

## **Interview with Rohan Edrisinha on the subject of Abrogation of the CFA and the latest Interim APRC Proposal**

PLEASE COMMENT ON THE INTERIM REPORT BY THE APRC

The two page document released by the APRC in late January is really an extremely disappointing document and there is a lot of misunderstanding as to what the APRC's proposals were really about. If we look at what happened the APRC had been meeting for a very long time under the chairmanship of Tissa Vitharana and it seemed likely that they were coming to a conclusion on a set of proposals that would have been similar perhaps to the proposals of the 2000 Constitution. It seems clear that, certain elements in the government realized that this was happening and were nervous about letting the APRC come out with that set of proposals. So they wanted something that was less imaginative and less radical. So elements in the government came up with this idea of: "*why don't we have full implementation of the 13th Amendment of the constitution.?*"

Now, around the 17<sup>th</sup> January and just before that, various proposals based on full implementation of the 13<sup>th</sup> Amendment, probably even a little bit more than the 13<sup>th</sup> Amendment, surfaced, and were discussed. Why I say a little bit more than the 13<sup>th</sup> Amendment is because some of the proposals - let the government voluntarily say that we are not going to exercise certain powers with effect to the concurrent list so that in effect the provinces will have a considerable amount of power. Full implementation of the 13<sup>th</sup> Amendment would also have meant that the police powers given to the provinces which have never been implemented for the last twenty years would also be implemented for the first time. But between the 17<sup>th</sup> January and the 23<sup>rd</sup> January a lot of pressure was brought to bear so that finally, to cut a long story short, a 10 or 13 page document was cut down to two pages and all those promises about the Central Parliament not exercising certain powers, voluntarily devolution with respect to police and land . . .all that was removed and so we have a very bare, basic 2 page document. If we look at the two page document, I think it is the 13<sup>th</sup> Amendment minus - or less than the 13<sup>th</sup> Amendment to the Constitution. Also it's not really a constitutional document- it's full of vague promises. So for example: part of the two page document says *the government should try*

*to give the provinces more power and the government should try to give more money its not legally binding, its just vague promises.*

There is also a very interesting section that says parliament should pass a law to *ensure that constitutional provisions on language in chapter 4 are implemented.*

You don't need a law to implement the provisions of a Constitution. That is a question of enforcement, political will, penalizing those who do not obey the law because the existing law on language does require that Tamil speaking people should be able to engage with the government in the Tamil language - but that doesn't happen in practice. An indication of how the APRC document changed from the 17<sup>th</sup> to the 23<sup>rd</sup> it's clear from the title if we look at the document that was discussed earlier on around the 17<sup>th</sup> of January it was *action to be taken by the President to fully implement the 13<sup>th</sup> Amendment to the constitution.* The 2 page document that finally emerged says “*action to be taken by the President to fully implement relevant provisions of the constitution*” not all provisions of the 13<sup>th</sup> Amendment not all provisions of the Constitution.

So I think people need to really look at the two page document and not be influenced by what appeared in the paper earlier as drafts or leaks from the draft. The two page document is what needs to be judged and evaluated.

The second big issue about the two page document is that it talks about setting up an interim council in the North and I think there are very serious constitutional issues about this. Firstly they say there is no need to have an interim council in the East because the environment is ideal for a Free and Fair Election .How the APRC can say that given the reality in the East, is really mind boggling because there are indications some of the candidates who have been nominated to contest have been forced to give their names to contest. Therefore the people are scared. The normal law and order is not in place, the paramilitary groups are very powerful so I think the fact that the APRC, which consists of senior politicians like Tissa Vitharana, can actually say that the environment in the East is ok raises very serious concerns. What about the North? The document does not say how the interim council is going to be set up. And if we look at the 13<sup>th</sup> Amendment to the Constitution there is hardly any reference to an interim council there, so it is an interesting question. If this desire to set up an interim council was a serious one, then

surely this document should have at least had the way in which it was going to be set up - under what section of constitution, what is the process etc.

We can only speculate. Now, apparently Mr. Douglas Devananda has sent a proposal to the president saying that an interim council can be set up under article 154 T of the Constitution. But if we look at article 154 T it talks about transitional measures. It's a clause which says that after the 13<sup>th</sup> amendment is introduced, if there are some practical difficulties about implementing the provincial council system, the president can give various directions and orders. The marginal note to that section says transitional measures. I do not think it is appropriate that that particular clause is used to set up an interim council twenty odd years after the 13<sup>th</sup> Amendment was introduced. However there is a way in which an interim council can be set up and that is under article 154 L and 154 M of the Constitution. There are two sections which actually allow the President to take power back to the center and therefore we have criticized these two sections in the past. **B**ut these two sections may be used to set up an interim council and its goes something like this: When there is a failure of the administrative machinery in a province (and certainly one can argue that in North there is a failure- there isn't a provincial council on the grounds.) Parliament can take over the legislative powers of the Provincial Council and the President can take over the Executive powers of the province (that's step number one). Step No 2: Parliament can then, by resolution, give the legislative power of the province to the President. Third step the president can then delegate those legislative powers from the province to parliament, from parliament to the President, - to **any other body**. The wording is so wide. So technically it can be given even to YMCA if you go by the literal meaning of the section. So that is the way I would have thought - if we are looking for legal way to set up an interim council. The president can delegate to an interim council that is set up with or without Douglas Devananda or wherever. But you can see that that is a better way because he talks about failure of administration the process is better as parliament also enters the scene whereas the proposal of Douglas Devananda does away with all those checks. As I said I do not think 154 T should be used: I think, if at all, 154 L or M and N should be used. But the important point I'm trying to make is that for such an important thing like this, where some sort of legal basis should have been specified, the two page document does not specify it just says "an

interim council shall be established.” So to me the two page document is not even a proper legal document – it can not even be considered a set of constitutional proposals. This and the section on language is very weak: even today Sinhala and Tamil do not have equal status in our constitution: Sinhala has a slightly higher status. If you are really interested in fully implementing the language provision you either change the constitution or you penalize people who are violating the language provisions. I was in Batticaloa in October, and I went into the Batticaloa police station. The Batticaloa town has more Burghers than Sinhalese. But every notice on the notice board in the Batticaloa police station was only in Sinhala, in *Batticola!* Including a notice the title of which was **“This is only for non Sinhalese police officers”** even that was only in Sinhala!

Its shows you don't need a law there is a total lack of political will - I would have thought the IGP or the Police Commission should penalize the police station which functions like that, but that is not happening and so this two page document really is a total anti climax, it's damp squib! So much was expected from the APRC, as people had a lot of respect for Prof. Tissa Vitharana, he was trying his hardest. But in that last week he seems to have capitulated completely and allowed himself and the APRC to be associated with a two page document which I think is totally inadequate and very badly drafted - it doesn't make sense. Obviously huge parts have been cut, so there is no logical sequence suddenly a sentence appears that sounds like G.L .Peiris, suddenly a sentence appears that sounds like someone else. I think they have just cut and pasted from these larger documents, reduced it to two pages, so that it doesn't make sense when you read it as a whole. There is no inter connection and at the end of the day I think that it can not be considered a set of constitutional proposals.

**BUT THE GOVT ARGUES THAT THIS IS ONLY AN INTERIM PROPOSAL AND WILL BE FOLLOWED BY A FULL PROPOSAL LATER ...?**

I hope that happens but look at what happened? The APRC was meeting the President and the president produces a document and gives it to the APRC and says *“these should be submitted to me as your proposals”*. It shows the total lack of respect with which the APRC was treated - and the APRC has very senior political figures as I said. The other point is I'm also struck by how much power the JVP and the JHU have. They seem to have basically had access to the President and were able to get everything that they

wanted implemented. Look at this from the constitutional point of view: Tissa Vitharana, Dew Gunasekara and all the people who are pro the APRC process are members of the cabinet of ministers. They are members of parliament. If we look at the JVP, they are not part of the cabinet; they are supported to be in the opposition. The JHU has a single member in the Cabinet.

But they seem to be more powerful they seem to have the ear of the president. They seem to have control of the Presidential Secretariat and much more access than the cabinet of ministers and the leaders of the traditional member parties of the UPFA. This raises a very interesting governance question also 1) the influence of the JVP and the JHU 2) it highlights again the dangers of the presidential system because other institutions are undermined. The Cabinet of Ministers is not so powerful, Parliament is not so powerful but the Presidential Secretariat which has been almost taken over by the JHU and JVP seems to be very powerful. Everyone is talking about Mahinda Chinthanaya I think it might be useful to remember that one of the solemn promises of Mahinda Chinthanaya was also to abolish the executive presidency by the end of the President's first term. If you are opposing devolution or any form of devolution that is inconsistent with the unitary label on the basis of Mahinda Chinthanaya you must also abolish the executive presidency if you want to be faithful to Mahinda Chinthanaya. The other point that I would like to stress is I don't think that the President and the government are willing to keep the APRC going. They won't scrap it but they will never allow Tissa Vitharana to present his proposal. I think Minister Vitharana owes it to the country, since they have had so many meetings and spent so many hours; the papers are calculating something like 68 meetings and 500 odd hours. He owes it to the country to at least hold a press conference and say these are what our proposals are, the President and the Government doesn't seem to like them but this is what we did and these are our proposals. I hope he does that otherwise his credibility will be at stake. The last point I'd like to make is that I'm really amazed that the international community has been so positive about this very flimsy, inadequate two page document. Particularly India. One must understand Indians supported the Indo-Lanka Accord. The Indo-Lanka Accord has a huge section on Sri Lanka's multicultural, plural, multiethnic character which is not in our present constitution, not in the 13<sup>th</sup> amendment and not in the Provincial Council's Act. It

also includes the merger of the North and East which is not in the 13<sup>th</sup> Amendment but which is in the Provincial Council's Act which goes hand in hand with the 13<sup>th</sup> Amendment. Even when the Supreme Courts considered the 13<sup>th</sup> Amendment in the famous case, both the 13<sup>th</sup> Amendment and the Provincial Council's Act were read together because the Provincial Council's Act not only deals with the mergers but also deals with provincial finance and the provincial public service; very important aspects of the Provincial Council System. So I can understand Indians favoring an Indo-Lanka Accord type solution because it includes the merger and also substantial devolution, police powers, land, everything. But looking at this two page document and welcoming it, and saying that it is a step forward, I think it's really quite amazing and I think the Indians have got it wrong. I think it's a step backwards not a step forward.

#### HOW DO YOU COMPARE THIS DOCUMENT WITH THAT SUBMITTED EARLIER BY GROUP A?

I think it falls horribly short. The majority report goes even slightly beyond the 2000 constitution and is very pro-devolution. The interesting thing to compare it with is the Group B report. H.L. De Silva, GH Periris, Gomin Dayasiri and Manohara De Silva; their minority report is actually a very interesting document. It's very well written; they raise their concerns about federalism, and even though I don't agree with them they put forward the arguments very effectively. But they do ultimately say that the province should be the basis of devolution. They come up with various modifications. I think this could even be less than Group B; because Group B basically was talking about provincial based devolution of power. So I think it's very important to recognize the inadequacy of this two page document and one can only hope that Tissa Vitharana will release his proposal and take the line. Ok the government is interested in an interim arrangement, we have come up with some comments on that; but in the mean time we are going to release our proposals and the government can either accept or reject it. After all it's an All Party Representative Committee. There is no guarantee that what they propose has to be accepted by the government. So I think Tissa Vitharana owes that to the people.

FROM THE B-C AGREEMENT TO NOW, ALMOST ALL AGREEMENTS HAVE BEEN THROWN INTO THE DUSTBIN SO NOW THIS PROPOSAL HAS BEEN PUT FORWARD AND IT WILL NOT FIT TO THE TAMIL'S ASPIRATIONS, WHAT MESSAGE SO YOU THINK HAS BEEN GIVEN TO THE NORTH AND EAST TAMILS?

I think that's an important question because it's almost as if the whole APRC process has been obsessed about reaching southern consensus and developing a consensus that is acceptable to the Sinhalese; but we're talking about a set of constitutional proposals that can be used as a basis for negotiations with the Tamil people. The Tamil political leaders who would argue with some justification that they have been engaged in a struggle for many years. They have demanded certain things, they have certain basic aspirations. If you look at it as a set of proposals for conflict resolution or for addressing some of their grievances and aspirations, these proposals actually go back. They go backwards almost 20 years. And the message that is being sent to the Tamil people is that perhaps the Sri Lankan Government and the parties in the present government just don't have any empathy, any understanding, any awareness of the history of the struggle, the evolution of the struggle. This can only further polarize relations with the Sinhalese and the Tamils in particular. It's going to make the Tamils feel that any solution within one country, within a united Sri Lanka is just not going to work. There is a lack of comprehension, a lack of understanding, a lack of willingness to even meet us half way. This combined with the enhanced military campaign- the danger here is that the Tamil community which I think was moving away from the LTTE, might actually be pushed back in their arms because they are going to look at the LTTE as the only group that's going to preserve their dignity and their security. In other words, you could have a solution that makes the prospects for a long term solution even more difficult. The other point I want to make is relation to that is, look at what is going to happen in the North and the East. Now in the East the indications are that we are going to have an election that is not free and fair. The TNA is boycotting, the UNP is boycotting the election the government is linking up with paramilitary groups who are accused of serious human rights violations in certain local authorities. The net result of that is you will probably have an eastern political network or whatever that is really controlled by the centre and not by the political parties that have

support on the ground. Look at what will happen in the North too. If the President sets up an interim council in whatever way whether it's through article 154 T or article 154 M or L, and if he appoints people like Douglas Devananda and doesn't appoint even some of the TNA MPs from the area; if it comprise only people from the centre or people who are not seen as really having widespread popularity in the North, then the Northern interim council will be seen as an extension of presidential rule and an extension of the centre and not as a devolved entity. So actually we could be seeing a re-centralization of power through the interim administration rather than devolution of power. And when you have those institutions in place it will be much more difficult to have a long term political solution to the conflict. I think a lot of thought and care has to be exercised about how to respond to this two page document and even this initiative to set up an interim council. It must be seen as an interim council that is responsive and accountable to the people of the North and East rather than an interim council that is imposed from the Presidential Secretariat.

#### FROM HERE WHAT CAN WE DO?

The abrogation of the CFA was unfortunate but I do think the CFA agreement itself had certain fundamental flaws. I think that the peace process that was lead by Ranil Wickramasinghe also had flaws. One of them was that Wickramasinghe did not negotiate strongly enough on issues of human rights and pluralism. So the perception was created among Sinhalese and the Muslims that he was basically appeasing the LTTE too much and that the LTTE was using the CFA to liquidate its political opponents. I think that those of us that were supportive of the peace initiative now should be honest enough to admit there were certain defects which probably helped the people who were opposed to the peace process to come to power. But having said that I think the CFA has a lot of positives. The number of people killed was reduced. There was people to people contact. People engaged with each other. CPA was able to go to the North and engage with people. We were challenged in our views and we learned as well. I think people to people contact helped a lot. Another negating aspect of the abrogation of the CFA from that point of view is in a sense it also does away with the SLMM and the SLMM was performing a useful function in terms of documenting human rights violations and

atrocities. So viewed from that perspective, all this is going to basically encourage a government that believes the primary way of dealing with the challenge or the problem or the national question is through military means. Now I hate to have to say this but it could be that since this strategy seems to be reasonably popular among certain sections of the Sinhalese and Muslim populations that, just as much as the peace process had a chance, this process also needs to have a chance. I'm convinced it will not succeed and the people who are going to pay the price for this experiment or this strategy are ordinary civilians, Tamils, Sinhalese and Muslims. They're the people who are going to be killed. They are the people who are going to have their schools and hospitals and houses destroyed. But I feel that at some point sanity will return or shall we say that the *limits of the military option will be realized*. And at some point there will have to be a serious discussion on a political solution and on constitutional reform and if that stage is ever reached I don't think the two page document produced by the APRC will be worth anything. We will have to look at more serious initiatives. The 2000 constitution draft bill, the Committee of Experts report, both A and B; as I said I think B is very useful to look at; I have tremendous respect for the people on that committee. I don't agree with their arguments but I think we need to take it seriously. It will be much more useful for us to base our deliberations on both those committee reports and the 2000 constitution and on the Oslo Declaration which I think is very positive – federalism within a united Sri Lanka – rather than looking at what has emerged from the APRC. In fact the APRC document probably should be called a Rajapakse-JHU document because that seems to be the reality; it seems to have been drafted by the JHU and President Rajapakse. I don't think the APRC members really subscribe to what emerged in the two page document. But the irony is that it was given to the President by the APRC even though it's probably a document drafted by him and the JHU.