee on Law and Order, p. 13 available here: <http://english.constitutionalassembly.lk/images/pdf/04-Law-and-Order-ste.pdf>

⁷ Ibid, p. 14

heavily tilted in favour of the National Police, with the Provincial Police appearing to be a tokenistic institution.

ACPR is also concerned about the purported comments made by the Prime Minister in his address to the Constitutional Assembly while tabling the reports of the sub-committees⁸. The Prime Minister is reported to have said that devolution in the new constitution will not go beyond the limits to devolution within the unitary state as identified in the judgment of the plurality of the court written by Chief Justice Sharvananda in *In Re the Thirteenth Amendment to the Constitution of Sri Lanka*⁹ read along with the separate opinion of Justice Ranasinghe in the same case.

Chief Justice Sharvananda, desirous to fit the thirteenth amendment within the unitary constitutional framework of 1978 and thus to avoid the bill being referred to a referendum provided an extremely narrow interpretation of the unitary state.

Chief Justice Sharvananda in his judgment quotes with approval Prof. K.C. Wheare's differentiation of unitary and federal forms of Government as follows:

“...in a Federal Constitution the powers of government are divided between a government for the whole country and governments for parts of the country in such a way that each government is legally independent within its own sphere. The government for the whole country has its own area of powers and its exercises them without any control from the governments of the constituent parts of the country, and these latter in their turn exercise their powers without being controlled by the Central Government. In particular the legislature of the whole country has limited powers and the legislatures of the State or Provinces have limited powers. Neither is subordinate to the other. Both are co-ordinate. In a unitary Constitution, on the other hand, the legislature of the whole country is the Supreme Law-making body in the country. It may permit other legislatures to exist and to exercise their powers, but it has the right, in law, to overrule them they are subordinate to it.”¹⁰

⁸ The official text of the speech at the time of publication is neither available on the Parliament website or that of the Constitutional Assembly.

⁹ 1987 (2) Sri.L.R 312

¹⁰ Ibid at 319 quoting K.C. Wheare, *Modern Constitutions* (OUP) p. 19

Chief Justice Sharvanada then proceeds to demonstrate in his judgment that the institutions created by the 13th amendment do not violate the boundaries of the unitary state thus understood because it does not create independent spheres of government, but rather it creates only subordinate institutions that exist on the will of the centre:

“In our view no division of sovereignty or of legislative, executive or judicial power has been effected by the 13th Amendment Bill or by the Provincial Council Bill. The national government continues to be legally supreme over all other levels or bodies. The Provincial Councils are merely subordinate bodies. Parliament has not parted with its supremacy or its powers to the Provincial Councils. In our view, the Republic of Sri Lanka will continue to be a Unitary State and the Bills in no way affect its unitariness”¹¹.

Prime Minister Wickremesinghe’s reference to the Sharvananda standard of a unitary state is deeply troubling in that the Prime Minister’s remarks seem to indicate that the new constitution’s treatment of power will be conditioned by the same understanding of unitariness found in the current constitution as found in its text and developed through the jurisprudence of the Supreme Court. The recent remarks of the Prime Minister form part of a continuum of his earlier pronouncements that the new constitution will not go beyond the boundaries set by the 13th amendment.¹² These remarks also undermine arguments made by those constitutional scholars and activists, including a section of the Public Representation Committee on Constitutional Reforms,¹³ who take the position that it is possible to have a minimalistic, watered-down-approach to the unitary state in the new constitution, while retaining the unitary label for its political value amongst the

¹¹ Ibid at p. 323

¹² See most recent remarks made in Jaffna in this regard by the PM here: <http://www.ceylontoday.lk/columns20160321CT20170330.php?id=410> (Ceylon Today, September 19,2016)
Last accessed on 30 November 2016

¹³ Report of The Public Representation Committee on Constitutional Reforms, p. 25: The watered down provision of the unitary state a section of the committee recommends can provide as follows: ‘The Republic of Sri Lanka shall be an independent, free, sovereign, unitary state consisting of governmental organs as provided in the Constitution and it shall promote and preserve peace and harmony among various peoples of the country while promoting a Sri Lankan identity, For the purpose of this article the unitary state means an undivided country with multiple tier governance systems’.

Sinhala Buddhist electorate and providing a genuine scheme for power sharing at the same time.

ACPR's position is that unless it is clearly provided that Provincial Councils shall be independent and supreme within their spheres of influence, the use of the word 'unitary' will carry the import of a hierarchical arrangement rendering the provinces subordinate to the centre. Be that as it may, the Prime Minister's purported remarks do not even show willingness to adopt a minimalistic approach to unitariness and in fact signals preference for a highly centralised understanding of unitariness. If the Prime Minister's approach also dictates the direction of the Steering Committee on the nature of state question, ACPR fears that the critical work put in by the CPR Sub-Committee may be undermined.

ACPR hence,

- takes note of the report of the CPR Sub-Committee with cautious optimism;
- urges the Steering Committee to deal with the 'nature of the state' question in the same spirit as that of the CPR Sub-Committee; and
- calls on the Prime Minister to reconsider his remarks concerning the continuation of a deeply centrist unitary state in the new constitution.