

REFLECTION ON THE POWERS OF THE PROVINCIAL COUNCILS OVER STATE LANDS IN LIGHT OF THE NORTHERN AND EASTERN PROVINCES OF SRI LANKA

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ABSTRACT: Sustainable development of the Northern and Eastern Provinces of Sri Lanka requires lands importantly State lands, and participation of people in development of the Provinces. The Thirteenth Amendment to the Constitution has been enacted to devolve, *inter alia*, powers relating to lands to the Provincial Councils in Sri Lanka, and enable the people at provincial level to participate in development of the Provinces. The provisions relating to powers of the Provincial Councils over State lands are ambiguous in nature. The Supreme Court of Sri Lanka has given different interpretation at different time to the words and phrases relating to powers of Provincial Councils over State lands. The different interpretations given by the Supreme Court has created judicial inconsistency relating to the powers of the Provincial Councils. *Solaimuthu Rasu* Case is the latest case relating to powers of the Provincial Councils over State lands. In this case, the Supreme Court has held that the Provincial Councils have legislative power with regard to administration, control and utilization of State lands that have been given to the Provincial Councils by the Government. It means that the ownership of the State lands is not vested with the Provincial Councils. The Supreme Court has also held that the President has powers to alienate State lands including the lands given to the Provincial Councils to any citizen or organization. Therefore, the Provincial Councils have very limited powers over State lands. These limited powers over State lands restraint the Northern and Eastern Provincial Councils and the people in the Provinces to promote sustainable development in the Provinces.

Key words: Thirteenth Amendment, Provincial Councils, State Lands

INTRODUCTION

Sri Lankan 'ethnic conflict' is mixed with ethnicity and land. Land related issues continue to be the crux of the conflict since independence. Land and governance of lands are, *inter alia*, important requirements to promote economic, social and environmental components of sustainable development. Promotion of sustainable development will be more effective when powers relating to governance of State lands are devolved at local level, and people at local level participate in the governance of State lands.

The Thirteenth Amendment introduced to the Constitution established the Provincial Councils in 1987 with a view to resolve the ethnic conflict in the country. Devolution of land powers to the Provincial Councils is one of the significant features of the Thirteenth Amendment. Although the Thirteenth Amendment has been enacted to resolve the ethnic conflict, it devolved symmetrical powers to all Provinces in the Country.

The main research question in this paper is the extent to which powers relating to State lands have been devolved to the Provincial Councils by the Thirteenth Amendment to the Constitution. The objectives of this research is to extract legal principles relating to powers of the Provincial Councils over State lands from the provisions of the Thirteenth Amendment to the Constitution and cases decided by the Supreme Court of Sri Lanka, and to evaluate the extent to which powers relating to State lands have been devolved to the Provincial Councils, and to assess whether the powers are adequate to promote sustainable development in the Northern and Eastern Provinces.

METHODOLOGY

As this paper deals with analysis of Constitutional Provisions and Case Law, qualitative research method has been adopted to carry out this research. The provisions of the Thirteenth Amendment to the Constitution have been reviewed to identify the provisions relating to powers of the Provincial Councils over State lands, and thereafter the provisions have been critically analyzed for the research. The review of the provisions indicated that the paragraphs in Appendix II to List I (Provincial Council List) in the Ninth Schedule of the Thirteenth Amendment become more important than the main provisions of the Thirteenth Amendment to determine the powers of the Provincial Councils over State lands. The review and analysis of the provisions had an approach of interpreting one provision in light other provision/s as the relevant provisions are scattered in the Thirteenth Amendment, and also the provisions are couched with words that are ambiguous in nature. As the important case decided by the Supreme Court in relation to powers of the Provincial Councils over State lands is *Solaimuthu Rasu* Case, the relevant provisions of the Thirteenth Amendment have been analyzed in light of the judicial pronouncement of the Supreme Court in the case.

RESULTS AND DISCUSSIONS

The powers relating to State lands are important to a Provincial Council as exercise of powers relating to the subjects that have been allocated to the Provincial Councils depend on availability of lands. According to the Thirteenth Amendment, land is in the Provincial Council list and the appendix to the list provides that land shall be a Provincial Council subject. Therefore, a person who reads the provisions plainly may misconceive that State lands come under the Provincial Councils, and the Central Government does not have any control over them. A critical analysis of the provisions of the Thirteenth Amendment leads to a different conclusion.

Reserved List in the Thirteenth Amendment has the subjects that come under the central government. The item begins with the words 'Rivers and Waterways' in the Reserved List provides that "State lands ... except to the extent specified in Item 18 of List I" is a subject matter of the Central Government. The List I in the Ninth Schedule has the Provincial Council subjects. Item 18 of the Provincial Councils' List provides that "Land – Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II." The scope of Item 18 in the List is limited to the extent set out in Appendix II. The clauses in Appendix II become more important than the provision in Item 18 in determining the powers of the Provincial Councils over State lands. It shows that the provisions in the Thirteenth Amendment relating powers of Provincial Councils over State lands are not contained in one provision, but scattered in many provisions and make it very complex.

The first peremptory clause in the introductory part of Appendix II provides that "State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d)..."⁶⁶ The second peremptory clause in the introductory part of Appendix II provides: "Subject as aforesaid, land shall be Provincial Council Subject, subject to the following special provisions." The paragraphs that follow the peremptory clauses also become important in determining the powers of the Provincial Councils over State lands.

Paragraph 1.1 provides that "State land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilised by the Government in accordance with the laws governing the matter. The Government shall

⁶⁶ It should be noted that Article 33(d) has been renumbered as Article 33(2)(f) by the Nineteenth Amendment to the Constitution.

consult the relevant Provincial Council with regard to the utilisation of such land in respect of such subject.” In *Solaimuthu Rasu v. Superintendent, Stafford Estate Case*⁶⁷, Mohan Pieris, C.J stated citing the Indian case of *S.B.Gupta v. Union of India*⁶⁸ that the word ‘consult’ in this provision would not mean ‘concurrence’ but mean ‘conference’. However, the true nature of the word ‘consult’ in light of the words ‘may be utilized’ and the scheme of the Thirteenth Amendment is yet a matter for judicial interpretation.

Paragraph 1:2 provides “Government shall make available to every Provincial Council State land within the Province required by such Council for a Provincial Council subject. The Provincial Council shall administer, control and utilise such State land, in accordance with the laws and statutes governing the matter.” When the Supreme Court made a special determination on *Town and Country Planning (Amendment) Bill*⁶⁹ stated: “...State land would continue to vest in the Republic, and Provinces would have authority over such land only subject to the special provisions laid down in terms of the Constitution stipulated under Appendix II.” In *Solaimuthu Rasu Case*, Mohan Pieris, C.J stated with the concurrence of other judges: “...Provincial Councils would have legislative competence to make statutes only to administer, control and utilize State Land, if such State Land is made available to the Provincial Councils by the Government for a Provincial Council subject.” It explains that the Provincial Councils do not have ownership over State lands, but they have limited powers for the use of the lands that have been made available to them by the Central Government.

Paragraph 1:3 provides “Alienation or disposition of the State land within a Province to any citizen or to any organisation shall be by the President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter.” Article 33 (2)(f) (before the Nineteenth Amendment 33 (d)) of the Constitution provides that the President shall have the power to make grants and dispositions of lands vested in the Republic. These provisions raise the question whether the President has unfettered exclusive power to alienate a State land within a Province to any citizen or organization.

The Supreme Court stated when it made its determination on the *Land Ownership Bill*⁷⁰ that the power of the President to dispose of State lands in terms of Article 33 (d) has been qualified by the paragraph 1.3 of Appendix II. Shirani A.Bandaranayake, CJ stated in the determination: “...In effect, even after the establishment of Provincial Councils in 1987, State land continued to be vested in the Republic and disposition could be carried out only in accordance with Article 33(d) of the Constitution read with 1.3 of Appendix II to the Ninth Schedule to the Constitution.” In *Prema Jayantha v. Divisional Secretary*⁷¹ while providing a clarification on the jurisdiction of the Civil Appellate High Court, Shirani A.Bandaranayake, CJ reaffirmed her observation in the Determination on the *Land Ownership Bill*.

In *Vasudeva Nanayakkara v. Choksy*⁷² Case, Sarath N.Silva C.J cited Item 18 of the Provincial Councils List and special provisions 1.1, 1.2 and 1.3 in Appendix II and observed: “It is seen that the power reposed in the President in terms of Article 33 (d) of the Constitution ... to make grants and dispositions of State lands is circumscribed by the provisions of “Appendix II” cited above...A pre-condition laid down in paragraph 1.3 is that an alienation or disposition of State land within a Province shall be done in terms of the applicable law only on the advice of the Provincial Council...”⁷³ According to the

⁶⁷ S.C.Appeal No.21/13.

⁶⁸ A.I.R 1982 SC 140.

⁶⁹ S.C Special Determination, No. 03/2011.

⁷⁰ SD Nos. 26-36/2003.

⁷¹ S/C Reference, No.04/2011.

⁷² (2008) 1 Sri LR 134.

⁷³ At p. 172.

determination in *Land Ownership Bill* and the observation in *Vasudeva Nanayakkara Case*, paragraph 1.3 of Appendix II imposes a limitation on the discretion of the President to alienate a State land within a Province.

However, in *Solaimuthu Rasu* case the Supreme Court disagreed with the determination and the observation, and Mohan Pieris, C.J stated that the definite article 'the' before the words 'State land' in paragraph 1.3 refers to the land made available to the Provincial Councils under the special provision 1.2. He also stated that the absence of the word 'only' before the word 'advise' in paragraph 1.3 indicates that the advice of the Provincial Councils is non-binding in nature. Accordingly, the advice of the relevant Provincial Council is required when a State land made available to the Provincial Council is alienated by the President and the 'advise' also not binding the President with regard to alienation of the State land.

It also leads to the conclusion that State land within a Provincial Council but not vested to the Provincial could be alienated by the President according to his own discretion and the advice of the Provincial Council is not required for such alienation. The interpretation given by the Supreme Court to the provisions in the Thirteenth Amendment in the *Solaimuthu Rasu Case* makes the Provincial Councils dependents on the good will of the Central Government for State lands. Thus, the provisions of the Thirteenth Amendment give land powers to the Provincial Councils with one hand and take them by the other hand.

Wickremaratne points out that the word 'the' in this special provision in paragraph 1.3 is not in the Sinhala version of the thirteenth amendment.⁷⁴ The relevant provisions in the Tamil version of the Thirteen Amendment also reads as "மாகாணத்தினுள் அரசு காணியைப் பாராதீனப்படுத்துதல்", but not as "மாகாணத்தினுள் **அந்த** அரசு காணியைப் பாராதீனப்படுத்துதல்". As Sinhala and Tamil are languages of legislation and there is no conflict between Sinhala and Tamil versions, the Supreme Court shall consider the Sinhala and Tamil versions of the Thirteenth Amendment in relation to State lands within the Provinces. Therefore, it could be argued that the President shall consult the Provincial Councils to alienate any State land within the Provinces.

Wickremaratne also suggests that the lands alienated to the Provincial Councils lose their character of State land and therefore the 'advise' and 'not mere consultation' of the Provincial Council is required for alienation.⁷⁵ If this suggestion relating to change of character of land is agreeable, the President cannot alienate such land in accordance with the powers given to him under Paragraph 1.3 as the land loses its character of 'State land'. If so, it could also be argued that paragraph 1.3 applies to the State lands other than the lands given to the Provincial Councils. If the phrase 'shall make available' in Paragraph 1.2 is interpreted as mandatory in nature, and a State land loses its character after it is vested to a Provincial Council, it will give more powers to the Provincial Councils with regard to State land.

In *Solaimuthu Rasu Case*, the interpretation given by the Supreme Court to the provisions of the Thirteenth Amendment relating to powers of the Provincial Councils over State land has become an authority regarding the issues in the Case. In *Solaimuthu Rasu Case*, the material question to be decided by the Supreme Court was whether the Provincial High Court had jurisdiction to issue writ of certiorari to quash the quit notice issued for recovery of State land from an illegal occupant in terms of the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979. Hence, the opinion expressed by the Supreme Court in *Solaimuthu Rasu Case* in relation to the powers of the President to

⁷⁴ Wickramaratne, J. (2015), Powers Relating to Land under the 13th Amendment. Bar Association Law Journal. Vol XXI. p.07-13.

⁷⁵ *Ibid.*

alienate State lands in terms of Paragraph 1.3 in Appendix II cannot be considered as *ratio decidendi* of the case.

The Supreme Court judgment in the *Solaimuthu Rasu Case* has opened legal issues and political issues in relation to the powers of the Provincial Councils over State lands. The ambiguous nature of the words and phrases in the Thirteenth Amendment may be interpreted differently by another bench of the Supreme Court in future. However, it will continue the judicial inconsistency with regard to the provisions of the Thirteenth Amendment relating to State lands. The interpretation of the Supreme Court in the *Land Ownership Bill Case*, *Vasudeva Nanayakkara Case* and *Solaimuthu Rasu Case* and the opinions of the jurists have already created the judicial inconsistency. An important Amendment introduced to the Constitution to resolve the ethnic conflict which is a national issue shall not be with ambiguous words and judicial inconsistency.

CONCLUSION

Re-development takes place during post-war period in the Northern and Eastern Provinces. The re-development should be designed to promote sustainable development in the Provinces. It is a broad based long term approach to promote economic, social and environmental components of sustainable development in equitable manner with the participation of local people in development and governance. But, the limited powers of the Provincial Councils over State lands become a challenge to the Northern and Eastern Provincial Councils and the people in the Provinces to promote sustainable development in the Provinces. Thirty seven subjects have been devolved to the Provincial Councils for development of the Provinces. However, because of lack of powers over State lands, the Provincial Councils cannot effectively make use of the thirty seven subjects for development of the Provinces.

The Thirteen Amendment devolves powers symmetrically to all nine provinces in the Country. It is recommended to devolve more powers relating to State lands to the Northern and Eastern Provincial Councils in asymmetrical manner using the words and phrases that are certain and unambiguous as the Provincial Council system has been introduced to resolve the ethnic conflict, and the two Provinces require special attention for development during post-war period.

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