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Edited by

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SRI LANKA THE 13TH AMENDMENT



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About the Debate...

The *IPCS Debate Series* has been conceptualised with a vision to address contemporary issues pertaining to international security vis-à-vis presenting perspectives of noted researchers in the field. This particular compilation consists of commentaries by Indian and Sri Lankan analysts on the issue of the 13th Amendment to the Sri Lankan Constitution and its implications on India-Sri Lanka relations.

Prof. V. Suryanarayan (India), Sugeeswara Senadhira (Sri Lanka), and N Manoharan (India) make assessments of the various nuances with respect to the 13th Amendment in their individual commentaries. Tamil disenchantment with the rolling out of the constitutional amendment, differing domestic standpoints on the issue, and varying definitions of the terms "13th Amendment", "13-plus", and "13-minus" have been deconstructed through these commentaries. Significantly, the history of the process and its ramifications for India-Sri Lanka ties have been viewed in the light of positive changes in India's policy toward the same. The analyses conclude with a durable way forward by reconciling the differing domestic views on the core issues at hand, and looking at a long-term tenable relationship between the neighbouring countries with mutual cooperation and respect .

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Sri Lanka and the 13th Amendment: Tamil Disenchantment

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During the Fourth Eelam War, in order to ensure India's support to the ongoing military operations, President Mahinda Rajapaksa used to assure New Delhi that his government would sincerely and expeditiously implement the 13th amendment, once the war was won. On few occasions he remarked that Colombo will go even beyond the 13th amendment.

Four years have passed since the decimation of the LTTE, but ethnic reconciliation remains a distant dream. Instead of entering into a comprehensive dialogue with the Tamil National Alliance (TNA) to arrive at an amicable solution, the media reports suggest that the Government was preparing to whittle down important provisions of the 13th Amendment. Contradictory statements were issued by Government spokesmen about impending constitutional amendments. The minority ethnic parties expressed their misgivings. The left wing allies of the Government had their reservations. In order to diffuse the situation, the President announced that the Parliamentary Select Committee has been assigned the task of suggesting amendments to the Constitution. Needless to say the views of the Sinhala majority will prevail in the Parliamentary Select Committee.

In order to understand the policies and programmes of the present Government, it is necessary to highlight the basic transformation that has taken place in the Island Republic. Chandrika Kumaratunga and Ranil Wikramasinghe were conscious that there were serious flaws in the nation building experiment. They sincerely believed that ethnic reconciliation can take place by devolving more powers to the Provincial Councils and creating space for self-government. The present Government has a retrograde policy, which can be summed as follows. The destruction of the Tigers saw the end of the terrorist problem, which was the only problem confronting Sri Lanka. There is no ethnic problem.

Since New Delhi maintains that a solution to the ethnic problem can be found if Colombo sincerely implements the 13th Amendment, the question naturally arises – do the Sri Lankan Tamils subscribe to that point of view... given the allergy of Sinhalese leaders to the term federal, the Provincial Councils ... were a paradoxical attempt to introduce elements of federalism in a unitary setup.

Since New Delhi maintains that a solution to the ethnic problem can be found if Colombo sincerely implements the 13th Amendment, the question naturally arises – do the Sri Lankan Tamils subscribe to that point of view. It should be pointed out that given the allergy of Sinhalese leaders to the term federal, the Provincial Councils, which came into existence after the enactment of the 13th amendment, was a paradoxical attempt to introduce elements of federalism in a unitary setup. The Sinhalese ideology upheld the necessity to have centralization of powers and close identification of the nation state with Sinhalese community. It was, therefore, but natural that the Northeast Provincial Council would get entangled in serious difficulties. It had a short life of only 17 months, from November 1988 to March

1990. It lacked financial resources. What is more, by disingenuous mechanisms, like including a subject within “national policy”, central authority was re-established in agrarian services and national transport corporations. Education was a devolved subject but by terming a school as “national school” it could be brought under central control. President Premadasa established Divisional Secretariats, which were under central control. They further undermined the Provincial Councils.

Summing up the functioning of the Provincial Councils, Prof. GL Peiris, who was closely associated with both Chandrika and Ranil, admitted: “In fact, we have no devolution at all. Decentralisation - yes, devolution - no”. Whether Prof. Peiris remembers this statement which he made while inaugurating the India-Sri Lanka Consultation on Devolution or not is debatable. The present Government has already struck the death knell on devolution process. The merger of the north and the east, which is an article of faith as far as Si Lankan Tamils are concerned, has been undone by a judicial pronouncement. The Government spokesmen have made it clear that Colombo has no intention to devolve police and land powers.

What is not being realized by the policy makers in New Delhi is the fact that both Chandrika and Ranil were willing to go beyond 13th Amendment. The Chandrika constitutional proposals, Mangala Moonasinghe Report, the draft 2000 Constitution and the Experts Committee Report - all of them have made positive recommendations which go far beyond the 13th Amendment.

What is not being realized by the policy makers in New Delhi is the fact that both Chandrika and Ranil were willing to go beyond 13th Amendment. The Chandrika constitutional proposals, Mangala Moonasinghe Report, the draft 2000 Constitution and the Experts Committee Report - all of them have made positive recommendations which go far beyond the 13th Amendment. The draft Constitution of 2000 was a consensus document. The legal luminary of the UNP Choksi had a big role in its preparation. The TULF leaders made their benign inputs. The Experts Committee Report, for the first time, has touched upon the problems facing non-territorial minorities - the Moslems and the Malaiha (hill country) Tamils and has made positive recommendations.

Can India afford to be a silent spectator to the ominous developments in its southern backyard? Prime Minister Manmohan Singh has expressed his unhappiness and concern about the sad turn of events. The need of the hour is for India and international community to pressurize Colombo not to proceed with constitutional amendments. On the other hand, negotiations should immediately commence between the Government and the TNA as to how to implement the positive aspects of the draft 2000 Constitution and the Expert Committee Report.

Sri Lanka and the 13th Amendment: Welcome Changes in India's Policy

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India is committed to achieving a bright future for the Sri Lankan Tamil community in a united Sri Lanka, in which all citizens can live in dignity, equality, and self-respect. In furtherance of this objective, India would work for a durable political solution through meaningful devolution of powers and the implementation of the 13th amendment.

New Delhi's commitment to the unity and territorial integrity of Sri Lanka, in which the Tamil identity can be protected and fostered, has not been appreciated both by the Sinhalese and the Tamil extremists. The India-Sri Lanka Accord, 1987, and the subsequent 13th Amendment were viewed by important Sinhalese leaders as illustrations of India's hegemonic designs.

The induction of the Indian Peace Keeping Force (IPKF), on the specific invitation of President Jayewardene, transformed the political contours of Sri Lanka. At a heavy cost of men and materials, the IPKF was able to bottle up the LTTE guerrillas; the Sri Lankan government even withdrew its armed forces from the north and the east and concentrated on tackling the JVP revolt. Instead of earning the eternal gratitude of the Sinhalese, India was accused of imposing its hegemony over Sri Lanka. Sadly, the blind hatred of New Delhi brought the two hitherto antagonistic forces - Prabhakaran and Premadasa - together. Money and arms were supplied to the Tigers to confront the Indian army. But Premadasa had to pay for the wages of sin; he became a victim to the LTTE.

The Tamil extremists were also sharply critical of New Delhi. Prabhakaran viewed the Accord as a clever device to snatch away the fruits of his hard won struggle. The TULF also did not play ball with New Delhi. New Delhi was very keen that the Tamil moderates should contest the election to the Northeastern Provincial Council and assume power. However, the TULF did not want to displease the Tigers and decided to abstain. As a result, the EPRLF filled up the void, contested the election, and came to power.

In retrospect, the India-Sri Lanka Accord should have been signed between Colombo and the Tamil groups. India could have been its guarantor. But

New Delhi's commitment to the unity and territorial integrity of Sri Lanka, in which the Tamil identity can be protected and fostered, has not been appreciated both by the Sinhalese and the Tamil extremists. The India-Sri Lanka Accord, 1987, and the subsequent 13th Amendment were viewed by important Sinhalese leaders as illustrations of India's hegemonic designs.

President Jayewardene was shrewd enough to realise that the Indian armed forces will inevitably come into conflict with the recalcitrant Tigers. Prabhakaran will not flinch from his single-minded determination to achieve a separate state of Tamil Eelam through armed struggle. The IPKF experience highlighted India's limitations in bringing about a political solution to a domestic problem of a neighbour.

The fact remains, however, that India cannot insulate itself from the developments in Sri Lanka. India-Sri Lanka relations are like the behaviour of Siamese twins, what afflicts one will affect the other. Following Rajiv Gandhi's assassination and the ban imposed on the LTTE as a terrorist organisation, New Delhi began to insulate itself from the ethnic conflict. At the same time, there was intelligence cooperation between the two countries, as a result of which the "floating warehouses" of the Sea Tigers were destroyed by the Sri Lankan Air Force. The Tigers became fish out of water, which paved the way for their eventual defeat. The sad fact remains that when the war against the Tigers became a war against Tamil civilians and gross human rights violations took place in Sri Lanka, New Delhi did not adopt an activist policy to rescue the Tamil civilians. What is more, New Delhi was lulled into inertia by the

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assurances of the Sri Lankan President and his advisors that after the war was won, they would expeditiously implement the 13th Amendment. The unfolding events in Sri Lanka clearly illustrate that Colombo has no intention to devolve powers to the provinces. What is more, they would like New Delhi not to champion the cause of Sri Lankan Tamils. The Sri Lanka watchers of India should analyse the implications of Gotabaya Rajapaksa's recent statement that the national question should have a "home grown solution". To quote: "We should not listen to India on this; this does not mean that we should lose the relationship that we have with India. But if there is a problem it should only be solved by Sri Lankans and not India".

India cannot afford to be a silent spectator to the ominous developments next door. The India-Sri Lanka Accord was not only an agreement between two Governments, as far as the resolution of the ethnic conflict was concerned; India signed the agreement on behalf of the Tamils. The continuing whittling down of the provisions of the 13th Amendment is a major setback to India's Sri Lanka policy.

At long last, New Delhi is waking up to realities. At the end of the TNA delegation's recent visit to New Delhi on 19 June 2013, a press statement was issued cautioning Sri Lanka not to dilute the 13th Amendment. The National Security Advisor is visiting Sri Lanka soon. He should avail of the opportunity to impress upon the President that New Delhi cannot remain silent when the terms of the Accord are being unilaterally changed. Sri Lanka is not just another country; India should take note of the fast changing events and react in a more forthright and meaningful way.

Sri Lanka and the 13th Amendment: Reconciling Differing Viewpoints

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Number 13 is generally considered unlucky. In the Sri Lankan case, it is more than true. The 13th Amendment to the 1978 Sri Lankan Constitution, an offshoot of Indo-Sri Lankan Accord of 1987, has got mired into controversy since day one. It has become more contentious now. The issue is the existence of different points of view on the 13th Amendment citing different reasons. Four standpoints are conspicuous, at least for the time being, based on “nationalistic”, “aspirational”, “practical”, and “scientific” arguments.

Total Repeal

At one end of the spectrum are those who stand for the total repeal of the 13th Amendment. Sinhala hardline parties like Janata Vimukthi Peramuna (JVP), National Freedom Front (NFF), and Jathika Hela Urumaya (JHU) are advocates of this viewpoint. To them, Provincial Council system “does not suit” a country like Sri Lanka. It is, in fact, a divisive mechanism. The system, to them, was not indigenous, but was “forced on Sri Lanka” by external forces like India. Unfortunately, a strong section of the government, led by the President’s brother and Defence Secretary, Gotabaya Rajapaksa, subscribes to this viewpoint.

Internal Self-Determination

At the other extreme are those who concur with the view that the 13th Amendment should be rolled back, but should be replaced by a separate nation for Tamils, at least based on “internal self-determination”. Until the LTTE was there, it stood for nothing less than a separate Eelam. But, in the post-LTTE Tamil polity, none talks of separation, not even those parties that were considered the political fronts of the LTTE. Only a small section of the Sri Lankan Tamil diaspora and certain political parties of Tamil Nadu keep the separation slogan alive for obvious reasons. The proponents argue that Tamils “deserve” it because of the sacrifices involved and because of the separate ethnic identity. Interestingly, as long as the separatist view was dominant, especially with the help of an armed component, those who are now at the forefront demanding the scrapping of the 13th Amendment were totally out of the devolution discourse.

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13th Amendment Plus

Then, there are those who stand for the retention of the Amendment, but with requisite value additions. This is what is famously known as the “13th Amendment Plus” framework. Most of the Tamil parties of Sri Lanka and the government of India favour this as the “practical” solution to the ethnic question. The Tamil parties of the island think that since they are presently in a weak position, the 13th Amendment could be a starting point. This position is even shared by the pro-government Tamil party Eelam People’s Democratic Party (EPDP). For India, as one of the signatories of the 1987 Accord, this is the viable option at any point in time, with or without the LTTE. In hindsight, India’s position has been consistent and seems acceptable.

13th Amendment Minus

Looking ahead, reconciling these differing views is the need of the hour. It is indeed a challenging task because even the current Rajapaksa regime is divided and confused on the exact status of the 13th Amendment. The major issue is the lack of political will to look beyond immediate political gains. In the long-term interests of the country, a consensus, at least broadly, is required on the subject. Only the government of the day is in a position to do this.

Yet another section stands for diluting the 13th Amendment as the “scientific” option. Termed as the “13th Amendment Minus” framework, this is the latest among the four viewpoints. The main proponent of this standpoint is a dominant section of the present UPFA (United People’s Freedom Alliance) government led by Mahinda Rajapaksa. The argument is, since whatever limited police and land powers that are vested with the provinces were not practically implemented, the move now is to devolve only those implementable portions. In the words of an incumbent Sri Lankan minister, “In practice we are giving provincial councils more police powers. But in theory, one can say they will have less powers.” The crucial question, however, is who was responsible for the non-implementation of the 13th Amendment? Not the Provinces. One may also be tempted to ask, what is the guarantee that even the proposed amended version would be implemented in full?

Looking ahead, reconciling these differing views is the need of the hour. It is indeed a challenging task because even the current Rajapaksa regime is divided and confused on the exact status of the 13th Amendment. The major issue is the lack of political will to look beyond immediate political gains. In the long-term interests of the country, a consensus, at least broadly, is required on the subject. Only the government of the day is in a position to do this. Indeed, a Parliamentary Select Committee (PSC) has been set up to review the entire gamut of provisions in the Amendment. But, main actors like the principal opposition party, UNP (United National Party), and the dominant Tamil entity, TNA (Tamil National Alliance) have refused to be part of the PSC process. While the UNP is sceptical of the outcome because of a lack of clarity in the government, the TNA sees the process as a political gimmick to hoodwink the international community, especially India. The onus of allaying their apprehensions lies solely with the President and his government. Mahinda Rajapaksa has to decide whether he should be remembered as a politician or as a statesman. On its part, New Delhi should go beyond just making statements and giving assurances that “the 13th Amendment should not be diluted and Sri Lanka should go beyond the Amendment to ensure meaningful devolution of powers.” The international community is the only hope.

Sri Lanka and the 13th Amendment: What is '13 Plus'?

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The Parliamentary Select Committee (PSC) on constitutional reform focused on devolution of powers met for the first time on July 9 without the participation of opposition parties including the Tamil National Alliance (TNA). On the same day, the Indian National Security Adviser Shiv Shankar Menon called on President Mahinda Rajapaksa to discuss the thorny issue of the 13th Amendment to the Constitution, under which the provincial councils were established. Rajapaksa, while explaining the difficulties in devolving land and police powers to provinces, however stressed that he would accept whatever the proposal emerges out of PSC deliberations and requested Menon to use his good offices to urge the TNA to join the PSC.

While the vast majority of the country, perhaps including President Rajapaksa himself believe that the provincial council system is a 'white elephant,' there is a universal acceptance that the Tamil majority provinces should have the right to manage their affairs under a substantial devolution package.

These two important developments took place in the back drop of mounting opposition within the government for strengthening of provincial council powers. While the vast majority of the country, perhaps including President Rajapaksa himself believe that the provincial council system is a 'white elephant,' as openly described by no lesser person than Presidential Secretary Lalith Weeratunga in his twitter, there is a universal acceptance that the Tamil majority provinces should have the right to manage their affairs under a substantial devolution package. Although Sri Lanka has given an assurance to India during Rajapaksa-Manmohan talks in July 2010 and subsequently to UN Secretary General Ban-ki-Moon that the government would go beyond the 13th amendment to devolve substantial powers to Tamil majority areas, neither India nor the UNSG asked Colombo to specify the meaning of 13 plus. During one of the Indo-Lanka pow-wows in New Delhi, when Rajapaksa evaded the elaboration of his '13 plus' promise, Menon himself asked if it was to establish an upper house to the parliament to ensure more minority participation and Rajapaksa nodded in affirmation.

The 13th amendment was introduced to create provincial councils as a follow up action on Indo-Sri Lanka Agreement of 1987 to devolve powers to the Tamil majority north and east. However, the then President J R Jayewardene's government, decided to set up 9 provincial councils for the entire Island-Nation in order to scuttle the mounting opposition to devolution of powers to Tamil areas. While the main opposition, including Rajapaksa's Sri Lanka Freedom Party and the radical Janatha Vimukthi Peramuna (JVP) decided to boycott the 1989 provincial council elections, they later entered the fray after realizing that the then ruling United National Party succeeded in building up a powerful second level

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political power structure through provincial councils. The PC members enjoyed all the privileges enjoyed by central ministers, deputies and parliamentarians including duty free car permits, free fuel and various subsidies and benefits and gradually expanded their power bases to become a major asset to the party. First the SLFP and then JVP too realized their folly of boycott, and contested the subsequent PC elections and later the SLFP-lead alliance wrested power of all the seven provincial councils in the south. Although the central government did not devolve land and police powers to the provinces, the councilors were given all the perks enjoyed by the central parliamentarians, thus giving a clear impression to the masses that the PCs are nothing but 'white elephants'.

Even at the height of the war against Tamil Tigers in May 2009, India was aware that it would not be prudent to expect Rajapaksa to keep his promise on 13 plus. A Wikileaks cable revealed that the U.S. sought a bigger role in pushing a political solution for Tamils but was kept at bay by India. According to the cable, (then) Foreign Secretary Shivshankar Menon told the U.S. Embassy Charge d'Affaires Peter Burleigh on May 15, 2009 that the Sri Lankan government had reassured India that "the government would focus on the implementation of the 13th Amendment Plus as soon as possible, but Menon was skeptical." (207268: confidential, May 15, 2009). The Sinhalese majority is opposed to the devolving of land and police powers to the Northern Provinces, mainly because of the bitter experience of 1990 when the first and only elected Chief Minister of temporarily amalgamated North and East Provinces, Vartharaja Perumal made a Declaration of Unilateral Independence. It was made worse by the visible Indian hand in the episode as Perumal left the country with the returning Indian Peace Keeping Force (IPKF) and sought political asylum in India.

In the circumstances it is essential to find a solution acceptable to a substantial section –if not the majority – of all the communities. Hence, a consensus through the PSC will go a long way to allay fears –unfounded or real- in the majority community. The TNA argues that there was no point in another PSC as the issue has already been thrashed out at several all party confabs during the last 30 years. However, one should not forget that for a long lasting solution it is essential to find consensus among major parties representing different communities.

There is a crucial role for the TNA as well as the main opposition, UNP in this national issue of paramount importance. The TNA and UNP will find a considerable support base among the government side for a reasonable devolution package as already four ministers, Rajitha Senarathne (SLFP), Vasudeva Nanayakkara (New Left Front), Tissa Vitharana (Samasamaja Party - Socialist) and D E W Gunasekera (Communist) have openly stated that the 13th amendment should be implemented in full and three of them are in the 19-member government team in the PSC. If the TNA, UNP and JVP eventually agree to fill the remaining 12 seats in the PSC, they will find a sizeable support from the treasury benches for a consensus formula.

Sri Lanka and the 13th Amendment: The Arithmetic of 'Plus' and 'Minus'

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Many decades ago, Bertrand Russell remarked, “Mathematics may be defined as the subject in which we never know what we are talking about, nor whether what we are saying is true.” The arithmetic revolving around the debate on the 13th Amendment to the Sri Lankan Constitution seems to confirm this observation. Suddenly there is an intense interest to know what constitutes “13th Amendment”, “13-plus”, and “13-minus”. Definitions are being floated according to the needs and interests of actors in the Island and beyond.

Thirteen

Through the 13th Amendment, Sri Lanka was divided into nine provinces each governed by a Council headed by an elected Chief Minister. It also merged north and east as one province called Northeast Province, and made Tamil an official language along with Sinhala, and powers were divided under three lists (Provincial, Reserved and Concurrent). Since Colombo never implemented all the provisions of the 13th Amendment, there have never been 13, but only “13-minus”.

Thirteen-Minus

Police and land powers were never devolved. The provinces, especially the northeast, struggled without adequate financial powers. Then came the merger of the north and the east in January 2007, thanks to the Sri Lankan Supreme Court ruling. Amendments to the Constitution like the 18th, centralised even more powers in the Executive President, thus eroding the autonomy and integrity of all other institutions, including the Provincial ones.

The recent Divineguma Act that “has entrusted wide powers to the Economic Development Minister to regulate and decide on a wide range of issues including subjects within the purview of the Provincial Councils, with limited checks and balances” is another blow on the Provincial Council system. Ironically, the 13th Amendment benefitted all the other provinces, barring the north... Therefore, it is not an exaggeration to say that even on paper it was “13-minus”; and, in practice, it was “13-minus-minus”.

The recent Divineguma Act that “has entrusted wide powers to the Economic Development Minister to regulate and decide on a wide range of issues including subjects within the purview of the Provincial Councils, with limited checks and balances” is another blow on the Provincial Council system. Ironically, the 13th Amendment benefitted all the other provinces, barring the north. Except for the Northern Province, every province has had a Provincial Council. Therefore, it is not an exaggeration to say that even on paper it was “13-minus”; and, in practice, it was “13-minus-minus”.

Thirteen-Plus

One tends to agree that there is no clear-cut definition of “13th Amendment plus”. But, it is difficult to say that there is no clarity of what “13-plus” is all about. The problem, on the other hand, is the existence of more than one meaning. What “13-plus” meant before the defeat of the LTTE differed from what it meant post-Eelam War IV. During peace talks between the LTTE and the government of Sri Lanka in late 2002, Colombo was not averse to agreeing for a federal settlement that was far beyond the 13th Amendment. The LTTE, however, rejected it. Later, President Rajapaksa appointed the All Party Representative Committee (APRC) in April 2006 to work out a solution that “must be seen to be good and reasonable enough to address the concerns for which great suffering has been endured.” What Rajapaksa meant by this was very clear: the 13th Amendment framework was not enough. The APRC had been working accordingly.

India has been realistically insisting on a two stage process: firstly, implement the 13th Amendment in full; and later go beyond it. New Delhi knows that it is practically difficult to hit the “13-plus” without fully realising the 13th Amendment. The alleged “scepticism” of Shivshankar Menon was actually over the possibility of Colombo making a direct landing on the “13-plus” formula all of a sudden. Even otherwise, can Indian scepticism be taken by Colombo as a positive signal for brushing the so-called “13 plus” under the carpet?

In its interim report, submitted in January 2008, the Committee recommended the “implementation of the 13th Amendment in full”, which meant unimplemented provisions as well. The war had just begun and the LTTE was still a formidable military force. During the height of the war, to get India’s support, Rajapaksa was talking about “13th Amendment Plus One”. The “One”, he had in mind was the Second Chamber, and “Plus” meant whatever the APRC was going to recommend. However, when the final Report (that was said to have gone beyond the 13th Amendment) was submitted in July 2010, the war was already over in favour of Colombo. That explains why the final report of the APRC has so far not been made public. It should be pointed out that if the “13-plus” means the creation of Second Chamber based in Colombo, it is not a “plus”, but “minus” because such a House is not going to address even an iota of Tamil and Muslim minority grievances. It would make things worse instead. Whatever it may be, “13-plus” is certainly not less than “13”. Even a kindergarten child knows this simple arithmetic.

Realistic Arithmetic

It is for this reason that India has been realistically insisting on a two stage process: firstly, implement the 13th Amendment in full; and later go beyond it. New Delhi knows that it is practically difficult to hit the “13-plus” without fully realising the 13th Amendment. The alleged “scepticism” of Shivshankar Menon was actually over the possibility of Colombo making a direct landing on the “13-plus” formula all of a sudden. Even otherwise, can Indian scepticism be taken by Colombo as a positive signal for brushing the so-called “13 plus” under the carpet? It could be minus somewhere and plus somewhere else, but the essence of the arithmetic is to have an arrangement that meets the sentiments and grievances of minority communities and which brings peace and prosperity to the Island.