The Law, The Constituent Assembly and The New Constitution*

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The Two Methods of Constitutional Reform

There are two methods of Constitutional reform. (1) It is possible to proceed within the existing constitutional legal structure, i.e. by following the procedure for amendment prescribed in the Constitution. In Ceylon this would entail relying on section 29 (4) which gives power to Parliament to amend the Constitution if an act is passed which receives a two-thirds majority in the House of Representatives. (2) The other method is to make a complete break with the past; to bring about a revolution; to set up a new and distinct constitution, ignoring the existing constitution and legal order. In other words a completely new constitution may be proclaimed after a revolutionary process. Revolution means change —and it must be noted that change may occur peacefully as well as violently. In Ceylon the present government has chosen the second of the two methods referred to above.

Reform within the existing legal order

Bearing in mind the above two methods of reform it is intended to briefly discuss the pros and cons of the first method—reform by constitutional amendment within the existing structures. The question was posed in an article written in the Times of Ceylon[1] "Why Bypass the Constitution," where it is suggested that the Constitution be reformed by reference to existing constitutional structures. The answer to this question is simple. The Constitutional documents have been so drafted that it is very doubtful whether fundamental changes can be effected by amendment to it.

There are many legal problems which stand in the way of fundamental constitutional changes being carried out within the present legal order. The basic constitutional principles are contained in two documents, The Ceylon Independence Act, 1947 and the Ceylon (Constitution) Order in Council, 1946.

The Ceylon Independence Act is an Act passed by the Parliament of the United Kingdom and contains an abdication of legislative power in

* *Editors' Note :* This essay was presented to us sometime ago when the Constitution was being drafted and doubts had been expressed about the procedures which were being followed and the ultimate validity of the Constitution once it was proclaimed. The essay highlights some of the issues which arose during the period of Constitution making.

1. "Why Bypass the Constitution", in *Times of Ceylon* of 5th October, 1970, page 4.

relation to Ceylon by the United Kingdom Parliament and confers certain powers on the Parliament of Ceylon. The abdication of legislative power by the Imperial Parliament is contained in section 1 (1) of the Ceylon Independence Act which enacts that the United Kingdom Parliament cannot in future legislate for Ceylon "unless it is expressly declared in that Act that Ceylon has requested and consented to the enactment thereof." This Act cannot be repealed by the Ceylon Parliament because the draftsmen of the Ceylon Constitution has not conferred on the Parliament of Ceylon the power to repeal it. Section 1 (2) of the First Schedule to the Ceylon Independence Act gives the Parliament of Ceylon the power to repeal, ".....existing or future Acts of the Parliament of the United Kingdom." By comparison the Indian Independence Act refers to ".....this or any existing or future Act of the Parliament of the United Kingdom." Thus the omission of the word "this" in the Ceylon Independence Act means that while Ceylon can repeal "existing" (in 1947) and "future" (after 1947) legislation of the United Kingdom Parliament, it cannot repeal the Ceylon Independence Act, 1947 which is not caught up by the above words. The words "present" or "this" would have been required to draw in the Ceylon Independence Act."[2]

The apparent solution appears to be to resort to the provision referred to above and to request the Parliament of the United Kingdom to repeal the Independence Act. But further legal problems arise. The provision regarding legislation for Ceylon by the United Kingdom Parliament refers to "consent of Ceylon." The Act does not refer to the Parliament of Ceylon. The question arises as to how "Ceylon" should manifest her consent. It is not clear whether it is the Parliament of Ceylon, the people of Ceylon or the government of Ceylon (i.e. the executive arm) which must "consent." This raises a knotty legal problem and it is not clear whether it can be resolved at all.

There is another reason why it is doubtful whether the United Kingdom Parliament can repeal the Ceylon Independence Act despite the specific words in the Act. Dicey[3] takes the view that, after a colony has obtained independence, the United Kingdom Parliament would be considered to have abdicated its sovereignty to the Parliament of the Dominion, another sovereign body, and can in no circumstance legislate for it. Anson[4] agrees. Wade[5] takes a similar view. It is implicit in Amerasinghe's analysis[6]

2. L. J. M. Cooray, *Essays on the Constitution of Ceylon* (1970) pp. 54 and 58.
3. A. V. Dicey, *England's Case against Home Rule* (3rd ed., 1887) pp. 241-46.
4. W. R. Anson, "The Government of Ireland Bill and the Sovereignty of Parliament" in (1886) 2 L.Q.R. 427, 440.
5. H. W. R. Wade "The Basis of Legal Sovereignty" in *Cambridge Law Journal* (1955) pp. 172-89.
6. C. F. Amerasinghe, "The Legal Sovereignty of the Ceylon Parliament" in Public Law (1966) pp. 66-69.

of the sovereignty of the Ceylon Parliament that the United Kingdom Parliament has no power in any circumstances to legislate for Ceylon.

Thus there is much to be said for the conclusion that the Ceylon Independence Act cannot be repealed by the United Kingdom Parliament or the Ceylon Parliament.[7] The conclusion is that a part of our constitution is completely unalterable. Even if the United Kingdom Parliament can repeal it, it is a serious reflection on the powers possessed by the Parliament of Ceylon during the last 22 years and scarcely in keeping with the self-respect of the nation, if a request must be made to the United Kingdom Parliament to resolve Ceylon's constitutional problems and help in reforming the Constitution.

The other Constitutional document is the Ceylon (Constitution) Order in Council of 1946 which contains the basic principles relating to the organs of government. Here too constitutional reform raises a number of problems. Amerasinghe takes the view that section 29 (2) which was intended to confer some protection on minority groups cannot be amended in any way—in other words not only cannot the minority rights contained in it be taken away, but they cannot also be added to or increased.[8]

The view has also been expressed that a fundamental reconstitution of Parliament may be invalid.[9] Parliament consists of the Queen, the House of Representatives and the Senate. The Queen is given a special legal status by provisions in the Constitutional documents and if that status is removed the entire balance of the Constitution may be irretrivably destroyed. It is perhaps because of this difficulty that Ceylon was not declared a Republic. Amerasinghe in a different context also takes the view that a fundamental reconstitution of the House of Representatives would be invalid.[10]

The principle derived from judicial decisions that judicial power is vested in the judicature and cannot be exercised by the executive or the legislature[11] has limited (to an extent which is not quite clear) the powers

7. But despite above view, in fact, the Parliament of the United Kingdom has legislated after independence for Canada in 1960 and Cocos Islands in 1959 at the request of those countries. The validity of such legislation has not been questioned in the Courts. See O. Hood Phillips, *Constitutional and Administrative Law*, (1962, Sweet and Maxwell) pp. 67-68.

8. *Op. cit.*, pp. 73-78.

9. Amerasinghe, *op. cit.*, pp. 85-88.

10. *Ibid*, p. 95, note 98.

11. See especially *Queen* v. *Liyanage* (1962) 64 N.L.R. 313; *Liyanage* v. *The Queen* (1965) 68 N.L.R. 265. P.C.; *Kariapper* v. *Wijesinghe* (1966) 68 N.L.R. 529 S.C.; (1967) 70 N.L.R. 49. P.C. and other cases discussed by L. J. M. Cooray, *op. cit.*, p. 187-206, who submits that the courts have "added" this principle to the Constitution. Distinguish from above decisions the "tribunal cases' which proceeded on an analysis of the words "judicial officer must be appointed by the Judicial Service Commission" in section 55 (1) of the Constitution and held therefore that any person who exercises judicial power must be appointed by the Judicial Services Commission. See *Bribery Commissioner* v. *Ranasinghe* (1964) 66 N.L.R. 73; *Senadira* v. *The Bribery Commissioner* (1961) 63 N.L.R. 313. See L. J. M. Cooray, *op. cit.*, p. 174-78 and 187.

of the legislature,[12] and has also cast doubts on the extent to which the procedure in section 29 (4) can be used to amend the Constitution.[13]

It is not intended to discuss the merits of these views. It is sufficient to say that doubts have been expressed as to whether fundamental reforms can be effected within the present legal structures and these doubts can only be resolved by a litigation which would be completed only about three years after the amendments were passed. In view of these doubts it would be unwise to proceed to amend the Constitution. The government and the country would be in doubt for a number of years as to whether the amendments were valid or not—and in the interim the functioning of the executive and legislative organs would be seriously affected. Constitutional changes may be effected—a new legislature may be constituted. This legislature would pass acts implementing government policy. One of these Acts could be challenged on the ground that the amending procedure followed is invalid. The litigation arising from the challenge would drag on for years and the conclusion may be reached many years later than the amendments to it were invalid. The effect may be that every act passed by the legislature during this period is invalid.

Autochtony

The legal problems involved are such that the government is wise in not proceeding to reform the Constitution by amendments following the prescribed legal procedures.

There is another reason why the legal method has been rejected. The Constitution of Ceylon of 1948 is found in an Order in Council issued by the Queen and an Act of the Parliament of the United Kingdom. The Constitution, the basic legal document, derives its authority from a foreign legal source. Ceylon after 1948 enjoyed a system of government which was in no way subordinate to the Government of the United Kingdom. But the framers of the new Constitution emphasised that they sought to draft a Constitution which had the force of law and, if necessary, of supreme law within Ceylon through its own native authority and not because it was enacted by the law making authorities of the United Kingdom. In other words they wanted a Constitution deriving its authority from Ceylonese legal sources, a Constitution which is "so to speak 'home grown', sprung from the native soil, and not imported from the United Kingdom."[14] In other words what is asserted is not the principle of autonomy only (which the 1948 Constitution conferred) but also a principle of something

12. See L. J. M. Cooray, *op. cit.*, pp. 187-206.

13. See L. J. M. Cooray, *op. cit.*, pp. 203-06; C. F. Amerasinghe, "Sovereignty of the Ceylon Parliament Revisited" in *Colombo Law Review* (1970) pp. 91, 101-02.

14. K. C. Wheare, *The Constitutional Structure of the Commonwealth*, (1960, Clarendon Press, Oxford) p. 89.

stronger, of self-sufficiency, of constitutional autochtony or a principle of Constitutional autonomy, of being constitutionally rooted in the native soil of Lanka.

Though the word "autochtony" has not been used this idea has been referred to frequently by our Constitution makers. And this in itself is a valid reason for ignoring the present Constitution and setting up a Constituent Assembly.

Reform by Revolution

The first method of constitutional reform (reform within the constitutional structures and by references to the prescribed constitutional procedure) which was referred to at the outset cannot be followed in Ceylon for fundamental reforms. The other method, which in this eventuality must necessarily be adopted, is extra-legal and extra constitutional— a political method which aims at drafting and proclaiming a new constitution, creating a complete break with the pre-existing order. This is the method which the present government has chosen.

A discussion of the second method has to be preceded by an analysis of legal concepts. One must begin by asking the question, from where does law originate, or to use a legal phrase one asks—what are the sources of law? To which one would give the answer legislation, case law, custom, equity. Legislation is by far the most important and accounts for the bulk of the laws of a modern state. What is legislation? It may be defined as the act of a legislature. From where does the legislature derive its powers and authority? It may be said that the legislature derives its powers from the Constitution. Section 29 of the Constitution Order in Council gives the Parliament of Ceylon power to legislate for the peace, order and good government of Ceylon. The Constitution gives Parliament the power to enact laws. But from where does the Constitution derive its authority? Why is the Constitution valid? This is the crucial issue. Before answering the question let us examine the foundations and origins of two very famous democratic Constitutions—those of the United States and the United Kingdom.

In the eighteenth century the American States were colonies of Great Britain. The United Kingdom Parliament was the supreme legislative authority—the legislatures in the colonial American states were subordinate to it. The British Government was the chief executive authority, which possessed the legal power to control and direct the executive arm of government in the colonial states.

But after the War of Independence this legal structure was ignored. An Assembly drafted a Constitution, which came to be venerated by the citizens of the country. But it is significant that this Constitution was proclaimed in flagrant disregard of the existing legal Constitutional structures.

In Britain in 1688 a group of politicians deposed the existing King, in violation of the legal principles of the Constitution regarding succession, and then they imported a king from Holland placed him on the throne—on condition that he agreed to a number of fundamental Constitutional changes, which were enshrined in the Bill of Rights of 1688 and the Act of Settlement of 1701.[15]

Sir Ivor Jennings[16] has to this say about the 1688 Revolution:

> "It is easy to show that the Parliament summoned by William of Orange was not a Parliament, that accordingly William and Mary were not lawfully made joint monarchs, that the Parliament which pretended to ratify the Bill of Rights was not a Parliament, that the Bill of Rights was not law, that Anne was not Queen of England, that the Act of Settlement and the Acts of Union were not law, that all succeeding rulers had no right to the throne, that therefore Elizabeth II has no right to the throne and the United Kingdom does not exist—provided only that the "law" in question was that of 1687. In fact, however, the Revolution settlement was a revolution settlement, and revolutions, if successful always make new law. What made William and Mary monarchs instead of James II and the person who called himself James III was the fact of recognition, not a pre-existing rule of law. All revolutions are legal when they have succeeded, and it is the success denoted by acquiescence which makes their Constitutions law."

From these two examples we can draw the clear inference that the validity of a Constitution does not flow from law. Where this validity flows from is a complicated jurisprudential question. Kelsen[17] says it is based on the "grund norm or fundamental postulate of a legal system." Salmond[18] calls it the "ultimate legal principle." Wade[19] says that "the true basis of the sovereignty of Parliament as understood in British Constitutional law, is that it is a political fact which can only be changed by revolution." In simple language or non legal language it could be said that the ultimate validity of a Constitution does not flow from law; the validity of a Constitution flows from acceptance by the people, the courts and the administration. The validity of a Constitution initially is a political fact. It is not a legal question. If a new Constitution is accepted after a successful revolution, it becomes legal.

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15. Though it is often asserted that the British Constitution is unwritten important provisions are contained in written law—and among these the Bill of Rights and the Act of Settlement which mark the victory of Parliament over the Crown are the most basic and fundamental, the consequence of which was that the claim of the Kings to govern arbitrarily by prerogative was replaced by a constitutional monarchy. Among the principles established by these two statutes were: that the suspending of and dispensing with laws at the discretion of the sovereign was illegal that the King could not without consent of Parliament maintain or raise an army; that there could not be taxation without the consent of Parliament; the rules regarding succession to the throne; the guarantee of freedom of speech and debate in Parliament; that Parliament and not the King could take a decision to wage war. The idea of The Independence of the Judiciary could also be traced to provisions in the Act of Settlement. See further Wade and Phillips. *Constitutional Law*, (1965, Longmans) p. 7-8.

16. W. I. Jennings, *Law and the Constitution*, (1959, University of London Press) p. 85.

17. H. Kelsen, *General Theory of Law and State*, (trans. by Anders Wedberg), 20th Century Legal Philosophy Series: Volume I, (1961, N. Y., Russel & Russel).

18. *Salmond on Jurisprudence*. (by P. J. Fitzgerald) (1966, Sweet and Maxwell, London), pp. 43-57, 111-12.

19. Wade, *op. cit.*, at p. 189.

The word "revolution" as used above is used as a synonym for change. A revolution could result in violent change—the War of Independence which preceded the American Constitution—the Russian Revolution or the Chinese Revolution. But a revolution could be a peaceful and bloodless one as in Britain in 1688. Wade[20] takes the view that whenever a colony becomes independent a legal revolution takes place. Thus for instance the constitutional document of a newly independent former British Colony derives its original legal validity from the legislation of the United Kingdom Parliament and/or Orders in Council. But subsequently the constitution is recognised by the courts and the people and becomes the basic instrument and its former legal pedigree becomes irrelevant and the constitution is not regarded as deriving its legal validity from United Kingdom sources.

Wade[21] goes on to make an assertion which is very relevant in the present context, namely that when a revolution occurs the courts follow" .....the movement of political events.....When sovereignty is relinquished in an atmosphere of harmony the naked fact of revolution is not so easy to discern beneath its elaborate legal dress. But it must be there just the same."

The distinction between Constitutional changes which have been effected in accordance with Constitutional structures, and those which have been effected by revolution has been emphasised. It is only the latter that are relevant as comparisons to the Constituent Assembly of Sri Lanka of today. But sometimes the neat classification which has been drawn is not observed in practice. There are constitutions which have come into being partly as a consequence of reliance on existing Constitutional structures, and partly by a revolution which brings into existence a new grund norm. Such Constitutions do not fit into the classification drawn above, e.g. Ireland and India. And these are also different and are not relevant as comparisons to Ceylon's current experiment.

The Indian Independence Act, 1947, passed by the Parliament of the United Kingdom, set up two independent Dominions, namely India and Pakistan. The Government of India Act, 1935, was amended to suit the new situation created by the grant of independence. Under the Indian Independence Act, the Indian legislature received full powers to make laws for the two countries including the power to repeal or amend any Act of the Parliament of the United Kingdom. That Act also provided that the powers of the legislature of each Dominion shall, for the purpose of making provision as to the Constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of each Dominion, and that references in the Act to the Legislature of the Dominion, shall be construed

20. *Ibid.* at p. 191.
21. *Ibid.*

accordingly. The constitutional measures as well as the Constitutions themselves which were adopted by these two Assemblies were, however, deliberately not submitted to the Governor-General for his assent. Legislation under the existing legal structures would have been valid only if assented to by the Governor-General. In India the question whether the Governor-General's assent was required under the then existing legislation for constitutional measures passed by the Constituent Assembly was never raised in the Courts. In Pakistan, on the other hand, this question was raised and it was held by the Federal Court that such assent was necessary in order that the constitutional measures of the Constituent Assembly may have the force of law. Thereupon a new Constituent Assembly was summoned in that country by the Governor-General. This assembly considered and approved the Constitution which was duly presented to the Governor-General for his assent. In India it is now too late to raise the issue. In the unlikely event of the issue coming before the courts, the courts will take the view that a legal revolution has taken place which the courts, the people and the administration have recognised.[22]

Ghana after she attained independence in 1957 was, like Ceylon, governed under a Constitution Order in Council made by the Queen in Britain. The Constitution also safeguarded certain fundamental rights and provided for a special method for the amendment of the Constitution, namely, by not less than two-thirds of the whole number of members of the Assembly. This special procedure for constitutional amendment was repealed by the Constitution (Repeal of Restrictions) Act, 1958, so that amendments could be made by a simple majority of the Assembly. The requirement that Bills became law only when the Royal assent was given remained, however, in the Constitution Order in Council.

The first step taken by the Government to establish the republican Constitution was to introduce the Constituent Assembly and Plebiscite Bill in the House of Assembly to transfer the supreme power to make law, so far as the Constitution was concerned, from Parliament to the National Assembly alone. The Assembly when sitting to consider the Constitution became a Constituent Assembly. It was explained that while in strict law it was for the Constituent Assembly finally to enact into law the new Constitution, the Government considered that the Assembly would be morally bound by the decision of the people after the constitution had been submitted for their approval in the proposed plebiscite. This Bill provided that Bills passed by the Constituent Assembly did not require the Royal assent. A White Paper was then issued by the Government containing the Draft Constitution of the Republic and a motion for its

22. W. I. Jennings, *Constitutional Problems in Pakistan* (1957, Cambridge University Press), pp. 1-75; A. Giedhill, "The Constitutional Crisis in Pakistan (1954-55)" in (1955) Indian Year Book of International Affairs, p. 1; S. A. de Smith, *The New Commonwealth and its Constitutions* (1964, Stevens, London).

approval was passed by the Constituent Assembly. After the electorate gave its approval, the Constitution Bill was presented in the Constituent Assembly and given its three readings.[23]

The Ghanian example is one which is apparently similar to Ceylon but is in fact very different because in Ghana existing constitutional amending procedures were followed and there was no break in legal continuity. In Pakistan too there was no break in legal continuity.

In India a link was maintained with the existing legal order in that the Constituent Assembly was set up by an Act of Parliament enacted by the sovereign legal authority at that time. But the Constitution prepared by the Assembly was not enacted by the legislature of the old legal order, but was proclaimed by the Constituent Assembly. Thus the procedure followed in India may be regarded as partly legal and partly extra-legal and does not fit into the distinction drawn at the outset.

The Constituent Assembly of Sri Lanka

The Constituent Assembly of Sri Lanka does not owe its origin and powers to the existing legal order. It is wrong to say that the House of Representatives has constituted itself into a Constituent Assembly, citing Ghana as an example. In Ceylon the House of Representatives by resolution or Parliament by Act did not set up a Constituent Assembly. A Constituent Assembly was convened by the Prime Minister. At its first meeting the Prime Minister said[24] "In the name of the people of Sri Lanka, I have called upon you as Members of the House of Representatives to assemble here today.....We have met in order to constitute, declare and proclaim ourselves the Constituent Assembly of the People of Sri Lanka.....to adopt, enact and establish a Constitution." A resolution to this effect was passed at the meeting. The members of the Constituent Assembly happen to be members of the House of Representatives, but this is merely the method of identifying them. They can be regarded as representatives of the people. In the Constituent Assembly they are not regarded as members of the House, but as representatives of the people summoned to draft and proclaim a constitution. It was for the purpose of establishing and identifying the Constituent Assembly as a distinct entity, separate from the House of Representatives and Parliament, that it met for the first time at the Navarangahala.

There is a subtle but real distinction, between saying that the House of Representatives constituted itself into a Constituent Assembly, and that a Constituent Assembly was set up, the membership of which is drawn from the House of Representatives.

23. "Constitutional Autochtony in Ghana" in *Journal of Commonwealth Political Studies* (1961) 51; S. A. de Smith, *op.cit.*, p. 111.

24. See *Ceylon Daily News*, July 20th page 1.

If one reviews (the problems of space forbids such a review) the various methods by which new constitutions have been established by extra legal procedures—it is clear that there is no uniformity in the procedures adopted. Each country, has followed a different procedure. And Ceylon has the right likewise to follow its own unique procedure. And no one can claim that because a particular procedure has been followed in another country, it should be followed here.

In some countries referrenda have been held before the adoption of a constitution. But it must be noted that in most situations where referenda have been held, changes were being effected within constitutional legal structures and such precedents are not relevant where extra-constitutional and revolutionary methods are employed. In the latter instance a Referendum is not essential. A Referendum was not held in the United States or in the United Kingdom after 1688 or in India after the Indian Constituent Assembly drafted and proclaimed a Constitution.

It would be a natural demand for a new Constitution to be placed before the people in a Referendum in countries where there is a tradition and constitutional practice of resort to the referendum in relation to important issues. Thus the French would think it natural and indeed essential, that a new Constitution be referred to the people because that is a part of their constitutional ethos. But there is no justification for a demand that the Constitution of Sri Lanka be placed before the people in a referendum, because no such tradition or practice exists in the country.

Acceptance by the people may be signified by a referendum—but it may be manifested in other ways—peaceful acceptance by the people, the courts and the administration, and the mere fact that the draftsmen of the constitution were the elected representatives of the people.

There has been much speculation, on the basis of number of votes cast, and in view of the complex issues examined by the voters at the last general election, whether there was a mandate to set up a Constituent Assembly.[25] A direct mandate is not essential to the setting up of a Constituent Assembly. The draftsmen of the Constitution of the United States had no direct popular mandate. It is a misleading question to ask "Did the United Front government have a mandate to set up a Constituent Assembly." The fact that the issue was included in the manifesto of the United Front is just one factor which, in common with other factors, may be relied on to support the right of the Assembly to draft and proclaim a Constitution. Though there may be no express and unambiguous mandate—yet the popular acclaim that accompanied the setting up of the Assembly leaves no doubt as to the wishes of the people.

25. See "Why Bypass the Constitution? in *Times of Ceylon* of 5th October, page 4.

It is relevant that the constituent parties of the United Front refused to participate in the Select Committee for Constitutional Reform chosen by the last Parliament, on the grounds that they wanted a new Constitution. This view was embodied in the Common Program, reiterated in the manifesto, and was actively canvassed during the election campaign. In the perspective of such public conduct, a strong moral claim and justification for the setting up of a Constituent Assembly can be established.

It is also very significant that every political party participated in the formation of the Assembly, and this meant that they accepted the basis on which it was constituted. Some political parties were at first inclined to boycott the Assembly but did not do so because they felt it would be impolitic to do so. In other words the pressure of public opinion forced them to participate. All sections of the community have accepted it, and memoranda have been submitted to it from all quarters. No group can say that its acceptance of the Assembly is dependent on the Assembly accepting its views on any issue. No group, minority or otherwise, said so at the time the Assembly was constituted, and *a fortiorari* no group can later on make such an assertion. All that the members of the Assembly itself and the public can ask is that the Assembly functions democratically in coming to its decisions.

It appears from the above analysis that there are a number of factors which give the Constituent Assembly a moral and political right to function.

Is the Constituent Assembly legal? The answer is clear from what has been said. The question of the legality of the Constituent Assembly does not arise. You might just as well ask, was the American War of Independence legal? The Constituent Assembly of Sri Lanka is part of a revolution which aims at overthrowing the existing constitution.

The ultimate question will be—is the constitution legal? And this is initially a political question as the quotation from Jennings referred to above shows. It will in course of time become legal if it is accepted by the (1) the people (2) the courts and (3) the administration.

The view has been expressed[26] that the Constitution drafted by the Constituent Assembly will bear the stigma of illegality. It is hoped that this view has been effectively rebutted. But it could be answered by posing another question—does the stigma of illegality apply to the United States Constitution or to the Bill of Rights and the Acts of Settlement which followed the 1688 Revolution in England? The 1688 Revolution is referred to as the Glorious Revolution and the Bloodless Revolution.

It may be argued that a Constituent Assembly is a device which offers any Government an easy method of overthrowing a Constitution. It is conceded that a Constitution should have some degree of permanence

26. *Ibid.*

and not be amenable to change to suit the needs of the moment. But our present constitution (1) cannot be amended fundamentally within the present legal order, (2) is of British origin and does not derive its authority from local and indigenous legal sources and is (3) unsuited to present conditions. Therefore there is no alternative but to adopt the procedure which has been resorted to.

Academic exercise or political dialectic?

A criticism may be levelled against this analysis on the grounds that it uncritically supports the establishment of the Constituent Assembly, and cannot therefore be regarded as an academic analysis.

The issue discussed in this analysis are (1) the legal principles related to the establishment of the Constituent Assembly and the adoption of a new Constitution and (2) the political issues raised and the interpretation and application of legal principles in a political context. The lawyer cannot compromise with (1) and what is stated in relation to (1) is based on and supported by legal authorities. As regards (2), in the particular circumstances, there is no scope for anything but an unequivocal approach. Suggestions for the procedure which could with advantage be followed, may have been put forward before the Constituent Assembly was established. But once a particular procedure has been followed and a Constituent Assembly established, the realist must take an unequivocal stand—to accept or reject the particular method adopted. It is futile to accept the establishment of the Constituent Assembly, subject to reservations or conditions or to suggest new or alternate procedures which should be followed, both of which carry the implication that the establishment of the Assembly is valid in part or conditionally valid. The new Constitution cannot be partly valid.

Conclusions

There are two methods of Constitutional reform—the legal method and the extra-legal method. Extra-legal constitutions arise consequent to a revolution or a revolutionary process. The establishment of a Constituent Assembly without reference to the existing legal order is a revolutionary act. The deliberations of such a Constituent Assembly are part of a revolutionary process and it is irrelevant to ask whether it is legal. It is futile to question whether a revolution is legal. A Constituent Assembly may adopt a Constitution. The validity of such a constitution or indeed any constitution does not depend on law—but is based on an "ultimate legal principle" or a "fundamental postulate of a legal system." In non-legal language it may be said that the validity of a Constitution is initially a political fact and legality is derived from acceptance of the Constitution by the people, the courts and the administration.

The Constituent Assembly of Sri Lanka is part of a revolutionary process which aims at overthrowing the present[27] constitution and drafting and proclaiming a new one. This process was adopted for two reasons: (1) Reform of the present constitution within the existing legal framework posed insuperable legal problems; (2) the Constitution of the Sovereign Republic of Sri Lanka should derive its authority from the people of the country and local legal sources, rather than from an Order in Council and an Act of Parliament of the United Kingdom.

There has been no historical uniformity in the establishment of Constituent Assemblies in other countries. Therefore any country is free to follow its own unique procedure, provided it derives support from the popular will.

The Constituent Assembly of Sri Lanka has a moral and political right to function because: it consists of the *elected representatives* of the people elected in an election in which an exceptionally large proportion (87%) of the population turned but to vote; one of the issues before the people in the election was the setting up of a Constituent Assembly; all political parties, representing the significant strands of political and social thinking in the country at large, associated themselves with the establishment of the Assembly by accepting the Throne Speech in Parliament and voting for the Resolution moved by the Prime Minister in the Assembly itself; the establishment of the Assembly was accompanied by the manifestation of an overwhelming degree of public support and confidence; all sections of the community have submitted memoranda to it.

The Constituent Assembly cannot include in the new Constitution every view put forward. No group can make its participation in the Assembly dependent on the Assembly accepting its proposals. If the Constituent Assembly considers memoranda submitted to it and functions democratically in coming to its decisions, the Constitution must necessarily be accepted by the people, the courts and the administration.

27. *Editors' Note:* This essay was written at the time the Republican Constitution was being drafted. The reference to the present Constitution is to the Constitutions of 1946 and 1947. The tenses as used by the author have also been retained.