

~~Sir Ivor Jennings Memorial Oration 2026 ~~

REFLECTIONS ON THE EVOLUTION OF CONSTITUTIONAL IDEAS AND THEIR CRITIQUES

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As a member of the generation born just after independence Sir Ivor Jennings was a larger-than-life figure in all our lives. He was sent to what was then Ceylon by the British government in 1942 to be the Principal of University College Colombo. He was asked to create a university for what was then a crown colony and he decided to model it on Cambridge University. He became the founder Vice Chancellor of the University of Ceylon from 1942 till he left in 1955. Along with the architect Sir Patrick Abercrombie and his Sri Lankan associates he built a beautiful campus in idyllic surroundings combining eastern and western architecture. In his memoir *Road to Peradeniya*, he wrote of his vision of producing high quality intellectuals for an emerging independent Sri Lanka.

For many of us it was truly an honour to sit at the feet of the first two generations of scholars who graduated from the University of Peradeniya. I was once Director of the International Centre for Ethnic Studies and had the proud benefit of being mentored by Dr Neelan and Sithie Tiruchelvam and to receive guidance from Professor Savitri Goonesekere who were products of the Peradeniya law department before it moved to Colombo. Among the other great jurists to come from Peradeniya were Supreme Court Justices Mark Fernando and A.R.B Amerasinghe

But it was not only lawyers but some of the world's greatest anthropologists that had their initial training in Peradeniya. At the International Centre for Ethnic Studies law and anthropology merged as ethnography informed constitutional design and social justice. Professor Gananath Obeyesekere of Princeton University and Professor S.J. Tambiah of Harvard University were always grateful for their years at Peradeniya. It was a bond that bound them together and rooted them in the country's history and villages.

However, it is Jennings's other contribution, his involvement in the drafting of our first Constitution that is of particular interest to us today. After the Soulbury Commission and its consultations it has been well documented that the first Constitution was drafted by Jennings in close collaboration with our first Prime Minister Mr. D.S. Senanayake. Mr. Senanayake with little formal education relied heavily on Sir Ivor Jennings. Harshan Kumarasingham writes, "the two made an odd couple. Senanayake with his prosperous frame and background was a genial, near inarticulate Buddhist Sinhalese squire happiest working on his lands while Jennings was an austere, sardonic cadaverous scholarship boy of English working-class stock invariably surrounded by piles of academic text and plumes of cigarette smoke. Together, however, they were formidable and their relationship symbiotic."

Jennings himself in a public interview to the Ceylon Daily News said, "My most unpaid job was that of constitutional advisor to Mr. D.S. Senanayake. Some day I must tell that story at length for it resulted in the independence of Ceylon." In some ways to Sri Lankan nationalists this may seem to be an alarming and arrogant confession.

While India, short of universal suffrage but led by Ambedkar boasted a relatively autochthonous and participatory process in formulating their constitution, the final details of our Constitution were said to be carefully finalised by two men in the Bandarawela Hotel. A plaque at the hotel commemorates this process. As Jayadeva Uyangoda has stated Ambedkar's constitution was an epistemological break from the British tradition, ours was a negotiated one. The Indian constitution has stood the test of time, though often undermined by unscrupulous executives. We have gone through three constitutions and we await a fourth.

This lecture will attempt an examination of the debates around important political and constitutional ideas as they have come to us through the years. The first part will deal with constituent issues such as a written constitution, sovereignty and citizenship. The second part will deal with constitutional powers, the legislative, executive and judicial powers and the final part on human rights and identity.

PART ONE: CONSTITUENT ISSUES

1.1 *Written Constitutions*

Though US commentators often call their Constitution of 1787 the first written Constitution- i.e.- a single written document establishing a structure of government and rights, the history of written constitutions actually dates back to the Greeks and even perhaps to older civilisations. Before laws were written, adjudicators primarily relied on oral traditions and precedent. Village Councils in India conducted their matters in this manner. Indian and Chinese legal systems were elaborate but were primarily about administration and punishment and not really about democratic self-governance. The Greeks were perhaps the primary ancient tradition that *theorised* democracy.

The *Lyceum*, the think tank that Aristotle set up compiled the *Politeia*, a collection of constitutions from 158 Greek city states. Only one has survived- the Constitution of the Athenians. In this era of religious disharmony, it may be important to remember that Aristotle's writings were wiped out of Europe during the dark ages but preserved in Arabic translation. It was then retranslated back to Latin and Greek. If not for the Arabs and Thomas Aquinas who truly revived him, Aristotle may have been a very minor figure in the history of philosophy.

The idea of a modern written constitution, as opposed to the Greek, is rooted in the idea social contract theory developed by theorists of the Enlightenment such as Thomas Hobbes, John Locke and Jean Jacques Rousseau in the eighteenth century. They were responding to a Europe that was trying to break away from theories of the divine rights of kings as posited by thinkers like Robert Filmer. The Divine right of kings had created truly despotic regimes which had ruled Europe and the rest of the world for centuries. Social contract theory was a radical secular idea. Their hypothesis that people were once in a state of nature and then came to together to willingly devise a system of governance saw politics in a very different light. This social contract willingly entered into by free and equal human beings is the core of the notion of the consent of the governed which is the basis of all modern constitutions.

A written constitution is also a guarantor of the rule of law in countries without a common law tradition. The belief coming from the magna carta that the rule of law is supreme and that the king or the executive must submit is better anchored if there is a written constitution. Such a constitution can also better ensure the due process of law free from the arbitrary whims of personalities, especially for those who have been arrested or detained by the state .

Sri Lanka has had three written Constitutions since independence. Neelan Tiruchelvam has called them “instrumental constitutions” each written by a party that came to power with a two thirds majority. We await a fourth Constitution that has been promised but not yet delivered. The 2000 draft of a constitution that had the support of many stakeholders was not adopted. The country has been in anticipation of a new written constitution involving the consensus of all stakeholders for over four decades. This ambiguous state of anxiety and anticipation often defines present day constitutional discourse in Sri Lanka.

1.2 Sovereignty

Where does sovereignty lie in a constitution? The answer to that often reveals a great deal.

Theorists of the sovereign like Hobbes in the Leviathan saw the sovereign as the monarch, someone who had the complete monopoly of power. The Sovereign for Bentham and Austin, architects of British constitutional thinking were different and laid the basis for democracy in the Anglo-American system. For them the Sovereign is a sociological fact and not a legal construct. The Sovereign is anyone who receives the habitual obedience from the population.

The sovereign was indivisible and illimitable. British theorists in the Austinian tradition saw their Parliament, Queen and the House of Lords as their Sovereign though the House of Lords was demoted in the twentieth century. This British commitment to a unitary legislature as Sovereign brought to the colonies by thinkers and draftsmen like Sir Ivor Jennings would have important consequences in post-colonial societies of a plural composition.

Twentieth century thinkers put their own twists on sovereignty. Carl Schmitt, the legal theoretician of the Third Reich who is enjoying a revival in academia stated that “the Sovereign is he who decides on the exception.” Legal norms can’t anticipate every crisis so true sovereignty lies not in the one who makes the ordinary rules but in the authority that must decide when a normal legal order must be suspended.

It was Jean Jacques Rousseau who captured the romanticism of the modern age. He firmly believed that “the people”, not institutions were the only source of sovereignty. His belief in popular sovereignty as represented in the term “We the People” is now the introductory clause of the United Nations Charter even though it uses the term “peoples” instead of people.

The US constitution also adopted “the people” as the foundational constituent power. The US Declaration begins “We the People of the United States, in order to form a more perfect union,”... We hold these truths to be self-evident that all men are created equal”. Generations

after can only point out the greatest irony that Thomas Jefferson the drafter of this declaration of liberty was one of the largest slave owners in the United States on Monticello his plantation.

This idea of popular sovereignty, “we the people” would soon become the template of the modern nation state. From the beginnings it had the radical possibility of rebirth both in a positive and destructive way. The French thinker Sieyes in the eighteenth century was the first to inquire into the theoretical possibilities of “We the People”. He was the first to point out that the people are prior to and unbound by the Constitutions they create. “We the people” can always draft constitutions but also revoke and remake themselves. This radical potential is what makes a constitution into a living document.

But others found the romanticism around constitution making somewhat fraudulent. Who does it exclude? Jacques Derrida in his analysis of the US Declaration of Independence is scathing and called it a ‘mystical foundation’ an act of founder violence that is neither legal or illegal. He insisted that “We the People” is a legal fiction. The founding moment is extra-legal, violent and performative with its capacity to include and exclude people. He points out that “The People” don’t exist until the Constitution creates them. It is for him a retroactive performance. Having stripped these founding documents and Constitutions of their romanticism he points to actual power distribution contained in them. The US Constitution when it was initially drafted actually left out slaves, women, people without property and recognised and consolidated settlor violence against Native Americans.

How does Sri Lanka deal with sovereignty? Article 3 of the Constitution is very clear, “In the Republic of Sri Lanka sovereignty is in the people and is inalienable”. But, “The People” are passive, sovereignty lies in them, they are not creating a constitution with full agency. Where does the agency of creation lie? For that we have to go to the preamble. It states the people “entrusted to and empowered their Representatives elected on that day to draft, adopt and operate a new Republican Constitution.” The Representatives are the active agents. At the core this reflects a British faith in Representative government. Let us contrast this with the Preamble of the Indian Constitution which is a rallying call for all constituents in India. It reads “We, the People of India, having solemnly resolved to constitute India into a Sovereign, Socialist, Secular, Democratic Republic ...in our constituent assembly the 26th November 1949, do hereby adopt, enact and give to ourselves this Constitution.” No agents, we are sovereign, we give ourselves.

1.3 *Citizenship*

Central to some ancient ideas of governance was also the idea of citizenship, a core idea of modern constitutions. This Greek contribution is unique as most ancient societies do not have this idea of political individuals. Aristotle defines the citizen as someone who participates and shares in ruling a city state. Though he agrees types of citizenship vary with the nature of government, he believes citizenship is not passive but active.

The idea of a citizen as a rights bearer is the modern approach to citizenship. A citizen has certain rights a person does not. The Sri Lankan Constitution continues this dichotomy between citizen and person. It is only citizens who enjoy the freedoms of speech and expression, freedom of peaceful assembly, freedom of association, freedom to form a trade

union, freedom to manifest his or her religion, freedom to promote his or her culture and use his or her language, freedom to engage in a lawful occupation, freedom of movement, freedom of return and access to official information.

On the other hand, persons enjoy freedom of thought conscience and religion, the right to be free from torture, are seen to be equal before the law and enjoy equal protection of the law though only citizens have a cause of action against discrimination. Persons also have certain protections from the criminal justice system. This dichotomy between citizen and person clearly reveals the Republican strand going back to the Greeks that the citizen is the main active player in political and civil society while everyone else is merely protected from the excesses of the state.

Yet, we live in very troubled times. Modern thinkers like Giorgio Agamben have come with a new political category of persons which is ignored by the Constitution. “Homo Sacer”- Latin for accursed man drawn from Roman law: a person who could be killed by anyone without it counting as a homicide and his killing is also not part of a religious ritual. A person banned from both human and divine law. For Agamben a person as “homo sacer” is excluded from all of law’s protections. He calls this “bare life” as opposed to qualified political life.

Using Schmitt’s theory, he states it is The Sovereign that determines who falls within the “homo sacer” exception. He argues modern day immigration procedures, concentration camps, detention camps, migrants and refugees centres, Guantanamo, stateless people, people on death row and remand prisoners are for him all examples of “bare life” where the persons are “Homo Sacer” stripped of all legal protection. The countries which held up the Enlightenment promise of a rights-holding individual, are at the forefront of designing these systems of what Agamben calls “bare life”. The countless accounts and narratives of the subterranean life of undocumented and stateless people around the world and especially in the West amplifies Agamben’s point.

1.4 Reason and Virtue

For Ancient thinkers the citizen was not only rights holding but was expected to have a certain character. Constitutional design and practice were expected to foster this kind of individual. Today we have strong belief in religious faith but no real dedication to civic virtue

Socrates was sentenced to death because he wanted an education system based on reason and science. He was accused of corrupting young minds by introducing new forms of thinking. He wanted to teach them virtue, reason, and politics while playwrights and artists of the period like Aristophanes wanted to keep the focus on Homeric myths and the warrior ethics. They wanted to have education based on the Iliad and the Odyssey. Aristophanes play *The Clouds* satirised Socrates as the head of a school called the “Thinkery”. Socrates’s successors Plato and Aristotle ensured that Socrates won the battle for young minds in western Europe. Reason would be the centrepiece of western legal and political thought.

For Ancient and Medieval thinkers, the other quality of character a citizen must have is virtue. Aristotle’s virtue appears as a settled calm disposition backed by habit that is moderate in action and guided by reason. Islamic theorists like Al Farabi influencing and being greatly

influenced by Aristotle integrated the idea of virtue contained in the Nicomachean Ethics. Many feel Confucius's Doctrine of the Mean with its emphasis on moderation and equilibrium was also a parallel development in articulating a concept of virtue.

As constitutional lawyers and human rights activists we are subconsciously grounded in these ideas of what a citizen should be. As is the United Nations. But it is always important to note that a counter tradition with a different view of reason and human beings has also emerged. Friedrich Nietzsche has had an important impact on western intellectual thought challenging the basis of these traditions as well as the enlightenment ethic. Peter Thiel and many of the tech billionaires today cite him as an inspiration. Artists have also found sympathy in Nietzsche's unbound freedom. For Nietzsche individuals and citizens must have the will to power, to expand to dominate to make and remake the world. He feels Judeo Christianity with its "Blessed are the meek" philosophy based on what he calls "ressentiment" has made people weak and enslaved.

Nietzsche argues that we have all become what he calls "The Last Man", complacent, comfort seeking, risk averse looking for safety and pleasure. With last men he says the world will have a slow nihilistic death. Instead, he calls for the superman, "Übermensch", a person who creates his own morality, does not give into herd consciousness, moves beyond God and fixed moral absolutes and who accepts the necessity of pain and suffering in his quest. Liberal theorists have seen these ideas as reasons for the rise of Nazi Europe but Nietzsche has inspired many leading philosophers and artists in the twentieth century and even today.

As many move away from a moderate reason-oriented, rights bearing citizen who animated our Constitutions to a tendency that admires the "Übermensch," creating his own morality, refusing herd consciousness public life is put in a dilemma not only with the Constitution but the rule of law itself. Some citizens may be so empowered that they may not see the Constitution as limiting their aspirations. The techno billionaire elite in many parts of the world feel a sense of privilege and act as if they are beyond the rule of law. If they don't like constitutional limits, they move to other countries that are more welcoming.

PART TWO: CONSTITUTIONAL POWERS

2.1 *Legislative power and representation*

Democracy begins when we move away from arbitrary executive acts to follows laws made by legislatures. Legislative power is often seen as the authority to make, amend and repeal laws. It is usually exercised by an assembly, parliament or congress and its scope, procedures and limits are set in the Constitution.

In the early centuries if there were assemblies there was direct participation. The Licchavi republic based in Southern Nepal in the 4th century CE along with the Shakyas and Mallas republics in Nepal for example worked through an assembly-based system with the direct participation of the heads of the clan as did village councils all over South Asia. Generally, whether with the Greeks or in India large parts of the population, especially the women did not participate.

Of Enlightenment thinkers Jean Jacques Rousseau was a strong believer that democracy required direct participation. He felt without direct participation, factionalism and interest groups would thrive. His legacy was carried on to the twentieth century by writers such as Tolstoy, Emerson, Thoreau and the Fabian movement. In New England in the US, small townships until very recently had direct participation, face to face and a show of hands. Even today a few Swiss cantons continue to have face to face participation. But increase in population size began to make face to face participation difficult.

The concept of direct participation remains in another form in the modern era with the use of the referendum. In Sri Lanka in 1982 the use of a referendum displaced national elections to parliament. In 2016 the Brexit referendum fundamentally transformed the relationship between the UK and Europe.

For the most part however, political participation in the modern world is not direct. Britain's absolute embrace of legislative power as being supreme forestalled any modern experiment with direct participation. These ideas were enhanced by the theories of Jeremy Bentham who wrote extensively as the British parliament grew in stature. For him the role of government and the role of the legislature was to maximise happiness for the greatest number. He argued that only under representative democracy would rulers be able to serve the interest of the greatest number.

With majority rule being the norm of parliamentary procedure, the interest of the greatest number would be secured. Bentham also rejected checks and balances to reign in the legislature. For him the checks were universal suffrage, public debate and transparent processes. Bentham's somewhat narrow vision influenced generations of British positivist legal thinkers. Through Sir Ivor Jennings we inherited this tradition and would therefore be unprepared to deal with the realities of powerful nationalisms, increasing poverty and plural national traditions.

The biggest concern coming out of Bentham's theory is its complete disregard of minorities whether of opinion, race, class or gender. Majority rule and maximising pleasure leaves no room for those who are not in the mainstream. This bias in the British system would create unending trouble for post-colonial states. Article 29 (2) of the Soulbury constitution provides some protection but soon after the Jennings inspired constitution was enacted in Sri Lanka, the Malaihar Tamil community was disenfranchised and made stateless without any protection.

Students of Bentham in the legal field such as John Austin would become dominant in schools of law not only in the UK but all over the former colonies. Along with legal positivists like Hans Kelsen they would monopolise theoretical insights into the law. Norms and logic would be the basis of analysis. The insistence that law is a closed system of rules, insulated from morals and the social sciences made law into an analytical legal exercise often divorced from reality. The only positivist to break free from this confining imagination was H.L.A. Hart who made the actual practices of officials a defining element of his theory. But he too was unconcerned with actual realities or moral dilemmas as they operate in the ordinary lives of the people.

Legal positivism may be very useful in some areas of the law but are inappropriate or unable to deal with the complex issues of constitutional law and social justice. It is necessary to understand that in these areas the law is not isolated but in a constant dialectic with morality and a necessary interaction with the social sciences. Justice can only be served if all these aspects enter the legal calculus making law into a living dynamic force in people's lives.

2.2 *Deliberative Democracy*

With the legislature emerging as the supreme institution of power in Great Britain deliberations within the legislature became an important constitutional concern. Jurgen Habermas argued that only norms that would be accepted by all parties in a rational discourse are valid. His was a modern idea of consensus making based on rational deliberation. Forging a consensus was necessary for him and he saw a close interaction between civil society, media, social movements and legislatures.

Carl Schmitt on the other hand had little patience with prolonged deliberation. In his "The Concept of the Political" he defined politics as recognising who is friend and who is enemy and the enemy is often a mortal threat to one's collective life. Collaborating and giving in to a mortal enemy is not an option even with the threat of violence. The paralysis of modern democracies with their unwieldy majorities has brought back interest in Schmitt both from the left and the right.

This deliberations debate has relevance for Sri Lanka especially in fashioning electoral systems for the future. On the one hand like Habermas, any system must aim at maximum consensus. In a bid to be inclusive it is still important to ensure "decisional mobility" without constantly recreating situations where there will be hung parliaments and endless deliberations. These bogged down parliamentary processes will lead to the kind of exasperated, frustrated populism described by Schmitt.

2.3 *Executive Power*

Machiavelli who lived in the fifteenth century imagined the new executive prince for the modern era. He or she was to be secular, free from religious influence and also of powerful nobles, the two vested interest groups that bogged down medieval Italy. He or she would deal directly with the people. This notion of the imperial executive continues to live in contemporary times even as we speak.

Theoretically an executive president has its strong points. Where he or she is elected it is by a national mandate representing all parts of the population. An executive presidency has "decisional mobility" and in times of war and crisis may provide for stability and a more co-ordinated response. But Sri Lanka's experience, the experience of the US at the moment and the machinations of illiberal democracies in Hungary and other parts of the world point to the powerful risk that unlimited executive power pose to a strong democracy. A prime minister with a 2/3 majority can do equal harm but short of a two third majority a parliamentary system is more secure. '

The test for the use and abuse of executive power has always been a situation of crisis or a national emergency. Machiavelli was absolutely clear in case of an emergency the executive has a duty to violate ordinary rules of law and morality and proceed with whatever means necessary. Locke the democrat also gave way, speaking of “prerogative power”, the power to act in the public good against the letter of the law in situations that are unanticipated. Though Locke did not take away accountability, these actions were to him in the public good, meant to be temporary and evaluated after the fact.

It is Carl Schmitt and his writings before and after the Weimar Republic that have gained currency especially in this so-called era of terrorism. He argues ordinary law does not anticipate crisis. Someone has to decide when to set those laws aside and move into emergency action. For him it is the executive that determines this exception. His interpretation of the Constitution of the Weimar Republic gave absolute power to the President and then Adolphe Hitler.

Schmitt’s views were directly confronted by Hans Kelsen. Schmitt wrote that the executive should be the final arbiter of political constitutional issues. Kelsen in a direct rebuttal argued that the Courts perhaps a Constitutional Court guided by rules and procedures must be the ultimate authority to discuss constitutional issues even in times of crisis. This was the foundation of the rule of law principle. This inevitable tension in times of crisis between executive and judicial power continues to play out with the government on one side and civil society on the other. The danger of the chain of events that took place with Weimar Republic is always a possibility.

Schmitt’s diagnostic tools live on and are prominent in academic circles today. Giorgio Agamben is a scholar who takes Schmitt’s state of exception seriously but from another lens. He agrees with Schmitt to some extent that the Sovereign is the one who decides emergency and the state of exception. But he argues in the modern world the state of exception is neither rare nor temporary but the hidden paradigm of the modern state. It is actually the normal. After over fifty years of emergency rule in Sri Lanka we should know. In these situations, law ironically suspends itself while technically remaining legally in force. As mentioned earlier this state of exception makes many populations lead what Agamben calls “bare lives”-mere biological existence. This is the underbelly of executive power in the modern age.

Meanwhile Sri Lanka of the past may easily be a case study of Giorgio Agamben’s “State of Exception” with populations living “bare lives” as “Homo Sacer”. After one major civil war with a violent ending and two brutal southern insurgencies much has been written about these “bare lives” that people led. Jayadeva Uyangoda’s recently published book of poetry about the time he was in prison in the 1970s, P. Ahilan’s poetry about the civil war in the north and east and Sanathanan’s paintings and installations capture this state of “Homo Sacer” better than anything else. When political and legal words fail it is only art that captures the reality. Ermiza Tegel and Shalomi Daniel in “Judicial Review and Laws of Exception in Sri Lanka: A story of exclusion and impotency” gives us an insight into the hollowness of our legal and constitutional system and the failure of the executive in times of crisis.

2.4 Judicial Power

The notion of strong and independent judicial power is of recent origin. It is Montesquieu who speaks of executive, legislative and judicial power as being co-equal and checking each other. The actual genesis of a very strong judiciary was the case *Marbury vs. Madison* by a unanimous US Supreme Court in 1803 in a judgment by Justice John Marshall.

In the first US election with political parties in 1803 John Adams of the Federalist party loses to Thomas Jefferson of the Republican party. In the four months between elections and the inauguration John Adams passes a new Judicature Act and appoints his Secretary of State John Marshall as Chief Justice. Marbury the petitioner in this case was a justice of peace appointed under the Act. His commission was signed but not delivered. He brought a writ of mandamus before the Supreme Court to have the Commission delivered

A wily John Marshall accepts the validity of the Commission as done by proper process but holds that the Judicature Act as a whole was unconstitutional. In one ground breaking decision he established that the Supreme Court is the interpreter of the Constitution and has the power to overrule enacted legislation. It was the first time in history that a Supreme Court or judiciary has been able to overrule an act of Parliament. Thus came the very important tradition of Judicial Review. This judgment borne out of political strife in the early years of independence of the United States would become the basis for judge-led activism in the twentieth century. Yet everyone forgets how crooked and unprincipled the actual process behind *Marbury vs. Madison* was.

In 1954 the US Supreme Court unanimously decided *Brown vs Board of Education* ruling segregation to be unconstitutional and ordering the remedy of busing school children to desegregate schools. This ushered a whole era of Public Interest Litigation where civil liberties from racial equality, criminal due process to freedom of speech and the right to privacy were enforced by an activist Court strengthening and entrenching the Bill of Rights.

The jurist closely associated with this process was Ronald Dworkin who in the realist tradition urged the Court to constructively interpret the Constitution and that abstract moral language such as equality, liberty and due process should be interpreted according to their best moral meaning. He treated the legal system as a coherent set of principles. Law in harmony with higher principles drawn from the judicial and constitutional system itself was Dworkin's thesis. His was the theory for the hard cases that can actually make good law.

The British tradition of law was deeply suspicious of all these developments across the Atlantic. The British legal establishment spent the latter half of the twentieth century warding off the influences from the United States to the west and France to the South. Throughout the 2000s British legal theorists like Martin Loughlin also sharply critiqued Ronald Dworkin and judicial activism in the United States in not so polite language. Arguing against the "juridification of politics" he stated that US courts were trying to replace political contestation with legal constitutionalism usurping the work of representative institutions. Dworkin's answer was to point to the fact that the executive could be despotic and deliberations in the legislature may sometimes result in the tyranny of the majority. In those situations, Courts were called upon to protect the rule of law and the basic principles and values that govern the

Constitution. However dramatic reversals by the present US Supreme Court amplifies Loughlin's point.

The post-colonial world was also searching for a role for its judiciary in the mid twentieth century. The problems of poverty and inequality posed enormous expectations that called for more than plain meaning law and interpretation. To be legitimate they had to respond to the reality around them and they could not hide behind a wall of logic. In countries with powerful federal judiciaries- India and South Africa- the Supreme Courts began to follow US experimentation with judicial power.

Social Action Litigation emerged in the late 1970s in India and transformed the Supreme Court into an activist court. With its origins in the Post Emergency period of 1975 the Court took it as its mission to be the protector of rights. Locus standi rules were expanded so third parties could appear for the aggrieved party, letters or post cards could be sent to trigger what was called "epistolary jurisdiction" removing procedural barriers entirely. Sweeping remedies and court supervision of those remedies through "continuous mandamus" became a matter of course in the heady days of the 1970s and 1980s. Issues from pavement dwellers, undertrial prisoners and sexual harassment were taken up for consideration. These decisions by Justice Krishna Iyer and Justice Bhagwati interpreted rights far beyond their textual scope. Their revolutionary forays were encouraged by jurists such as Upendra Baxi. Upendra Baxi's writing "Taking Suffering Seriously: Social Action Litigation" and his "On the Shame of not Being an Activist: Judicial Activism" were pioneering articles in this field.

With time social action litigation in India lost momentum. Strong governments replaced these visionary judges with more compliant ones and resisted a strong independent assertion of judicial power. In addition, it was realised over time that the sweeping remedies of an activist court were unwieldy and hard to supervise. Still in certain cases the Court does revert to its watchdog role. In *Naz Foundation v. NCT of Delhi* (2009) and *Navtej Singh Johar v. Union of India* (2018) it decriminalised same sex relationships. Though, it felt insisting on same sex marriage was a matter for the legislature it gave strong arguments as to why criminalising same sex relationships violated the Constitution.

Rehan Abeyratne in his recent book, *Courts and LGBTQI+ Rights in an Age of Judicial Retrenchment* argues how in India, the US and Hong Kong the Courts are signalling a commitment to liberal values in the area of gender while regressing and being compliant in the area of traditional civil liberties especially the eternal struggle against the National Security State, allowing for the most horrific violations. Abeyratne warns that this democratic backsliding may eventually take its toll on LGBTQI rights themselves as well as legislatures begin to react to the decisions of the Court.

All of Sri Lanka's constitutions display a Benthamite suspicion of judicial power perhaps inherited from our colonial masters. Article 4 C of the 1978 Constitution states "the judicial power of the people shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognised, by the Constitution, or created and established by law". It is Parliament that is vested with judicial power and it shall exercise it through the courts. Textually the judiciary is not a co-equal partner. This wording then makes it difficult to argue that the Courts can exercise full judicial review of enacted legislation. They can only

review pre-enacted legislation without any understanding on how the law will operate in the real world.

Nevertheless, Sri Lankan legal actors have been imaginative and have allowed for an activist tradition to develop regardless of the language of restraint. The judicially constructed tradition of “arbitrariness” drawn from Locke and the principles of natural justice was often used by the Supreme Court to curtail government unfairness. Dinesha Samararatne has also written about how Sri Lanka’s “public trust” doctrine has been used as a form of judicial review.

Bhavani Fonseka and Luwie Ganeshathasan’s *Salient Aspects of Public Interest Litigation Jurisprudence in Sri Lanka* is a comprehensive collection of chapters by scholars and activists published by the Centre for Policy Alternatives who have engaged with the judiciary on a whole array of cases. These scholars and activists have not let the tepid words of the Constitution hold them back. Innovative standing procedures have made it easy for individuals and social movements to approach the court. Petitioners have managed to use Article 7 and 126 of the Constitution to enforce fundamental rights. Legal activists in the area of criminal justice, the environment, protection of wild life, devolution of power, language rights, gender rights among others have forced the Sri Lankan Supreme Court to face up to the important issues of our time.

2.5 Judicial Independence

When we speak of judicial power of Courts or Commissions of Inquiry the most important value for civil society is independence- independence of the Court from political and social one sidedness.- the recognition by the legislature, executive and society that these are independent bodies making neutral decisions. Today as the country grapples with the retiring age of judges and an amendment to the Judicature Act these issues are now part of the public debate.

Marxists, post structuralists and post modernists fundamentally question whether courts are really independent. Even today people continue to make that argument. The Critical Legal Studies movement with theorists such as Duncan Kennedy fundamentally challenge the lack of bias in the judiciary. His writings expose the power dynamics behind judicial creation and judicial decision-making. Nothing is neutral. Gramsci’s belief that all institutions reflect the hegemonic power of the rulers- perhaps with some room for autonomy- is rooted in leftist thinking. His argument is that hegemonic power consolidates itself not only through coercion but manufactures consent through civil society, schools and churches. For Gramsci Courts are an integral part of that hegemony and independence is a legal fiction. The post structuralists with their theories of “interpellation” and “governmentality” also see little room for truly independent judicial power.

But the twentieth century in India, South Africa and even Sri Lanka has shown that this legal fiction of independence is extremely important and must be protected. It allows marginalised people to find their voice and allows some judges to make revolutionary judgments based on the understanding of their important role. It is also at the root of public perceptions of fairness.

PART THREE: HUMAN RIGHTS AND IDENTITY

3.1 *Universality and Human Rights*

All religious faiths have teachings on the universality of the human condition. But it was the stoics and Buddhists who believed in universal reason- the belief that all human beings share this common rational nature. Buddhist traditions developed elaborate systems of logic though reason was not an end in itself. Thomas Aquinas also relied on universal reason though it was always combined with faith.

Immanuel Kant is probably the most consequential thinker when it comes to modern human rights. He believed in the heritage from the Stoics and the natural law tradition of Thomas Aquinas that there are universal unchangeable principles. His philosophy is far too complex to warrant a comprehensive review but he felt individuals have a duty to act according to the Categorical Imperative, moral principles that reason can discover that are aligned to the universal law. He always argued that human beings must be treated as ends and with dignity and never be used instrumentally. A person was for him an autonomous being capable of making moral decisions and judgments. Persons had inalienable rights and inherent freedoms. This universality based on reason highlighting human agency is the foundation of the international human rights system today.

It is interesting to note that Jeremy Bentham called all these natural law efforts of Kant “nonsense on stilts”. Perhaps that is why Sir Ivor Jennings did not include a Bill of Rights in our first Constitution. Kant went on to write *Perpetual Peace* which is a blueprint for the development of international multilateral institutions. His writings persuaded thinkers especially during the time of the Treaty of Versailles to set up the League of Nations.

This universal project of Kant and the Enlightenment have come under great deal of criticism. When the Universal Declaration of Human Rights was written the American Anthropological Association was very sceptical. They questioned a universally accepted bill of rights given profound cultural and civilisational variations. Alasdair MacIntyre dismissed much of the rights movement as moral “emotivism” feeling the moral chaos today could only be rectified by building traditions and by a return to Aristotle’s notion of the common good, the good life and a revival of the community. Makau Mutua has written extensively on the nature of the European and imperial project that accompanies universal ideas such as human rights as have other leading third world thinkers.

The terms “genealogy” and “archaeology” used by post structuralists like Michel Foucault were attempts to root certain epistemological systems of thought in certain eras, making them historical, contingent and non-universal. Post -modernists like Jean Françoise Lyotard and Gayatri Spivak were determined to eschew what they called “meta narratives” and concentrate on local issues and community level organising.

Yet what are the real alternatives we have? Gayatri Spivak, torn between her advocacy for important political causes and her deep scepticism toward Kantian metaphysics, has spoken about “strategic essentialism”- using universal human rights strategically in certain kinds of cases, especially those involving mass atrocities and people’s movements. The writings of

Anthony Anghie and Vasuki Nesiah are also more nuanced recognising the historicity as well as the liberatory potential of universal discourses like human rights.

Sri Lanka in the text of its Constitution accepts universalism as a guiding philosophy especially in the chapter on fundamental rights. The Chapter is based on the International Covenant on Civil and Political Rights. Most advocates filing fundamental rights petitions also accept this framework. But as recent cases on gender and same sex issues have shown, petitioners do challenge this universality arguing that Sri Lanka has a particular history and a unique political and religious tradition and does not embrace the universality of certain ideas.

3.2 Freedom

Most jurists agree that the notion of a Bill of Rights is primarily influenced by John Locke and John Stuart Mills of the Scottish Enlightenment.- this notion that from the state of nature people have inalienable rights that no government can take away from them. These rights were the right to life, liberty and property. Since Thomas Jefferson replaced the word "property" in the US Declaration of Independence with the "pursuit of happiness", the right to property has fallen off the radar of constitutional analysis. The argument by John Locke that unowned land could be taken over, fenced in and once your labour entangles with the land it becomes your property which the Constitution must protect. Until recently people did not realise that John Locke was very close to the British settlers on the American continent and had in fact in 1669 drafted the Constitution of the Carolinas. His idea of property is therefore linked to the idea of the settlor. Legally unowned land, fence it and put in your labour- the property becomes your inalienable right. This is no longer framework as there are now varied types of property and various types of regimes.

But Locke has also left us with other memories of freedom- the ones relating to life and liberty. His statement that when people enter into a social contract for their protection, they retain certain fundamental rights is followed by the argument that if the government markedly interferes with those rights, people retain the right to resist even violently. In this way the relationship between the state and the individual is a fiduciary trust. This trust is the basis on which the government is considered legitimate as it rules with the consent of the governed.

But perhaps it is John Stuart Mill who is very relevant today in the era of social media. His worry was that not only government but society was becoming more intolerant of opinion and diversity. Having chosen an unusual private life, he was very critical of social censure and the tyranny of public opinion. He stated that the government, the intellectual elite and the Church created a stultifying atmosphere in Britain of his time. He argued that democracy does not guarantee liberty and with his partner Harriet Taylor wrote a passionate treatise called *On Liberty*.

Mill was right to point out that freedom is as much dependent on the nature of a society as it is on the state. B.R. Ambedkar, with his Dalit roots, and the author of the Indian constitution said "if the fundamental rights are opposed by the community, no law, no parliament, no judiciary can guarantee them in the real sense of the world".

Ancient civilisations both east and west were not so dogmatic about freedom. But beginning with the Enlightenment and further developed by Jean Paul Sartre and the Existentialists, freedom has become the ideological *raison d'être* of western societies and their constitutions are often structured around it. The post-structuralists especially Althusser warned us that this was an illusion and we are actually embedded and interpolated within large systems of power and control. In this era of technological giants, artificial intelligence, unmanned technological warfare courts and legislatures will be called upon to define our freedoms in this new unchartered reality.

3.3 *Equality*

In most constitutional systems influenced by Anglo American traditions the idea of equality is primarily drawn from Aristotle. His formal equality principle was “treat like cases alike and unlike cases differently, in proportion to their relevant differences”. Central to this idea is that office, honours and resources should be distributed proportionally according to merit or just deserts. This is the central idea of equality in the Anglo-American tradition organised around merit. This is the basis of “the similarly situated” test that is dominant in constitutional interpretations of equality. Article 12 (1) of the Sri Lankan Constitution is the classic framing of the sameness principle

There is another strain of equality that is dominant in the world. Since the eighteenth century and the industrial revolution there has been a growing awareness of economic and social rights. The labour movements in the nineteenth and twentieth century and the Bolshevik revolution in 1917 led to economic and social issues being included in the Constitution. The Soviet Union had included them as Directives of State Policy but they were not justiciable. In the latter half of the twentieth century after the formulation of the International Covenant on Economic and Social rights some countries have included economic and social rights in their constitutions making them justiciable in courts of law. Chapter VI of the Sri Lankan Constitution on Directive Principles of State Policy include these economic and social rights though like the earlier Soviet Constitution they are non-justiciable. The 2000 draft of a new Sri Lankan constitution contained economic and social rights that were justiciable.

The theorist who has had the most impact on modern constitutional ideas of equality is John Rawls. He is perhaps the best theorist of what is termed substantive equality. Beginning his analysis by seeing fairness as procedural justice, he forsakes Aristotle’s goal of a pure meritocracy. From his particular state of nature individuals emerge as decision makers not knowing where they will eventually stand in the final social hierarchy. This “veil of ignorance” of the decisionmakers forces them to design a system that will protect their own interest while serving the interests of all the other persons. Ignoring the possibility of a gambler or risk taker, he argues that a principle of justice will emerge from this “veil of ignorance” where all social resources must be distributed equally unless the unequal benefits is directed at the least disadvantaged.

This so-called “difference principle” allows inequality in society only as affirmative action to help the least advantaged. He justifies this by arguing that our natural endowments are random, arbitrary and based on luck. For this reason, he was very sceptical of merit-based

argument that believed in justice based on just deserts. His “difference principle” recognises differences in society only to earmark those social arrangements that will benefit the least advantaged.

Rawls did not radically change the social and economic framework, The market economy and civil liberties were important to him and remained lexically prior to other considerations but the “difference principle” operates as a safety net and a protection given to those born lower in the hierarchy because of the inevitable genetic lottery. In many ways his ideas would form the basis of the social democratic movements from the 1960s to the 2000s which defined many of the parameters of international human rights such as The International Covenant on Economic and Social Rights and the Convention on the Elimination of Discrimination Against Women.

By the 1970s major economic ideologies were changing. Successes in East Asia and Latin America brought forward the era of neoliberalism. The theorists associated with neoliberalism had a completely different analysis of the world. Robert Nozick’s *Anarchy, State and Utopia* (1974) is a direct rebuttal of John Rawls, arguing for a limited state with a strong criticism of expansive redistribution plans. Nozick argues for a minimal “night-watchman” state. The only purpose of his state was to protect against the use of force, theft, fraud and the enforcement of contracts. We have steadily viewed Nozick’s ideas take hold in many countries as states have become minimal, withdrawing from public life and allowing private capital to take its place. Here he is augmented by the ideas of Friedrich Hayek that decentralised markets, a fear of central planning and scepticism about welfare rights should animate constitutional decision-making. The rise of these ideas and their acceptance in the economic mainstream has placed a hold on the Rawlsian idealism of the era before.

These traditions of equality which were the backbone of Anglo-American traditions on equality have been dismissed by radical thinkers in Critical Legal Studies, Critical Race Theory and Feminist Studies. For them, drawing from Marxist and post structuralist schools, the main issue is dominance and subordination and structures and systems of oppression that keep groups unequal to one another. Their focus is not on the individual. Catherine Mackinnon perhaps illustrates this best when it comes to relationships between the sexes, before Judith Butler and performative gender identities.

Catherine Mackinnon’s most famous legacy was the legal theory of sexual harassment and its recognition as a legal cause of action. Going beyond consent-based narratives she argues that in certain contexts there is a power differential of structural inequality that makes consent sometimes masked coercion. In situations in the work place where an employer requests sexual favours or allows a hostile workplace in which women are forced to work, these situations are forms of sexual harassment. Sexual harassment is one of the few areas of the law where the paradigm of dominance and subordination becomes the understanding of equality under the Constitution. In Sri Lanka, *Manohari Pelaketiya v. H.M. Gunasekera and Others* about sexual harassment in the public sector was argued within that framework.

3.4 Diversity and Difference

Another way of looking at the question of equality is to evaluate the concept of “difference”. Equality remains in tension with the idea of difference. Equality implies a universal principle that will apply regardless of race, gender, class, disability or any other social identity. Difference, on the other hand, implies special recognition of any of these identities to give them an affirmative special position so as to level the playing field. Martha Minow has written extensively on this subject. Rawls’ difference principle also augments this understanding.

The leading theorist of difference is Charles Taylor whose work ushered in the era of multiculturalism and pluralism. In his work *“The Politics of Recognition”*, Charles Taylor argued that our identities are not monological but dialogical. They are created in interaction with others, primarily those in our own community. Constitutions recognise individuals but it is community recognition that gives people a healthy identity and sense of themselves. It is also their source of authenticity and interacting with the world. For Taylor it was important for Constitutions to recognise these social, community identities and give them a place and if necessary, a special arrangement because such recognition is essential to their dignity.

As for territorial minorities, Taylor has an interesting approach. He felt such problems and dilemmas must not be seen as a management issue- i.e.: to come up with a framework that administratively contains and manages a national problem. He takes the vantage point of the right to self-determination, and with experience in the Quebec question he argues States must recognize what he calls “deep diversity” that make populations want separation or nation seeking recognition within the larger polity. This can be devolution or federalism but the nation seeking unit must be recognised collectively even in an asymmetrical manner. Taylor is not a fan of separation and though his critics argue he is not very clear he has stated that there are boundaries and safety nets like universal rights that may bind the country together. Like Yash Ghai he sees the framework as one of accommodation not management. Kalana Senaratne problematises internal self-determination as an aspect of international law and reminds us that scholars have found it to be “indeterminate, incoherent and unprincipled” requiring greater clarification by international institutions and mechanisms.

Taylor’s writings were carefully read in Sri Lanka especially by ethnic Tamil leaders in the 1990s. Taylor and perhaps Will Kymlicka were the theoretical inspiration for Neelan Tiruchelvam in his advocacy for devolution in Sri Lanka. Their ideas along with the communitarian ideas of Indian thinkers such as Ashis Nandy were discussed in detail at the International Centre for Ethnic Studies.

Recently there have been innovative writing by young scholars regarding the chapter that gives Buddhism its foremost place in the Constitution. Sanjay Rajasingham writes that the chapter should not be read from a purely discriminatory lens. It could be read in dialogical terms as one that gives the Buddhist a particular history and identity- a sense of self and adventure that is important for their self-respect. According to Rajasingham this Buddhist identity should also be taken into account and be part of the negotiation in the resolution of diversity issues in the island. Asanga Welikala in his more recent articles has also argued that Article 9 is a symbolic political flashpoint that requires careful negotiation.

3.5 *Women and Gender*

Sri Lankan feminists have been in the forefront on issues relating to women and gender both nationally and internationally. Savithri Goonesekere adopted a Rawlsian approach and was a great advocate for substantive equality both nationally and internationally when she was a member of the Committee for the Elimination of Discrimination Against Women. Kumari Jayawardene was perhaps one of the first to adopt the approach of intersectionality - how gender intersects with issues relating to class, race and ethnicity.

The most complicated issue today around equality is the term gender. For many decades the terms women and gender were used interchangeably especially in development literature with gender relating to structural issues. Judith Butler's book *Double Trouble* brought forward the concept of performativity, stylised and repetitive acts over a period of time that congeal into a stable gender identity. This identity need not correlate with biological design. There is no essential gender or sex. This fluidity posed serious questions for lawyers and constitutional judges especially for those whose constitution uses the term woman or sex as the rights bearer.

Some have embraced the challenge. India, in Supreme Court in *NALSA v. Union of India* (2014) ruled that transgender people have the right to self-determine their gender identity under the Article 21, what is often called the dignity clause. In Ireland the *Gender Recognition Act* of 2015 was passed allowing for self-declaration without medical or judicial determination. Argentina, Malta, Portugal, Luxembourg, Denmark, Norway among others all have administrative self-identification regimes.

Despite some language in the *Bostock* decision under a different US Supreme Court, the Anglo-American courts appear to be insisting on a biological reasoning. The UK Supreme Court in 2025 ruled unanimously that the definition of a woman in the *Equality Act* of 2010 refers to a biological woman and biological sex putting into doubt the status of transgender persons holding a Gender Recognition Certificate. The trajectory of the US Supreme Court seems to in the same direction. The current political and social atmosphere prevailing in those countries makes lives of people with varying gender identities very precarious. In Sri Lanka too, *Jayathilaka v. Sirisena et al* brought forward these issues this year but was dismissed on technical grounds

Many people ask me of all my experiences in the national and international field which has had the most impact. There is no hesitation in my mind. It is my work on the Presidential Commission on Youth after the 1987-1990 disturbances. I met youth from all over the country. Equality was at the core of their grievances. They called English kaduwa, the language that cuts them down. They were appalled at the politicisation and abuse of power. The concept of the Constitutional Council came out of the Commission report- an attempt to depoliticise and make things more equitable. Unless one understands this drive and urge for an egalitarian society, one will not truly understand Sri Lankan society.

3.6 *Constitutions and the Every Day*

Constitutions if properly drafted and constructively interpreted can have meaning in the every day lives of people. Rohit De in his *A People's Constitution: The Every Day Life of Law in the Indian Republic* looks at the Indian Constitution from below and not as an elite project. De shows how ordinary and marginalised litigants from Muslim butchers, sex workers, petty traders among others actively used the new Constitution and its fundamental rights provisions to challenge state regulation immediately after the Constitution was enacted in 1950. He says the Constitution's meaning is made through everyday litigation not just elite drafting. He argues as a result there is popular attachment and consciousness with regard to the Indian constitution. He shows how what he terms "vernacular constitutionalists" filed writ after writ to make the constitution a living instrument. Social movements and petitioners organising around constitutional issues are very often the dynamic lifeblood of the law as well of society.

Does the Sri Lankan constitution live in the every-day? Are people attached to it? Is their public consciousness? Is our unease with it due to a lack of legitimacy due to its unilateral beginnings? To be truly alive we need a new Constitution that has near total support of stakeholders from all parts of the country and which is animated by some of the ideas that have proved successful through the years. Understanding the intellectual roots of our constitutional ideas may lead to a more honest discussion of what kind of people we are and what kind of society we want to be. Sir Ivor Jennings gave us a narrow ahistorical beginning. We must now adopt a constitution based on our own actual experiences and our own aspirations.
