

**REFLECTION ON THE 13TH AMENDMENT TO THE
CONSTITUTION IN LIGHT OF SETTLEMENT OF ETHNIC
CONFLICT IN SRI LANKA**

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Letter of Declaration

I certify that this dissertation does not incorporate without acknowledgement, any material previously submitted for a degree or diploma in any university, and to the best of my knowledge and belief it does not contain any material previously published or written by another person, except when due reference is made in the text.

S. Dinesan

June 2016

This is to certify that the Dissertation on

**Reflection on the 13th Amendment to the Constitution in Light of
Settlement of Ethnic Conflict in Sri Lanka**

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**has been accepted by the Faculty of Arts, University of Jaffna, in partial fulfillment of the
requirements of the Bachelor of Laws Degree.**

ABSTRACT

Sri Lanka is a multi-ethnic, multi-religion and multi-language country even though it is a unitary state. The ethnic conflict is a major issue in the era. As with many civil wars, Sri Lanka's began with internal conflict between different people groups in the country, primarily between the majority Sinhalese and the minority Tamil. The civil wars come end in May 18th 2009. In Sri Lanka, Tamils who are minorities continually claim self-determination from independent Ceylon. In August 1987, the Sri Lankan Parliament passed the 13th Amendment to the Constitution and the ancillary Provincial Councils Act. It was forced into the Sri Lankan Constitution by India and was passed in the parliament without a public referendum; others firmly believe that the implementation of the 13th Amendment would be a key political solution to national issues. The Sri Lankan Government declared that the enactment of these laws fulfilled the promises made in the Accord, to 'devolve power' on the Tamil people. This study examines the basic provisions of the 13th Amendment and the Provincial Councils Act and inquires whether these laws devolved power on the Tamil people or whether these laws amount to fulfill its objective and resolve the ethnic conflict, with power continuing to reside in a Sinhala dominated Central government within the frame of a unitary constitution.

Key words: Ethnic conflict, Unitary State, Self-determination and Devolve power

CHAPTER I

1.1 Introduction

“The core objective of the constitutionalism is that of safeguarding each members of the political community as a political person possessing a sphere of genuine autonomy. The constitution is meant to protect the self in its dignity and worth. The prime function of a constitutional political order has been and is being accomplished by means of a system of regularized restraints imposed upon those who wield political power”.

(Carl Friedrich, Transcendent justice, Durham, North Carolina 1964, P.17)

Sri Lanka is an island situated in the Indian Ocean just off the south-eastern tip of India. Its history is adulterated with hundreds of years of colonization by the Portuguese, the Dutch and finally the British until gained independence in 1948. Sri Lanka is a multi-ethnic and religious country. The ethnic composition of Sri Lanka is about 74% Sinhalese, most of whom are Buddhists; 18% Tamils, most of whom are Hindu; and is 7% Muslim and follow Islam with the rest belonging to other smaller groups.

Sri Lankan Tamils’ claim that the North and East parts of the island are their traditional home land, but there are a lot of Muslims also living in those areas. In those areas there are small groups of Sinhalese were colonized by the government and the Tamils were forcibly evicted from there. Muslims are sporadically living throughout the country. The Tamils of recent Indian origin are living particularly in the up-country. The majority Sinhalese are mainly living in whole part of the island other than North and East province.

Despite this multi-faceted character of Sri Lankan society even under colonization, the British believed that the population was made up of only the three primary ethnic groups, which they referred to as ‘races’: the Sinhalese, the Tamils, and the Moors (Rogers 1993: 108). The British considered these three basic racial groups to be “fixed entities” with inherent, natural, quasi-biological differences that could be discerned in appearance, aptitude, and character as well as culture (Rogers 1993: 101). British racial theory de-emphasized religion and caste, which had been more important in pre-British times¹.

¹ A. T. M. Abdullahel Shafi & Md. Harun-Or-Rashid :Ethnic Conflict In Sri Lanka: A Critical Analysis <http://www.impactjournals.us/download.php?fname=--1375515497-3.%20Humanities-Ethnic-A.T.M.Abdullahel%20Shafi.pdf> (8/6/2016)

The ethnic conflict is a biggest problem in the era because every minority ethnic group tried to establish self-governance; on the other hand majority ethnic group willing to take whole part of the country. The racial distinctiveness based on language such as Sinhala and Tamil. The ethnic conflict raised in colonial period. The British allocated jobs according racial base.it is root cause of ethnic conflict in Ceylon. British used ethnic discrimination as a tool for control whole part of the country.

The ethnic conflict within last three decades can be considered as a conflict between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE). It is a conflict between majority; Sinhalese and minority; Tamils. More commonly it was known as the Tamil Tigers, the LTTE wants a separate state for Tamil minority. It made path to conduct a huge civil war. The civil war has killed approximately one hundred thousand people with various kinds of crimes and vulnerabilities. It was defeated in 2009 as a war².

Here we have to consider about the Muslims position also, who make up over 10% of the population, as they are now claiming for a separate union in Kathankudi, which is situated in the so called Tamils' traditional home land Eastern Province. When we consider about a power sharing mechanism as a solution to the ethnic conflict, we have to consider them as a separate group even though they speak Tamil as their mother language because they were forcibly expelled by Tamils from their native residents in North and East. As well as they are clearly deferent from Sinhalese and Muslims were chased from the fort kingdom in pre-colonial period by Sinhalese also. And there was a riot between Sinhalese and Muslims in 1915. When we think about power sharing mechanism, the Indian Tamils, who make up almost 3% of the population, also have to be taken in to consideration even though they are not fighting for anything. In up-country where, Sinhalese, Muslims and Sri Lankan Tamils are living together (Neetham 2009: pg. 246)³.

The 13th Amendment of the Constitution promises to devolve powers to Northern and Eastern provinces of Sri Lanka which are dominated by Tamils who are minority community in Sri

² A.R.M. Imtiyaz, Ph.D. : Ethnic Conflict in Sri Lanka: The Dilemma of Building a Unitary State
http://www.federalidea.com/files/Chapter-conflict_and_peace.pdf (8/6/2016)

³ In the search of a solution for Sri Lankan ethnic conflict... "The right to self-determination and power sharing"
(Law students' Association Neetham 2009)

Lanka. The region lacks autonomy in administration and is controlled by Central Sinhalese government. It was product of a pact signed between Rajiv Gandhi (Indian PM) and J R Jayawardene (Sri Lankan President) in 1987. According to Indo-Lanka agreement, LTTE an extremist separatist group were to surrender their arms in exchange for peace and autonomy in the region. The pact also promised the equality for Tamils, while shedding their second class citizen status⁴.

The 13th Amendment and the Provincial Council Act become law in 1987. They introduced several changes in the Constitutional structure in Sri Lanka. These laws were the culmination of the political and social upheavals experienced in Sri Lanka after its Independence in 1948. The adverse reaction of the minorities to certain legislative measures taken by the Government under the Soulbury Constitution maybe described as one of the main reasons for the aggravation of the events that led to the devolution of the powers in 1987 through these two enactments. The other events that largely contributed towards the proposal for the devolution is traced to the 1972 and the 1978 Constitutions, both of which unfortunately had the effect of alienating the minorities. Some aspects of these Constitutions are discussed to demonstrate their inadequacies which led to a demand for a separate state by Tamil minorities⁵.

This study deeply analyzes reflection on the 13th Amendment to the Constitution in light of settlement of ethnic conflict in Sri Lanka.

1.2 Statement of problem

The prime objective of the 13th Amendment to the Constitution is sharing powers to Provincial Councils. Through which Thirteenth Amendment ensures self-governance and solve the national ethnic conflict. In practice 13th Amendment failed to accomplish the basic objective – of solving ethnic conflict. This dissertation identified two major problems which need to be settled in order to achieve the ethnic conflict such as;

1. Failure of internal mechanism – (substantial mechanism of thirteenth amendment) provisions of the 13th amendment did not provide enough power sharing to meet the ethnic conflict

2. Failure of external mechanism (enforcement mechanism)

⁴ Kumari Jayawardhana : Ethnic Conflict In Sri Lanka And Regional Security
<http://www.infolanka.com/org/srilanka/issues/kumari.html#k>

⁵ K. C. Kamalabayson PC - Devolution of Powers: The Sri Lankan Experience

13th amendment did not provide a clear Legislative, Executive, Judicial enforcement mechanism in order to enjoy the powers shared by the thirteenth amendment.

1.3 The Aim and Objectives

The objectives of this report are identify the main roots of ethnic conflict in Sri Lanka and research currents solutions and its necessary changes. In This thesis effectively analyses the salient aspect of the 13th Amendment and find the actual problem to fully enforce the 13th Amendment. Find answer of the role of the 13th Amendment to resolve the ethnic conflict through provincial council system. Give recommendation to new constitution for resolve ethnic conflict in Sri Lanka and ensure peace and security of the country.

1.4 Research Methodology

This study attempts to use the descriptive approach to examine the History or evaluations of the ethnic conflict in Sri Lanka and analytical approach to examine the substantive part of the 13th Amendment of the constitution. Ethnic conflict in Sri Lanka, a qualitative method which is not completely devoid of quantitative analysis has been used in the study. Quantitative approach has been incorporated to provide comprehensive analyses of the issue at hand. The study focuses on the peace building processes and resolves the ethnic conflict. In order to understand and explain the role of 13th Amendment for power sharing to Provincial Council as minority home land, the study relies on the normative approach.

This approach offers a useful theoretical lens in understanding the peace building process where new ideas need to be introduced to guarantee security in the new political setting. It tries to design an over-all and broad model of peace building that involves governance, capacity building, decision making, and democratic transformation.

1.5 Research Questions

Following research question I had identified.

- ❖ What are the main roots of ethnic conflict in Sri Lanka?
- ❖ What is the modern history of the ethnic conflict of Sri Lanka?
- ❖ Whether the 13th amendment of the constitution can be considered as a permanent solution for the internal ethnic conflict in Sri Lanka?

- ❖ What are the interferences and limitations exist since the Chief Minister and Members of the Provincial Council were elected by the Tamil people where the Governor was appointed by a President?
- ❖ What are the difficulties to settle ethnic conflict through the 13th Amendment?
- ❖ How can we settle ethnic conflict through new constitution?

1.6 Research Hypothesis

The Ethnic conflict is a major issue in Sri Lanka. The 13th Amendment failed to set out proper mechanism to share the police power and Authority over lands. Provincial council became a dependence on central government to enforce the powers granted by the Thirteenth Amendment. If Sri Lankan government will share the powers and Authorities to the Northern and East provinces have been areas of historical habitation of Sri Lankan Tamils through new Constitution, it will prevent the ethnic conflict of the Sri Lanka and ensure the peace and security of the country.

1.7 Literature Review

The review of literature has been undertaken to inform of existing discourse on 13th Amendment to the constitution in light settlement of ethnic conflict and provide an in depth understanding of the subject matter. Literature by prominent scholars in the field like Lakshman Marasinghe and Jayampathy Wickremeratne and Asanga Welikala are studied in this research. The literature review aims to add more emphasis on the legal frameworks in existence regarding devolve power and how effective they are.

Lakshman Marasinghe and Jayampathy Wickremeratne and Asanga Welikala are studied in this research on Devolution within the Unitary State; A Constitutional Assessment of the Thirteenth Amendment with reference to the experience in the Eastern Province.⁶

The Book written by Deepika Udagama and Geoffrey Doidge the work named as “National Reconciliation Experience of Sri Lanka & South Africa” in this article, a comparable analysis is made between Sri Lanka position and South Africa position. In this book Neluma Deepika Udagama referred that [“...if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of

⁶ Lakshman Marasinghe and Jayampathy Wickremeratne (eds) (2010), ‘13th Amendment: Essays on Practice’, (Colombo: Institute for Constitutional Studie, Stamford Lake) and Asanga Welikala, ‘Devolution within the Unitary State: A Constitutional Assessment of the Thirteenth Amendment with reference to the experience in the Eastern Province’ in CPA (2010) Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perception, 2008--2010(Colombo: Centre for Policy Alternatives)

law..” with that simple yet elegant phrase the preamble of the Universal Declaration of Human Rights captures the essence of a timeless truism. I survey the political debate and events unfolding in post-war Sri Lanka, the wisdom of those words constantly comes to mind] .she was strongly emphasized reconciliation process and she was compare with South African experience. Geoffrery Doidge was described about Nelson Mendala is a champion of peace and reconciliation. He explained reconciliation process through history of Nelson Mendala.

The book written by K.C. Kamalabayson PC the work named as “Devolution of powers: the Sri Lankan Experience”. Justice Saleem Marsoof referred about this work that “the publication is well-timed, as the question of a political solution to the ethnic conflict which devastated this nation for nearly three decades is currently being mooted, and the debate is on whether the Thirteenth Amendment to Constitution provided for too much or too little devolution”. It contains a brilliant analysis of the Thirteenth Amendment and Provincial Councils Act of 1987, which is followed by separate chapters that deal with Federalism and devolution, Devolution of Legislative power, Devolution of Executive power, provincial Finance, Devolution of Judicial power, the control of Provincial Councils by National Government and an Epilogue. Mr. N. Selvakumaran has taken forward the story of Devolution of Legislative Power in the chapter written by him as Chapter 6(A) entitled Devolution of Legislative power-post-1994 Experience. Mr.Faisz Musthapha, P.C has done the same with Devolution of Executive power in his contribution as Chapter 7(A) entitled Devolution of Executive power-post-1994 Experience. Mr Selvakumaran then deal with the later developments relating to Devolution of Judicial Power in in his Chapter 9(A) entitled the Exercise of Judicial power and Provincial High Court-1994 Experience. Similarly, Mr. Uditha Egalahewa has taken forward the Control of Provincial Councils by the National Government in his contribution as Chapter 10(A) entitled The Control of Provincial Council by the National Government: A critical evaluation.

This paper will not only examine the root causes of the Ethnic conflicts, but instead examine reflection on the 13th Amendment to the Constitution in light of settlement of ethnic conflict in Sri Lanka. The ambition in this thesis is to permanent answer to ethnic conflict.

1.8 Chapter Outline

Chapter I of this paper focus on introduction and Research Methodology. And there are six chapters in this paper.

Chapter II of this research discusses the Nature of the ethnic conflict in Sri Lanka and History of the ethnic conflict.

Chapter III of this study mainly deal with Salient aspect of the 13th Amendment of the Constitution of Sri Lanka. This chapter focuses on internal mechanism – (substantial mechanism of thirteenth amendment) provisions of the 13th amendment provide power sharing to provincial council.

Chapter IV broadly deals with Enforcement of the 13th Amendment of the Constitution in practically. This chapter include itself opinion of the representative of the people and experts in the 13th Amendment.

Chapter V of this paper analyzes an assessment of the 13th Amendment to resolve the ethnic conflict in Sri Lanka. Failure of internal mechanism – (substantial mechanism of thirteenth amendment) provisions of the 13th amendment did not provide enough power sharing to meet the ethnic conflict and Failure of external mechanism (enforcement mechanism) 13th amendment did not provide a clear Legislative, Executive, Judicial enforcement mechanism in order to enjoy the powers shared by the thirteenth amendment.

Chapter VI finally comes to conclusion. And give clear idea about 13th Amendment. And give recommendations to new constitution for settle ethnic conflict Sri Lanka and ensure peace of the Country.

CHAPTER II

NATURE OF THE ETHNIC CONFLICT IN SRI LANKA

2.1 Introduction

The ethnic conflict of Sri Lanka is a well-known issue of the International political arena. Desire to maintain the unitary state structure of the country, while weakening the political solution to the deadly ethnic civil war in Sri Lanka, aggravated the ethnic tensions between the Tamils and the Sinhalese, the dominant majority ethnic group. This paper attempts to look at how the Sinhalese political leaders in their quest for a power attempted to consolidate the unitary structure of the island since country's independence in 1948, and it argues that Sinhalese unwillingness to share the power with the Tamils led the Tamils to lose trust in the state and its institutions and thus, gave birth to the violent Tamil political movements including that of the Liberation Tigers of Tamil Eelam (LTTE). The paper is by exploring the process of the origin and consolidation (post-independent era) of the unitary structure, attempting to identify major root causes of the ethnic conflict presently known to us today⁷.

2.2 History of the Ethnic Conflict

The ethnic conflict in Sri Lanka has many root causes and consequences that are closely inter-linked. Sri Lanka is a multi-ethnic and religious country. The ethnic composition of Sri Lanka is about 74% Sinhalese, most of whom are Buddhists; 18% Tamils, most of whom are Hindu; and is 7% Muslim and follow Islam with the rest belonging to other smaller groups.

The history of ethnic conflict in Sri Lanka is the history of emergence of realization among the majority community, the Sinhala, which defined the Sri Lanka society as Sinhala-Buddhist, thus denying its multi-ethnic character. The growth of this perception impinged on the minorities in Sri Lanka to the extent that internal resolutions of the problems become impossible. In the 12th and 13th centuries, certain developments in Sri Lanka determined its ethnic demography in a decisive way with effects that have continued to the present⁸.

⁷ Dr.Wasantha Subasinghe, Department of Sociology, University of Kelaniya, Sri Lanka
wasanthasubasinghe@kln.ac.lk

⁸ Ethnicity, Aid, and Peace in Fragile States: A Sri Lankan Case Study Luckshmi Sivalingam September 2005 London School of Economics and Political Science

After the fall of the Kandyan Kingdom to the British the island of Ceylon became one territory from early 19th century. At the time of independence from colonial rule in 1948, although the Tamils claimed for party of status, neither that nor a Federal system was considered necessary. The unitary type of the constitution with simple Majoritarian Rule was enacted with prohibition on the passage of adverse legislation against any minority community⁹.

There have been a lot of violations and discriminations against minorities particularly Tamils since the independence of Ceylon in 1948. In 1948, 1 million Indian origin Tamils were declared as non-citizens of Sri Lanka through **Citizenship Act No.18 of 1948**. Since 1949 the systematic state sponsored colonization was carried out with a view to changing the demographic pattern of the North and East province, which are claimed to be Tamils' traditional home land. In 1956, Sri Lanka parliament enacted **Official Language Act No.33 of 1956**. It was declared Sinhala was made the official language. Discriminate the minority groups of Sri Lanka base on their Language and Birth. This unfair treatment leads to ethnic conflict. In April 1957 the main Tamil political party, the Ceylon Federal Party, articulated in its Trincomalee resolution its claim that the Tamil people in Ceylon were a distinct nation and were therefore entitled to self-determination¹⁰.

An Agreement was entered in to between the then prime minister of Ceylon S.W.R.D. Bandarenayake and S.J.V. Selvanajagam, the leader of the Ceylon Federal Party. This Agreement envisaged the creation of regional councils by which governmental power was to be dissolved. This Agreement was, however, was not implemented due to the stiff and apparent opposition by the majority Sinhalese. Later in 1965 another similar Agreements for autonomy was signed which was known as Dudley – Selva pact. But this too was not implemented for the same reason¹¹.

A policy of standardization in the 1970's that effectively ended the hopes of higher education for the Tamils served to exacerbate their frustration. For a same university entrance exam Tamils need to 30% more. In 1972 Sri Lanka became Republic and the name was changed from Ceylon to Sri Lanka. The 1st and 2nd Republican Constitutions were enacted 1972 and 1978 respectively, without the consent and participation of the Tamils, and both affirmed Sinhala as the official language and made Buddhism as state religion. They also left out the section 29 prohibition

⁹ Section 29(2) of the soulbury constitution 1947

¹⁰ Quoted by R.S. Wanasundara J in Re the 13th amendment to the constitution (1987) 2 SLR 368

¹¹ *Ibid* 3

found in the Soulboury Constitution. This naturally resulted in opportunities being denied to the Tamils to join the administrative service hitherto dominated by them¹². In this period Tamil youth resorted to violence as a last resort and as a means of protest against oppression and discrimination. In 1977 the Prevention of Terrorism Act was brought to crack down these agitations¹³.

Furthermore, a lot of state sponsored Genocide were time to time executed during Sri Lankan history of independence. When the Tamils protested the Sinhala Only Act in front of the Parliament in 1956 they were assaulted by Sinhalese and attacks spared the whole island and this short of violence continued in 1958, 1961, 1974, 1977, 1981, 1983, some of them were massif riots. In every one of those occasions affected Tamils from other part of the country were transported to North and East. The Tamils cite this as the official recognitions of their traditional home land in those two provinces¹⁴.

In 1976, the elected Tamils political leaders convened and resolved to restore Tamils sovereignty by declaring an independent Tamil state in the North and East of Sri Lanka. In 1977 election Tamil ratified the call for independence by 82% popular vote. Then the Tamil legislation' were thrown out of Parliament by the government.

During 1970's and 1980's many armed groups spontaneous from Tamil society. Finally Liberation tigers of Tamil Elam (LLTE) Became the dominate armed group and gained the support of the Tamils and till this movement it is fighting against the Sri Lankan government forces to established a separate independent country in their traditional home land, even though their military capacity and their several leaders including Chief .V. Prabaakaran have been destroyed and killed by the government force in the name of war against terrorism as well as the Sinhala and Muslim peoples were also killed by the Tamil militants¹⁵.

After the civil war, first time Northern provincial Council established in 2013. During the LTTE period they didn't accept provincial council system. Now Tamils demand FEDERAL state.

¹² H.A. Amankwah, self-determination and freedom' tortuous path revisited, (1998) 5 JCULR 141

¹³ *ibid* 10

¹⁴ *ibid*

¹⁵ *ibid*

2.3 Armed conflict in Sri Lanka

The 26 years long armed conflict of Sri Lanka was essentially the result of deepening divides along ethnic and religious lines followed by the escalation of violent confrontations between the Government of Sri Lanka (GSL) and the LTTE, also known as the Tamil tigers. After Sri Lanka gained independence from Britain in 1948, the newly elected GSL mainly composed of elite Sinhalese was brought to power. The GSL enforced a series of discriminatory policies limiting access to education and employment for Tamils. Most importantly, in 1956 Sinhala was established as the official language of Sri Lanka, making it difficult for Tamils to secure employment in the public sector or hold on to their civil service jobs.¹⁶ In reaction to these inequalities, the Tamils staged rallies and demonstrations demanding equal rights. This was met with violent repression by the GSL, thereby inciting the emerging militant Tamil groups, the most popular being the LTTE, to use force. Over time, what began as peaceful protests by the Tamil community against discriminatory state policies turned into a violent civil war in 1980s, with a central demand for a separate state in the Northern and Eastern Sri Lanka?

The violence rapidly escalated in 1983 flaring up ethnic riots and generating large scale displacement of Tamils.¹⁷ Civil conflict of Sri Lanka assumed an international dimension when the GSL accused India, which is home to a large number of ethnic Tamils, of assisting Tamil insurgents. In an effort to resolve the conflict, India formulated the Indo- Lanka Peace Accord and deployed Indian Peace Keeping Forces (IPKF) on the island.¹⁸ However, the defiant LTTE rebels continued their armed struggle for an independent state, and the IPKF mission did not succeed in restoring peace. By 1990, India had withdrawn the last of its forces from the Island.¹⁹ A year later Rajiv Gandhi, prime minister of India at the time of the peacekeeping force deployment, was killed by an LTTE suicide bomber.

In February 2002, the GSL and the LTTE signed a Cease-fire Agreement (CFA) facilitated by Norway which intervened as the international moderator of the peace process. Despite

¹⁶ Watchlist on Children and Armed Conflict. (2008, April). No Safety No Escape: Children and the Escalating Armed Conflict in Sri Lanka. Last visit June 2015, from Watchlist web site:

http://watchlist.org/reports/pdf/sri_lanka/ENGLISH%20REPORT%20LR%20p.pdf,

¹⁷ Council on Foreign Relations. (2009, May 19). The Sri Lankan Conflict. Last visit may 29, 2015, from The Council on Foreign Relations web site: <http://www.cfr.org/terrorist-organizations/sri-lankan-conflict/p11407>,

¹⁸ Hargreaves, C., Karlsson, M., Agarwal, S., Tengtio, K & Hootnick, J. (2011). International Dimensions of the Sri Lankan Conflict. Last visited May 30, 2015, from University of St. Andrews web site:

<http://www.standrews.ac.uk/intrel/media/Sri%20Lanka%20International%20Dimensions-1.pdf>,

¹⁹ State Department. (2011). Background Note: Sri Lanka. Last visited May 30, 2011, from State Department web site: <http://www.state.gov/r/pa/ei/bgn/5249.htm>,

international support, the peace process failed to achieve its intended goals. The LTTE abandoned the peace talks after one year of signing the agreement, asserting that they were being marginalized. The human rights condition of children, and civilians in general, had improved significantly on the signing of CFA. But in December 2005, the fighting continued to escalate at an alarming rate and the number of civilian casualties reached dramatic levels.

The United States, India, the United Kingdom, Canada and many other countries along with the European Union (EU) banned the LTTE as a terrorist group. The United States and the United Kingdom also reduced military assistance and aid to Sri Lanka in response to the human rights violations by the Sri Lankan security forces.²⁰ The armed conflict in Sri Lanka has been characterized by massive human rights abuses carried out by both the Sri Lankan government forces and the LTTE. The LTTE used children as child soldiers. Similarly, the GSL supported the Sri Lankan army that shelled areas populated with civilians, committed extra judicial killing and arbitrary arrests, and restricted humanitarian assistance for people trapped in the conflict zones. On 19 May, 2009, the civil war finally ended with the complete liquidation of the LTTE, and the government declared victory after the army took control of the entire island.²¹

2.4 Causes & Consequences

The Sri Lankan conflict has furthered immensely because the Sinhalese continue to feel economically discriminated. One group accuses the other of enjoying supremacy in the bureaucracy, governmental patronage and ruling the elite-based institutions. Demands for state divisions reduce when the economic benefits are fruits of hard work. The ethnic conflict in Sri Lanka has many root causes and consequences that are closely inter-linked. In general, these themes can be broadly indent-

- Ethnic politics and the interpretation of the past
- Politics of language
- Politics of education
- Other factors, including employment and land.²²

²⁰ Watchlist on Children and Armed Conflict. (2008, April). No Safety No Escape: Children and the Escalating Armed Conflict in Sri Lanka. Last visit June 30 2015, from Watchlist web site:

http://watchlist.org/reports/pdf/sri_lanka/ENGLISH%20REPORT%20LR%20p.pdf,

²¹ State Department. (2011). Background Note: Sri Lanka. Last visited May 30, 2011, from State Department web site: <http://www.state.gov/r/pa/ei/bgn/5249.htm>,

²² *Ibid* 1

CHAPTER III

SALIENT ASPECT OF THE 13TH AMENDMENT OF THE CONSTITUTION OF SRI LANKA

3.1 Introduction

The Donoughmore Commission suggested a provincial council system to replace some of the power and functions of the Government Agents (G.A). This suggestion was however not implemented²³.

On 29th July 1987 India and Sri Lanka signed the Indo-Lanka Agreement to establish peace and Normalcy in Sri Lanka. One of the objectives of the Agreement was ‘resolve the ethnic conflict in Sri Lanka’²⁴ by preserving the ‘unity, sovereignty and territorial integrity of Sri Lanka’. The Indo-Lanka Agreement also recognized that the Northern and Eastern provinces have been areas of historical habitation of the Sri Lankan Tamil speaking peoples, who have at all times hitherto lived together in this territory with other ethnic groups²⁵. The Indo-Lanka Agreement sought to achieve peace by addressing the grievances of the Tamil community through the creation of Tamil majority area in the North and East within Unitary State. In pursuance of this, the 13th Amendment to the constitution and Provincial Council Act No. 42 of 1987 were enacted²⁶.

The 13th Amendment devolves power at provincial level and establishes a provincial council for each the nine provinces of Sri Lanka. The objective is to maintain the unitary nature of the state proclaimed by Article 2 of the constitution of 1978²⁷ and to hand over the responsibility of domestic affairs of each province to the local population of the province within the framework of a unitary Sri Lanka. In this respect, as observed in the majority judgment in *In Re The Thirteenth Amendment to the constitution*²⁸, the second Republic Constitution encourages the devolution of powers and has expressly declared in its chapter entitled the ‘Directive Principles of state policy and Fundamental Duties’ that :-

²³ The report of the special commission on the constitution 1978

²⁴ Bandarage, Asoka *The separatist conflict in Sri Lanka* 65 Vijitha Yapa publications (2009)

²⁵ The Bandaranaike-Chelvanayakam Pact of 1957 and the Dudley- Chelvanayakam Pact of 1965 had also recognized the ‘Tamil Homeland’ concept.

²⁶ *Ibid* 14

²⁷ The supreme court has determined that the 13th Amendment does not in any manner affect the unitary nature of the Sri Lanka; in *Re the Thirteenth Amendment to the Constitution* (1987) 2 SLR 312

²⁸ [1987] 2 SLR 312

“The State shall broaden the democratic structure of government and the democratic rights of the People by decentralizing the administration and by affording all possible opportunities to the People to participate at every level in national life and government”²⁹

In order to achieve its aim of substantial devolution of power within a unitary state, the 13th Amendment has put in place a complex and intricate system of check and balances. This evident upon a cursory perusal of the provisions in chapter XVIII of the Constitution and Provincial Council Act³⁰.

3.2 Devolution of Legislative Powers

In the terms of the 1978 constitution, sovereignty is in the people³¹ and Legislative Power of the people is exercised by Parliament³². In the exercise of such power the Parliament makes laws³³. In Soulbury Constitution, the basic law making power is contained in sec 29(1). Sir Ivor Jennings stated that; ***“the phrase peace and order and good government in this section is not a description of the purpose for which legislation may be enacted nor is it necessary for a court in relation to each act of parliament to decide whether it deals with peace or order or Good government”***. This phrase is the Academic way of standing absolute and complete powers and power to legislative for the peace order or good government of a country is a power to legislate, on any subject whatever³⁴. It is a power as plenary and ample as the imperial parliament in the plenitude of its power possessed or could bestow³⁵. The Privy Council construed this phrase as conferring the widest law making power appropriate to a sovereign³⁶.

The legislative power which was implied under the Soulbury Constitution is couched in express terms in the 1978 Constitution. It provided that, the legislative power of the people is exercised by Parliament acting alone: by the Parliament acting together with the people at a referendum³⁷ or by the people alone at a referendum³⁸.

²⁹ Art. 27(4), In Re the Thirteenth Amendment to the constitution (1987) 2 SLR 312 at p. 331

³⁰ *ibid*

³¹ Art 3 of the 1978 constitution

³² Art 4

³³ Art 75

³⁴ Sir Ivor Jennings- the constitution of Ceylon P.72

³⁵ Hodge v the Queen 9 A.C 117

³⁶ K. C. Kamalabayson PC - Devolution of Powers: The Sri Lankan Experience The Sri Lankan Experience 30 Kamalabayson Foundation (2009)

³⁷ Art 83

³⁸ Chapter XIII Art 85(2)

In the term of the Constitution, the power given under Article 75 is unlimited and the Parliament can with the approval of the people even amend or repeal any of the provision of the Constitution including Article 75. In this background, the question whether the provisions in the 13th Amendment erode the legislative power of the Parliament has been answered by the supreme court in favour of sovereignty. The majority view was that the provisions only impose procedural restraints.

Article 154 G enables the Provincial Council to make statutes. This power is subject to the provisions in the constitution including Article 75 and article 154 G (10)³⁹. A statute does not attain the constitutional status of Law, as the definition of Law in Article 170 remains un-amended⁴⁰. Similarly, it does not enjoy constitutional immunity or protection that is accorded to an act of Parliament⁴¹. It does not attribute of finality and is always subject to the review by the court of Law, even years after its passage. If it is *ultra vires* for a provincial council to enact such a statute, it is null and void⁴².

A statute comes into force only upon receiving the assent of the Governor⁴³. When a statute is presented to the Governor for his assent he shall either assent or may return it to the Provincial Council together with a message requiring the council to reconsider it or consider the desirability of introducing amendment as may be recommended in the message⁴⁴. In which event it is imperative for the Provincial Council to reconsider the statute having regard to the message of the governor but it may pass the statute with or without the amendment and present it again to the governor for his assent⁴⁵.

Thereafter the Governor may assent to the statute or reverse it for reference by the Supreme Court, within one month of the passing of the statute for 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 without his assent⁴⁶. The above provisions place several effective obstacles in passing of a statute before it come in to force. Unlike the plenary power of Parliament in relation to the Bill, which requires no executive assent, a statute requires the assent of the Governor who is the chief executive of the province. He is given an

³⁹ Art 154 G (1), 154 G (5) (b)

⁴⁰ Art 170 – Law means any act of parliament and any law enacted by any legislature at any time prior to the commencement of the constitution and includes an order in council.

⁴¹ Art 80 (3)

⁴² K. C. Kamalabayson PC - Devolution of Powers: The Sri Lankan Experience The Sri Lankan Experience 32 Kamalabayson Foundation (2009)

⁴³ Art 154 H(1)(2)

⁴⁴ Art 154 H(2)

⁴⁵ Art 154 H (3)

⁴⁶ Art 154 H(4)

opportunity to make proposals. On the other hand, the council is obliged to consider such proposal and if necessary give effect to them.

It is apparent that the Constitution intended the Governor to exercise some degree of control over the Provincial Council's power to make statutes. At the same time constitution ensure that a statute will not be unduly delayed, by stipulating a time limit of one month, within which it may be referred to the Supreme Court⁴⁷. According to 154G the governor who appointed is refer able to the executive power of the people, is permitted to play a legitimate role in the making of a statute by a provincial council, thereby strengthening argument that constitution open a gate to a governor to temporarily obstruct a statute for various reasons yet a permanent obstacle may be placed, only if the statute inconsistent with the constitution⁴⁸.

Another important feature is that Article 154G(3) provides that the parliament could, by simple majority legislate in respect of the matter specified in list I (Provincial Council List) with the consent of Provincial Council, in which event, the bill shall become law (Not as a statute), applicable only provinces.

Legislative power of the Provincial Council may be summarize as follow.⁴⁹

- i. President after its publication in the gazette and before it is placed on the order paper refer the bill to every Provincial Council,
- ii. Where every such Provincial Council agrees to the passing of the bill, it is passed by a simple majority,⁵⁰
- iii. Where one or more council do not agree, it is passed by a two third majority, in which event such law will be applicable to all the Provincial Council,⁵¹
- iv. In the event of an inconsistency between law passed as above and a statute, the provision of the law prevail,⁵²

⁴⁷ Art 154 H(4)

⁴⁸ K. C. Kamalabayson PC - Devolution of Powers: The Sri Lankan Experience The Sri Lankan Experience 34 Kamalabayson Foundation (2009)

⁴⁹ Art 154G(3) of the 1978 constitution

⁵⁰ Art 154G(3)(a)

⁵¹ Art 154G(3)(b)

⁵² Art 154G(3)(6)

- v. Where on such reference one or more provincial council agree to the passing of the bill, it shall become law applicable only to those provinces,⁵³ and
- vi. The Parliament may make law at the request of the Provincial Council.⁵⁴

The power is also given to the parliament to legislate in respect of any matter set out in concurrent list⁵⁵ after such consultation with Provincial Council as the Parliament may consider appropriate in the circumstances of each case.⁵⁶ The extent and scope of the consultation is not specified. But in *Re Transport Board Statute case*, it was held that such consultation is mandatory. In the context of the constitutional structure, the superior power of the Parliament must necessarily be regarded as the guiding factor⁵⁷.

The majority determination in *Thirteenth Amendment case* is that the Provincial Council does not exercise sovereign legislative power and subsidiary bodies exercising limited legislative powers⁵⁸. Article 76(1) provides that Parliament shall not abdicate or in any manner alienate its legislative power and shall not setup any authority within any legislative power. The word “delegate” which was found in the corresponding sec in 1972 Constitution⁵⁹ has been dropped from this Article thereby enabling some of the plaintiffs in support of the bills to argue with much force that statute are nothing more than subordinate legislation.

Provincial Council cannot make statutes in respect of any matters set out in Reserve List, the first items in the reserved list is the National Policy on all subjects and functions. The provincial council has no powers in respect of National Policy, even on subjects and function 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 the Parliament retains its control on all matters and where appropriate may dictate to the provincial council. The *National Transport commission Act No 37 of 1991* in this acts some of the provisions of this act conflict with item 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 simple majority.

⁵³ Art 154G(3)(b)

⁵⁴ Art 154G(4)

⁵⁵ List III Ninth Schedule

⁵⁶ Art 154G(5(a))

⁵⁷ Devolution of Legislation power under the thirteenth Amendment ((Law students' Association Neetham 2014)

⁵⁸ Article 76 (3) in support of this view

⁵⁹ Sec 45 of the 1972 constitution

In Re Agrarian Services (Amendment) Bill, the Supreme Court expressed the following view: it is sufficient for present purposes that the matters dealt with in the bill are all matters of policy in regard to the rights and liabilities of the owners and tenant cultivators and thus fall within List II. All subjects and functions not specified in List I or List III are brought within Reserved List. The residuary power is vested in the National Government.

Once a statute is made, the Provincial's Council is in control of the matter covered by the statute. The making of a statute, in legal terms mean the exclusion of the National Government activity. A statute without the necessary machinery to implement its provisions is worthless and may cause hardship to the people of the province. The constitution is silent with regard to consultative process between parliament and provincial council, in respect of the matter in the concurrent list.

In Re the transport case Supreme Court held as following way:

- i. Provincial council can make statute (in respect of the provisions of intra-provincial road transport services in respect of both passengers and goods) By virtue of item 8 as well as item 21 of the provincial council.
- ii. Provincial council statute can authorize the council itself to provide road transport service.
- iii. The duty to consult under Article 154 G 5(a) and (b) are mandatory
- iv. Provincial council statute can't transfer or vet in the council without compensation the assets of a public corporation which is empowered to provide or providing both intra-provincial and inter-provincial road transport service.⁶⁰

On the other hand, if it has the capacity to discharge its responsibility in respect of the matters in concurrent list, provisions is made for the council to do so, provided that, where there exist a conflict between the National Government and Provincial Council, the Parliament could effectively obstruct the council firstly objecting to the making of any statue in respect of the said matters and thereafter by enacting legislation based on National policy.

⁶⁰ K.C.Kamalasabayson PC : Devolution of powers: the Sri Lankan Experience The Sri Lankan Experience 43
Kamalasabayson Foundation (2009)

Indian constitution Article 246 (2) the corresponding provisions which confer wider power on a state legislature. Where there is a law in respect of any matter in the concurrent list on the relevant date and provincial council makes a statute on the same matter inconsistent with the law, the statute has the effect of suspending the provisions of the within the province from the date of its assent, unless the parliament resolves otherwise.⁶¹

Article 154G (5) (b) empowers the provincial council to make statutes with respect to any matter in the concurrent list. By virtue of Article 154G(6) any provision in the statutes made by the provincial council inconsistent with any law made in accordance with 154G, is, to the extent of such inconsistency void and the provisions of the law shall prevail.

The law contemplated in term of this Article is

- a. Law made in respect of any matter in the provincial council list in accordance with the procedure under Article 154G (3)
- b. Law made in respect of any matter in the concurrent list.

However, under Article 154G (8) the statute made in respect of the concurrent list takes precedence over any law in existence at the time statute comes into force.

On the other hand Article 154 M of the 13th Amendment empowers the parliament to confer power on president to make statutes or to delegate such power to any other authority. This article contemplates a positive deviation with regard to legislative and statute making power of the provincial council respectively.

The provincial council Act provides for a special procedure in respect of statute relating to financial matters, even though they relate to the matters specified in the provincial council list. It provides for the recommendation of the governor before the statute is introduced into or moved in a provincial council. Although the conditions specified in section 24 appear to be in conflict with Article 154G (1) of the constitution, in view of Article 80(3), it is now too late in day to question its constitutional validity.

There can be no question that in my view of the check and balance in the constitution of Sri Lanka, the devolution of legislative power in terms there falls far short of federalism. But in this area of devolution, it is the provincial that is expected to take the first step by making statutes having regard to its capacity and competence. On the other hand, the national government must be cautious in enacting national policy legislations which may eventually result in the Supreme

⁶¹ Art 154G(9)

Court handing down a restrictive interpretation in keeping with the constitutional intent of the Thirteenth Amendment.⁶²

3.3 Devolution of Executive Powers

The Executive power of the Provincial Council is concerned one could not help but draw parallels with the early colonial Constitution of Ceylon. In the exercise of executive powers the Provincial Councils are subject to center. The executive power of Provincial Council is vested in the Governor. He is not a mere figure-head but is an active participant in the affairs of the Provincial Council. The governor is appointed by the President and holds office in accordance with Article 4(b) of the constitution⁶³ at the pleasure of the President. Moreover, all executive action of the Governor is expressed to be taken in the name of the President⁶⁴. Thus the executive of the governor is in effect the executive power of the president. As such the Governor is intrinsically connected with the National Government and forms the essential umbilical chord between the national government and the provincial council administration which is essential securing the unitary form of the state even devolving power⁶⁵.

Article 154C stipulates that the executive power extending to matters in the Provincial Council list and the Concurrent List shall be exercised by the governor either directly or through the board of ministers of the Provincial Council or through the officers' sub-ordinate to him in accordance with Article 154F. Article 154F (1) establishes the Board of Ministers of the provincial with the Chief Minister at the head and not more than four other Ministers to aid and advise the governor in the exercise of his functions. However the Article further stipulates that the Governor must act in accordance with the Board of Ministers when exercising his functions except where he is required by the constitution to exercise any function in his discretion.⁶⁶ Thus it would appear that in terms of the constitution, the Governor is the sole executive authority of the Provincial Council. The Executive power of the elected Board of Ministers appears to be purely *de facto*. Kamalabayson argues that although the function of the Board of Ministers is merely advisory, by implication it is through them that the governor exercises his executive powers. Therefore, unless there is a deadlock between the Governor and Board of Ministers on a

⁶² K.C.Kamalabayson PC : Devolution of powers: the Sri Lankan Experience The Sri Lankan Experience 49 Kamalabayson Foundation (2009)

⁶³ Art 154B(2)

⁶⁴ Section 15(2) of provincial council act no 42 of 1987

⁶⁵ Devolution of power in post conflict Sri Lanka: full implementation, of the 13th amendment and beyond? (The Bar association law journal [2009] vol.XV)

⁶⁶ The governor is required to act on the advice of the chief minister when he appoints the members of the board of minister under Art.154F (5) and when he summon, prorogues or dissolves the provincial council on the advice of the chief minister, as long as the board of minister enjoy the confidence of the council in term of Art.154B (8).

crucial issue, the board of ministers will be *de facto* exercising the executive power of the Governor and to that extent the 13th amendment permits the devolution of executive power from the President to reach the Board of Ministers through Governor⁶⁷.

This position is further strengthened by the judgment of the court of Appeal in *Mahindasoma V Maithripla Senanayake and others*⁶⁸ where it was held that in exercising his executive powers under Article 154B (8) in a situation where the board of minister commands the support of the majority of the Provincial Council in the opinion of the Governor, the Governor has no discretion and is bound by Article 154B (8) (d) to act on the advice of the Chief Minister. The court went on to hold that:-

“[Article 27(4)] requires that state, to broaden the democratic structure of government and democratic rights of the people, by decentralizing the administration, and affording all possible opportunities to the people to participate at every level in national life and in government. It is in that background that the provision had been made requiring the governor to consult the Chief Minister, the elected representative of the people, who commands a majority of the elected members”.

The mechanism checks and balances involved in devolving powers in the unitary state amply demonstrated by this situation where the Governor who is appointed by the President is given the *de jure* executive power which is required to be exercised in accordance with the wishes of the elected representatives of the people of the province. As vividly described by Wanasundera J in his dissenting judgment:

“So in reality the substantive Executive power exercised in a Provincial Council emanates and is created from below and does not in fact constitute devolution of power coming from above, from the President. The executive is therefore broken at a dividing point, one purporting to devolve from the President and the other arising from the elected members of the Provincial Council”⁶⁹

This appears to be the case especially in light of the fact that Article 154F (6) declares that the Board of Ministers shall be collectively responsible and answerable to the provincial council. According to one commentator this is a manifestation of the intention of the framers of the 13th

⁶⁷ K.C.Kamalasabayson PC : Devolution of powers: the Sri Lankan Experience

⁶⁸ [1998] 2 Sri LR 333

⁶⁹ In Re the Thirteenth Amendment to the constitution [1987] 2 SLR 312 at p. 359

Amendment that the Board of Ministers is an integral and essential part of the executive of the Provincial Council.⁷⁰

Although in two other decisions⁷¹ the Court of Appeal has held that when exercising powers in relation to members of the Provincial Public Service commission or other officers of the Provincial Public Service, the Governor must act independently and that the board that the Board of Ministers of the provincial council have no authority to advise the governor on such matters in the recent judgment of *Western Province Technological Officers (civil) Union V Nimal Karunaratna and 32 Others*⁷² Marsoof J held that while the provincial Board of Ministers is constitutionally charged with the responsibility of advising and advising the governor in the exercise of his functions, the governor is bound in law in the exercise of his functions, as a general rule to “act in accordance with such advice, except insofar as he is by or under the constitution required to exercise his functions or any of them in his discretion”⁷³.

Where the governor is required to exercise his discretion, he must exercise it on the directions of the president⁷⁴. It has been observed that this provision “tightens the link between the President and the Governor”.⁷⁵ Article 154F (2) lays down that if any questions arises whether any matter is or is not a matter as respects which the Governor is required to act in his discretion, the decision of the Governor in his discretion is final and the validity of anything done by the governor shall not be called in question in any court on the ground that he ought or ought not have acted on his discretion. The Supreme Court in two decided cases⁷⁶ held that this ouster clause applies only in respect of the limited question of whether the governor must act on his advice or in his discretion in a given situation. The Supreme Court held that the exercise of powers vested in the governor under 154F (4) (excluding the proviso) pertaining to the appointment of the chief ministers is subject to judicial review by the Court of Appeal and that the governor’s decision in this respect involves a constitutional power and duty of the Governor, and a constitution right of the petitioners to the proper exercise of such power and duty.⁷⁷

⁷⁰ Kamalabayson K.C Devolution of powers: The Sri Lankan Experience 78 Kamalabayson Foundation (2009)

⁷¹ Podinilame (Chief Minister Sabragamuwa provincial council) and others V Mathew (Governor Sabaramuwa Province) and others [1996] 2SRL 82 and R.M.R. Nimal Bandara, chief Minister North Western Province V Hector Aarawwala Governor North Western Province and others CA No.483/95 decided on 24.05.96

⁷² [2008] SLR 72

⁷³ Devolution of power in post conflict Sri Lanka: full implementation, of the 13th amendment and beyond? (The Bar association law journal [2009] vol.XV)

⁷⁴ Art. 154 F (2) states that the exercise of the governor’s discretion shall be on the president’s direction. The governor is required to exercise his discretion on the direction of the president when exercising powers under Art 154 (10), Art 154H (2), Art 154H (4), Art J and Art 154N (3).

⁷⁵ Kamalabayson K.C Devolution of powers: The Sri Lankan Experience 66 Kamalabayson Foundation (2009)

⁷⁶ SC Ref. 2-5/93 SC Minutes of 16.08.93

⁷⁷ *Ibid* 72

The Governor wields wide powers in terms of the administration of the Provincial Council. Apart from appointing the Chief Minister and the Board of Ministers, the Governor is also given wide power in respect of the legislative functions of the council. In terms of Article 154H the governor is entrusted with the task of assenting statutes. The statute only comes into force upon receiving the assent of the governor may refuse assent to statutes and recommend amendments. Moreover it term of section 24(1) and (3) of the provincial council Act, statutes dealing with specified financial matters cannot be introduce or moved in the provincial council expect with the recommendation of the governor. Apart from the powers in relation to legislation the governor also has wide executive powers. In terms of Article 154B (11) the Chief Minister has a duty to communicate to the Governor the decision and affairs of the province and the proposals for legislation, to furnish information relating to the administration of the affairs of the province and the proposals for legislation. The governor may also address and send messages to the council.⁷⁸

Apart from these wide ranging powers, the Governor is also the custodian of the purse of the Provincial Council. The Governor's hold on the finances of the Provincial Council is the feature that is reminiscent of the early colonial Constitutions of Ceylon where the elected members were nothing more than a talk-shop. In addition to recommending specific finance related statutes, the governor makes rules regarding the custody of the Provincial Fund, the payment of money into such fund and all other matters connected to the fund.⁷⁹ The governor is also directly holding the Emergency Fund of the province.⁸⁰ It is also the duty of the governor to cause to be laid before the provincial council the annual financial statement.⁸¹

In terms of section 32 and 33 of the Provincial Council Act, the Governor is also vested with the powers of appointment, transfer, dismissal and disciplinary control of officers of the Provincial Public Services as well as the power to appoint the members of the Provincial Public Service Commission. The Governor prescribes rules in respect of the delegation of duties of the Provincial Public Service Commission and hears appeals against the orders of the commission. As commented by Kamalabayson, it is the Governor who is the starting point as well as the finishing point. He not only delegates but also entertains appeals⁸².

⁷⁸ Art 154B (10)

⁷⁹ Section 19 (5) of the Provincial Councils Act No. 42 of 1987

⁸⁰ Section 20 of the Provincial Councils Act No. 42 of 1987

⁸¹ Section 25 of the Provincial Councils Act No. 42 of 1987

⁸² Kamalabayson, K.C Devolution of powers: The Sri Lankan Experience 80 Kamalabayson Foundation (2009) he observes that devolution would be has been meaningful in relation to the provincial public service commission if, instead of the Governor, the Board of Ministers was made the principle appointing authority.

Thus the Governor, who is the representative of the President, is conferred wide powers and he could therefore manipulate the destiny of the provincial Administration by exercising these powers. The concept of putting so much power in the hands of a representative of the National Government raises questions regarding the very purpose of devolution. Perhaps the purpose of placing so much power in the hands of the governor takes into account the fact that members of provincial councils are inexperienced to run the Provincial Administration under the watchful eye of the governor. Kamalabayson also agrees that these powers, duties and functions conferred on the administration.⁸³ This hypothesis may be supported by Article 154D (2) which provides for the provincial council to grant a member of Parliament elected for electoral districts within the province the right to participate in the proceedings of the council. Although this would appear in the first instance to defeat the purpose of the provincial council and the devolution of power, these provisions may have been made for the express purpose of educating and training provincial lawmakers.⁸⁴

In any event, despite the vast powers of the Governor, the members of the provincial council also have a check on the Governor. In terms of Article 154B (4), the Provincial Council may a 2/3rd majority present and address to the president advising the removal of the Governor on any of the grounds specified therein. The procedure for the removal of the Governor is much simpler than that provided in Article 38 for the removal of the president. On the other hand, as observed by Kamalabayson, a deliberate attempt to obstruct the devolution of power by the Governor may attract either Article 12 or Article 154B (4) (a) (i) of the Constitution.⁸⁵

⁸³ Kamalabayson, K.C Devolution of powers: The Sri Lankan Experience 75 Kamalabayson Foundation (2009)

⁸⁴ *Ibid* 72

⁸⁵ *ibid*

3.4 Provincial Finance

In terms of Article 154R provides for a Financial Commission to make recommendations regarding the allocation and distribution to funds to Provincial Councils. It appears that the Commission was established in order to ensure impartial and equitable distribution of funds to the provinces, so as so minimize the risk of the National Government having a stranglehold over the provincial administration. However the commission can only make recommendations to the President and these recommendations have to be laid before Parliament⁸⁶.

The Finance Commission must act with the objective of achieving balanced regional development taking into consideration the population and the per capita income of each province and the need to progressively reduce social and economic disparities between provinces⁸⁷

3.5 Devolution of Judicial Power

An interesting feature of the devolution is that it does not provide for the devolution of judicial power. Although Article 154P establishes a High Court for each province having appellate and revisionary jurisdictions as well as writ jurisdiction in respect of matters in the provincial council list, the judiciary remains firmly rooted to the centers and the judges of the High Court are appointed by the President while their disciplinary control, transfers and dismissals are carried out by the Judicial Service Commission⁸⁸.

⁸⁶ Art 154R (7)

⁸⁷ Kamalabayson, K.C Devolution of powers: The Sri Lankan Experience 96 Kamalabayson Foundation (2009)

⁸⁸ Devolution of power in post conflict Sri Lanka: full implementation, of the 13th amendment and beyond? (The Bar association law journal [2009] vol.XV)

CHAPTER IV

ENFORCEMENT OF THE 13TH AMENDMENT OF THE CONSTITUTION

The 13th Amendment of the constitution promises to devolve powers to Northern and Eastern provinces of Sri Lanka which are dominated by Tamils who are minority community in Sri Lanka. LTTE rejected the basic provisions of the 13th Amendment. The war come end in 2009 then, the first time Northern Provincial Council established in 2013. However Northern Provincial council faced many difficulties to enforce its functions. Such as:

- The 13th Amendment will do nothing to share executive power with the Tamil people because such power will continue to be vested in the President and in his servants.
- It will do nothing to secure an equitable allocation of financial resources to Tamil areas because such allocation will continue to be determined at the discretion of a Sinhala dominated Central Government.
- It will do nothing to prevent continued state aided Sinhala colonization of the Northern and Eastern Provinces because the disposition of state land will be in the hands of a Sinhala dominated Central Government.
- The 13th Amendment will do nothing to prevent standardization of admission to Universities, because higher education is a subject excluded from the Provincial List.
- The 13th Amendment will do nothing to control the abuse of police powers because the subject of 'Police and Public Order' in the Provinces will continue to be effectively vested in a Sinhala dominated Central Government.
- The 13th Amendment will do nothing to prevent the operation of the Prevention of Terrorism Act whose provisions were described by the International Commission of Jurists as a 'blot on the statute book of any civilized country' because this too will be within the competence of a Sinhala dominated Central Government⁸⁹.
- The 13th Amendment will do nothing to prevent the operation of emergency regulations which enable Tamils to be killed and disposed of without a post mortem inquiry and which regulations have been condemned by Amnesty International as an encouragement to indulge in extra judicial killings.(*Amnesty International Report, 1984*)⁹⁰

⁸⁹ Thirteenth Amendment to Sri Lanka Constitution - Devolution or Comic Opera by Nadesan Satyendra, March 1988 – www.Tamilnation.org

⁹⁰ *ibid*

- The 13th Amendment will do nothing to prevent the operation of the 6th Amendment to the Constitution which according to the International Commission of Jurists, violated the right to freedom of expression⁹¹.
- On the contrary, the 13th Amendment will require members of the Provincial Council to take their oaths under the 6th Amendment and acquiesce in and sanction such violation⁹².
- And the 13th Amendment will do nothing to motivate the Tamil people to work for the rehabilitation of their homeland, because it refuses to recognize the existence of the Tamil people as a people with a homeland⁹³.

This part explains the enforcement mechanism of Provincial council through experience and opinion of the Chief Minister of Northern Province and expert & a member of Public Representations Committee (PRC) on Constitutional Reforms. This interview took from me for this research purpose.

Hon. C.V. Vigneswaran

Chief Minister of the Northern Province

1. Whether the 13th amendment of the constitution can be considered as a permanent solution for the internal ethnic conflict in Sri Lanka? What is your opinion, as a Chief Minister of Northern Province, with regard to the above question?

The answer the above mentioned question is NO; because the 13th amendment of the constitution was brought on the basis of the Indo-Sri Lankan Agreement. According to this agreement only both parties Sri Lanka and India agreed and enact the 13th amendment. This enactment was started to enact with the intention to provide the same powers as India was given to its States. However, this enactment has been passed by the, then President of Republic, JR. Jayawardena, before the committee of Indian Lawyers draft the model for the amendment. Immediately after passed the 13th amendment to the constitution, they have been brought the Provincial Council Act, without any delay. Therefore, a letter had been sent to Rajeev Gandhi (PM of India) in relation to the issues in the passed amendment of the constitution by Mr.Amirthalingam, Mr. SivaSithamparam and Mr. Sampathan on 10th day of October 1987. In such letter to Rajeev Gandhi, they have pointed out that, this amendment to the constitution does not satisfy the expectation of the Tamils of the Nation and it could not be as a solution for their conflict.

⁹¹ *ibid*

⁹² *ibid*

⁹³ *ibid*

Moreover, it's important to note the provision in the amendment which provides that the amendment shall be modified or altered under the unitary state, whenever needed. Further, it's noteworthy to remember that, in the year of 1992, the Government Agents and District Secretariats was taken under the power of central government from the powers of Provincial Council. This instance shows that, the unitary nature of the state take hold of the least powers and rights which was given by the 13th amendment. Thus, according to my point, the 13th amendment of the constitution cannot be a solution for the Tamils' issues and problems.

2. What are the practical problems in wholly implementing the 13th amendment? What are the challenges, the Northern Provincial government face in vesting the powers under 13th amendment?

Many problems were faced by the Provincial Council. First of all, the issues with regard to the powers and Rights of the Governor who is appointed by the President of Sri Lanka. Once, this was criticized by a Professor that, this Provincial Council system is likely to give the power in one site and taken away it another way. Thus, the appointment of Governor in order to monitor the function of Provincial Council prevents the Provincial Council to act independently upon its own decision. The second issue is, the powers given under the 13th amendment. According to the 13th amendment, the powers given by this can be divided into three.

1. Powers comes under the National List.
2. Powers comes under Provincial Council List, and
3. Powers comes under Concurrent List.

If these list out the powers clearly, then some problems might be minimized. But, the existence of concurrent list paves ways for many issues. Take an example; "Agriculture" comes under the national list. But the matters connected to the agriculture and extension of agriculture comes under the Provincial Council List. Because of this complexity, central government use this gaps and take the matter under its power. Thirdly, the provisions of the amendment give the space for the central government to act arbitrarily in funding to us. For next, in the present context, there are two parallel administrative bodies exist. While one body known as board of provincial council comes under Provincial Council, another comes under the central government identified with the GA and DS. Generally, central government administers the Province with the assistance obtained from the state officers who is headed by the GA and DS. But, the salary for those state officers was paid by the Provincial Council and the power for administering them vested by the central government.

Finally, the Chief secretariat does not bring within the scope of Provincial Council. He is appointed by the central government. Therefore, the difficulties of the people do not take to the notice of the central government by the Provincial Council. But, it's reached to the government through the secretariat who was appointed by the central government. Generally, the government officers and appointees do not speak against their superiors or the Chiefs and trying to finish the orders what they made. Thus, there are possibilities that, the issues of the people do not take into the consideration of the central government. So, as a solution, the Prime secretariat and GA and Ds should entirely bring under the control of Provincial Council. Then only, we can effectively carry out our function under 13th amendment. However, the 13th amendment does not provide the room for this free exercise of our power.

3. What are the differences or impediment can you find between your tenure of office as a Chief Minister and the period when Mr.Varatharajan and Mr.Chandrakanthan hold the office of Chief Minister?

I could not completely answer for this question. In my opinion there is no difference between the then a present laws. But in 1992, all the office of GA and Office of DS were under the control of Provincial Council and then it brought under central. I believed it was occurred after the tenure of Mr.Varatharajan. After his period, small amount of powers only have given to us rather than his period of office.

Once, Mr.Chandrakanthan made a statement that, he was at the position in which at least he could not appoint a labourer to the Hospitals. This is the situation still continues. We are unable to do anything without the knowledge and permission or approval of the central. Some officers told that to act something without informing the government. But, in practice it will cause serious issues. In my opinion the law should be clear in defining the powers and providing the rights. I won't welcome the activities which done illegally without the approval of the central government.

4. What are the reforms shall be made in the 13th amendment, with regard to the powers over the police and land matters?

The powers connected with the police and land should be completely given to the Provincial Councils. One can define the province, by only defining the lands, where it's located. Province shall be known by its lands and the people of the province shall be consider as the person who born and grown up there. They have a sentimental and serious close intimacy with their lands. Thus, we are the owners of our land and where government prevents us to see our land impliedly

means to ignore us too. The powers connected with the police also same land powers. Whenever, the outsiders comes as a police officers they are trying to bring out something from here. They do not have any concern on the security or welfare of our people. However, some of them can be honestly acts with the fear of laws. But in most of the situations, the outside police forces do not have enough familiarity in our languages too. Therefore, in the present context, we faced many problems out of these kinds of appointments. For an example, nowadays, the drugs offences are rapidly increased in our areas. It's a funny thing to think that, we have all superior police officer from Sinhalese and appointed by the central, in where the drugs offences are increased rapidly.

But, if we have the power to appoint the police forces then we never allowed for these kinds of offences to take place. The central told that for 2 years, they will hire Tamil people as police in Tamil areas. But no one is appointed so far. Thus, police power also completely needed for a Provincial Council to effectively govern their territory. Unless and otherwise, Provincial Councils cannot be effective and innovative enough.

5. What are the interferences and limitations exist since the Chief Minister and Members of the Provincial Council were elected by the Tamil people where the Governor was appointed by a Sinhala President?

13th amendment provides more power to the Governor. The Governor can be a rubber stamp. But in our Provincial Council system he holds most of the powers rather than the Board of Ministers of Provincial Council. If this continues, it paves ways for the destruction of rule of people and democracy.

We keen for the self-determination and world's countries, international convention and international laws also supported us in this regard. That's why we claim for the federal state. But, in practice, central vests its power through the Governor which creates more complicated situations. Therefore, needless to say about the Governor. It's an undeniable truth that, the law provides for many goods to them and refuses even the basic powers to us.

6. What kind of power the Provincial Council vested in making statutes or by laws?

Generally, there is an issue in relation to the question that the power of the Governor to refused to give consent to the statues or amends it or to reject so forth. For example, we made a statue on the matter of finance of Northern Province (Chief Minister Trust) and have sent that for the consent of the then governor who was a military officer of Sri Lanka. Then, he refused to give his consent for the statue, by saying that, the Chief Minister has no power to made statue with regard to the matters of finance and led evidence of five Provincial Councils and said that they

have a statute on finance matter contrary to the law. If it is illegal there is a question rise why no one take action against such illegal statute made by those five Provincial Councils?

Moreover, we talked with the President with regard to this and we are on the process to take actions. By this, it's obvious that, the governor's powers deemed to be a major obstacle for us to implement our powers in making statutes. Thus, this power of the governor should take away by the amendment of this law. Other than this, AG also considerably interferes into our law making power. It is notable here that our self-determination claim is considerably denied by the central.

7. In today's context, Sri Lankan government takes step to reform the constitution. According to the Tamils claim they need a federal state. But under the 1978 constitution if we need to change the unitary nature of the state we have to done it through the referendum. Since Sri Lanka has consisted majority of Sinhalese, what extent it's possible?

I accept that there is no possibility for that. But, among the Sinhalese, for 50 years, there is a believe that, the federal states amounts to the separation. Until they have the same attitude they won't support for the reform made from unitary to federal state. Thus, if our claim wants to success the Tamil and Sinhala leaders wants to change the attitude by giving awareness among Sinhalese. They should tell that, the purpose of the federal state is to unify the nation as one; not for the separation. There is a problem with regard to this. Tamils asked that, why the government refuse to give the reasonable claim of the Tamil just because it was not accepted by Sinhala people since both of them constitute the people of the state. Mostly who resides in Colombo thinks that, Tamil will comprise with their claim since the Sinhalese refused to it. According to our wish, we want to govern ourselves while being of the Sri Lankan government. My 2013 election manifesto also tells the same which is accepted by all. According to that our solution is, "dissemination of power on the basis of federal state within the undivided state,"

Mr. N.Selvakumaran

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Faculty of Law, University of Colombo,

1. Whether the 13th amendment of the constitution can be considered as a permanent solution for the internal ethnic conflict in Sri Lanka?

The indo-Lanka agreement was an attempt with the intention as a solution for the ethnic conflict in Sri Lanka. But, if the both parties such as minorities and majority (the government) implement it with bona fide and good heart, it might be solve the conflict. Even today, under this amendment there are some provisions which enable the implementation of the civil, political, economic, social and cultural rights within the unitary system of state. But, the question is whether there is a political inspiration to implement those provisions?

2. What are the practical problems in wholly implementing the 13th amendment? What are the challenges, the Northern Provincial government face in vesting the powers under 13th amendment?

One of the reasons for the issue with regard to the full implementation of 13th Amendment is, the party who wants to implement it does not have clear knowledge on what is 13th Amendment. For an example; 13th amendment is an amendment made in the constitution and it's a part of the constitution. Like this, there are some other parts exist in the Constitution. If a country ruled by the rule of law, then one cannot accept that, the arrangements of law, specifically, Constitutional arrangements do not implement fully. Can the President of the republic say that he does not implement the constitutional arrangement? In the country, where the rule of law exists no one can say as above. If one compares this with the 13th amendment, the statement of non-implementation of 13th amendment in a complete manner indicates the position against the rule of law and it defect the application of rule of law also.

Under the 13th Amendment, the administrative power was given to the Provincial Council. Specifically, Provincial Council has the legislative and executive power over the matters specified in the Provincial Council List. But, when the Provincial Council ignore this powers and attempt to make by laws on the matters which was already enacted by Parliament, then the governmental ministers and officers will take this opportunity to confirm their powers on their sides. Thus, in such instances, there are possibilities to the rise of conflicts between the executive of central and province. Considering, the solution for this conflict shall be, the

Provincial Council should make statues within their ambit and if they do, the governor should approve that statue for the enforcement of it. If they act in this manner, then until the statue in force in such Province, the central cannot interfere over that. But, there is another challenge that, question of competent body to make statues.

3. What kind of power the Provincial Council vested in making statutes or by laws? What is the position about statute of Chief Minister Trust?

With regard to the Chief Minister Trust, it's true that the Chief Minister made statues regarding finance and the governor was refused to give concern. According to the constitutional provision, if a Provincial Council enact statue again with regard to the matter to which the governor refused to give consent in earlier instance, the governor has the power to either to give consent or refer it to the supreme court through the President in order to decide whether the governor wants to give concern or not? But in the case of Northern Provincial Council, the Chief Minister did not make statue for second instance. If he attempt to made it and if it was sent to Supreme Court and then decided, we can accept the point of the Chief Minister. It's a different instance if a matter is impossible after following the constitutional arrangements. There are possibilities to prevent the powers of Provincial Council by Supreme Court if they are attempting to make laws with matters connected to Reserve List. This process is same even in Federal state also.

Once discussing about the conflict between the governor and Provincial Council, one have to think about the method in which the 13th Amendment was enacted. At such time we have the executive presidential system from whom the governor gets the power. As discussed above, if both parties act in bona fide these issues would not have been raised. If the governors of Northern- Eastern provinces acts as the same manner exist in other provinces, the 13th amendment would have been given a great solution for the ethnic conflict in Sri Lanka.

4. You have worked with the Public Representations Committee (PRC) on Constitutional Reforms. Accordingly, whether, the new Constitution bring the solution for the ethnic conflict? Whether it will help to the Tamils in the matter of self-determination?

We have worked with all 25 Districts. Because of the lack of time, we worked separately in a routine where some visit one province another went some other areas. We were in the limitation of period within 3 months. Therefore, we spend the initial 5 days in Colombo in January and within February 1-21 we went other provinces. Out of this visit we learned two important matters. One of them is, the governmental method of Sri Lanka should be a method of democracy; i.e.; the States institutions must be comply with the limited powers under the

Sovereignty of people, the state should govern by the rule of law and the independence of judiciary must be protected. With that all, the rights and the freedom of people should not be improperly or unlawfully restricted or deterrent. And, the state and other government institutions should be accountable for their acts.

Secondly, the reconciliation should be constructing in Sri Lanka. But people have doubt on the stability of this reconciliation and they have different opinions in the process in which the reconciliation should be achieved. The concept of self-determination does not have a clear cut definition for it. In liberal democracy, the autonomy of person should not be restricted. If one accepts this point in strict sense, the question of its availability to determine the self-determination is raised. Further, there is an opinion from the Muslims and Sinhalese who resides in northern and eastern provinces claim for the distribution of power within the unitary nature of state.

The following opinions derived from The Sunday Leader Newspaper (2013/12/08/) written by Waruni Karunaratne. This Article consist, some political parties expressed their opinion pro and against the implementation of the 13th Amendment as a political solution to the existing issues of the country⁹⁴.

Hon. Ravi Karunanayake (*United National Party MP*)

The 13th Amendment to the Constitution of Sri Lanka was passed during a UNP government. Full powers according to the amendment were granted to the provincial councils under the UNP government. However, land powers and police powers need to be relooked at. There has to be an independent National Police Commission. However, the present government has been unable to implement the 13th Amendment to the constitution. Sometimes back, the government promised Indian Prime Minister Manmohan Singh that the Sri Lankan government would take necessary measures to fully implement the 13th Amendment to the constitution. Now the Sri Lankan government has suddenly changed their decision. Implementing the 13th Amendment may not be a solution to all the issues of Sri Lanka but it will be a good confidence building exercise.

⁹⁴ <http://www.thesundayleader.lk/2013/12/08/13th-amendment-is-it-a-political-solution>

Ven. Galagoda Aththe Gnanasara Thero (*Bodu Bala Sena, General Secretary*)

India cannot suggest political solutions to national issues of our country. Indian government tries to poke its finger into every matter in Sri Lanka for their own political gains. They act in favour of Tamil Nadu who has various other interests that will only please the Tamil population in their country. We do not have to act according to their propaganda. We are not a colony of India.

Hon. D E W Gunasekara (*Minister of Human Resources*)

When the 13th Amendment to the Constitution was brought into parliament in 1987, I was one of the few to vote in favour of the amendment even though I was in the opposition at the time. I still stand by my decision. The 13th Amendment is the political solution agreed by all the Tamil political leaders to address the national issues in the country except LTTE.

LTTE did not agree upon the political solution brought forth through the 13th Amendment and took arms against the Sri Lankan government. I still believe that the 13th Amendment should be fully implemented to provide a political solution to national issues.

CHAPTER V

AN ASSESSMENT OF THE 13TH AMENDMENT TO RESOLVE THE ETHNIC CONFLICT IN SRI LANKA

The 13th Amendment of the Constitution was enacted for resolve the ethnic conflict in Sri Lanka based on Indo-Lanka Agreement between Rajiv Gandhi (Indian PM) and J R Jayawardene (Sri Lankan President) in 1987. According to Indo-Lanka agreement, LTTE an extremist separatist group were to surrender their arms in exchange for peace and autonomy in the region. The pact also promised the equality for Tamils, while shedding their second class citizen status.

Since the coming into force of the 13th Amendment, several problems have been observed in the operation of the Provincial Council system. The very purpose of devolution, which was to provide self-determination to the ethnic minorities in the Northern and Eastern provinces, has failed. A few of these are the result of inherent defects in the relevant legislation and Constitution provisions. Other difficulties are extraneous and arise from the manner of operation of the Provincial Council.

The most obvious problem that threatens to hinder the devolution of power is the ability of National Government to legislate in respect of subjects contained in the Provincial Council List by claiming to lay down National Policy. Item 1 of the Reserved List permits the National Government to make “National Policy on all subjects and functions”. Although it is obvious that the National Government should be entitled to and should thus have to power to lay down national policy in respect of all subjects contained in the Ninth Schedule, the danger is that the National Government would use this as a mechanisms to legislate through the back-door, as it where, in respect of matters contained in the provincial councils, by passing the procedure laid down in Article 154G (3). This may have serious consequences on the concept of devolution and the trust reposed in the minorities on the provincial councils. The Supreme Court has however held that once national policy has been duly formulated in respect of any subject; there cannot be any conflicting provincial policy on that subject⁹⁵. It has been suggested that a court should reflect upon the subject matter in respect of which the national policy in question has been laid

⁹⁵ The Official Language Act of 1956 which created the need for devolution in the first place was also enacted in pursuance of the “Sinhala Only” policy of the government of the day which was implemented as National Policy through the Official Language Act.

down and consider whether such subject matter demands a provincial policy due to their “provincial characteristics” or a national policy as they transcend provincial attributes⁹⁶. It remains to be seen whether Sri Lankan courts would take this pre-devolution stance and engage in scrutinizing the merits of National policy declared by the National Government.⁹⁷

Another problematic piece of legislation, which has given rise to mixed reviews, is the provincial councils (Consequential Provisions) Act No. 12 of 1989. The provides that the powers and functions of the minister or a public officer under any written law made prior to 14th November 1987 in respect of any matter set out in the Provincial Council List could be exercised by the Governor or Relevant Minister of Board of ministers of a Provincial Council or by an officer in the provincial public service holding corresponding office. Kamalabayson argues that this Act is clearly conflict with the constitutional provisions and that the 13th Amendment did not contemplate devolution in this form. He argues that the Act has an adverse effect on the provincial administration as it slowed down the statute making process and prompted the councils to take upon themselves more than what could be handled. He also accuses the Act of aggravating the existing conflict between the officers of the National Government and officers of the provincial who both now exercise powers under the identical law which has in turn led to a certain amount of confusion and uncertainty. Kamalabayson illustrates this point by referring to how in cases where the fundamental jurisdiction of the Supreme Court is invoked, the petitioners often cite both the National Government and the provincial council officials as Respondents⁹⁸. This has also lead to a multiplicity of functions and even at times the non-performance of statutory functions due to the inability of the officials of the National Government and provincial council to decide who is responsible for performance of a particular duty.

On the other hand Jayampathy Wickramaratne has presented a more positive picture of the provincial councils (consequential provisions) Act. He argues that there was an absolute necessity to enact the Act as reference to Ministers or particular public officials in pre-1987 enactments could not be taken to be references to the Governor or the provincial Minister or the corresponding provincial public officer. In the absence of the Act therefore, the provincial councils were faced with the impossible task of passing statutes corresponding to all such laws if

⁹⁶ Kamalawathie & Others V. The Provincial Public Service Commission, North Western Province and others SC/FR 300/2000. SC Minutes of 3rd October 200

⁹⁷ Devolution of power in post conflict Sri Lanka: full implementation, of the 13th amendment and beyond? (The Bar association law journal [2009] vol.XV)

⁹⁸ N. Selvakumaran in Kamalabayson, K.C Devolution of powers: The Sri Lankan Experience 62 Kamalabayson Foundation (2009)

they were to exercise executive power.⁹⁹ However he concedes the difficulties that have cropped up as result of the operation of the Act. He states that:-

“Although provincial authorities are able to exercise powers under pre-1987 law to which the provincial councils (consequential provisions) Act applies, central authorities are also able to exercise powers if they so wish, unless and until a provincial statute is made”¹⁰⁰

A further problem faced by the provincial councils is the unwillingness of the National Government to devolve power hitherto vested in them. The National Government continues ignore the provincial councils and exercise powers which have been devolved to the provincial councils by law.

A famous example of this is the 17th Amendment to the constitution which enacted in 2001. The 17th Amendment brought in Amendment to Article 154R in chapter XVIIIA and Ninth Schedule which was introduced by the constitution. In terms of the Article 154G(2), all Bills for the amendment and repeal of the provisions of chapter XVIIIA and Ninth Schedule must be referred to the provincial councils by the president before placing the same in the order paper of Parliament for the expressions of their views. Where one or more councils do not agree to the amendment, such Bill must passed by a special majority. It is true that, being an amendment to the constitution the 17th Amendment was anyway passed by special majority in Parliament. However the National Government and Parliament completely ignored following procedure set out in Article 154G. According to N. Selvakumarn this demonstrates a total lack of serious with regard to consulting the elected members of the people at the provincial level.¹⁰¹

In *Ghany V Dayananda Dissanayake, Commissioner of Elections and others*¹⁰² the Supreme Court drew the attention to the requirements stipulated in Article 154G (2) of the constitution with regard to the enactment of the 17th Amendment. However the Supreme Court chose to leave the question whether the provisions of the 17th Amendment have become law without answering it. Similarly the enactment of the Tsunami(Special Provisions) Act which contained provisions having an impact on subjects in the provincial council list was passed without making any attempt to comply with the provisions of Article 154G(3)¹⁰³ .

⁹⁹ Kamalabayson, K.C Devolution of powers: The Sri Lankan Experience 82-83 Kamalabayson Foundation (2009)

¹⁰⁰ Wickramaratne, Jayampath 13th Hotly Debated Amendment and Beyond <http://www.himalmag.com/13th-hotly-debate-Amendment-and-beyond-nw3107.html>

¹⁰¹ *ibid*

¹⁰² N. Selvakumaran in Kamalabayson, K.C Devolution of powers: The Sri Lankan Experience 54 Kamalabayson Foundation (2009)

¹⁰³ [2004] 1 SLR 17

Wickramaratne cites the Gunawardena Committee report which states that most government ministries routinely address guidelines and circular instructions direct to the respective provincial heads of department by-passing the provincial ministry. Further there is no restricting in the center in terms of roles and functions in the context of devolution¹⁰⁴ .

The extent of these crises became evident when the National Government took over the administration of the Ratnapura and Kegalle Base Hospitals which were administered by the Sabaramuwa provincial council in terms of the provincial council list. According to Wickramaratne that in the absence of a provincial council statute that provided for the administration of the two hospitals, the control of the two hospitals legally remains with the National Ministry of Health¹⁰⁵ . In the same position applies in northern and eastern provinces of Sri Lanka which are dominated by Tamils who are minority community in Sri Lanka.

The reluctance at National level to effectively devolve power to provincial councils has caused heavy financial burden on the country. This has caused most critics to lobby against the system of provincial councils itself¹⁰⁶.

An anomalous feature of the provincial councils is the introduction of a new dissolution provision by the Provincial Councils (Amendment) Act No. 27 of 1990 whereby the provincial council stands dissolved when the Governor communication to President that more than half of the total membership of such provincial council has expressly repudiated or manifestly disavowed obedience to the Constitution or in contravention of the oath or affirmation taken or subscribed to by such members or that the provincial council for all intent and purpose ceased to function as of any date, the provincial council stands dissolved.¹⁰⁷ The Bill was introduced as a result of the emergency that arose when on 17th March 1989 the Northern and Eastern Councils passed a resolution of unilateral declaration of independence and purported to convert the council into a constituent Assembly. Thereafter the Chief Minister and some of the other members left the country resulting in an imminent breakdown of administration¹⁰⁸ .

Another feature of the 13th Amendment is that it provides wide ranging powers upon the president to interfere with administration of the provincial council in the event of emergency.

¹⁰⁴ N. Selvakumaran in Kamalabayson, K.C Devolution of powers: The Sri Lankan Experience 56 Kamalabayson Foundation (2009)

¹⁰⁵ Wickramaratne, Jayampath 13th Hotly Debated Amendment and Beyond <http://www.himalmag.com/13th-hotly-debate-Amendment-and-beyond-nw3107.html>

¹⁰⁶ *ibid*

¹⁰⁷ Section 5A of the Provincial Council Act

¹⁰⁸ The Bill was opposed on the basis that its provisions conflicted with Article 154 and 125 and that it required a special majority but the Supreme Court rejected these submission. See Kamalabayson, K.C Devolution of powers: The Sri Lankan Experience 120 Kamalabayson Foundation (2009)

Articles 154J, 154K, 154L, 154M, and 154N deal with these provisions. Thus upon a proclamation under the public security ordinance the president is empowered to give directions to the governor regarding the manner of exercising his executive manner. Similarly where the Governor of a province fails to comply with or give effect to a direction given by the president, or where the President receives a report from the Governor that a situation has arisen where the administration of the province cannot be carried out in accordance with the Constitution, the President can declare that the powers of the Provincial Council can be exercised by Parliament directly for a maximum period of one year. Finally in the event of financial instability or threat to the credit of Sri Lanka or any part of its territory, the President may by proclamation made a declaration to that effect which proclamation shall be valid for 2 months, during which time the President can give directions to the Governor to observe financial propriety as specified in the direction¹⁰⁹.

These provisions no doubt help to create trust in the minds of the majority Sinhalese and prevent any possibility of a separate state being formed in any part of Sri Lanka making advantage of the Provincial Council system. Thus they act as effective mechanism to maintain check and balances of the provincial administration.

In beginning time LTTE refused to accept the 13th Amendment and the same time Tamil leaders of political party (Mr.Amirthalingam ,Mr.Siva Shithamparam and Mr. R. Sampanthar) was write the letter to Indian Prime Minister about the defect of the 13th Amendment in 1987. So under the 13th amendment, National Government has full control over the Provincial Council and same time didn't provide certain power to Provincial council so it is failed to ensure self-determination of the minorities and failed to settle ethnic conflict in Sri Lanka. The 13th Amendment pretends that the Tamil nation does not exist. It denies to the Tamil people the right to sit as equals with the Sinhala people and determine the political structure within which the two people may live in equality.

¹⁰⁹ *ibid* 72

CHAPTER VI

6.1 Conclusion

The study has attempted to an assessment of the Thirteenth Amendment of the Constitution to resolve the ethnic conflict in Sri Lanka. Exactly 100 years after the enactment of the Constitution of 1910 which initiated the rift between the two main ethnic communities of Sri Lanka, we are once again contemplating Constitution reform. The political and constitutional landscape has changed markedly. Legislation has been made and repealed, race riots have taken their toll, civil wars have been fought and won and a great deal of blood has been spilled over the last century.

The long lasted civil war silenced on 19th day of May 2009. During the war more Tamils killed and more persons missed. After the conclusion of war, Tamil Nation Alliance, (TNA), Political party, representatives of Tamil people demanded for a Federal state as solution to the ethnic conflict. After the Civil war, The Provincial Council for the Northern Province was established in 2013. Even though Minorities are not satisfying with the present power sharing mode, because the 13th Amendment failed to set out proper mechanism to share the police power and authority over lands. Provincial Council became a dependence on Central Government to enforce the powers granted by the Thirteenth Amendment.

The question facing Sri Lanka today is either to continue with the 13th Amendment or to go beyond it to a FEDERAL Constitution within a united Sri Lanka. Since its enactment in 1987 the 13th Amendment has had little success. The very purpose of devolution, which was to provide self-determination to the ethnic minorities in the Northern and Eastern provinces has failed. However, now with the separatist war behind us, Sri Lanka can look forward to making the Provincial Council system work for the first time in a peaceful Northern and Eastern province and providing an opportunity for the Provincial Councils to reach fruition in the hands of minority ethnic communities to which may give us a chance to test their full potential. However, it would be essential for a full devolution of powers as envisaged in the Provincial Council List, including power over land police and police order.

There are many views about what we must achieve in post-war Sri Lanka. There appears to be a general acceptance that reconciliation among the various ethnic groups in the country is the top most priority some think that for reconciliation to be realized we must primarily focus on economic development; others think that we must focus on a political solution; yet others think that what is of crucial importance is the investigation of alleged war crimes and established the truth; some are of the opinion that all those measures are necessary. There are indicators and

bench marks developed to measure reconciliation. Most are about specific deliverables- devolution of power, resettlement of IDPs, demilitarization, equitable land policy, depoliticization of institutions and so on.¹¹⁰

Therefore one the Tamils view, we have to search for a proper solution under federal set up which should recognize the Tamils' long term claims. That only will provide a durable solution to this conflict, so here we have to know what Federalism is. Federalism, namely the decentralization and devolution of powers, the court stated was necessitated by the very existence of a multi-ethnic society and the constitutional mechanism to achieve unity through diversity. Democracy was seen as supporting the Principle of Federalism and was mainly concerned with the Canadian Electoral System. Constitutionalism and rule of insure the existence of an ordered society that protects citizens from arbitrary of the multi ethnic society of Canada.¹¹¹ The Concept of Federalism of federal from of government signifies the high watermark of appointment of power within a state. Federalism has been response of the question of how to link separate political communities together in order to pursue effectively objective otherwise un-obtainable alone, but without submerging their own identities.

If we want to find out an amicable and durable solution to the ethnic conflict in Sri Lanka, we have first to throw away the present Constitution as the 13th Amendment to the Constitution failed to meet the Tamils' aspirations and stress on Unitary. Then we have to search for a solution on the basis of Federalism. If we want to once again make this small destroyed island as an elegant flower garden, we have to recognize the Tamils' long term aspirations and claims those are to recognize their right self-determination and the traditional homeland which do not in any way erode the state sovereignty and give rise to secession. The intended Constitution must guarantee and entrench the provisions to make it impossible to the Central Government to withdraw the federal set up even with the unanimous decision of central parliament and without the consent of Federating regions. For that we the Sri Lankan people must work hard without any discrimination on the basis of race or religion. We have to give up our conservative thought and we will be progressive persons and make this country prosperous.

¹¹⁰ Deepika Udagama: National Reconciliation Experiences of Sri Lanka and South Africa

¹¹¹ Reference Re secession of Quebec 1998 2SCR 217

6.2 Recommendations

Now two main National Parties became together and they are established Good Governance. The Good Government tries to bring a new Constitution for settle ethnic conflict in Sri Lanka. I cannot ensure whether it is possible or not. Even though I will try to give some recommendation to new constitution for resolve the ethnic conflict in Sri Lanka.

Before introduce a new Constitution, what we have first to do is, we have to resettle the Muslims and Tamils who were forcibly evicted by Tamils and Sinhalese respectively from their native places before and during the war period. Muslims were forcibly chased by Tamils from North and East during 1990's and Tamils were chased by Sinhalese from their native places and Sinhalese were colonized there. So they should be resettled with their consent.

Then first we have to abolish this Provincial Council system and regional bodies should be introduced. We have to divide the country into 3 regions. The North and East should be one regain an Upcountry should be another region. The rest of the island should be the third region. The internal set up within this 3 region may be differing, and we should, if necessary, allow and consent to give more power to some of those region. The three governmental organs- Legislative, Executive and Judiciary should be devolved to those regions. And the Central Government should be made even with unanimous decision, unable to make Constitutional change without the consent of the federating regions. National Security and some instance foreign affairs should be vested with the central government. Further, the power of the central government and regional government should be already enunciated in the Constitution.

The number of members of assembly will be determined according to the population of that particular region. The regional assembly shall have the sole power to pass legislation in relation to the matters allocated to the regions. The Central Government will be in any way nothing to do with those Legislations. If those are unconstitutional the court will strike down them. The powers of the regions, if and when necessary may be differ from one to one as in India. India the state of Punjab and Kasmir are given additional powers.

As far as Judiciary is concerned, there shall be a Court of Appeal with appellate, revisionary and writ jurisdiction for each and every regions and there shall be a Supreme Court with final appellate jurisdiction at the center. Any appeal from any region in relation to any matters other than the constitutional matters should be made possible to lodge with the Supreme Court. There shall be a Constitutional court with sole and exclusive jurisdiction to deal with constitutional matters. There should be judicial review of the legislation, and whenever the central legislature

or Regional Assemblies pass legislation which is unconstitutional, and then the Constitutional Courts shall have the power to strike down them. The Judges of the Constitutional Court will be appointed by the Central Government and they should be from each 3 major communities in equal membership.

As far as Central government is concerned, it should consist equal representation from three major communities Sinhalese, Tamils and Muslims. We can say that the main cause of this ethnic conflict is the Sinhalese dominant not only in the government. That is why they do not consider the minorities and their aspirations. And this will rectify the Tamils claim of parity of status and it will make possible to any person even from minority community to become the Prime Minister of this country. Further the Executive Presidential system should be abolished. Then only every community will rely on other community and this will enable them to understand the community of people. Then only the rulers will respected the other communities also. Whatever the powers should be left with Central Government and whatever the powers should be left with Regional Government must be determined by Constitutional law exports, they may be foreign exports and the leaders of every community or their representatives.

Sinhala, Tamil and English languages should be made the official languages of this country. All religious should be respected and given equal position in the Constitution. And the country should be made secular nation. These two were also the main cause of the present ethnic conflict.

Those are difficult to arrange within the unitary state so Sri Lankan Government should enact New Constitution base on Federal character otherwise it is impossible.

Appendix

This opinions derived from The Sunday Leader Newspaper (2013/12/08/) written by Waruni Karunaratne. Some political parties expressed their opinion pro and against the

implementation of the 13th Amendment as a political solution to the existing issues of the country.¹¹²

Hon. Mano Ganeshan (*Democratic People's Front, Leader*)

Many agreements have been signed between Tamil political leaders and governments that had come into power to address national issues of the country. However, many agreements came to an end without any effect. The Bandaranaike–Chelvanayakam Pact that was signed between S W R D Bandaranaike and S J V Chelvanayakam was later abandoned by the government, which led to further issues.

The 13th Amendment to the constitution of Sri Lanka is the only piece of agreement that was passed in parliament and came into existence as a law in the country. India played a significant role in pushing the Sri Lankan government to bring the 13th Amendment and therefore has the right to insist upon its implementation. In the joint statement by President Mahinda Rajapaksa and UN Secretary-General Ban Ki-moon after his visit to Sri Lanka on May 23, 2009, the government agreed to implement the 13th Amendment and to enhance the 13th Amendment.

Thus, the government has pledged to proceed with the implementation of the 13 plus to address the national issues. Due to the CHOGM pressures, the government conducted the Provincial Council Election in the North and East. However, it is not allowing the elected body to function and perform its duties. They have also played tricks, which have now led to a conflict between the Governor and the Chief Minister. The 13th Amendment is not the medicine for all the problems in the country but it will address a substantial part of the issue.

Hon. Ayantha Ketagoda (*Democratic National Alliance MP*)

The government has officially made promises to implement the 13th Amendment under many circumstances and now they have to face the consequences. The 13th Amendment was introduced as a political solution to the ethnic conflict in the country. However, there is no use of introducing new constitutions or amendments to the constitution as long as disparities and disagreements exist among ethnic and religious groups. The solutions should be provided to the core of the problem. The country lacks democracy.

¹¹² <http://www.thesundayleader.lk/2013/12/08/13th-amendment-is-it-a-political-solution>

Hon. Suresh Premachandran (*Tamil National Alliance MP*)

In order to find a political settlement to the existing problems in Sri Lanka, the 13th Amendment has to be fully implemented and enhanced as promised by President Mahinda Rajapaksa. Even though the president has categorically pledged to the Indian Prime Minister to implement and improve the 13th Amendment, the Sri Lankan government has been unable to do so. According to the 13th Amendment, North and East have to be merged as one political unit, which is now being demerged. Land powers and police powers need to be enhanced as promised by the president to the Indian Prime Minister.

However, some powers of the original 13th Amendment have been withdrawn under other amendments to the constitution. For example, the implementation of the 18th Amendment to the constitution has invalidated some elements of the 13th Amendment.

Hon. Vijitha Herath (*Janatha Vimukthi Peramuna MP*)

For over 27 years, it is proven that the 13th Amendment is not the solution to the national issues of Sri Lanka. It is just a white elephant, which has no worth or relevance. We are a small country that cannot afford to be divided into two. The 13th Amendment has elements that encourage separatism. We are a sovereign country and we should not act according to India's agenda. We should find solutions to our problems. The solutions should be sustainable political solutions but the 13th Amendment is clearly not one of them.

Mr. Nishantha Sri Warnasinghe (*Jathika Hela Urumaya, Media Spokesperson*)

As a political party, we believe that the 13th Amendment should be completely abolished. Sri Lankan public never asked for a 13th Amendment. It was passed in the parliament in 1987 due to high pressure exerted by the Indian government. It was clearly an amendment to the constitution done by force. They did not seek a mandate from the people (referendum) to pass the amendment, which should have been the right procedure. If the government cannot completely abolish the 13th Amendment, they should at least take police powers and land powers under the Central government. Two provinces should not be adjoined to form one administrative unit and there is also no need of the majority of the provincial councils to make decisions in the parliament. India has been playing with Sri Lankan politics to favour Tamil Nadu. India or any other country does not have the right to give political solutions to our country. We have our own parliament and we should be able to give solutions to our problems.

Evidently, the 13th Amendment is not a solution to national issues in the country.

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