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Constitutions & Institutions

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CONTENTS

Publisher says:

Constitutions are living documents, they change and adopt as the nation or the organisation changes...

Fr. Rohan Silva OMI

It is with a great pleasure and sense of pride that we bring this 200th commemorative edition of SOCIAL JUSTICE to our readership. Its erstwhile legacy which commenced in August 1962 under the imaginative vision of late Fr. Peter Alacantra Pillai OMI. Then after his demise the eminent Oblate Fr.Tissa Balasuriya carried the torch with his internationally known socio-political reading of theology did house the production of the magazine at the Centre for Society and Religion (CSR), Colombo 10 which he founded with his Province. The latter is to be credited also for thoughtfully initiating its sister magazine, Saadharanya for the Sinhala speaking population which still is actively engaged in its production side by side with SOCIAL JUSTICE. As publishers are determined that we, the CSR would facilitate and provide support to continue both magazines as part of our contribution to the various discourses, issues and debates across the board within the country, the region, and in fact address them in the context of the global trends. It is in this background that this edition's discussion is thematized as *Constitutions and Institutions* so that we join many others in the current debate and discussion on the Constitution of Sri Lanka at different levels. The notion of institutions we have purposely tagged as they both exist cross-fertilizing each other. Interestingly we can read some other 'constitutional experiments'that are brought together in this volume which would give us a glimpse of possible alternatives attempted elsewhere.

The Constitution is known as a living document, it changes and adopts as the nation or the organisation changes but of late such changes have become compelling in the context of rapid global changes. This change is as if expedited in the last twenty years with the digital resurgence and the structural reforms demanded by the avid fiscal pressures and the assertive Market priorities. No constitution is etched or engraved on a stone and we know it's more 'molded in the clays of time', context and circumstances. However, it certainly provides technically designed statues and clauses to work out a system of checks and balances, what ought and ought not to be done, provision for amendments when required, the provisions for the Executive, Legislature and the Judiciary to function within the rule of law. The constitution not only helps this'triad of democracy' to promulgate laws and but also demands that all three be under the rule of law and that right institution be in place to safeguard the rights of all citizenry.

Sri Lanka having become a Republic in 1972 and moving beyond to contain an Executive presidency under the new constitution in 1978, the island-nation moved ahead but certainly with multiple socio-political challenges hitherto unknown as a post-colonial polity. This colonial legacy with three European powers for nearly 500 years, also did not help the nation to discover 'a new national glue', a cultural identity as an independent polity. The replacement was as if a displacement with a loss of identity. Hence, the lacuna of 'a national self' has been tremendous even through the constitutions were indigenously produced, yet fundamentally point to 'an identity crisis'. The 1978 constitution already has had 20 amendments; however, the nation is yet to reach a consensus to right governance with the best possible political framework and the right structure for its institutions to operate. The'1215 Magna Carter' of king John of England, Lincoln's 'view of democracy', 'theAmbedkar constitutional legacy'and 'the Mandela

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Editorial

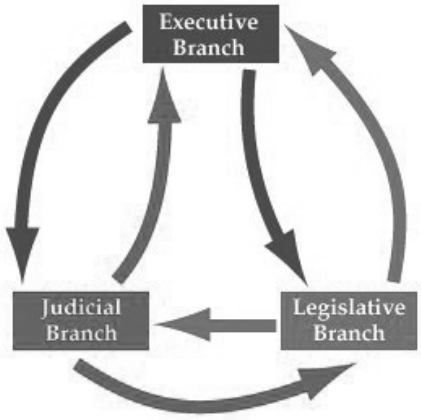
Strengthening institutionalised forms of political expression is a crucial aspect of constitutional reform . . .

> “All Reforms must ultimately restore and preserve people’s sovereignty and equal citizenship, and promote human development.”

The 200th Edition of *Social Justice* is published during a critical juncture in Sri Lanka’s post-independence and post-war history. The last seventy-odd years have witnessed a number of ruptures in the social fabric of the country. Two major insurrections, precipitated by class divisions in the South, and a thirty year armed conflict stemming from ethnic differences, have left Sri Lanka severely scarred. Since the conclusion of the armed conflict, religious tensions have come to the forefront. The tensions have escalated into mob violence targeting Muslims on more than one occasion, and have contributed towards the rise of Islamist militancy, which culminated in the Easter Sunday Attacks of April 2019. As we write this editorial, the global COVID19 pandemic rages on. This new and extraordinary crisis has only served to exacerbate the challenges Sri Lanka faces with respect to social justice. Despite this somewhat pessimistic outlook, there is also space formore hopeful reflection on the constitutional priorities that lie ahead.

This editorial explores the major themes that underlie the struggle for social justice in Sri Lanka. We touch on four such themes, each connected to certain constitutional challenges that confront the country. First, we examine the relationship between citizen and state, and the manner in which people’s sovereignty has evolved under recent constitutional reform initiatives in Sri Lanka. Second, we discuss the role of independent institutions tasked with advancing social justice, and specifically ask whether recent reform serve to strengthen or weaken these institutions. Third, we reflect on the need for human development goals to be better reflected in Sri Lanka’s constitutional scheme. We note the emergence of a public conversation on human development and anticipate a reconfiguration of the people’s expectations that the constitutionmore clearly articulates commitments to human

> Strengthening the role of the executive can only be justified if executive power is checked through the separation of powers among the three traditional organs of government.



development. Fourth, we discuss the rise of violent ideologies and militant groups, and the constitutional challenge this development poses. We end by briefly outlining the other salient themes explored in the articles featured in this volume.

It may be useful to preface the discussion with a brief summary of the recent developments with respect to constitutional reform in Sri Lanka. A constitutional reform project was initially launched in January 2016. The process was initiated with public consultations on constitutional reform conducted by a Public Representations Committee. Thereafter, in March 2016, Parliament passed a resolution establishing a Constitutional Assembly. This process of reform primarily focused on three areas: reforming the executive presidency, the devolution of power, and electoral reform. In September 2017, the steering committee tasked with preparing the draft constitutional proposal for the Constitutional Assembly published its interim report.[1] In addition to the proposals presented in the Interim Report, political parties were permitted to annex their individual observations and alternate proposals to the proposals presented in the Interim Report. This Report indicated: 1) that reforming the executive presidency was a source of contestation among the majority of parties, 2) that there was a high level of consensus over electoral reform proposals, and 3) that there was significant consensus on the broad parameters with respect to the devolution of power.

Following the general election of August 2020, the new government announced that it would introduce the Twentieth Amendment to the Constitution, effectively to reverse the provisions of the Nineteenth Amendment, which had introduced important reform with respect to strengthening independent institutions. Several petitioners challenged the Twentieth Amendment Bill, and argued that the Bill could not become law without a referendum. The Supreme Court heard the petitioners, the state, and several intervenient petitioners arguing in favour of the Bill. The majority of the Court found that the Bill could be enacted with a two-thirds majority in parliament if certain portions were revised. One of the crucial elements of the Bill that needed to be revised was the restoration of presidential immunity. The Nineteenth Amendment had reduced the scope of presidential immunity by subjecting the president's actions to the fundamental rights jurisdiction of the Supreme Court. The Twentieth Amendment Bill originally removed this clause and reintroduced absolute presidential immunity. However, the Court found that such removal violated the judicial power of the people. The government eventually revised the Bill and presented it in parliament, where it was passed with the two-thirds majority.

Two major changes were introduced through the new Amendment. First, it abolished the Constitutional Council, and replaced it with a Parliamentary Council comprising exclusively of members of parliament. Appointments to all independent commissions, including the Human Rights Commission, National Police Commission, Judicial Service Commission, and Public Service Commission, is now within the sole remit of the president. The president is only required to seek the views of the Parliamentary Council, and will retain discretion over appointments regardless of the Council's views. Accordingly, the president can now make appointments to the Supreme Court and Court of Appeal, select an attorney-general, and exercise control over the judiciary. Second, it reintroduced the president's ability to hold ministerial portfolios, and function as the head of cabinet. Accordingly, the reduction of the powers of the executive president under the Nineteenth Amendment was reversed, and power was once again concentrated in the office of the president.

Meanwhile, the Cabinet of Ministers tasked a committee of experts with drafting a new constitution, and the public was invited to submit proposals to this committee. The committee is currently proceeding with this consultation process.

Citizens and States

The relationship between the state and its citizens has undergone a fundamental change over the past few decades. This transformation is observed in many countries – especially in Europe – where non-institutionalised forms of political

actions (petitions, demonstrations, and political consumerism) have increased to the detriment of institutionalised forms of expression. While both forms of participation can have their benefits in terms of preserving equal access to democratic decision-making processes, non-institutionalised forms of participation are often unsuccessful in developing countries, where inequality due to education often acts as a barrier to meaningful democratic engagement. Hence, a necessity has arisen for those countries to strengthen traditional forms of expression between citizens and the state.

Strengthening institutionalised forms of political expression is a crucial aspect of constitutional reform, as addressing social justice from the citizens' perspective is necessary, especially in a fragile post-war situation such as in Sri Lanka. This process becomes even more relevant in the current context where clear existing forms of communal tensions – including via online platforms – can become amplified due to the COVID19 pandemic.

The participatory approach adopted by the current government with regard to the ongoing constitutional reform project presents an important opportunity for the public and civil society to engage the state by sharing their perspectives on institutions and the state machinery as a whole.However, in Sri Lanka, the concept and the experience of 'citizenship' are intrinsically linked to the ethno-religious identities of its citizens. This amalgamation ultimately shapes any participatory approach that thestate adopts. As such, both citizenship and national identity need to developconcurrently, either organically or synthetically, through a more inclusive and equitable 'social contract' between citizensand the state. Any mechanism or policy that does not comprehensively reflect the needs, expectations and obligations of the people (both within the majority and the minorities, as well as marginalised groups), and the capacity of a particular state at a particular given time, will find it difficult to succeed. Hence, the state must ensure that it engages in a more inclusive form of governance – onethat reflects the diversity of all its citizens, and where institutions and policies are accessible, accountable, and responsive to all. The human development approach is perhaps the most ambitious articulation of this notion of inclusivity – where more inclusive processes can foster more inclusive development.

Ensuring accessibility, accountability, and responsiveness of existing institutions through the Constitution is therefore crucial to maintaining a meaningful social contract between citizens and the state, and eventually preserving the people's sovereignty.

Restoring Independent Institutions

Although all nation-states are not democratically accountable to their citizens, the principle of popular sovereignty is deeply rooted in most constitutions. In Sri Lanka, the 1978 Constitution links the concept of people's sovereignty (Preamble and Article 3) to the judiciary, where the Supreme Court is authorised to supervise legislative and executive action that might violate people's sovereignty. This system of checks and balances was strengthened for a brief period of time through the Nineteenth Amendment to the Constitution (2015), which was seen as an attempt to depoliticise processes put in place through the Eighteenth Amendment (2010). The Twentieth Amendment (2020) reverses the progress made through theNineteenth Amendment by weakening the separation of powers and institutional independence. Institutions that were once provided with a certain level of independence are once again heavily politicised with more powers vested in the executive branch, and particularly the executive president. The abolition of the Constitutional Council remains one of the most questionable features of the Twentieth Amendment.

A strong executive is often detrimental to the functioning of institutions. Strengthening the role of the executive can only be justified if executive power is checked through the separation of powers among the three traditional organs of government. For instance, in France the Head of State, despite being referred to as a 'Republican Monarch', is kept in check through the other two branches of government, especially the legislature. As such, in France, the Constitutional Council plays a particular role in the institutional structure of the Fifth Republic. Its

In the French experience the Head of State, despite being referred to as a 'Republican Monarch', is kept in check through the other two branches of government, especially the legislature and the Constitutional Council play a particular role in the institutional structure of the Fifth Republic.

Yet sovereignty could be safeguarded only if the constitution embraces a holistic notion of dignity, freedom, and development. It is in this context that human development may be worth pursuing as a workable constitutional principle.

establishment by Charles de Gaulle was meant to guarantee respect for the new division of powers between the executive and the legislature, as well as to prevent parliamentarians from circumventing the constitutional provisions that govern them. The establishment of the Council thus came following the need to redistribute powers.

In Sri Lanka, the independence and impartiality of the judiciary are now at risk due to the fact that the Twentieth Amendment abolished the Constitutional Council, and removed checks that were previously placed on the executive in relation to key appointments to independent institutions. The fact remains that this controversial amendment permits the president to appoint the highest judges, attorney-general, and members of independent commissions with no effective checks against politicisation. This development undermines the independent institutions, and consequently weakens the 'social contract' established between citizens and the state.

Constitutionalising Human Development

We next turn to the question of human development as a constitutional commitment. Amidst the recent constitutional reform efforts, there is an important opportunity to infuse new thinking into the current constitutional framework – thinking that more robustly incorporates commitments to human development. We have already explored the crucial challenges faced with respect to people's sovereignty under a new constitution. Yet sovereignty could be safeguarded only if the constitution embraces a holistic notion of dignity, freedom, and development. It is in this context that human development may be worth pursuing as a workable constitutional principle.

The human development approach calls for a departure from measuring development purely in economic terms, and instead focuses on people, opportunities, and choice.[2] It sets out to improve human capabilities by ensuring a long, healthy life, knowledge through education, and a wholesome standard of living. It also prioritises the creation of certain conducive conditions for opportunities and choice. Such conditions include human security, rights, environmental sustainability, political representation, meaningful democratic participation, and gender equality.

Sri Lanka's prioritisation of human development goals has a fairly long history, despite the fact that the terminology of 'human development' is a more recent phenomenon. Free education was ensured in Sri Lanka following a powerful movement championed by social activists including Ven. Walpola Rahula Thera, and by social movements such as the Vidyalankara Bhikkhu movement. Alongside such activism, C. W. W. Kannangara, the Minister of Education, introduced a bill to provide for free education, and that Bill was enacted in 1945, three years prior to independence. Similarly, successive governments have advanced policies of free healthcare, which has now become embedded in the long-term policy commitments of the state.

The value placed on human development therefore resonates with Sri Lanka's own policy history. The people have demanded the realisation of developmental goals that extend beyond mere economic growth, and political manifestos have tended to includepromises to meet these demands. Such promises form part of the long history of the Sri Lankan welfare state founded on notions of human development. Therefore, the democratic process has made socioeconomic rights enforceable to some extent even without the explicit constitutionalisation of such rights. Yet political processes are often insufficient to ensure the meaningful realisation of these rights, and may lead to situations where a government reneges on its own promises.

Sri Lanka's current constitution does not contain justiciable socioeconomic rights. Instead, it lists certain directive principles of state policy that refer to certain socioeconomic rights such as 'adequate food, clothing and housing' and 'the right to universal and equal access to education at all levels'. In this context, Sri Lanka's current constitutional reform initiative presents us with an opportunity to make the state's obligations towards socioeconomic rights enforceable. The Public Representations Committee appointed in late 2015 to ascertain the public's views on constitutional reform in fact confirmed public

demands for such rights to be included in a new constitution. It observed: 'There were strong submissions from people requesting that the Directive Principles should be justiciable.'[3] In this context, it would be important to embed enforceable commitments to human development within a new constitution. Socioeconomic rights including the right to healthcare, education, and housing ought to be enumerated in the constitution. Since a constitution of a country should reflect its people's basic aspirations, there is a clear justification for recognising aspects of human development – in particular enforceable socioeconomic rights – in a new constitution.

Violence and Disruption

Sri Lanka's constitution must ultimately deliver conditions that ensure social justice for its citizens. We have explored how independent institutions and a human developmental approach can ensure those conditions. We now turn to one of the more significant challenges.

In Sri Lanka, majoritarianism, Islamophobia, Islamist radicalism, and violence are interconnected and are in many ways mutually reinforcing. The recent policy to ban the burial of persons suspected to have died of COVID19 is symptomatic of deep-seatedIslamophobic elements both within society and within the state. The policy had a discriminatory impact on the Muslim community, but appears to have enjoyed the support of a large segment of the population.

Islamophobic discourses feed off deeper majoritarian entitlement complexes and existential fears, where the Muslim community comes to symbolise a 'threat' to the majority community. This status of being a 'threat' is then seemingly legitimised by intra-Muslim competition that ultimately incentivises Islamist radicalism. Meanwhile, Sinhala-Buddhist militant groups such as the *Bodu Bala Sena* have suggested that such Islamist radicalism vindicates their concerns with regard to the Muslim 'threat'. The ensuing discourse is often filled with hate and antagonismbetween the Muslim community and other communities,and has directly contributed towards violence.

Anti-Muslim violence can then circle back to reinforce incentives among some disenchanted members of the Muslim community to gravitate towards more radical practices.The Easter Sunday Attacks of 2019 in some ways reflect the plausible connection between Islamophobic discourses, anti-Muslim violence, and Islamist radicalism.This observation was in fact made by the Presidential Commission of Inquiry that investigated the Easter Sunday Attacks.[4] It is plausible that experiences of anti-Muslim violence, and outrage over such violence, motivate young Muslims to gravitate towards militant Islamist groups seeking to recruit disenchanted young followers. However, once they join such groups, agendas that are not particularly connected to or interested in local contexts may be prioritised. This prioritisation may explain why the chosen targets of the Easter Sunday Attacks were Christian places of worship rather than Buddhist places of worship – despite the perception that Sinhala-Buddhist militant groups perpetrated violence against Muslims.

The Easter Sunday Attacks have then become a watershed event likely to create new waves of majoritarian existential fears that underlie prejudice towards the Muslim community in Sri Lanka. Perceptions concerning the Muslim community that are already shaped by deep-seated prejudice may be compounded by these attacks. Therefore, the attacks themselves add to the cycle of fear, radicalism, and violence.

What does this vicious cycle mean for constitutional reform? Such antagonism and violence have the potential to undermine a meaningful exercise in constitutional reform, as they influence the trajectory of reform efforts in a way that stifles the core constitutional values. Two observations may be made in this regard.

First, deeper majoritarian views may find expression in the constitutional text as a manifestation of anxieties felt by the majority community. This sort of anxiety underscores efforts to dismantle even the weakened mechanisms for power-sharing available under the current constitution, and to further concentrate power under the executive president. The constitution reform project can then be a step in the wrong direction; it can ultimately undermine a more inclusive

« Sri Lanka's prioritisation of human development goals has a fairly long history, despite the fact that the terminology of 'human development' is a more recent phenomenon which we argue could have a constitutional flavor and backing for civic progress. »

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conception of citizenship.

Second, the emergence of Islamist radicalism has lent credence to building a stronger national security apparatus. While human security is certainly a priority to ensuring a stable society in which citizens can flourish, over-emphasis on national security can lead to situations where the interests of the state override those of the citizen. Individual rights, freedom, choice, and opportunity are often sacrificed in such situations; authoritarianism is undoubtedly incompatible with people's sovereignty and human development, and such authoritarianism is a predictable corollary of a national security state. In this context, the mutually reinforcing emergence of majoritarianism, Islamophobia, Islamist radicalism, and violence poses a very serious threat to meaningful constitutional reform in Sri Lanka.

The present volume offers an array of reflections on Sri Lanka's constitution reform project and beyond. We end by briefly outlining some of the major themes captured in the articles featured in this edition.

It features a comparative piece by **Andrew Godden**, who presents an illuminating account of Northern Ireland's constitutional andinstitutional reform initiatives. Godden offers important insights that remain highly relevant to Sri Lanka's own contemporary struggles if taken seriously. **Jeeva Niriella** meanwhile discusses the role of women in civil justice and social institutions. She calls for the transformation of institutions across the boardto enable women to be decision makers. She argues that such a debate might be key to reforms and institutional changes fundamental to justice delivery. **Basil Fernando** offers some critical insights on Sri Lanka's experimentation with 'semi-dictatorship'. He suggests that Sri Lanka as a people must confront the choice between democracy based on the rule of law, and semi-dictatorship, which quite dangerously appears to be what the current trajectory is leading on to constitutional and institutional reform.

Prasantha Lal De Alwis and **Shanthikumar Hettiarachchi in** a joint article offer an interestingly reflective Buddhist perspective to pursue and secure conditions of independency rather than dependency. They emphasise the need for a broader and more vibrant constitutional conversation between the majority community and the minority communities in Sri Lanka, where the 'public good' is considered and treated as an essential goal of any 'constitutional order' towards a'right institutional framework'.

We anticipate that readers will find the 200th edition of *Social Justice* a fascinating and enlightening read. It is hoped that the thoughts and observations presented in this volume contribute towards a meaningful discourse on constitutional reform in Sri Lanka – reform that ultimately restores and preserves people's sovereignty and equal citizenship, and promotes human development.

End Notes

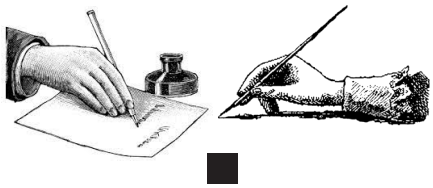
1. The Constitutional Assembly of Sri Lanka, The Interim Report of the Steering Committee, 21 September 2017, https://english.constitutionalassembly.lk/images/pdf/interim-report/ReportE%20CRR.pdf[last accessed on 8 March 2021].

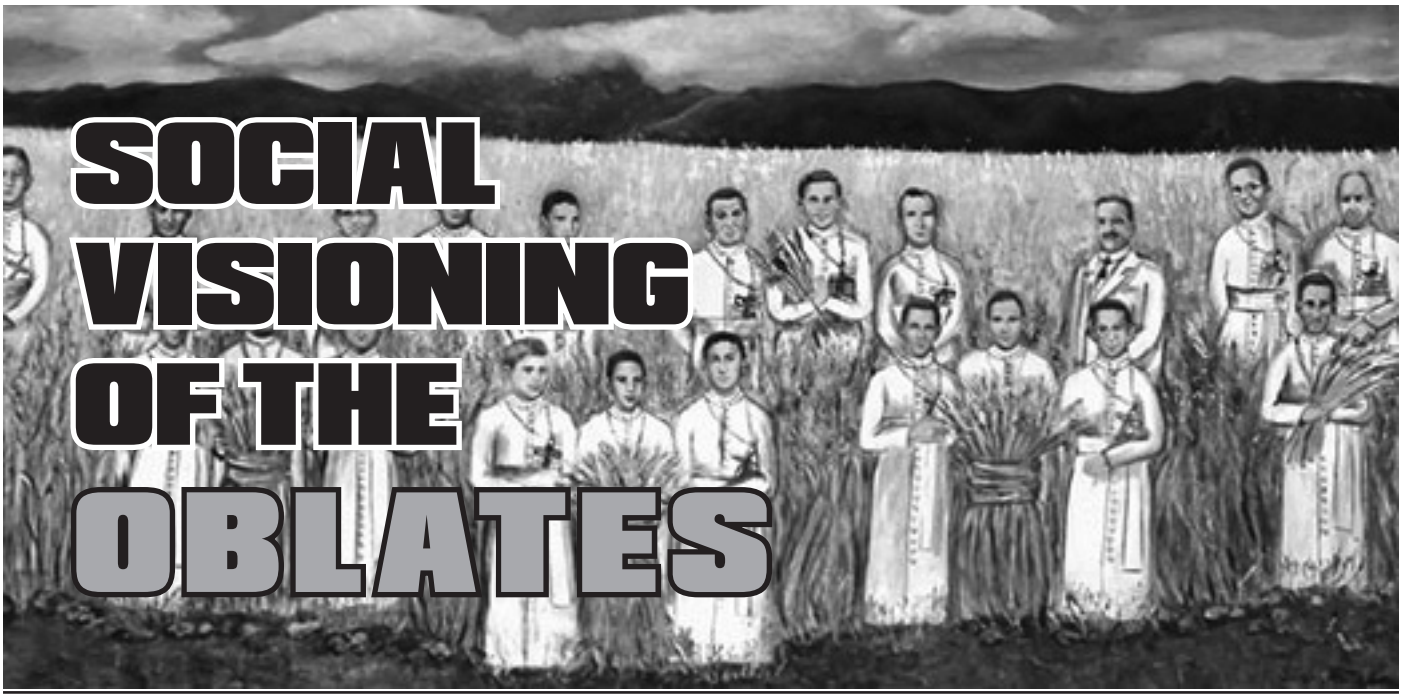
2. United Nations Development Programme, 'About Human Development', http://hdr.undp.org/en/humandev. [last accessed on 8 March 2021].

3. Public Representations Committee on Constitutional Reform, Report on Public Representations on Constitutional Reform (May 2016), at 90.

4. The Commission of Inquiry to Investigate and Inquire into and Report or Take Necessary Action on the Bomb Attacks on 21st April 2019, Final Report: Volume (31 January 2021), 335.

Gehan Gunattileke and Kamaya Jayatissa ***(Guest Editors)***





SOCIAL VISIONING OF THE OBLATES

Our Felicitations on the 200th edition

Fr. Emmanuel Fernando OMI, Rajabima Oblate Centre, Anuradhapura

It is with a spirit of joy and privilege that I am writing these few paragraphs to congratulate the editor-in-chief and his editorial team as they prepare this volume to commemorate the 200th edition of the magazine, *Social Justice*. Secondly, to further encourage the current administration of the Centre for Society and Religion (CSR) for resuscitating the magazine after being dormant for a few years.

Medical experts are needed to diagnose the sicknesses of people and to suggest suitable medical care. Social scientists are needed to analyse the social ills andto propose the necessary remedies for the development of the society. Both medical experts and social scientists have recourse to scientific journalsin order to update their knowledge and techniques.

The *Social Justice* magazine edited and published by the CSR, housed at Deans Road, Colombo 10, Sri Lanka, has been auniquely Oblate initiative within the Catholic community of Sri Lanka. This Oblate initiative had also arisen when Sri Lankan Catholic organisations /Movements and the Catholic weeklies - the *Gnanartha Pradeepaya* and the *Messenger* and the monthly *Bhakthi Probhodanya,*though historically significant ventures in the print media, yet there was a lacuna in the area of social concerns and issues of justice.

As I began my ministry in the social apostolate (1970-1978), assisting late Fr. Joe Fernando, who was encouraged and supported by late Fr. Lucien Schmitt, OMI to embark on establishing the National Socio-Economic Development Centre (SEDEC, Caritas Sri Lanka) way back in 1968, I came in contact with late Fr. Tissa Balasuriya OMI who was very much committed to the apostolate of social justice. His initiative of a 'mission centre'in the heart of Colombo as the CSR was indeed timely and hestrategically located the publication of this magazine ever since at the same centre of discourse, debate and dissent (DDD @ CSR in CMB).

My close contact with Fr. Balasuriya, made me understand that he besides being a theologian, was also well-qualified in the social sciences, economics and social analysis and had become close to his theological reading of society. Being one who was more engaged at the grassroots level, working with the poor and the disadvantaged groups, I needed to become more aware of the forces at work in Sri Lanka against the oppressed groups, and the social remedies suggested by social scientists. The articles and discussions published in the *Social Justice* edited by Fr. Balasuriya helped me immensely to reflect critically on the unjust situations at the international and national levels, caused by unjust structures.

Fr. Tissa, no doubt was continuing the 'social mission' voiced through the *Social Justice* magazine, edited and published since 1937 by late Fr. Peter Pillai, OMI (1940-1961), the Rector of St. Joseph's College, Colombo**.** He was an academic luminary and a champion of social justice. He campaigned strenuously through this magazine for socio-economic reforms, the fair treatment of the working class, payment of family wage, the establishment of an eight-hour working

Fr. Tissa Balasuriya OMI campaigned strenuously through this magazine for socio-economic reforms, the fair treatment of the working class, payment of family wage, the establishment of an eight-hour working day, improvement of better quality of life for people living in the plantation sector and the implementation of an Employees Provident Fund (EPF).

day, improvement of better quality of life for people living in the plantation sector and the implementation of an Employees Provident Fund (EPF). He had been also keen on promoting religious and inter-racial justice, economic development geared towards an equitable distribution of resources, retirement benefits, proper housing, agrarian reforms and a new land policy. A cartoon of late Fr. Peter Pillai carrying a placard titled 'Social Justice' published in the then Times of Ceylon wasa clear proof that his ardentcampaign for social justice had caught the public attention in Sri Lanka.

Fr. Oswald Firth OMI who succeeded Fr. Balasuriya, as director of CSR continued to edit and publish the *Social Justice* magazine since he too, as an Oblate, was convinced that anyone who wanted to raise the quality of life of the oppressed and neglected masses, needed to know the unjust forces operational at macro and micro levels (at the international and national levels). Fr. Ashok Stephen OMI, the former director and the current director Fr. Rohan Silva OMI being also Oblates,continue to hear and intervene in the struggles of the voiceless masses through this historically valuable magazine as a humble means just like the original intention of the founding fathers, and with the help of committed and skilled individuals now working alongside the Oblates for the public good.

Jesus, the Prophet and the Saviour will continue to bless the work of the current editorial team of *Social Justice*, the Oblate ministries in collaboration with many others whowork for justice in the spirit of reconciliation and build a society that honours human rights and be awakened to civic duty by the nation and especially for the betterment of its most disadvantageous.

Our best wishes once again for many years ahead for productive service to the people in this country and beyond.

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2021 මාර්තු/අප්‍රේල් Social Justice සඟරාවේ 200 වන පිටපත ප්‍රකාශයට පත් කිරීම සම්බන්ධයෙන් එහි සහෝදර සඟරාව වන 'සාධාරණය' සුභාශිංසන පළ කරනු ලබයි. තව දුරටත් යුක්තිය, සාධාරණත්වය හා සමාජ සාමය උදෙසා දීර්ඝ ගමනක් අපත් සමග යාමට හැකි වේවායි ප්‍රාර්ථනා කරමි. එහි ප්‍රධාන සංස්කාරක, ආචාර්ය ශාන්තිකුමාර් හෙට්ටිආරච්චි ඇතුළු සංස්කාරක මඬුල්ලේ හා CSR හි විධායක අධ්‍යක්ෂක මෙන්ම සඟරාවේ ප්‍රකාශක ගරු රොහාන් සිල්වා නි.ම.නි. පියතුමාගේ තිරසර කැපවීම ද අගය කරමි.

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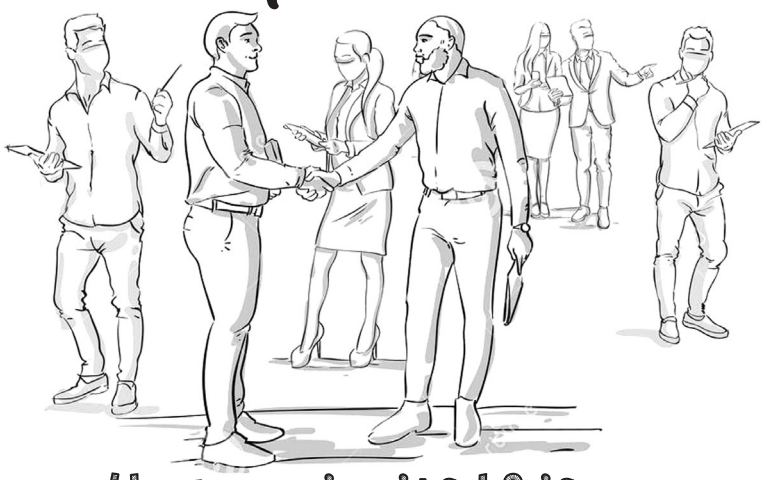
Saadharanaya Felicitates Social Justice

We, the sister magazine, Saadharanaya felicitates and congratulates the editorial board and the publisher of SOCIAL JUSTICE as it launches its 200th edition. We are confident that we as a united voice alongside the Centre for Society and Religion (CSR) will forge ahead in the work for justice in this country and in the region and at the international level too.

Editorial Team Speaks...



> the magazine itself is an expression of the Oblate commitment to social justice and human development in their vision and the work on this island-nation.

It is with great pleasure and honour that we produce this 200th edition of Social Justice in the first quarter of 2021. Its first publication, (Vol. 01, No. 01, August 1962) was edited by late Fr. Peter Pillai OMI and then later was housed at the Centre for Society and Religion (CSR) under the able leadership of late Fr. Tissa Balasuriya OMI and subsequently Fr. Oswald Firth OMI edited it as its succeeding director. After a period of non-publication, Fr. Ashok Stephen OMI recommenced the publication of its 194th edition (June/July 2018) and continues by the CSR's current director, Fr. Rohan Silva OMI. Its sister magazine, *Saadharanaya* carries its specific discussions and debates on national and regional issues for the Sinhala readership under Sanath Fernando as its editor.

The Oblates since their arrival in Ceylon in 1847 have had their pastoral presence across Ceylon during the British period. There had been four metropolitan bishops of Colombo from Christopher Ernest Bonjean OMI (1883) and the fifth Oblate Archbishop of Jean-Marie Masson (1944-1947) was also the last of the French link to Colombo diocesan episcopate and the briefest. After his demise the co-adjutor bishop, Thomas Benjamin Cooray OMI was made the first indigenous priest-bishop to be the archbishop of Colombo in 1947. Interestingly it is exactly after 100 years since the arrival of the Oblate missions in Ceylon that this appointment of a local clergyman was to lead the archdiocese from the lineage of mostly the French Oblates since 1847. It was as if a special tribute to the Oblate mission to Ceylon that the pope Paul VI made the then incumbent archbishop Thomas Cooray OMI a Cardinal in 1965.

The Oblates have been pioneers in many areas of work such as non-formal education, interreligious dialogue, ministry for social justice, ethnic peace and later years in direct parish pastoral work including the preaching ministry. This magazine itself is an expression of the Oblate commitment to social justice and human development in their vision and the work (*Missio Dei*) towards the reign of God. The editorial team felicitates those visionary pioneers who have rendered a yeoman service to this land and to its people for over 150 years and acknowledge those among us active for many years ahead of productive work on this island-nation, and are appreciated in different ways and modes.

The editorial team invited two young law scholars, Gehan Gunattileke and Kamaya Jayatissa to decorate this 200th edition by way of a 'joint guest editorial' with their knowledge and reading on the subject. They are joined by Andrew Godden, a law lecturer in Belfast, Northern Ireland, Basil Fernando, Asian Human Rights Commission, domiciled in Hong Kong, Jeeva Niriella of the Law faculty of the University of Colombo, Prasantha Lal De Alwis, specialized in Criminal law of the faculty of Law, Colombo. Most contributors seem like in the field of law, yet have crossed their familiar territory to reflect and engage otherwise. We are most grateful to each of their attempts to this special 200th edition, they are a reflection of the sheer diversity of ideas and multiple layers of the knowledge base we have evolved as a people.

Editorial Team, 200th edition (March/April 2021)

What they have to say of the Previous Edition, *Social Justice* (Oct. / Nov. 2020)

The last edition of *Social Justice* (Vol. 43, No.199 Oct/ Nov 2020) came as a gift in circumstances of our history to me here in Chiapas at a time the world is going through multiple crises that require us to unite all the threads to create a new fabric of our humanity. More than ever, we have become aware of some constitutive not only of the features of our identity and the circumstances but also that which hinder is our progress. If certainly what we have experienced most profoundly in these times of the pandemic is our condition as vulnerable beings, it is also true that we have become more aware that we live in an intense context of pluralities and polarities posing new challenges.

From Chiapas, Mexico, I congratulate the *Social Justice* editorial team for their most recent edition on *Pluralities and Polarities*, as these are critical issues that we need to address and innovatively read the signs of the times. We live in the midst of a reality characterized by pluralities and polarities, which are manipulated by the system as a destructive weapon that could generate division, dissension and confrontation. However, reading this edition of *Social Justice*, we have been challenged to manage *pluralities and polarities* in a critical way, unmasking the socio-political system that uses our *pluralities and polarities* to provoke more division and confrontation between groups, people, cultures and religious traditions.

In this crucial hour in our history, believers, and all humanity in general, are challenged to manage with lucidity and wisdom our inherent *pluralities and polarities* to create new times marked by brotherhood/sisterhood, harmonizing the opposing forcesand by deploying our energy to include, heal and create spaces where we can all coexist in peace. Thank you, *Social Justice* for encouraging us to dream that possibility.

Geraldina Céspedes OP, born in Dominican Republic is a religious nun of the Dominican Missionary Sisters of the Rosary. Her PhD is in Theology, (Universidad Pontificia Comillas, Madrid) is a professor in Theology and a member of Amerindia. A member of the Association of Third World Theologians (EATWOT, Americas). She works and lives in Chiapas, Mexico.

It is with great pleasure that I share my impressions of the Oct./ Nov.2020 edition of *Social Justice* in time for the 200th issue of the magazine March/ April 2021.

The editorial reminds us that the challenge facing all of us is how to accept the "oneness" of each and the "manyness" of the rest without simply othering the other on account of difference. The recent spate of terrorist attacks in France and the ensuing anti-France protests across the Islamic world highlight how the line between acceptance and rejection is indeed a fine line in need of careful mediation. Nevertheless, in a particularly meaningful reflection on the UN's diamond jubilee, Palitha Kohana encourages us that however immense the polarities may be, they can always be overcome through a considered understanding of the values and benefits of embracing the possibilities of plurality.

Drawing on phenomena from Latin America and beyond in a wonderful piece on relationality, Diego Irarrazaval CSC highlights to us the need to replace exploitative structures of power with those that are instead symmetrical and life-nurturing. The necessity to iron out polarities in a post-Covid environment is also the theme of an insightful contribution by Oswald Firth OMI. While polarities will almost certainly emerge as we begin to turn the tide against this devastating disease, he is right to caution us against equating pluralities as a contributing factor in the rise of polarities.

In another engaging piece, Joe William analyses polarity and plurality with special reference to contemporary conditions in Sri Lanka. He is right in his assertion that political leaders and state officials have a crucial role to play in fostering a more equal society in Sri Lanka. Fr. Rohan Silva OMI also reminds us through his text that regardless of the pluralities and polarities that face us, whether in Sri Lanka or beyond, we ought not to take extreme positions which benefit some but harm others. As Dilantha Gunawardana poetically observes in his column, we are all a global village, and it is satisfying indeed when polarity becomes plurality.

Bhadrajee S. Hewage is currently a postgraduate student at the University of Cambridge's Centre of South Asian Studies. He secured his BA(History, Princeton University), and he is the author of *A Name for Every Chapter: Anagarika Dharmapala and Ceylonese Buddhist Revivalism* (Sulochana Publishing & IngramSpark, 2020).

I had the privilege of reading the Oct./Nov. 2020 issue of the *Social Justice* magazine published under the theme – Pluralities and Polarities. The volume is indeed a timely and much needed publication not only in Sri Lanka, perhaps internationally too. There is social apathy and displeasure among people and this publication directly addresses some of that succinctly and does inspire proactive engagement.

With an esteemed and distinguished editorial team, as well as contributors - this edition is not only of value to those reading it but also an important part of history that documents the struggle for social justice and its challenges.

I have a feedback though to the editorial team of this pioneering effort.

Firstly, that the powerful and information-filled contributions may be a struggle for some to handle as they are fairly text-heavy. The inclusion of some images and graphics that highlight the points being made would ease up and also help widen the readership beyond those engaged in social justice to include those who may not be overly familiar with the nuances of the subject but are looking to learn more.

Secondly it would also be of great value to see a better diversity of the approaches to the topic of social justice – perhaps from specific lenses such as gender, race, sexuality, economics etc. that can draw in those who work in these sub-sections and often struggle to situate their work in the wider social justice context.

Finally I congratulate the efforts of those involved in this timely publication and look forward to similar editions which would be of great benefit, especially to the young social justice advocates and activists to be able to learn from experienced seniors in this space, as well as have the opportunity to share their own ideas and work.

Sharanya Sekaram identifies herself a feminist writer, researcher, and an activist based in Sri Lanka and works primarily as an independent consultant in the gender space. Sharanya holds an LLB (Hons, Staffordshire University) and an MA (Conflict and Peace Studies, University of Colombo) and she is currently reading for a Post-grad. Dip., (Women and Gender Studies, University of Colombo).

The previous edition of *Social Justice*, weaving together perspectives and reflections on the rich theme of *Pluralities and Polarities*, was a welcome gift. I want to thank the editorial team and contributors for creating an inspired and inspiring resource, which illustrates some of the imaginative work required of us in these pressured, fragile times.

The journal itself is performing the kind of relational work described throughout the last issue, a work that I hope will continue to flourish and evolve. In our locked-down, socially-distanced worlds, many of us are deprived of opportunities for the kind of full-bodied, unmasked, face-to-face presence to one another in which relationality can be cultivated. Too many everyday interactions are constrained or outlawed. Deprived during this pandemic era of proximity and of tactile ways, we may be more at risk of imagining one another falsely, as caricatures rather than as the complex, mysterious persons whose identities and webs of relationship can never fit neatly into explanatory categories, or into the kinds of intellectual shorthand which gives us divisive binaries, polarities and reasons to mistrust difference.

Several articles in your previous edition prompted these reflections, and for that I was most grateful.

For the most of the world, the 2020 was a year that simply faded away, we here in the UK live with the consequences of the peculiar divisions which permeate these islands, fostering resentments and tensions which have set us adrift from continental Europe. Nevertheless, plenty of us are committed to the work of reimagining and constructing a connected, diversified future, more just and more ecologically robust than we have yet known. Of course, we are realistic about the forces and currents which constantly threaten, or which regularly overwhelm and extinguish the most vulnerable. We know our limits and our foibles. In the face of which, the *Social Justice* journal is a real encouragement. Thank you for your work.

Revd. Dr. Gary P. Hall is a Methodist minister, teacher and theologian at the Queen's Foundation, Birmingham UK, where he also coordinates the international Partnership in Theological Education, lives also in Birmingham.

Constitutions, Institutions and Transformations:

A Northern Ireland Perspective on Constitutional Change

Andrew Godden

> **they ignore the historical reality that the people of Britain and Ireland have shared a common ancestral heritage since time immemorial**

Preamble

Tuesday 22 June 2021 will mark the 100th anniversary of the state opening of the first Northern Ireland Parliament, which formalised the partition of Ireland into two jurisdictions. That momentous occasion set in motion a chain of events that would transform relations between the people and governments of Northern Ireland, the United Kingdom and the Republic of Ireland, with ramifications that are still being felt in the European Union and the wider world. This year affords a unique opportunity to reflect on the events that have transpired over the past century, most notably the Northern Ireland peace process. Such an enterprise is of great significance to constitutional theorists and practitioners, since Northern Ireland has few parallels among Western democracies that can match its *penchant* for constitutional and institutional change, meaning that it can provide useful instruction to other countries in a variety of contexts around the world.

That *milieu* of constitutional change will provide the backdrop to this article. Unlike other contributions to the historical literature, however, this paper will focus on the ways in which the diverse (and often dramatic) constitutional reforms of the past 100 years have affected the trust of the Catholic and Protestant communities in Northern Ireland**.** Inter-community trust is a precious commodity in divided societies, yet one that is too often neglected. This paper will show that a lack of inter-community trust was the catalyst for most of Northern Ireland's violent political past. It will also argue that the creation of cross-community structures, which were the bedrock of the Belfast (Good Friday) Agreement of 1998, was the key that unlocked the

> **a decisive shift from the confrontational politics inherent in the Westminster system toward a consociational system of cross-community government, which was carefully calibrated to the political exigencies of Northern Ireland.**

door to the gradual exchange of trust that paved the way for the Northern Ireland peace process. Finally, the article will consider the ways in which 'Brexit' may impact the integrity of the 1998 settlement moving forward, concluding that whatever lies ahead for Northern Ireland in terms of its constitutional status, the only way to avoid the mistakes of the past will be to retain cross-community institutions and a constitutional framework in which trust and equality are recognised as cardinal principles of good governance.

A History of Discord

It has been said that the Northern Ireland conflict is one of the most over-researched topics in the world.[1] That statement is certainly true as far as historical research is concerned. Too frequently, however, the volume of these outputs is undermined by their quality**,** as shown by the *corpus* of flawed historical accounts that depict the conflict as an 'anti-colonial and anti-imperialist freedom struggle' between Irish republicans and the British state, with 'nothing in between and nobody else relevant'.[2]Such accounts are fatuous at best and dangerous at worst, as they fail to grasp the complex history that preceded the conflict and thus contributeto the dissemination of false narratives. In particular, they ignore the historical reality that the people of Britain and Ireland have shared a common ancestral heritage since time immemorial. Over several hundred years, this heritageproduced two distinct populations on the island of Ireland, each with different religious and political affiliations.

These populations may be described as the 'Gaelic Irish', who are overwhelmingly Catholic and well known for their loyalty to their ethno-religious group; and the 'Anglo-Celtic Irish', who are overwhelmingly Protestant and whose loyalty extends to Britain, due to links with successive generations of Scottish and English settlers. Although fellow Irishmen, these groups became ever more enmeshed in the politico-religious machinations of Britain (the dominant power) from the 16th century onward, the experience of which led to divided loyalties and intense mistrust that would often flare into ethnic violence. Thus, while there was certainly a postcolonial dimension to the modern conflict that we now refer to as 'The Troubles', a more complete account will factor in the pre-existing strife that has existed between the two traditions in Ireland for at least 500 years.

It is true that after the Protestant Reformation, English (and later, British) policy in Ireland was directed toward empowering the Protestant minority at the expense of the Catholic majority.[3] In constitutional terms, that policy reached its zenith with the passage of the Act of Union 1800, which united the Kingdoms of Great Britain and Ireland under a single constitutional framework. Between 1800 and 1900, however, calls for Catholic emancipation resulted in important reforms such as the Roman Catholic Relief Act 1929. Then, towards the end of the 19th century, Irish nationalists leveraged their growing freedom to campaign for self-government for Ireland, in what became known as the 'Home Rule' movement. That is when centuries of ethno-religious tension began to crystallise, because the leadership and supporters of the Home Rule movement were almost exclusively Catholic. It was thus viewed with great distrust by the bulk of the Irish Protestant minority, who foresaw that Home Rule would lead to complete independence for Ireland and leave them vulnerable to a hostile Catholic hegemony.[4] In the end, Protestant grievances went unaddressed by the Home Rule movement and the British government, and the resulting stalemate led to the passage of the Government of Ireland Act 1920. That Act partitioned Ireland into two jurisdictions: the 26 Catholic-majority counties of Southern Ireland (later, the Irish Free State, and now the Republic of Ireland); and six Protestant-majority counties in the northeast, known as Northern Ireland, which became the first devolved nation of the United Kingdom.

Discrimination duly followed on both sides of the border. In the Irish Free State, the Protestant population dropped by a third between 1911 and 1926, spurred in part by intimidation,[5] forcible removal of land[6] and the prioritisation of Gaelic Catholic culture in the Constitution of Ireland 1937. In Northern Ireland, the Protestant-controlled Parliament redrew electoral boundaries to silence Catholic voters, while discriminating against them in areas such as social housing and civil service recruitment.[7] Unlike the Republic of Ireland, where Protestant numbers were declining, Northern Ireland became a microcosm of the whole 'Irish problem', with age-old antagonism between Gaelic and Celtic erupting into violent clashes that spread across the country in 1968. Thus began a bloody conflict that would last the next 30 years, with state and non-state actors engaging in brutal acts of violence that claimed the lives of over 3700 people and resulted in the collapse of the Northern Ireland institutions. Inevitably, such a prolonged and bitter feud had a devastating impact on inter-community trust, the resolution of which would require a seismic leap of faith by the Catholic and Protestant people.

Noise, Sound and Symphony

Situating the breakthrough of 1998 within the context of several hundred years of mutual distrust is vitally important if one is to understand its

the Agreement was a considerable achievement in constitutional innovation, which provided the means by which the two communities could leave behind their violent past and work towards a common future

significance. That year, after three decades of chaos in which '[o]rdinary lives were lived against the background noise of gunfire, bombings [and] rioting',[8] the principal parties to the conflict – most of Northern Ireland's political parties and the British and Irish governments – signed the document that is now known as the Belfast (Good Friday) Agreement (hereafter, the 1998 Agreement). Endorsed by an overwhelming majority of citizens in a referendum that was held on both sides of the border in 1998, and guaranteed by a treaty between the British and Irish governments, the Agreement formed the cornerstone of the Northern Ireland peace process and the new constitutional order, under which the institutions of government would function on a cross-community basis. Unlike the failed constitutional experiments of the past, the 1998 Agreement was unique because the main belligerents in both communities recognised the legitimacy of their respective identities and political aspirations,[9] while dedicating themselves 'to the achievement of reconciliation, tolerance and mutual trust, and to the protection and vindication of the human rights of all'.[10]

Because Northern Ireland is a devolved nation of the United Kingdom (as are Scotland and Wales, which achieved devolution long after the partition of Ireland), primary legislation was required from the sovereign Parliament at Westminster in order to place the Agreement on a statutory footing. That legislation was duly passed in the form of the Northern Ireland Act 1998, which has since been recognised by the highest national court as a *de facto* constitution for Northern Ireland.[11] The Act reaffirmed Northern Ireland's place as a constituent nation of the United Kingdom and resurrected the devolved institutions that had lain dormant for a generation; institutions that would now operate according to a radically new form of constitutionalism than existed under the Government of Ireland Act 1920. The main difference was a decisive shift from the confrontational politics inherent in the Westminster system toward a consociational system of cross-community government, which was carefully calibrated to the political exigencies of Northern Ireland.

Thus, at the executive level, the government of Northern Ireland would comprise a cross-community coalition; it would be chaired jointly by the First Minister and deputy First Minister, who would represent their respective communities and share identical powers;[12] and government departments would be allocated to ministers not at the discretion of the chief executive, but using an objective mathematical formula known as the d'Hondt method.[13] When exercising their functions, public authorities would also have a statutory duty to promote equality of opportunity and good relations between all people, regardless of their religious belief or political opinion.[14]Similarly, the new Northern Ireland Assembly would have checks and balances – known as the cross-community support procedure and the Petition of Concern[15] – built into the legislative process to protect the two communities in the event that one should gain a majority over the other. In addition, a key aspect of the 1998 Agreement was that the British government would undertake to incorporate the European Convention on Human Rights into domestic law, so as to provide a robust mechanism for the people of Northern Ireland to enforce their rights against public bodies in national courts. That was achieved with the passage of the Human Rights Act 1998, which, even today, represents the high-water mark of human rights protection in the United Kingdom.

What once had been a morass of dissonant constitutional structures could now be likened to a finely balanced symphony of institutions, protections, checks and balances, all attuned to the political realities of Northern Ireland. Of course, the settlement was not a perfect solution to the country's problems. It required painful compromises on both sides, and despite the duration and intensity of the negotiations leading up to the Agreement, it still failed to address some of the underlying causes of the conflict. In particular, it was a remarkable oversight of the negotiating parties not to acknowledge the issue of socio-economic disadvantage as being a major contributory factor in The Troubles.

Research has shown that poor, working-class areas of Belfast bore the brunt of the violence and criminality that afflicted Northern Ireland from 1968 onward.[16] Yet apart from a single perfunctory reference to 'class' and some oblique provisions on economic planning,[17] the Agreement fails to make explicit reference to the class dynamics of the conflict or to provide targeted measures for breaking the link between poverty and sectarianism. Similarly, section 75 of the Northern Ireland Act 1998 fails to require public bodies to promote equality of opportunity and good relations between people of different socio-economic backgrounds. The Agreement afforded a major opportunity for the parties to tackle one of the root causes of The Troubles in a direct and holistic fashion, and their failure to do so is one of the main reasons why acute poverty still predominates in the areas worst affected by the violence.[18]

Nevertheless, in the quest for constitutional renewal in extremely divided countries, the perfect is the enemy of the good. For all of its flaws, the Agreement was a considerable achievement in constitutional innovation, which provided the means

by which the two communities could leave behind their violent past and work toward a common future. It did so by establishing a new constitutional paradigm under which the institutions of government – for the first time, on either side of the border – would function on the basis of equality and mutual respect between the two traditions on the island. Although the institutions could not guarantee the emergence of trusting relationships after decades of division, they did provide the stability and reassurance that were vital prerequisites. Having done so, the focus of the main political parties and the British and Irish governments turned toward protecting the integrity of the institutions against internal and external threats, so as to create sufficient time for the new arrangements to strengthen and bear fruit. As recent events have shown, that task is just as important today as it was in 1998.

The Test of Time

Violent conflicts that have their origins in centuries of ethnic division rarely end in a single 'constitutional moment', and the Northern Ireland conflict was no different. In the 23 years since the Agreement was signed, the Northern Ireland institutions have collapsed, failed to meet for long periods of time, or been suspended on multiple occasions by the Westminster Parliament. The most recent collapse was in 2017, with power-sharing only being restored to Northern Ireland three years later. Perhaps inevitably, these setbacks were the result of political deadlock arising from a lack of trust between the main political parties. Each time, however, the parties have managed to settle their differences via political compromises that enabled them to return to government.

Some of these compromises entailed changes to the Northern Ireland Act 1998 and the institutions of government, as with the St Andrews Agreement of 2006; while others resulted in new political pacts, such as the Fresh Start Agreement of 2007 and the 2020 agreement known as New Decade, New Approach.[19] However, the basic tenets of the 1998 Agreement, and the institutions that it created, have remained intact despite these changes. Indeed, recent decisions by the Assembly show the extent to which the institutions have succeeded in fostering inter-community trust. One of these was the passage of the Assembly and Executive Reform (Assembly Opposition) Act (NI) 2016, which created formal structures for 'opposition parties' to challenge the decisions of the Executive. Such structures were carefully omitted from the Northern Ireland Act 1998 in order to give all eligible parties a stake in government, thereby maximising cross-community 'buy in'. The fact that the Assembly has created these structures of its own volition is a sign of growing recognition that disagreement is part of the democratic process, and does not have to be destructive.

Therefore, notwithstanding some false starts, the Northern Ireland state has enjoyed more peace, stability and cross-community support over the past two decades than at any other time in its history. That success testifies to the versatility of the 1998 institutions, derived as they are from an agreed constitutional settlement that draws its power from the consent of both sides of the community. However, it may be the case that the biggest test for the institutions is yet to come. In an ironic twist, 2021 will not only mark 100 years since the border was drawn between Northern Ireland and the Republic of Ireland, but will see the introduction of a new trade border between Northern Ireland and the rest of the United Kingdom. That was the result of the Withdrawal Agreement that was reached between the United Kingdom and the European Union at the conclusion of the Brexit negotiations, which provides for an Ireland-Northern Ireland Protocol to keep the border open between both countries to facilitate free movement across the island.[20] Although faithful to the spirit of North-South cooperation that is contained in the Agreement, the Protocol undermines Northern Ireland's place within the United Kingdom, which is guaranteed by law.[21] Emboldened by this development, Irish nationalist leaders are now calling for a referendum on whether Northern Ireland should leave the United Kingdom and form an all-island state with the Republic.[22]

While such calls are legitimate, they pose a new danger to inter-community trust. The reason why is because they rarely come with detailed assurances that the same protections that are now afforded to the Northern Irish people would be mirrored in a unitary state. Rather, as with the campaign for Home Rule 100 years ago, most of these calls are coming from representatives of the Catholic community against the express wishes of their Protestant countrymen,[23] who are still a minority on the island. Unlike the 20th century, however, the British government is now legally obliged to call a border poll if it commands majority support in Northern Ireland, without the need for a qualified majority.[24] That means that drastic constitutional change could again be triggered in Ireland at the behest of the majority, without specific and prior protection for the rights of the minority.

If the Home Rule crisis and the Northern Ireland Troubles have taught us anything, it is that majoritarianism of this kind may have serious consequences if left unchecked. Indeed, suchconsequencescan already be glimpsed in the violence that has

That success testifies to the versatility of the 1998 institutions, derived as they are from an agreed constitutional settlement that draws its power from the consent of both sides of the community.

engulfed many Protestant areas of Belfast as a result of the Protocol and a widespread feeling of abandonment by the British government;[25]a sentiment that is strikingly similar to that of the Irish Protestant minority during the Home Rule crisis. Thus, with history seemingly coming full circle, it is incumbent on the proponents of Irish unification to recognise that if they are not prepared to abide by the lessons of yesteryear and build upon the hard-won trust that we now have, then Northern Ireland's dark past is almost certain to repeat itself.

Conclusion

Tony Blair, former British Prime Minister and architect of the Northern Ireland peace settlement, once spoke about the potential impact of the 1998 Agreement on the war-torn countries of the Middle East, saying 'one of the things that gives them hope is the success of the Northern Ireland [peace] process. It is a big symbol of change and possibility right around the world'.[26] However, a great deal can be learned from Northern Ireland's constitutional development over the past century and not just the events of 1998, even though the latter were a major turning point in the country's history. Moreover, democratic nations have just as much to learn as those that are engaged in and emerging from conflict.

Northern Ireland was the first devolved nation of the United Kingdom, and the Government of Ireland Act 1920 laid the foundations, in terms of constitutional precedent, for the devolution of Scotland and Wales at the end of the 20th century. Northern Ireland is thus an example to other democracies whose constitutions permit the development of multi-level governance structures. Likewise, the 1998 Agreement is a powerful example to divided nations of what can be achieved through constitutional politics and the establishment of cross-community government.

Above all, the Home Rule crisis and the Northern Ireland conflict are stark reminders to *all* nations of what can happen when equality and trust are sacrificed in the name of majority rule**.** As this article has shown, majoritarianism led to the partition of Ireland and to the Northern Ireland Troubles, whereas equality and trust were (and are) indispensable to the contemporary peace. With that truth in mind, and as we grapple with the uncertainties of the post-Brexit era, it is imperative that trust and equality remain at the heart of any future movement for constitutional change. Failure to do so will disturb the delicate partnership that now exists between Catholics and Protestants, in consequence of which the 1998 institutions will lose the lifeblood of cross-community support that is vital for their success. Such an outcome would likely condemn the two communities to the ethnic turmoil of the past, and could make the transition to constitutional stability even more difficult than a century ago.

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> Social justice is now inextricably linked to the preservation of individual liberty or freedom, the achievement of equality, and the establishment of common bonds of all humanity to reach out to public good.

CIVIL INSTITUTIONS AND THE ROLE OF WOMEN IN JUSTICE PURSUITS:

A SRI LANKAN PERSPECTIVE

Jeeva Niriella

Introduction

The position of women in Sri Lanka has been influenced by patriarchal values and ideas embedded in traditional/pre-colonial, colonial, and post-independence ears by relatively rigid traditional laws and gender inequality reflected in the legal system, and by norms and principles introduced during the British colonial administration. Although Sri Lankan policymakers introduced a social policy compendium of free health, education and food etc. which dramatically improved women's quality of life, women's position still is at secondary status and subject to peritracheal ideologies. Due to this reason it will remain a question whether she may fully enjoy all the dimensions of the concept of social justice. Considering certain scenarios in the rest of South Asia, Sri Lankan women are treated relatively well. However, the path is still devoid of socio-cultural taboos and impediments for Sri Lankan woman to enter into some fields both in the public and the private sectors and their active presence in decision making processes and consultative capacity are not fully deployed. Women must forge ahead demanding meritocracy to be institutionally entertained within the system.

Nuancing Social Justice

The term 'social justice' was first used in 1840 by a Sicilian priest, Luigi Taparelli d'Azeglio, and given prominence by Antonio Rosmini–Serbati in *La Costitutione Civile Secondo la Giustizia Sociale* in 1848.'[1] The phrase social justice indicates fair treatment for all people in a society, including respect for the rights of minorities

> WOMEN ARE THE MINORITY IN THE SRI LANKA DECISION MAKING, MAJORITY OF UNIVERSITY STUDENTS ARE SIGNIFICANTLY FEMALES WHO ARE WILLING TO PURSUE THEIR HIGHER EDUCATION REGARDLESS OF ALL CONSERVATIVE NORMS AND THE APPARENT LACK OF OPPORTUNITY IN THE MANY AREAS OF PUBLIC LIFE.

and equitable distribution of resources among members of a community.[2] The *Oxford English Dictionary* defines social justice broadly as "justice at the level of a society or state as regards the possession of wealth, commodities, opportunities, and privileges".

Social Justice is an old concept dated back to many centuries. Yet, the universal concept of justice first appeared between 1,500 and 2,500 years ago in the teachings of most of the world's common (great) religions, such as Judaism, Christianity, Islam, and Buddhism.[3] Great philosophers such as Plato, Aristotle, Confucius, Averroes, Jean Jacques Rousseau, Emmanuel Kant, and A.V. Diceyto name a few innovatively studied and reflected on the notion of justice through a jurisprudential perspective and advocated the need to consider justice to redress the issues injustice and unfair treatment of the innocent and the vulnerable members of a given society.

According to the early records belonged to pre classical period, the ideology of social justice was group-specific, i.e., it was applied solely to a particular group of people or nation to redress the effects of hierarchical inequalities. In *The Republic*, Plato expanded the meaning of justice by equating it with human well-being.[4] Aristotle further developed this concept in his *The Nicomachian Ethics*, where he introduced a view of justice that anticipates modern debates about issues of resource allocation. During the period 17th and 18th centuries, social justice was used to rationalize the consolidation of state power under the authority of absolute monarchs.

Social justice is now inextricably linked to the preservation of individual liberty or freedom, the achievement of equality, and the establishment of common bonds of all humanity to reach out to public good. Thereby the democratically and constitutionally established institutions are able to deliver justice to all and the public to invited to access for if their rights are violated.

The concept of Social Justice would be incomplete without what Rawls introduced when he defined inthe concept of distributive justice which provided that "…all social values… are to be distributed equally unless an unequal distribution of any or all these values is to everyone's advantage."[5] Before Rawls, A. V. Dicey in his book *Introduction to the Study of the Law and Constitution* presented his perception of therule of law which includes equalityof all before law. This principle is being embodied in International Human Rights Law Treaties and in majority of local Constitutions. Article 12 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka stipulates that, 'All persons are equal before the law and are entitled to the equal protection of the law' which reflects the social justice concept.

Social Justice in Human Rights Law

Social Justice that emphasizes the equal opportunities, equal right to personal liberty, etc. today are honoured and safeguarded under human rights provisions. The foundational document of the modern human rights movementas we are aware is the Universal Declaration of Human Rights (UDHR), andis characterized by a "whole scale inclusion of justice among human rights including procedural justice, distributive justice and fairness."[6]

International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR) are also laid down as universally recognized human rights standards including equitable treatment and redress inequality in order to establish justice and fairness in society and value of human dignity. This may view as pragmatic approach to defending social justice. Today, social injustices in every aspect including sexual, communal, religious discriminations have been remonstrated and refused as violations of fundamental human rights ensuring the equal opportunity and the equal protection

of the laws.[7]

It is a fact that these legal provisions within human rights law support and enhance rule of law as noted above which provides the appropriate institutions to function for civil order and create a vibrant democracy within a given constitution. This interplay between the constitution and the institutions are paramount even in our discussion on women and their social, political roles to be represented within a polity. It is indeed a matter of justice as their rights are also inviolable just like their counterparts in employment to governance and more importantly in decision making processes.

Secondary status of women in Sri Lankan society

52.1% of the total population of Sri Lanka is women. Out of the total economically active population, only 33.6% are women. Thus, almost 70% of the labour force constitutes economically inactive women.[8] In order to encourage women's participation in economic activities, first it is mandatory to understand the reason for keeping them out of the process. Inequity that exists due to some reasons caused to the transformation of social justice to social injustice.[9]

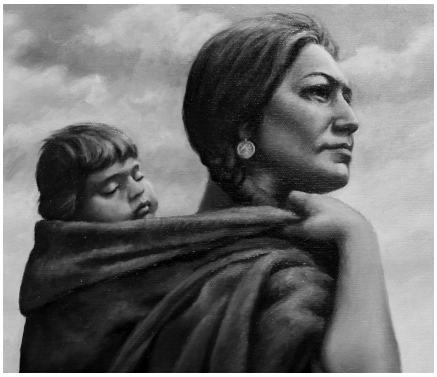
Sri Lanka produced the world's first woman Prime Minister in 1960, and elected the country's first woman Executive President in 1994 with the highest percentage of registered votes. However, with such a legacy, it is a puzzle as to why there is such abysmally lowparticipation of women in the political landscape of Sri Lanka. In the 2020 general election, only 5.3% - just 12 out of 225, parliament members are women. Despite being the majority of the population and voters also being women, the female voice has been kept conspicuously away from the decision-making process. It is evident that the gender quota introduced by the 10 Local Authorities Election (Amendment) Act, No. 1 of 2016, in fact is not an adequate solution to eradicate deep-rooted gender discrimination issue in Sri Lanka.

The policy makers should seriously consider the social and cultural neglect of women and their roles in a productive piece of legislature in the 21st century.

Although women are the minority in the Sri Lanka decision making, majority of university students are significantly females who are willing to pursue their higher education regardless of all conservative normsand the apparent lack of opportunity in the many areas of public life.Today, legal profession is being invaded by female lawyers and professional Legal Education is being captured by female law students which can set certain parameters for other professions.

According to the 2017 statistics of the Bar Association of Sri Lanka, out of 1,097 lawyers admitted as attorneys at law in that year, 65% were women.[11]out of them, only 28.9% of female lawyers are involved in Judicial Service as Judges and Magistrates which indicate certain male-dominated elitism in the profession.The rest of the female lawyers were called to the Bar, do not engage in an active practice. Do they give up active practice due to family commitments or other social, cultural or political barriers? Such professional impediments are also caused by social and cultural taboos that operate in the patriarchal family network. Only a few have socially and professionally made it to the highest career level in the respective fields.

It is essential to recognize the role of a woman as care taker of family members and a professional who is endowed with yet other capacities and confidence to balance the cradle and the country bothwith her multi-tasking skills. The stereotyped gender bias perceptions prevent her enter into active practice and women must find their support system in their counterparts as some of the men have realized for themselves that their incapacity in certain areas can be more skillfully supplemented by women if an opportunity is provided. Such phenomena indicate that social institutions of marriage as well as family must be reimagined even though new legal reforms are proposed.



It is essential to recognize the role of a woman as care taker of family members and a professional who are endowed with yet other capacities and confidence to balance the cradle and the country both with her multi-tasking skills.

There is a dearth in the active economic, financial, business and the corporate sector and a non-inclusion and promotion of women into the high ranks of leadership and real policy making corridors of power. They are not provided with a conducive and women friendly environment in many work places. It is not an exaggeration oran over statementto notehere that women do possess qualities and potential that can be vital to the survival and success of any businessin terms of their resilient capabilities and negotiation skills for professional breakthroughs.Certainly, they are capable contribute a unique and new paradigm to corporations and institution willing to be inclusive. Unfortunately the small number of women who are already functional in both the public and in the corporate sector come across predicaments caused by the systemic discrimination and conflicts that affect women direct that have compel them to leave the position for personal sanity and self-care. This is one area where the nation's constitution be able to bind the institutions to ensure that it provides right route to redress.

Another aspect of social injustice towards women in Sri Lanka is evident in the Application of Special Laws where the male dominance ideology has become a major fact.Section 23 (1) (a) (ii) of Marriage and Divorce (Kandyan) Act No 44 of 1952 distinguishes between *diga* and *binna* marriages. In a *diga* marriage, generally the bride shifts to the bridegroom's house after marriage and if her father dies intestate she doesn't receive any share of ancestral/ *Paraveni* property. As Hayley stated, 'The exclusion of diga-married daughter from the succession of her father's estate is chiefly due to her separation from her father's house and union with a different family, to bear children who will belong to a different gens.'[10](genes)

The widow's intestate succession rights are the other debatable aspect of Kandyan Law. Section 11(1) (a) states that, when a man dies intestate, the widow holds only a life interest on husband's acquired property. These discriminatory inheritance rules do not exist in the Matrimonial Rights and Inheritance Ordinance in which a widow inherits on half share of the deceased's property and one half shares among descendants.[11]A preference for male offspring and ideology of male superiority is being reflected through gender discriminatory provisions in Kandyan Law. Hence, these laws indicate stark injustice, hence proves that there can be unjust laws and even socially untenable. The Kandyan law that is in place is deeply problematic to the institution of marriage as well as inalienable right of a woman as a person. The constitution must protect her and hers failing which it cannot hold as a justly devised piece of law.

Some legal restrictions have been imposed by the Jaffna Matrimonial Rights and Inheritance Ordinance (JMRIO) on married women governed by ThesawalamaiLaw. In general law, a married woman has been granted the legal status of a 'femme sole' to manage her property and contracts under the Married Women Property Ordinance, No 18 of 1923. Section 6 of the JMRIO (as amended by the Ordinance No. 58 of 1947) provided that, 'women govern by Thesawalamai shall obtain the written consent of the husband in the case of disposing of and dealing with immovable property by any lawful act.' Although the married women under general law of the land, the Kandyan and Muslim law is a *femme sole*, the married women govern by Thesawalamai Law is still under the marital power of her husband.[12]

According to Savithri Goonasekara, statutory provisions as well as case law have been used to develop a strong concept of a 'husband's marital power' of controlling and managing his wife's property under Thesawalamai.[13]It sounds rather disabling for modern women who pass out universities with sufficient knowledge base of the rapidly changing world that they have encountered. There is a clear issue that the institution of marriage is under a severely calcified patriarchy.

Muslim law permits polygamy and demonstrates a strong commitment to patriarchal values. Although a man who has sexual intercourse with a girl under the

> "Gender unequal provisions in Kandyan Law, Thesawalamai Law and the Muslim Law are inconsistent with Article 12 of the Constitution of Sri Lanka expresses that No citizen shall be discriminated against sex'...

INTERPLAY BETWEEN THE CONSTITUTION AND THE INSTITUTIONS ARE PARAMOUNT EVEN IN OUR DISCUSSION ON WOMEN AND THEIR SOCIAL, POLITICAL ROLES TO BE REPRESENTED WITHIN A POLITY

age of 12 (whether or not she is his wife), with or without her consent, is guilty of rape under the Penal Code, Muslim law provides that a marriage contracted by a girl under 12 years of age is valid provided a Quazi (a person who exercises judicial power under the Muslim Marriage and Divorce Act) authorizes its registration[14]. In the event of a marriage breaks-up, the husband is free to divorce his wife without cause or his wife's consent, however, for a wife to obtain a divorce, she must either have her husband's consent or establish before a Quazi one of the grounds for divorce under Muslim law.[15] Muslim law discriminates women in matters of inheritance. Wives as surviving spouses do not receive equal shares of inheritances,[16]and a wife is required to share her part of the inheritance with the other wives of a polygamous husband.

Gender unequal provisions in Kandyan Law, Thesawalamai Law and the Muslim Law are inconsistent with Article 12 of the Constitution of Sri Lanka expresses that No citizen shall be discriminated against …sex'. These three examples within Sri Lanka further violate several provisions related to non-discrimination in International Human Rights Instruments in which Sri Lanka is a state party. It is clearly evident that, the women who are governed by special Laws are specifically experiencing discriminatory treatments as a consequence of male dominance socio-cultural factors. Therefore, the institution of marriage and family laws (special laws) must be revised to eradicate the ill treatment of women on the basis of an archaic law which stands outside the national constitution and continue to violate rights of women blatantly.

These inequalities and social injustice prevent a country from developing and expanding its economywith an abiding common rule of all men and women are safeguarded without which indicates that the constitution as well as the institution cannot deliver that they say they fulfill and such an environment democracy too is at stake. Mainstreaming Social justice obviously is key to the progressive policy development, governance and security – domestically and internationally. The most suitable and timely relevant example would be New Zealand which is the first country where women won the right to vote. The Present Prime Minister of New Zealand has received Gleitsman International Activist Award from Harvard Kennedy School's Center for Public Leadership (CPL) as an honor for her role in guiding New Zealand through the terrorist mosque attacks in Christchurch and the coronavirus pandemic; policies on climate change, inclusivity, and social well-being; and "principled, effective, and just leadership.[17] It's a credit that goes to this country for the right place of the constitution in governance whereby appropriate institutions have played their part for social cohesion and political stability of New Zealand.

Conclusion

Social justice for women means also transforming women's condition from dependency to independency which also indicates that the country's institutions are willing to work for the wellbeing of all. If a system is unable to cater to the half of the population (women) then its future is bleak and basically heading for a social collapse. This in fact is crucial when the nation is preparing for a new constitution to be adopted. Learning from mistakes and taking into account the 'unjust laws' that existed with years discrimination must be revised, rectified to suit the new requirements and expanding knowledge on the human abilities and skills deposits in various groups of the polity. There are no fixed measurements neither there are permanent solutions of all new questions that emerge, but innovative approaches are possible as we pass through the stages of the life of a people and a polity. The reason why there should be new constitution or to reform a constitution is because what exists is proven inadequate to the needs of the people or such has become inapplicable to facilitate the institutions and to the progress as men and women and to their aspirations as a citizen.

Endnotes

1. Michael Novak, Defining Social Justice, First Thing, Institute on Religion and

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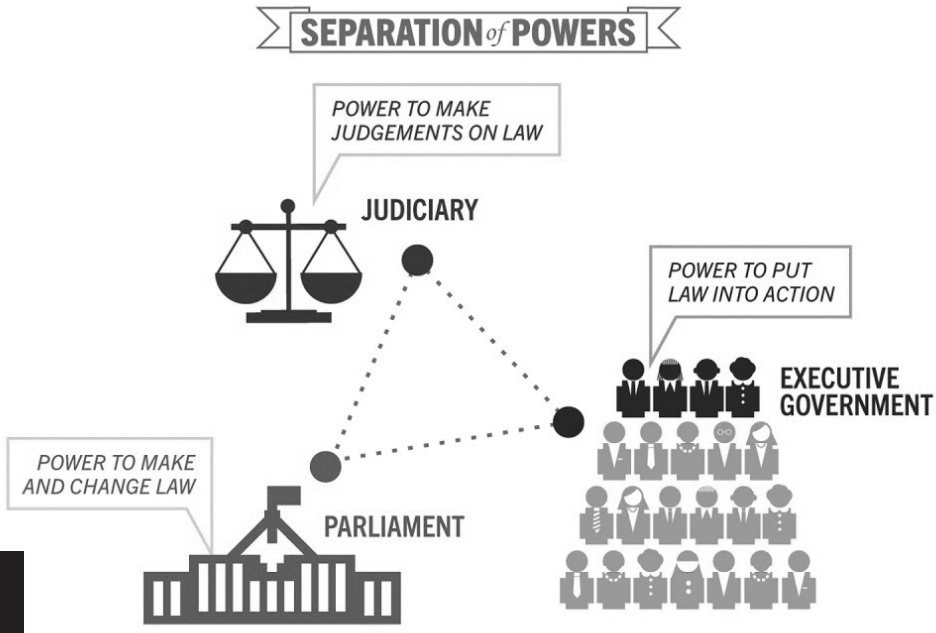
REFLECTIONS ON SRI LANKA'S EXPERIMENTS WITH SEMI-AUTHORITARIANISM

> "The Soulbury Constitution only created a new form of governance, based on the principle of the separation of powers."



Basil Fernando

The discussion on the Constitution should begin with the reasons for having the discussion. There can always be abstract discussions on any topic. A good example is the essay on a coconut tree that almost every Sri Lankan school child has to learn to write. There, the ideal picture of the coconut tree is painted. It mentions all kinds of uses of the tree and its produce. In the past, in a similar way, the Constitutions of the United States, the unwritten constitutional tradition of Britain, and the French model were discussed as some ideals that others could use.[1]

However, the historical situation under which the discussion on the Sri Lankan Constitution is taking place is not one of that nature. There is a complicated situation in the country and society, and the discussion on the Constitution has to relate to the problems arising from these conditions.[2]

This matter can be further clarified by referring to the past attempts to overcome some perceived defects of the 1978 Constitution.[3] These attempts took place around the 17th and 19th Amendments. In both instances, the overall conceptual basis and structural framework of the 1978 Constitution were not challenged. Some proposals were discussed and used in attempts to modify some of the perceived defects. Despite achieving success in getting these Amendments passed, the actual situation of the public institutions and their performance did not change significantly. In any case, the 18th Amendment and the 20th Amendment abolished the 17th and

> Outside Germany, there was an understanding of the weaknesses of the Weimar Constitution. It paved the way for a possible emergence of a fascist regime, as well as what happened thereafter.

19th Amendments.

Therefore, the issue is the existing constitution of 1978 and the needs of the contemporary situation. The problems faced by the country and its people need to be looked at with the view to assess whether the Constitution contributes to resolving these problems. If the answer is yes, then the discussion has merely to confine itself to the articulation of the ideal qualities of this Constitution with, perhaps, some minor suggestions on how to make it somewhat better.

However, if the answer is in the negative, then many complicated questions will have to be raised and discussed. The nation has to engage with and resolve these constitutional problems.

A Historical View

In 1815, when all of Sri Lanka became a British colony, a completely new form of administration was introduced. From then up to 1948, that system gradually took root in Sri Lanka. The features of that system of administration were based on certain concepts developed in British and Western history. Within that system of administration, the law was the foundation of the workings of all public institutions. There was no one above the law, not even the British monarch that was the supreme head of the entire empire. A firmly established principle by then was that all power had to be derived from laws publicly enacted. Actions of anyone working within the framework of the State had to be within that legal framework.

Throughout the 19th century, there was the establishment of some 7 institutional systems. Notably, they are the Civil service, administration, justice, public services (health, education et al), functioning financial institutions; the commercial and trading system, had to function within institutions which in turn were acting upon the foundation of law. Thus, legality is the test of actions, right or wrong, done on behalf of the State.

When the Soulbury Constitution was written, it merely articulated a system of principles that had already taken root in Sri Lanka.[4] They were exercised through a network of State institutions functioning throughout the island. The Constitution merely articulated a system already in place. The Soulbury Constitution only created a new form of governance, based on the principle of the separation of powers. But the institutions through which that governance was to be carried out were to be the same as what already existed in the country.

With the institution of a semi-dictatorship notion, introduced through the 1972 and 1978 Constitutions, confusion was created at the top level. It was a misunderstanding between two things: the principles on which the institutional framework of the country was operating, and the political leadership at the head. The top political leadership was envisaged to function within the framework of a semi-dictatorship. However, institutions on the ground were firmly established to work within a framework of liberal democratic principles. These were carved into the laws, rules, regulations and practices under which these institutions functioned.

Over a period of about 40 years, this conflict between the conceptual framework that is operating at the top and the conceptual framework within which the State institutions were functioning at the ground level, conflicted with each other. This conflict led to confusion now spread into the entire functioning state system.

With heavy pressure from the top to function according to its wishes, based on this notion of semi-dictatorship, the institutions at the bottom suffered great setbacks. Those who were supposed to be running the various public institutions no longer had a clear idea of what their role, function and capacities were. By tradition, acquired from the past, they were accustomed to act on the basis of law-based principles. However, due to pressure from above, they are confused as to how far they could carry out these roles, functions and duties.

The result of this conflict is felt by people everywhere. It is the receivers of service from state institutions that are directly affected by the confusion that has now gotten so deeply entrenched. This not only creates confusion among the people but also affects every type of activity that engage the people. The economic system has been seriously affected by this overall conflict. It not only created an unprecedented financial crisis (in terms of an unbearable national debt) but it also created enormous problems at the level of production and distribution of goods. The major problem of the economy is that the production levels are so low

that it cannot generate the kind of income that is needed for running the State. When the running of the State is in crisis, the burden of that crisis had to be borne by the people. And, as usual, the major part of the burden is shifted to the already poorer sections. For a number of decades now, it created the kind of problem that the country is experiencing.

The question, then, is whether the making of a Constitution can avoid the issue of dealing with these two conflicting situations. On the one hand, you have the governing philosophy that a semi-dictatorship is necessary for the country. On the other hand, you have a system of law-based institutions that function within notions of fairness based on principles of the rule of law and democracy. If this problem is not addressed and resolved, then the discussion on constitutions will not contribute very much towards creating a sensible and a meaningful discourse.If this conflict is not addressed and further measures are brought to strengthen the top with greater powers (to the detriment of the public institutions), the existing chaos will become even worse.Therefore, in the course of institution-making, it is far better to adapt the approach taken after World War II in Germany and France. Examine what is wrong with the existing constitutional system. Correct the wrongs. Strengthen the conceptual and structural basis of the entire state from 'top to bottom' on the basis of the rule of law and the separation of powers.

As Shakespeare's phrased it in one of his plays, one may drink from a cup without noticing a spider was in it; later, when they see the spider, they feel the ill effects on their psyche. Similarly, since 1978, people have lived through the experience of the prevailing constitution. Many did not understand the negative effects this constitution would have. Now, after a long period, there is a general realization in the country that this constitution has brought about a situation of chaos and destruction.

Therefore, the most vital question that needs to be discussed is: was the adoption of the notion of a semi-dictatorship justified? Given that there is no basis for an affirmative answer, the questions that arise are: Will the overall total structure of the State function on the basis of liberal democratic principles? Will the overall organizing principle of the State be the rule of law or not?The debate needs to concentrate on this issue. Without resolving this issue, it is not possible to resolve any of the other problems faced by the nation.

Reviewing the Weimar Constitution

World War II raised many questions, both in the minds of the German people and worldwide. For Germans, the issue was how a dictator like Adolf Hitler could emerge when there was a democratic Constitution in the country, the Weimar Constitution.[5] The further questions were twofold: How could the horrendous crimes that took place in Germany, and by Germany in nearby countries, have happened? Also, how could the constitutional framework be reconsidered in order to preserve the rule of law protecting peoples' freedoms?This set in motion one of the greatest debates within Germany itself. Outside the country, there was an understanding of the weaknesses of the Weimar Constitution. It paved the way for a possible emergence of a fascist regime, as well as what happened thereafter.[6]

The second aspect of the debate was: what constitutional means could be developed to prevent any possibility of a similar occurrence in the future? The best minds among German and international jurists and humanists, representing various perspectives, were engaged for a considerable period of time on this. They were attempting to identify what went wrong. They were trying to lay a constitutional foundation able to withstand the pressures against it. They wanted to be able to preserve constitutional order for liberal democratic principles in the future. Many serious and far-reaching changes were achieved.[7] And, as a result, the discussion on the constitution produced results beneficial for the generation now living and for those in the future.

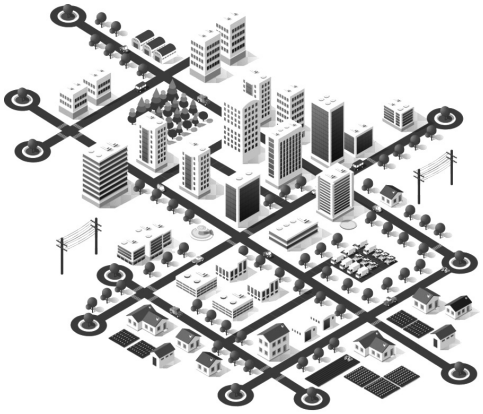
The few reflections that are included in this short essay are based on a perspective similar to that which was engaged in by the people and their professional legal minds in the aftermath of the Second World War.

Deficits and Structural Disturbances

This implies the admission that there is a serious constitutional crisis in the country. The existing constitution is involved. It is directly

> "So, we ask, what kind of government do the people of Sri Lanka agree to and want for themselves? It will bring us to the debate on this issue that has gone on for several decades."

> “in the course of institution-making, it is far better to adapt the approach taken after World War II in Germany and France. Examine what is wrong with the existing constitutional system. Correct the wrongs.”



or indirectly responsible for things that have gone wrong inthe country's institutional framework and the foundational principles relating to governance.

This would imply identification of at least some of the major problems arising from the existing Sri Lankan Constitution. It would require a discussion on the development the 1972 and the 1978 Constitutions. This means expansion of the State protective mechanisms for the people as a whole. Is there a crisis in the functioning of public institutions in Sri Lanka? By 'public institutions', we mean the institutions which are essential for carrying out the functions of governance, including named as Sri Lanka's civil service. These institutions relate to the administration of justice. It means policing with an emphasis on two specific functions: police investigations, and the keeping of law and order.

Prosecutors function under the Attorney General's Department, and there are various judicial institutions from the Magistrates' Courts up to the Supreme Court. All these institutions relate to financial matters, trade, commerce and corruption, which ensure accountability within the framework of the rule of law. Thus, this crisis within the public institutions affects the day-to-day functioning of the State as well as the day-to-day needs of the population that seek protection for themselves in order to ensure their own security. Are the Constitutional structures capable of fulfilling the above-mentioned roles of public institutions by guaranteeing strict adherence to the rule of law?

Is the balance of power between the three branches of government (legislative, executive, judicial) functioning in a responsible manner? Is each branch held accountable for its proper functioning within the framework of the law? Does it ensure that public institutions perform their roles in the manner required by law?I s the conceptual understanding of the functions of the three branches of Government intact, i.e. to balance each other in order to ensure accountability? In other words, does the conceptual framework uphold the principles that are needed for the system to operate under the rule of law? Lastly, are the institutions performing different functions for the government working effectively and efficiently without conceptual disturbances that could undermine performance?

In order to further clarify the above-mentioned enquiries, it is necessary to go beyond the purely legal conceptions to a more political conceptual framework. So, we ask, what kind of government do the people of Sri Lanka agree to and want for themselves? It will bring us to the debate on this issue that has gone on for several decades.

Semi-Dictatorship vs. Liberal Democracy

When the Weimar Constitution was being discussed in Germany, with a view to needed reforms after World War II, there was absolute agreement without any vacillating: no person or branch of government should exercise absolute power. The agreement was that the future constitutional framework of Germany would be based on the principles of a liberal democracy. On that point, no controversy was allowed. In fact, given the circumstances of WWII there was unanimous agreement that something had gone severely wrong. Furthermore, there was agreement that repetition of the past should be prevented by a firmly stated conceptual framework, which would not leave any room for doubt about the manner in which the German state is to function in the future.

In Sri Lanka, since the end of the 1960s, there have been controversial statements that have thrown some doubts as to whether a liberal democratic system is suitable for Sri Lanka. The first person to publicly air this view was Felix Dias Bandaranayake, Minister of Justice in the coalition government elected in 1970. He famously stated, and often repeated, that Sri Lanka needs a semi-dictatorship.This idea was incorporated through the 1972 and 1978 Constitutions. Its advocates, such as Professor AJ Wilson, considered that it would stop Sri Lanka from going "off-balance".[8]

Diminishing Judicial Power

In the 1972 Constitution, this view of a semi-dictatorship was articulated in a somewhat mild manner. One of the main aims of the 1972 Constitution was to diminish the power of the judiciary to review

legislation passed by the Parliament. The speeches made in Parliament during this debate clearly reflect this view.

The practical result of that desire to somewhat diminish the power of the judiciary was to remove the power of judicial review. Until then, the Sri Lankan Supreme Court had the power of judicial review. This meant that any review could be challenged in the Supreme Court on the basis of legality. And, if the Court was satisfied that an illegality had taken place, it could declare any such law as null and void. There were many judgments which were handed down in the early part of the 20th century through to about 1972. The Court had at times declared certain laws, passed by Parliament, to be null and void.

It was this power that was important to the Supreme Court, so that it could perform its function of balancing power between the three branches of Government. It could ensure that all legislation that could be enforced within Sri Lanka was made within the framework of legality. The principle of legality is the foundation stone upon which any law rests. Therefore, no one from any of the branches has the power to make a law which would violate the principle of legality. A law that is promulgated must be a just law. However, while doing this, the 1972 government was still aware that this could create certain imbalances. It provided for a Constitutional Court that could decide on matters of constitutionality. In a sense, though not absolutely, the Constitutional Court could exercise a certain degree of judicial review.

Undermining the Necessity of Law

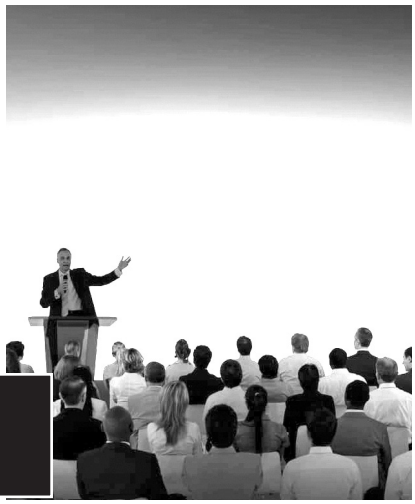
Moving on, we see that the 1978 Constitution went the whole way. It negated the judicial review power completely. It also created an institution called "the position of Executive President" whose actions could not be challenged in any court of law. This particular provision in the 1978 Constitution was an attack on the very foundation of the principal of legality. It meant that certain actions could be valid and enforced by legally authorized authorities-even if those measures were not legal and contravened the principle of legality.

This was an extremely important point that had drastic consequences on the entirety of the conceptual framework of the system of laws in Sri Lanka. Some actions, which may be illegal, could still be carried out by the lawful authority. It was a very blatant violation of the principle of the rule of law.Further inroads into the doctrine of checks and balances were made by shortening the time period needed for the passing of legislation. These limits were imposed through the Constitution itself. Certain laws could be passed within a very short period of time without providing adequate notice to the people or to the authorities. They had to implement these laws to be able to participate in the process of making of such laws. Having a system whereby only just laws could be implemented is the foundation on which the principles of legality and the rule of law rest. That anything could become law, even if it violates the accepted normative framework of laws, radically altered the nature of both the practice of checks and balances and the very nature of the State itself.

Absolute Power Vs. the Rule of Law

The pursuit of the idea of a semi-dictatorship gradually emerged into a situation of absolute authority of the Executive over other branches of government. Here, a distinction must be made between the legal conceptions expressed in terms of the text of law plus other written publications, and the actual system being practiced on the ground. What is important is what really takes place on the ground. We need this in order to understand the nature of the operative principles that are at work. Judging from actual experiences of the functioning of State institutions, it is quite clear that there is a very disturbing state of confusion of the conceptual framework regarding these institutions. The conflict, between many of the expressed notions at the ground level of functioning of institutions, remains based on the

> "some of the minority spokespersons, like the former professor A. J. Wilson, who worked very closely with president J. R. Jayawardena entertained an approach and they felt that all the stakeholders should agree on the principles on which the system of governance in Sri Lanka is to be based. Is it a liberal democratic form of governance or one based on the rule of law, or is it a semi-dictatorship?"



> “Some actions, which may be illegal, could still be carried out by the lawful authority. if so then, it's a very blatant violation of the principle of the rule of law.”

older framework of institutions - built over nearly 150 years.

Current (Mis) direction

Unfortunately, a notion developed over the last several decades is that the first issue to be resolved within Sri Lanka is rise of the minority. The justification for a call for the protection of minority rights cannot be underestimated in any way. However, when the entire system is in a chaotic situation-- as described above-- trying to resolve problems faced by minorities as a purely separate issue is bound to add greater confusion to an already chaotic situation. Moreover, there will be practical problems that continually worsen the overall situation, which will affect minorities. What is needed first of all is to agree on the principles on which the system of governance in Sri Lanka is to be based. Is it a liberal democratic form of governance or one based on the rule of law, or is it a semi-dictatorship? Unfortunately, some of the minority spokespersons, such former professor A. J. Wilson, who worked very closely with president J. R. Jayawardena had this approach. Notably, there was an idea that the semi-dictatorial model of governance introduced through the 1978 Constitution could better provide solutions to the minority issues than liberal democracy. This is due to the fact that a liberal democracy, based on electoral processes, allows a greater say to majority rule. However, all that president Jayawardena could offer to Wilson at the end was safe passage to the airport when the 1983 riots broke out Wilson later wrote that several years of his life were wasted in this pursuit.

In conclusion, there are clear challenges that the people Sri Lanka have to face. They need to decide on the common structure under which they choose to live. This fundamentally is a choice between a democracy based on the rule of law, or to continue down the path of semi-dictatorship, or worse. In the absence of a clear agreement on this issue, it is not possible to conduct a sensible and a logical conversation on what a future constitution might be and what institutions become worthy of delivery.

Endnotes

1. A. V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) 84.

2. See ‘SRI LANKA: A submission on the making of a new constitution’ http://www.humanrights.asia/news/ahrc-news/AHRC-STM-029-2020/

3. Asanga Welikala, (2019) Constitutional Reforms in Sri Lanka – More Drift?, The Round Table, 108:6, 605-612, DOI: 10.1080/00358533.2019.1687964

4. Patrick Peebles, *The History of Sri Lanka* (Greenwood Publishing Group 2006), Chapter 8 ‘The Coming of Independence’, p. 95.

5. The Constitution of the German Reich of 11 August 1919.

6. “The Power ofthe People and the Rule of Law”: The Problem of Constitutional Democracy in the Weimar Republic.” Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism, by Peter C. Caldwell, Duke University Press, Durham; London, 1997, pp. 1–12. JSTOR, www.jstor.org/stable/j.ctv11smq6s.5.

7. Uwe Hessler, ‘Germany marks 60 years of postwar of postwar constitution’ (DW.com, 22 May 2009) https://www.dw.com/en/germany-marks-60-years-of-postwar-constitution/a-4272150

8. A. Jeyaratnam Wilson, The Gaullist System in Asia: The Constitution of Sri Lanka (1978), 168.

Quest for Models of Constitutions and Institutions:

A Buddhist Perspective

Historical attempts of Buddhist societies have certain experiments not necessarily such can be adopted wholesale, however they can be revisited as they indicate productive measures and comprehensive ethico-cultural basis open for reformative adjustment

Prasantha Lal De Alwis & Shanthikumar Hettiarachchi

Preamble

Constitution as we know is an aggregate of fundamental principles or established precedents that constitute the legal basis of a polity, organization or other type of entity and commonly determine how that entity is to be governed. Every entity, polity has its own unique 'Institutions', to have its functions done both effectively and efficiently.[1]

The French philosopher-Judge, Montesquieu (1689-1755)argues that the theory of separation of powers, incorporated into many constitutions of the world,is the most acceptable civic safety valve for governance. The Executive, the Legislature and the Judiciary are today function asliving organs of a democratically elected state. Jean-Jacque Rousseau (1712-1778), a contemporary of Montesquies ratifies in his 'discussion on Inequality'which they read and detested in the French feudal system burdened on the socially marginalized by the equally powerful Royalty and the Papacy led clergy. Secondly, Rousseau presents the concept of the 'Social Contract' which has become cornerstones in modern political and social thought have infused a binding and an abiding demand on the 'ruler and the ruled'. The three pillars or the triad of democracy are set in motion in most modern states to carryout separate functions of promulgating the law, implementing it, and interpreting it and thereby compelling all to be law abiding subjects within the law providing equal treatment and opportunity in a citizenry. It invariably provides the appropriate institutions to emerge and operate seriously edifying functioning of civic life. The three pillars independently provide 'checks and balances' as their *modus operandi* becomes the *raison d'être*

to prevent possibility for a full blown autocracy and breach of the rule of law in a given democracy. Hence, it is important to initiate the institutions that can support and enhance the constitution while on the other hand to equip the constitution that enables the establishment of institutions. Such arrangements indicate arguably a healthy functioning of a society that honours the 'social contract'by the people. It is also proven that if a constitution is democratically agreeable for a people to be governed alongside their preferential option, then such could promulgate rule of law to be accepted as a guiding principle of 'all and the whole'

Law Making in Buddhist History

The Buddha declared a *vinaya* rule (disciplinary code) in the line of what we might understand as a 'social evolutionary theory' after considering either the public outcry or a dispute amongst the *Sangha* he recruited, trained and empowered tofollow the Dhamma. During the rainy season (*wassana*/*(varsa*)), when insects and sprouts were trampled by the *bhikkhus* on *pindapatha* (traditional begging for food), they were criticized by the people because their act of walking causes *himsa* (violence) to the seasonal habitat and its active biodiversity. Hence the matter was brought to the Buddha seeking advice and Buddha in consultation with them suggested to restrict the movement of the *Sangha* by limiting them within confines of the living abode *(vihara)* during the rainy season primarily setting apart the time for studying, teaching and coaching. This was called the 'v*as period'* (an auspicious period). It is one thing to sternly forbid which could have negative effects,but finding an alternative route is a positive act that could lead to new avenues of enlightened propositions. The 'Buddha praxis' adopted the latter for the formation and the training of the early Sangha. A public criticism arose, as toa certain woman offering human flesh as food to an ailing *bhikkhu*, obtained from her own calf.When reported to the Buddha, he admonished a strict rule prohibiting the *bhikkhus* to consume human flesh as food even if it was a voluntary offering (*dana*) through the generosity of the donor. Some rules came about as strict advice while some were constituted which laterbecame part of the *Vinaya*. He found them useful as guidelines and rules forthe disciplinary spiritual training of *bhikkhusavakas* on the basic precepts.

Buddha in the preliminary examination of the *bhikkhu's* misdeed of consuming the *dana* of human flesh set an appropriate new rule. Therefore, he asked the *bhikkhus* a few questions and proclaimed that anthropophagy (eating human flesh) is a 'serious abject misdeed' (Pali. *thullaccaya*, Skt.*sthulatyaya*), to indulge and to act on it without having investigated the origin of the dish is a wrongdoing.[2] We are reminded thatthe 'offering of the body is central' to some of the main virtues of Buddhist ethics: the perfections (*paramita*) of giving (*dana*), of energy (*virya*), and of patience (*ksanti*), with all of them subsumed in the esteemed virtue of compassion (*karuna*). All this is directed to an ethically abiding institution of a spiritual culture. The *Anguttaranikaya* enumerates the *tisso sikkha* (three fold discipline)is to be a binding the institution of the Sangha through the practice of ethical conduct (*sila*), mental discipline (*samadhi*) and wisdom (*panna*). Then developing them into *Adhisilasikkha*, *adhicittasikkha* and *adhipannasikkha*)[3] which makes *bhikkhu-bhikkhuni savaka* a true *samana* (seeker). Because such is proposed as a pathway for the final elimination of *lobha* (*greed*) *dosa* (hatred) *moha* (delusion) for wholesome conduct and virtuous living, while wishing wellbeing of all and the whole.

The Buddha being the *Satta-deva-manussanam* (teacher of humans and devas, one of the nine qualities of the Buddha),[4] he perhaps would have consulted his erudite *savakas* as well as 'sharper well-wishers' before he arrived at a certain practice. This practice he made sure was well informed and found a consensus as if indicating to the fundamentals of democratic consultation, consensus and even compromise.The two examples above, one more controversial which is mostly misunderstood out of context during the life time of the Buddha provide ample evidence of his perspective on a disciplinary route (constitution) and the practice of it via contextually formed

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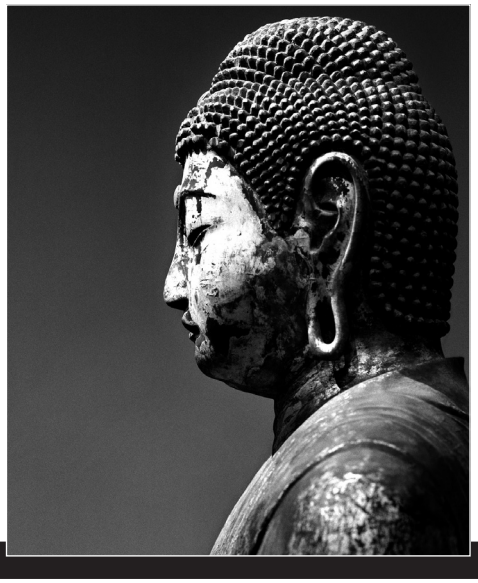
“There was neither doctrines nor a revelatory process from another source. He did not emulate religious parampara (tradition), but provided a basic process of disciplinary ethical conduct (*sila*) tied to carefully determined principles, directions and guidelines to his disciples (*savakas*).



institutions. Historical attempts of Buddhist societies have certain experiments not necessarily such can be adopted wholesale, however they can be revisited as they indicate productive measures and comprehensive ethico-cultural basis open for reformative adjustment. One such we wish to share with our readers.

Licchavi Governance

The Licchavis were part of the *Vajjian* clan of the *Vajji Mahajanapada* (metropolitan in modern understanding) and it is presumed that the *Licchavis* largely domiciled in *Vaishali*, the central city of the *Mahajanapada*. It isconsidered an ancient kingdom in India which existed in today’s Nepal from approximately 400 to 750 CE. What we are discussing here is a model that only short lived as Ajathasathu of Magadha invaded the Licchavi city Vaishali and annexed to his rule of autocratic monarchy. However, the Licchavi socio-political experiment is still referred to as paradigmatic for democratic governance and social wellbeing of the ruler and the ruled during the sixth century BCE.

The tension was between the monarchical kingdoms which occupied the Yamuna valley and the republican territories in Kathmandu valley in the foothills of the Himalayas. Uma Charkavarti, an Indian historian notes that the *gana sanghas* which were considered to be the Vajjian confederacy[5] were synonymous with republicans. Rhys Davids, J. P. Sharma, A. K. Werder, P. V. Bapat, C. R. Majumdar, Jotiya Dhirasekaraare are of the view that the Buddha might have preferred the republican model to the monarchy even though a Magadhan monarch like Bimbisara had been his close friend-donor to him and his ‘shramana movement’. It seems that the Buddha expressed his opinion to Vassakara, one of the ministers of Ajathasattu that the Vajjis would remain invincible as long as they adhered to the seven rules governing their (in this case of the Licchavis) conduct (*satta aparihana dhamma*).[6] Buddha admired the Republic’s ancient customs, its democratic government, its respect for wise men (but he might not have seen it as a right solution to the problem of *dukkha* which was his ethico-philosophical pursuit).

There are few references at least in two *Jathaka* stories, like the *Cullakalinga Jātaka* and the *Ekapaṇṇa Jātaka* mention that the Licchavi as having over 7000 *rājā*s. Interestingly Kautilya in his *Arthaśāstra* (ch. XI), describes the Licchavis as a republic (*gaṇa sangha*) which Umar Chakravarthi suggests and whose leader uses the title of *rājā* (*rājaśabdopajīvinah*). But still unclear whether two *Jathakas* we have named the above referring to the same, however there must have been a clan, or a tribe of this group in the *Vajji Mahajanapada* and that the *rājā* was the head of their system of governance different to the their neighbours. This same notion is confirmed in the *Manusmriti* (X.22) of the *Dharmasasthra* where the Licchavis are placed in the category of the, *Vratsa Kshatriya*s (obedient, faithful to the clan), yet again is depicted as a clan with alternative institutions and abiding a constitutional framework (a disciplined path to the rule of law perhaps). All this records indicate that the Licchavi civic consciousness of the Kathmandu valley has been commendable given the monarchical dominance in the Yamuna valley.

Licchavi Framework

The distinct convention of the Licchavi model is that it demonstrated, unlike most of its neighbours, that it was not an absolute monarchy which they resisted. Ultimate authority rested with the 7000 + *rajas* (much comprehensive than the Athenian model) who met each year to elect one of their members as a ruler and a council of nine to assist him. Of course it was far from what we understand by modern democracy as only a small portion of the Licchavi population qualified to vote.

Secondly, that those with *raja* status were only the male heads of households who belonged to the *kshatriya varna.* We certainly are aware that the *varna* stratification was strictly adhered and dominated profoundly despite the severe countercultural preaching by the Buddha himself. The *Vasettasutta* as well as the *Ratthapasutta* of the *Majjhimanikaya* and his numerous interventions with the brahmanic structural dominance he encountered during his sojourns in and around present Bihar and Patna are evident. The place and role of women are not even in the equation unfortunately at the time; some would argue that very little might have changed even in the 21st century for more than half of the global population of women. Eva Niriella elsewhere in this edition distinctly and courageously elaborates this social deficit even in the 21st century.

The three chief functionaries of the Licchavi administration were the *Rājā* (the ruling chief), the *Uparājā* (the deputy chief) and the *Senāpati* (the chief of the army). Interestingly an important place of the trade (barter) or economic order (*arta*) is found in the introductory portion of the *Ekapaṇṇa Jātaka* as we noted above which refers to the *Bhāṇḍāgārika* (the chancellor of exchequer, or the minister of finance) as part of the institutional framework in the context of Licchavi governance. Interestingly, according to the *Aṭṭhakathā*, an accused criminal had to pass through seven layers of judges (a severe scrutiny prior to a considered judgment), each of whom investigated and interrogated the accused.

These judges were the *Viniccaya Mahāmātta* (the inquiring magistrate), the *Vohārika* (the jurist-judge), the *Sūttadhāra* (the master of the sacred code), *Aṭṭhakūlakā* (the eight clans, probably a federal court in modern understanding). Then the *Senāpati* (head of military) and the *Uparājā* (deputy executive). The final judge was the *Rājā* (chief executive not ultimate like in a monarchy), who could find him guilty, whereupon the convict received the punishment prescribed in the *Paveṇipotthaka* (the book of precedence carefully formulated with necessary checks and balances with other consultors) for the offence committed by the individual. A tedious but a transparent and an accountable process from the beginning to the end of an issue had been maintained as far as they could as per literature we have consulted.

Even if the 21st century legislators, social planners and constitutional experts hesitate to fully adopt the Licchavi model of governance and its civic responsibility yet they still can study carefully what de facto, made the Licchavis in the 6th century. BCE even before the Athenian concept of city states to embrace such a socio-political civic conduct and comprehensively focused on promoting civility and adherence to rule of law and justice delivery.

Bhutanese Experiment

Siddharta Gautama as the Buddha, in his first twenty (20) years of his public life of forty five (45) years of preaching there might not have been strict rules promulgated on the *Sangha.* As controversial and complex issues arose, when public condemnation arose, then the Buddha seemed to have recommended certain disciplinary boundaries or are gulatory compass to govern the institution of the *Sangha,* which can be interpreted as a disciplinary guideline or the rule of law in modern understanding.

Buddhism proposed 'a view of life and a way of life' and is not a religious thought per se assessing its original *dhamma* preaching, teaching and practice.But later interpretations led to a textualized format and then further *attakathas* and systematizations. It won worldwide acceptance as a philosophical ethical code attesting that a 'view of life and way of life' (*patipada*) is possible through a gradual training of oneself avoiding fruitless ascetic conduct, (*Attakilamathanuyoga)*, prestige and pleasure (*Kamasukhallikanuyoga*), opting for *majjhima patipada* (middle path). The Buddha did not transfer any divine oracle to his hearers nor spoke via a divine authority nor by his own authority but through sheer authentic credibility as *Satta.* There was neither doctrine nor a revelatory process from another source. He did not emulate religious *parampara* (tradition), but provided a basic

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process of disciplinary ethical conduct (*sila*) tied to carefully determined principles, directions and guidelines to his disciples (*savakas*).

Interestingly we have found an attempt where such Buddhist principles are being deployed to the modern formation of constitution and institutions. It is in this context that we would like to share a strong and a special reference to the formation of a constitution which our ‘near neighbor of the Himalayan state of Bhutan’(still of the Kathmandu valley) adopted in July 2008. The king of Bhutan, Jigme Khesar Namgyel Wangchuck, pronounced even against the view of majority that the country must change from a single monarchy to a modern state, with civil institutions and with a written constitution after seven years of consultations, some led by the king alongside those who willing to opt for a new route to governance.

Some notable reforms were suggested by the king himself. The monarch will retire by age of 65 stepping down to handover throne to the prince or princess provided that the royal heir has come of age (Article 2, section vi). Therefore, Bhutan’s constitution whilst creating a continued succession in the monarchy ensures vibrant, youthful and possibly healthy institutions. This was an emotional, hotly debated issue which every Dzong Khag (regional body) repeatedly opposed in both spirit and principle.[7] However, the king explained and introduced his intention stressing the importance of a strong monarchy thereby a stable country. He transferred most of his administrative powers to the Council of Cabinet Ministers and allowed even an impeachment of the king by a two-thirds majority of the National Assembly. There are exhaustive provisions made to cover situations if the heir to the monarchy had not attained the governable age in the case of a minor.

The spirit in which Bhutan introduced a new way of looking at the rapidly changing world and society with a less than a million population through its ethnic and religious minorities is to adopt anon-invasive system of defining the purpose of human lifeaccepted to all. It is not rocket science they discovered but an aged old pursuit: Happiness. The king won his people by this single objective which of course resonated with the pursuit of the Buddha himself who sought meaning in life. The king strategically introduced an interpretation to global obsession on Gross Domestic Product (GDP) which he said would be futile if people are unhappy in his Himalayan commune. Hence, he innovatively suggested to his people as if a strapline for Bhutan: Gross National Happiness (GNH) also as something they should pursue in their passion for economic prosperity and development goals. So that the final value of the goods and services produced within the geographic boundaries of a country during a specified period of time is not just evaluated by the GDP index alone but a GNH index as well (this index strategy is also now developed).[8] That if people are happy then even half the success in economic growth many be assessed well and take measures to rectify the deficit but still be happy about the other half of success they have made. It is in this context that the Bhutanese king with his associate proposed to the people an edifying constitution and related institutions that should drive the next century.

Bhutanese View and Model

Article 3, (section i), of the constitution states that “Buddhism is the spiritual heritage of Bhutan, which promotes the principles and values of peace, non-violence, compassion and tolerance. However, under Article 3, section 2, the King (Druk Gyalpo) is the protector of all religions in Bhutan even though majority is Buddhist of nearly a population of 800,000.

Article 3, (section iii) clearly whilst giving responsibility to religious institutions and personalities to promote the spiritual heritage of the country, clearly separate religion from politics and further state that, religious institutions and personalities to remain above politics. This unique provisions give clear guideline as to the function of most sensitive institution ‘religion’ in its relationship with the conflicting, perhaps controversial area politics.

Article 9 which covers "state policy" and provides the state to create conditions to enable the true and sustainable development of a good and compassionate society rooted in Buddhist ethos and universal human values.

Unique feature of Bhutan's Constitution is the recommendation to the anti-corruption commission made by a joint consensus (Article 27 section ii) of the Prime Minister, Chief Justice of Bhutan, the Speaker, Chairperson of the National Council and even the Leader of Opposition, thereby preventing arbitrary biased appointments (King appoints them). Therefore, the recognition and acceptance of entire Bhutan is assured. There is a similar procedure for Royal Civil Service Commission (RCSC) (Article 26, section ii), Royal Audit Authority (Article 25, section ii), Election Commission (Article 24, section ii)

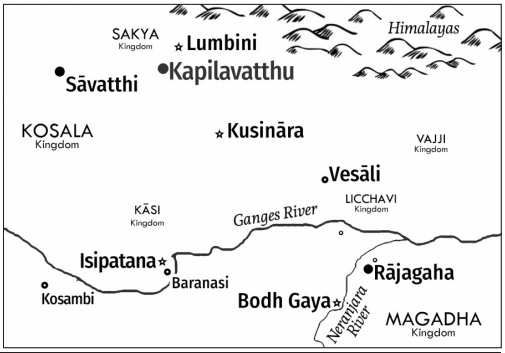
They cannot resort to regionalism, ethnicity and religion to incite voters for electoral gain (Article 15, section iii). This is because of the strong possibility of languages, ethnicities in the regions. Its membership shall not be based on region, sex, language, religion or social origin (Article15, section 4 b) and must be broad based Gross National Membership with commitment to National Cohesion and stability (Article 15, section 4 c). It is a common factor in the world, that it is the corrupt rich, both individuals and business entities who control the government activities, due to contributions they make to political parties in their pursuit for success at elections. Bhutan constitution prevents such malpractices where it prevents accepting "any money or any assistance" other than those contributions made by its registered members (Article 15, section 4 d) and any assistance from foreign sources including governmental, non-governmental, private organizations or from private parties or individuals (Article 15, section 4 c). But unfortunately we have not seen any provision made to the heterogeneous Bhutanese people of Nepalese descent. The Lhotshampa people are native to southern Bhutan, who are known as 'Southerners' and a stateless population. The world is looking at Bhutan for a homegrown solution instead of asking the West to receive them as refugees.

A close reading of Westminster's institutions and the model of governance, its developments and adaptations may be useful in the light of where there is no written constitution per se. A bell was rung way back in 1826 when Sir John Cam Hobhouse, a valuable recruit to the Reform Party noted in the house of commons and is credited with the invention of the phrase His Majesty's (loyal) Opposition made during a speech in the House of Commons. With such interventions the Westminster parliament was compelled to provide due value to the role of the opposition in governance. It is still the case of the Westminster proceedings and the subsequent 'shadow cabinet' is perhaps a development of this infusion of value to the opposition. In the case of the Himalayan capitol of Thimpu which we discuss, a similar recognition is tendered to the 'opposition as a partner in governance' by proposing an Institution of the Opposition Party.

It is a unique provision that is allocated for the opposition party or parties in the Bhutan Constitution which is worth reflecting here. Perhaps it's more worth even emulating such a model where strong ruling parties as currently dominating, one can observe Turkey, Hungary, Belarus and Uganda as most visible regimes that seem to undermine their oppositions.

An interesting model of the Bhutanese constitution displays their opposition party and those in power: it shall play a constructive role in good governance (Article 18, section i). shall promote National Integrity, Unity, Harmony and Cooperation (section ii) even as the opposition, promote constructive and responsible debate in parliament and not disable and mime itself, while providing healthy debate must remain a dignified opposition (section iii) and will not allow party interest to prevail over the National Interest (section iv). They are supposed to oppose the government and articulate alternative policy decisions (section v). It is clear that a weak opposition is a bad sign even in a vibrant democracy. The opposition while pulsating must be a proactive sign of productive governance an enlightened

"The tension was between the monarchical kingdoms which occupied the Yamuna valley and the republican territories in Kathmandu valley in the foothills of the Himalayas.



“The distinct convention of the *Licchavi* model is that it demonstrated, unlike most of its neighbours, that it was not an absolute monarchy which they resisted.

leadership.

Wrapping Up

Constitutions and Institutions are once again emerging as old topics but requiring a new understanding and interetation in the digitalized world more so with the second and the third wave of the pandemic despite the hopes of a vaccine rolling out through the countries. The new US Biden administration is planning to convene a global ‘Summit on Democracy’ and on Ecology which seems to seek fresh conversations on *constitutions and institutions* as they form the core of democracy to confront a multi polar world of politics, governance and international relations.

Currently in Sri Lanka parliamentary groups are commissioned by the government of Sri Lanka to carve out a new constitution as an attempt to provide more powers to the legislature and secure the independence of the judiciary and are being met by various civil society groups and the individual submissions are being entertained while other constitutional models are also studied. A lacuna in the debate might be how the majority community wishes to deal with the nation’s minority communities with varying aspirations and historical struggles. The minorities themselves must reflectively assess and propose a winnable deal to draw the attention of the majority itself. The opposition as we write is wanting to rally as a ‘united voice’ but the precipice among the groups is enormously factional as the radical left party does not wish to be on the same platform. The debate is on and we hope it becomes more vibrant and that any model of constitution must seek ‘public good’ and the institutions model themselves as those that deliver such objectives in practice on the ground.

Endnotes

1. Chisholm, Hugh, ed. (1911), "John Cam Hobhouse, Baron Broughton" Encyclopedia Britannica 4 (11th ed.), Cambridge University Press, pp. 655–656 where this reference is made. 2. Hubert Durt, Two interpretations of human-flesh offering: misdeed or supreme sacrifice, See for an extensive discussion https://core.ac.uk/download/pdf/290124587.pdf accessed on 18/02/2021. The notion of *svadeha-parityiiga*, *kayasya niksepam*, *sarira-bheda* all mean some sort of bodily dana or the renunciation of one’s body (this does not refer to suicidal are found in Mahayanic texts, like the *Lotus Sutra*). Also see the offering of the thigh flesh in the Mahaparinirvana sutra and the sacrifice of the princess in the *Jnanavati parivarta* of the *Samadhiraja-sutra*

3. See Gradual Sayings (Anguttara Nikaya) 1: 215

4. See Dhammacakkapavattanasutta– (setting in Motion the Wheel of Truth).

5. The exact composition of Vajjian confederacy is a matter of controversy altought there is a general consensus regarding its status as a confederacy The Social Dimentions of early Buddhism, (Oxford University Press, Delhi, 1987) pp. 8 & 57.

6 . 1. Daily meeting for consultation,2. Unity in action, adherence to old injunctions, 4. Respect of elders, 5. Respect for women, and never to be molested, 6. Reverence for places of worship within or without their territory, 7. Protection to worthy saints (*arahants*) in their territory See. Digha Nikaya II (trans.) PTS

7. See *The Consttitution of Bhutan: Principls andd Philosophies*, Tobgye, L. S., Became law in 2008 by aan Act of Parliament.

8. See http://www.grossnationalhappiness.com for the work of the Centre for Bhutan Studies on the GNH research, accessed on 18/02/21. Also see Oxford Poverty and Development Initiative (OPDI) for its assessment of the latest of the Bhutan’s Centre for Bhutan Studies revised and released an updated GNH index in 2011. There are 33 indicators in the 9 domains (Psychological wellbeing, Health, Education, Time use, Cultural diversity and resilience, Good governance, Community vitality, Ecological diversity and resilience and Living standards) See https://ophi.org.uk/policy/gross-national-happiness-index/ for a comprehensive understanding of the for the 33 indicators.

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3. Michael Reisch, 'Defining Social Justice in a Socially Unjust World', Families in Societies: The Journal of Contemporary Human Service' Vol. 8(4), 2002, p. 344

4. Plato , *The Republic* (G.M.A.Grube Trans. 1974)

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6. Neil Hibbert, 'Human Rights and Social Justice' *Laws,*MDPI, Open Access Journal, US, (2017) p.1

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8. See *Women's Wellbeing Survey 2019*, Findings from Sri Lanka's first dedicated National Survey on Violence against Women and Girls Final Report Published by the Department of Census and Statistics, Sri Lanka in October 2020.

9. http://www.statistics.gov.lk/GenderStatistics/StaticalInformation/WomenEmpowerment/Newmemberlawyersregistrationsofbarassociation of SriLankabyyearandsex (retrieved on 10.02.2021)

10. Hayley F. A, The laws and customs of the Sinhalese or Kandyan law' H.W. Cave &Co, Colombo, (1923) page 331

11. Matrimonial Rights and Inheritance Ordinance No 8 of 1923 Section 22 and 23

12.Tambaih, S. J., in *Vijayaratnam* Vs *Rajadurai* (1966) 69 N. L. R. 145 at 148

13. Asian Values, Equity and a Sri Lankan Family Policy, G. C. Mendis Memorial Lecture, Colombo (1996) p.14

14. Muslim Marriage and Divorce Act No.13 of 1951, Section 23

15. Muslim Marriage and Divorce Act No.13 of 1951, Section 27 and 28 (1)

16. S. Goonesekera, "The Status of Women in the Family Law of Sri Lanka," Women at the Crossroads: A Sri Lankan Perspective. (ed.), Sirima Kiribamune and Vidyamali Samarasinghe, Vikas Publishing Ltd, New Delhi, (1990) p. 167

17. https://news.harvard.edu/gazette/story/2020/12/new-zealand-prime-minister-wins-gleitsman-award/ (retrieved 12.02.2021) (retrieved 12.02.2021)

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Publisher says :

Constitutions Are...

experiment' of a rainbow nation with black, white and brown communities living in harmony, are abiding and guiding examples for those legislators now at work. It proves that it is possible for human communities to politically opt for civility in the name of 'common good'.

Sri Lanka's 'constitutional reforms debate' has tended to focus exclusively on whether the executive should be presidential or parliamentary; the electoral system for electing members to the legislature should it be constituency based majority representation or be based on proportional representation? While these can be important issues, little attention seems to be tendered to highlight the values and principles by which the society should be governed. The need to enshrine them in the constitution not only is imperative but also obligatory by the mandate received 'by the people', because it is 'of the people' and 'for the people'- as they own ultimate sovereignty.

A nation, a people must feel that there is social, economic and political justice for them in their ordinary lives. That their liberty and freedom of thought, expression, belief, faith and worship is at their disposal. They should feel and able to experience that they have equal status, opportunities and avenues to pursue them. They must be assured the dignity of the individual in the land they have opted live.The institutions must provide workable structures in order to achieve the desired ends highlighted in the Constitution and this is why the right institutions are fundamental to the smooth execution of the constitution. They are just like the cog and the spikes in a wheel.

However, it is evident in a given situation that there are no good or bad institutions but what exists arguably are the well-managed or ill-managed institutions. If well-managed then such bring integrity to the constitution and if ill-managed then both the institution and the constitution bring shame to the very fundamentals of why they have been established anyway.

Therefore, much will depend on in the civic credibility of those who govern and those appointed to administer. They can either derail the system, weaken and perhaps lead to a point of collapse or be creative dispensers of desired goals. Binding those mandated to govern should both honour the constitution and honourably place those honorable men and women to build a society with civility, justice and respect the freedoms of all.

The enlightened political leadership with a strong sense of public commitment is paramount. Its willingness to set aside petty personal gains even if they are lucrative for the wider and perennial 'public good' is what makes it credible. Winning credibility of the people is the core of governance. No short cuts on this path, politics of working for 'public good' is what makes the leadership worthy of a mandate.

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May you go from Strength to Strength in the years to come.

Thank you, the Publisher (CSR), the Editorial Team, the Designer and the technical staff

Ad Multos Annos!

CONSTITUTIONS, POWER AND INSTITUTIONS

There were changes in the constitution
And it is the same old story: power.
Still we are doing better than
Middle East and North Africa before
The Arab Spring as well as modern day
Africa. Mauritius,the country
With the fairest electoral system in Africa
Is a democracy,which gave the
Dodo of tyranny, last rites.
The message is democracy is easier
On the eye and harder on paper.

Africa knows Bokassa, Idi-Amin, Mugabe
And the usual suspects who
Account for mass bloodshed and constraint
Of freedoms. South of Sahel
We have democracies of blood diamonds,
Tensions between Watutsi and Hutus,
That was made into a Hollywood movie
Hotel Rwanda, we have white farmers
Whose land rights were revoked, and Mozambique
That is seeing a new form of ISIS.
Spring is beautiful, although
The first cherry blossoms have short vigils,
Arab Spring that started in Tunisia
And spread to Algeria, Egypt and many more
Countries, could not usher the summer
Of peace and democracy.

We cling onto America,
The founding fathers, who made the
Constitution open for corrections,
According to times. The bill of rights
Is the revered ten commandments
That foster the basic rights of a human,
Albeita yankee. There is a joke saying
That Moses was the first to download
Anything from the cloud into a tablet.
Still how beautiful was the very first download,
A tablet of ethics that still resonate in modernity.
So why are constitutions so precious?
It is because they check and balance power,
The bigger evil. The hunger for power in insatiable,
As shown in Africa, America and Arabia.
Still indigenous messiahs are not the answer,
They are clones of Chavez and Morales,
While Trump and Orbán were too
Dependent on the white vote.

The constitutions are many,
But let us not forget the *de facto*
Over the *de jure*. A sentence can never
Eliminate the powers, of which
The focus stares at us like
A reflection. When Ali threw away
His medal from the Rome Olympics
He was making a strong statement,
For the ones who are different
From picket-fenced America.
Was he the greatest? Only
Time will unveil. While a gunshot
In Memphis drowned the dream
Inside a can of bleach,
White America.

Stay tuned to the times,my dear.
African-Americans are just a dream away, race
Relations are a favorite Beetles Song,
I want to hold your hand. While
The handshake of Mandela
And De Klerk, mirrored a world
Of change, Mugabe made
Farmers runaway, to their mother ship.
So do spare a genuine thought for
The ones who are different.

The world *turns, turns, turns,*
Sings the Bryds. Change can be
A spring of revolt, a push towards
Democracy, a purpose-driven life;
Still, when you look at the tall
Spines that hide behind, you
Can find a sense of power.
Let us not forget Mandela had
More power from Robben Island,
Than poor JFK in Dallas, Texas.
Idi-Amin chased away the Jews and Indians,
And still we remember Entebbe,
The perfect escape.

I can imagine Mandela whose
Dejected head nodded between
His knees, as a world wept;
What kept him alive is what mattered.
That is the true human spirit my friend.
The greatest power is love, how
Mandela forgave, and leased the
Remainder of his life to service.
When Mandela was released
There was a 29-year old lawyer,
Who was holding the fort
At Harvard Law Review.

They finally met in 2005.
They shook each other's hands.
In that moment, *the audacity of hope*,
Converged on *the long walk*
To freedom. Invictus stood strong
Inside both hope warriors;
The poetic words rippled through both,
"Out of the night that covers me,
Black as the pit from pole to pole,
I thank whatever gods may be
For my unconquerable soul".

The man with the jump shot spoke to
The man who had no private toilet bowl.
It was a heart-to-heart.

They both made History.
They gave **COLOUR** to power.

Dilantha Gunawardana