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A CRITICAL ANALYSIS OF THE *SOLAIMUTHU RASU* DECISION

THE JUDICIAL MIND & JUDICIAL MATTERS IN SRI LANKA

LAW & SOCIETY TRUST

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

The *LST Review* in this Issue, publishes two analytical essays on the functioning of Sri Lanka's judiciary with the common theme being the examination of state power and the role of the judiciary thereto.

The first matter in focus is the 2013 decision of the Supreme Court in *Solaimuthu Rasu* (SC (Spl) Leave to Appeal Application No 21/2013, SCM 26-09-2013). This ruling was issued in response to an ostensibly innocuous jurisdictional dispute concerning the authority 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 'elevation' of a jurisdictional question to a veritable constitutional conundrum emerged through the Court's cavalier treatment of the 13th Amendment in this case. The judicial position as articulated by the Chief Justice was that in instances where State land is required by the Central Government in a Province, 'consultation' between the Centre and the Province 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.

Further the term 'advice' in 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) was constructed as not to imply binding advice. This construction was based on interpretation of the omission of the word 'only' before the words '...on the advice of the relevant Provincial Council....'

Against this background, the Chief Justice's emphatic pronouncements on the 'unitary nature of the state' contrasted somewhat oddly with the fact that precedent of the Supreme Court itself on the nature of power given to Provincial Councils by the 13th Amendment in previous decisions had not called the unitary nature of the state into question at any point.

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 have the legislative competence to administer, control and utilise state land were all accepted provisions underlying the thrust of the 13th Amendment. There was little controversy regarding this.

In a contribution to this Issue, ***Kirsty Anantharajah*** looks at the Court's jurisprudential constructions in the *Solaimuthu Rasu* case. She critiques the Court's curt dismissal of the constitutional creation of a consultative process, through the manner and form requirements imposed by the 13th Amendment in regard to the exercise of the Republic's power of alienation or disposition of state land. As underscored by her, this understanding had been premised through the 13th Amendment on the acknowledgement that, despite land being vested in the Republic, the Provincial Councils maintain a constitutionally conferred interest.

> *The Justices appear to adopt a blunt approach in interpreting the nuances of the 13th Amendment and in doing so, fail to grasp the intricacies of the devolved structure envisioned by the framers.*

Her analysis of the Court's constructions lays bare several challenges to the Rule of Law: in some instances, there are inconsistent and selective applications of principles of constitutional interpretation and the opinions display a disconcerting disregard for the text and the purpose of the 13th Amendment, as well as for precedent. Divergences in previous jurisprudence in the area of land powers under the 13th Amendment are highlighted. Further, the issue of the three separate opinions delivered by the justices in *Solaimuthu Rasu* is raised with the specific question of precedential impact thereto.

An interesting part of this analysis encompasses examination of the provisions of the Indian and Australian constitutional structures as well as the case law interpreting devolutionary instruments in those countries. This segment is prefaced by the caution that these nations are federal states. However, as she remarks, the strength of India and Australia's Centres increases the jurisprudential relevance of these structures to the Sri Lankan inquiry. The success of devolution in India and Australia has been aided by their

courts' preservation of, and deference to, the meaning of their national devolutionary instruments. Based on the merits of these models, it is arguable that elements of jurisprudence from both these jurisdictions may provide Sri Lanka with valuable comparative interpretive guidance.

Quite apart from the political debates around the contested matter of devolution and the efficacy or otherwise of the 13th Amendment that this decision gives rise to, provincial land officers throughout the country are faced with serious dilemmas in regard to the exact extent of their powers under the State Lands (Recovery of Possession) Act No 7 of 1979 (as amended). We publish this paper in the belief that the potential new legal environment for provincial land administration under the 13th Amendment, as ushered in by the opinions of the three Justices in *Solaimuthu Rasu,* calls for detailed scrutiny in this regard.

We are also glad to publish a review of the Law & Society Trust's 2014 report on *'The Judicial Mind in Sri Lanka; Responding to the Protection of Minority Rights'* contributed by ***Rajan Phillips.*** As his succinct exploration of the main themes of this publication demonstrates, there is 'surprisingly broad scope of judicial complicity in the undermining of minority rights by the legislature and the executive.'

Set against the Supreme Court's historic failure to follow the 'basic structure' doctrine propounded by the Indian Supreme Court decades ago, his point is that the Supreme Court of Sri Lanka was also characterized by an unfortunate failure to uphold bolder decisions of the High Court during that time in regard to the protection of minority rights. In a broader context meanwhile, his remarks on the Indian constitutional experience in regard to federalism and state power are pertinent;

> *It could be argued that in the case of India, federalism has contributed to the positive fragmentation of state power, and it is to the credit of the Indian Supreme Court that it has conclusively established federalism as a basic structure of the Indian Constitution. This is a remarkable development considering that at its founding, India's Constitution was far more pre-occupied with the threat of disintegration than any of Sri Lanka's three Constitutions. Additionally, the principles of secularism and linguistic plurality were conscious political choices that have since been entrenched administratively and judicially.*

Notably this review is distinguished by its cogently overraching observation that apart from Sri Lanka's 'celebrated minority rights cases in the areas of citizenship, language and counter-terrorism' what is new in this book is its examination of numerous other cases, including the judicial response in areas such as land and housing, employment and religious rights which are generally unknown.

He makes the further point that though the book has limited itself to examining faultlines in the judicial treatment of minority rights across religious and ethnic lines, a similar examination across class lines may be equally beneficial. As he states 'class and other socioeconomic biases should also be included as explanatory variables in analyzing judicial complicity in the entrenchment of state authoritarianism.'

This is, no doubt, an eminently valid observation for future efforts of this nature.

Kishali Pinto-Jayawardena

Solaimuthu Rasu: A Critical Analysis

Kirsty Anantharajah[*]

1. Introduction

> *Healthy democracy must, develop and adopt itself to changing circumstances. The activities of central government now include substantial powers and functions that should be exercised at a level closer to the People. Article 27 (4) has in mind the aspirations of local people to participate in the governance of their regions. The Bills envisage a handing over of responsibility for the domestic affairs of each province, within the framework of a united Sri Lanka. They give new scope for meeting the particular needs and desires of the people for each province. Decentralisation is a useful means of ensuring that administration in the provinces is founded on an understanding of the needs and wishes of the respective provinces. The creation of elected and administrative institutions with respect to each province, that is what devolution means, gives shape to the devolutionary principle.*[1]

The ideal of cultivating a healthy democracy through devolution, as articulated above by a majority in the Supreme Court in 1987, is a participatory objective yet to be attained in Sri Lanka. The recent September 2013 judgment, *Solaimuthu Rasu* places such aspirations, intrinsically attached to the 13th Amendment, even further out of reach.[2] Through restrictive constructions of the purview of the Provincial Councils with respect to lands, the three member bench of the Supreme Court strayed from the purpose and meaning of devolution in Sri Lanka as intended by the 13th Amendment to the Constitution of Sri Lanka. *Solaimuthu Rasu* exhibits a judicial resistance to the meaning and text of this constitutional instrument, reflective of a corresponding political aversion to fully implementing these power-sharing structures, especially with regards to land.[3]

In response to this judgment, this paper addresses two issues facing Sri Lanka because of this decision: firstly, the legal ramifications of this decision; secondly, the inherent challenge to the Rule of Law. A multifaceted analysis of *Solaimuthu Rasu*[4] and its legal context will be undertaken in exploring these issues.

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[1] Re The Thirteenth Amendment to The Constitution and The Provincial Councils Bill 2 SLR 312, 326-327.

[2] SC (Spl) Leave to Appeal Application No 21/2013, SCM 26-09-2013.

[3] *Supra* footnote 2.

[4] *Supra* footnote 2.

The case brought into issue the jurisdiction of the Provincial High Courts and in resolving this matter, it became necessary for the Court to delineate the nature of powers over State land through legal analysis of the 13th Amendment. All three Justices construed the Provincial Councils' powers with respect to land, conferred by the 9th Schedule of the 13th Amendment, narrowly. The Provincial Councils' competence to administer, control and utilise State land was conditioned on State land being made available to the Provincial Councils by the Centre. Additionally, the President's powers to legislate with respect to the alienation or disposition of land were read broadly: they were largely shielded from the procedural requirement of Provincial Council advice necessitated by Special Provision 1.3 of Appendix II. [5] In critically examining this decision, this paper reflects in previous jurisprudence in the area of land powers under the 13th Amendment in the *Lands Bill Case, Vasudeva Nanayakkara* and *Re The Thirteenth Amendment to The Constitution.*[6] In doing so, the judicial deviation exhibited by *Solaimuthu Rasu*[7] is highlighted. The separate opinions delivered by the three justices in *Solaimuthu Rasu* are contrasted and compared.[8] Most importantly the Rule of Law challenges presented by the reasoning in *Solaimuthu Rasu*[9] are analysed.

Summarising the reasoning of Pieris CJ, Sripavan and Wanasundera JJ and the position of the law,[10] the Justices appear to adopt a blunt approach in interpreting the nuances of the 13th Amendment and in doing so, fail to grasp the intricacies of the devolved structure envisioned by the framers. This is perhaps where deference to established precedent, or even guidance from jurisprudence of relevant foreign jurisdictions, would have been beneficial, as is detailed later.

2. *The Nature of Devolved Powers in Sri Lanka*

The 13th Amendment: an introduction to the constitutional provisions

The 13th Amendment acts simultaneously both as the foundation and skeleton of devolution in Sri Lanka. The country's legislative and constitutional, viewed in certain lights, displays a strong intention of creating and supporting a devolved structure of governance. Several instruments stand testament to this intention, such as Parliament's passing of the 13th Amendment to the Constitution, followed by the Provincial Councils Act No. 42 of 1987 and the Provincial Councils (Consequential Provisions) Act No. 12 of 1989. However, the implementation of the 13th Amendment as well as an effective devolution of

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[5] 'Provision 1.3 of Appendix II states: *Alienation or disposition of the State land within a Province to any citizen or to any organisation shall be by President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter.*'

[6] *Vasudeva Nanayakkara v N.K. Choksy, P.C. former Minister of Finance et al* (2008) 1 Sri LR 134; Re a Bill titled Lands Ownership SC Spl. Determination Nos 26/2003, 10.12.2003; *Supra* footnote 1.

[7] *Supra* footnote 2.

[8] *Supra* footnote 2.

[9] *Supra* footnote 2.

[10] 'Provision 1.3 of Appendix II states: *Alienation or disposition of the State land within a Province to any citizen or to any organisation shall be by President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter.*'

certain administrative processes arguably remains the missing element to an increase in social and economic development in Sri Lanka. Moreover, there appears to be an increasing callousness displayed by the State in regard to safeguarding of the rights of the individual, especially with respect to land in all parts of the country.[11]

The 13th Amendment's 9th Schedule delineates the spheres of authority to be under the purview of the Provincial Councils, the Centre or both concurrently: subjects allocated to the Provincial Councils are prescribed in List I ('The Provincial List'); List II establishes areas which are to be the exclusive domain of the Centre ('The Reserved List'); List III ('The Concurrent List') identifies 'shared' territory.

Article 154G of the 13th Amendment confers limited legislative power on the Provincial Councils:

> *(1) Every Provincial Council may, subject to the provisions of the Constitution, make statutes applicable to the Province for which it is established, with respect to any matter set out in List I of the Ninth Schedule (hereinafter referred to as "the Provincial Council List")*

Stemming from the power and interest vested in the Provincial Councils by List I of the 9th Schedule, the 13th Amendment prescribes procedural requirements for the Central Government when legislating within the Provincial Council spheres. Article 154 of the 13th Amendment requires a consultative procedure:

> *(3) No Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed in the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference,*

Article 154 (b) maintains that where one or more of the Councils do not agree to the passing of the Bill, such Bill is to be passed by the special majority required by Article 82.

Land is demarked as a subject within the sphere of the Provincial Councils. It is located within The Provincial Councils' List:

> *18. Land - Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land*

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[11] See *Supreme Court Settles the Question of Land Powers: ft lk, Dharisha Bastians* http://www.ft.lk /2013/09/27/supreme- court-settles-quest ion-of-land-powers/>

improvement, to the extent set out in Appendix II.[12]

However, land is simultaneously claimed as a subject for the Central Government. State land is to be found in The Reserved List, identifying the Centre's power over land as power over:

> *State Lands and Foreshore, except to the extent specified in Item 18 of List I.*[13]

This constitutionally created duality in authority has given way to the complex legal dilemmas characteristic of 13th Amendment questions of land.[14] The Amendment is clear however, on the constitutional vesting of land with the Republic:

> *State Land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing the matter (Appendix II).*[15]

Appendix II also clearly states, *land shall be a Provincial Council Subject* (subject to special limitations).[16] This gives rise to the procedural requirement of 1.3 of Appendix II:

> *alienation or disposition of the 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.*

It is important to note that while the 13th Amendment also makes provision for a National Land Commission (the constitution of which includes members of Provincial Councils), which was empowered to formulate a National Lands Policy, it has thus far failed to be established. [17]

3. *Solaimuthu Rasu: A Legal Analysis*

Introduction to the 2013 judgment of the Supreme Court: *Solaimuthu Rasu*

Following the brief introduction to the relevant constitutional provisions pertaining to devolution of land, the case law, as it stands following *Solaimuthu Rasu,* must be explored.[18] It is important to note that the

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[12] 13th Amendment, 9th Schedule, List I.
[13] 13th Amendment, 9th Schedule, List II.
[14] Jayantha de Almeida Guneratne, Kishali Pinto-Jayawardena and Radika Gunaratne, *Not this Good Earth; The Right to Land, Displaced Persons and the Law in Sri Lanka* (Law and Society Trust) (2013), xxviii.
[15] 13th Amendment, 9th Schedule, Appendix II.
[16] *Supra* footnote 15.
[17] *Supra* footnote 14, at page xxviii.
[18] *Supra* footnote 2.

jurisprudence in this area is in a state of uncertainty, particularly following the 2013 judgment.[19] This section will outline the facts, reasoning and outcomes of *Solaimuthu Rasu:* a legal turning point that inclines the law away from devolution in Sri Lanka.[20]

The challenge in the Supreme Court was brought on the following facts. A quit notice was served in respect of illegal occupation of State land under the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979. The Respondent (petitioner at first instance) filed an application in the High Court of Kandy, seeking a writ of certiorari to quash the said quit notice. The Provincial High Court held that it had no jurisdiction to hear and determine the application. The respondent took an appeal to the Court of Appeal on the grounds of an erroneous reading of the constitutional provisions by the High Court. In its judgment, the Court of Appeal set out:

i) That the subject of State land is included in the "Provincial Council List" of the 9th Schedule of the 13th Amendment;

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 the prerogative remedies filed to quash quit notices issued under State Lands (Recovery of Possession) Act No 7 of 1979 as amended.[21]

This judgment was appealed to the Supreme Court of Sri Lanka, which defined the issue as whether the Provincial High Court has jurisdiction to hear cases where dispossession or encroachment or alienation of State lands is/are in issue. In addressing this jurisdictional question, the Justices engaged in a process of constitutional interpretation of the relevant provisions of the 13th Amendment.

A new position on the law

The constructions of the three Justices gave way to a clear delineation of the scope and nature of the Provincial Councils' purview over land; a noticeably diminished area of significance for the Provincial Councils with respect to land was demarked. Simultaneously, procedural and consultative requirements imposed on the Centre when acting with regard to State lands were essentially voided of their intended efficacy. This section will outline the reasoning of three Justices, in particular, that of the Chief Justice Mohan Pieris.

[19] The precedential divergence of this judgment will be the focus of a later part of this paper.
[20] *Supra* footnote 2.
[21] Statement of facts per Pieris CJ in supra footnote 2, at pages 4-6 of the judgment.

State Land in List II: The Greater Reserve

Pieris CJ's reading navigated the relevant provisions from the origin of 'The Reserved List', to 'The Provision Council List' and then to the destination of Appendix II.[22] This course of interpretation was based on the notion that the State land of List II formed the greater reserve out of which land in List I represented a limited allocation; land under Provincial Council purview was the smaller entity to be derived out of the greater mass allotted to the Centre. [23] Pieris CJ relied on certain textual hooks to base this assertion as well as the unitary nature of government as a constructive tool. It was asserted that 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 portions were to be assigned.[24]

The reservation articulated in List II: '*State Lands and Foreshore <u>except to the extent specified in item 18 of List</u> I* [emphasis in the original]' was held to denote the portion allocated in Item 18 list I as the lesser.[25] This subordination of Item 18 as the 'lesser' perhaps does not acknowledge the potential for a substantive amount to be allocated out of the reserve, a possibility which is at least raised from the breadth of the text of Item 18. Item 18 reads:

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

The Justices, despite pronouncements of a textual approach, fail to acknowledge the breadth of what has been set down in this item.[26] Before attention is to be paid to the express limitations, the rights set out here could be read as broad and general rights over land. The idea that what is allocated from List II to List I must be conceptualised as the lesser arguably lacks logical foundations and is at odds with a *prima facie* reading of the text of Item 18.

Limitations to Provincial Council Influence: Textual Constructions

Chief Justice Pieris draws several limitations to the Provincial Councils' purview over land from the text of the 13th Amendment. The Chief Judge dwells on the words *'land, <u>that is to say</u>...'* in the formulation of Item 18 and construes it as a primary limitation to the Provincial Councils' authority over land.[27] These words are contended to embody the notion that the land allocated to the Provincial Councils is exhaustively that which is specified in Item 18.[28] This is a coherent argument; however, the exhaustive

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[22] *Supra* footnote 2, at page 10 of the judgment.
[23] *Supra* footnote 2, at pages 11 of the judgment.
[24] *Supra* footnote 2, at page 8 of the judgment.
[25] *Supra* footnote 2, at page 10 of the judgment.
[26] *Supra* footnote 2, at pages 8-9 of the judgment.
[27] *Supra* footnote 2, at page 11 of the judgment.
[28] *Supra* footnote 2, at page 11 of the judgment, per Pieris CJ.

nature of the section is then heralded to 'set out a narrow scope of the corpus of land in Item 18.'[29] As maintained previously, the text of Item 18 lends itself to a broad reading. The very fact that the powers of Provincial Councils with respect to land must be construed exclusively from that set out in Item 18 does not necessarily indicate that these powers are narrow. In the same vein, Pieris CJ uses the idea of 'lesser nomenclature' as an indication of Item 18's subordinate position.[30] He affirms that '*land*' of Item 18 constitutes a lesser nomenclature to the '*State land*' in List II.[31] This textual hook is weak; it is as easy to affirm that the term 'land' bears a greater generality and therefore enjoys broader operation.[32]

As identified in the text of Item 18, Appendix II is a limitation that must be explored. The opening principle of Appendix II, strongly acknowledged by all three Justices, is that '*State Land shall continue to vest in the Republic and may be disposed on, in accordance with Article 33 (d) and written laws governing the matter.*'[33]

Special Provision 1:2 states that:

> *"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.*[34]

This provision was read to limit the powers conferred on the Provincial Councils in Item 18: the Provincial Councils' exercise of rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement are limited to administering, controlling and utilising such State lands as are given to them by Government. Again, this argument has some *veritas*; however, it is then put forward that it is erroneous to conclude that State lands is a Provincial Council subject in the absence of a total subjection of State lands to the domain of the Provincial Councils.[35] While it has been made clear that land continues to be vested with the States, it still remains a Provincial Council subject.[36] An analysis of land as prescribed by the 13th Amendment necessarily involves a understanding of the interplay between the spheres of authority of Central

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[29] *Supra* footnote 2, at page 11 of the judgment, per Pieris CJ.
[30] *Supra* footnote 2, at page 12 of the judgment, per Pieris CJ.
[31] *Supra* footnote 2, at page 12 of the judgment, per Pieris CJ.
[32] Rules of Statutory Interpretation require the plain meaning, that is, the ordinary and natural meaning, to primarily be given to the words of a statute. See, for application of this principle in U.S jurisdiction, *Federal Deposit Insurance Corporation v Meyer*, 510 U.S 471 (1994); for application of this principle in Britain see *Sussex Peerage Case* (1844); and for application of this principle in Australia see *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
[33] *Supra* footnote 15.
[34] 13th Amendment, 9th Schedule, Appendix II, 1:2.
[35] *Supra* footnote 2, at page 16 of the judgment, per Pieris CJ.
[36] See Re a Bill titled Lands Ownership SC Spl. Determination Nos 26/2003, 10.12.2003 at page 15. Here, Bandaranayake CJ finds that, on consideration of the words of Appendix II, that 'it is abundantly clear that the matter in question is a Provincial Council Subject that has been devolved to the Provincial Councils in terms with the Thirteenth Amendment.'

Government and Provincial Councils, and arguably the Justices' reading of this Special Provision fails here: it relegates the Provincial Council's constitutionally vested interest to an interest subject purely to Governmental will.

Special Provision 1.3 is read to further confine the scope of Item 18:

> '*Alienation or disposition of the State land within a Province to any citizen or to any organisation shall be by President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter.*'[37]

The Court concluded that the inclusion of the article 'the' refers to land that has already been conferred to the Provincial Councils; the Provincial Councils only have the right to have advice be heard on issues involving alienation or disposition of land that has already been granted.[38] The effect of this conclusion is the widening of the power of the Central Government to alienate and dispossess, by the removal of effective and constitutionally prescribed procedural requirements. A further consequence is the disintegration of the consultative process envisaged by the 13th Amendment.

It is evident that the judgment of *Solaimuthu Rasu* has appreciably curtailed the Provincial Councils' purview over 'lands:' it is now to be viewed as a 'lesser' and subordinate allotment; power to *administer, control and utilise* is to be limited to lands granted by Central Government; the opportunity to advise is to be similarly limited to matters concerning lands already conferred by the Government.[39] Arguably, the most crucial blow to the Provincial Councils, as well as to the spirit of the 13th Amendment as an instrument of devolution, is the notion that State lands will not be considered a Provincial Council subject in the absence of a total subjection of State lands to the domain of the Provincial Councils.

Jurisdiction of the High Court

It is now necessary to turn to the determination of the primary question of the case: does the Provincial High Court have jurisdiction to hear cases where dispossession or encroachment or alienation of State lands is/are in issue? Article 154P 4(b) affirms that every such High Court shall have jurisdiction to issue, according to law, orders in the nature of writs of *certiorari*, *prohibition*, *procedendo*, *mandamus*, and *quo warranto* against any person exercising, within the Province, any power under any law in respect of any matter set out in the Provincial Council List.[40]

Pieris CJ, Sripavan and Wanasundera JJ concluded that matters relating to the recovery, dispossession, encroachment or alienation of State lands are not in the Provincial Council list, and thus, such matters do

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[37] 13th Amendment, 9th Schedule, Appendix II, 1.3.
[38] *Supra* footnote 2, at page 17 of the judgment, per Pieris CJ.
[39] *Supra* footnote 2.
[40] 13th Amendment, Article 154P 4(b).

not fall within the jurisdiction of the High Court.[41] This opinion stands on the shoulders of previous conclusions in the judgments such as that State lands is not a Provincial Council subject in the absence of a total subjection of State lands to the domain of the Provincial Councils; such a conclusion was only possible following a judicial whittling away of the substance of Item 18.

4. *Solaimuthu Rasu: Divergence from the Case Law*

This part of the paper will identify the extent to which *Solaimuthu Rasu* strayed from precedent, in particular, from the jurisprudence coming from *The Lands Bill Case*, *Vasudeva Nanayakkara* and *Re The Thirteenth Amendment to The Constitution.*[42] This departure from accepted jurisprudence is a vital consideration to be noted.

Common ground: land continues to be vested in the Republic.

The common jurisprudential territory between *Solaimuthu Rasu* and previous case law must primarily be acknowledged.[43] In *Solaimuthu Rasu,* Pieris CJ quotes the opening words of Appendix II: 'State lands shall continue to vest in the Republic and may be disposed of, in accordance with Article 33 (d) and written laws governing the matter.'[44] This is identified as a 'preemptory declaration' acting as an indicator to the fact that State land belongs to the Republic and not to a Province.[45] The fact that land continues to be vested in the Republic, contrary to popular commentary, was never a disputed or contentious issue in *The Lands Bill Case;*[46] nor in *Vasudeva Nanayakkara.*[47] In *The Lands Bill Case*, Chief Justice Bandaranayake not only acknowledges this constitutional fact, but strongly and persuasively outlines its legal and historical foundations.[48] Chief Justice Bandaranayake quotes Hayley (Singhalese law and customs, F.A Hayley, chapter II) in her discussion of the ancient history of land tenure:

> *"The king was bhupati or bhupala, 'lord of the earth,' 'protector of the earth' or as the late Niti Nighanduwa terms Manu the Vaivasvata, the first King of men, 'lord (adhipati) of the fields of all.* "[49]

Bandaranayake CJ states, 'from time immemorial', land has been held in 'trust' for the people in this island now a Republic. She notes that even at the establishment of Provincial Councils in 1987, although

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[41] *Supra* footnote 2.
[42] *Supra* footnote 2; *supra* footnote 36; *Vasudeva Nanayakkara v N.K. Choksy, P.C. former Minister of Finance et al* (2008) 1 Sri LR 134; *supra* footnote 1.
[43] *Supra* footnote 2.
[44] *Supra* footnote 2, at page 13 of the judgment, per Pieris CJ.
[45] *Supra* footnote 2, at page 13 of the judgment, per Pieris CJ.
[46] *Supra* footnote 36; also for this point, see Kishali Pinto-Jayawardena '*No Tectonic Shift in State Land Being Vested in the Republic'* The Sunday Times, October 6th, 2013 accessed at http://www.sundaytimes.lk/131006/columns/no-tectonic-shift-in-state-land-being-vested-in-the-republic-64811.html
[47] *Vasudeva Nanayakkara v N.K. Choksy, P.C. former Minister of Finance et al* (2008) 1 Sri LR 134, p 172-173.
[48] *Supra* footnote 36, at page 23 of the judgment.
[49] *Supra* footnote 36, at page 23 of the judgment.

the subject of land was devolved to the Provincial Councils, it did not stray from policy that land is being held in trust for the people by the State.[50] It is at this point that these determinations diverge: in *Solaimuthu Rasu* the principle of the vesting of State lands in the Republic essentially precluded the potential of the Provincial Councils' exercising any control over State land,[51] whereas in *The Lands Bill Case* the vesting of State lands in the Republic did not prevent land from being a devolved subject.[52] Stemming from the reasoning of *The Lands Bill Case*, particularly the recognition of land as a devolved subject, the purview of the Provincial Councils' powers under the 13th Amendment includes the ability to give advice on Government disposition of land (Special Provision 1.3) and the conferral of Jurisdiction to the Provincial High Court to issue writs with respect to matters of land as set out in Item 18 (Article 154P).[53] As will now be evidenced, these constitutional manifestations of devolution are the critical points of *Solaimuthu Rasu's* judicial deviation.[54]

Special Provision 1.3: requirement of Provincial Council advice

Provision 1.3 of Appendix II, *prima facie*, attempts to impose a consultative process; the conditioning of the alienation or disposition of State land upon the advice of the relevant Provincial Council textually appears as a procedural limit to that act of alienation or disposition. Provision 1.3 affirms:

> *alienation or disposition of the 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.*

It is important to note that Special Provision 1.3 requires the compliance with procedure, Provincial Council advice, in the alienation or disposition of State land; this provision is a manner and form provision. As articulated in *Re The Thirteenth Amendment*, this type of provision validly imposing procedural restrictions does not derogate from the sovereignty of Parliament; it does not operate to invalidly fetter the powers of the President.[55]

The position of the case law prior to *Solaimuthu Rasu* upholds Special Provision 1.3 as a vital manner and form provision.[56] *Solaimuthu Rasu* derogates from this established position in two ways: firstly, this case diverges on the issue of the requisite nature of Provincial Council advice; secondly, this case exhibits departure in its narrowing of the scope of the matters (or lands) regarding which the Provincial Councils are entitled to tender advice.[57] The Supreme Court in *Vasudeva Nanayakkara* found that whilst the

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[50] *Supra* footnote 36, at page 24 of the judgment.
[51] *Supra* footnote 2.
[52] *Supra* footnote 36.
[53] *Supra* footnote 36.
[54] *Supra* footnote 2.
[55] *Supra* footnote 1, at page 322 of the judgment; *Attorney-General for New South Wales v. Trethowan* [1932] A.C. 526; *Harris v. Ministry of Interior*, (1952) 2 S.A.L.R. 428.
[56] *Supra* footnote 2.
[57] *Supra* footnote 2. In this case Sripavan J approved of the principle from *The Lands Bill Case*. See later analysis in this respect.

ultimate power of alienation and making a disposition remains with the President, the exercise of the power would be subject to the conditions in Appendix II being satisfied.[58] In that case, the requisite nature of Provincial Council advice was affirmed:

> *Appendix II in my view establishes an interactive legal regime in respect of State land within a Province. Whilst the ultimate power of alienation and of making a dispositions remains with the President, the exercise of the power would be subject to the conditions in Appendix II being satisfied. A pre-condition laid down in paragraph 1.3 is that an alienation or disposition of State land within a Province shall be done in terms of the applicable law only on the advice of the Provincial Council. 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.*[59]

Under this statement of principle, the advice of the relevant Provincial Councils is a condition precedent to the alienation or disposition of State lands. The reasoning in *The Lands Bill Case* follows this line of jurisprudence.[60] The Justices in that case read the requirement of Provincial Council advice in Special Provision 1.3 not as inoperative, but, rather, as being a key expression of devolution: 'This [Special Provision 1.3] reaffirms the position that State land shall continue to vest in the Republic while the subject of land is a matter for the Provincial Council.'[61] The importance of Provincial Council advice was further reflected here in terms of the application of Article 154(3):

> *(3) No Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed in the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon...*

In *The Lands Bill Case*, this procedural requirement of consultation proved to be imperative: failing to fulfill this requirement (and failing to put the Bill in question to a Special Majority), led to the Bill being deemed ultimately invalid.[62] The Justices in this case affirmed 'the Bill in question, being of a matter set out in the Provincial Councils' List, shall not become law unless it has been referred by the President to every Provincial Council as required by Article 154(G)3 of the Constitution.'[63]

Solaimuthu Rasu limits the requirement of Provincial Council advice: the Provincial Councils were only given the right to advise in the limited context of State land that has been made available to them by

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[58] *Supra* footnote 47.
[59] *Supra* footnote 47, at page 173 of the judgment.
[60] *Supra* footnote 36.
[61] *Supra* footnote 36, at page 15 of the judgment.
[62] *Supra* footnote 36.
[63] *Supra* footnote 36, at page 16 of the judgment.

virtue of Special Provision 1.2.[64] Pieris CJ unequivocally confines the sphere of operation of Provincial Council consultation:

> *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 utilisation for a Provincial Council subject by virtue of 1.2.*[65]

In these narrow circumstances, Pieris CJ concedes the facilitation of 'an element' of advice. [66] Contrary to previous jurisprudence, in *Solaimuthu Rasu* Pieris CJ denies the requisite nature of Provincial Council advice: he finds that the absence of the word 'only' before the word advice indicates the nature of the advice the Provincial Council proffers.[67] Here, *The Lands Bill Case's* stance, that Provision 1.3 qualified the President's power of disposition, was deemed to be 'patently in error.'[68] As is evident from the above analysis, *Solaimuthu Rasu* deemed Provincial Council advice in matters of the alienation and disposition of State land- imbued with importance and effectuality by the Constitution and previous case law- necessary in only narrow circumstances.[69]

Interpretation of Special Provision 1.2

A key divergence in jurisprudence emerged from Pieris CJ's reading of Special Provision 1.2 in *Solaimuthu Rasu.*[70] In previous cases, notably *The Lands Bill Case,*[71] and *Vasudeva Nanayakkara,*[72] it was affirmed that while land remains vested in the Republic, it has been devolved by the 13th Amendment as a Provincial Council Subject. In *Solaimuthu Rasu,* it was found that the Provincial Councils'

> *'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 utilising such State Lands as are given to them.'*[73]

Substantial limitations to the influence of Provincial Councils stem from this statement of principle; namely the jurisdiction of the Provincial High Courts to issue writs with regard to land. Such limitations are derived from the understanding that, despite land being vested in the Republic, the Provincial Councils maintain a constitutionally conferred interest. Departing from jurisprudence again, the Court's

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[64] *Supra* footnote 2.
[65] *Supra* footnote 2, at page 17 of the judgment, per Pieris CJ.
[66] *Supra* footnote 2, at page 17 of the judgment, per Pieris CJ.
[67] *Supra* footnote 2, at page 17 of the judgment, per Pieris CJ.
[68] *Supra* footnote 36; *supra* footnote 2, at page 18 of the judgment, per Pieris CJ.
[69] *Supra* footnote 2.
[70] *Supra* footnote 2.
[71] *Supra* footnote 36.
[72] *Supra* footnote 47.
[73] *Supra* footnote 2, at page 16 of the judgment, per Pieris CJ.

confining of the Provincial High Court's jurisdiction is a further manifestation of the decline of Provincial Council participation with respect to State land.

The bench in *Solaimuthu Rasu* dismantled the devolutionary structures preserved by former courts.[74] In *Vasudeva Nanayakkara,* the essential function of Appendix II was seen to be the establishment of 'an interactive legal regime...within a province;'[75] following *Solaimuthu Rasu*, this section potentially no longer has this function.[76] It has become evident that the bench in *Solaimuthu Rasu,* in failing to follow the body of established precedent, has not fairly interpreted the intricacies of the 13th Amendment. [77] In doing so, this bench has set down principles in contradiction to the text and spirit of the 13th Amendment.

The 13th Amendment: from *Re The Thirteenth Amendment to The Constitution and The Provincial Councils Bill* to *Solaimuthu Rasu.*

An examination of the initial determination of the 13th Amendment illuminates the extent to which *Solaimuthu Rasu* has strayed from the original constructions of the 13th Amendment.[78] In *Re The Thirteenth Amendment* the Supreme Court conducted a thorough analysis of the nature of the 13th Amendment.[79] In that case, it was concluded by the majority that the Amendment did not affect the unitary nature of the Sri Lanka. Interestingly, the majority in that case explored the nature of the limitations that the 13th Amendment placed on the Central Parliament, specifically Article 154G(2) and (3).[80] The majority, quoting from *The Privy Council in Bribery Commission vs. Ranasinghe* 66 NLR 73 at page 83 affirmed:

> *'A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority e.g. when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a 2/3 majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself, which can always, whenever it chooses, pass the amendment with the requisite majority'* [81]

The majority further stated that:

> *'No abridgment of legislative sovereignty is involved when rules prescribe as to how*

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[74] *Supra* footnote 2.
[75] *Supra* footnote 47, at page 173 of the judgment.
[76] *Supra* footnote 2.
[77] *Supra* footnote 2.
[78] *Supra* footnote 2.
[79] *Supra* footnote 1.
[80] *Supra* footnote 1, at page 322 of the judgment.
[81] *Supra* footnote 1, at page 322 of the judgment.

legislative authority can be exercised. Article 154G(2) and (3) merely set out the manner and form for the exercise of its legislative power by Parliament to repeal or amend the provisions of Chap. XVIIA and the Ninth schedule or to legislate in respect of any matter included in the Provincial Council List.'[82]

These articles were seen as manner and form provisions validly imposing procedural restrictions. The majority in *Re The Thirteenth Amendment* affirmed that manner and form provisions do not derogate from the sovereignty of Parliament.[83] Here, the determination in this case can be seen to uphold the integrity of the procedural limits on Parliament, enshrined in the 13th Amendment. The court's view on Article 154 G(2) and (3) is easily extended to Provision 1.3, Appendix II of the 9th Schedule. The consultative requirements in this section are requisite for the legally effective expression of Parliament's will.[84] This logic did not underscore the reasoning in *Solaimuthu Rasu* in its devaluation of the importance of Special Provision 1.3.[85] The majority explored the creation of, and conferral of jurisdiction, on the Provincial High Courts. A fundamental aspect of this determination was the rationale and purpose of the creation of these courts:

'vesting of this additional jurisdiction in the High Court of each Province only brings justice nearer home to the citizen and reduces delay and cost of litigation. [86]

Here, considerations of justice and efficiency underpin the creation of the Provincial High Courts. The aspiration of bringing justice closer to home through the creation of the High Courts holds great significance in issues concerning the lands within a province. Lands are seen as a regional issue, and thus justice should appropriately occur on a provincial level through the administration of justice by the Provincial High Courts. The considerable reduction of the High Courts' jurisdiction in *Solaimuthu Rasu,*[87] goes against the grain of the principles of regional justice presented in *Re The Thirteenth Amendment.* [88]

It is important to note that the majority in *Re The Thirteenth Amendment* deemed the 13th Amendment to be a vital instrument in the pursuit of democracy.[89] The majority quoted from the Directive Principles of State Policies found in Article 27(4) of the Constitution:

'The State shall strengthen and broaden the democratic structure of Government and the Democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in

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[82] *Supra* footnote 1, at page 322 of the judgment.
[83] *Attorney-General for New South Wales v. Trethowan* [1932] A.C. 526; *Harris v. Ministry of Interior,* (1952) 2 S.A.L.R. 428 cited in *supra* footnote 1, at page 322 of the judgment.
[84] Colin Turpin in British Government and the Constitution (1986) at 37 quoted in *supra* footnote 1, at page 322 of the judgment.
[85] *Supra* footnote 2.
[86] *Supra* footnote 1, at page 324 of the judgment.
[87] *Supra* footnote 2.
[88] *Supra* footnote 1.
[89] *Supra* footnote 1.

government.'[90]

The majority view was that the devolutionary instruments of the 13th Amendment and the Provincial Councils Bill represented 'steps in the direction of implementing the programme envisaged by the Constitution makers to build a social and democratic society.'[91] From this judgment we see the majority imbue these devolutionary instruments with national significance; they appear as instruments preserving democracy that must not be derogated from or diminished. In failing to give the intended weight to the provisions of the 13th Amendment establishing a interactive relationship between the Centre and the Provincial Councils, the majority in *Solaimuthu Rasu* perceivably departs from the principles and original intention supporting devolution.[92]

Interestingly, the reasoning of the court in *Solaimuthu Rasu,* can be seen as extending from the dissenting judgments in *Re The Thirteenth Amendment.*[93] The dissent of Wanasundera J in that case is predicated on perceived threats to the unitary status of Sri Lanka presented by the 13th Amendment, as well as political considerations.[94] As will be discussed, these themes heavily influenced the justifications presented in *Solaimuthu Rasu.*[95] From the analysis conducted in this part, it is evident that *Solaimuthu Rasu* marks clear divergences from accepted precedent.[96] However, it may be too soon to unequivocally state that this case heralds a new position of law; as will be discussed in the following part, the precedential status of this decision remains unclear.

5. *Solaimuthu Rasu: discrepancies in the three judicial opinions*

The earlier segments of this paper primarily referred, in the analysis thereon, to the judgment of Chief Justice of Mohan Pieris. However, it would be in error to end the analysis of the reasoning of *Solaimuthu Rasu* here.[97] All three justices, while arriving at the same conclusion, at times adopted different reasoning. This raises two important questions: firstly, what were the points of the judicial divergence; and secondly, what is the subsequent precedential value of this case in light of the divergence?[98] A key area of inconsistency was the manner in which each Justice dealt with precedent. This difference in judicial opinion is patently clear in terms of the treatment of *The Lands Bill Case.*[99] Sripavan J quotes principle from this case with approval:

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[90] *Supra* footnote 1 at page 356 of the judgment.
[91] *Supra* footnote 1 at page 327 of the judgment.
[92] *Supra* footnote 2.
[93] Supra footnote 2; supra footnote 1.
[94] *Supra* footnote 1, at page 373 of the judgment.
[95] See Part VII for this discussion.
[96] *Supra* footnote 2.
[97] *Supra* footnote 2.
[98] Note that this question was explored in M.A Sumanthiran 'Was Rajiv Gandhi Deceived By Jayewardene?' Colombo Telegraph, October 6th, 2013.
[99] *Supra* footnote 36.

"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 the 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."[100]

Here, Sripavan J affirms the authority and precedential value of this case, expressly approving of the proposition that Presidential Power of alienation and disposition of Land was qualified by Special Provision 1.3 of Appendix II. However, Pieris CJ, when referring to this very same statement of principle from the *Lands Bill Case,*[101] assumes an opposing position:

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. [102]

Here, there is clear discrepancy between Sripavan J and Pieris CJ's opinions regarding the enduring value of *The Lands Bill Case's,* jurisprudence on the effect and operation of Special Provision 1.3 on the power of disposition vested in the President. [103] Sripavan J affirms *The Lands Bill Case,* which reads the requirement imposed in this provision, the requirement of Provincial Council advice, to qualify the Presidential power of disposition. [104] Pieris CJ, however, denies the existence of such qualification. While not expressly dealing with authority of the *The Lands Bill Case,*[105] on Special Provision 1.3 Wanasundera J rejects its interpretation of Appendix 1.2:

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 1.2.[106]

Here, despite the fact that both Pieris CJ and Wanasundera J reject the Court's reasoning in this case, they each maintain a different locus for their criticism: Pieris CJ finds issue with *The Lands Bill's* construction of Special Provision 1.3 whereas Wanasundera J expressly rejects this determination's interpretation of

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[100] *Supra* footnote 2, at page 11 of the judgment, per Sripavan J quoting *supra* footnote 36, at page 22 of the judgment.
[101] *Supra* footnote 36, at page 22 of the judgment.
[102] *Supra* footnote 2, at page 17-18 of the judgment.
[103] *Supra* footnote 36.
[104] *Supra* footnote 36.
[105] *Supra* footnote 36.
[106] *Supra* footnote 2, at page 5 of the judgment, per Wanasundera J

Special Provision 1.2. [107] This disparity renders commentary denying the continued relevance of *The Lands Bill Case* subject to uncertainty.[108] Sripavan J's citing of that case with approval supports the enduring validity of the principles coming out of it; His Honour's opinion casts Pieris CJ's categorical rejections of *The Lands Bill Case* into doubt. [109]

As discussed earlier, *Vasudeva Nanayakkara,*[110] was also expressly rejected by Pieris CJ in its construction of Special Provision 1.3:

> *" 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."*[111]

Neither Sripavan or Wanasudera JJ address the authority of *Vasudeva Nanayakkara* in their deliberations; only the Chief Justice expressly denies its value in interpretations of Appendix II.[112]

In light of these key inconsistencies in judicial opinion, it becomes necessary to determine whether *Solaimuthu Rasu* can be seen to have strong precedential value.[113] On the face of this judgment, especially from the opinion of Pieris CJ, this case seems to conflict with both *Vasudeva Nanyakkara* and *The Lands Bill Case;*[114] however, it is arguable that *Solaimuthu Rasu* does not effectively challenge the enduring validity of the case law coming from these previous judgments, at least in terms of their constructions of Special Provision 1.3.[115] This is due to the rules of precedent.[116] In *Bandahamy vs. Senanayake* it was found that:

> *"three Judges as a rule follow a unanimous decision of three Judges, but if three Judges sitting together find themselves unable to follow a unanimous decision of three Judges a fuller bench would be constituted for the purpose of deciding the question involved"* [117]

On this principle, while there appears to be intent on the part of certain members of the bench in *Solaimuthu Rasu* to displace the operation and validity of accepted precedent, it is likely that the law will

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[107] *Supra* footnote 36,
[108] *Supra* footnote 36,
[109] *Supra* footnote 36,
[110] *Supra* footnote 47.
[111] *Supra* footnote 2, at page 18 of the judgment per Pieris CJ.
[112] *Supra* footnote 47.
[113] *Supra* footnote 2.
[114] *Supra* footnote 47; supra footnote 36.
[115] *Supra* footnote 2.
[116] *Supra* footnote 98.
[117] *Bandahamy v. Senanayake* (1960) 62 N.L.R. 313, 346.

not consider the reasoning presented in *Vasudeva Nanyakkara* and *The Lands Bill Case* successfully impugned.[118] *Vasudeva Nanyakkara* and *The Lands Bill Case* were both decided unanimously by a three-judge bench, and thus arguably, their law remains undisturbed. [119] This analysis holds that despite the clear jurisprudential divergence exhibited in *Solaimuthu Rasu,* the validity and future precedential value of *Solaimuthu Rasu*'s interpretations of the 13th Amendment should not be taken as settled. [120] However, the question of even greater practical relevance is whether or not such rules of precedent will be recognized by policy makers and the courts.

6. *Comparative Analysis: The Relevance of Foreign Jurisprudence*

Comparative Analysis: India

It is useful to view the jurisprudence emerging from *Solaimuthu Rasu* through a comparative lens: despite stemming from a different constitutional system, the jurisprudence of Indian courts is relevant to the assessment undertaken by this paper.[121] The 7th Schedule to Article 246 of the Indian Constitution served as the model upon which the devolutionary structures of the 13th Amendment were built, and thus indubitably have relevance in the examination of interpretive approaches employed by the Sri Lankan courts.

The 7th Schedule of Article 246 of the Indian Constitution delineates the respective powers and responsibilities to be vested in the Union and the states. The 7th Schedule, like the 9th Schedule of Sri Lanka's 13th Amendment, creates these divisions through assigning powers in three distinct lists: List I is termed the Union List and demarks areas where the Union will wield exclusive power; List II is the State List comprising of items where the states will enjoy exclusive powers; List III, the Concurrent List, creates space in which both the Union and the states have powers.[122]

Item 18 of the State List demarks land as state subject:

> *'Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonisation.'*

Here, powers over land have been fully devolved to the states. The states of India have administrative and legislative capabilities in the regulation of the land within the state.[123] States will, generally speaking have ministries formulating land policy, procedure, rules and regulations relating to matters in and over

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[118] *Supra* footnote 2; *supra* footnote 47; *supra* footnote 36.
[119] *Supra* footnote 47; *supra* footnote 36. Also see *supra* footnote 98
[120] *Supra* footnote 2.
[121] *Supra* footnote 2.
[122] Verite Research, *Devolving Land Powers: A Guide For Decision Makers*, (Verite Research) (2013), p. 30.
[123] In the State of West Bengal land is regulated by Lands (Acquisition and Regulation) Act 1981, the West Bengal Premises Tenancy Act, 1997 and the West Bengal Public Demand Recovery Act, 1913.

land such as the maintenance of land records and surveys, land reforms, land revenue, management and use of government lands, requisition and acquisition of government land.[124] It is interesting to note that the Central Government's role in land administration is mainly advisory.[125]

Strong parallels can be observed between the Constitutional provisions of the State list of the 7th Schedule of the Indian Constitution and the Provincial Council List of the 13th Amendment. Despite these connections, there are substantial differences in the level of devolution experienced in India and Sri Lanka. Several factors contribute to these divergences: the limiting nature of Appendix II of the 13th Amendment has curtailed the Provincial Councils' powers to administrate, control and utilise State land; furthermore, the structural differences of each state has played a central role in constitutional interpretation. The unitary context within which the 13th Amendment prescribes devolution has strongly impacted the developmental course of Sri Lanka's case law on the matter.

Though the term 'federal' is not used in the Constitution, the Union of India is a federal state. The federal character of the Indian Constitution was strongly upheld by Dr. Ambedker during the drafting process:

> *'it establishes a dual polity with the Union at the Centre and the States at the periphery, each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution. The Union is not a League of States, united in a loose relationship, nor are the States the agencies of the Union deriving power from it.*
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> *Both the Union and the States are created by the Constitution; both derive their respective authority from the Constitution. The one is not sub-ordinate to the other in its own field; and the authority of one is co-ordinate with that of the other.'*[126]

The Indian federal Constitution is not completely disparate from the Sri Lankan unitary model: despite the federal nature of India, the strength of its Centre is a key locus of similarity. The Constitution was structured in a way in which preserved the supremacy of the Union; the authority of the state was unambiguously limited to certain subjects.[127] It is for this reason that the Indian model may be legitimately compared to the Sri Lankan constitutional devolutionary instruments and its jurisprudence may validly present some guidance in interpretive approaches.

Indian Jurisprudence: Interpretive Guidance

Indian courts have employed certain interpretive principles when construing the respective spheres of authority to be conferred on the Union and the states, articulated in the three lists of the 7th schedule. Two such approaches will be outlined in this part; these approaches having relevance to the

[124] *Supra* footnote 122 at page 30.
[125] *Supra* footnote 122 at page 30.
[126] Constituent Assembly Debates, Vol. VII, p. 33.
[127] Cheluva Raju, 'Dr. B. R. Ambedkar and Making of the Constitution: A Case Study of Indian Federalism' *The Indian Journal of Political Science,* (1991) 52: 2, pp. 157-158.

interpretational issues placed before the Court in *Solaimuthu Rasu.*[128] Firstly, both the Indian Constitution and its jurisprudence make clear the predominance of the Union List. Article 246 states:

> *'Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the Union List)'.*

In *Profulla Kumar v Bank of Commerce* these opening words were held to securely express the predominance of the Union List over the State and Concurrent List. [129] This principle is reflective of India's preservation of a strong Centre.

The principle of the predominance of the Union List operates in conjunction with a second vital principle; this interpretive tool requires each entry, whether located on the Union or State List, to be interpreted broadly. *The Central Provinces Case* asserted that large liberal construction must be given to legislative powers.[130] In *Calcutta Gas Ltd. v State of West Bengal*, the SC found that the widest possible and most liberal interpretations should be given to the language of each entry.[131] In *Prem Chand Jain v R.K Chhabra* it was affirmed that a general word used in an entry must be construed to the extent of all ancillary or subsidiary matter which can fairly and reasonably be held to be included in it.[132] This methodology employed by the Indian Courts stands in stark contrast with the interpretive approaches evidenced in *Solaimuthu Rasu:* in this case, the justices arguably read down and confined the scope of Item 18.[133]

The Indian Courts are bound to pursuing a harmonious interpretation: *State of Bombay v F.N Balsara* asserted the Court should try, as far as possible, to reconcile entries and to bring harmony between them.[134] When this is not possible only then the overriding power of the union legislature, and the federal power prevails.[135] Arguably, despite assertions from Pieris CJ in *Solaimuthu Rasu,* this primary obligation to a harmonious interpretation was not fully discharged in this case; the justices proceeded directly to the predominance of central power. [136]

Entry 18 of the State List, and Item 18 of the Provincial Council List both open with the words: 'Land, that is to say...' In *Solaimuthu Rasu,* these words were interpreted as words of limitation and this limitation was one of the key forces in the judgment inspiring a narrow construction of the scope of the Provincial Councils' power with respect to land.[137] The Indian jurisprudence on the matter stands in

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[128] *Supra* footnote 2.
[129] *Profulla Kumar v Bank of Commerce* AIR 1947 SC 60.
[130] *The Central Provinces Case* (1939) F.C.R. 18.
[131] *Calcutta Gas Ltd. v State of West Bengal* AIR 1962 SC 1044.
[132] *Prem Chand Jain v R.K Chhabra* (1984) 2 SCC 302.
[133] *Supra* footnote 2.
[134] *State of Bombay v F.N Balsara* AIR 1951 SC 318, 322.
[135] *Supra* footnote 134.
[136] *Supra* footnote 2.
[137] *Supra* footnote 2.

conflict with the view in *Solaimuthu Rasu.*[138] As a matter of principle, the Indian Courts are precluded from viewing the words 'that is to say' as operating to introduce limitation. In the *Bhola Prasad Case* it was found that the words 'that is to say' are explanatory or illustrative words and not words either of amplification or limitation.[139] In *Meg Raj v Allah Rakhia* the phrase 'land, that is to say...' was found not to operate as a limitation, but as words of illustration.[140] Furthermore, Indian jurisprudence construing Entry 18 has read the word 'land' broadly.[141] *In Megh Raj v Allah Rakhia,* the word 'land' was held to include every form of land, whether agricultural or not, and rights in land include such general rights as full ownership or leasehold.[142] In that case the authority over land was held to include authority over mortgages. [143]

Indian jurisprudence stands in stark contrast with the reasoning of *Solaimuthu Rasu.*[144] This divergence cannot fully or legitimately be explained away by accounting for the difference in constitutional system. The more likely explanation for this jurisprudential variance can be attributed to the disparate policy perspectives regarding the implementation of devolutionary structures in each State.

Comparative Analysis: Australia

Australia is a federal state, formed by the federation of its six British colonies in 1901. Despite this nation's federal status it provides an illuminating point of comparison: in Australia, the Constitution has maintained a strong Centre (the Commonwealth), while simultaneously exhibiting effective devolution through the states' administration of Crown lands.[145]

The Commonwealth is vested with 42 constitutionally conferred powers, and states are vested with the residue. Ss 52 and 90 of the Australian Constitution denote areas that are exclusively the purview of the Commonwealth, such as the imposition of excise duty. However, the powers vested in the Commonwealth under the heads of power of s 51 are mirrored by State Constitutions. The powers vested in the states are plenary powers. Section 2(1) of the Australia Act states that legislative powers of the states shall be exercised only for the 'peace, order and good government' of the nation.[146] Relevant state Constitutions reflect this section. Section 5 of the New South Wales Constitution states:

> *'The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever.*

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[138] *Supra* footnote 2.
[139] *Bhola Prasad v The King-Emperor* (1942) F.C.R 17, 26.
[140] *Megh Raj v Allah Rakhia* A.I.R 1947 P.C 72.
[141] See *Atma Ram v Punjab* 1959 A.I.R 519.
[142] *Supra* footnote 140.
[143] *Supra* footnote 140.
[144] *Supra* footnote 2.
[145] *Supra* footnote 122 at page 32.
[146] Clarke, J, Keyzer, P, and Stellios, J (9th ed) *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis) (2013).

In *Union Steamship Co v King* (1988) 166 CLR 1 it was noted that words peace, order and good government denote plenary powers; these words are generally perceived not to be words of limitation.[147] S 106 of the Australian Constitution has been read to preserve the existence of the states and their constitutional powers: [148]

> *S 106: Saving of Constitutions*
>
> *The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.*

The supremacy of Commonwealth powers is exhibited in s 109, a constitutional provision dealing with inconsistency between Commonwealth and State legislation.

> *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.*[149]

It is important to note that the powers of the Commonwealth have been used, and read, expansively.[150] The expansive, and arguably supreme nature of Commonwealth power has not undermined effective devolution in Australia. Devolution has been especially successful in the administration and control of Crown Lands.[151] While there is a lack of express constitutional reference to power over Crown Land, it is accepted that this power is vested in the states. The states are vested with this power residually and thus, legal authority to administer Crown Lands is conferred upon the states indirectly.[152] In Australia, there is a clear demarcation of Crown land as either federal (Commonwealth) or state owned; land held by the Commonwealth, such as the Australian Capital Territory (ACT), are comparatively the lesser reserve.

States administer their Crown Lands through different legal regimes; these are generally extremely comprehensive. In Western Australia, legislative authority from the Western Australian state parliament is necessary for all dealings in Crown Land not granted in free-hold title; consequently, such land is controlled, utilised and administrated through the operation of legislation in that state.[153] In Victoria, nearly 30% of land is Crown Land and Victorian legislation governs this land. [154] Similarly, Tasmanian legislation, the *Crown Lands Act* 1976 (Tas), operates over Crown Lands in Tasmania; South Australian Crown Land is governed by the *Crown Land Management Act* 2009 (SA), a South Australian statute.

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[147] *Union Steamship Co v King* (1988) 166 CLR 1.
[148] *Victoria v Commonwealth* (1971) 122 CLR 353, 371-2 per Barwick J; supra footnote 146, at page 63.
[149] *Australian Constitution* s 109.
[150] *Supra* footnote 122 at page 32.
[151] *Supra* footnote 122 at page 32.
[152] *Supra* footnote 122 at page 32; also for further example see *Western Australia Constitutional Act* 1889.
[153] See *Land Administration Act* 1997 (WA).
[154] See *Land Act* 1958 (Vic), the *Crown Land (Reserves) Act* 1978 (Vic), the *National Parks Act* 1975 (Vic).

From this summary of state legislative schemes, it is evident that in Australia, the administration of Crown Land is completely within the purview of the states. [155] These states successfully govern Crown Land through both laws and institutional structures of state governments. [156]

Australian Jurisprudence: Interpretive Guidance

Australia is not only a pertinent model of devolution with respect to Crown Lands, but it also provides a more general devolutionary guide. This jurisdiction offers guidance through the manner in which Australian courts have navigated the power balances between the Centre (the Commonwealth) and its states. Based on the consistent reference to the unitary nature of the Sri Lankan state by the bench in *Solaimuthu Rasu,* it is arguable the landmark Australian case, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (*'The Engineers Case')* has acute relevance. [157]

At the time that this case was decided, Australia was a newly federated nation. Political concerns concentrated on the fear of the federal government encroaching on the purview and independence of the states.[158] The Doctrine of Reserved Powers was reflective of this political apprehension; this doctrine required that conferral of power to the Commonwealth through the Constitution should be read restrictively in order to prevent intrusion on the reserved powers of the states. Here, this doctrine required courts to take into consideration the federal nature of Australia in their construction and interpretation of constitutional provisions. [159]

In *The Engineers Case* a majority of the High Court strongly rejected this doctrine.[160] The Court held that such a doctrine was 'formed on a vague, individual spirit of the compact' and did not accord with the words of the constitutional text.[161] The Court rejected doctrines supposedly implied by the Constitution based on the relationship between the Commonwealth and the states. The text of the Constitution was heralded by the majority to be the primary relevant consideration to be interpreted through ordinary principles of statutory interpretation. Higgins J states:

> *The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the state as a whole. The question is, what does the language mean? And when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we*

[155] *Supra* footnote 122 at page 32.
[156] *Supra* footnote 122 at page 32.
[157] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
[158] *Supra* footnote 146.
[159] *Supra* footnote 146, at page 58.
[160] *Supra* footnote 157.
[161] *Supra* footnote 157, at page 145 of the judgment.

think the result to be inconvenient or impolitic or improbable... unless the limitation can be found elsewhere in the Constitution, it does not exist al all. [162]

Here, it is evident that the nature of the constitutional system of government is disparate from and irrelevant to a textually based reading of the Constitution. Fidelity to the text must remain even when the result of is likely to be 'impolitic.'[163] The judgment in *The Engineer's Case* reflects a victory of legalism and is partially rooted in Australia's conception of judicial independence.[164] This case has the precedential impact of precluding Australian courts from reading down a power based on the fear that it might be abused: such policing is strictly preserved as a matter for the political process.[165] Here, there are two clear benefits from an "*Engineer's* approach": firstly, there is the benefit of prohibiting political considerations that pervert a textual approach in judicial reasoning; secondly, such an approach, eschewing political considerations, increases the legitimacy of the courts. [166]

If we examine the reasoning in *Solaimuthu Rasu* through an *Engineers Case* perspective; constructive deficiencies become manifest.[167] The Justices in *Solaimuthu Rasu* each found it necessary to draw on the unitary nature of the Republic in their determinations under the 13th Amendment.[168] All three justices refer to Sharvananda CJ's reflections on unitary and federal distinctions.[169] This is problematic for two reasons: firstly, this consideration is irrelevant to such interpretation of the 13th Amendment; secondly, this political consideration underpinned a diversion from a textual approach and well established law.

It is important to note that past precedents of the Supreme Court on the nature of power given to Provincial Councils by the 13th Amendment never disputed the unitary nature of the state.[170] In *Re The Thirteenth Amendment,* the majority found that the 13th Amendment did not pose a constitutional challenge to the unitary status of Sri Lanka. [171] This was affirmed in the *Lands Bill Case* as well as in *Vasudeva Nanayakara:* further, both of these cases strongly establishing that land continued to be vested in the Republic. [172] Given this case law it can be asserted that the unitary nature of Sri Lanka was extrinsic to both the provisions of the 13th Amendment in question and the constructive task in front of the Court. If an *Engineer's Case* position is maintained it might be said that the judgment in *Solaimuthu Rasu* departed from the constructive role required of the Court to the considerations of political outcomes.[173]

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[162] *Supra* footnote 157 at page 161-162 of the judgment.
[163] *Supra* footnote 157, at page 161-162 of the judgment.
[164] *Supra* footnote 157.
[165] *Supra* footnote 146.
[166] *Supra* footnote 157.
[167] *Supra* footnote 2, *Supra* footnote 157.
[168] *Supra* footnote 2.
[169] *Supra* footnote 2, at page 20 of the judgment, per Pieris CJ; at page 10 of the judgment, per Sripavan J; at page 6 of the judgment per Wanasundera J.
[170] *Supra* footnote 46.
[171] *Supra* footnote 1.
[172] *Supra* footnote 36; *supra* footnote 47.
[173] *Supra* footnote 157; *supra* footnote 2.

One view may be that such preoccupations prevented a strict fidelity to the text of the 13th Amendment, and inspired a straying from long established precedent. An approach of legalism, a textual approach, isolates the judicial branch of government from political considerations, and is perhaps one of the interpretive models that could be gleaned from the Australian jurisdiction.

From a policy perspective, both India and Australia represent the potential success that can be attained from the devolution of powers over land. Despite the federal nature of these states' Constitutions, they bear strong relevance to Sri Lanka, a unitary nation, on the basis of the strength of their Centres. These jurisdictions should be used to inform interpretive principles: these models may be useful in drawing constructions of the 13th Amendment back to its text and original meaning.

7. *Solaimuthu Rasu: A prospective analysis.*

This paper will now turn to the considerable policy implications of this judgment. While this paper has recognised the uncertainty as to whether or not *Solaimuthu Rasu* has successfully displaced the formerly accepted legal principles, [174] this part shall proceed under the assumption that *Solaimuthu Rasu* will be considered by policy makers and the Supreme Court alike, to herald a new position in the law.[175] The critical question is how will this reduction of the Provincial Councils' purview over lands under the 13th Amendment be manifested in Sri Lanka?

Firstly, it must be noted that the Provincial High Courts will now have a limited jurisdiction. They will likely be able to hear and issue constitutional writs only in matters with regard to land that has already been allocated to the Provincial Councils by the Central Government. It is clear that the High Courts of the Provinces will not be able to review the issuing of a quit notice under State Lands (Recovery Of Possession) Act (No. 7 of 1979); such an alienation of land may not be quashed by order of a Provincial High Court. The Provincial High Courts are one less avenue available for the citizen to challenge a disposition or alienation of their lands. This marks an appreciable decline in the Provincial High Courts' ability to protect the rights of the citizens of Sri Lanka from government interference. The protection of individual rights is a central function of any Court; *Solaimuthu Rasu* will potentially have the effect of diminishing this function.[176]

Despite the fact that the legal question to be determined was that of the jurisdiction of the Provincial High Court, there will also be ramifications for any exercise of power with respect to land as prescribed by the 9th Schedule. This is because the Supreme Court's delineation of the Provincial Councils' purview over land cannot be viewed simply as *obiter dictum;* the construction of Item 18 and Appendix II were arguably requisite steps on the way to the construction of jurisdiction under Article 154P (4). [177] This judgment will likely directly impact on the administrative capacities of the Provincial Land Commissioners. An important consideration is whether the issuing of a quit notice under the State Lands

[174] As adverted to in Section 5 of this paper.
[175] *Supra* footnote 2.
[176] *Supra* footnote 2.
[177] For alternate view, see *supra* footnote 98.

(Recovery Of Possession) Act (No. 7 of 1979) comes under the ambit of 'administration' which is constitutionally vested in the Provincial Councils.

Extracting from the *Solaimuthu Rasu* judgment:

> *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 utilise such State land, in accordance with the laws and statutes governing the matter."*[178]

This was read to limit the powers conferred in Item 18: The Provincial Councils' exercising of rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement are limited to administering, controlling and utilising such State lands as are given to them by Government.

The power of 'administration' has unambiguously been confined here to the administration of lands that have been given to Provincial Councils by the Central Government. Following the logic of *Solaimuthu Rasu,* the Provincial Land Commissioners may only be seen to be competent authorities in the issuing of a quit notice when the land in question has been granted to the Provincial Councils by the Republic.[179] The administrative authority on land administration of each Province lies with the Provincial Land Commissioner. [180] However, the extent to which the Provincial Land Commissioner may 'administrate' is now extremely limited. In assessing whether the Provincial Land Commission may administrate, the relevant constitutional question now is whether the land in question has been granted; without such a grant, administration of State lands will likely be considered *ultra vires.* No wide rights to administer, control and utilise land will be recognised by the Courts.

8. *Solaimuthu Rasu: a Challenge to the Rule of Law*

Solaimuthu Rasu presents a serious challenge to the Rule of Law.[181] This case strayed into the sphere of politics: arguably, the integrity of the legal reasoning in this case was clouded by the attainment of policy outcomes. The 2013 case was decided merely five days after the TNA's (Tamil National Alliance's) electoral victory in the Northern province; which, if the provisions of the 13th Amendment were given their intended operation, would be a estimable feat for both the peoples of the Northern Province and for democratic ideal of devolution. However, *Solaimuthu Rasu* can be seen as a judicial attempt to strip the 13th Amendment of significance; a judicial response to the political fears attached to the Northern Province's electoral results.[182] This claim is substantiated by the quality of the reasoning in *Solaimuthu*

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[178] *Supra* footnote 2, at page 15 of the judgment, per Pieris CJ.
[179] *Supra* footnote 2.
[180] *Supra* footnote 122 at page 17.
[181] *Supra* footnote 2.
[182] See Wanasundera J's dissenting comments in *supra* footnote 1, at page 373 of the judgment.

Rasu.[183] Areas of this judgment exhibit partial application of principle and disregard for accepted jurisprudence.

Mohan Pieris CJ outlines the nature of the 13th Amendment:

> *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 people; it projects basic values and it sets out objectives and goals.* [184]

The Chief Justice further asserts the need for the intention of the parties to inform interpretation.[185] It is clear from all judgments, however, that the spirit and purpose of 13th Amendment played no role in judicial construction of the relevant provisions. In creating a level of governance through the Provincial Councils, the objective of the 13th Amendment is clearly the creation and preservation of effective power sharing structures. Despite the acknowledgement of the importance of deference to the constitutional objectives, there is no evidence of such considerations informing judicial interpretation. The construction favored by the Justices ensures the opposite end to that envisioned by the Amendment: the conclusions guarantee the concentration of power in Central Government and the ineffectuality of the Provincial Councils in the administration of land. The crippling of one party entirely removes the integrity from the notion of the democratic creation of an interactive, devolutionary regime. This point should be considered to the extent that intention should inform statutory interpretation.[186] Two problems are clear: firstly, Pieris CJ fails to give effect to the purpose of the 13th Amendment; secondly, His Honour does not demonstrate fidelity to the very approach that His Honour claims to be undertaking.

There are several instances in this case of partial and selective application of principle. This is evidenced in the following statement:

> *If the Constitution contains certain provisions which impose restraints on institutions wielding power there cannot be derogations from such limits in the name of a liberal approach.* [187]

This statement of principle was followed by the substantial reduction of constitutionally prescribed procedural requirements to the Central Government's authority over alienation and disposition of land. The requirement of Provincial Council advice prior to alienation was narrowed in scope and the balancing

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[183] *Supra* footnote 2.
[184] *Supra* footnote 2, at page 9 of the judgment, per Pieris CJ.
[185] *Supra* footnote 2, at pages 8- 9 of the judgment, per Pieris CJ.
[186] Considering the purpose of the 13th Amendment, the establishment of an interactive regime is not extrinsic to the constructive task at hand, as was found to be the issue with the considerations of the unitary nature of government in this case. Such purposive considerations are necessitated by the very words of the 13th Amendment. See *Project Blue Sky Inc v AMA* (1998) 194 CLR 355 for a comparative example on this point.
[187] *Supra* footnote 2, at page 9 of the judgment, per Pieris CJ.

of Central administration with judicial review from the Provincial High Court was also curtailed. Here, it is evident that constitutional 'restraints' were read and applied selectively, limiting only the ambit of the Provincial Councils' powers under Item 18.

Despite proclamations of an obligation to a textual approach,[188] the Justices fail to turn their attention to the actual words of Item 18. While in this judgment considerable attention is paid to construing words of limitation, no attention at all is paid to the breadth of the words: '*Land, that is to say rights in and over land, land settlement, land tenure, transfer, and alienation of land, land settlement and land improvement.*' Little weight is given to the substance of this section, and this oversight reflects a failure of a textual approach.

The most perplexing element of this judgment is that while a divergence from previous jurisprudence is made clear, there is no effort made to justify the reason for deviation. As opposed to commencing the process of reasoning from the foundations of accepted case law, the Justices embark upon their own course of interpretation and then proceed to declare the reasoning of these key precedential cases erroneous, on the grounds of the existence of their alternative formulations. Pieris CJ rejects the reasoning in *Vasudeva Nanayakkara* with regard to Provisions 1.3, as '*not supportable having regard to the reasoning I have adopted in the consideration of this all important question of Law.*'[189] As evidenced here, the Chief Justice's own reasoning anteceded that of accepted case law. This methodology is not compatible with the principle of legality and is troubling judicial practice.[190] The integrity of the judicial method is a key concern, because: '*advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning.*'[191]

Both the political context of this case and the quality of the reasoning employed warrant a discussion of the independence of the judiciary in Sri Lanka. The independence of the judicial branch of government is imperative to the existence of the Rule of Law in a state; furthermore, judicial independence is a prerequisite to the protection of public liberty. Blackstone, whose work underlies the drafting of many Constitutions, clearly articulates this point:

> *In the distinct and separate existence of judicial power, in a peculiar body of men... consists one main preservative of the public liberty; which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property, of the*

[188] *Supra* footnote 2, at page 9 of the judgment, per Pieris CJ.

[189] *Supra* footnote 2, at page 18 of the judgment, per Pieris CJ; *supra* footnote 47.

[190] It is even more concerning that this methodology was employed in the Supreme Court. See *Bloemfontein Town Council v. Richter* (1938) A. D. 195 at page 232 of the judgment:□□"The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors-such preference, if allowed, would produce endless uncertainty and confusion. The maxim *stare decisis* should, therefore, be more rigidly applied in this the highest Court in the land, than in all others."□

[191] *Breen v Williams* (1996) 186 CLR 71, 115 per Gaudron and McHugh JJ; also see Murray Gleeson, Courts and The Rule of Law, *The Rule of Law Series*, Melbourne University, 7 November 2001.

subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinion, and not by any fundamental principles of law... Were it joined with the executive, this union mush soon be an overbalance for the legislative. [192]

One perceivable threat to judicial independence is the infusion of political consideration and policy implications in the process of judicial reasoning. This arguably perverts the pure application of legal principles to a legal dilemma. An example of this challenge is identifiable in the dissent of Wanasundera J in *Re the Thirteenth Amendment:*

What we see before us is a device to grant autonomy to a significant portion of Sri Lanka and leave it in the hands of the Tamils, to the exclusion of Sinhalese and the Muslim who are also long time residents there and who are equally entitled ,to their rights. It has been submitted that the two provinces concerned constitute nearly 30% of the land area of Sri Lanka. 60% of its coast line, and it is being handed over to one ethnic community who constitute only 12.6% of the population. In substance and truth, it is urged that the severing of the Northern and Eastern territory from the rest of Sri Lanka is a violation of the rights of all peoples of this country, as it does violence to the unitary character of the State, its territorial integrity which are part of the Sovereignty and basic features of the Constitution.[193]

In this extract Wanasundera J, despite the words of the section, fails to see the 13th Amendment as an instrument of devolution; rather, His Honour mistakenly perceives it to be 'a device to grant autonomy.'[194] As is evidenced from this extract, Wanasundera J's analysis is manifestly reflective of the social and political fears of the time. This is not the role of the Court, and threatens the independence of the judiciary. On the premise of the perceived political undesirability of the 13th Amendment, Wanasundera J sees the 13th Amendment as a threat to the unitary nature of Sri Lanka. This proposition arguably perverts the reading of the words of the 13th Amendment itself, which, as found by the majority in this case, does not affect the unitary nature of the Republic. It is for this reason that the reference to the unitary nature of Republic in *Solaimuthu Rasu* is a concern: as established by prior case law, this preoccupation is not justified by either the words of this section or their implications; furthermore, this reference arguably brings with it echoes from Wanasudera J's dissent and the political fears it was founded on.[195] Fidelity to the text and meaning of the Constitution requires the bench to eschew considerations reserved for the political arena; the continuing integrity of Sri Lanka's constitutional instruments relies on the independence of its judiciary. Arguably, *Solaimuthu Rasu* exhibited a failure of textual fidelity attributable to a failure of strict independence. [196]

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[192] William Blackstone, Commentaries, pp. 259-60.
[193] *Supra* footnote 1, at page 373 of the judgment per Wanasundera J.
[194] *Supra* footnote 1, at page 373 of the judgment per Wanasundera J.
[195] *Supra* footnote 2.
[196] *Supra* footnote 2.

This paper argues that the judgment in *Solaimuthu Rasu* was reasoned backwards from a political conclusion, evidenced by the quality of the reasoning presented.[197] The judgment is a product of a dangerous level of judicial activism,[198] and presents a serious challenge to both the Rule of Law and to the ideal of judicial independence in Sri Lanka.

9. *Conclusion*

Solaimuthu Rasu represents a shift in the case law: it moves away from the words and spirit of the 13th Amendment and has simultaneously yielded jurisprudence that deprives the operation of the 13th Amendment of its intended meaning.[199] This case saw a considerable decrease in the Provincial Councils' purview over land, simultaneously removing constitutionally prescribed safeguards to the unchecked operation of the Central Government's powers with respect to land. These twin paradigms, the broadening of one sphere and the contracting of the other, in practice critically threatens the devolutionary object of the 13th Amendment.

In summary, despite the strong languqge used in *Solaimuthu Rasu* emphasizing the fact that land continues to be vested in the Republic, it must be reiterated here that this was never a disputed or contentious issue in previous decisions of the Court. However, *Solaimuthu Rasu* demarcates certain key alterations in the position of the law.[200]

Firstly, State lands will likely not be considered a Provincial Council subject without the conferral of State lands by the Republic. Secondly, the Provincial Councils' authority to administer, control and utilise State land was conditioned on said land being made available by the Central Government. Thirdly, the requirement of consultation in Special Provision 1.3 is viewed as appropriate only with respect to issues regarding land already granted.

Finally, the Provincial High Courts will not have the jurisdiction to hear matters with respect to State lands that have not been conferred to the Provincial Councils. The judicial, administrative and legislative functions of the Provincial Courts with regard to State land are essentially tied to the condition of State land being conferred; there is no recognition of authority over land stemming purely from the 13th Amendment. This case undoubtedly will initiate a high level of administrative confusion and uncertainty in the Provinces as the danger of acting *ultra vires* in administrating, controlling and utilising land has visibly increased. The constructions of *Solaimuthu Rasu* mark a critical shift away from previous jurisprudence, jurisprudence that offered sounder, more nuanced constructions of the 13th Amendment.[201] *The Lands Bills Case* and *Vasudeva Nanayakkara* maintained that while land is vested in the Republic it

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[197] *Supra* footnote 2.
[198] See Dyson Heydon, *Judicial Activism and the Death of the Rule of Law,* Quadrant Magazine Law - Volume XLVII Number 1-2 (January 2003)
[199] *Supra* footnote 2.
[200] *Supra* footnote 2.
[201] *Supra* footnote 2.

continues to be a Provincial Council subject.[202] The bench in *Solaimuthu Rasu* dismantled this clear and unambiguous statement of principle.[203]

The integrity of the reasoning of this case presents further concerns. *Solaimuthu Rasu's* political context, coupled with the inconsistent and partial application of principle draws questions of judicial independence.[204] This challenge to the Rule of Law is one of the key obstacles to be overcome following this case.

In the process of methodically examining the failures of this case, this paper has simultaneously signposted certain repositories of sound principle. *Re The Thirteenth Amendment, The Lands Bill Case* and *Vasudeva Nanyakkara,* in their textual reading of the spheres of authority delineated by the 13th Amendment, represent a high water mark in constitutional constructions of this Amendment.[205] It is crucial that the positions maintained in these cases be re-affirmed. Certain interpretive principles from both the Indian and Australian jurisdictions, for example, may also be useful in steering the course of 13th Amendment construction back towards its original purpose and towards the meaning of its text. As expressed by the majority in *Re The Thirteenth Amendment,* the 13th Amendment is the repository of many hopes, both past and present, for greater participation and protections for all Sri Lankans.[206] It is imperative that the Supreme Court, in its future deliberations under the auspices of the 13th Amendment, returns to this constitutional instrument its integrity, meaning and authority.

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[202] *Supra* footnote 36; *supra* footnote 47.
[203] *Supra* footnote 2.
[204] *Supra* footnote 2.
[205] *Supra* footnote 1; *supra* footnote 36; *supra* footnote 47.
[206] *Supra* footnote 1.

The Judicial Mind and Judicial Matters in Sri Lanka

Rajan Philips[*]

What is mind? No matter. What is matter? Never mind. You might cynically apply this old aphorism to the judicial mind and judicial matters in Sri Lanka. Increasingly, the grey matter of intelligence, erudition, wisdom and independence is becoming too scarce in Sri Lanka's judicial mind, and what can you do when you hear of judicial matters such as the now customary cavalier appointments to the Supreme Court, except shrug and sigh: Never mind!

But for lawyer and popular commentator Kishali Pinto-Jayawardena, and co-authors, Jayantha de Almeida Guneratne and Gehan Gunatilleke, shrugging off judicial matters and saying "never mind" has never been an option. So they have brought out a new monograph entitled "The Judicial Mind in Sri Lanka; Responding to the Protection of Minority Rights", in the midst of questionable and controversial presidential appointments to the superior courts. The book's focus is narrower and sharper in that it is limited to a critical analysis of court rulings involving minority rights. Yet, the book and its timing bring into broad relief the hugely troubled terrain of the Sri Lankan judiciary. At the same time, by chronicling and critiquing over forty individual court rulings in different areas of the law and in judicially significant historical periods, the book brings to light the surprisingly broad scope of judicial complicity in the undermining of minority rights by the legislature and the executive.

There may not be a direct correlation between judicial complicity on minority rights and the parlous state of the judiciary today, but the book illustrates that complicity on minority rights became the slippery slope for the judiciary to slide from the lofty potentials at the time of independence to today's pathetic pits. The authors say that they chose the title "The Judicial Mind in Sri Lanka" to show that their "focus is unequivocally on the judicial role" and their purpose is "not to dwell on political failures." The disturbing dialectic is that while political failures have contributed to the failure of the "Rule of Law", the failure of judicial institutions have enabled the entrenchment of state authoritarianism and the erosion of minority rights.

The authors rightly point out in the introduction that political failure is only part of the story and that Sri Lanka like other British colonies "shared a fundamental contradiction", as part of the colonial legacy, between the insistence on the force and universality of the law, on the one hand, and the accompanying reservations through the rules of exceptions and differences. They acknowledge, however, that despite this shared contradiction, the judicial trajectories have diverged quite differently in India and Sri Lanka,

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more positively upward in the former and disturbingly downhill in the latter. The divergence is associated with the "different directions that political liberalism has taken in India and Sri Lanka in the post-colonial period." What explains these differences? The authors raise the question but regretfully the answer is not elaborate, apart from pointing to "all the dissimilarities in socio-political contexts" and the "contrasting constitutional histories." In fairness, the body of the book exposes some of these differences through the analysis of court rulings in specific cases but even a brief overarching summary would have been helpful to the reader.

The framework of "political liberalism" provides a useful analytical approach based on its three defining elements: a moderate state with its power fragmented by the counter balancing functions of the executive and the legislature and oversight by the judiciary; an active and able civil society; and basic legal freedoms which include "first generation civil rights" including freedom of speech, association, belief and movement, and property rights. It could be argued that in the case of India federalism has contributed to the positive fragmentation of state power, and it is to the credit of the Indian Supreme Court that it has conclusively established federalism as a basic structure of the Indian Constitution. This is a remarkable development considering that at its founding, India's Constitution was far more pre-occupied with the threat of disintegration than any of Sri Lanka's three Constitutions. Additionally, the principles of secularism and linguistic plurality were conscious political choices that have since been entrenched administratively and judicially.

Inconsistent Jurisprudence across Ethnic Lines

Sri Lanka has gone in the opposite direction politically and judicially, starting with relative constitutional peace at the time of independence, sliding into public security and counter-terrorism pre-occupationsin the long middle period, and finally falling into the current postwar quagmire. The book is divided into two parts in dealing with the three historical periods. Five Chapters (1-4 and 6) in Part One deal with non-security cases involving language rights, employer-employee relationships, citizenship rights, land and housing rights, and religious rights. Although no cases appear to have been reported on the rights of minority religions to hold processions, a brief chapter (Chapter 5) is devoted to the practical application of the Police Ordinance in light of the foremost place given to Buddhism in the Constitution. Three Chapters in Part Two of the book address cases involving minority rights in the context of public security and emergency regulations, counter-terrorism, and the current postwar situation.

The analyses of individual cases in eight of the book's nine chapters, including the detailed quantitative analysis of 24 landmark cases involving public security, offer critical insights into Sri Lanka's judicial mind. I would limit myself to a few general comments about the book and the purposes it could serve. First, the number of cases identified as cases involving minority rights should be an eye opener to those who never stop asking the ignorant question – just what are the minority grievances?

As the authors indicate, the book does not analyze all the reported cases and they had difficulties in accessing unreported judgments. Even politically informed people are mostly familiar with a few

celebrated minority rights cases in the areas of citizenship, language and counter-terrorism. This book throws light on numerous other cases, including areas such as land and housing, employment and religious rights. Needless to say, there could be even more numerous instances where the victims of rights infractions will simply move on without demurring, or protesting, let alone litigating.

Equally remarkable is the authors' conclusion that their comparison of the specific treatment of minorities in cases involving citizenship, language, employment, land and religion with the general jurisprudence on corresponding issues revealed a fundamentally different treatment of minorities. In other words, "the judiciary appeared to have been unable to produce consistent jurisprudence across ethnic and religious lines on matters of language, employment, land and religious freedom." The rot started with the repudiation of Section 29 of the Soulbury Constitution by the legislature and the executive first on citizenship and then on language, with the judiciary meekly falling in line rather than calling its companion branches to order. As asserted by the authors, the Sri Lankan Supreme Court failed to emulate its Indian counterpart in propounding a corresponding basic structure doctrine for Sri Lanka based on Section 29. Counterfactually it could be said that the Sri Lankan Supreme Court could have altered the course of post-independence history by affirming the bold judgments delivered by District Court judges first in regard to citizenship (N. Sivagnanasunderam, DJ, in the 1951 Kodakan Pillai case) and later in regard to language (O. L. de Kretser, DJ, in the 1962 Kodeswaran case). In both cases, the District Court rulings were overturned.

A.J. Wilson, in his Political Biography of S.J.V. Chelvanayakam, has offered an interesting commentary on the Supreme Court overruling of District Judge Sivagnanasunderam's decision. Sir Alan Rose as Attorney General argued the case for the government, while S.J.V. Chelvanayakam, Q.C. assisted by S. Nadesan, Q.C appeared for the original Petitioner. The bench of three judges comprised of a Sinhalese (E.G.P. Jayatilleke), a Ceylon Tamil (M.F.S. Pulle), and a Burgher (V.L. St. Clair Swan), delivered a unanimous ruling which, according to Wilson, "suggested that in a keenly contested judicial decision, where the political executive could be seriously embarrassed, the court was likely, in the final instance, to come down on the side of the state," even if it involved ignoring the violation of Section 29 of the Soulbury Constitution.

Judicial Conservatism and Class Bias

There were not many instances of judicial boldness in Sri Lanka according to the authors of the present book and few will disagree.

The celebrated Bracegirdle case, in the last phase of the colonial era, "was a singular instance of judicial boldness", and was rarely emulated by the Supreme Court after independence. The exceptions, say the authors, have been mostly in regard to upholding the separation of powers between the executive, the legislature and the judiciary. In contrast, "the judicial record in regard to the protection of minority rights was starkly different." An equally valid assertion could be in regard to the judicial record in protecting the rights and requirements of the working people in such areas as minimum wages, working conditions and

trade union rights. Put another way, just as the authors have exposed the prevalence of inconsistent jurisprudence across ethnic and religious lines, it could equally be shown that the judiciary has been quite biased across class lines as well.

I make this point because class and other socioeconomic biases should also be included as explanatory variables in analyzing judicial complicity in the entrenchment of state authoritarianism. While the manifestation of these biases is universal, a distinct pattern can be seen in the enactment and enforcement of emergency laws in Sri Lanka: "while the enactment of the Public Security Ordinance in 1947 was in response to the General Strike of that year, the subsequent declarations of emergency in 1953, 1958/59, 1961 and more continuously since, have been either to quell a working class agitation or to suppress the protest movements of restive national minorities." This is what the present reviewer wrote in collaboration with the late Upali Cooray and Rev. Paul Caspersz for the MIRJE publication: *Emergency '79*.

It is appropriate to recall the imposition of Emergency rule, in 1979, in the District of Jaffna in the context of exploring the judicial mind in Sri Lanka, because 1979 Emergency was the watershed to the era of counter terrorism in all the three (legislative, executive and judicial) branches of the Sri Lankan state. It is also a watershed, from the standpoint of the present book, in that it is after 1979 that the disparity in judicial treatment of minorities began to be "evidenced more strongly." The 1980 strike and its suppression virtually shut the working class out of politics, leaving ethnicity and religion to become the determining dynamic in political and judicial matters.

Kishali and her co-authors have analyzed 24 "landmark cases" involving public security in three distinct eras. First, from 1947 to 1979, was the era of the Public Security Ordinance, when the judiciary "appeared to be largely conservative in matters concerning public security. Yet it did not appear to be racially biased at the time." While this is consistent with my emphasis on 'class bias', I would also suggest that the social and political conservatism of Sri Lankan judges was a critical factor in their failure to emulate after independence the boldness that British judges had shown in the Bracegirdle case. It would also be interesting to compare the trials of the accused in the 1962 coup d'état and the accused in the 1971 insurgency for evidence of political and social biases among judges. In coup trials, the judges were more assertively independent of the executive and were critical of the narrow range of punishment prescribed by the law, while the judges reportedly exceeded the sentencing limits in the insurgency trial. An additional point to note is the observation recently made by Lionel Bopage that the establishment of the Criminal Justice Commission to prosecute the 1971 insurgents was the beginning of political interference in the judiciary.

Be that as it may, the second period of cases studied in the book is the thirty year period (1979-2009) of "counter terrorism rhetoric". There were "progressive, conservative and regressive judgments involving public security", however, as the authors note, "many cases involving Tamil individuals suspected of 'terrorism' ended in decisions against the individuals." The progressive judgments "invariably involved petitioners from the majority community or petitioners who no longer posed any perceivable threat to the state." The judicial mind took a progressive turn during the ceasefire period when the "counter-terrorism

agenda had been momentarily suspended." However, the authors contend that "a complete transformation in the rights dispensation in Sri Lanka" has come about in the postwar period after 2009.

According to them, the judiciary that was first cautious, then deferential, is "now largely irrelevant." What is more, the judiciary after the war has been "unwilling to vindicate rights in the face of public security regardless of the ethnicity of the individual concerned." The role of the judiciary has been replaced by Presidential benevolence granting pardon at political pleasure.

To the many commentaries reflecting on the fifth anniversary of the defeat of the Liberation Tigers of Tamil Eelam (LTTE), one must add the conclusion offered by Kishali and her co-authors: "The triumph of the regime over 'terrorism' appeared to have settled – perhaps permanently – the tension between public security and individual rights in favour of public security."

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