

Achieving Social Justice through the Rule of Law

The full text of the 2019 Olcott Oration delivered by Maithri Panagoda on November 23, 2019 at Ananda College, Colombo

I am indeed proud and honoured to be here today on this stage exactly 50 years after I left Ananda College to enter the Law Faculty of the then University of Ceylon. It was the year 1969. Col Rajapakse was the Principal. He had been my English teacher in upper classes. I believe he was able to extract the best out of both educators and those who were being educated.

I must confess that my own life story is one that was very much inspired and driven by the likes of men such as Col. Rajapakse and of course by my own father who also taught at Ananda during the war years.

As Anandians we must also be proud of some of our great former Principals who played a pivotal role in protecting Buddhism when the country was under foreign occupation in the colonial era, such as Dr. G.P. Malalasekera, Mr. P. De S. Kularatne Mr. L.H. Mettananda, Mr. S.A. Wijetillaka and Mr. M.W. Karunananda among others.

Before proceeding any further I must thank the organisers, the Ananda College Old Boys Union for extending to me the privilege of delivering the prestigious annual Olcott Oration.

My sincere appreciation to Dushmantha Karrannagoda and the Executive Committee of the Ananda College OBA.

Col Olcott

This Oration is in honour of a man whose commitment to Buddhism and thereby to a just society has had a lasting and profound impact on the lives of generations of people.

Today we are celebrating Col Olcott's incredible life, career and legacy.

In an article that he wrote in 1891 under the title "Fundamental Beliefs of Buddhism", he said "Buddhists are taught to show the same tolerance, forbearance and brotherly love to all men, without distinction".

In another article titled "Life of Buddha and its Lessons" he wrote, "Buddha found that the social differences between men were arbitrary and illusive; caste bred hatred and selfishness; riches, strife, envy and malice".

In 1894, he founded a school in India for the children of poor and destitute families, the Harijans. As I understand it, the school still continues to provide free education for children from underprivileged backgrounds.

Col Olcott heaps praise on the Emperor Ashoka as being the most powerful monarch in Indian History, as warrior and as statesman. He goes on to say "but his noblest characteristics were his love of truth and justice, tolerance of religious differences, equity of government, kindness to the sick, to the poor, and to animals".

Col Olcott was instrumental in establishing the Colombo Buddhist Theosophical Society and became its founding president. The mission of the society included the establishment of orphanages and homes for the aged, to grant assistance to people affected by natural disasters. Also the establishment of a centre for the strengthening of Universal Brotherhood without distinction of race, religion, sex, caste or colour.

These are the aspects of social justice we must aspire to achieve for the future generations.

Col Olcott made representations to the British colonial government on behalf of the Sinhala Buddhist community.

He played a vital role during the Buddhist Christian riots at Kotahena in 1883 in order to bring the perpetrators to justice.

We are the proud recipients of his lifelong dedication and commitment for the good of all people.

Col Olcott was himself a lawyer by profession and specialised in insurance law. Here I draw a parallel with my own career, which I will be spelling out in a moment, with a great deal of humility.

My career

After taking my oaths in the Supreme Court of Sri Lanka, I proceeded to England for higher studies and I later migrated to Australia.

I have been practising law in Australia for nearly four decades.

Never having worked in the legal profession in my motherland, my knowledge of the law and practice in Sri Lanka is somewhat inadequate. My comments, therefore, are based on my experience in the legal field in Australia.

“Social Justice” is a universal concept. So is the “Rule of Law”.

These are important and strong pillars of any modern society. These phrases drive us towards achieving equality and fairness in society.

“Social Justice” as a concept goes back to the time of Socrates and Aristotle 500 to 400 BC. Questions such as “what is a just society?” and “who is a just man?” were vigorously debated during that time. These fascinating dialogues underpinned what we now know as western law.

There is a whole area of the law known as “Sociological Jurisprudence” developed by Prof. Julius Stone of Australia and Professor Wolfgang Friemann of Columbia Law School, and Professors Myers McDougal and Harold Lasswell of Yale Law School. Their fundamental line of thinking is that law must evolve from people’s needs rather than forced upon them from the top down.

Siddhartha Gautama (c.563/480/480 – c. 483/400 BCE) the enlightened Buddha asserted that the adoption of self-control and self-development was more effective than control imposed by the rulers when he taught “Veramani sikkhapadam samadiyami...” (I undertake the precept to refrain from...)

The Buddha’s teachings foreshadowed what the modern world recognises as an essential “DHAMMA” when he incorporated the principles of human rights into his teachings. In the opening verse of the Karaniya Meththa Sutra:

Karaniya meththa kusalena

Yantam santam padam abhisamecca

Sakko uju ca suju ca

Suvaco cassa mudu anatimani

(All those wishing to attain a state of peace must be able, upright, perfectly upright, amenable to correction, gentle and humble).

Mata yatha niyam puttam Ayusa ekaputta manurakkhe

Evampi sabba bhutesu Manasam bhavaye aparimanam

(Just as a mother would protect her only child with her own life, let him cultivate boundless thoughts of loving kindness towards all beings).

Chapter XI of the Chullavagga lays down rules addressing offenses within the monastic community. These are in line with the modern concepts of justice and fairness.

All human beings are entitled to justice. The law and its operation must be fair and it must treat everyone equally. It was Aristotle who said: “At his best man is the noblest of all creatures; separated from law and justice he is the worst.”

The functioning of institutions set up to ensure security, dignity and justice is paramount to the well-being of all human beings. When they fail, human beings become helpless, dependent and despondent.

Global human rights discourses, whether by philosophers, religious leaders or jurists are built upon deep foundations based on these values.

Throughout my legal career in Australia, it has been my privilege to represent the voiceless, marginalised people, the disadvantaged. That is those who do not have a voice or have been silenced.

In Australia, I felt honoured to represent the interests of the indigenous community i.e. Aborigines, who have a history of 65, 000 years of existence in Australia.

Where everything else fails, it is the Rule of Law that will ensure social justice. It is incumbent, especially for those of us in the legal profession to strive for justice, for that has been the fundamental purpose of our learning the law.

What is “Law and Justice”

It is important to emphasise that law and justice are not synonymous. Law is a social regulator, justice is a moral indicator. Law is a means to an end, the end being securing justice.

It is the paramount duty of every citizen to ensure that law is used as an instrument of achieving justice, not as a tool of oppression.

As far back as 1690, John Locke observed: “Where-ever law ends, tyranny begins”.

Law is there to protect the rights of the individual. In order to do that, certain aspects of freedom need to be restricted.

Over the years and around the world, legislatures have taken steps to replace primitive social practices as well as emerging social issues with new laws. Some examples that come to mind are, forced marriages, domestic violence, discrimination based on race, gender, religion and sexual orientation, disability rights, environmental issues, animal rights, so on and so forth.

A key issue today is whether the wheels of justice move efficiently and in a timely manner, particularly in Sri Lanka.

In practical terms, do all citizens have equal access to legal services to seek justice?

At the beginning of my legal career, I developed a keen interest in the Law of Torts, known as Delict in Sri Lanka (and in South Africa). I found that it was an excellent vehicle to achieve social justice.



Colonel **Henry Steel Olcott**

This area of the law is to do with civil wrongs as opposed to criminal acts. It could be a negligent act such as running down a pedestrian, or an intentional tort such as false imprisonment.

Tort Law is a way in which the law can interfere with relationships between private individuals to correct a form of conduct or wrong.

This is an ever expanding area of the legal system. In Australia, we have Professional Negligence which includes breach of duty of care by doctors towards their patients, engineers, architects, accountants towards their customers. And of course between lawyers and clients. We have public liability and product liability. Aggrieved parties are entitled to claim damages and compensation for their losses.

My very first experience in Australia was representing a 25-year-old Aboriginal man who had been wrongfully arrested and unlawfully detained for alleged drunken and disorderly behaviour.

Heavy-handedness on the part of the police, particularly towards Aboriginal

people was not an uncommon occurrence in certain parts of Australia at that time. There was medical evidence that the blood tests showed no signs of alcohol intake and he was acquitted by the magistrate.

This man turned out to be a lay preacher who never touched alcohol. We sued the police for wrongful arrest and the matter went before an all-white jury.

The jury gave a verdict in favour of our client and awarded compensation against the police.

This is just one example of how the Rule of Law can be instrumental in achieving social justice.

Kuru V State of NSW

On a cool night in Sydney Australia, a man and a woman had a noisy argument in their apartment. A neighbour heard it and called the police.

Six police officers rushed to the apartment block. By this time, everything was quiet. The woman had left. Two elderly men, family members, were sitting inside when the police knocked. The two men allowed the police in.

Police searched the unit, and were told that the woman had gone to her sister's place.

Another man emerged from the bathroom wearing short pants. He asked the police to leave. He was the occupier of the apartment.

An argument ensued between the man and the police. Then there was a scuffle. The man was handcuffed and behind his back and marched.

He was charged, but was acquitted.

We sued the police seeking compensation and damages for his injuries. The civil claim went through the appeal process and finally to the High Court which is the highest court in Australia.

The High Court held that the police had no right to remain in the unit after they were asked to leave.

The man received a large financial settlement.

One of the judges cited a remark made by an English judge several decades ago: "Wind may enter the shack. Rain may enter it. But no one else can. A man's home is his castle."

This is the power of law in a democracy.

The man was from a working class background. He had the courage to take on the mighty police and win.

I had the privilege of acting for the man. The case and its findings are now taught in university law courses as an example of justice prevailing over abuse of power.

Indigenous Australians

When the Europeans came to Australia over 200 years ago, they treated the country as not being inhabited. The Latin word is "terra nullius" meaning, "no one's land".

So they were able to impose their own legal system on the erroneous assumption that the country had not been occupied by humans.

It is estimated that over 750,000 Aboriginal people lived on the land in 1788. Despite this, Captain Cook declared sovereignty and used the concept of terra nullius to justify the dispossession of lands of the original inhabitants.

In June 1992, after a 10-year legal battle waged by an Aboriginal elder named Eddie Mabo, the High Court of Australia overturned the doctrine of terra nullius and held that native title existed for all indigenous people in Australia, prior to the establishment of the British colony of New South Wales in 1788.

This decision altered the foundation of land law in Australia.

This is another classic example of achieving social justice through the Rule of Law.

There is a saying that “White Australia has a black history”.

With the arrival of the Europeans, the original inhabitants not only lost their beloved land, but also their culture, their languages and beliefs.

The white rulers soon set about trying to eradicate the black race. Babies and children were removed from their families on the pretext of finding them a better life.

Boys were raised to work in farms. Girls were trained to be domestic servants.

They were punished for speaking their tribal languages. They were forced to discard their religious beliefs and convert to Christianity.

These children suffered all forms of physical and psychological abuse.

Now identified as the “Stolen Generations”, a large number of them led sad and deprived lives.

There were many political struggles seeking justice for the stolen generations. These led to an apology by the Prime Minister of Australia to members of the stolen generations, with the support of the opposition.

I had had the privilege of connecting with the Aboriginal community in my early days in Australia. This bond helped me to win their confidence and to be retained as their lawyer in seeking compensation for their losses. I had a great team of young lawyers who were empathetic to the cause and who were brilliant in their work which led to the achieving of a measure of justice for the Stolen Generations.

Thanks to the democratic institutions and the basic concept of fairness that prevails in Australia, we have been able to take legal action against the government for their past wrongs.

As I speak, we have been able to resolve over 245 claims for members of the Stolen Generations. Each one of them received a sincere, personal apology, lifetime counselling and financial compensation.

Affirmative Action

The term Affirmative Action was first used in the USA during the presidencies of John F. Kennedy and Lyndon B. Johnson. The laws passed required employers to take positive steps to hire people without bias based on race, religion, national origin and gender.

Australia has come a long way in taking positive steps to protect its citizens from discrimination and harassment. Australia has recognised and accepted its obligations under a number of international human rights treaties.

The Commonwealth Government has implemented some of those obligations through legislation such as the Racial Discrimination Act, Sex Discrimination Act, Disability Discrimination Act and Age Discrimination Act.

In 1986, the Commonwealth Government established the Human Rights Commission.

In 2017, following a national plebiscite, the Australian parliament almost unanimously (only 4 MPs voting against), passed Marriage Equality legislation.

In addition to the federal legislation, each state and territory has equal opportunity and anti-discrimination agencies, with statutory responsibilities.

It has been recognised that Affirmative Action, also called Reverse Discrimination, needs to be taken in order to correct past wrongs.

What it means is that Governments need to go beyond the concept of Formal Equality. It must allow different groups to be treated differently in order to promote Substantive Equality.

For example, children in rural areas, be it in Australia or Sri Lanka, who do not have access to educational opportunities that those in capital cities have, deserve a lower bar to get into universities.

In South Africa, the apartheid governments favoured Afrikaner-owned companies as a matter of state policy which in effect excluded employment for black people. Since the transition to democracy in 1994, all employers have been compelled by law to employ non-white people. This process came to be known as Black Economic Empowerment.

This is a perfect example of achieving social justice through the Rule of Law.

In the USA, *Brown V Board of Education of Topeka* is a landmark Supreme Court case in which the justices ruled unanimously in 1954 that racial segregation of children in public schools was unconstitutional.

In that case, Oliver Brown filed a class action against the Board of Education when his daughter Linda was denied entrance to an all-white elementary school. He argued that segregation violated the “equal protection” clause of the American Constitution. In delivering the judgment, Justice Warren wrote: “in public education, the doctrine of ‘separate but equal’ has no place, as segregated schools are “inherently unequal”.

The following year, in 1955, Rosa Parks was arrested for refusing to give up her seat on a bus. This sparked a movement leading to boycotts, sit-ins and demonstrations, many of them led by Martin Luther King. The result was far reaching and paved the way for the passing of the Civil Rights Act of 1964, Voting Rights Act of 1965 and the Fair Housing Act of 1968 in the United States.

In Australia now some universities run what is known as a Social Justice Clinic offering students hands-on legal experience under the supervision of experienced human rights and public interest lawyers.

Students get the opportunity to work on real-world social justice cases,

undertaking a range of activities including legal research and writing, client interviewing and non-legal advocacy. The aim is to prepare students for work in the social justice advocacy area.

There have been a number of cases where Australian courts have given recognition to issues of human rights and equal opportunities. This is an acknowledgement of the conscience of the country.

Hickie V Hunt & Hunt (1998)

Marea Hickie, a contract partner with Sydney law firm Hunt & Hunt, brought a complaint against her employer after her request to work part-time following the birth of her child was refused. She claimed that the firm had given away her entitlement to maternity leave. The Human Rights Commission found that the employer violated her human rights by requiring her to work full-time in order to maintain her practice. She was awarded monetary compensation.

Maguire V SOCOG (1999)

In the lead-up to the Sydney Olympics, Bruce Maguire lodged a complaint against the organisers for failing to provide its website and ticketing information in a format accessible to people with vision impairment. The website developer confirmed that some parts of the site were not accessible. However the Olympic organisation argued that correcting the site would cause unjustifiable hardship. The Commission disagreed and ordered the organisations to upgrade the website prior to the start of the games.

And provide information in Braille. Mr Maguire was awarded \$20,000 in damages.

Rule of Law in Sri Lanka

I mentioned at the outset that my personal experience in the practical legal world in Sri Lanka is limited. However, I have been a keen observer of the operation of the Rule of Law in this country over the past 40 – 50 years.

It would be a gross understatement to say that the concepts of Rule of Law and Separation of Powers in Sri Lanka have caused concern over the years.

It is not difficult to identify instances when the people of Sri Lanka displayed their lack of trust and confidence in the justice system of the country.

I read a statement issued by the Bar Association on 28th November 2015 which went “It is unfortunate that existing judicial and prosecutorial system have not met the confidence of many concerned. It is an undeniable fact that over a period of time, the independence and credibility of the many of these institutions have suffered due to many reasons, resulting in an erosion of the confidence in the system as a whole...”.

In his ceremonial address the former Chief Justice K Sripavan said “...it is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the Rule of Law...Credibility of the judiciary rests in the faith of the people, indispensable to that faith is the independence of the judiciary...”

I recall being shocked and perplexed a few years ago when I read that there were proposals to set up a hybrid judicial system. Sri Lanka has produced some of the best legal minds in the world. We are a sovereign nation and we have a well-

established legal system.

We have eminent lawyers and judges. Some are here in this audience. Why do we need outsiders to judge our issues?

If there has been an erosion of trust and confidence, well, it needs to be fixed. Restoring impartiality, confidence, equal access to justice, these pillars must be strengthened. Importing foreign labour, I mean judges, is not the solution, in my view. Another recent incidence that I found it difficult to come to terms with was the presidential pardon given to a convicted murderer.

As far as I know, this individual had been through the due process, represented by a team of highly experienced defence lawyers, and properly convicted.

An outgoing president pardoning a convicted murderer raises many questions. It undermines the Rule of Law and makes a mockery of the legal system.

It sets a bad precedent and helps perpetuate the belief in some sections of the community that a different set of rules apply to the rich and powerful.

Buddhism and Social Justice

As today's event is taking place on the hallowed grounds of Ananda College, it is imperative for me to also reflect on the concept of social justice based on Buddhist theory.

Ideally speaking, the ultimate goal of every Buddhist is the attainment of inner peace through the experience of enlightenment. We call this Nirvana. This is an ontological discourse aspiring for inner salvation through inner transformation of the "self".

If that is so, does it mean that Buddhism is not concerned with issues of social justice? Does it mean that an individual aiming for spiritual growth and salvation can turn a blind eye to wider social issues?

The answer to both questions, in my view, is "no".

The term "social justice" may only have come to prominence in the eighteenth century. That was the time when the western world woke up to issues such as political equality, universal franchise, abolition of slavery, fair distribution of wealth and the much wider concept of human rights.

I would argue that the Buddhist ontological struggle for personal enlightenment can comfortably encompass the noble idea of social justice.

The key Buddhist ideal of "selflessness" contains within it all the modern concepts of equality and fairness. Sangha organisation was set up on the basis of equality.

After guiding his first five disciples to enlightenment by delivering Dhammachakka-pavattana sutta at Isipathanarama, Gauthama Buddha urged them to go out to the community: "Bahu Jana Hithaya, Bahu Jana Sukhaya", Go forth Bhikkhus, go and preach the law to the world. Work for the good of others, for the welfare and happiness of the masses as well as for your own..., out of compassion for the world. Let no two of you take the same way".

In Mahayana Buddhism, the Bodhisattva postponed his own transition to Nirvana and chose to be born again and again so that he could help others to reach salvation by attaining Buddhahood.

It is consistently acknowledged that the social structure in Sri Lanka is based on Buddhist concepts.

It follows that modern legal principles such as Rule of Law and Separation of Powers although imported from the western world, are not only consistent with the values espoused by Buddhism, but also a vitally important ingredient in ensuring the establishment and maintenance of a just society in Sri Lanka.

The question should be asked, does the Buddhist establishment cater to the needs of those who are facing human suffering?

In this context, it is relevant to consider a social framework based on the four modes of sublime conduct: Metta (loving kindness), Muditha (appreciative joy), Karuna (compassion), and Upeksha (equanimity).

These four virtues embodied in Buddhism are a hallmark of a just and fair society.

Isn't it time that we focus our attention on practical ways that temples and Sangha organisations can render services to those experiencing hardship?

Social Justice and Sentient Beings (capacity to feel)

Sri Lanka is the heir to a rich and unique pre-colonial history in respect to Animal Welfare. Historical rock inscriptions and ancient chronicles e.g. Mahawamsa, reveal that extensive state protection was granted to animals.

These historical sources further reveal that the ethic of Ahimsa (non-violence), a cardinal tenet in Buddhism and Hinduism, was deeply respected and practiced in the pre-colonial era.

The trusteeship power of the State was extended to protect animals, birds and other living creatures of the land pursuant to a moving plea made by Arahant Mahinda to King Devanampiyatissa in their very first encounter at Mihintale about 2300 years ago.

Today, in Western countries there is a growing movement to give recognition to the rights of animals through legislation as a part of an evolving social justice programme.

For example, The Australian Capital Territory (ACT) became the first jurisdiction in Australia to change the legal status of animals from being purely 'property' to sentient beings in their own right.

Two months ago, in September 2019, the ACT passed animal welfare legislation to protect cats, dogs, and other pets, also farmyard animals. Dogs cannot be tied up for more than 24 hours without exercise and farm animals cannot be kept in any form of confinement that restricts their ability to move.

Being a predominantly Buddhist country, Sri Lanka must accept the moral challenge to be in step with legislative reform rapidly taking place in the developed world to bring animals within the fold of sentient beings worthy of extending respect and dignity, and bring animals within the ambit of Social Justice and Rule of Law.

My Question

Reflecting on the vision of Col Olcott in the sphere of social justice,

I pose the question, can we, as Anandians, be satisfied that we have done enough

to safeguard the principles of social justice. Are we equipped to tackle the emerging social problems in an effective way, and give leadership to the younger generation?

Do we maintain the values taught by our great educators, after entering university, becoming professionals in different fields, or by migrating to other countries?

These are the issues we need to ponder over.

Tribute to Ananda

I began by saying that it is almost 50 years since I left Ananda College.

For me, today is a “Nostalgia Day”.

As learned Greek Scholar James Rogers would have said, “nostalgia” comes from the Greek word “nostos”, meaning “to return home”. According to the Oxford dictionary, it is “a sentimental longing or wistful affection for the past”.

This is the exact sentiment that I am experiencing at the moment.

It was in 1969, half a century ago, that I last stepped on to this stage. It was the annual Prize Giving and the Chief Guest was the Governor General, William Gopallawa.

Some of my fellow prize winners on that day are present here today. I particularly mention Sanjiva Senanayake and Prof Sudharshan Seneviratne. There is a photograph of the three of us gazing at the Fritz Kunz Prize that Sanjiva and Sudharshan won. All three with shiny black hair.

Something that all three of us seem to have sacrificed along the way.