

THE APRC PROCESS: FROM HOPE TO DESPAIR

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*“It isn’t that they can’t see the solution. It is that they can’t see the problem” G.K Chesterton, **The Point of a Pin***

The damp squib of an incoherent, vague and poorly crafted two page document that finally emerged from the All Party Representative Committee highlights two important and worrying lessons. First, it seems that in the area of constitutional reform in general, Sri Lanka is moving backwards rather than forwards. The two page document is clearly Thirteenth Amendment MINUS. Second, in the area of governance, it appears that the major party in the ruling coalition, the Sri Lanka Freedom Party, and some of its coalition partners, the LSSP and the Communist Party, despite the fact that they occupy nearly all the positions in the Cabinet of Ministers, have abdicated their powers of decision making on vital matters of war and peace, to a party outside the Cabinet of Ministers, the JVP, and the JHU, which has a single Cabinet member.

THE THIRTEENTH AMENDMENT TO THE CONSTITUTION

Let’s first be clear about the serious limitations in the Thirteenth Amendment itself. As Professor G.L Peiris, when he was Cabinet Minister under Kumaratunga and Wickremesinghe often said, under the Thirteenth Amendment there was only a “vener” of devolution of power because “what was given with one hand was taken back with the other.”(Rajapakse’s Minister Peiris, not surprisingly, is singing a different tune). Under this Amendment there is not a single subject or function over which a provincial council has complete control and the centre possesses several mechanisms by which it can regain power to itself. In the twenty years of its implementation, the central Parliament has used the “National Policy on all Subjects and Functions” rubric to undermine devolution of power and take power to itself. Central Government Ministers have waved their Ministerial wands and converted schools and hospitals into national schools and hospitals and in a twinkle of an eye, such schools are brought under central government control. The three lists are drafted in such a way that the powers assigned to the centre are comprehensive and inclusive, while the powers assigned to the provinces are limited. Unlike in India there is no state or provincial representation at the centre to act as a watchdog to prevent Parliament’s encroachment into the provincial domain nor is there an independent public service to limit central executive interference in the affairs of the province. Devolution of power under the Thirteenth Amendment has proved to be fragile and vulnerable in a political culture that is centralized and hierarchical.

Significant powers such as those with respect to law and order and policing have not been implemented. The suggestion in the initial stages of the farcical process where President Rajapakse and his constitutional advisor G.L. Peiris had prepared a document which the

APRC was expected to present to the President as its own, that these powers were indeed to be implemented, albeit, 20 years too late, made some people, particularly in the diplomatic community, optimistic. The much pruned or mutilated 2 page document does not suggest that these powers will be devolved at all.

But this excitement in certain quarters about “full implementation” of the 13th Amendment does raise a fundamental question. How on earth could parts of the 13th Amendment to the Constitution, part of the Supreme Law of the country, NOT be implemented for over 20 years? What does this say about the Supremacy of the constitution and the Rule of Law in Sri Lanka? Indeed the fact that there was no legal remedy available to the ordinary citizen or a person committed to devolution of power to demand such implementation makes the situation even more reprehensible. Constitutions that permit non-implementation of its provisions and do not provide for an appropriate legal remedy in such situations, are flawed constitutions. Constitutions cannot rely on political will or the goodwill of the people in power for success. Indeed the basis of Constitutionalism is suspicion and scepticism about those who wield power. This fundamental question which underscores the crisis of constitutionalism in Sri Lanka must be addressed. If there can be constitutions and laws that can be flouted by the executive with impunity what does this mean for Sri Lanka’s obligations under GSP +, where the European Union requires not only ratification of various international human rights documents but also full and effective implementation of such human rights commitments?

However, the 2 page document does not even pledge full implementation of the 13th Amendment to the Constitution. The so-called interim proposals of the APRC (which perhaps should be more accurately described as the Rajapakse/JHU proposals) metamorphosed considerably between 17 January and 23 January. The final two page version, ironically titled APRC Proposals to the President, refers to Action to be Taken by the President to fully implement RELEVANT PROVISIONS of the present Constitution as a prelude to the APRC Proposals. Note- relevant, not All, maintaining the Sri Lankan tradition of non or partially implemented constitutional provisions.

Under steps to permit maximum devolution of powers to the provinces, the 2 page document merely contains vague and pious assertions such as the Government should endeavor to implement the 13th Amendment and adequate funds should be provided to facilitate the effective functioning of Provincial Councils. (See Paras 2.1 and 2.2). Paragraph 4.1 is intriguing and worth quoting in full-

“The Government should take immediate steps to ensure that Parliament enacts laws to provide for the full implementation of Chapter IV of the Constitution on language.”

Chapter IV though inadequate as it does not recognize parity of the Sinhala and Tamil languages, is comprehensive and there is no need for legislation to facilitate its implementation. Rather it requires action against state institutions that continue to violate the constitutional provisions on language. There are also statements stressing the importance of providing for interpreters, translators and other facilities to promote the

implementation of the language provisions of the Constitution. The 4 paragraph document when viewed as a whole is not really a set of constitutional proposals at all, but rather a memorandum containing a series of statements of what should be done to facilitate the implementation of certain provisions of the Constitution.

DEVOLUTION TO THE NORTH AND EAST

That the two page document is not even a set of constitutional proposals is clearly demonstrated by how the document deals with one of its most important proposals, the creation of an Interim Council in the north. Paragraph 3.3 states baldly,

As it is not possible to hold elections in the North, the President could make appropriate order (sic) to establish an interim council for the Northern Province in terms of the Constitution.

Given the present President's proclivity to violate the Constitution (e.g. the 17th Amendment to the Constitution) perhaps we should feel reassured by the last phrase of the paragraph. However how such an interim constitution is to be established, under what provisions of the constitution, should be made clear.

The 13th Amendment to the Constitution does not provide expressly for the establishment of an interim council. Therefore there is no clear or obvious constitutional mechanism by which such an interim council can be established. However, there do exist some constitutional provisions that may be used to achieve such an objective. They are Articles 154 L and M of the Constitution. What is worrying however is that certain groups allied to the government have suggested that an interim council be created using Article 154 T of the Constitution instead. This in my view would be unjustified.

Article 154 T is described as a provision dealing with Transitional Measures and reads as follows-

The President may by Order published in the Gazette, take such action, or give such directions, not inconsistent with the provisions of the Constitution, as appears to him to be necessary or expedient for the purpose of giving effect to this Chapter, or for the administrative changes necessary therefor, or for the purpose of removing any difficulties.

It is clear from the 13th Amendment read as a whole that this provision was introduced to enable the President to deal with any practical difficulties or administrative challenges that might have arisen with the introduction of the new provincial council system in 1987. Using such a transitional provision to effect a significant change to the system more than twenty years after it was introduced is highly questionable.

Articles 154 L and M are more appropriate provisions for the establishment of an interim council and subject to greater checks and balances as well. They deal with a situation

where there has been a failure of administrative machinery. In such a situation it provides that the President may by Proclamation assume to himself the administrative powers of the Province and the powers of the Governor. He can also declare that the legislative powers of the Provincial Council shall be exercised by Parliament. Article 154 M provides that thereafter Parliament may confer the legislative power of the said Provincial Council on the President and also authorize the President, in turn, to delegate such legislative or statute making power “to any other authority” specified by the President. While at first sight this Article is somewhat alarming in that it can permit a President with a pliant Parliament to grant the legislative power of a provincial council to even an NGO or the YMBA, and has often been cited as one of the numerous examples of the vulnerability of devolved power under the 13th Amendment, it is submitted that this is the constitutionally permissible manner in which an interim council should be established in the north.

There remains of course another fundamental question. If an interim council is established in the north consisting entirely of Presidential nominees and subject to the Control of the President, does it promote devolution of power or Presidentialism? The APRC’s amazing claim that “conditions in the east are conducive to holding elections to the Provincial Council” despite the atmosphere of fear, intimidation and lawlessness that exists there, and despite the absence of constitutionally mandated independent institutions such as the Elections Commission and independent Police Commissions and Public Service Commissions raises similar concerns. If only groups in alliance with the government will be viable candidates, the elections will hardly be free, and the end result again will be the extension of the centre in the east.

THE TAIL WAGGING THE DOG?

The political dynamics of the past 18 months which have contributed to the 2 page memorandum raise many concerns. When President Rajapakse addressed the Inaugural Joint Meeting of the APRC and the Panel of Experts on 11 July 2006 he urged the members to approach their task with a sense of urgency. He stated, *“It is imperative that the process moves speedily and effectively. After more than two decades of a protracted, cruel and violent conflict, the country cannot wait any longer to usher in a just and sustainable peace for all peoples of Sri Lanka.*

He added some advice also on the substantive issues involved- *I would urge that your proposals be creative and imaginative...The role of the APRC and as well as its panel of experts is to fashion creative options...*

One and a half years later, the APRC process despite the best efforts of its experts and chairperson, has produced a set of interim proposals that lack creativity. Given that its two main sections on “steps necessary to permit maximum devolution” and Special Arrangements to permit maximum devolution” do not even mention the subjects of police powers, land or a practical mechanism to ensure that the provinces exercise more powers over concurrent list subjects, it is clear that the architects of these proposals envisage a continuation of the status quo at best which given the tradition of non-implementation of

powers under the 13th Amendment ultimately results in a arrangement that is 13th Amendment Minus.

Part of the explanation for the retrogressive nature of the APRC proposals is the extraordinary influence of the JHU and the JVP in the Rajapakse administration. The JVP has its cake and eats it too. Its members were elected on the UPFA ticket and it is clear that the JVP would have not gained such a large number of seats but for such an alliance. Yet it claims to be part of the Opposition in Parliament. The JHU has a single member in the Cabinet and a handful of parliamentary seats. The SLFP, LSSP, Communist Party and MEP are older and more established members of the UPFA coalition. Many of their leaders, members of the present Cabinet of Ministers, have over the years by word and deed, indicated that a reasonable political solution, whether interim or longer term, must be 13th Amendment PLUS PLUS, if not federal in character. Many of them were involved in shaping and defending the Draft Constitution Bill of 2000 which went significantly beyond the 13th Amendment. Yet it seems that the JHU and JVP, with little influence in the Cabinet of Ministers, which under our Constitution is supposed to be responsible for the direction and control of the government of Sri Lanka, have more influence and control in the Presidential Secretariat, the real locus of political power in the country today. Another disturbing trend during the past one and a half years is that the President seems more inclined to listen to these two parties and follow their policies than the policies of his own party, the SLFP, which under the leadership of all 3 Bandaranaikes, S.W.R.D, Sirimavo and Chandrika, adopted relatively moderate policies on the ethnic issue. The JHU/JVP tail seems to be wagging the UPFA dog and one is tempted to ask this government, certainly with respect to the APRC proposals, not only “where’s the beef?” but also “where’s the SLFP?”