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POWER OF PROVINCIAL COUNCILS TO 'UTILIZE, ADMINISTER & CONTROL' STATE LAND

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Editor's Note... ... ...

This Issue publishes an essay by ***Kalana Senaratne*** which examines the context of the call for internal self-determination of the Tamil people in Sri Lanka as articulated by the *Illankai Thamil Arusu Katchi*, (ITAK or the Tamil Federal Party, the constituent leader of the Tamil National Alliance) at its 14th Annual Convention in May 2012. It is important to stress at the outset that in September 2013, the election manifesto of the Tamil National Alliance appears to have abandoned reference to this term which, as Senaratne observes, is welcome. The devolution of power on the basis of shared sovereignty remains, of course, a key point in the manifesto.

In this succinct exposition – which serves as a useful warning for the future - Senaratne critically interrogates the meanings of 'self-determination' and 'internal self-determination.' First he points to inherent complexities both in the essential definition and popular usage of the term 'self-determination' and uses this analysis to look at its relevance within the parameters of Tamil nationalism.

> *'The language of self-determination has played a central role in the Tamil nationalists' struggle, and continues to do so. This may be due to the revolutionary and liberating appeal the phrase 'self-determination' still holds in the imagination of sub-state nationalist groups in general, and the Tamil nationalists in particular.'*

The historically multifaceted use of this term is, in fact, interesting. Thus, as the writer observes, Sri Lanka's leftists found this term convenient at one point to emphasize the recognition of Sinhala and Tamil nationalisms. The Tamil Federal Party used it to call for federalism and autonomy and as is widely known, the Liberation Tigers of Tamil Eelam (LTTE) expanded the concept to encompass its thrust for separatism.

The later positing of this demand within the Tamil nationalist discourse with the rider of 'internal' qualifying the cry for self-determination, as Senaratne observes, carried certain advantages for the Tamil parties.

> *...the advantage here appears to be that in doing so, the Tamil nationalists are seen to be emphasizing the 'internal' dimension of self-determination (and not its 'external' or secessionist variant). Such a discourse appears to help promote the idea that what is demanded now is a solution within the existing framework, or boundaries, of the State – i.e. within an undivided Sri Lanka. Adopting the language of 'internal' self-determination makes the articulation of the demand for autonomy more convenient.*

But the phrase internal self-determination' is also complex and pregnant with potential for misinterpretation as well as abuse.

Its complexities include incoherence in regard to its application to a 'people' as opposed to a dominant minority group within a State. As is stated, '...self-determination (of any kind) is rarely conceded as a concrete right applicable to ethnic/linguistic minority groups...' In the context of Sri Lanka, further controversies abound as to the precise definition of the 'Tamil-speaking people' given the presence of the Tamil-speaking Muslim people in the country. Pressing for an alternative discourse, Senaratne suggests that the promotion of equality of peoples, greater participatory power sharing and the further democratization of the Sri Lankan polity should be a primary focus of the Tamil nationalist parties while emphasizing the non-separatist idea of Tamil nationhood.

Responding to overwhelming requests by readers of the *LST Review*, this Issue also publishes the three opinions handed down by the Sri Lankan Supreme Court in the September 2013 judgment, *Solaimuthu Rasu v. Supt. Stafford Estate, Ragala, Halgranaoya* (S.C. Appeal No 21/13, SCM 26.09.2013).

The factual matter before the Court was seemingly innocuous; namely, the jurisdiction of a Provincial High Court in the issuing of a quit notice under the State Lands (Recovery of Possession) Act No 7 of 1979 (as amended). The judges concurred in deciding that the Court of Appeal had erred in law in holding that the Provincial High Court had jurisdiction under the 13th Amendment to the Constitution and the consequent High Court of the Provinces (Special Provisions) Act, No 19 of 1990, to quash by way of a writ of *certiorari*, a quit notice issued under the State Lands (Recovery of Possession) Act, No 7 of 1979 (as amended).

It was agreed that the devolution of state land to Provincial Councils was subject to State land continuing to be vested in the Centre and that the power of the President to make grants and dispositions of state land continued to be unaffected. The Provincial Councils would have the legislative competence to administer, control and utilise state land once those lands are made available to the Provincial Councils by the Centre.

Certain features of the opinions however raised more questions than answers, chief among which is the largely commonsensical question as to why the issuance of a quit notice for ejectment proceedings was not held to be within the ambit of administering, controlling and utilizing of state land which is constitutionally decreed as lying within the ambit of the authority of the provincial administration. Though the Court answered

this question in the negative, this remains a contested issue with the potential to rear its head up in the future as well as in a practical sense, cause manifold problems in regard to the administering of the provincial administrative machinery

Further, two judicial opinions were in unequivocal disagreement with a previous Determination of the Court in the Lands Bill (SC Nos 26-36 of 2003, SCM 10.12.2003). The Court's reasoning in the Lands Bill was that the power of disposition by the President in terms of Article 33(d) had been 'qualified' by Section 1:3 of Appendix 11 of the 13th Amendment, requiring due consultation with the Provincial Councils.

In departing from this view in September 2013, the Chief Justice affirmed that the duty of 'consultation' which the 13th Amendment calls upon the Central Government to engage in with the Provincial Council when State land is required by the Central Government in a Province in respect of a reserved or concurrent subject, does not imply concurrence on the part of the relevant Provincial Council. It only means that there would be conference between the Central Government and that Provincial Council to enable them to reach some agreement.

It was stated therefore that this does not detract from the fact that State land continues to vest in the Republic. It was also observed that the interpretation of Item 18 of List 1 of the Ninth Schedule (the "Provincial Council List) Appendix 11 ("alienation or disposition of state land within a Province to any citizen or any organisation shall be by the President on the advice of the relevant Provincial Council in accordance with the laws governing the matter" *vide* section 1:3 of Appendix 11), does not mean that the advice referred to therein is binding. Rather, the omission of the word 'only' before the words '...on the advice of the relevant Provincial Council...' meant that only non-binding advice was contemplated.

These are certainly opinions that invite scrutiny. Moreover judicial references in regard to the 'unitary nature of the State' in a matter which concerned a question of the jurisdiction of a court were a notably singular factor. Indeed, the Court, in the 2003 Lands Bill, had not put the unitary nature of the State into question in any manner whatsoever. Neither was the undisputed fact that State land continued to be vested in the Republic, that the President was empowered to make grants and dispositions of state land and that the Provincial Councils only have the legislative competence to administer, control and utilise state land.

In fact, the 2003 Lands Bill specifically upheld the argument by counsel that clause 8 of that proposed legislation "providing for the disposal of the ownership of lands by the

transfer of ownership of State lands to citizens of Sri Lanka' was unconstitutional as it would result in fettering of the President's substantive powers in regard to the alienation of land.

As can be clearly seen, the problems of democratic power-sharing remain aggravated due to political power-play by majority and minority political parties alike with the judiciary becoming inextricably intertwined in this imbroglio.

The one consensus appears to be singularly unfortunate. Thus Sinhala nationalists complain that the 13th Amendment is a foisted external arrangement on the country. On the other extreme, Tamil nationalists use the 2013 Supreme Court opinions among manifold other reasons to state their case that this constitutional amendment is a manifestly unsuitable vehicle to address the concerns of the Tamil people.

In sum, Sri Lanka's post-war years appears to hold little possibility of the resolving of the tug and pull of these fundamental forces.

Kishali Pinto-Jayawardena

Tamil Nationalism and the Politics of Internal Self-Determination in Post-War Sri Lanka

Kalana Senaratne[*]

The end of the armed conflict between the Sri Lankan Armed Forces and the Liberation Tigers of Tamil Eelam (LTTE) in May 2009 paved the way for what was considered to be a new chapter in Tamil nationalist politics in Sri Lanka. At the 14th Annual Convention of the *Ilankai Thamil Arasu Katchi* (ITAK, known as the Tamil Federal Party) held in May 2012 – which is one of the most formidable Tamil political parties within the Tamil National Alliance (TNA) – Tamil nationalists proclaimed that a new chapter had been turned in their struggle for political autonomy.

In doing so, they invoked the popular demand for self-determination in international law; more specifically, the demand for 'internal' self-determination. The leader of the ITAK, R. Sampanthan contended, that the Tamil people of Sri Lanka were entitled to a right to 'internal' self-determination; that is to say, a political structure outside the existing unitary framework of government in Sri Lanka, wherein the Tamil people in the North and the East shall have all the powers of government needed to live with self respect and self sufficiency.[1] The slogan *'internal' self-determination* thereby became central to the articulation of Tamil nationalists' aspirations for autonomy in post-war Sri Lanka.

The focus of this paper is the principle of 'internal' self-determination. The purpose here is to critically examine the conceptual and practical relevance of 'internal' self-determination as a language (or an expression) of politics.[2] Three broad aspects of this claim will be examined. Firstly, I will briefly examine the origins of what is referred to as a *right* to 'internal' self-determination in international law, and its apparent relevance to the politics of Tamil nationalism today. Secondly, I will examine some of the problems inherent both in the concept of, and the demand for, 'internal' self-determination. Finally, I will explore whether it is necessary to envision or construct a discourse that abandons the language of 'internal' self-determination.

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[*] This is an edited version of a paper presented at the Third Law and Social Sciences Research Network (LASSNet) Conference, held at the University of Peradeniya, Sri Lanka 14-16 December, 2012. Parts of this paper are based on ongoing doctoral research work carried out at the Law Faculty of the University of Hong Kong.

[1] 'Speech at 14th ITAK Convention by Mr. R. Sampanthan, MP. Batticaola, May 2012', available at http://www.sangam.org/2012/06/Sumpanthan_Speech.php (visited 01 Oct 2013) [reproduced below].

[2] Therefore, this is not an examination of the influence of 'politics' on the 'law' of internal self-determination. Following the school of critical international legal theory, I do not endorse the popular and strict distinction between law and politics. Rather, international law is considered to be an expression of politics; see, Martti Koskenniemi, *The Politics of International Law* (Oxford and Portland, Oregon: Hart Publishing, 2011).

1. 'Internal Self-Determination' and Tamil Nationalism

'Self-determination' is a popular political expression. Mainstream international law writers have often considered its roots to be going back to the American and French Revolutions of the 18th Century[3], and the rise of the nationalist phenomenon as understood especially in Europe. And ever since it came to be promoted quite vigorously by the likes of Lenin and Woodrow Wilson in the late 19th and early 20th century, 'self-determination' has encapsulated an old (and broad) idea: independence, political freedom and autonomy of peoples.

Over time, self-determination came to be recognized as a principle that had attained the status of a legal right in international law. This was largely as a consequence of the establishment of the UN and the subsequent recognition afforded to self-determination in instruments such as the UN Charter[4], the 1966 International Covenants on Human Rights[5], the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples[6] and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States[7]. During this time, the right to self-determination was most popularly understood and articulated by the Third World as a right to independence, a right guaranteeing freedom from colonial domination, resulting in the establishment of newly independent States. This 'colonial definition' is perhaps the least-controversial definition attributed to the principle of self-determination in international law.

But this was not the only way in which 'self-determination' was understood. Some Western States, in particular, regarded the right to self-determination to be composed of two distinct dimensions: 'external' and 'internal'. As the Netherlands once pointed out in 1952, 'external self-determination' referred to the right of a people to form a State, while 'internal self-determination' referred to "the right of a nation, already constituted as a State, to choose its form of government and to determine the policy it meant to pursue."[8]

However, it is useful to bear in mind that this 'internal'/'external' dichotomy of self-determination was promoted by the Netherlands in the context of the 1949 Roundtable Conference on Indonesia, wherein

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[3] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), p. 11-13; Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity* (2000), p. 11.

[4] See especially Article 1(2) of the UN Charter, available at http://www.un.org/en/documents/charter/chapter1.shtml (visited 01 Oct 2013).

[5] Articles 1 of the 1966 International Covenant on Civil and Political Rights (ICCPR), available at http://www2.ohchr.org/english/law/ccpr.htm (visited 01 Oct 2013); and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), available at http://www2.ohchr.org/english/law/cescr.htm (visited 01 Oct 2013).

[6] UNGA Resolution 1514 (XV) of 14 December 1960, available at http://www.un.org/en/decolonization/declaration.shtml (visited 01 Oct 2013).

[7] A/Res/25/2625, 24 October 1970, available at http://www.un-documents.net/a25r2625.htm (visited 01 Oct 2013).

[8] Netherlands, 7 GAOR (1952) 3rd Committee, 447th mtg., (A/C.3/SR.447) para 4; quoted in James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Leiden and Boston; Martinus Nijhoff, 2007), p. 188

'external' self-determination was understood as a right to secession.[9] The creation of the 'external' dimension of self-determination served the purpose of providing the federal units of Indonesia an argument to break-away from the Indonesian Republic. For that, the right to self-determination had to encapsulate the meaning of secession as well, which was possible once the concept was broken into two parts. In other words, constructing the 'internal'/'external' dichotomy of self-determination was part of the divide-and-rule policy of the Dutch colonial powers whose grip over Indonesia was slowly but surely slipping away.[10]

Thereafter, the 1990s saw the vigorous revival and promotion of 'internal' self-determination. This was an optimistic time for liberal international lawyers; liberal democracy had emerged victorious (or so they thought). It was time to re-connect the relevance of democracy and self-determination. While international lawyers such as Thomas Franck wrote about the emerging right to democratic governance[11], the likes of Antonio Cassese, Alan Rosas and Patrick Thornberry focused on promulgating the specific dimension of 'internal' self-determination, as a right guaranteeing democratic governance to peoples within States including, inter alia, the right of peoples to choose their own constitution, as well as an autonomous status.[12] 'Internal' self-determination was essentially a liberal principle.

Gradually, this principle gained greater popularity. Judicial bodies such as the Canadian Supreme Court, endorsing this 'internal'/'external' dichotomy, suggested that self-determination is principally realized by peoples within States through 'internal' self-determination; i.e. the pursuit of freedoms within the framework of the existing State.[13] Its invocation and use in recent times is most prominently seen in some of the written statements prepared by States concerning Kosovo's Unilateral Declaration of Independence

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[9] Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven and London: Yale University Press, 1978), p. 14-15.

[10] James Summers, 'The Internal and External Aspects of Self-Determination Reconsidered' in Duncan French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge: Cambridge University Press, 2013), p. 245. This is reiterated in James Summers, 'Why does the Right of Self-determination have Internal and External Aspects?' (Lecture delivered at the Lauterpacht Centre for International Law, University of Cambridge, 28 October 2011), the audio version of which is available at http://sms.cam.ac.uk/media/1183823 (visited 01 Oct 2013).

[11] Thomas M. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46

[12] The main works in this regard were published in Christian Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht, Boston and London: Martinus Nijhoff 1993). The three chapters contained therein are some of the central works on the topic: i.e. Alan Rosas, 'Internal Self-Determination' (at p. 225-252), Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism' (at p. 101-138) and Jean Salmon, 'Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?' (at p. 253-282). A most significant addition during this time came in the form of Cassese's 1995 book (note 3 above), especially chapter 5 therein titled 'Internal Self-Determination' (at p. 101-140). However, Cassese had discussed the topic before; see Antonio Cassese, 'Political Self-Determination – Old Concepts and New Developments' in Antonio Cassese (ed.), *UN Law/Fundamental Rights: Two Topics in International Law* (The Netherlands: Sijthoff & Noordhoff, 1979), p. 137-165.

[13] *Reference re Secession of Quebec*, Supreme Court of Canada, 161 Dominion Law Reports (1998), 4th Series, p. 438, para 126.

(UDI).[14] The broad but basic idea of 'internal' self-determination was captured in the Separate Opinion of Judge Yusuf, who stated:

> "In this post-colonial conception, the right of self-determination chiefly operates inside the boundaries of existing States in various forms and guises, particularly as a right of the entire population of the State to determine its own political, economic and social destiny and to choose a representative government; and, equally, as a right of a defined part of the population, which has distinctive characteristics on the basis of race or ethnicity, to participate in the political life of the State, to be represented in its government and not to be discriminated against. These rights are to be exercised within the State in which the population or the ethnic group live, and thus constitute internal rights of self-determination. They offer a variety of entitlements to the concerned peoples within the borders of the State without threatening its sovereignty."[15]

In Sri Lanka, Tamil nationalism[16] has been the most prominent phenomenon through which the self-determination discourse was popularized. The language of self-determination has played a central role in the Tamil nationalists' struggle, and continues to do so. This may be due to the revolutionary and liberating appeal the phrase 'self-determination' still holds in the imagination of sub-state nationalist groups in general, and the Tamil nationalists in particular.

So we find, in the case of Sri Lanka, the language of self-determination being used to articulate numerous demands and aspirations. From the mid-1940s, the Left considered the right to self-determination to be useful for the recognition of two nationalities, the Sinhala and Tamil nationalities. From the early 1950s (in particular) to the early 1970s, the Tamil Federal Party invoked the right to self-determination to articulate its demands for federalism and autonomy. And from the 1970s to 2009, the LTTE in particular invoked this same right to self-determination largely as a demand for separation.[17]

The perceived relevance of 'internal' self-determination arises today, due to the demand for the broader right to self-determination made by the LTTE (in order to promote the idea of secession). In other words, the reversion to the language of 'internal' self-determination by the Tamil nationalists, after decades of LTTE activity, appears useful; the advantage here appears to be that in doing so, the Tamil nationalists are seen to be emphasizing the 'internal' dimension of self-determination (and not its 'external' or secessionist variant). Such a discourse appears to help promote the idea that what is demanded now is a

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[14] The written statements are available at http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1 (visited 01 Oct 2013). A careful reading of these statements does not suggest, however, that there is a clear and concrete meaning attached to 'internal' self-determination.

[15] '*Separate Opinion of Judge Yusuf*' para 9, available at http://www.icj-cij.org/docket/files/141/16005.pdf (visited 01 Oct 2013).

[16] On Tamil nationalism, see generally A. Jeyaratnam Wilson, *Sri Lankan Tamil Nationalism. Its origins and Development in the Nineteenth and Twentieth Centuries* (New Delhi: Penguin Books, 2000).

[17] For a collection of political proposals and documents which, inter alia, set out self-determination claims made by respective political parties, see generally Rohan Edrisinha, Mario Gomez, V.T. Thamilmaran and Asanga Welikala (eds.), *Power-Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008* (Colombo: Centre for Policy Alternatives, 2008) [hereinafter: Edrisinha et al, *Power-Sharing*]

solution within the existing framework, or boundaries, of the State – i.e. within an undivided Sri Lanka. Adopting the language of 'internal' self-determination makes the articulation of the demand for autonomy more convenient. It may be due to such reasons that some Tamil nationalists, as well as the liberal school[18], have sought to promote the principle of 'internal' self-determination in Sri Lanka.

2. Internal Self-Determination: Some Recurring Problems

However, this is just one part of the story.

Demands for any form of self-determination are always complex, controversial and contentious, because of the historical meaning attached to the concept of self-determination (i.e. independence). They are especially controversial when raised within deeply polarized multi-ethnic States. This seems to be the case with the demand for 'internal' self-determination as well; a demand which, while having the appearance of being the perfect self-determination argument for the Tamil nationalists, remains problematic for a number of reasons. Five such reasons are discussed very briefly, below.

Firstly. 'internal' self-determination as a concept inherits the perennial problems associated with the broader concept of self-determination in international law; one significant problem being the controversy over who its intended beneficiaries are. The old questions get repeated once again: Is 'internal' self-determination applicable to an entire population, or is its application restricted to a dominant minority group within a State? Or else, is it applicable to all minority groups within a State? Also, if an ethnic minority group is entitled to self-determination, does it make that group a 'people' in international law?[19] Cannot all ethnic minority groups concentrated within a particular territorial entity define itself as a 'people'?

These are some of the questions over which there has been, and continues to be, much controversy, contestation and uncertainty. It is on this foundation of uncertainty that international lawyers attempted to promote the principle of 'internal' self-determination and groups continue to invoke the demand for 'internal' self-determination.

This is why a careful reading of the literature on the topic tends to show that 'internal' self-determination often appears as a vague principle applicable to a population within a State (and this could include minorities), but not necessarily to ethnic minority groups per se. That self-determination (of any kind) is rarely conceded as a concrete *right* applicable to ethnic/linguistic minority groups seems to be an accurate claim, given that different groups of people have been treated differently on the question of self-determination in international law.

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[18] For a liberal perspective, see Asanga Welikala, 'The Right to Internal Self-Determination in International Law' in Rohan Edrisinha and Asanga Welikala (eds), *Essays on Federalism in Sri Lanka* (Colombo: Centre for Policy Alternatives, 2008), pp. 206-226.

[19] For a discussion on the diverse ways in which terms such as 'people' and 'peoples' have been understood by State actors, see Thomas D. Musgrave, *Self-Determination and National Minorities* (New York: Oxford University Press, 1997), especially the discussion at pp. 148-179.

For example, in the case of 'indigenous peoples', States have recognized such peoples as beneficiaries of the right to self-determination (in its 'internal' variant) through documents such as the 2007 UN Declaration on Indigenous Peoples.[20] This has not been so as regards ethnic minority groups. So the claim to a concrete right to 'internal' self-determination, raised by Tamil nationalists, continues to be a contested claim. Therefore, 'internal' self-determination is of no great use for minority groups given the indeterminacy in international law.

More critically, given that members of most groups could define themselves as amounting to a 'people'[21], any sub-state claim for self-determination raised within a multi-ethnic polity can be controversial. For example, the sweeping claim that a right to 'internal' self-determination is applicable to the 'Tamil-speaking people' remains unconvincing to many, given that this claim obscures the presence and relevance of the Tamil-speaking Muslim people within the broader category of 'Tamil-speaking people'. Representatives of the Tamil-speaking Muslim community can also argue for a right to 'internal' self-determination by defining themselves as a distinct *people* and nationality (as was done in the Oluvil Declaration of 2003).[22] In other words, rethinking the right to self-determination as 'internal' self-determination does not do much to address some of the underlying controversies pertaining to the self-determination concept.

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[20] UNGA Res. 61/295, 13 September 2007, available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (01 Oct 2013). For a recent study, see Stephen Allen and Alexandra Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford, Portland: Hart Publishing, 2011). Such recognition does not mean, however, that the right to 'internal' self-determination so recognized has now been totally granted by States to indigenous peoples. For a critical examination suggesting that such recognition has added very little to the debate on indigenous peoples' self-determination, see Malgosia Fitzmaurice, 'The Question of Indigenous Peoples' Rights: A Time for Reappraisal?' in French (ed.) (note 11 above), pp. 349-376.

[21] This is because of the important, yet vague, guidelines set out by international experts on the question of what constitutes a 'people'. See, for instance, the guidelines set out by 'UNESCO: International Meeting of Experts on Further Study of the Concept of the Rights of Peoples – Final Report and Recommendation', SHS-89/CONF.602/7, 22 February, 1990, para 22, available at http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf (visited 01 Oct 2013).

[22] See 'Oluvil Declaration (2003)', in Edrisinha, et al, *Power-Sharing* (note 16 above), pp. 684-687. Highlighting the need for the greater mobilization of the Muslims, the 'Oluvil Declaration' explained that the Muslims of Sri Lanka have been the traditional inhabitants of a land area stretching "from Pottuvil in the Ampara District along the Eastern coast up to Jaffna in the North." As a distinct group, they had continually, throughout history, preserved their "separate ethnic identity." It was also asserted that the Muslim community amounted to a "people", who had undergone oppression due to both Sinhala racism and Tamil domination, resulting in their political marginalization. As they were "sufficiently concentrated to form a separate political authority" they sought "unique political solutions" based on their political aspirations. Therefore they proclaimed, *inter alia*: a) The Muslims of the North and East constitute a separate political entity, and that they are a separate nationality or a *nation*; b) The area of the North and East is the *traditional homeland* of the Muslims; c) The Muslims of the North and East are entitled to the *right of self-determination*; d) It is a legitimate right enabling them to decide their own destiny; e) Any political solution must ensure the establishment of an *autonomous unit of political power* for the Muslims of the North and East.

Secondly, while emphasis on 'internal' self-determination appears to be uncontroversial given the emphasis on the domestic/internal dimension of the State, such emphasis does not necessarily mean that politically controversial claims and narratives of nationhood, territory and 'traditional homelands' are thereby conveniently resolved. This is because most sub-state demands for self-determination ('internal' or 'external') are sought to be justified on the basis of nationhood. For example, the Tamil nationalists' demand for 'internal' self-determination continues to be based on another contested claim: i.e. that the North and East of the country forms a 'traditional homeland' of the Tamil-speaking people.[23] Therefore, the slogan 'internal' self-determination does not add anything substantive to the question of how underlying issues concerning nationhood and territory can be addressed.

Thirdly, 'internal' self-determination is as broad and vague as any other kind of self-determination. It captures a wide range of political practices and mechanisms ranging from democratic governance (amounting to the right to vote and political participation) to devolution and federalism. Anything can reasonably amount to 'internal' self-determination as long as the framework of the existing State is intact. Given this indeterminacy, questions often arise as to how best 'internal' self-determination can be realized.

This indeterminacy raises a number of interesting political and strategic concerns; especially for groups demanding autonomy within a State.

a) On the one hand, for the sake of greater clarity, the group demanding 'internal' self-determination needs to explain its claim in more concrete terms; more as a demand for autonomy amounting to some form of devolution or federalism. But if so, the relevance of 'internal' self-determination becomes meaningless since that demand can then be phrased in the language of autonomy, devolution or power-sharing.[24]

b) On the other hand, this further exposes the indeterminacy of 'internal' self-determination, because autonomy amounting to devolutionary or federal arrangements are in any case complex arrangements that do not get easily granted or realized. Also, States often take the view that territorial forms of autonomy do not take precedence over other forms of power-sharing. This is why even within the EU context – wherein 'internal' self-determination gets widely promoted by the office of the EU High Commissioner for National Minorities (HCNM) – territorial autonomy is only one form of realizing 'internal' self-determination. This is what led a former HCNM to characterize 'internal' self-determination as a 'toolbox' which offers minority groups many options to choose from, - and not as a right to autonomy applicable to minority groups. As Max van der Stoel pointed out: "The *toolbox* relating to 'internal' rather

[23] For a critique, see K.M de Silva, *The 'Traditional Homelands' of the Tamils. Separatist Ideology in Sri Lanka: A Historical Appraisal* (Kandy: International Centre for Ethnic Studies, 1995).

[24] This therefore raises the question, which has been posed more recently by critics of the ITAK/TNA: if 'internal self-determination' is a reference to autonomy, why not claim autonomy instead? See Dayan Jayatilleka, 'Tamil Self-Determination or Minority Rights?', *Sri Lanka Guardian*, available at http://www.srilankaguardian.org/2012/07/tamil-self-determination-or-minority.html (visited 01 Oct 2013); "If it [internal self-determination] means the right to autonomy or some measure of self-governance within a united state, why not call it that?"

than 'external' self-determination is full of interesting and relatively untested possibilities..."[25] But now, more questions emerge: What is the best tool? Which possibility is the better one? Who decides? Within the framework of the State, such questions cannot be easily resolved.

c) Flowing from the above is the further realization that most arrangements can be supported or attacked as being adequate, or inadequate, for the realization of 'internal' self-determination (given that the latter is in any case indeterminate). For instance, the 13th Amendment to the Sri Lankan Constitution (and the Provincial Council system) can be interpreted by different groups in different ways: either as a mechanism which is totally inadequate for the realization of 'internal' self-determination (as certain groups of Tamil nationalists would argue); or as a mechanism which is more than adequate; or as one which, by amendment and gradual reform, can be transformed into a meaningful arrangement promoting 'internal' self-determination. Given the absence of a clear and concrete meaning of 'internal' self-determination, a debate on whether some arrangement is likely to guarantee 'internal' self-determination makes very little sense.

In short, the inherent vagueness of the language of self-determination continues to raise questions of indeterminacy that cannot be meaningfully addressed by new claims (or kinds) for self-determination, such as 'internal' self-determination. Such claims merely reproduce unresolved questions.

Fourthly, and more generally, a principle such as 'internal' self-determination (and especially its constitutional recognition) would only be practical where it is the sole intention of the concerned sub-state group to work within the framework of the existing State. If not, the constitutional recognition of such a principle as being applicable to a specific sub-state group can often end up recognizing, formalizing and carving out a distinct 'internal' self-determination unit for a distinct ethnic group. When it dawns that realizing greater autonomy is difficult (which will essentially be the case, especially in an antagonistic and polarized political culture), and that any mechanism can be attacked as being inadequate to guarantee 'internal' self-determination', a push for 'external' self-determination will be the natural option.

In other words, one sees here that 'internal' self-determination recreates the old fears of States. It is also the case that 'internal' self-determination gets interpreted by certain writers as a principle that includes the right to secession.[26] This further explains why the demand even for 'internal' self-determination was attacked by Sinhala nationalist forces.

Fifthly and finally, the demand for 'internal' self-determination as raised in the contemporary context is not a novel demand for two specific reasons.

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[25] Max van der Stoel, 'Early Warning and Early Action: Preventing Inter-Ethnic Conflict', available at http://www.osce.org/hcnm/32107 (visited 01 Oct 2013). For a more recent statement on the various models available for minority participation, see Knut Vollebaek, 'Rights for Peace: Promoting Minority Participation to Avert Conflicts', available at http://www.osce.org/hcnm/83622 (visited 01 Oct 2013).

[26] V.T. Thamilmaran, 'Self-Determination: A Minorities' Perspective' (1994) 6 *Sri Lanka Journal of International Law* 271, at pp. 278-279.

One: The demand has already been made by the LTTE especially during 2001-2002,[27] and was even considered to be a guiding principle enabling the exploration of a federal solution (as mentioned in the 2002 Oslo Declaration[28] drawn up under the facilitation of the Norwegian government). It is not a novel phrase for the TNA too, since its leaders have demanded 'internal' self-determination, in a number of speeches and statements, ever since that time.[29]

Two: More broadly, it was precisely this demand for 'internal' self-determination amounting to autonomy and federalism that the ITAK had raised by resorting to the broader language of self-determination ever since the early 1950s. For instance, the self-determination demands raised in the resolutions passed at First National Convention of the ITAK in 1951[30], the 1970 memorandum on a federal constitution[31] - these contain demands for 'internal' self-determination, expressed however, in the broader language of *self-determination*. This was also the approach adopted by the Ceylon Communist Party in the mid 1940s.[32] That these documents did not refer to *'internal' self-determination* makes it clear that the phrase 'internal' self-determination is simply a new phrase used to articulate an old demand.

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[27] See Anton Balasingham, *War and Peace: Armed Struggle and Peace Efforts of Liberation Tigers* (England: Fairmax, 2004), pp. 400-408.

[28] See 'Statement of the Royal Norwegian Government at the Third Session of Peace Talks (2002)', in Edrisinha, et al, *Power-Sharing* (note 16 above), p. 646-648. It contains the following passage: "Responding to a proposal by the leadership of the LTTE, the parties agreed to explore a solution founded on the principle of internal self-determination in areas of historical habitation of the Tamil-speaking peoples, based on a federal structure within a united Sri Lanka. The parties acknowledged that the solution has to be acceptable to all communities"; *ibid*, p. 647.

[29] See R. Sampanthan, 'TNA's Thrust in Sri Lanka Parliament', available at http://tamilnation.co/conflictresolution/tamileelam/norway/040627sampanthan.htm (visited 01 Oct 2013), being a speech delivered in 2004.

[30] See 'I.T.A.K. Resolutions Passed at the First National Convention (1951)', in Edrisinha, et al, *Power-Sharing*, (note 16 above), p. 212-215. It was stated that "this first National Convention of the I.T.A.K. demands for the Tamil-speaking nation of Ceylon their inalienable right to political autonomy and calls for a plebiscite to determine the boundaries of the linguistic states in consonance with the fundamental and unchallengeable principle of self-determination"; *ibid*, p. 212.

[31] See 'Memorandum on the Constitution & Model Constitution of the Federal Republic of Ceylon (1971)', *ibid*, pp. 238-247. The demand for federalism was a demand to restore the autonomy of the Tamil people under a Federal Constitution, and this was to be on the basis of socialism, whereby the "recognition of the Right to Self-determination of the smaller Nationalities and the establishment of Federal forms of Government" had been recognized; *ibid*, p. 239.

[32] *Ibid*, p. 114. The Communist Party thereby claimed that the Tamil nationality was entitled to the right to self-determination including the right to a separate state *if* the Tamil nationality so desired. It was explained that the recognition of a *right* to independent state formation and political existence is not akin to the recognition of an *obligation* to separate. See in this regard. 'Memorandum on a Federal Constitution submitted to the Working Committee at its Request by Pieter Keuneman and A. Vaidialingam of the Ceylon Communist Party' (October 1944), *ibid*, p. 121-125. It was pointed out that: "The recognition of their right to independent political existence is necessary as it shows that there is *no qualification of their right to self-determination* and removes the fear that one nationality wishes to dominate another"; *ibid.*, p. 122 (emphasis added). What is also ironic about the concept of 'internal self-determination' is that it can be viewed as a concept that restricts the self-determination of a group, thereby contradicting the very idea of *self-determination*. This is why the above articulation of the Communist

3. Conclusion: An Alternative Discourse?

'Internal' self-determination can appear to help sub-state groups express their political desire for autonomy and power-sharing. But the phrase raises the old and perennial problems which are an inherent part of the broader concept of self-determination. In other words, the language of 'internal' self-determination reproduces, in a different form, the old contestations between majority and minority-based nationalist groups, between sovereignty and self-determination. This is a clash which is bound to take place within the framework of the modern State, and inevitably so, given that many States are multi-ethnic in character. And in such a context, invoking new and different *kinds* of self-determination becomes a futile exercise. This is why the invocation of the 'internal' self-determination claim will not make the new chapter of Tamil nationalist politics any less controversial than the previous chapters.

International law rules, principles and ideas often have the characteristics of both 'normativity' and 'concreteness'; they tell you what the principle ought to be (normativity), but they also crave for concreteness; one side tends to represent idealism, the other always pulling towards a more realist assessment. And since "neither can be preferred in a general way, international legal practice constantly pushes towards the particular case, or the technical and contextual solution."[33] And in constructing a new form of self-determination ('internal' self-determination), international lawyers seem to have thought little about this problem.

If the intention of the Tamil nationalists is to emphasize its distinct nationhood while promoting the idea of two nations and the equality of the respective peoples, then, the language of 'internal' self-determination is unnecessary, even useless. It would be far better for the Tamil nationalists to stick to their demand for a right to self-determination, and articulate what they intend to promote by this slogan within Sri Lanka.

But the use of this slogan is also a matter about political responsibility. And in reverting to the use of the broader right to self-determination (and the non-use of the unnecessarily complicating language of 'internal'/'external' self-determination), it is necessary for the Tamil nationalists within Sri Lanka to promote greater unity, cohesiveness and the idea of a united Sri Lanka. This involves taking a critical look at the political potential that the slogan *'self-determination'* holds within Sri Lanka. Or more precisely, it involves the careful use[34] of the slogan in politics, without being uncritically attached to the

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Party can be read as an accurate description of the very idea of self-determination and what it ought to mean, in principle.

[33] Marti Koskenniemi, 'International Law in a World of Ideas' in James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), p. 61.

[34] Such careful use is quintessential, given that the self-determination slogan is adopted to promote separatism by external groups. For example, the Transnational Government of Tamil Eelam (TGTE) campaigns for the "realization of the Tamils' right to self-determination" to establish a Tamil Eelam State; see 'Mission Statement' of the TGTE, available at http://www.tgte-us.org/mission.html (visited 03 Oct 2013). The TGTE-brand of Tamil nationalism remains a significant challenge to Tamil nationalism within Sri Lanka. It is also a challenge for the Sri Lankan Tamil nationalists, in terms of constructing and promoting a self-determination discourse within the country. To be sure, the gargantuan challenge confronting the Tamil nationalists who are committed to a united

self-determination discourse.[35] In short, the Tamil nationalist discourse should, while promoting the non-separatist idea of Tamil self-determination within a united Sri Lanka, be one which necessarily seeks to promote the equality of peoples, greater participatory power-sharing, and the further democratization of the Sri Lankan polity.

Postscript

One of the important developments that took place (relating to the present topic), since the presentation of the above paper in December 2012, was the release of the TNA Manifesto for the Northern Provincial Council (NPC) election in September 2013.[36] A principal feature of this document is the absence of any reference to the right to 'internal' self-determination. This is in marked contrast to the speech delivered by R. Sampanthan in May 2012. The TNA seems to have decided to abandon the slogan of 'internal' self-determination and the popular (liberal) dichotomy of 'internal' and 'external' self-determination.

In principle, this policy is to be welcomed. In the 2013 Manifesto, the TNA refers to the Tamil people's "right to self-determination" to project the demand for a "power-sharing" arrangement "based on a Federal structure" involving "devolution of power on the basis of shared sovereignty."[37] Such a political structure falls within the broader framework of a united Sri Lanka. The use of the slogan of self-determination (or, the non-use of the slogans of 'internal'/ 'external' self-determination) now falls in line with the broader policy approach adopted by different Tamil groups; such as by the Tamil National People's Front (TNPF)[38] and numerous other Tamil civil society groups and activists.[39] And given the

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Sri Lanka is to show how their promotion of self-determination is different from the promotion of self-determination by groups such as the TGTE.

[35] The abandonment of the self-determination discourse has been a policy adopted by different political formations within Sri Lanka. An interesting recent study which refers to how a discourse that avoids the language of self-determination is constructed is: Jayadeva Uyangoda. 'Minority Rights, Political Inclusion and State Reform: The Case of the Upcountry Tamil Community in Sri Lanka' in Jayadeva Uyangoda and Neloufer de Mel (eds.), *Reframing Democracy: Perspectives on the Cultures of Inclusion and Exclusion in Contemporary Sri Lanka* (Colombo: Social Scientists' Association, 2012), p. 90-151.

[36] See 'Full Text: TNA's Northern Provincial Council Election Manifesto – 2013', available at https://www.colombotelegraph.com/index.php/full-text-tnas-northern-provincial-council-election-manifesto-2013/ (visited 01 Oct 2013) [reproduced below].

[37] *Ibid.*

[38] The TNFP is uncompromising on Tamil nationhood and the right to self-determination. As its leader Gajendrakumar Ponnambalam asserts during an interview, "They [the Sinhalese] must accept that we are a distinct Nation with our own sovereignty and that we are a people with the right to self-determination. It is on this basis that negotiations can take place to work out the modalities on how the Tamils and Sinhala Nations can coexist in one country"; see Paul Newman, 'We want an Internationally backed Transitional Administration', available at http://www.theweekendleader.com/Causes/1649/return-of-eelam.html (visited 01 Oct 2013). But the TNFP differs from other parties as it is more keen in seeking the establishment of a confederal state; see 'Newly formed TNFP is for confederation', available at http://www.tamilguardian.com/tg415/p4.pdf (visited 01 Oct 2013). This further proves how the broader language of self-determination can be used to promote different political projects and mechanisms.

[39] See generally: 'Submissions made by the Tamil Civil Society at the "Exploring Peaceful Options" Conference held in Berlin, 26-27 January 2013 organised by the Berghof Foundation', available at http://www.tamilnet.com/img/publish/2013/02/Civil_Society_Submission_Berlin.pdf (visited 01 Oct 2013) [reproduced below]. For a brief, but explicit view against splitting the right to self-determination into 'internal'

resounding victory it achieved at the NPC elections on 21 September 2013 by garnering over 78% of the votes in the North, one would expect the TNA (and Tamil nationalism in general) to abandon the approach of emphasizing different kinds of self-determination (as was done at the ITAK Convention in 2012). Post-war Tamil nationalism, therefore, seems to have moved away from the popular liberal distinction of self-determination made in international law literature.

In conclusion, 'self-determination' is a people's demand and a political slogan; and in principle it can, and should, be used to articulate any political position and demand which the group concerned desires. And the meaning of the term 'self-determination' is to be understood on a contextual basis, and is not always synonymous with the idea of secession or separation; to reiterate, it is both wrong and simplistic to consider 'self-determination' to be always promoting the idea of separation. It is largely due to such an assessment that the demand for self-determination will continue to be an extremely controversial one in post-war Sri Lanka.[40]

But as this paper argues, viewed from a broader conceptual perspective, it is not a demand of peoples that should be unnecessarily salami-sliced into 'internal', 'external' or other kinds of self-determination: there are no such different rights to self-determination like different types of goods that are waiting to be picked up from a supermarket. Such terms ('internal', 'external', etc.) are, at best, used for the very limited purpose of describing a political position. And yet, as explained earlier, even without such descriptive terms, the 'purer' right to self-determination came to be used by the Tamil Federal Party and the Communist party to promote, inter alia, the idea of the equality of the Sinhala and Tamils peoples, decades ago. However controversial or cumbersome the realization of that right may be within a country, 'self-determination' remains quite simply that: *self-determination.*

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and 'external' forms, see views of K. Guruparan: 'Geneva basing on LLRC unfortunate, 13A never a starting point: Guruparan', available at http://www.tamilnet.com/art.html?catid=79&artid=36363 (visited 01 Oct 2013).

[40] At the time of writing this postscript (03 October 2013), the TNA is confronted with the challenge of explaining its Manifesto to the Supreme Court; see Chitra Weerarathne, 'TNA given fortnight to object: Petition against TNA polls manifesto', available at http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=89363 (visited 03 Oct 2013).

THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

In the matter of an Application for Special Leave to Appeal against judgment of Court of Appeal dated 08.08.12 in Case No. CA(PHC) Appeal 37/2001 and in the High Court (Kandy) of the Central Province Case No. Certi 42/97.

Solaimuthu Rasu,
Dickson Corner Colony,
Stafford Estate,
Ragala,
Halgranaoya.

Petitioner-Appellant

Vs.

S.C. Appeal No. 21/13
S.C. Spl. LA 203/12
CA/PHC/Appeal No. 37/2001
HC/CP Certi. 42/97

1. The Superintendent
   Stafford Estate,
   Ragala,
   Halgranaoya.

2. S.C.K. De Alwis
   Consultant/Plantation Expert,
   Plantation Reform Project,
   Ministry of Plantation Industries,
   Colombo 04.

3. The Attorney-General,
   Attorney-General's Department,
   Colombo 12.

Respondent-Respondents

AND NOW BETWEEN

1. The Superintendent
   Stafford Estate,
   Ragala,
   Halgranaoya.

2. S.C.K. De Alwis
Consultant/Plantation Expert,
Plantation Reform Project,
Ministry of Plantation Industries,
Colombo 04.

3. The Attorney-General,
Attorney-General's Department,
Colombo 12.

Respondents-Respondents-Petitioners

Vs.

Solaimuthy Rasu,
Dickson Corner Colony,
Stafford Estate,
Ragala,
Halgranaoya.

Petitioner -Appellant- Respondent

BEFORE : Mohan Pieris, P.C., C.J.,
Sripavan, J.
Wanasundera, P.C., J.

COUNSEL : Manohara de Silva, P.C. with Palitha Gamage for the 1st Respondent-Respondent Petitioner.

Gomin Dayasiri with Palitha Gamage and Ms. Manoli Jinadasa and Rakitha Abeygunawardena for the 2nd Respondent-Respondent-Petitioner.

Y.J.W. Wijayatillake, P.C., Solicitor General with Vikum de Abrew, S.S.C. And Yuresha Fernando, S.C. for the 3rd Respondent-Respondent-Petitioner.

M.A.Sumanthiran with Ganesharajah and Rakitha Abeysinghe for the Petitioner Appellant-Respondent.

WRITTEN SUBMISSIONS	:	By the 2nd Respondent-Respondent Petitioner on : 24th July 2013 & 23rd August 2013.
FILED	:	By the 3rd Respondent -Respondent Petitioner on : 13th March 2013 & 25th July 2013
ARGUED ON	:	11th July 2013 17th July 2013
DECIDED ON	:	26th September 2013

Mohan Pieris, PC CJ

This is an application for special leave to appeal from the judgment of the Court of Appeal dated 08.08.12 wherein the Court of Appeal set aside the judgment of the Provincial High Court dated 25.10.2000. I have read in draft the judgment of my brother Sripavan J and while I agree with his reasoning and conclusion on the matter, I would set down my own views on the question of law before us.

The instant application before us raises important questions of law and at the inception of the judgment it is pertinent to observe that the Respondent-Respondent-Petitioners (hereinafter called and referred to as "Petitioners") obtained special leave from this Court on the following two questions -

(i) Did the Court of Appeal err by deciding that the Provincial High Court has jurisdiction to hear cases where dispossession or encroachment or alienation of State Lands is/are in issue?

(ii) Did the Court of Appeal err by failing to consider whether there is a right of appeal against the Order of the High Court dismissing the application *in limine* for want of jurisdiction?

Be that as it may, when this matter came up before us on 17.07.13, all Counsel agreed that they would make their submissions only on the first question of law and accordingly this Court proceeds to make its determination on the first question.

The Facts

The 2nd Petitioner - the competent authority initiated proceedings to recover a State Land in respect of an illegal occupation in the Magistrate's Court of Nuwara Eliya in terms of the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979. The Petitioner-Appellant-Respondent (hereinafter referred to as the "Respondent") filed an application in the High Court of the Province holden in Kandy praying for a writ of certiorari to quash the quit notice filed in the case. The 2nd Petitioner filed statement of objections and affidavit on 27.02.96 and raised the following preliminary objections.

(a) The said land is a State Land.

(b) The second Petitioner, as the duly designated competent authority in terms of the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 issued quit notice dated 7.10.1997 to the Respondent by virtue of Section 3 of the said Act;

(c) Thus the Respondent has no legal basis to invoke the writ jurisdiction of the Provincial High Court;

(d) The High Court of the Province stands denuded of jurisdiction to hear and determine the matter as the subject of the action pertains to State lands and the subject does not fall within the Provincial Council List - namely List I.

The Provincial High Court, after hearing the oral submissions and written submissions of the parties, by Order dated 17.11.2000, held that it had no jurisdiction to hear and determine the application and upheld the preliminary objection.

Thereupon the Respondent preferred an appeal dated 22.11.2000 to the Court of Appeal on the basis that the reasoning of the Learned High Court judge was erroneous vis-à-vis the provisions of the Constitution of the Democratic Socialist Republic of Sri Lanka.

It was the contention of the Respondent that the Provincial High Court had misdirected itself in holding that the Court was devoid of jurisdiction to inquire into and determine the application for writs in respect of notices filed under the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 as amended. By its judgment dated 08.08.12 the Court of Appeal states, inter alia, as follows :

(i) The subject of State Land is included in Appendix II of the "Provincial Council List" (List I) to the 9th Schedule to the 13th Amendment to the Constitution;

(ii) Therefore State Land becomes the subject of the Provincial Council List even though State Land continues to vest in the Republic;

(iii) Therefore, the High Court of the Provinces has the power to hear and determine applications for prerogative remedies filed to quash quit notices issued under the State Lands (Recovery of Possession) Act No 7 of 1979 as amended.

The Court of Appeal in arriving at its conclusion placed reliance on the Determination of this Court dated 10.02.2013 on the Bill titled "**Land Ownership** "(S.D. No. 26/2003 - 36/2003). The Court of Appeal has also alluded to the judgment of the Supreme Court in **Vasudeva Nanayakkara v Choksy and Others (John Keells case)** {2008} 1 Sri.LR 134 wherein it was stated - "a precondition laid down in paragraph 1:3 is that an alienation of land 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. The advice would be of the Board of Ministers communicated through the Governor, the Board of Ministers being responsible in this regard to the Provincial Council." In the end after having stated that it was bound by the principles laid down in the judicial decisions, the Court of Appeal concluded that State Land becomes the subject of the Provincial Council.

It is from the said judgement of the Court of Appeal that the petitioners have preferred this appeal and submissions of Counsel were addressed to us, as I have stated at the beginning of this judgment, on the question of law-

> *Did the Court of Appeal err by deciding that the Provincial High Court has jurisdiction to hear cases where dispossession or encroachment or alienation of State lands is/are in issue?*

It remains now for this Court to engage in an analysis of the Constitutional provisions and the judicial precedents to determine whether the Court of Appeal came to the correct finding when it held that the Provincial High Court could exercise writ jurisdiction in respect of quit notices issued under the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 as amended.

The resolution of this question necessarily involves an examination of the nature and content of the subject matter of State Land that lies with a Province by virtue of the 13th Amendment to the Constitution and it is quite convenient to begin this examination by looking at the apportionment of land as delineated by the terms of the Supreme Law of the country that are found in the 13th Amendment. The 13th Amendment to the Constitution refers to State Land and Land in two different and distinct places. In my view the entirety of State Land is referred to in List II (Reserved List) and it is only from this germinal

origin that the Republic could assign to the Provincial Councils land for whatever purposes which are deemed appropriate. It is therefore axiomatic that the greater includes the lesser (Omne majus continent in se minus) and having regard to the fact that in a unitary state of government no cession of dominium takes place, **the Centre has not ceded its dominium over State Lands to the Provincial Councils except in some limited circumstances as would appear later in the judgment.**

It is only from a reserve or pool or a mass that a portion could be translocated and if the entirety of state land is not assigned but a portion with conditions, these are the attendant circumstances that would demonstrate an unequivocal intention not to cede what belongs to the Republic. One would be driven to the conclusion that the subject matter in its entirety would belong to the dominant owner of property.

If there is a reservation in List II, the inescapable inference follows that what is reserved to the Republic could only be the larger entirety out of which the 13th Amendment chose to assign some portions of State Land to the Provincial Councils and the pertinent question before us is the parameters with which of what is entrusted to the Provinces. All this has to be gathered from the settlement that the 13th amendment chose to make in 1987 and one cannot resile from their

explicit terms of the 13th Amendment and there must be deference to that intendment. If the Constitution contains provisions which impose restraints on institutions wielding power, there cannot be derogations from such limitations in the name of a liberal approach. It must be remembered that a Constitution is a totally different kind of enactment than ordinary statute. It is an organic instrument defining and regulating the power structure and power relationship; it embodies the hopes and aspirations of the people; it projects certain basic values and it sets out objectives and goals. I now proceed to indulge into an inquiry as to the power structure and power relationship as delineated in the 13th Amendment to the Constitution.

Teleological as it may appear, one has to go from List II to List I. As the Counsel for the 2nd Petitioner submitted, Land in Sri Lanka consists of lands belonging to individuals, corporate bodies, unincorporated bodies, charitable, social institutions, local authorities, temples, kovils, churches, mosques and trusts etc. The bulk of the land is vested in the state as state lands and are held by the state and/or its agencies.

State can make grants absolutely and more often it does so provisionally with conditions attached or by way of leases, permits, licenses as per provisions governing disposition of state lands. Such conveyances can be made by the State to any person/organization

entitled to hold land including Provincial Councils. All this partakes of the dominium that the State enjoys in having ownership and its attendant incidents of ownership such as its use and consistent with these characteristics it is pertinent to observe that the Constitution unequivocally in List II and in Appendix II has placed State Lands with the Centre, **"Except to extent specified in item 18 of List I"** [quoted from List II]. **Thus the Constitution as far as State Land is concerned traverses from List II via List I to final destination Appendix II.**

List II and List I

In List II (Reserved) it reads as follows :

> ***"State Lands and Foreshore except to the extent specified in item 18 of List I."***

In List I (Provincial Council) appearing in item 18 the sentence reads as follows :

> ***"Land - Land that is to say, rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement to the extent set out in Appendix II"***

A perusal of the above two provisions unequivocally points to the fact that State Lands as referred to in List II embraces the comprehensive entirety of the corpus of State Land out of what is carved out Land. It is not just land but land that is to say, rights in and over land, land settlement, land tenure, transfer and alienation

of land, land use, land settlement and land improvement to the extent set out in Appendix II"

List II connotes the greater mass of State Land that includes List 1 as the lesser. But what has been given as land for purposes to be gathered from Appendix II is itself circumscribed by the qualification - **that is to say...** One begins from the larger namely List II out of which List I originates. What is allocated remains embedded in item 18 of List I which demarcates the extent delivered to Provincial Councils.

As contended by the Learned Counsel for the 2nd Petitioner, the use of the phrase "that is to say" carries with it the notion that what is allocated as land is all that is specified in item 18 and nothing more. Having set out a narrow scope of the corpus of land in item 18, the Constitution in the same breath answers the question as to what extent land powers have been extended to Provincial Councils. The next phrase delineates and demarcates the extension - " rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement to the extent set out in Appendix II".

Thus the Constitution, in item 18 of List I circumscribes the land powers in that there are two terminals between which one encompasses the land given to provincial councils. The first terminal,

namely the use of the phrase "that is to say" indicates the limited powers conferred on the Provincial Councils and the second terminal "to the extent set out in Appendix II" indicates as to how far Provincial Councils can go in exercising the land powers that have been bestowed namely - "rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement."

I now proceed to examine Appendix II which is an annexe to List 1.

We have seen that it was the intention of the framers of the Constitution to give an exalted position to State Lands in List II and leave it in the hands of the Republic and deliver a specified portion of State Lands to the Provinces namely -" rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement." and call it "Land" in List I . The lesser nomenclature "Land" in List I connotes the subsidiarity of the role that lands assigned to Provincial Councils play and it becomes patently clear upon a reading of Appendix II which brings out the purposes for which land has been assigned to Provincial Councils.

Appendix II

Appendix II begins with an unequivocal opener -"State Land shall continue to vest in the Republic and may be disposed of, in accordance with Article 33 (d) and written laws governing the matter. "This peremptory declaration is a pointer to the fact that State Land belongs to the Republic and not to a Province. The notion of disposition of State Land in accordance with Article 33 (d) and written laws governing the matter establishes beyond doubt that *dominium* over all "State Land" lies with the Republic and not with the Provincial Councils. In fact the relevant portion of Article 33 (d) would read as follows -

> "33 (d) - to keep the Public Seal of the Republic, and to make and execute under the Public Seal, the acts of appointment of the Prime Minister and other Ministers of the Cabinet of Ministers, the Chief Justice and other Judges of the Supreme Court, such grounds and disposition of lands and immovable property listed in the Republic as he is by law required or empowered to do, and use the Public Seal for sending all this whatsoever that shall pass the Seal."

Limited Extents of Powers Over Lands

Having set out the overarching dominium of State Lands with the Centre, Appendix II sets out special provisions which would qualify as further limitations on State Lands assigned to Provincial Councils. These special provisions apart from demonstrating the limited

extents of Provincial Councils over Land also display unmistakeably that State Land continue to be a subject of the Centre.

Having grafted the brooding presence of the Republic on all State Lands in List II, List I and then the Appendix II and subject to these pervasive provisions, State Land is declared to be a Provincial Council Subject in the second paragraph of Appendix II but that declaration is only explanatory of the purposes for which the Provincial Councils have been assigned with lands. Those purposes are evident in the special provisions 1.1, 1.2 and 1.3 of Appendix II.

These special provisions also strengthen the position that State Lands continue to be a subject located in the Centre.

Special Provision 1.1 - State Land required by the Government of Sri Lanka

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 **consult** the relevant Provincial Council with regard to the utilisation of such land in respect of such subject.
The consultation specified in this special provision would not mean that the Government has to obtain the concurrence of the relevant Provincial Council. State Land continues to vest in the Republic and if there is a law as defined in Article 170 of the Constitution that governs the matter it is open to the Government to make use of the

State Land in the province of the purposes of a reserved or concurrent subject. Consultation would mean conference between the Government and the Provincial Council to enable them to reach some kind of agreement –**S.P.Gupta v Union of India A.I.R 1982 SC 140.** Such consultation would not detract from the fact that that particular State Land which the government requires continues to vest in the Republic.

Special Provision 1.2

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 utilize such State Land, in accordance with the laws and statutes governing the matter.**

We saw in item 18 of List 1 that the Provincial Councils have "rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement." These rights, as item 18 of List I itself states, are subject to the special provision 1.2 of Appendix II.

The resulting position, on a harmonious interpretation of the Constitution would be that when the State makes 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 utilize such State Land, in accordance with the laws and statutes governing the matter.

In other words, Provincial Councils in exercising "rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement to the extent set out in Appendix II (conferred by List I) are limited to **administering, controlling and utilizing such State Lands as are given to them. In terms of Article 1.2 State Land is made available to the Provincial Council by the Government. In the background of this constitutional arrangement it defies logic and reason to conclude that State Lands is a Provincial Council Subject in the absence of a total subjection of State Lands to the domain of Provincial Councils.**

A perusal of the special provision 1.3 also strengthens the view that State Lands do not lie with Provincial Councils.

Special Provision 1.3

Alienation or disposition of the State Land within a Province to any citizen or to any organization shall be by the President, on the advice of the relevant Provincial Council in accordance with the laws governing the matter.

The provision once again emphasizes the overarching position inherent in the 13th Amendment to the Constitution that State Land will continue to vest in the Republic and may be disposed of by the

President in accordance with Article 33 (d) and written laws governing the matter. The use of the definite article "the" before the word State Land in this provision conclusively proves that the state land referred to in this provision is confined to the land made available to the Provincial Council for utilization for a Provincial Council subject by virtue of 1.2. If after having made available to a Provincial Council a state land for use, the government decides to dispose of this land to a citizen or organization, the government can take back the land but an element of advice has been introduced to facilitate such alienation or disposition. In the same way the Provincial Council too can initiate advice for the purpose of persuading the government to alienate or dispose of the land made available for a worthy cause. It has to be noted that the absence of the word "only" before the word advice indicates the non-binding nature of the advice the Provincial Council proffers. Thus these inbuilt limitations on the part of the Provincial Council establish beyond scintilla of doubt that the Centre continues to have State Lands as its subject and it does not fall within the province of Provincial Councils.

This Court observes that if the advice of the Provincial Council is non binding, the power of the President to alienate or dispose of State Land in terms of Article 33 (d) of the Constitution and other written laws remains unfettered. In the circumstances I cannot but disagree with the erroneous proposition of the law which this Court expressed in the determination on **the Land Ownership Bill (SD Nos. 26 - 36/2003)** that the power of disposition by the President

in terms of Article 33 (d) has been qualified by 1.3 of Appendix II. This view expressed in that determination is patently in error and unacceptable in view of the overall scheme of the 13th amendment which I have discussed herein. In the same breath the observations of the Supreme Court in **Vasudeva Nanayakkara v Choksy and Others (John Keells case)** {2008} 1 Sri.LR 134 that "a precondition laid down in paragraph 1:3 is that an alienation of land 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" is also not supportable having regard to the reasoning I have adopted in the consideration of this all important question of Law. This reason is a non sequitur if one were to hold the advice of the Provincial Council binding having regard to the absence of the word "only" in 1.3 and the inextricable nexus between 1.2 and 1.3.

It is unfortunate that the Court of Appeal fell into the cardinal error of holding that the Provincial Council has jurisdiction to hear and determine applications for discretionary remedies in respect of quit notices under the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 as amended. This wrong reasoning of the Court of Appeal is indubitably due to the unsatisfactory treatment of the provisions of the 13th Amendment that resulted in patently unacceptable precedents that need a revisit in the light of the fact neither Counsel nor the Bench in the cases cited above has subjected the relevant provisions to careful scrutiny.

Be that as it may, I would observe that the national policy on all subjects and functions which include State Lands in terms of List II is also dispositive of the question within whose competence State Lands lie. Paragraph 3 of Appendix II which provides for the establishment of a National Land Commission by the Government declares in 3.1 that the National Land Commission will be responsible for the formulation of national policy with regard to the use of State Land. It is apparent that Provincial Councils will have to be guided by the directions issued by the National Land Commission and this too reinforces the contention that State Lands lie with the Centre and not with Provincial Councils

Further there are other provisions that indicate that State Lands lie within the legislative competence of the Centre. Article 154 (G) (7) of the Constitution provides that a Provincial Council has no power to make statutes on any matter set out in List II (Reserved List). One of the matters referred to in that List is "State Lands and Foreshore" except to the extent specified in item 18 of List I. Thus, it is within the legislative competence of Parliament to enact laws in respect of "State Lands" bypassing the powers assigned with Provincial Council, on the premise that the subjects and functions not specified in List I and List II fall within the domain of the Reserved List. The Provincial Councils are also expressly debarred from enacting statutes on matters coming within the purview of the Reserved List.

All these features I have adumbrated above features redolent of the unitary nature of the state. Sharvananda C.J in ***Re The Thirteenth Amendment to the Constitution*** (1987) 2 Sri. LR 312 at p 319 referred to the two essential qualities of a Unitary State as (1) the supremacy of the Central Parliament and (2) the absence of subsidiary sovereign bodies. He analyzed the provisions of the 13th Amendment Bill in order to find out whether the Provincial Council system proposed in the Bills was contrary to these two principles. He referred to the essential qualities of a federal state and compared them with those of the unitary state. It is pertinent to recall what he stated in the judgment.

> *The term "Unitary" in Article 2 is used in contradistinction to the term "Federal" which means an association of semiautonomous units with the distribution of sovereign powers between the units and the Centre. In a Unitary State the national government is legally supreme over all other levels. The essence of a Unitary State is that this sovereignty is undivided - in other words, that the powers of the Central Government power are unrestricted. The two essential qualities of a Unitary State are (1) the supremacy of the Central Parliament and (2) the absence of subsidiary sovereign bodies. It does not mean the essence of subsidiary lawmaking bodies, but it does mean that they may exist and can be abolished at the discretion of the central authority. It does, therefore, mean that by no stretch of meaning of words can subsidiary bodies be called*

subsidiary sovereign bodies and finally, it means that there is no possibility of the Central and the other authorities come into conflicts with which the Central Government has not the legal power to cope.....

On the other, in a Federal State the field of government is divided between the Federal and State governments which are not subordinate one to another, but are co-ordinate and independent within the sphere allotted to them. The existence of co-ordinate authorities independent of each other is the gist of the federal principle. The Federal Government is sovereign in some matters and the State governments are sovereign in others. Each within its own sphere exercises its powers without control from the other. Neither is subordinate to the other. It is this feature which distinguishes a Federal from a Unitary Constitution, in the latter sovereignty rests only with the Central Government.

It is my considered view that the reasoning I have adopted having regard to structure of power sharing accords with the gladsome jurisprudence set out as above by Sharvannda C.J.

Having adopted the above analysis and in light of the structure and scheme of the constitutional settlement in the 13th amendment to the Constitution, the irresistible conclusion is that Provincial Council subject matter in relation to State Lands would only mean that the 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. As I pointed out above, if and when a National Land Commission is in place, the guidelines formulated by such Commission would govern the power of the Provincial Councils over the subject matter as interpreted in this judgement in relation to State Lands.

When one transposes this interpretation on the phrase "any matter set out in the Provincial Council List" that is determinative on the ingredient necessary to issue a writ in the Provincial High Court in relation to State Land, the vital precondition which is found in Article 154P 4 (b) of the Constitution is sadly lacking in the instant case. In terms of that Article, a Provincial Council is empowered to issue prerogative remedies, according to law, only on the following grounds -

(a) There must be a person within the province who must have exercised power under
(b) Any law or
(c) Any statute made by the Provincial Council
(d) In respect of any matter set out in the Provincial Council List.

No doubt the Competent authority in the instant exercised his power of issuing a quit notice under a law namely State Lands (Recovery of Possession) Act as amended. But was it in respect of any matter set

out in the Provincial Council List? Certainly the answer to the question must respond to the qualifications contained in 1.2 of Appendix II namely administering, controlling and utilizing a State Land made available to a Provincial Council. The power exercised must have been in respect of these activities. The act of the Competent authority in issuing a quit notice for ejectment does not fall within the extents of matters specified in the Provincial Council List and therefore the Provincial High Court would have no jurisdiction to exercise writ jurisdiction in respect of quit notices issued under State Lands (Recovery of Possession) Act as amended.

In the circumstances the Court of Appeal erred in law in holding that the Provincial High Court of Kandy had jurisdiction to issue a writ of certiorari in respect of a quit notice issued under State Lands (Recovery of Possession) Act as amended. The order made by the Court of Appeal dated 08.08.12 is set aside and the order of the Provincial High Court of Kandy dated 25.10.2000 is affirmed.

The question of law considered by this Court is thus answered in the affirmative.

Mohan Pieris PC
Chief Justice

SRIPAVAN, J.

The Respondent-Respondent-Petitioners(hereinafter called and referred to as the "Petitioners") sought, special leave to appeal against the judgment of the Court of Appeal dated 08-08-12 whereby the Court of Appeal set aside the judgment of the Provincial High Court dated 25-10-2000, holden at Kandy.

On 31.01.13 this Court granted Special Leave to Appeal on the following two questions :-

(i) Did the Court of Appeal err by deciding that the Provincial High Court has jurisdiction to hear cases where dispossession or encroachment or alienation of State Lands is/are in issue?

(ii) Did the Court of Appeal err by failing to consider whether there is a right of appeal against the order of the High Court dismissing the application in limine for want of jurisdiction?

However, at the hearing before us on 17.07.13, all Counsel agreed to confine their submissions only on the first question referred to above; thus, this Court did not consider the second question in this judgment.

The facts in this application were not disputed by Counsel. It would appear that the Petitioner-Appellant-Respondent (hereinafter called and referred to as the "Respondent") instituted an action in the Provincial High Court of Kandy seeking, inter-alia -

(a) A Writ of Certiorari to quash a quit notice issued on him by the second Petitioner in terms of the State Lands (Recovery of Possession) Act No.7 of 1979 as amended ,

(b) A Writ of Prohibition, prohibiting the first and the second Petitioners from proceeding any further with the Writ of Execution evicting him from the land morefully described in the schedule to the petition; and

(c) A Writ of Mandamus directing the First and the Second Petitioners not to interfere with his lawful possession of the said land.

The Petitioners filed their Statement of Objections on 27.02.96 and took up the position that :-

(a) the land in question is "State Land";

(b) the "quit notice" dated 07.10.97 was issued by the designated Competent Authority in terms of Section 3 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended;

(c) the Respondent has no legal basis to invoke the writ jurisdiction of the Provincial High Court in view of the facts of the case; and

(d) in any event, the High Court of the Province lacks jurisdiction to hear and determine the matter as it relates to a "State Land".

The jurisdictional issue with regard to the powers of a Provincial High Court to grant a Writ of Certiorari to quash the quit notice issued under the provisions of the State Lands (Recovery of Possession) Act was taken up as a preliminary matter. The Provincial High Court after hearing oral and written submissions of the parties, by its order dated 25.10.2000 held that the Provincial High Court had no jurisdiction to entertain the said application and dismissed the same. The Respondent

thereafter on 22.11.2000 preferred an appeal to the Court of Appeal on the basis that the Provincial High Court had misdirected itself by holding that the Court lacks jurisdiction to inquire into and to make a determination relating to notices filed under the provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended. The Court of Appeal delivered its judgment on 08.08.12 holding, inter-alia, as follows :-

(i) that the subject of "State Land" is included in Appendix II of the "Provincial Council List" (List 1) to the 9th Schedule to the 13th Amendment to the Constitution.

(ii) that therefore "State Land" becomes a subject of the Provincial Council List even though State Land continue to vest in the Republic.

(iii) that therefore, the High Court of the Provinces have jurisdiction to hear and determine Writ Applications filed to quash the quit notice issued under the provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended.

It must be noted that the demarcation between the Centre and the Provinces with regard to "State Land" must be clearly identified. As observed by Fernando, J. in the Determination of the Agrarian Services .(Amendment) Bill [S.C. Special Determination 2/91 and 4/91], it is not possible to decide whether a matter is a List 1 or List 111 subject by merely looking at the headings in those lists. The headings may not be comprehensive and the descriptions which follow do not

purport to be all inclusive definitions of the headings. Exclusions may be set out in the detailed descriptions which again may indicate that the headings are not comprehensive. As far as possible, an attempt must be made to reconcile entries in Lists I ,II and III of the Constitution and the Court must avoid attributing any conflict between the powers of the Centre and the Provinces.

Therefore it becomes necessary to examine and scrutinize the relevant Articles contained in the Constitution in relation to "Land" and "State Land" . Article 154(G)(1) grants power to every Provincial Council to make statutes applicable to the Province for which it is established with regard to any matter set out in List 1 of the Ninth Schedule (hereinafter referred to as the "Provincial Council List"). On an examination of the Provincial Council List, it would appear at item 18 as follows :

> *"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"*

Appendix II sets out as follows:

Land and Land Settlement

"State Land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing this matter.

Subject as aforesaid, land shall be a Provincial Council Subject, subject to the following special provisions:-

1. State land -

1.1 *State Land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilized by the Government in accordance with the laws governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilization of such land in respect of such subject.*

1.2 *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 utilize such State land, in accordance with the laws and statutes governing the matter.*

1.3 *Alienation or disposition of the State Land within a Province to any citizen or to any organization shall be by the President on the advice of the relevant Provincial Council, in accordance with the laws governing the matter."* (emphasis added)

Thus, it is important to bear in mind that "land" is a Provincial Council subject only to the extent set out in Appendix 1I. This Appendix imposes the restriction on the land powers given to Provincial Councils. The Constitutional limitations imposed by the legislature shows that in the exercise of its legislative powers, no exclusive power is vested in the Provincial Councils with regard to the subject of "land". The restrictions and/or limitations in respect of the utilization of "State Land" as stated in Appendix II may be summarized as follows:-

1. In terms of 1.1 above, the Government of Sri Lanka can utilize State Land "in respect of a reserved or concurrent subject." However, this could only be done in compliance with the laws passed by Parliament and in consultation with the relevant Provincial Council, so that the Government and the Provincial Council reach consensus with regard to the use of such "State Land".

2. According to 1.2 above, it is important to note that a Provincial Council can utilize "State Land" only upon it being made available to it by the Government. It therefore implies that a Provincial Council cannot appropriate to itself without the government making "State Land" available to such Council. Such "State Land" can be made available by the Government only in respect of a Provincial Council subject. The only power casts upon the Provincial Council is to administer, control and utilize such "State Land" in accordance with the laws passed by Parliament and the statutes made by the Provincial Council.(emphasis added)

3. Paragraph 1.3 above, deals with alienation or disposition of "State Land" within a province upon an advice made by such Provincial Council. It cannot be construed that the advice tendered by the Provincial Council binds the

President. However it must be emphasized that if the President after an opinion or advice given, decides to dispose of the State Land, such disposal has to be in compliance with the laws enacted by Parliament.

Thus, with regard to the administration, control and utilization of "State Land", the legislative power of a Provincial Council is confined and restricted to the extent set out in paragraph 2 above. The Provincial Councils do not therefore exercise sovereign legislative powers and are only subsidiary bodies, exercising limited legislative powers subordinate to that of Parliament.

At this stage, it may be relevant to quote the observation made by Sharvananda C.J. *Re The Thirteenth Amendment to the Constitution* [(1987) 2 S.L.R. 312 at 320].

> *"The question that arises is whether the 13th Amendment Bill under consideration creates institutions of government which are supreme, independent and not subordinate within their defined spheres. Application of this test demonstrates that both in respect of the exercise of its legislative powers and in respect of exercise of executive powers no exclusive or independent power is vested in the Provincial Councils. The Parliament and President have ultimate control over them and remain supreme."*

Shirani A. Bandaranayake, J. too in the Determination of the Bill titled "Land Ownership" [S.D. No. 26/2003 – 36/2003 Determination dated 10th December 2003] noted as follows:-

> *"With the passing of the Thirteenth Amendment to the Constitution, such Constitutional power vested with the President was qualified by virtue of paragraph 1:3 of Appendix* II *to the Ninth Schedule to the Constitution. By such provision the authority for alienation or disposition of the State land within a province to any citizen or to any organization was yet vested with the President..... . 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."*

Learned President's Counsel for the First Petitioner drew the attention of Court to item 9:1 of the Provincial Council list under the heading of "Agriculture and Agrarian Services" which reads thus:-

> Agriculture, including agricultural extension, promotion and education for provincial purposes (other than inter-provincial irrigation and land settlement schemes, State Land and plantation agriculture)

Here again, the subject relating to "State Land and plantation agriculture" is excluded from the legislative competence of Provincial Councils.

Article 154 (G)(7) further provides that a Provincial Council has no power to make statutes on any matter set out in List II of the Ninth Schedule (hereinafter referred to as the "Reserved List"). One of the matters referred to in the Reserved List is "State Lands and Foreshore, except to the extent specified in Item 18 of List I". Thus, it is competent for the Centre to enact laws in respect of "State Lands" avoiding the powers given to the Provincial Councils as specified in item 18 of the Provincial Council List, on the basis that the subjects and functions not specified in List I (Provincial Council List) and List III fall within the ambit of the Reserved List.

In view of the foregoing analysis, and considering the true nature and character of the legislative powers given to Provincial Councils one could safely conclude that "Provincial Councils can only make statutes to administer, control and utilize State Land, if such State Land is made available to the Provincial Council by the Government for a Provincial Council subject.

It must be emphasized that Appendix II in item 3:4 provides that the powers of the Provincial Councils shall be exercised having due regard to the national policy formulated by The National Land Commission. The National Land Commission which includes representatives of all Provincial Councils would be responsible for the formulation of the National Policy with regard to the use of State Lands.

There is nothing to indicate that "State Land" which is the subject matter of this application and in respect of which a quit notice was issued by the second petitioner was a land, made available to the relevant Provincial Council by the Government for a Provincial Council subject. Hence, the said land is not under the administration and control of the relevant Provincial Council and no statute could have possibly been passed by the said Provincial Council with regard to the utilization of such Land. Therefore, this land does not fall within the ambit of any matters set out in the Provincial Council list.

Even if the Government makes available State Land to a Provincial Council, the title to the land still vests with the State. In such a situation, one has to consider whether recovery of possession of State Land is a Provincial Council subject.

The jurisdiction conferred upon on Provincial High Court with regard to the issue of writs is contained in Article 154P 4(b) of the Constitution. According to the said Article, a Provincial High Court shall have jurisdiction to issue, according to law:-

> *Order in the nature of Writs of Certiorari, prohibition, procedendo, mandamus and quo-warranto against any persons exercising, within the Province, any power under:-*
>
> *(I) any law; or*
>
> *(II) any statue made by the Provincial Council established for that Province;*
>
> *in respect of <u>any matter set out in the Provincial Council List</u>*
>
> (emphasis added)

There is much significance in the use of the words "any matter set out in the Provincial Council List." The fundamental principle of constitutional construction is to give effect to the intent of the framers and of the people adopting it. Therefore, it is the paramount duty of this Court to apply the words as used in the Constitution and construe them within its four corners.

In *Weragama* Vs. *Eksath Lanka Wathu Kamkaru Samithiya & Others* (1994) 1 S.L.R. 293, this Court opined that a Provincial High Court could in fact entertain matters that are strictly within the purview of the devolution of powers with regard to the subject matter as set out in the Provincial Council List.

Fernando, J. at page 298 said *"As to the intention of Parliament in adopting the Thirteenth Amendment, this Court cannot attribute an intention except that which appears from the words used by Parliament. I find nothing suggesting a general intention of devolving power to the Provinces; insofar as the three Lists are concerned, only what was specifically mentioned was devolved, and "all subjects and functions not specified in List I or List II" were reserved – thus contradicting any such general intentions.... There was nothing more than a re-arrangement of the jurisdictions of the judiciary."* If powers relating to Recovery/dispossession of State Lands, encroachment or alienation of State Lands are not in the Provincial Council List, matters relating to them cannot be gone into by a High Court of the Province.

Accordingly, I hold that the Court of Appeal erred in holding that the Provincial High Court of Kandy had jurisdiction to issue a Writ of Certiorari, in respect of a quit notice issued under the State Lands (Recovery of Possession) Act The order made by the Court of Appeal dated 08.08.12 is set aside and the order of the Provincial High Court of Kandy dated 25.10.2000 is affirmed.

The question of law, considered by this Court is thus answered in the affirmative.

JUDGE OF THE SUPREME COURT

Wanasundera, PC.J.

An application was filed for special leave to appeal from the impugned judgment of the Court of Appeal dated 08-08.12 wherein the Court of Appeal set aside the judgment dated 25th October 2000 of the Provincial High Court. I have had the benefit of reading in draft the erudite judgments of my brothers, His Lordship the Chief Justice and His Lordship Justice Sripavan with both of which I agree. I would also, however, set down in brief my own views on the single important question of law which this Court decided and that is whether the Court of Appeal erred in deciding that the Provincial High Court had jurisdiction to hear cases where disposition or encroachment or alienations of state lands is/are in issue or where there is a challenge to a quit notice issued in respect of a State Land.

At this point may I quote Lord Denning in Magor and St. Nallons RDC. Vs. Newport Corporation (1950) 2 AER 1226, 1236 CA with regard to the onus of a Judge, "We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis." As such, I am strongly of the view that the interpretation and analysis the provisions in the Thirteenth Amendment to the Constitution should never pave way to destruction of any sort.

I would refrain from going into the facts in the case as they have been dealt with exhaustively in the judgments of my brothers. It is abundantly clear that land in item 18 cannot include the dominium over State Land except the powers given over State Land in terms of the Constitution and any other powers given by virtue of any enactment. The devolution of State Land to the Provinces undoubtedly is subject to state land continuing to be vested in the Republic. There is no doubt that the President's power to make

grants and dispositions according to existing law remains unfettered. The interpretation in my view to be given to all the provisions governing this matter as set out in the judgments of my brothers is that the exercise of existing rights of ownership of state lands is unaffected but restricted to the limits of the powers given to Provincial Councils which must be exercised having regard to the national policy, that is, to be formulated by the National Land Commission.

This Court's determination in the Land Ownership Bill (S.D. No. 26/2003 – 36/2003) ignores everything else in the 9th schedule and errs in its interpretation of Appendix II 1.2. The resultant position is that the centre would cede its seisin over state lands to the Provincial Councils except in some limited circumstances as set out in the judgments of my brothers. It is observed that the draftsmen of our Constitution have given List II primacy leaving state lands in the safe dominium of the Republic and only delivered a specified segments of state lands in well delineated situations namely - "rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement" and this is what is described as land in list I. As His Lordship the Chief Justice has adumbrated ~~in his judgment, item~~ 8 of List I is itself qualified by paragraph 1.2 of Appendix II namely 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 utilize such State land, in accordance with the laws and statutes governing the matter.**

This limited cession of state lands which must be for purposes of **administration, control and utilization of. . State lands made available by the government to a provincial council subject** must be understood in the context of the two important features of a unitary state when examining the matters in issue.

His Lordship Chief Justice Sharvananda in ***The Thirteenth Amendment to the Constitution*** (1987) 2 Sri. LR 312 went on to explain the term unitary in contrast with the term Federal. His Lordship went on to identify the supremacy of Central Parliament and the absence of subsidiary sovereign bodies as two essential qualities in an unitary state and that subsidiary bodies should never be equated or treated as being subsidiary sovereign bodies and that it finally means that there was no possibility of a conflict arising between the Centre and other authorities under a unitary Constitution. The Federal bodies are co-ordinate and independent of each other. In other words, a federal body can exercise its own powers within its jurisdiction without control from the other. In a Unitary state sovereignty of legislative power rests only with the centre.

I am also mindful of Mark Fernando J's observations in **Weragama vs Eksath Lanka Wathu Kamkaru Samitiya and others (1994) 4 Sri.LR 293** when he went on to observe that as to the intention of Parliament in adopting the 13th Amendment, the Court cannot attribute the intention except that which appears from the words used by Parliament and that all subjects and functions not specified in list 1 or list II were reserved thereby contradicting any such general intention to do otherwise. It is also my view that if powers relating to recovery/disposition of state lands, encroachment or alienation of state lands are not in the Provincial Council list, any review pertaining to such matters cannot be gone into by the Provincial High Court.

Judge of the Supreme Court

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