

Splendid Collection on Constitutional Issues

Asanga Welikala (edt). 2012. *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*. Colombo: Centre for Policy Alternatives (CPA). Also at <http://republicat40.org>

Reviewed by Laksiri Fernando

May 1972 was undoubtedly a 'constitutional moment' as the editor of this mammoth two volume publication has correctly stated. Many people were excited about it including myself at that time, but the new republican constitution (1972) did not bring about the expected results, except the so-called 'constitutional revolution.' It couldn't capture the aspirations of the youth who rebelled in April 1971 against state oppression by democratising the state structures. Some of these aspirations are articulated by Lionel Bopage in the volume. Instead it created a parliament and politicians that ostensibly wielded all powers in the name of people's sovereignty.

It failed to meet the aspirations of particularly the Tamil community either who sought at least a compromise for their national question that bedevilled the country since communal riots in 1958. R. Sampanthan has very clearly expressed this view in the volume. Instead it established the hegemony of Sinhala Buddhist nationalism through the provisions on language, religion and entrenching a strict unitary state structure. No minority, religious or ethnic, had much objection to recognize the historical role of Buddhism or Sinhala culture in a nonintrusive manner but complete majoritarian supremacy was and is objectionable. There are more than half a dozen of chapters in the publication that directly and invariably revisit this theme from different angles.

The first republican constitution did not last for more than six years but a more centralized second republican constitution (1978) with an all- powerful executive president and all hallmarks of majoritarian supremacy continues until today with uneasy changes, i.e. establishing a provincial council system (1987). If there is a major lacuna in this volume, it is the lack of proper attention or analysis of this 'obnoxious constitution' and the misery that it has brought. Almost thirty four years of the 'forty years of the republic' is occupied by this second constitution.

Problem in Essence

Sunela Jayewardene brilliantly captures this predicament in graphic form in the cover page; the 'ancient state' reincarnated in modern form. Both constitutions, 1972 and 1978, contradicted the very essence of 'republicanism' by being oppressively vertical. A true republic should have been based on at least some forms of horizontal democratic principles by strengthening the local government system and incorporating the regional councils agreed upon by the Bandaranaike-Chelvanayakam Pact in 1958. The most depressing was the hegemony of the majoritarian ethnicity, language and religion in the last forty odd years of

the so-called republican political system. As quoted by Qadri Ismail, perhaps Martin Wickremasinghe, the ‘inspiring iconoclast’ according to Ismail, was the most apt in capturing this republican predicament in ordinary parlance.

“The exploitation of language, race and religion by politicians is partly due to their inability to identify themselves with the common people or the greater nation. There is a cultural unity among the common people in spite of differences of religion, language and race.”

‘Race’ may not be the correct word to use in categorizing people, and it only reflects the influence of a dominant perception transplanted perhaps through colonialism, in otherwise a radical interpretation of the republican predicament. Wickremasinghe is not talking about the ‘common people’ as it is, but as it ‘ought to be’ in a true republic. As a literary figure, Wickremasinghe was a social visionary but the politicians unfortunately were not. For the republic to be meaningful, we lacked visionaries like Thomas Paine, Thomas Jefferson or James Madison in Sri Lanka.

A review of a mammoth anthology such as the present cannot do justice by trying to comment on each and every chapter in the collection. The two volumes run into 1166 pages with 22 substantive contributions and 5 lengthy interviews. Only few of them are around 20 pages and the longest runs into over 80 pages. The editor has appropriately divided the volume into four parts: (1) constitutional history (2) constitutional theory (3) constitutional practice and (4) interviews and recollections. This review can do some justice by taking perhaps one or two chapters from each part and reviewing them briefly while commenting on others as appropriate. The selection is not by any objective merit but completely by the academic preference of the reviewer.

Constitutional History

If there is anything strikingly new about the history of the republic that this volume has produced it is the compelling argument that the ‘legal revolution’ that the constituent assembly followed was ‘erroneous’ or at least not necessary as a legal or constitutional requirement. This undoubtedly resonates the ideas held by Nihal Jayawickrama among others, during the time of framing the new constitution and later, but Asanga Welikala, has in a 56 page chapter very clearly elaborates this proposition giving clear evidence and substantive references. His investigation while going deep into the textual interpretation of Section 29 of the Soulbury or the independent constitution, also explicates the case law and prevalent academic views on the subject. What might be also new about his argumentation is the weight that he has given to the legal/theoretical positions of Sir Ivor Jennings who was the legal creator of the constitution. In that sense it is also a tribute to Jennings.

Welikala seems to hold the view that the limitations entrenched on legislative power in Section 29 were procedural and not substantive and in fact were necessary within the premises of liberal constitutionalism. It may be true, but Colvin R De Silva undoubtedly held

completely a different view not only as a Marxist who aspired for a 'kind of revolution' but also in this case as a constitutional lawyer who didn't want to gamble with a former colonial power by following the circumscribed procedure in constitutional change.

There are five other chapters in the section on history; Nihal Jayawickrama making his reflections both on the making and the contents of the constitution comprehensively and Radhika Coomaraswamy giving a lucid overview on the constitution useful for any beginner. The three remaining chapters are useful in understanding the post 1972 political dynamics, Benjamin Schonthal analysing the section on Buddhism in the constitution that precipitates future trends, Farzana Haniffa painfully describing the misgivings of the Muslim community and Michael Roberts unravelling the roots of Sinhala hegemony in ancient history. Robert's chapter is more theoretical than historical.

Constitutional Theory

Although there are ten chapters in this section, none could be considered supplying an overall theoretical framework for constitutionalism, except partially by Stephen Tierney. Perhaps it is the way it was intended. However, if sovereignty can be taken as a major facet of modern constitutionalism then the chapter by Hallie Ludson and the joint chapter by Cheryl Saunders and Anna Dzedzic are both informative and analytical on the subject; the latter is exceedingly useful being a comparative study. Kumar David undoubtedly gives an alternative Marxist point of view on constitutionalism other than interpreting the 1972 constitution from the same point of view.

If there is any common thematic underpinning in the whole volume, it is the recurrent discussions on Sinhala Buddhist nationalism. This selection of focus is quite topical, whether prompted by the editor or coincidental selection by individual authors, in the context of the recent emergence of Bodu Bala Sena (Buddhist Force Army) as a major political force, if I may say, 'within the ruling coalition.' In this case, Roshan de Silva Wijeyeratne's chapter is quite inspirational apart from its analytical rigour. If there is a major underlying ideological force that could be identified behind the constitutional change in Sri Lanka that is undoubtedly nationalism and Sinhala nationalism for that matter. Apart from nationalism, there have been changes in the political economy but unfortunately none of the chapters have paid any attention except Kumar David.

Wijeyeratne says "The 1972 Constitution is replete with a particular cultural inheritance: when held in front of a mirror its reflection is a testament to the primordial consciousness of Sinhalese nationalism." I hardly disagree. But I cannot fully agree with him when he says "the executive precedency introduced under the 1978 Republican Constitution has merely enhanced this process." I would attribute more of political economy changes to the distinct features of the 1978 constitution than of Sinhala nationalism or its extension. We might prove our folly, however brilliant our analysis is, if we try to explain everything from a single theoretical angle.

Further on the theoretical front of the volume, Qadri Ismail's chapter on culture and its understanding through the means of 'language' is quite refreshing although he has not directly referred to the constitution. His title of the chapter says that 'the republic is forty, but culture is one-forty!' Ismail analyses at length an essay by Martin Wickremasinghe titled "Impetus for the Growth of a Multiracial Culture" (1972) drawing upon post-structuralist critical theory. This 'culture' as expressed by Martin Wickremasinghe is not a devising factor like language, ethnicity or religion but (hopefully) a uniting force that people share or could share. This is particularly true of the essence of literature, music or art. Ismail's chapter ends with a hopeful note and perhaps that is the way forward for Sri Lanka.

Constitutional Practice

The section on constitutional practice begins with a conceptual analysis of ethnicity, nationalism and necessary pluralism written by Yash Ghai based on the Kenyan experience with a cautiously positive note highlighting the changes incorporated in the new 2010 constitution. It is educational and pointer to possible changes in the constitution in Sri Lanka. It is followed by a similarly educational chapter by L.C. Arulpragasam yet focusing on the uneasy balance between democracy and national aspirations of various communities in a modern polity or 'nation state' drawing parallels from other countries for Sri Lanka. His views are less critical compared to many others who consider "constitutionally and otherwise, the Constitution of 1972 was an improvement on the Soulbury Constitution." The chapter by Nicholas Haysom on 'constitutional making and nation building in divided societies' is more of an analytical study on the subject useful for anyone in understanding some of the intricacies of national building.

There are two chapters specifically on gender issues and constitutionalism in the overall Sri Lankan context one jointly written by Maithree Wickramasingha and Chulani Kodikara and the other written by Susan H. Williams. While the former is a detailed and empirical exposition of the paucity of women representation in parliament, provincial councils and local government institutions, the latter gives light on to some of the sociological underpinnings for this paucity looking forward to possible constitutional remedies.

Jayampathy Wickramaratne's chapter on fundamental rights in this section does not limit to the 1972 constitution. It traces the genesis of fundamental rights in constitutionalism, why for example Ivor Jennings advised not to incorporate a chapter in the Soulbury constitution and the nature and scope of their incorporation in the 1972 constitution. He maintains the view that there was an apparent failure on the part of the Left in its inability to convince the constituent assembly or the SLFP to incorporate economic, social and cultural rights while maintain the argument that "the contention that fundamental rights were not justiciable under the 1972 Constitution is not correct." He is also of the opinion that the recreation of a 'constitutional court' might be imperative to preserve the supremacy of the constitution or constitutionalism in Sri Lanka.

Conclusion

This review did not attempt to discuss the five interviews incorporated in the final section of the volume as they are primarily political opinions and not based on research work. This review also did not attempt to discuss the much important conception or model on 'plurinational constitutionalism' of Stephen Tierney in the volume as it may require much thought before its application to Sri Lanka and much space for its discussion as a relevant concept.

The editor of the volume should be congratulated for his untiring efforts in bringing much valuable research and opinion monographs together that would be immensely useful for the general reader as well as the students and teachers particularly of law, political science and contemporary history. It is indeed a splendid collection. If I were to point out two weaknesses of the whole volume, that would be the absence of at least a comparative analysis of the first republic (1972) with the second (1978), and also the absence of any 'political economy' analysis of constitutionalism in Sri Lanka. It may be true that 'all hell broke loose' in 1972, but it continued or culminated in 1978. If the 1972 constitution was the 'mirror' of the 1956 Sinhala nationalist revolution, the 1978 constitution was the 'mould' of the neo-liberal economy; both in combination produced the ethnic civil war in the country.