

The Irrelevancy of the 13th Amendment in Finding a Solution to the National Question: A Critical Note on Sri Lanka's Post-War Constitutional Discourse.

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1. Introduction:

The 13th amendment to the Second Republican Constitution that established the Provincial Council system has become the centerpiece of the discourse on constitutional reforms in post-war Sri Lanka. For two decades between 1989 and 2009, the provincial council system was rarely mentioned in the constitutional reform debate, except when it found mention in the President Mahinda Rajapaksha-appointed All Party Representative Conference (APRC)'s Interim Proposals in 2008. But since the end of the war in May 2009 the 13th amendment has made a definitive come back to the constitutional reform debate. Today the solution to the ethnic conflict in some way or the other is proposed by way of reference to the 13th amendment. President Rajapaksha's Government would like to water down as much as possible the 13th amendment ('13-'), whereas the Tamil National Alliance's stated position (derived from the Indian position) is for the full implementation of the 13th amendment and moving beyond the 13th amendment towards 'meaningful devolution'. This main purpose of this article would be to demonstrate that a solution to the National Question, based on the 13th amendment would not be possible. It will seek to problematize the minimalistic argument for 'full implementation of the 13th amendment', demonstrate the impossibility of '13+' and 'meaningful devolution' within a unitary state, seek to locate the role of the Supreme Court as an arbitrator of devolution disputes and as to why a solution within the unitary state will not be possible and more importantly why its unlikely that the majority community will agree to a solution beyond the unitary state. There is sufficient literature on the law of the 13th amendment and hence this article will primarily seek to reflect critically on the politics and constitutional praxis of the 13th amendment.

2. The Law and Constitutional Praxis of the 13th Amendment.

2.1. The legal content of the 13th amendment: the fundamental defects in design and its radically inadequate nature of dealing with the National Question.

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I define the National Question in Sri Lanka as the problem relating to the hierarchical nature of the Sri Lankan state at the helm of which is the Sinhala Buddhist nation. In this hierarchical state structure the other constituent nations and peoples of Sri Lanka are regarded as subservient peoples and nations to the dominant nation. The dominant nation (the Sinhala Nation) has used the state, its constitutional and legal apparatus to preserve its dominant status. This I contend is the best explanation of the post-colonial constitution making efforts in the country, in general and of constitutional praxis in post-colonial Ceylon/Sri Lanka, in particular. A solution to the National question, I assert, will only come about through a radical and fundamental re-envisioning of the state on the basis of equality amongst the constituent nations and peoples of Sri Lanka. If this is the problem to be dealt with the question that will be put to test in this piece is as to whether the 13th Amendment serves as a useful reference in this discourse towards finding a solution to the National Question.

The 13th amendment was introduced as part of the Indo-Lanka Accord of 1987. The latter claimed to address the National Question but also more importantly included about key security arrangements between the two countries². The 13th amendment is not a self-containing law on the Provincial Council system. It has to be read along with *inter alia* the various legislations that have a direct and indirect bearing on the Provincial Council system and with the relevant case law. As noted in the introduction there is sufficient legal literature on the subject³ but the following is a short list of the problems with the 13th Amendment.

² The security arrangements technically speaking were not part of the text of the accord itself but can be found in letters that were exchanged between the Indian Prime Minister and the Sri Lankan President. Full text of the accord and the letters exchanged can be found here: http://www.satp.org/satporgtp/countries/shrilanka/document/papers/indo_srilanks_agreement.htm (Last accessed 21 October 2013) For a collection of historical documents that led to the enactment of the 13th amendment and the accord see, Tamil United Liberation Front (1988), *Towards Devolution of Power in Sri Lanka: Main Documents: August 1983 to October 1987* (Jeevan Press, Chennai).

³ See for example: Lakshman Marasinghe, Jayampathy Wickremeratne (eds) (2010), '13th Amendment: Essays on Practice', (Colombo: Institute for Constitutional Studies, 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 Perceptions, 2008-2010* (Colombo: Centre for Policy Alternatives)

- a) The 13th amendment sits within a very inflexible unitary state framework, which provides the background for interpretations regarding the working of the 13th amendment being tilted in favour of the Centre.
- b) The Governor, an appointee of the President, has to provide consent for any bill that has financial consequences, before it can be tabled before the Provincial Council⁴. He also can delay any legislation brought before the Provincial Council in the name of purported unconstitutionality⁵. This can only mean that the Governor has ultimate control over the whole of the legislative agenda of the Provincial Council.
- c) The Governor of the Province has plenary powers (appointment, dismissal and transfer powers) over the Provincial Public Service and exercises uncurtailed discretion over the Provincial Executive⁶. The Constitution has a bizarre provision that says that the Governor has the discretion to decide what is in his discretion⁷. The Transfer of Powers Act No 58 of 1992 brought in by President Premadasa transferred all executive power of the Province to centrally controlled Divisional Secretaries to whom the Governor can give directions. The same applies to *Grama Niladaris/ Grama Sevakas* who come under the control of the Central Government.
- d) The Provincial List, which contains a list of subjects devolved to the provinces, has lengthy descriptions of the subjects, in order to restrain the scope and extent of the actual devolution. The three appendices to the provincial council list contain in eight pages restrictions on three most important subjects of devolution: law and order, education and land. These appendices take away most of what appears in first reading to have been devolved as a subject under the list.

⁴ The financial powers of the Governor are laid out in Sections 19 (5), 20 (3), 23 (2), 24 (1), 24 (3), 25 (1), 26 (3), 28 (1) and 30 of the Provincial Councils Act No 42 of 1987.

⁵ Article 154 (H) of the Constitution.

⁶ Sections 32, 33 of the Provincial Council Act No 42 of 1987. See also *Podinilame v Mathew* 1996 2 Sri L R 82 wherein Justice Ranaraja notes, 'the Board of Ministers in such circumstances has no power vested in it to advise the Governor or the Public Service Commission on the appointments of officers to the Provincial Public Service'.

⁷ Article 154 F (2) of the Constitution. In *Premachandra v Major Monatgue Jayawickrema* (1994) 2 Sri L R 90 the court decided that this provision does not apply to Art. 154 F (4) relating to the appointment of the Chief Minister.

Experience has shown that on all these three issues the provinces have very little or no powers. Perhaps this was the reason why the incumbent Foreign Minister of Sri Lanka, Professor G.L Pieris used to argue that under the Thirteenth Amendment there was only a “veneer of devolution of power because what was given with one hand was taken back with the other.”⁸ Edrisinha has categorically noted that there is no subject that has been properly devolved to the Provincial Councils⁹. There is no coherence in the manner in which power is apportioned in the 13th amendment. As Asoka Gunwardena points out this gives the central government an opportunity to interfere and micro manage devolved governance¹⁰.

- e) The Central executive can in the name of formulating ‘national policy’ make decrees on any subject ‘devolved’ to the provinces¹¹.
- f) State Land alienation, prime among Tamil concerns, continues to be vested with the Centre more particularly the President, vide Article 33 (d) of the Constitution¹².
- g) Police powers though appearing to be devolved remain with the Centre with most policing powers retained for the National Police and appointments to the Provincial Police Service being strictly controlled by the Central

⁸ G.L. Pieris as cited by Rohan Edrisinha, “APRC Process: From Hope to Despair”, (03 February 2008) <http://groundviews.org/2008/02/03/the-aprc-process-from-hope-to-despair/> (Last accessed 21 October 2013)

⁹ Roahn Edrisinha, ‘Federalism Myths and Realities’ appearing in Rohan Edrisinha & Asanaga Welikala (Eds.) *Essays on Federalism in Sri Lanka* (Colombo: CPA, 2008). Chapter 4 pp. 85-108

¹⁰ Asoka S Gunawardena, ‘Beyond Legal and Administrative Constraints Confronting Provincial Councils: Issues in Devolution and Governance Change in Sri Lanka’, (Sri Lanka Institute of Local Governance, Year of Publication not mentioned), p. 62

¹¹ 9th Schedule to the Constitution. List II.

¹² The President, the 13th amendment says, has to do exercise this power on the ‘advice’ of the Provincial Council (Item 1.3 in the Appendix on Land in the 9th Schedule) Sarath N Silva CJ in *Vasudeva Nanayakkara v Choksy and Others (John Keells case)* {2008} 1 Sri.LR 134 opined that the 13th amendment has created an ‘interactive’ regime with regard to state land alienation and that state land can only be disposed with the advice of the provincial council. In *Solaimuthu Rasa v Superintendent, Stafford Estate*, S.C.M 26. 09.2013 Mohan Pieris CJ, held that the view in the *John Keells case* could not not be supported owing to the fact that the word ‘only’ was absent in Item 1.3 in the Appendix on Land in the 9th Schedule which referred to the need to consult the Provincial Council. Mohan Pieris CJ also held that the holding in the *Land Ownership Bill* SD No 26/2003- 36/2003 case that Article 33 (d) was qualified by 1:3 was erroneous in law as the consultation was non-binding.

Government. Even the appointment of the DIG, where the Chief Minister and the Inspector General of Police don't agree, is a matter for the President.

- h) Subjects relating to the developmental and livelihood needs of the Tamil people are not 'devolved' to the Provincial Councils. For example, planning is mentioned in the provincial council list but is also a subject in the concurrent list, which includes the 'formulation and appraisal of plan implementation strategies at the provincial council level'. The concurrent list has everything else that is important for the immediate reconstruction of the livelihood of the war-affected population – fisheries, agriculture, social services, employment planning at provincial level *et al* - the list is quite long. The concurrent list for all practical purposes is an appendix to the reserved list (which details the powers of the centre). On top of all this there is the unconstitutional, illegal Presidential Task Force, which has to approve every single developmental programme carried out in the North.

- i) An assessment by the US Agency for International Development of provincial and local government in Sri Lanka claims that measured in fiscal terms at least, Sri Lanka has one of the least decentralized systems of government in the entire Asia-Pacific region¹³. The inflexibility in the provincial finance situation is demonstrated by the fact that most of their expenditure is recurrent which is in turn financed by the central government. This leads to Gunwardena concluding that 'The scope of provincial service provision is therefore severely constrained and continues to be input oriented de-concentrated provincial components of national programmes. The limited financial space makes the financing of services essentially a maintenance exercise, lacking in a quantity and quality orientation'¹⁴

2.2. What does 'Full implementation' of the 13th Amendment entail?

Given what has been described in 2.1 the question of what a 'full implementation of the 13th amendment' means or is supposed to achieve is an important question. The use of the term 'full implementation' was used for the first time in the President Rajapaksha-appointed All Party Representatives Conference's Interim Proposals

¹³ USAID Sri Lanka, "Sri Lanka: Local and Provincial Council Assessment", July 2005 available at http://pdf.usaid.gov/pdf_docs/PNADD827.pdf (Last accessed 21 October 2013)

¹⁴ *ibid*, n. 10

submitted to the President in early 2008¹⁵. Today the Tamil National Alliance and the Government of India use the same language and demand for a ‘full implementation’ of the 13th amendment as a precursor to ‘meaningful devolution’¹⁶. Edrisinha makes two poignant points about the language of ‘full implementation’: One, that the APRC interim proposals do not seek a ‘full implementation of the 13th amendment’ but as the title of the report reveals only those relevant aspects of it. Two, is the irony of calling for the ‘full implementation of the 13th amendment’ in a state that claims to be a constitutional democracy. As Edrisinha notes:

“How on earth could parts of the 13th Amendment to the Constitution, part of the Supreme Law of the country, NOT be implemented for over 20 years? What does this say about the Supremacy of the constitution and the Rule of Law in Sri Lanka? Indeed the fact that there was no legal remedy available to the ordinary citizen or a person committed to devolution of power to demand such implementation makes the situation even more reprehensible. Constitutions that permit non-implementation of its provisions and do not provide for an appropriate legal remedy in such situations, are flawed constitutions. Constitutions cannot rely on political will or the goodwill of the people in power for success”.

There is a third point that needs to be made about the rhetoric of full implementation. Given what has been already said about the law of the 13th amendment the question arises as what is to be achieved by calling for a full implementation of the 13th Amendment. It is important not to forget that a full implementation of the 13th Amendment will suffer from the fundamental flaws of the 13th amendment that have been outlined. For example, the ‘excesses’ of the office of the Governor are not really excesses but in most occasions are lawful and constitutional exercise of the powers vested in the Governor by the Constitution. Ironically the demand seems to be that the Governor does not exercise his powers

¹⁵ The full title of the interim report was “Action to be taken by the President to fully implement Relevant Provisions Of the present Constitution as a prelude to the APRC Proposals” Full text available here: Government of Sri Lanka, http://www.priu.gov.lk/news_update/Current_Affairs/ca200801/20080124aprc_proposals.htm (Last accessed 21 October 2013)

¹⁶ Mr. M.A. Sumanthiran, Attorney-at-Law and Member of Parliament of the TNA has commented that “the full implementation of the Thirteenth Amendment and movement beyond as a necessary albeit insufficient step to resolving the national question”. M.A. Sumanthiran, ‘Response to NPC Election Manifesto Criticism’ <https://www.colombotelegraph.com/index.php/response-to-tna-2013-npc-election-manifesto-criticism/> Meaningful devolution Mr Sumanthiran argues in this article means ‘movement in the direction of a more federal structure’. (Last accessed 21 October 2013)

under the law and allow for the elected provincial council to function. This is not asking for a full implementation of the 13th amendment but quite the contrary, a demand that the constitutional vigour of the Governor's office be curtailed in practice. Needless to say when the 13th amendment is implemented in full land (even if the National Land Commission is established) and police powers (even if a Provincial Police Division is established) will not be subjects over which the Province will have sufficient control. One recognizes that full implementation could refer to an implementation of the 13th amendment keeping with the 'spirit of the idea of devolution'. However that would be to rely in a constitutional democracy on political will or the goodwill of the people in power for success rather than on institutional limitations, checks and balances. Some scholars have sought to distinguish between what they call "discretionary decentralisation" and "constitutionally guaranteed decentralisation". The former depends on the grace and authority of the centre whereas in the latter the dispersal of power is obligatory¹⁷. The 'full implementation of the 13th amendment' argument along with the 'spirit of the devolution' argument in the context of the 13th Amendment is made with the hope that 'discretionary devolution' would work - a hope that does not exhibit an understanding of the constitutional praxis of the 13th amendment.

2.3. The 'Negative Asymmetry' in the practice of the 13th Amendment in the North - East Provinces.

One of the recurring themes in the federal debate in Sri Lanka is the possibility of an asymmetrical devolution for the North - East wherein the North-East would be constitutionally provided with more powers than the other provinces who might prefer the centre exercising such powers. The experience of the working of the 13th Amendment in the Eastern Province indicates a case of what I would term 'negative asymmetry'. By negative asymmetry I refer to the practice of the implementation of the 13th amendment which denies the North-East a measure of autonomy which other provinces are allowed to enjoy.

The problematic role of the Governor has already been referred to. However it is interesting that most of the Governors, if not all, have been dormant in the provinces outside of the North and East, and have not used the full vigour of their office, especially when the party to which the Governor belongs and the party in majority in the council are the same. This however was not the experience of the Eastern

¹⁷ See further Eghosa E. Osaghae, 'A Reassessment of Federalism as a Degree of Decentralization', 20 (1) *Publius*, pp. 83-98

Provincial Council between 2008 and 2012. The ruling coalition at the centre was also in power of the Eastern Provincial Council during this time. One example was the refusal by the Governor to assent to a Statute that empowers the Council to levy stamp duties and certain other levies devolved to it through the 13th Amendment. The statute was word to word akin to the one passed by the North Western Provincial Council. A provincial minister in an interview to *Virakesari* expressed his anguish as follows:

“I have spoken to Chief Minister from other provinces as well. The bitter truth for us is that they don’t face any of the problems that we face [with the Governor] in their provinces. They should at least give us the powers that the other provinces are allowed to enjoy. The Governor of the Eastern Province summons Provincial Ministry Secretaries and speaks to them and issues orders. He calls and conducts his own meetings. He has declared that he is fully in control of the subject of finance. He says that appointing power of even a health labourer is with him. Therefore even the little powers that have been devolved to us we have not been in a position to exercise because of the Governor’s intrusion in our work”¹⁸. (Translated into English by the author from the Tamil original)

It is noteworthy that the experience of the Eastern Provincial Council as narrated above was despite it being controlled by the same party in power at the centre. The experience is testimony to the general lack of will to accommodate Tamil and Muslim political parties even where they showed allegiance and were in alliance with parties at the centre.

2.4. The Supreme Court’s problematic role as an arbitrator of the devolution scheme.

Traditional literature on federalism emphasizes the role of a specialized constitutional court or the highest court of the land in resolving disputes between the centre and the periphery¹⁹. As Tierney notes, the courtroom has become in recent years a strong focal point for constitutional disputes in contemporary democracies, and it is before the courts that some of the most highly charged constitutional disputes have been played out in plurinational states. Sri Lanka is no

¹⁸ A.N. Siddic Kariapper (in Tamil), *‘The Governor intervenes to the detriment of the functioning of the Eastern Provincial Council’*, Interview with MHM Hisbullah, *Virakesari*, 12 July 2009, ‘Samakala Arasiyal’, p. 5

¹⁹ See generally, KC Wheare, *‘Federal Government’* (Oxford University Press, 1951)

exception. From *Kodakkan Pillai v Mudanayake*²⁰ and *Kodeeswaran v AG*²¹ to the *North East De-Merger* and *PTOMS*²² cases key constitutional issues relating to the national question were fought out in the courtroom and needless to say the Tamil judicial experience has been largely one of disappointment. For the Tamils, to use Tierney's words, the constitution serves to consolidate the privileged position of the dominant society (the Sinhalese) within the state and in this context courts are a manifestation of a wider structural imbalance, playing the role of reinforcing the dominant narrative of constitutional meaning.

The judgments of the Supreme Court in relation to the 13th amendment barring a few exceptions have generally had an anti-devolution vein. The court struck down a piece of legislation brought by the first and only elected North-East Provincial Council on narrow technical grounds²³. The North-East merger was also invalidated on technical grounds of legality. It is conceded that some judgments pertaining to the 13th amendment may be classified as 'pro-devolution'. But among these cases one may find the individual political preferences of the judge concerned making an instrumental use of a 'pro-devolution' reading of the 13th amendment to strike down a particular piece of legislation²⁴ or executive act²⁵ that they felt to be politically reprehensible for other reasons. These decisions have been largely about the failure of the central government to consult provinces when attempting to pass legislation on a provincial council subject.

The Sri Lankan Supreme Court is well known for incoherent jurisprudence and for having scant regard for judicial precedent. It would be wrong to think that the partisan politicization of the courts is only a recent phenomenon that flows from the extra-constitutional impeachment of Chief Justice Shirani Bandaranaike in January 2013. If at all it has become only worse. The 'anti-devolution' approach that the

²⁰ 54 NLR 433

²¹ 72 NLR 337

²² *Wijesekera v Attorney General* 2007 1 Sri L R 38, *Weerawansa v. Attorney General*, SCM, 15 July 2005.

²³ See for example the court's determination in *Re the Transport Board Statute of the North-Eastern Provincial Council* SC No. 7/89 (Spl). SCM. 22.02.1990

²⁴ Shirani Banadaranaiké J's judgment in the *Land Ownership Bill* SD No 26/2003- 36/2003, SCM 10.12.2003. The Land Ownership Bill was struck down because it had failed to consult the provinces with regard to the contents of the Bill. Justice Bandaranaike's prime motivation to strike down the Land Ownership Bill were however that State Land can only be held in trust and that it can never be fully alienated by the State.

²⁵ Sarath N Silva CJ in the *John Keels case*.

current Chief Justice would take with regard to matters relating to the 13th Amendment has become clear by way of a recent judgment²⁶ that has been handed down by the incumbent Chief Justice on devolution of land powers under the 13th amendment. It would be futile to think that the Supreme Court could play a role in furthering the 'spirit' of the 13th amendment or towards 'full implementation'.

2.5. The elusive '13+'.

The mantra of '13+'²⁷, 'building upon the 13th Amendment'²⁸ or 'progressing towards meaningful devolution' using the 13th amendment as a base (within the confines of the present constitution) has no constitutional meaning. The Supreme Court in *In re the 13th Amendment to the Constitution and the Provincial Councils Bill*²⁹ implied that the 13th amendment is the maximum that one could go within the confines of the unitary state as envisaged in the current constitution. The court in that case was initially split equally as to the constitutionality of the bill. Three judges signed on to Chief Justice Sharvananda's opinion which took the position that the bill could be passed with a 2/3rds majority whereas three other judges signed on to Justice Wanasundera's opinion which took the position that the bill had to be passed with a 2/3rd majority and accepted at a referendum. The remaining judge, Justice Ranasinghe agreed with all of Chief Justice Sharvananda's findings except for two clauses which would have required a) a 2/3rds majority and a referendum to alter anything in the ninth schedule introduced by the 13th amendment bill which contains the three lists and the appendices and b) a 2/3rds majority and a referendum for Parliament to pass a bill on a provincial council subject. Justice Ranasinghe held that both these clauses by requiring a referendum in addition to a

²⁶ *Solaimuthu Rasa v Superintendent, Stafford Estate*, S.C.M 26. 09.2013

²⁷ See for example, The Hindu, 'Committed to settling the Tamils issue: Rajapaksa' <http://www.thehindu.com/news/international/committed-to-settling-the-tamils-issue-rajapaksa/article2807950.ece?ref=relatedNews> (January 18, 2012) Indian External Affairs Minister S.M. Krishna is quoted as saying: "I discussed this matter [political solution for Tamils] with His Excellency the President this morning. The President assured me that he stands by his commitment to pursuing the 13th Amendment [to the Sri Lankan Constitution] plus approach,"

²⁸ *Suo Moto* Statement in Lok Sabha & Rajya Sabha by Shri S. M. Krishna External Affairs Minister on the Situation in Sri Lanka. <http://pib.nic.in/newsite/PrintRelease.aspx?relid=73900>, 04 August 2011, (Last accessed 21 October 2013) "The External Affairs Minister of Sri Lanka affirmed his Government's commitment to ensuring expeditious and concrete progress in the ongoing dialogue between the Government of Sri Lanka and representatives of Tamil parties and that a devolution package, building upon the 13th Amendment, would contribute towards creating the necessary conditions for such reconciliation".

²⁹ *In Re the Thirteenth Amendment To the Constitution and the Provincial Councils Bill*, (1987) 2 Sri LR 312

2/3rds majority violated Article 83 and since Article 83 could only be amended by a 2/3rds majority and a referendum, that a referendum was required if the said two clauses were to be retained. The Parliament responded by passing the 13th Amendment deleting the references to referendum in the said two clauses.

Given the above it is difficult to see how any further additions to the scheme envisaged in the 13th amendment ('13+') could withstand the test of Article 2 of the constitution, without going for a referendum. Any constitutionally guaranteed devolution to be meaningful will have to go beyond the unitary character of the state and violate Article 2. The possibility of a referendum succeeding that seeks to alter Article 2 of the constitution are very remote for reasons that will be argued in the next section of this article. The comparatively easier option might be to replace the constitution with an entirely new constitution which would require only a 2/3rds majority and not a referendum. Hence the conclusion that '13+' or meaningful devolution within a unitary state will not be possible within the present constitutional framework.

2.6. The Unitary State as understood in the Sinhala-Buddhist Nationalist Discourse

In '*In re the 13th Amendment to the Constitution and the Provincial Councils Bill*' the majority of the Supreme Court was of the opinion that the unitary character of the State of which the characteristics are the supremacy of the central Parliament and the absence of subsidiary sovereign bodies remains unaffected³⁰. It interpreted devolution to mean the delegation of Central Government power without the relinquishment of supremacy. In what possibly was the most regressive statement in its desire to uphold the constitutionality of the bills, the majority noted:

*"The powers that are conferred on the Provincial Councils are not at the expense of the benefits which flow from political and economic unity of Sri Lanka. **Political unity means that Parliament, representing all the people, must remain sovereign over their affairs and that the government of the day must bear the main responsibility to Parliament for protecting and furthering the interests of all***³¹." (Emphasis mine)

The passage quoted above is an interpretation by the highest court of the land that unity is synonymous with the exercise of power by a unitary parliament. The effect of this interpretation by the Supreme Court is that it gives credence to the common

³⁰ *ibid*, p. 327

³¹ *ibid*

myth prevalent in the discourse of the majoritarian polity that equates 'unity' with 'unitary'. The general effect of the bills the Court's majority opined 'will be to place under provincial democratic supervision a wide range of services run in the respective provinces for the said provinces, without affecting the sovereign powers of Parliament and the Central Executive'³².

The unitary character of the State is deeply embedded in the Sinhala-Buddhist nationalist consciousness. The narrative is that without a unitary state the existence of the Sinhala nation would be fundamentally threatened. As Asanga Welikala explains,

"Sinhala Buddhist nationalism employ(s) a powerful idiom of centralisation of state power. That is to say, it interpolated the glorious historical paradigm of the ancient Sinhalese monarchy, patron of the people and protector of the faith, onto the new institutions of political independence. The greatest characteristic of a truly heroic occupier of the Sinhala monarchical paradigm was the overthrow of foreign domination (usually Dravidian invasions but subsequently Western powers as well) and subsequent 'unification of the country' under a single, central authority. This is the imperative precondition of the good life: peace, stability, economic progress and cultural renaissance, and is the subject matter of popular historical myth. On the other hand, dilution of central authority, often derisively attributed to vapid leadership in Sinhala historiography, was seen to produce anarchy, pestilence, moral decadence and cultural degradation. Therefore centralised unity related to territorial integrity is axiomatic in the traditional Sinhala ontology of the state and exercise of sovereignty, and explains its resonance in the modern nationalist hostility to any sort of political decentralisation. Decentralisation, devolution, federalism, power sharing and autonomy, in the Sinhala nationalist view, are mere precursors of an unthinkable certainty: the territorial division of the island"³³.

Dave Rampton stresses the point that Sinhala nationalism is not just merely an elitist project – a manifestation of competitive party politics - which most liberal peace efforts (including the Norwegian facilitated peace process of 2001-2003) in the

³² Ibid, p. 328

³³ Asanga Welikala, *Theorising the Unitary State: Why the United Kingdom is Not a Model for Sri Lanka*, paper presented at the 60th Anniversary Academic Sessions of the Faculty of Law, University of Colombo, Sri Lanka, 25th October 2008 (paper in file with author)

past have assumed it is³⁴. These liberal peace efforts have assumed that if the 'ethnic-outbidding' problem is resolved and an agreement between both major Sinhala parties (the UNP and SLFP) is produced that a resolution to the National Question could be found. Dave Rampton argues that this assumption is flawed and argues that Sinhala Buddhist Nationalism is not an elitist project but a manifestation of a 'deep hegemony'. He emphasises that Sinhala Buddhist nationalism must be understood as 'a socio-political representation of Sri Lanka, in which the territory, state and nation of the island compose a bounded unity revolving around a majoritarian axis of Sinhala Buddhist religion, language, culture and people'. This social representation, Rampton argues reproduces a hierarchy placing the Sinhala nation at the apex with Sri Lanka's minority communities in a position of subordination.

What the above analysis suggests is that Sinhala Buddhist Nationalism is incapable of conceiving of a solution that goes beyond the contours of the unitary state and hence that the problem is not really the lack of a 'Southern Consensus', understood narrowly as an agreement between the two important political parties in the South. A more realistic assessment is that the 'Southern consensus' is that it is ideologically wedded to Sinhala Buddhist unitary nationalism. It is also the reason why something as minimalistic as the 13th amendment is seen as threatening to the unitary state. Calls for abolition for the 13th amendment are based on such an understanding. Given the Tamil position since 1949 that no solution is possible within a unitary state, there exists then an unbridgeable gap. It is in this context that the Tamil side is being forced to accept a solution based on the 13th amendment because it gives the appearance of responding to the National Question while being strictly within the confines of a unitary state. As to whether the Tamil polity, in the post-war weakened state that it finds, can resist this remains to be seen.

3. The Politics of reviving the 13th Amendment in the Post-War Constitutional Reform Discourse.

3.1. The Politics of the South

It has been a feature of President Mahinda Rajapaksha Government's official narrative on the 13th amendment to over- exaggerate its importance, reach, scope and extent. An example of such over-exaggeration, if not plain lying, is when Minister of Economic Development, Basil Rajapaksha in a July 2013 interview to *The*

³⁴ David Rampton "'Deeper hegemony': the politics of Sinhala nationalist authenticity and the failures of power-sharing in Sri Lanka", 49 (2) *Commonwealth & Comparative Politics*, pp. 245-273 at p. 255 and 256

Hindu grandly claimed that a (Tamil National Alliance [TNA] controlled) provincial council with police powers will lead to the creation of a parallel army in the North³⁵. President Mahinda Rajapasha in January 2011 engaged in similar politics of deceit when he pointed to an incident where the aircraft of a top politician was not allowed to land in an Indian State, and added that he did not want such problems in Sri Lanka³⁶. The same can be said of the interpretation by a number of political parties and groups of the TNA's electoral statement as harbouring a separatist agenda.

Such over-exaggeration has two objectives. One, keeping alive the insecurity feeling among the Sinhala Buddhist polity as with regard to any scheme of power sharing with the Tamils. I have elsewhere already made reference to the nature of Sinhala Buddhist nationalism and its perceived insecurities. The second objective is to create the feeling, for consumption particularly by the International Community, that they are holding the Northern Provincial Council elections despite grave political risk (of being rejected by the Sinhala Buddhist polity) and hence wanting the highest price for taking the risk – for example slowing down any progressive movement towards international investigations into the allegations of Genocide, War Crimes and Crimes Against Humanity, initiated through resolutions passed in the UN Human Rights Council in March 2012 and March 2013. The usefulness of the 13th Amendment as an instrument for dealing with post-war international pressure is reluctantly acknowledged by those associated with the Government of Sri Lanka. Dayan Jayatilleke, then Sri Lanka's Ambassador in Geneva wrote in 2009 that a full, if reasonably graduated implementation of the 13th amendment is the cornerstone of Sri Lanka's postwar relationship with India, the relationship with which is the cornerstone of Sri Lanka's international relations³⁷.

3.2. The Politics of the Tamil National Alliance and the Indian interest:

Up to the end of the armed conflict, Tamils had consistently rejected the 13th amendment, as even a starting point to a political solution – not only the LTTE, but

³⁵ *The Hindu*, 'Cannot risk a parallel army in the North'.
<http://www.thehindu.com/news/international/south-asia/cannot-risk-a-parallel-army-in-north-basil/article4928631.ece> (Last accessed 21 October 2013)

³⁶ *The Hindu*, Sri Lankan President rules out police powers for north
<http://www.thehindu.com/news/international/article1092754.ece> (Last accessed 21 October 2013)

³⁷Dayan Jayatilleke, - '13th Amendment: Why non-implementation is a non-option', 13.06.2009
<http://groundviews.org/2009/06/13/13th-amendment-why-non-implementation-is-a-non-option/>
(Last accessed 21 October 2013)

also the Tamil United Liberation Front (TULF) which was engaged in a dialogue with Prime Minister Rajiv Gandhi at that time regarding the contents of the 13th amendment. The TULF in a letter that it wrote to Prime Minister Rajiv Gandhi on the eve of his departure to sign the Indo -Lanka Agreement, expressed its disappointment with both the 13th Amendment and the Provincial Council Bill. It said that they do not 'meet the aspirations of the Tamil people nor are in any way commensurate with the loss of life, sufferings and privations suffered by the Tamil people'. The letter also pointed that in breach of the accord that the government had unilaterally acted in deciding the residual issues without even notifying the Indian Government. It concluded that it is not in a position to recommend the contents of the Bills to the Tamil people as being satisfactory.³⁸ It is noteworthy that the current leader of the Tamil National Alliance (TNA), R. Sambanthan was part of the trio who took part on behalf of the TULF, in the TULF- Rajiv Gandhi talks.

Today, the Tamil National Alliance is under pressure from the Indian Government to accept a solution based on the 13th amendment (or building further on it as they would like to call it³⁹). India believes that that the repeal of the thirteenth amendment would, in a fundamental way, equal the unilateral abrogation of the Indo Lanka Accord and the security interests which it has pursued and intends to pursue through the Accord⁴⁰. According to this interpretation, for the TNA to reject the 13th amendment would be against Indian interests⁴¹. The complicated political dynamics is such that the TNA also probably does not want to be seen as rejecting something that President Rajapaksa is reluctant to give. As a result the Tamil representatives are engaged in a futile battle with those who call for it to be

³⁸ TULF, *op. cit*, p. 153

³⁹ For an analysis on the Indian involvement on a political solution based on US cables exposed by Wikileaks see: The Hindu, '13th Amendment Plus': India sceptical of Sri Lankan promise' (26 March 2011) <http://www.thehindu.com/news/the-india-cables/india-and-neighbours/article1571806.ece> (Last accessed 21 October 2013)

⁴⁰ Dharmaretnam Sivaram, "Ten years after the Indo-Lanka Accord: Not even the Kovanam", (1997) <http://tamilnation.co/forum/sivaram/970727.htm> (Last accessed 21 October 2013)

⁴¹ Gajendrakumar Ponnambalam former MP for Jaffna (2001-2010 representing the TNA and now leader of the Tamil National People's Front) argues that it should be possible to reject the 13th amendment while not rejecting the Indo-Lanka Accord. In a recent interview he noted, "We are not against the provisions in the Indo - Lanka Accord that safeguard India's national security and strategic interests. What we cannot accept is the part that prescribes a solution to the ethnic conflict in the form of the 13th amendment and the provincial councils. We have in the past, and we will in the future too, do our utmost to safeguard India's interests in Sri Lanka. But India must not merely look to safeguard her own interests at our expense. That is just not acceptable". Paul Newman, 'Focus Ealam', <http://www.theweekendleader.com/Causes/1658/focus-eelam.html#sthash.B7ZTBG6g.dpuf> (Last accessed 21 October 2013)

repealed, to save whatever little is left in the 13th amendment. It is a wholly nonsensical debate: those who want to repeal the 13th amendment argue, quite misleadingly, that the 13th amendment significantly devolves land and police powers to the provinces - when it does not, and also call for parliament to be stripped of its powers to enable a merger of the North and Eastern provinces – even when the main opposition party (the United National Party) is against such a North-East merger. Meanwhile, equally misleadingly, those campaigning for the 13th amendment, including India and the TNA, are attempting to give the impression to the Tamil populous that the 13th amendment can offer Tamils something meaningful and is a good starting point to a political solution.

3.3. The Politics of the International Community

Failing to understand and grapple with the dynamics of Sinhala Buddhist Nationalism, as described elsewhere in this article, the international actors interested in Sri Lanka also seem to have clung on to the 13th Amendment as a remedy for the current impasse in Sri Lanka. This can only mean that the international actors have not learnt much from the previous failed attempts at liberal peace making.

4. Conclusion

I have tried to demonstrate in this article that given the structural deficiencies of the 13th Amendment that it fails to even perform the role of a reference point to a discourse on a political solution. This article calls for and tries to provide the sketch for a critical, nuanced approach to some of the rhetorical clichés (like ‘13+’) that dominate the contemporary political landscape on the subject of the 13th amendment. At a broader level, I have painted a pessimistic picture as to the possibility of finding a constitutionally negotiated solution in general. I have tried to demonstrate that this pessimism is more deeply rooted and is not a reflection limited to the current political context in Sri Lanka.

The rhetoric and political play with the 13th amendment will continue in Sri Lanka’s post war constitutional discourse for a considerable period of time. Those who have a vested interest in keeping the debate alive will do their utmost to prolong the debate. It is likely that the next few years might witness an utterly useless battle between the Government and the Tamil National Alliance over trying to retain what is left over in the 13th amendment. But in the midst of all this hysteria, any move towards finding a meaningful and genuine political solution will be lost. Goodin’s

conclusion that there is no constitutional solution to be found to the case of 'radical social diversity'⁴² might just as well as be true for Sri Lanka.

⁴² Robert E Goodin, 'Designing Constitutions: The Political Constitution of a Mixed Commonwealth', 44(3) *Political Studies* 635-636 at 643.