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**Extended Abstract**

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**Devolution of Power- The Prospects under the Proposed New Constitution**

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**1. Abstract**

Sri Lanka is engaged in making the third Republican Constitution to resolve the national issue and the areas which need reform have been identified and dealt with. The subject of devolution of power, a contentious subject, occupies significant place in the reform process. The Public Representation Committee has substantially dealt with this subject and various recommendations have been made out of numerous representations made, including for strengthened provincial councils and local governments thus making the governance closed to the people and accountable to them. The report of the SubCommittee on Centre-Periphery relations too have recommended for an independent provincial structure without interference from central executive and legislature and local governments in line with principle of subsidiarity and more participation of people in governance.

Although the above two reports have made recommendations toward substantive devolution of powers at provincial and local government tiers, the recommendations have not received wider acceptance. The report of the Public Representation Committee itself reveals the amount of disagreements among its members over the matter of devolution of powers to the provincial councils. The sub-committee report on Centre-Periphery relations too did not receive consensus, some members from joint opposition and JVP did not sign the document. The Sub-Committee report have been attacked on several grounds, the total abolition of the control of centre by removing concurrence list, suggestion to bring the district secretaries and the divisional secretaries under the control of the provincial councils, the fear on devolution as an incentive for division of the country are few factors among many cause criticism on the report.

The main objective of the research is to explore the recommendations made by Public Representation Committee and the Sub-Committee on Centre-Periphery relations and the different expressions made in terms of devolution in and out of the reports. The research will also explore the ideologies based on

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which different expressions are made on devolution, they are on numerous grounds such as the sovereignty of state, unity in diversity, self-governance, regional/provincial autonomy, devolution within unitary framework, devolution under federal system, corporative devolution, greater devolution, minimum devolution, devolution as in the 13<sup>th</sup> amendment, division or session of country, etc. Overall, the research attempts to assess the prospects for devolution of power under the proposed new Constitution based on the progress taken place so far and against the absence of any final document consists of information with regard to devolution of power.

### **Key Words**

Devolution, Expectation, New Constitution, Recommendations

## **2. Introduction and Research problem**

There are number of models to share state powers at provincial/regional and local level. Decentralization of administrative power at different tiers for easy administration by virtue of legislation is one basic method. Devolution of executive, legislative and judicial power to an extent to federal/provincial and other levels with the constitutional endorsement is another. The devolution of power is often connected to unitary form of state as there is the likelihood of revocation of devolved subjects by the centre at any time. The devolution of power under the federal system is considered to be sustainable and effective where the demand for power sharing is very high.

Sri Lanka possesses a long history of experimenting different models of power sharing as a solution to the ethnic conflict and attempts at different point of time had failed for different reasons. When the ruling party is engaged with the Tamils about bringing in a solution, the party in opposition opposes it, and when then opposition negotiates with representatives of Tamils as a ruling party, there is opposition too, the Banda- Selva pact and the Dudley-Selva pact which had arrangements to redress the grievances of Tamils were abandoned due to this culture of opposition.

The demand for power particularly from the minority community does not remain the same over time. Tamils first demanded for a scheme that provides for balanced representation, and then the demand elevated to different levels as a changing response to uprising of Sinhala nationalism, majoritarian rule and the so influenced Sinhala leaders. The devolution paving way for autonomy and self- government in the regions was demanded subsequently. The scheme of regional councils and District Development councils were proposed and again they were in effective as they could not meet the expectations.

The devolution under a federal scheme was the demand at one point and based on which the Tamil representatives took part in the drafting process of the first Republican Constitution. Despite of the demand for a federal form of governance from the minorities, the 1972 Constitution declared expressly that Sri Lanka is a unitary state. The 1978 Constitution made the same declaration but without participation of Tamils at any stage of the constitution making. The determination of the rulers to constitutionalize the unitary character of the state for the first time under the 1972 Constitution had led

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the Tamil leaders to determine and to publicly declare the idea of separate Tamil state as the solution to their problem. The commencement of war, its prolongment for decades and the negative consequences in terms of loss of human lives, properties etc., are the remains of the struggle for power.

There were discussions, negotiations, attempts to reform the constitution aiming at resolving the ethnic conflict even during the war throne and all are failed attempts. There is only one attempt which is the establishment of Provincial Councils for eight provinces with the merged North-East Province( which had been demerged subsequently), though not be called as successful, at least in operation almost for two decades since its establishment in 1987. The judicial determination in In Re the Thirteenth Amendment to the Constitution case declared Provincial Councils as subordinate organs subject to the control of the central parliament and executive in a unitary state. The provincial council system also has failed to provide independent governance at provincial level

After the end of war in 2009, attempts were made to bring in a solution and again failed due to lack of political will. The devolution discussions after the introduction of provincial councils focused either on full implementation of the provincial powers or strengthening of the system. The change of government in 2015 and the togetherness of long time enemy parties in government have created a space to think of devolution and other matters worthy of reform. The government has expressed its commitment to reform the present and draft a new one, and towards this end the Parliament has been converted as a Constitutional Assembly following a unanimous resolution to make the Constitution, the Public Representation Committee, a Steering Committee and six Sub-Committees were appointed.

The report of the Public Representation Committee has a chapter on devolution from page 47-69 dealing with unit of devolution and scope of devolution. With regard to devolution, the Steering Committee has been tasked with devolution and land while the subcommittee is assigned to deal with Centre-Periphery relations. However with this overlapping, the sub-committee on Center-Periphery relations has come up with a scheme of substantive devolution. The report of the steering committee is yet to be tabled.

The reports are significant as they are shown to be the part of the steps taken by the Sri Lankan government toward reconciliation and nation building, establishment of which is not only a local obligation but also an international commitment. The fact that the reports have been prepared in consultation with people and experts is adding further importance to the reports. The reports have opened a flood gate of different expressions for and against devolution under different footing. The age old debate of unitary vs. federal still happens. On one hand, a substantive devolution with functional independence to the provinces not under the unitary framework is demanded by Tamils, and on the other hand, even those who propose devolution are skeptical of a devolution scheme going beyond the unitary framework as a threat to sovereignty of the state. The likelihood of abuse of powers as a result of centralization of powers in the province, the fear over substantive devolution as an incentive for separate state are examples of negative thoughts on devolution. There are views expressed to the effect that devolution has been done enough under 13<sup>th</sup> Amendment and going beyond that will be dangerous. The problem of the moment is to what extent devolution is possible and under which framework it is to be

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implemented. With regard to the larger framework on which the Constitution should operate, there appears to be consensus to negotiate irrespective of label but on contents.

### **3. Research Methodology**

The research involves a qualitative study. The report of the Public Representation Committee and the Sub-Committee report on Centre-Periphery relations have been studied and critically analysed. Since there is no document with finality as to the provisions on devolution in the public domain and no draft constitution is made, the chapter on devolution under the report of Public Representation Committee and the SubCommittee report on Centre-Periphery relations were considered primarily in analyzing the prospects for devolution of power under the proposed new Constitution.

The recommendations made in contrary to one other owing to the disagreement among the members of the committee over devolution revealed in the public representation committee report itself and the disagreement implied through non- signing of the report on Centre-Periphery relations by some of its members from joint opposition and JVP have also been subjected to critical analysis. Although the PRC could arrive at unanimous decisions over certain matters such as fundamental rights, devolution of power was the most controversial subject where unanimity was not possible at all.

The comments expressed through electronic and print media by scholars, political leaders, research institutes etc., on the concept of devolution in the background of the reports also been analysed.

The research also involves the study of literature on devolution of power and the past attempts to devolve powers and the lessons learnt in Sri Lanka.

### **4.Results and Findings**

The Public Representation Committee has mixed recommendations as to the unit of devolution. It has recommended to retain the nine provinces with the option to join two or more adjacent provinces through referendum thus retaining Article 154A (3), some members strictly opposed to the merger of North and East provinces and insisted on repealing Article 154A(3). A recommendation was made to assure equal representation of minorities in provincial councils and internal autonomous units should be provided to Malayaha Tamils in the Central province and to Muslims in Eastern Provincial Council to decide the matters impacting them. There was also a recommendation suggesting that the power should remain with the central organ of the State under the unitary state, the Central Government can delegate powers to the provinces, but retain the power and authority to take back any power to the Centre without the concurrence of the provincial unit. Another recommendation was made to the effect that unit of devolution shall be demarcated based on a rational basis taking into account, geographical, socio-economic and demographic factors not based on racial, ethno-religious or linguistic considerations.

Likewise it has made variety of recommendations with regard to scope of devolution too. It has recommended to have a ceremonial governor with no real executive powers and should be appointed by

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the President in concurrence with the Chief Minister. Governor must act on the advice of the Chief Minister. The Committee has recommended to take away the power of the Governor to assent the statutes made by the council and alternatively provided for pre and post judicial review of provincial statutes by Constitutional Court or constitutional bench of the Supreme Court. However a dissenting recommendation was made to the effect of retaining the

Powers of the Governor as it is or establishing a similar setup at the centre.

The committee has recommended to abolish the concurrent list to enable the smooth functioning of the councils without interference from Centre. Even though the committee heard controversial representations, for example police and land powers are already distributed to provincial councils, no need to give further if the 13<sup>th</sup> Amendment is fully implemented; it has put forward recommendations with regard to devolution of police and land powers to the provincial councils. The committee has recommended for a Provincial Police Commission in-charge of transfer, dismissal and disciplinary actions regarding officers of the Provincial Police below the rank of Assistant Superintendent of Police. Recommendation was made to the effect of making provincial police officers responsible and accountable to Chief Minister and Board of Ministers with regard to Law and Order. It recommends that in respect of prevention, investigation and prosecution of suspected offenders the police within the province shall function independently from the political actors of the province.

With regard to grant of power over state lands, two different views have been expressed, majority hold the opinion of establishing a National Land Commission with the power to formulate national policy on land including State land, land alienation, land use, human settlement and other related matters. Any dispute between the Central Government and the

Provincial Councils shall be decided by the NLC with the right to appeal to the highest court. There was another recommendation for vesting power over state lands with the provincial councils while giving the right to central government to request from the provincial council for state lands for any legitimate purpose. It is evident that the report of the Public Representation Committee did not make recommendations in one voice, however the committee was able to give a summary of representations made by the people and different recommendations were made as expressed by the members differently.

The sub-committee on Centre-Periphery relations provides unanimous recommendations, however disagreed members did not sign up the report. In line with the recommendations made by the Public Representation Committee, the sub-committee has recommended for a strong provincial structure. Reduction of Governor's status as ceremonial head with no real executive powers, appointment of Governor by President acting in concurrence with Chief Minister, the impediment on the power to assent the statutes passed by Provincial Councils, the abolition of concurrence list, the removal of the provision to make laws on national policy on any subject, under the reserved list, the public service of the province functioning under the elected executive of the Province, Provincial Councils with fiscal autonomy, state

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land and law and order must be the subject of Province, reorganization of public service to avoid duality *inter alia* are the recommendations of the subcommittee.

Both reports have recognized local governments as third tier of government. Re organization of local authorities incorporating the principle of subsidiarity with more participation of people in governance through the idea of Grama Rajya has been recommended.

The reports have been subjected to critical analysis across the country and government is being provided with insight ideas as to what ought to be done toward reforming the Constitution.

In addition to the disagreement among the members of the committees to arrive at a unanimous decision, there are number of comments made against the reports. The main defect identified over the PRC report is its failure to recommend one best course of action thus giving directions to the Constitutional Assembly to consider that best action in arriving at final decision<sup>1</sup>. With regard to scope of devolution, the failure on the part of the PRC to consider federal structure as one of the recommendations even within its chosen method to provide all possible recommendations is considered a serious flaw. The difference between Sinhala and English text on the issue of nature of state also receive criticism. While the English report provides for 3 recommendations as to the nature of state, the Sinhala text provides for retaining the unitary character only<sup>2</sup>.

The report of the Sub-Committee on Centre-Periphery relations has attracted much criticism as it makes strong recommendations with regard to devolution of power.

Mr.Kushan D' Alwis P.C who served in the Public Representation Committee condemns the recommendation of the committee to have strong provincial administration leading to de facto federal concept, he is of opinion that 13<sup>th</sup> Amendment too was an unwanted child and as a solution to the demand from North East people, economic development activities and administrative policies can be developed, no need of constitutional arrangements. He supports the retaining of unitary character and considers greater devolution of power dangerous as it will fall short of only one step behind a separate state<sup>3</sup>.

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<sup>1</sup> Comments by Dr.S.Keethaponcalan on PRC report.<http://www.eurasiareview.com/01092016-sri-lanka-public-representationcommittee-report-on-constitutional-reform-oped/>

<sup>2</sup> <http://www.ceylonews.com/2016/06/constitutional-committee-recommends-sri-lankato-retain-unitary-state-video/>

<sup>3</sup> <http://www.dailymirror.lk/article/Kushan-D-Alwis-PC-Efforts-underway-to-weakenunitary-character-122281.html>

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The National Joint Committee rejects the report of Sub-Committee on Centre-Periphery relations as a whole. It makes strong opposition to the current 13<sup>th</sup> Amendment and insists that the constitution must endorse the nature of the state as unitary not only in label but also in contents. The sub committee's recommendation on removing the concurrent list, making the governor merely ceremonial, abolition of the provision on law making authority on national policy by the central government, providing fiscal power to provincial councils are seriously rejected by National Joint Committee as it get away with unitary character<sup>4</sup>.

Some are of the view that Sri Lanka needs constitutional reform with regard to devolution of power and many other but not needed a new Constitution. Some are of the view that no systematic change is needed to get away from unitary character but structural changes can be made to devolve powers<sup>5</sup>.

Some members of Parliament who voted for the resolution to make a new Constitution, later on changed their view and taken a hostile approach to constitutional making. Some members of SLFP who are part of the coalition government feel uncomfortable to advocate concepts such as devolution of power and minority rights and feel more comfortable to advocate concepts such as national sovereignty, national security and the centralization of power on the basis of their perception that the ethnic and religious minorities constitute a threat along with the international community. They also do not wish to go before the people at a referendum to obtain the people's backing for concepts they do not really believe in<sup>6</sup>. These are examples of hardline opposition to devolution of power.

There are some other expressions made not to the effect of opposing the whole idea of devolution of power, but different expression is made as to the scope of devolution. Dr Laksiri Fernando does not agree with the submission of Sub-Committee on CentrePeriphery relations to remove the concurrent list and suggesting to get rid of overlap with the assistance of a cooperative list. He also opposes the idea of removing the central government's power to make laws on national policy. He is of opinion that the Sub-Committee had gone beyond its scope and made recommendations. He also holds the view that unitary

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<sup>4</sup> <http://www.lankaweb.com/news/items/2016/12/17/statement-of-the-national-jointcommittee-on-the-report-submitted-by-the-centre-periphery-sub-committee-onconstitutional-reform/>

<sup>5</sup> Dr.DayanJayatilake at the public discussion on “ Constitution and You” , organized by Sri Lanka Incorporated held at Buddhist Cultural Centre, Colombo on 21.02.2017 <https://www.facebook.com/Srilankainc/videos/818969608241467/>

<sup>6</sup> JehanPerera: “Influencing the Polity for Constitutional Reform,” 27 February 2017 <https://thuppahi.wordpress.com/2017/03/01/constitutional-reforms-in-the-meltingpot-bulathsinghala-and-perera/#more-24424>

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concept is not an impediments for devolution as concerned by the chairman and some members of the Sub-Committee and in fact devolution is devised to democratize a unitary state giving emphasis on communities, provinces, regions and villages, devolution is not about federalism<sup>7</sup>.

There are few institutions expressed opinion in agreement with Sub Committee report subject to Steering committee's report in the same line<sup>89</sup>. There are number of expressions made in support of the new constitution making and greater devolution of power. Dr. Jayampathy Wickramaratne advocates the need for a new Constitution which is democratic and inclusive<sup>10</sup>. Some while acknowledging the little consensus among people over the matter of power sharing and the reluctance on the part of the government to go to referendum without a unitary clause, the pragmatic approach adopted to work on power sharing irrespective of the label unitary or federal is appreciated. The option of constitutional silence on the self-description of the state and the development of a neologism to capture the core idea of unity in diversity, or to include the unitary state in the constitutional text but to define it expressly and narrowly so as to stress the commitment to unity and territorial integrity (including an explicit prohibition on secession) and in this way to limit its substantive potential to fetter devolution is welcomed<sup>11</sup>.

The Centre for Policy Alternatives had organized a conference with representation of Provincial Council and published a book consisting of agreed outcomes of the conference<sup>16</sup>. The representatives of the Provincial Councils were agreed upon a greater devolution scheme, it has provisions on Governor's power, concurrent list, national policy, law and order, land and natural resources, public service and administration etc. The report reveals that the demand for autonomous provincial administration does come not only from North and Eastern Provincial Councils but also from other provinces.

It is revealed that there are arguments as to whether a new Constitution needed or not and arguments for and against devolution. Even within the group which is for devolution there is no consensus as to the extent to which devolution is essential for Sri Lanka. There is a huge disagreement over the larger framework under which devolution is going to be operated

## **5. Conclusions, Implications and Significance**

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<sup>7</sup> [http://www.island.lk/index.php?page\\_cat=article-details&page=articledetails&code\\_title=156770](http://www.island.lk/index.php?page_cat=article-details&page=articledetails&code_title=156770)

<sup>8</sup> <http://sangam.org/wp-content/uploads/2016/12/ACPR>

<sup>9</sup> [november issue brief no. 1.pdf](#)

<sup>10</sup> <http://www.thehindu.com/opinion/op-ed/%E2%80%98Need-safeguards-againstmajoritarianism%E2%80%99/article14021581.ece>

<sup>11</sup> Sri Lanka's search for constitutional consensus amid social and political divisions

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It is clear that the proposed new Constitution will incorporate provisions for devolution of power, but what is unclear is the extent to which the power is going to be devolved. The provincial council systems has received much recognition as the unit of devolution along with local governments, however the questions as to the power of the provincial council under the new Constitution has not arrived at any final decision. Whether the Constitution continues to be labeled as unitary state or converted to be a federal state or more devolution notwithstanding the label are questions about the overall framework of governance. The Steering committee report is awaited; particularly the committee's position over the issue of land and devolution and the nature of the state may answer the concerns. At last, what matters is accommodation of the claim for substantive devolution

By DrAsangaWelikala, 19 July 2016 <http://www.constitutionnet.org/news/sri-lankasearch-constitutional-consensus-amid-social-and-political-divisions>

<sup>16</sup>A New Devolution Settlement for Sri Lanka <http://www.cpalanka.org/wpcontent/uploads/2016/11/Book.pdf>.  
under a suitable framework as requested by the minorities with the approval of the Sinhala majority community. Whatever is done toward reforming the Constitution must avoid further polarization of communities.

This piece of research has dealt with the very recent dialogue on devolution of power from different dimensions. The recommendations put forwarded in the report of the Public Representation Committee on devolution of power and the recommendations as to the Centre-Periphery relations by the Sub-Committee on Centre-Periphery relations are subjected to debate in the contemporary political discourse in Sri Lanka and based on which the research has attempted to assess the prospects for devolution of power under the proposed new Constitution. This analysis leads discussion to decide firmly to what extent the state power to be devolved under the new Constitution.

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ii. <http://www.ceylonews.com/2016/06/constitutional-committee-recommends-sri-lankato-retain-unitary-state-video/>

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