



# Tamil Information Centre

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Committed to Human Rights and Community Development

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## TIC Statement

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### **Sri Lanka: APRC politics after sixty years of Independence**

The proposals of the All Party Representative Committee (APRC) submitted to President Mahinda Rajapakse in January 2008 have accentuated Tamil fears about the intentions of the Sri Lankan government in finding a solution to the conflict that has resulted in widespread human suffering. The APRC's actions appear to be in unison with the government's preference of a military solution rather than a negotiated political settlement.

The APRC was born in an atmosphere characterised by a malaise of political opportunism. Sri Lankan governments, including the Rajapakse regime, have been engaged in an opportunistic political game throughout the post independence period that is either aimed at outmanoeuvring the opposition or placating political partners, at the expense of national unity, reconciliation and progress. In this process, the executive has undermined the judiciary and the legislature, often by threats, intimidation and physical harm to members of these bodies. As a result, the judiciary and the legislature have become subservient to the executive.

It is regrettable that the Japanese government has welcomed the interim proposals of the APRC, without making any reference to its inadequacy. This indicates the insensitivity and lack of understanding of the root causes of the Sri Lankan conflict on the part of sections of the international community that are closely involved in peacemaking efforts.

After 18 months of discussion and 63 meetings, the APRC could only come up with the recommendation that the Thirteenth Amendment to the Sri Lankan Constitution introduced in 1987 should be fully implemented. According to APRC members, the President informed APRC Chairman Tissa Vitharana on 9 January 2008 that the proposals must be submitted by 23 January and that the proposals should not recommend a federal system of government or go beyond the Thirteenth Amendment. In the circumstances, the APRC was forced to cancel a mid-January visit to Britain and Spain to study devolution. It is clear that the APRC has been intimidated and pressured by President Rajapakse to come up with these proposals.

President Rajapakse also submitted a document to the APRC on 9 January, titled *A political proposal: The way forward*, which says that "although the 13<sup>th</sup> Amendment is an integral aspect of the Constitution of Sri Lanka, it has not been implemented in its entirety or even substantially, at any time up to the present", and declares that "the Government will correct this situation by immediately commencing the

implementation of the Thirteenth Amendment”. The President’s document reflects his and the government’s determination to maintain Sri Lanka as a unitary state without any power-sharing. President Rajapakse has not only thwarted the APRC but also has undermined the democratic process itself as he has done on many other occasions. The question arises as to what happened to the many proposals submitted to the APRC by the various parties. These have not been published up to date. It is clear that the APRC process is neither independent nor transparent and lacks democratic accountability.

President Rajapakse appointed the APRC in June 2006 with a mandate to prepare a set of proposals that would be the basis for a solution to the national question. The APRC submitted its interim proposals to the President on 23 January 2008. As expected, the APRC has followed the “instructions” of President Rajapakse. Clause 2.1 of the proposals says that “The government should endeavour to implement the 13<sup>th</sup> Amendment to the Constitution in respect of legislative, executive and administrative powers”. The APRC proposals have followed the Rajapakse document of 9 January in other matters as well.

Following the Indo-Sri Lanka Agreement of 29 July 1987, the Thirteenth Amendment to the Sri Lanka Constitution was introduced in October 1987 providing for elected Provincial Councils. Under the Thirteenth Amendment, all power is held by the central government. The Governor of a Province is appointed by the President and is subject to control by the President. The functions of the Chief Minister and the Board of Ministers of a Province are to aid and advise the Governor in the exercise of his functions. Whether any matter requires the advice will be decided by the Governor on the direction of the President and this cannot be called into question in any court. The Governor has the discretion to ignore the advice of the Chief Minister and Board of Ministers.

The Governor can summon the Provincial Council, including ministers, and give instructions. If the Council fails to comply with any instruction, the President can declare that the powers of the Council will be exercised by Parliament and that the powers of the ministers will be exercised by the President. The Provincial Council cannot pass any laws imposing or altering any taxes in the province without the recommendation of the Governor. No funds can be withdrawn from the Provincial Fund (including funds allocated by the central government) without the sanction of the Governor. The President has powers under the Thirteenth Amendment to take over the functions of the Governor, the Chief Minister and the ministers and also declare that the powers of the Provincial Council are vested in the central Parliament. This cannot be called into question in any court [See Annex for more details about the Thirteenth Amendment].

The APRC interim proposals contain the following statement:

“Under the circumstances, the APRC taking into consideration its own proposals, has identified a course of action to achieve maximum and effective devolution of powers to the provinces in the short term. The emphasis would be on meeting the aspirations of the Tamil speaking peoples, especially in the North and East. This would be done within the framework of the present Constitution, that is, the 1978 Constitution.”

The current unitary Constitution says in Article 76 that ‘Parliament shall not abdicate or in any manner alienate its legislative power, and shall not set up any authority with any legislative power’. There cannot be real devolution of power under the 1978 Constitution and the Thirteenth Amendment, and furthermore, the Tamil people have emphatically rejected the Thirteenth Amendment. At the time the Thirteenth Amendment was introduced in 1987, Tamil representatives made their position clear, as regards its

inadequacy, in writing to the Sri Lankan and Indian governments. APRC's contention that there could be devolution of power under the Thirteenth Amendment and that Tamil aspirations could be satisfied under a unitary state and the Thirteenth Amendment is fraudulent and an attempt to mislead the international community.

The merger of the Northern and Eastern Provinces as a single indivisible linguistic region has been a fundamental demand of the Tamil people, and the two provinces were merged as provided in the Indo-Sri Lanka Agreement of 1987 which gave rise to the Thirteenth Amendment. The Oslo Declaration of December 2002 also recognizes the north-east region as the historical habitation of the Tamil speaking peoples. The Rajapakse government has ignored these important agreements and has taken measures to divide the two provinces, manipulating the judiciary in the process.

Breaking pacts, unilateral abrogation of agreements and failure to implement accords on the part of successive governments have determined the bloody course of history in Sri Lanka in sixty years of independence. It is in this context that the United National Party admitted in its election manifesto in 1977 that the lack of solution to the problems of the Tamil people made them to support the creation of a separate state. The situation has hardly changed in twenty years. The Tamil Information Centre emphasizes that proposals that aim to bring about a lasting solution to the Sri Lankan conflict must meet the aspirations of the Tamil speaking people, providing them substantial regional autonomy and self-rule on the basis of the right to self-determination in the areas of their historical habitation, where they could live in peace with dignity and security.

## **Annex**

### **The Thirteenth Amendment to the Sri Lanka Constitution**

#### **1. Introduction**

Some important features of the Thirteenth Amendment to the Sri Lanka Constitution are examined below.

#### **2. Provincial Councils**

Following the Indo-Sri Lanka Agreement of 29 July 1987, the Thirteenth Amendment to the Sri Lanka Constitution was introduced in October 1987 providing for an elected Provincial Council, a Provincial Board of Ministers with a Chief Minister and a Provincial Governor. A Provincial Councils Act was also introduced. At provincial elections held on 19 November 1988, a North-East Provincial Council (NEPC) controlled by the Eelam People's Revolutionary Liberation Front (EPRLF) was elected. The NEPC was dissolved in 1990 and since then there have been no provincial council elections in the north-east.

The Governor, though not elected, holds all the power, and the ministers, though elected, virtually have no power. There is in reality no devolution of power to the provinces.

The Indo-Sri Lanka Agreement acknowledged that the Northern and the Eastern provinces "have been areas of historical habitation of the Tamil speaking peoples". The two provinces were merged as

envisaged in the Agreement. The Provincial Councils Act provides for a referendum in the Eastern Province to determine whether the eastern people want permanent merger of the two provinces. The referendum has not been held.

### 3. Provincial Governor

Under the Thirteenth Amendment, the President appoints the Provincial Governor and can dismiss him/her.<sup>1</sup> The Governor holds executive power in the Province in relation to those matters, which are within the competence of the Provincial Council.<sup>2</sup> Since the Constitution vests executive power in the President,<sup>3</sup> it follows that the Governor is subject to control by the President.

The Governor can exercise his executive power either directly or through the Board of Ministers or through the members of the provincial public service.<sup>4</sup> The disciplinary control of officers of the province is vested in the Governor.<sup>5</sup> The Governor will also determine terms and conditions of their employment.<sup>6</sup> He/she can delegate his/her powers to a Public Services Commission (PSC), but PSC will also be appointed by him/her and controlled by him/her.<sup>7</sup> In this circumstance, the Board of Ministers in effect becomes redundant.

The functions of the Chief Minister and the Board of Ministers are to aid and advise the Governor in the exercise of his functions.<sup>8</sup> The Chief Minister must communicate all decisions of the Board of Ministers to the Governor.<sup>9</sup> The ministers also must respond when the Governor calls for information.<sup>10</sup> The Governor will exercise executive power also in respect of all provincial legislation passed by the Provincial Council.<sup>11</sup>

The Governor is empowered to make rules for allocation of business among ministers.<sup>12</sup> The Governor can summon the Provincial Council, including ministers, and give instructions.<sup>13</sup> If the Council fails to comply with any instruction, the President can declare that the powers of the Council will be exercised by Parliament and that the powers of the ministers will be exercised by the President.<sup>14</sup> The Governor has the discretion to ignore the advice of the Chief Minister and Board of Ministers.<sup>15</sup> Whether any matter requires the advice of the Chief Minister will be decided by the Governor on the direction of the President and this cannot be called into question in any court.<sup>16</sup>

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<sup>1</sup> Article 154B (2) – 13<sup>th</sup> Amendment to the Sri Lanka Constitution 1978

<sup>2</sup> Article 154C – 13<sup>th</sup> Amendment

<sup>3</sup> Article 4 (b) – Sri Lanka Constitution 1978

<sup>4</sup> Article 154C – 13<sup>th</sup> Amendment

<sup>5</sup> Section 32 (1) - Provincial Councils Act

<sup>6</sup> Section 32 (3) – Provincial Councils Act

<sup>7</sup> Sections 32 (2), 33 (1) and 33 (8) – Provincial Councils Act

<sup>8</sup> Article 154F (1) – 13<sup>th</sup> Amendment

<sup>9</sup> Article 154B (11) (a) – 13<sup>th</sup> Amendment

<sup>10</sup> Article 154B (11) (b) – 13<sup>th</sup> Amendment

<sup>11</sup> Article 154C - 13<sup>th</sup> Amendment

<sup>12</sup> Section 15 – Provincial Councils Act No 42 of 1987

<sup>13</sup> Article 154B (10) (a) – 13<sup>th</sup> Amendment

<sup>14</sup> Article 154K and 154L (1) – 13<sup>th</sup> Amendment

<sup>15</sup> Article 154F (1) – 13<sup>th</sup> Amendment

<sup>16</sup> Article 154F (2) and (3) – 13<sup>th</sup> Amendment

#### **4. Finance**

Under the Thirteenth Amendment, a Finance Commission consisting of the Governor of the Central Bank, Secretary to the Treasury and three other members each representing the three major communities, (appointed by the President), will recommend the amount to be allocated from the Annual Budget to meet the needs of the province. The President will decide the amount.<sup>17</sup>

The Provincial Council cannot pass any laws imposing, altering abolishing any taxes in the province without the recommendation of the Governor.<sup>18</sup> No money can be withdrawn or utilized from the Provincial Fund (which will include money allocated by the central government and taxes and levies) without the sanction of the Governor.

The Provincial Council does not have powers to borrow internally and externally, provide guarantees and indemnities, receive aid directly, and engage in or regulate internal and external trade. The power to receive aid directly was granted to an elected provincial body under the proposals of the People's Alliance (PA) in 1995. But this provision was removed in the 1997 draft constitution of the PA.

Under the Sri Lanka constitution all powers of auditing of accounts in relation to monies received from international sources are vested in Auditor-General appointed by the President.<sup>19</sup>

#### **5. Take over of functions**

If the President is satisfied that a situation has arisen in which the provincial administration cannot be carried out (for example, if the Provincial Council does not act in accordance with the recommendation of the Governor in the case of taxes), the President can take over the functions of the Governor, the Chief Minister and the ministers and also declare that the powers of the Provincial Council are vested in the central Parliament<sup>20</sup>. This cannot be called into question in any court.<sup>21</sup>

#### **6. Matters of no advice**

Under the Thirteenth Amendment, the Chief Minister and the Board of Ministers can advise the Governor only in respect of matters on which the Provincial Council can pass laws. Over other matters, they cannot even advise. These are as follows:

##### **A. Police**

The Inspector General of Police (IGP), who is under the direct control of the President, will be the head of all provincial police forces. A Deputy Inspector General of Police (DIG) will head the provincial division of the police force.<sup>22</sup> The DIG will be appointed by the IGP with the concurrence of the Chief Minister, but if there is no agreement, the President will appoint the DIG after

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<sup>17</sup> Article 154R – 13<sup>th</sup> Amendment

<sup>18</sup> Section 24 (1) – Provincial Councils Act

<sup>19</sup> Articles 153 and 154 – Sri Lanka Constitution

<sup>20</sup> Article 154L (1) – 13<sup>th</sup> Amendment

<sup>21</sup> Article 154L (6) – 13<sup>th</sup> Amendment

<sup>22</sup> Clause 2, Appendix I – 13<sup>th</sup> Amendment

consulting the Chief Minister.<sup>23</sup> The DIG will be responsible to the Chief Minister and under his control.<sup>24</sup> But there are no provisions for the exercise of such control other than through the IGP and the President.

Recruitment to the provincial police will be through a Provincial Police Commission, composed of three members. The members are the DIG, a person nominated by the Central Public Service Commission in consultation with the President and a nominee of the Chief Minister.<sup>25</sup> The central government, therefore, will have a majority in the Provincial Police Commission.

Offences against a public officer and offences prejudicial to national security or maintenance of essential services will not be within the competence of the provincial police force. These offences are under the jurisdiction of the national police division.<sup>26</sup> This means that the national police division deals with offences under the Prevention of Terrorism Act (PTA).

## **B. Land and Land Settlement**

Although this matter is in the Provincial List under the Thirteenth Amendment, the disposal of land within the province will be under the direct control of the President.<sup>27</sup> State lands will not be vested in the Provincial Council and therefore it will not be able to distribute land to the people in the province.

There is a long-standing complaint of the people in the north-east relating to distribution of state lands to those from outside the north-east and forcible occupation of private lands as a result of government-organized colonisation or settlement programmes.

## **7. Judiciary**

Under the Sri Lanka Constitution, judicial power is exercised by Parliament through courts established by law.<sup>28</sup> The President appoints the judges of the Supreme Court and Court of Appeal on recommendations made by the Constitutional Council<sup>29</sup> [President Rajapakse has been acting unconstitutionally by making appointments without the recommendations of a Constitutional Council]. Under the Thirteenth Amendment, a High Court is established for the Province.<sup>30</sup> The Chief Justice chooses the High Court judge for a province from among the High Court judges<sup>31</sup> appointed by the President.<sup>32</sup>

The High Court in each province has original criminal jurisdiction<sup>33</sup> in respect of offences within the province and appellate jurisdiction in respect of decisions of Magistrates Courts and Primary Courts

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<sup>23</sup> Clause 6, Appendix I - 13<sup>th</sup> Amendment

<sup>24</sup> Clause 11:1, Appendix I - 13<sup>th</sup> Amendment

<sup>25</sup> Clause 4, Appendix I - 13<sup>th</sup> Amendment

<sup>26</sup> The Schedule to Appendix I of the 13<sup>th</sup> Amendment lists offences to be investigated by the National Police Force.

<sup>27</sup> Appendix II of the 13<sup>th</sup> Amendment and Article 33 (d) of the Sri Lanka Constitution

<sup>28</sup> Article 4 (c) - Sri Lanka Constitution

<sup>29</sup> Article 41C - 17<sup>th</sup> Amendment

<sup>30</sup> Article 154P (1) - 13<sup>th</sup> Amendment

<sup>31</sup> Article 154P (2) - 13<sup>th</sup> Amendment

<sup>32</sup> Article 111 - Sri Lanka Constitution

<sup>33</sup> Article 154P (3) (a) - 13<sup>th</sup> Amendment

within the province.<sup>34</sup> From the decisions of these courts, appeals lie to the Court of Appeal and the Supreme Courts of Sri Lanka on matters prescribed.

## 8. The three lists

The Thirteenth Amendment provides three lists:

**Provincial Council List** - The Provincial Council may make laws applicable to the province in respect of matters in this list.<sup>35</sup>

**Concurrent List** - Both the Sri Lanka Parliament and the Provincial Council may legislate on matters in this list.<sup>36</sup>

**Reserved List** - Only the Parliament may make laws in respect of matters in this list.<sup>37</sup>

Despite this, the central Parliament will be able to legislate by a simple majority on all subjects on grounds of national policy. The law-making powers of the Provincial Council do not include national policy.<sup>38</sup> Parliament can also legislate in respect of any subject in the Provincial Council List if such law is necessary for implementing any treaty, agreement or decision at an international conference.<sup>39</sup> This would enable Parliament to legislate in respect of any matters in all three lists.

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<sup>34</sup> Article 154P (3) (b) - 13<sup>th</sup> Amendment

<sup>35</sup> Article 154G (1) - 13<sup>th</sup> Amendment

<sup>36</sup> Article 154G (5) (a) - 13<sup>th</sup> Amendment

<sup>37</sup> Article 154G (7) - 13<sup>th</sup> Amendment

<sup>38</sup> Article 154G (10) and Ninth Schedule - 13<sup>th</sup> Amendment

<sup>39</sup> Article 154G (11) - 13<sup>th</sup> Amendment