

Tenth Neelan Tiruchelvam
Memorial Lecture

CONSTITUTIONAL UTOPIAS
A Conversation with Neelan Tiruchelvam

by

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Prefatory Remarks

Beloved Neelan-san, poignantly I may not converse with you any longer in ways we used to; yet, I insist on doing so today in the spirit of a great metaphysical poet, John Donne. Addressing the 'mighty death' not to be 'proud,' Donne reminds Death: 'One Short sleepe past 'wee wake eternally/ And death shall be no more; death, thou shalt die.'

In this conversation, I address you as a living presence, because you remain so for me as well as for others bearing the gift of your love and friendship. And while acknowledging and sharing all that that my distinguished predecessors in this Memorial Lecture Series have said about you, I will not quite follow these rituals of future memory.

I have to present to you, Neelan, two sorts of questions. The general question is: 'How may one affirm the power of memory in struggle against injustice, if only because the perpetrators of injustice always thrive as the assassins of memory?' The specific question is: 'How may we bring alive your everyday energetic commitment, active compassion and holistic vision of justice, rights, peace, and development, and not just in the troubled contexts of the post-war Sri Lanka, and South Asia, but also beyond?

Attending to the specific question is best done Neelansan, by a fuller acknowledgement of Sithie's contribution to the making of your public presence. As all your good friends know full well, her deep affection for you has contributed profoundly to your own development of the sense of empathy and solidarity. I do not fully know how far she accomplished the mission of 'feminizing' you, not exactly an impossible project! But this must remain a story for another day!

It does not matter, Neelan, that you did not feel the need to acknowledge Sithie's contributions in a full public view because I believe this rectitude on your part signified no patriarchal vice relegating women to a familiar background effect in the lives of public men.

Like many of your close friends, I was privileged to know you both as an indissoluble singular presence. Do you recall our first meeting in Chicago in 1971, where in daytime we discussed seriously that monstrous something called 'unobtrusive social science research methods' yet in the evenings remained on fully display for all those who promenaded the Riverside Drive the magic moments of your politics of intimacy: your enchanting Harvard honeymoon phase remained there memorably on display!

It is impossible to overstate your doting parentage of Nirgunan and Mitran, born, like many others, as the Sri Lankan 'midnight's children' and brought up in the vortex of violence. They now both live their own resplendent lives with their partners and I am sure you know about the replenishment of the Tiruchelvam-clan adored fully now by a proud Sithie-san grandma. As your grandchildren grow young in this aging world, they will remain proud of their legendary grandfather. I sense and share your joy and pride at the fact that for now over ten years, Sithie has in her own ways replenished as well as you institutional children - the Law and Society Trust, the International Centre for Ethnic Studies and other sisterly

siblings, amidst the recent histories of this deeply troubled nurturance.

Revisiting Our Difficult Friendship

To descend to the realm of the 'trivial sublime' of personal reminiscence, I need to fully say that our friendship remained always a difficult one: some differences concerned our varying understanding of the role of law in social transformation, others touched upon economic reforms, and still others remained just a matter of style. This recall remains important because I believe that the time of true friendship remains always a testing time.

One thing that united us above all was the love of reading, although you never appreciated my quip dividing the human species into two kinds of 'worms': 'bookworms' and 'ordinary' ones! I always envied your vast personal library; and astonishingly well-read as you were, you did not wear your learning on the sleeves! Our writing styles differed and mine on the most part amused you¹. You read high legal theory but looked askance at metaphysics; I read this not so much as an aversion to theory but rather as 'resistance to theory.'

1 Especially, you remained bemused by prolific reference to the sources as well to my own writings! Every time I presented you with my articles, you looked at the references and exchanged semiotic messages with our friend Clarence Dias! You wisely and well wrote and spoke about the crises of constitutionalism in Sri Lanka, and 'South Asia,' almost entirely bereft of citation of quotational sources, except of course when contexts of international publication demanded some copious references. Our stylistic differences were marked, at least in part, by my location within the howsoever activist academy.

It will carry this presentation too far afield even to mention our divergent musical tastes. Do you, and dear Sithie, recall my plight when you insisted that I accompany you for viewing (in Kuala Lumpur) the *Saturday Night Fever*?

I think you disfavored ideological critique of law, especially of what now passes under the rubric of 'Left Legalism.' In the best sense of that term, you preferred the thoughtways of the 'old' and the 'new' pragmatism. While understanding fully the limits of effective legal action always strove to trespass these; law for you was best viewed as a program of social change; in particular, you tested the received Euroamerican wisdom, or *doxa*, on the terrain of conflicted South Asian society, polity, and economy.

Legislation and regulation remained for you far more crucial than adjudication. You thought that I had a more enchanted notion of judicial activism and in this indictment you are scarcely alone; yet perhaps the indictment is overbroad! In all my writing and work, I have maintained that adjudicatory power is an aspect of the sovereign power of the state and therefore we may not expect much from our Justices when the 'Reason of the State' is at stake especially in states of emergency, and now the near-permanent war on 'terror.'

It is universally true that everywhere that when apex Justices as holders of state power go wrong, they can go terribly wrong as well. We know this even as regards even a bicentennial grammar of experience of American constitutional interpretation. Only recently critical constitutional scholars have been pointing out that it was an egregious error to start the classroom and literary discussion with the *Marbury Case*; even more decisive was the *Dred Scott* decision. Critical race theory movement reminds us also that judicial self-restraint for long justified the unjustifiable: racial segregation in all its forms, including electoral gerrymandering (depriving Afro-American citizens of their right to political participation). The practices of McCarthyism during the Cold War, and now also the war on terror, based denials of elementary human rights and freedoms offer further examples. More may be said but here desist save saying that judicial action can often support the most atrocious results!

And yet we also know the adjudicatory power can also be converted or deployed in support of human rights and social justice movements. Having been privileged to contribute to the emergence of social action litigation in India (different from public interest litigation), I at least know that at certain historic moments it remained possible to imagine the Supreme Court of India into the Supreme Court *for* disadvantaged dispossessed, and deprived citizens. I thought then, and continue do so even now, that courts and justices may, compared with representative institutions, learn more sincerely to take people's suffering seriously in order to take human rights seriously. And Justices may often perform the labours of re-democratizing the practices of political power. This has been a part of contemporary experience in the Global South, including most parts of South Asia, as well.

I of course agree with you that adjudicatory power remains Janus-faced and that is why we all, each on our location, continue to struggle with visions of an independent yet socially responsive, judiciary. This does not always happen and often the venality of citizen-justices intervenes. Justice M. Hidayatullah memorably addressed this in a critique of the advocacy of the 'committed judiciary' in India by his rather acerbic remark: His Lordship contrasted Justices that are *forward-looking* and those who merely *look forward*!

This venality has not escaped the Sri Lankan judiciary, if I may say so with greatest respect for her eminent Justices, especially the great dissentient Justices and those who preferred to resign their august positions rather than sanction grave miscarriages of judicially administered constitutional justice. Even, so, Beloved Neelan, I wonder how you may have received, as well as critiqued, some nascent forms of contemporary adjudicatory activism in Sri Lanka?

Unlike some (including myself) who pursue 'non-representational' form of politics, you felt yourself propelled into the realm of electoral politics because rightly, you believed

that the tasks of social peace and national reconciliation are best pursued in representational, rather than adjudicatory theaters. Yet, you also believed in the push and prod of the external critique of the ways of representational politics. It is amazing indeed but true that you were able, consistent with representational role and demands of the legal profession, to innovate institutions and forums for multi-disciplinary dialogues within Sri Lanka and across South Asia, concerning justice, rights, and development. You provided a catalytic space for young and not so young South Asian scholars and activists. Veena Das spoke for many of us in highlighting your magnificent contribution in this realm in her moving tribute to you in the pages of the *Hindustan Times*. Indeed, you carried this sense of adventure further onwards to the newly industrialized ASEAN societies.

Turning now to some other differences between us in this retrospect, I may first mention the fact that the State socialist project in both our countries led to changing models of the 'control and command' economy, which also often degenerated into a 'cash-and-carry' developmental economy, not much different from what students of African development often name as 'ethno-clientism.' You preferred on the whole to articulate concerns about high levels of governance corruption by remarkably engaging us all in the discourse of public regulation of statutory corporations, often fully blessed with the loquacious presence of a great Indian Justice S. Rangarajan, whose enthusiasm for the cause then infected us all in a co-equal measure!

Even so, then and now, the question remains: How may judicial activism, or 'juristorcacy,' given the potential of the emergent regulatory cultures of governance arrest the carcinogenic growth of a corrupt sovereign? I am not quite

sure how far we differed here; yet, I fully recognize a compelling question that one your acolytes now raises for me. She asks 'considering that civil society in Sri Lanka is fighting hard for regulatory mechanisms such as the Constitutional Council... why may not we imagine and 'dream... of a participatory democracy based on regulatory mechanism?' Only such powerful interlocution, I believe, may best preserve the memory of your constitutional struggles.

Neelan-san, may I now mention with fear and trembling the fact that as an eminent attorney some pathways (with my eminent teacher and friend Professor Phiroze Irani) your fostered some legal itineraries of 'privatization' of Sri Lankan economy well ahead of these halcyon days of headless and headless hyperglobalization? My recall of this may be somewhat unfair to you but I was deeply perplexed by your professional role, especially in relation the order of Special Economic Zones in Sri Lanka. Understandably, in turn, you looked askance at my critical questioning of globalization processes on the occasion of the Annual ICES address entitled '*Globalization: A World without Alternatives?*'

Likewise, you found some of my comments on a new draft constitution of Sri Lanka not just unpersuasive, but also distracting (especially concerning the right to property but also on other related matters). You did not think that understanding 'Uncle' Marx was relevant to any pertinent task at hand. Yet, as a critical liberal thinker, you also strove towards forms of a new constitutionalism that promoted both the liberalization of the Sri Lankan economy which also provided a more secure future of human rights and accompanying freedoms. I think we differed here and fancy also to a good purpose, after all!

I know that far too many times you found me wanting in a sense of occasion. I disrupted many a time your quiet diplomacy in New Delhi adventures with Radhika Coomaraswamy (presently the UN Under-Secretary General). It is clear to all

2 Forgive me, dear Neelan, to invite attention to my 'Introduction' to I. P. Massey, *Administrative Law* (Seventh Edition, Lucknow, The Eastern Book Company, 2007).

friends of Sri Lanka, as well as human rights, peace, and social movement activists worldwide, that *just* peace initiatives may never fully fructify outside a truth-finding endeavor in a post-'war' Sri Lanka, as elsewhere. I remain sure that you continue to today in supporting this noble mission.

Nothing so far said diminishes the warmth of our friendship! Beloved Neelan, and to say further that our relationship was also literally explosive, in the sense of being accompanied by a few explosions! Do you recall, Neelan, how on the occasion of my ICES Annual Lecture you came harassed towards the middle of my speech, barely recovered from the bombs exploding near 8 Kinsey Terrace? Do you recall how on our way to Penang (via Ipoh) when we (Masaji Chiba, Clarence Dias, yourself and me) were caught in sniper fire on both sides? Explosions also marked the last evening of our constitutional consultations: the wing of the hotel where Justice P.N. Bhagwati, Justice Pius Langa (now the President of the South African Constitutional Court) and I stayed was blown apart on the eve of my return to Delhi. Had Justice Langa not persuaded me to travel with him to the Colombo airport, in early morning hours much before my flight, I simply would not have been around to mark my presence with you today!

Some Remarks Concerning the Tasks of Feminizing Collective Memory

Thanks to women's movements, the practices of critical feminist and critical race theory, as well particularly the development of cultural feminist studies, we know about the ways of construction of the 'politics' of memory. I think one way of grasping that politics was offered by Milan Kundera who begins his *Book of Laughter and Forgetting* with the saying that 'the struggle of men [and I add women] is a struggle of memory over forgetfulness.' To this, we must all add a supplement: contrary to the common adage, public memory is not *short* but is *shortened* by the state and civil society forces of domination. Thus remain

always severed acts of memory and event, causing as well some catastrophic narratives of human rightlessness and injustice.

By the difficult phrase 'feminizing memory,' I wish on this occasion to refer to the work of mourning that often sediments historically some new imageries of peace, justice, and human rights futures. Much has been written, deconstructing Sigmund Freud's pioneering distinction between 'mourning' and 'melancholia.' And in the specific contexts of Sri Lanka, but also others, Pradeep Jeganathan's gifted work remains especially instructive³. Even as 'contemporary mourning theory' suggests the politics of unfinished grief⁴ I still feel drawn to a notion of the politics of grief articulated as an 'in between' affair of 'mourning and melancholia,' a notion that 'sustains the pain of loss rather than seeking to overcome it, but in which this pain ignites (instead of dampening) creative [and I may add collective] self-transformation'⁵.

How this unfinished work may play out in traumatic contexts of Sri Lanka remains a central question; it remained so for India as well, whose constitution was being composed

3 See Pradeep Jeganathan, 'The Postnational, Inhabitation and the Work of Melancholia,' *Economic & Political Weekly* XLiv: 19, 54-57 (March 9, 2009). This recent retrospect does scant justice, if I may say so, to his exceedingly rich corpus.

4 See, Greg Forter, 'Against Melancholia: Contemporary Mourning Theory, Fitzgerald's *The Great Gatsby*, and the Politics of Unfinished Grief,' *differences: A Journal of Feminist Cultural Studies* 14:2, 134:170 (2003).

5 See Forter, Note 4 above, citing at page 167, Footnote 6, this observation of Kathleen Woodward, 'Late Theory, Late Style: Loss and Renewal in Freud and Barthes, Anne M. Wyatt Brown and Janice Rossen (Ed), *Aging and Gender in Literature: Studies in Creativity*, 82-101 (Charlottesville: University of Virginia Press, 1993). I agree with Forter that this, of course, constitutes 'an expanded notion of mourning.'

among the massacre on both the sides of the Partition. I wish to suggest to you, dear Neelan that a new constitutionalism for a postwar Sri Lanka will be the more enduring when informed by the tasks of the addressal of 'unfinished grief.'

To your eternal distress, of course, may I still evoke an old Bollywood lyric: '*Jahen Bajati Hey Sahani /Wahen Matam be Hota Hey Hai! /Mera Jeevan Sathi Bichaad Gaya/Lo Khatam Kahani Ho Gai.*' Translated this says: 'Where trumpets blow, lamentations always also follow/My life-companions have been taken away from me, thus cruelly ending all narrative spaces of hope.'

However, *matam* (the power of women's lamentation) also emerges as a narrative of women's solidarity against the celebration of the triumphant call of the trumpet. Women's *matam*, especially in the context of genocidal massacre on both the sides, fully protests the pathological disorders of the state and insurgent desires. Their *matam* signifies more than a 'melancholy of gender.' As the Ukrainian woman author Olha Kobylians'ka reminds us, *matam* also critiques 'modern types of either feminized or androgynous cultural utopias'⁶.

Women's *matam*, as some recent studies by Partia Mukta⁷ and Veena Das⁸ differently suggest, remain simultaneously the

6 See, Tamara Hundorova, 'The Melancholy Of Gender,' *Acta Slavica Iaponica* 22: 165-176, on www.cceol.com (visited 11 July 2009). See for different provocations, Tsu-Chung Su 'Writing the Melancholic: The Dynamics of Melancholia in Julia Kristeva's *Black Sun*,' *Concentric: Literary and Cultural Studies* 31:1, 163-191 (2005).

7 Parita Mukta, 'Lament and Power: The Subversion and Appropriation of Grief,' *Studies in History*: 13/ 2, 209-246 (1997).

8 See, Veena Das, (ed). *Mirrors of Violence; Communities, Riots and Survivors in South Asia* (Delhi, Oxford University Press, 1991); *Critical Events: An Anthropological Perspective on Contemporary India* (Delhi: Oxford University Press, 1995) and *Life and words: Violence and the descent into the ordinary*. Berkeley: University of California Press (2007).

sites of appropriation by state and civil society forces as well as the markers of resistance articulating powers of an insurgent memory. Insurgent, if only because, as Mukta observes, 'the social and ritually structured grief of women following a death,' is 'one of the most politically threatening of social emotions'⁹. Writing about Sinhalese Mother's movement and women's peace movements, Malathi de Alwis also suggests ways in which *matam* often 'forced' the Sri Lankan state towards 'a re-fashioning' of its 'own counter-rhetoric and practices'¹⁰. *Matam* and memory perform some roles of social regeneration in deeply traumatized societies¹¹.

Neelan-san, why is it that the constitutional utopic in South Asia almost always leaves no time for the power of *matam*? Why it is that the making constitutions, and putting these to *work* or *sleep* (as the case may be) leave their 'women unmourned'¹²? For example, how may we ever fully gasp the fact that it has taken more than five decades in India via the performatives of critical feminist theory to revisit the discourse of Partition, rupturing fully the otherwise 'heroic' prose of the making of the Indian Constitution¹³?

9 Mukta, Note 7, at 209.

10 See Malathi de Alwis, 'Postnational Location as Political Practice' *Economic and Political Weekly* XLV: 10, 51-53, at 51 (EPW, March 9, 2009).

11 Antonio C. G. M. Robben, 'How Traumatized Societies Remember: The Aftermath of Argentina's Dirty War' *Cultural Critique* 59, at 120-164 (2005). See also, Barbara Biesecker, 'No Time for Mourning: The Rhetorical Production of the Melancholic Citizen-Subject in the War on Terror,' *Philosophy and Rhetoric*, 40:1, 147-169 (2007).

12 To adapt here Partia Mukta's telling phrase.

13 See, as concerns Indian narratives, the review essay by Sukeshi Kamra, 'A "Messy" History and its Many "Messy" Texts: An Essay on Partition (India, 1947) and its Narratives,' *Literature Compass* 3:5, 1160-1185 (2006).

It would be trite to say, Neelan, that the subsequent narratives of nation-‘building’ and ‘development’ continue to push the power of women’s civic lamentation to the realms of interior grief, realms of *sentimental* reason that may *not* after all speak to the ‘*reason of the State*’ (or as the feminist philosopher Wendy Brown put this, the ‘male-in-the- state, and also add ‘civil society.’) Yet alternate histories of *matam* also suggest spaces of resistance as well. Why, I ask you, that in both our societies the tasks of feminizing memory and history must thus remain thus always emplaced on the nostalgic margins of *matam*, amidst the otherwise worthwhile, though not always worthy, constitutional endeavor¹⁴?

The State and Civil Society ‘War Machines’

The contexts of ethnic wars in Sri Lanka, and the many war-torn zones of India, not to mention the rest of South Asia, suggest a naming that refers to some new formations of *civil society war machines*, which too tend to co-opt the power of *matam* to their own predatory ends. Such naming transgresses what George Deleuze and Felix Guattari named in the difficult languages of ‘the nomadic war machine’¹⁵ and of course risks a fully justified reproach by Deleuze-Guattari ‘purists.’

¹⁴ Please do forgive me a theoretic aside, dear Neelan-san! At the level of theoretical construction/ reflection, it is clear that outside *matam*, the scandal of colonizing violence and the ethical obscenity of postcolonial state and insurgent violence against women may not be ever be entirely grasped via vogueish recourse to legacy of male thinkers (such as Jacques Derrida, Walter Benjamin, Carl Schmitt, and Giorgio Agamben) who otherwise so giftedly speak to us about the ‘states of exception’ or the categories and forms the ‘foundational’ and ‘reiterative’ violence of constitutionalisms.

¹⁵ See, George Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (St. Paul, University of Minnesota Press, 1982).

The growing post 9/11 discussion concerning South Asia as a dangerous place is suffused with various databases on organized political violence¹⁶ Such quantitative profiles fully render irrelevant, and even impertinent, the histories of women’s *matam* at acts of war-like violence. At another level, these demonstrate not just the styles of escalating militarized governance but also testify abundantly to the rise, growth, and consolidation of *state-like* formats, and forms of ingenuous rebel subjectivities, at times enhanced by diasporic peoples, movements, and forces¹⁷.

The standard narratives suggest that such state-like groups often have access to sophisticated military hardware; a chain of command; ways of conscripting unwilling civilians into all sorts of people’s armies; capabilities for training and effectively deploying armed cadres; versatile access to fairly sophisticated information and communication technology; and an ability to sustain insurgent ideologies justifying recourse to ‘terror’ for a ‘better’ social human and social future. They also remain capable of declaring ‘cease-fire’ agreements and to further also to renege from these. To these state-like formations and agents, we must also add further some horrendous state or regime sponsored militias who too justify killing as acts of ‘ethical violence.’

I have elsewhere addressed the politics, or the ethics, naming the wars *of* and *on* ‘terror.’¹⁸ I may not revisit this here

¹⁶ See, Lakshmi Iyer, ‘The Bloody Millennium: Internal Conflict in South Asia,’ Harvard Business School, Working Paper, 09-086 (2009).

¹⁷ See as to this, Ahilan Kadirgamar, ‘Sri Lanka’s Post-War Political Economy and the Question of Minorities,’ *Economic and Political Weekly*, XLIV 24: 21, 72-77 (EPW, June 13, 2009).

¹⁸ See Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* (Delhi, Oxford University Press, 2008); *Reading ‘Terror’: Reflections on François Debrix, Tabloid Terror: War, Culture, and Geopolitics..., Theory & Event* (forthcoming, 2009).

save saying that some recent histories of state and civil society war machines complicate understanding the prospects of political reconstruction in South Asia. Almost across South Asia, As Jayadeva Uyangoda notes, the ways of insurgent peoples' politics fully translate ethnic *conflicts* into some tragic trajectories of ethnic *war*¹⁹.

The participation of women as active agents of massacre on all sites in ways that further silences and sequesters the powers of women's civic lamentation poses a difficult narrative landscape. All I may here is just this: the tasks of feminizing memory towards any re-orientation of the pursuit of the values of 'justice'²⁰ remains thus infinitely aggravated even as regards the finite futures of human rights and just peace in South Asia. Necessarily, I must say today that neither the taming of the state war machine by tinkering with constitutional forms, nor the periodic conquest of civil society war machine, may ever fully address the material conditions that constitute the mass experience of human rightlessness and social misery and the changing profiles of women's *matam*.

Recalling Aspects of Your Practices of the Virtue of Complex Rectitude

You remained steadfast in you belief that re-establishing connections between the tasks of memory and justice may best be accomplished by rectitude, in *itself a form of political responsibility*. Not *dramatization* of memory but rectitude in *recall* was your way of constructing responsibility for memory.

19 See his insightful discussion in *Ethnic Conflicts in Sri Lanka* (Policy Studies 32; Washington DC, East-West Centre, 2007; hereafter referred to by the author).

20 See, for example, Srila Roy, 'The Everyday Life of the Revolution: Gender, Violence and Memory,' *South Asia Research*; 27; 187-204 (2007).

No sincere reader of your public and Parliamentary speeches²¹ may fail to note your *complex rectitude*. I name this as such because you never lost sight of the volatile and violent contexts of your contributions to deliberative discourse. Allow me to offer a bouquet of examples.

In your condolence motion for Dr. M.C.M Kaleel [June7, 1995] you rather fully acknowledge that acts of historic memory always remained acts of consociation, no matter what you otherwise and often wrote about consociation as a constitutional form. In movingly speaking about Dr. Kaleel, you also addressed his extended family and the distinguished contributions that each one of them made to the troubled times of the life of Sri Lanka. For you thus dear Neelan, acts of memory remained collective affirmations or *not at all*.

In your memorial lecture for Paramanathan Navaratnarajah, your mentor into the profession of law, you describe him as great professional litigator; *not* as a *great* jurist—incidentally, a term woefully debased in the Indian genre of recall! Rectitude did not forbid from you recalling warmly his liquid integrity, his fondness for Scotch! This is what you had to say:

Since he had to often struggle against an asthmatic condition, he would breathe heavily into a glass of whisky and inhale its fumes, which he convinced others had a medicinal quality. After the fourth glass of whisky, his mind was perfectly clear and was at its best.

Incidentally, and in a lighter vein, if I may say so, Neelan, your pupilage with him, remained woefully inadequate on this register! Our good friend Clarence Dias and I always marveled at your capacity to remain 'perfectly clear' without that first, let alone, the fourth glass!

21 *Transcending the Bitter Legacy: Select Parliamentary Speeches* (2000, Colombo, International Centre for Ethnic Studies; Lisa M. Kois Ed).

Neelan-san, your parliamentary speeches exemplify your complex rectitude. To take just one example, even in the face of the 'terror' of the anti-'terror' laws during the constantly refurbished states of emergency, the farthest you would go as late as the Emergency Debate (April 17, 1998) is to say that there is 'a lack of sensitivity in the interrogation of persons' and that security forces had yet to inform themselves of the judicial decision in *Wimaladran Case*! A noble pursuit of the finest Leninist traditions of polemics was not for you the best way to ameliorate matters!

Only once, as far as I can tell, you were poetically outspoken. I refer here to your extraordinary Parliamentary speech on the annual Budget [November 16, 1998.] I have yet to come across, worldwide, any Budget speech that had the courage of conviction to recite the Russian poet Anna Akhmatova who, as early as 1919, movingly spoke to us thus:

Why is this age worse than earlier ages
In a stupor of grief and dread
Have we not fingered the foulest wounds
And left them unhealed by our hands?

...

All has been taken away: Strength and love
My body, cast into an unloved city
And only conscience, more terribly each day,
Rages, demanding vast tribute
For answer, I hide my face in my hands...
But I have run out of tears and excuses

Neelan-san, I read this singular retreat from your unusual rectitude as exemplifying the politics of a wounded constitutional passion. At this singular moment, you emerge as an exemplary custodian and guardian of memory as a work of mourning, demanding a 'vast tribute' for the suffering humanity of the impoverished and embattled masses of Sri Lanka.

Constitutionalism and Emancipation

This agonizing thematic of your writings and speeches remains hauntingly relevant today in the context of a post-war Sri Lanka; for you linking constitutions to the tasks of emancipation was not a metaphysical endeavor but a distinctive form of political action. Yet, at the same moment, you demonstrated that in negotiating constitutionalism in a violently fractal political economy peace treaties remain also as often consensually negotiated as unilaterally imposed.

'Emancipation' is a notion held hostage by the changing 'fortunes' of political contexts. Your invocation of it remains located in the politics of liberal passion (as Roberto Unger names this) not in any 'universal excitement' with which the authors of *The Communist Manifesto* engaged with it. With the Gandhian Peace Prize winner A.T. Ariyaratne, you too believe in the sovereign tasks of establishing just peace; unlike him, however, just peace for you signifies primarily an affair of impassioned human rights, desires for justice; not for you remain as pertinent as with Ariyaratne the harmony ideology inspired by Buddhism as a 'moment of universal awakening'²². Nor for you was pertinent the transformative Buddhism that Babasaheb Ambedkar—the Aristotle of Dalits-- invented for India's *Atisudras*, the social and economic proletariat. I hope that this summary provocation may suffice here for our conversational purposes on this occasion.

Your approach to the emancipative potential of Sri Lankan constitutionalism questioned both the lethal practices of 'ethnic cleansing' and the limitless 'ethical violence' ushered in by the articulators of political justice always questing ungrudging respect for cultural difference. The question now posed is just this: How then may some new constitutional arrangements still emerge Phoenix-like from the ruins of memory?

²² See his *Buddhism and Sarvodaya* (... 1996).

Never ignoring, Neelan-san, our esteemed friend Roberto Unger's imagery of the 'politics' of 'passion'²³, you also set your feet firmly on the ground, fully recognizing, as well with Donald Horowitz, the callous and cruel constructions of violently troubled enactments of 'ethnicity' in 'severely divided societies'²⁴. In a remarkable text entitled *Constitutionalism and Diversity*²⁵, you wisely and well insisted that constitutionalism remains a dialogical, not any monological endeavor. Constitutionalisms remain ethical only in so far as these construct *pluriverses* (or many universes) not the prowess of any historically singular voice or what (adapting here Vandana Shiva's gifted phrase) the 'monocultures of the mind.' It is for this reason that you so often reiterated providing scope for the profiles of constitutional 'management' of 'ethnic' conflict.

The trouble with mere *instrumentalist* forms of constitutionalisms is that these translated the very idea of constitution in terms that 'effectively correspond[s] to the political style of the regime in power.' In contrast, forms of *consensual* constitutionalism envisage the 'fundamental law enshrining for all times the basic values, aspirations and ideals of the different components of the body politic.' If the instrumentalist form 'recognizes a somewhat authoritarian process of Constitution-making' which disregard the 'aspirations of groups in opposition to the regime in power,' the consensual

23 Roberto Mangabeira Unger *Passion: An Essay on Personality*, (New York: The Free Press/Macmillan, 1984).

24 See, Pradeep Jeganathan and Qadri Ismail (Ed) *Unmaking the Nation: The Politics of Identity & History in Modern Sri Lanka* (Colombo, Social Scientist Association, 1995, republished 2009 as a global edition, by South Focus Press, New York). See also, Nira Wickeramasinghie, *Civil Society in Sri Lanka: New Circles of Power* (New Delhi, Sage, 2001).

25 See, *The Law and Society Review*, 9:141, July 1999.

from 'views the Constitution as a legal and political compact capturing the compromises that have been worked out between different communities and political groups... (and) defines the framework within which the different groups may compete for power and gain access to the resources of a society.' The instrumental form remains, at the end of the day, just the plaything of power, 'whereas the 'consensual' form near- 'eternal.' The time-dimension contrasting the historically abbreviated shelf-lives of instrumental constitutionalisms with those that endure historically indeed matters. The question now is just this: 'Is then this historic moment for the Sri Lankan peoples to after all arrive at a 'consensual' constitutional form?

Diversity

If indeed so, dear Neelan-san, how may diversity be addressed, outside the violent constructions of plurality? 'Diversity' signified for you not any *given* and *primordial* but always a socially *constructed* category²⁶. How may we further proceed to grasp your insight, especially in the South Asian contexts, that essentializing and totalizing constructions of identity and difference often remain *repressive* rather than *emancipatory*²⁷?

You accentuated is *process*, a gentler name you chose to give to what many of us would more directly name, with Antonio Negri, as *constitutional insurgency*²⁸ and thus capaciously affirmed in so doing many a contrast between what stands now furnished as 'blueprint' as opposed to 'iconoclastic' ways of critical

26 Incidentally, I will have let pass some essentialist constructions of to the 'Estate Tamils.

27 I stress this anxiety differently from you, in my work, *The Future of Human Rights* (Delhi, Oxford University Press, 2008).

28 Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (1999).

Utopian thoughtways²⁹. For you, Sri Lankan constitutionalism may remain emancipative only so far as providing a new architecture of a future society, marking pathways towards a peaceful coexistence between otherwise antagonistic notions of the 'imagined communities' of Sinhalese and Tamil nation-peoples. Not for you ever were welcome the violently constituted forms of what Martin Heidegger named as 'being-towards-Death.'

'Process,' Neelan-san, was your way then of what the eminent philosopher Charles Taylor named, in the context of Canadian crises of identity, as the problematic of 'reconciling [violent] solitudes' in which 'both sides [the English and the French Canadians] have a way of playing on each other's fears, resembling nothing so much as a *marriage of neurotics*³⁰.'

You quested heroically for a different imagery order of *constitutional togetherness* for Sri Lankan peoples, with their singular histories, cultures, and aspirations. Put differently, and in a favorite imagery with (and since) Jacques Derrida, you dedicated your lifetime towards a constant reimagining the process of a 'democracy-to-come³¹.' Put still differently, and simply, you educated us all that this may not come to pass

29 See, Russell Jacoby, *Picture Imperfect: Utopian Thought for an Anti-Utopian Age* (New York, Columbia University Press, 2005).

30 Charles Taylor, *Reconciling Solitudes: Essays on Canadian Federalism and Nationalism*, at 31 [emphasis added] (1993).

31 See, notably, Giovanna Borradori, (Ed). *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago: The University of Chicago Press, 2003); Alain Badiou, "We Need a Popular Discipline": Contemporary Politics and the Crisis of the Negative.: Interview by Filippo Del Lucchese and Jason Smith" *Critical Inquiry* (2008); W. J. T. Mitchell, 'Picturing Terror: Derrida's Autoimmunity,' *Critical Inquiry* 277 (2007); and Roberto Esposito, *Bios: Biopolitics and Philosophy* (Minneapolis, University of Minnesota Press; Timothy Campbell, Trans., 2008).

via the measures of '*de-concentration*' (reliving administrative congestion of despotic power) and '*decentralization*,' almost always entailing centralization of supreme executive power³², but rather by some politically responsible and socially responsive performances of '*devolution*' as radically opposed to its meager cousins.

Neelan, your understanding marks a desolate tension between the Sri Lanka as a 'multi-ethnic and a plural society' and (following Jayadeva Uyangoda) 'the presence in Sinhalese society of a very specific political culture, along with an ideology and the idiom of a centralized state³³.' How may *non-neurotic* constructions of autonomy and ethnicity thus be articulated and shaped?

Acts of Reading with Neelan the President's Speech

This was the question that also confronted His Excellency President Mahinda Rajapaksa, especially in his Address to the Sri Lankan Parliament on the 'defeat of the LTTE.' This text remains compelling, in its complexity and contradiction and warrants a most anxious concern with that which gets *said* and that which remains *unsaid* on the eve of a new national reconciliation.

In my present conversation with you, I dare not speak today with you as any Neelan-'surrogate' (an impossible task indeed); nor may I lay any claim to a full understanding of what Jayadeva Uyangoda (and other distinguished Sri Lankan scholars he cites) say to us in complex languages of 'competing state projects' and the 'dynamic of internationalization' that often 'plays into the

32 See further, Christine Bigdon, 'Decentralization, Federalism, and Ethnic Conflict in Sri Lanka,' Heidelberg Papers in South Asian and Comparative Politics, Working Paper No 18 (May 2003).

33 See, especially, Neelan Tiruchelvam, 'The Politics of Federalism and Diversity of Sri Lanka,' in Yash Ghai (Ed) *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States*, at 197, 198 (Cambridge University Press, 2002).

agenda of ethnic purists who seek to create monoethnic mini-states out of ethically plural societies³⁴. Further, because I know how parlous remain the otherwise precious sites of the Law and Society Trust and the ICES, I owe an absolute obligation to assist constructive communication concerning the tasks necessarily ahead.

Within these necessitous caveats, I believe Neelan-san that you would have indeed welcomed the President's brief prefatory remarks in Tamil, where he speaks to us all in the languages of a new *politics of a caring maternal state*: Sri Lanka is a 'motherland' for all Sinhalese, Tamils, and Muslims.' The 'war against LTTE, it now gets fully said, is not against the 'Tamil people.' Neelan-san, I believe that you would have further saluted the Presidential declaration:

'Protecting the Tamil speaking people of this country is my responsibility. That is my duty. All the people of this country should live in safety without fear and suspicion. All should live with equal rights. That is my aim. Let us all get together and build up this nation.'

You would have been second to none in applauding the Presidential call to 'respect all ethnic and religious identities' and to construct '*a new society that protects individuals and social freedoms*' and anew imagery of Sri Lanka that rejects '*any arbitrary, savage or brutal rule*' (emphasis added). Yet, I still sense that you would have after all benignly questioned the celebration marking the sovereignty of the Sri Lankan state³⁵. This gesture of celebration would have remained incomplete for you without an alternate construction of the imagery of

34 Jayadeva Uyangoda, at 4.

35 'This session of Parliament opens in a country where the writ of this august legislature spreads equally throughout the 65, 332 sq. km of territory of Sri Lanka.'

'constitutional patriotism'³⁶ far exceeding any triumphalist reading of the further Presidential remark that the 'defeat in Sri Lanka of the world's most ruthless terrorist organization in the world that is made up of all these deadly qualities can be considered second to none.' At stake, as you would have gently but firmly reminded us all, no celebration of a new form of biopolitical sovereignty may conflate politically impermissible irredentism with any sincere regard for constitutionally-based legitimate autonomy movements as fully destructive of Sri Lankan forms of 'democracy.' Outside the immediate compulsion of the political event, I believe that the learned President may also have, after all, agreed with you.

His Excellency suggests with all ethically decent persons in Sri Lanka, and elsewhere, that: 'At this victorious moment, it is necessary for us to state with great responsibility, that we do not accept a *military* solution as the *final* solution' (emphasis added). However, it remains a lamentable global social fact that, for weal or woe, we all now live in an era of the reinvention

36 I may do no better, or indeed worse, Neelan-san, than invite your attention to an excerpt in Sri Lanka government Website that hails an article from *Washington Times* [June 2, 2009] perilously captioned: 'US Could Learn Lessons From Sri Lanka Victory.' What may be these 'lessons?' For the 'self-appointed global leader in the war on terrorism' a 'most important lesson' is just this: the debunking of the widely held belief that terrorism cannot be quelled militarily. The Sri Lankan military demonstrated that professionalism, strategy, discipline and unswerving commitment can beat terrorism.' I will not here analyze this text in any further detail save to invite your attention to a deadly counsel that thus follows: 'If elected Western leaders actually believe their own rhetoric that all civilized nations must cooperate in this global war on terror, they must actively support the anti-terrorist initiatives of fellow democracies around the world. Ideological movements, religious cults, political insurgencies and cults of personality that employ terror to push their agenda should be eradicated as quickly, as universally and as completely as possible.'

of the dreadful languages of the 'final solution,' privileging militarized politics and governance styles as the *only*, and even the *best* possible, prelude to social peace. Thus, any moral/ethical reading of the President's Address now has to resolve some dilemmas constituted by the margins of extraordinary political generosity on the one hand, and on the other by the logics and languages of responsibility towards human rights vales, norms, and standards

No 'Minorities,' Only 'Peoples?'

A poignant question stands thus raised for any new envisioning towards a postwar Sri Lanka constitutionalism. His Excellency says thus:

We have removed the word minorities from our vocabulary three years ago. No longer are the Tamils, Muslims, Burghers, Malays and any others minorities. There are only two peoples in this country. One is the people that love this country. The other comprises the small groups that have no love for the land of their birth. Those who do not love the country are now a lesser group' (emphasis added).

Of course remain writ large some deeply volatile contexts of the postwar Sri Lanka³⁷ in the Presidential Address. Even so, as a friendly outsider, may I read his Address as *not* altogether canceling some very hard-won achievements of the justly celebrated standards and norms of international humanitarian law and human rights? Episodic political utterances, as international lawyers full well know, may never cancel international law conventional and customary regimes; the Vienna Convention on the Law of Treaties regulates the power

37 As late June, 2009 stands rejected the fulsomely endorsed worldwide activist (and even human rights diplomacy type) summons towards establishment of an international commission to investigate violations of international law by government forces and the Liberation Tigers of Tamil Eelam.'

of consenting State concerning any of unilateral denunciation of international law-making and framework treaties.

A difficult moment of reading posed at the threshold by the term 'minorities.' For one things, I so not know (though should know) how may translate either in classical or contemporary Sinhalese, Tamil, Persian, Arabic, or Urdu. I do know, however, about some nefarious difficulties that attend the Indian constitutional discourse that renders 'minorities' as *alpa-shankyaks* (literally, the official census constituted 'minuscule' peoples). I may, but will not, speak volumes about how this diction has all too often run violently aground in India. Further, as you always stressed, systems of proportional representation aggravate any understanding 'minorities' as electorally constituted groups.

The President of Sri Lanka must be accorded the full dignity of discursive courtesy. His Excellency would have appreciated with John Rawls, the great and gentle philosopher of justice and rights, that plurality is a 'social fact' beyond political acts of eradication and the tasks of constitutional politics always consist in fashioning approaches towards 'reasonable pluralism'³⁸. Surely, all this may not be achieved outside the *matam* aroused by the histories of dominance and resistance, of wounded identities, and some per-enduring histories of cultural belonging and pride, and the histories of violently imposed harm and hurt.

Further, we all know, or ought to, that the state and the law, must *somehow* know their rather severe limits in tasks of mediating ethnic conflicts; these may *never* be done to a point of denying very existence of the 'old' cultural, linguistic, and religious minority group rights, as well of the newly emergent 'minority' rights as different as those of the internally displaced peoples, sweatshop labour in Special Economic Zones, and the rights of people relegated to the orders of despised sexuality.

38 John Rawls, *Political Liberalism* (New York, Columbia University Press, 1993).

I can almost hear you, dear Neelan, saying this much in your Parliamentary speech responding to the Presidential Address!

I do not think that it may be constructive, or even fully warranted, to analogize the Presidential remarks as echoing in some extraordinary ways the erstwhile British Prime Minister Margaret Thatcher's dictum: 'There is no such thing as society.' If otherwise, and in passing, I cannot help wishing that some future Sri Lankan Foucaults will, in course of time, produce as stunning a work as his *Society Must Be Defended*³⁹.

His Excellency's further distinction between the people 'that love the country' and the people that do not' and therefore worthy of as peoples of a 'lesser regard' indeed puzzles!. Incidentally, my life partner Ms. Prema Baxi, in an early reading of my draft texts of this Lecture, acutely reminds me that this phrase—regime of *lesser* rights may not be read as entailing *no* regard for human rights of the 'minority' peoples. I think you would probably have agreed with Prema, leaving a margin of appreciation towards His Excellency's Address as allowing future narrative spaces for re-envisioning the multi-ethnic and deeply plural profiles of Sri Lankan society.

By way of a marginal remark, I do not think that you would have been much interested in a detour that I now wish to briefly offer. Post-Auschwitz progressive Eurocentric thinkers, whom I rather fondly describe as A-to-Z (from Arendt to Žižek) thinkers regard the notion of 'peoples' as inherently capable of diverse, and often genocidal, appropriations.

Regardless, no moral reading of the President's Address may suggest, I believe, any gesture of political refusal entirely condoning war crimes and crimes against humanity on both the sides of massacre and the politics of cruelty and impunity. These auspices of international treaty regimes, and even those customary law regimes of humanitarian law, fashion an ethic

39 *Lectures at the College de France, 1975-1976* (London, Picador Books; David Macey, Trans., 2003).

of ambiguity that allow, at any rate, vast margins of national appropriation, appreciation, and application of state conduct in times of peace as well as of war. Impertinently, perhaps, though in no way entirely politically incorrect, remains my act of saying today that any future renaissance of Sri Lankan constitutionalism invites now an end to Sri Lanka's much debated vacillation toward the obligations under the Rome Treaty establishing the International Criminal Court. It is out of such acts of postcolonial prose of the 'politics of friendship'⁴⁰, even towards peoples worthy of 'lesser regard, Neelan-san you would have surely said that the best possible futures for peace, justice, and human rights may thus be constructed.

Towards Some Future Envisionings of Sri Lankan Democracy?

How may postwar Sri Lankan constitutionalism my after all still speak to us of our 'responsibility', or '*response-ability*' towards 'memory'⁴¹? Listening to Derrida remains important because he maintains that "no Justice" at all "seems possible or thinkable without the principle of some responsibility beyond all living present, within that which disjoins the living present"⁴².

Precisely because there are no *known* (pre-given) *just* ways to identify the 'friends'/enemies' of democracy, the question notoriously persists: 'Who/what may we exclude/disarticulate *in limine* [at the threshold] from an over-inclusive imagery of

40 I may do no better than here to merely cite the insightful work of Leela Gandhi, especially *Postcolonial Theory: A Critical Introduction* (New York, Columbia University Press, 1998) and *Affective Communities: Anticolonial Thought, Fin-de-Siècle Radicalism, and the Politics of Friendship* (Politics, History, and Culture) (Durham, NC: Duke University Press, 2006).

41 Jacques Derrida, *Specters of Marx, The State of Debt, The Work of Mourning, and the New International*, xix (Peggy Kamuf, trans., Routledge (1994).

42 Id. at xix.

peoples worthy of a 'lesser regard?' I believe with Jacques Rancière (in his by now justly celebrated *Ten Theses on Democracy*) that 'democracy' always entails forever innovative modes of politics, which continually foreground the emergences of 'parts' of the demos, which 'have no part' in forming the whole⁴³. In complete plain words and with a sincerity of obstinacy of politics of hope, I believe with you, Neelan-san, that the Presidential declaration may not after all *mean* what it actually seems to *say*.

In Lieu of a Conclusion

Well-beloved Neelan-san, you lived amidst the pursuit of a new dawn for Sri Lankan constitutionalism amidst its thousand sunsets. Yet, you never relinquished the responsibilities towards the tasks of memory and justice, because you made worthy the very idea of constitutionalism in terms of morally decent state and society orderings. For you, the tasks of the 'rule-of-law' theory and movement always signified making State incrementally *ethical*, power in state and civil society, in all its hidden habitats, more fully *accountable/responsible*, and governance progressively *just*.

In this imagery surely you would have warmed, I believe, to the unfinished political work of *matam* via a recall of an extraordinary gesture of Ms. Priyanka Gandhi. Visiting with Ms. Nalini Sriharan, now serving a commuted life sentence for conspiring towards the assassination of her father Rajiv Gandhi in the Chennai jail, she memorably stated: 'Meeting with Ms. Nalini was my way of coming to peace with the violence and loss that I have experienced.' Priyanka Gandhi said that while she may not be fully able to 'forgive' her, she still strove to 'understand' her.

Neelan-san, perhaps you may agree that such magnanimity of moral sentiment must after all mark approaches towards new forms of Sri Lankan constitutionalism, as this did surely emerge

for a post-apartheid South Africa. Put another way, how may we acknowledge in the contemporary contexts of Sri Lanka, and fully with Hannah Arendt, that political responsibility must entail acknowledgment of responsibility for '*something I [we] have not done*' and for that reason '*no voluntary act of mine can dissolve ... my responsibility [of] membership in a group (a collective)*'⁴⁴.

Perhaps, this precisely also animated the Sri Lankan President's moving invocation of the 'qualities of *Mettha* (loving kindness), *Karuna* (Compassion), *Muditha* (Rejoicing in others' joy) and *Upeksha* (Equanimity), which 'the philosophy of Buddhism can present.' It is another matter that a further reference to the great Thiruvalluvar, the legendary author of the Tamil classic, *Thirukkural* would have gloriously supplemented the Presidential invocation of the Buddha.

The question now is just this: 'How may this great recall of the salient Buddhist virtues further assist the birth-pangs of new forms of a new postwar Sri Lankan constitutionalism?' How may the noble virtue of *Mettha* be creatively crystallized in terms of a profound ethical concern now for the rather abruptly declared 'non-peoples' of Sri Lanka? How may the post-war reconstitution of the Sri Lankan society, politics, and the economy emulate the all-encompassing virtue of *Karuna*? In what ways *Upeksha* be achieved without fully piercing the regimes of politics of immunity and impunity for mass atrocities?

Granting His Excellency's insistence that: 'We do not have the time to be experimenting with the solutions suggested by other countries' and therefore, 'it is necessary that we find a solution that is our very own, of our own nation,' how may we further envisage (as also articulating at the same moment the resurgent South African spirit of the *Ubuntu*) 'a solution

43 Jacques Rancière, *Ten Theses on Politics* 5 *Theory & Event*, Issue 3.

44 Hannah Arendt, 'Collective Responsibility', in James W. Bernauer (ed), *Amor Mundi: Explorations in the Faith and Thought of Hannah Arendt*, 43-50 (Dordrecht, Martinus Nijhoff, 1987, emphasis added).

acceptable to all sections of the people? Put starkly, the question now is simply this: *'What is to be Done?'*

I shall not conclude this conversation by any invocation of the *matam* of our esteemed good friend Roberto Unger, who asked at the end of his magisterial *Knowledge and Politics*⁴⁵ the Biblical question: *'Father, Why Hath Thou Abandoned Me?'*

Rather, the elective affinities of our *matam* require me to ask of you, Beloved Neelan, to *please speak to us all to us now, amidst the debris of our deeply wounded and wounding togetherness*. I do so because you always spoke to us with the poignant urgency of the saying of the great poet-philosopher Schelling: *'Tasks left undone one moment/May be restored by No Eternity'*

Thank you, Neelan-san, for remaining present thus this evening severally marking the politics of 'unfinished grief.'

There is simply no way for me ever to express gratitude for dear Sithie-san, and all our dear friends, companions, and your successors, and admirers who still in troubled and trying times seek to preserve the gift of your being.

⁴⁵ New York, Free Press (1975).

ICES



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