



## *Beyond representation: independent and international institutions*

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I wish to highlight three issues for discussion in the final session of the Melbourne Forum 2020. The second and third issues focus on the Sri Lankan experience, but the discussions in the first three sessions of the Melbourne Forum which have been held so far indicate that some of the points I raise may be relevant to other countries in the region as well.

### **1. The Role of the United Nations and International Organisations.**

The COVID-19 pandemic highlighted the role of the United Nations and one of its specialized agencies, the World Health Organisation (WHO). It perhaps should have been an opportunity to illustrate the importance of multilateralism in a world that had moved away from such an approach in recent years. One would have thought that a mysterious, worldwide pandemic would serve as an exemplar for an organization whose Charter declares as its founding objectives, “international cooperation and the solving of international problems of an economic, social, cultural or humanitarian character” and being “a centre for harmonizing the actions of nations for the attainment of common ends.” Unfortunately, the controversies about WHO, the speed with which it responded to the crisis, allegations of pro-China bias, threats of withdrawal of funding by the US, and other political considerations, undermined the role of WHO as the international convenor and coordinator of the response.

The United Nations and its specialized agencies are only as good and effective as member states allow them to be. The representation of member states in the General Assembly and the World Health Assembly provide the organisations with their legitimacy. The continuing dominance of powerful countries through the Security Council, through the privilege that their political and economic influence and their financial contributions generate, balances the one member one vote principle with the pragmatic considerations that have always served as an incentive for powerful countries to participate in the international organisations. The norms of the organization permit the Secretary General of the UN, his Secretariat and the leaders and staff of the specialized agencies to organization to affirm certain principles and policies that sometimes are resisted by members states who almost always act on the basis of national self-interest. There is, therefore, a continuous interplay of representative member states, privileged and influential member states including the members of the Security Council, UN staff/international civil servants, and international norms in almost all areas of the work of the UN and its specialized agencies. The crisis in WHO was caused partly by the interplay of interests and forces described above.

It is important to recognize that the representative character of the United Nations places it at an advantage in country contexts as well. The fact that nearly all 194 member states of the UN representation in the UN General Assembly and the World Health Assembly, for example, and have

UN presences in their own countries creates unique opportunities for engagement and cooperation. Often the success of the engagement and cooperation depends on the skills and commitment of the UN leadership of the UN Resident Coordinator and the UN Country Team.

Generally, in countries like Sri Lanka and Nepal, the role of the UN in the economic and social areas (through the work of WHO, UNICEF, WFP, FAO, UNFPA, UN Women and many aspects of UNDP's work) is welcomed by governments. Governments, however, feel much more threatened by the more "political" work of the UN (Department of Peacekeeping and Political Affairs and OHCHR) and rely on national sovereignty to resist pressure on these fronts. For example, in Sri Lanka and Nepal, in recent years, governments have pushed back on issues related to constitutional and political reform to address the root causes of conflict, transitional justice, human rights, inclusion and reconciliation. Skillful UN engagement will make use of partnerships and engagement in the "non-controversial" areas to raise, push and lobby on important issues in the "controversial" areas. This is not easy; it requires discernment, courage and skill as well as a strong commitment to UN norms and values, qualities that not all UN Resident Coordinators and senior international civil servants have.

There are, therefore, two points to note about the role of the UN in general. The first is that the fact that it is representative is both positive and negative. It provides legitimacy and a distinctive space for engagement but it also makes decision-making difficult, generates a massive bureaucracy and requires a creative use of opportunities. In that sense, while representation is important, the UN and its staff must also move beyond representation by recognizing the interplay of factors at work in the system and by also engaging in a continuing justification and affirmation of the norms and values of the UN with the general public. This is of great importance in a context where universal norms and values and multilateralism are being challenged in a variety of new ways.

## 2. Independent Institutions vs Effective Institutions?

The controversy raging in Sri Lanka over the proposed 20th Amendment to the Constitution suggests a disturbing trend in the region that poses a challenge to Constitutionalism: the public desire for efficient institutions even at the expense of their independence. The 20th Amendment seeks to replace the 19th Amendment that was adopted in 2015. It introduced limits on the powers of the President, restored a two-term limit, introduced greater power-sharing between the President and the Prime Minister, restored the Constitutional Council (an idea borrowed originally from the Constitution of Nepal 1990 and first introduced in 2001), and the independent commissions including Audit and National Procurement Commissions. The 19th Amendment introduced restraints on power, strengthened the powers of Parliament vis-à-vis the Presidency, strengthened independent institutions and made the office of the President more accountable to Parliament and financial scrutiny, the cumulative effect of which was to promote constitutionalism.

However, the repeal of the 19th Amendment was a key element of the presidential campaign of President elect Gotabaya Rajapakse and the parliamentary election campaign of his party the SLPP nine months later. The criticism of the 19th Amendment was that it undermined strong and effective leadership, weakened the office of the President and was largely responsible for the chronic dysfunction that was a feature of the coalition government particularly in the last two years of its tenure and facilitated the Easter Sunday terrorist attacks of April 2019. The Rajapakse forces seem to have succeeded in their campaign not only because of their sweeping victories at both elections but also because the campaign to defend the 19th Amendment from its repeal by the 20th Amendment has not evoked much enthusiasm among the public.

The public response to the government's handling of the COVID-19 crisis before the August 2020 parliamentary election demonstrated a similar preference for effectiveness or efficiency over legality and constitutionalism. President Rajapakse dissolved Parliament soon after the outbreak of the pandemic. He opted not to declare a State of Emergency which would have automatically resulted in a reconvening of the dissolved legislature. Recourse to the *Disaster Management Act 2005*, introduced soon after the 2004 tsunami to introduce a crisis response mechanism, was not even seriously discussed presumably because the mechanisms would have facilitated partnership with the opposition and a system of checks and balances. The fact that in addition, curfews, restrictions on movement, the establishment of special task forces including significant representation from the military, withdrawals and allocation of monies from the Consolidated Fund and other responses to the pandemic were all extra or contra constitutional, did not seem to perturb the public.

The Government's justification based on effectiveness and efficiency trumped any concerns about Constitutionalism and the Rule of Law. The Supreme Court in effect rejected petitions challenging the Government's course of action, on the ground that they did not even indicate a prima facie case that the Government's response was unconstitutional! The likelihood of the same court reviewing the 20th Amendment, including provisions that will remove safeguards for an independent judiciary, and determining that parts of it need to be approved by the People at a Referendum (as provisions that affect important constitutional provisions are required to do) is extremely unlikely.

The COVID-19 response and the introduction of the 20th Amendment indicate a mindset and approach that is the very antithesis of Constitutionalism and the Rule of Law – the concentration of power in a single institution/person, the Rule of "Men", rule by executive fiat on the basis of executive convenience, the increased role of the military in spheres that have hitherto been the preserve of the civilian and the public servant, and the intention to exercise power with little, if any, checks and balances, public scrutiny and public accountability and the reform of independent institutions to ensure that "independence" does not undermine strong leadership. The primary justification for all this is efficiency and effectiveness. I think we see similar trends, perhaps not so dramatic or extreme, but where a premium is attached to efficiency and effectiveness, in other countries in the region.

### 3. Rethinking Representation; its Rationale and Objectives.

The fact that quite apart from reasons of constitutional propriety, by and large, the people of Sri Lanka did not seem concerned about the fact that the country existed without a Parliament for over 6 months from March to August 2020, suggest that the public had little confidence in Parliament as an institution and Members of Parliament. This lack of public confidence has steadily increased in recent years and is particularly unfortunate in a country that prided itself in being one of the first among British colonies to have elected representatives in national legislatures and a State Council (national legislature) elected under universal adult franchise in 1931. The elected State council members played a key role in the governance of the country in the seventeen years leading to Independence in 1948 (which included the "national emergency" of the World War years) and most of its members assumed leadership positions in the executive and legislature of independent Ceylon. Hansard clearly demonstrates the effectiveness of Parliament and its centrality in the governance of the country in the first thirty years after independence.

The decline in Parliament with respect to three of its important functions: (a) a deliberative assembly; (b) promoting accountability; and (c) scrutinizing the executive, commenced in the 1980s after the adoption of the Second Republican Constitution of 1978 with its key feature the executive presidency. The Parliament ceased to be the main locus of political power; all three functions were seriously

undermined as successive Presidents sought to curtail Parliament's powers and control its members. From the 1990s, serious deliberation on important national matters occurred in fora outside Parliament: All Party Conferences, Presidential task forces and special commissions. Political parties functioned with less intra-party democracy; ideological divisions among parties became less pronounced, and with changes to the electoral system, the financial resources needed to contest elections increased exponentially. The cumulative effect of these developments contributed to a different kind of politician entering politics and contesting elections. The new type of politician was not inclined to independent judgment or deliberation, had no qualms about obediently following the dictates of the party leadership and soon Parliament consisted of loyal ambassadors of political parties rather than elected representatives of the People. In recent years, Parliament's role as a deliberative assembly, forum for scrutiny of the executive and public accountability has declined as has public confidence in it.

In such a context, therefore, it should not be surprising that when Parliament was dissolved six months before its term expired and the elections that should have been held within three months of dissolution were postponed due to the pandemic, the public was indifferent to calls for the old Parliament to be reconvened. The public was quite happy to allow the President and military led task forces to lead the response to the pandemic with scant respect for the Rule of Law and constitutional governance. The public wanted action, not deliberation; enabling powers for those leading the response rather than restraints and scrutiny, and was happy to trust the "efficient" military without fretting unduly about public accountability. The minority which may have considered some deliberation, scrutiny and accountability desirable probably thought that Members of Parliament were particularly unsuited to perform such tasks.

A comprehensive response is needed to ensure that public confidence in parliamentary democracy does not deteriorate further. This includes a review of the electoral system, constitutional and legal reform to ensure that MPs can serve as representatives of the people rather than ambassadors of political parties and that the executive cannot coopt the legislature thereby undermining its checking function of the executive, legislation to govern the conduct of political parties that includes the protection of intra-party democracy and regulation of finances and campaign financing.

Perhaps we need to revisit the concept of representation and representative democracy in a modern constitutional democracy in the light of the Sri Lanka specific observations outlined above. There seem to be tensions between the various functions performed by a Parliament in the Asia Pacific region: Parliament as a representative body promoting also inclusion, the representation of women, ethnic and religious minorities and other important groups in society: Parliament a law-making institution, a forum for deliberation, scrutiny and public accountability.

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**Biography:** Rohan Edrisinha was a Senior Political Officer and Constitutional Advisor at the United Nations until early 2020. He also served as the constitutional advisor to UNDP Nepal from 2011 to 2014 and was an consultant on constitutional reform in Myanmar in 2015. He holds an LLB from University of Colombo and an LLM from the University of California, Berkeley. He taught at the Faculty of Law, University of Colombo from 1986 to 2011, the Faculty of Law, University of the Witwatersrand, South Africa, in 1995 and was a visiting fellow at Harvard University (2005) and the University of Toronto (2009). He was a founder Director and Head of the Legal and Constitutional Unit of the Centre for Policy Alternatives (CPA), Sri Lanka, from 1996 to 2010.