India’s benign constitutional revolution

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How ‘We the People’ came to be the source of authority of the Constitution

This is the story of how and why the framers of the Constitution of India deliberately designed a procedural error in the adoption of the new Constitution with a view to severing the seamless transition of legal authority from the British Crown-in-Parliament to the new Republic of India. The deliberate procedural error consisted in a deviation from the Constitution making procedure prescribed by the Indian Independence Act, 1947 — the law enacted by the British Parliament granting India independence and formally

authorising the Constituent Assembly to draft a Constitution for the newly liberated state. To be sure, the framers of the Constitution of India were not the first, and indeed they were not the last to deliberately incorporate such procedural errors in the process of Constitution making. The founders of the Constitutions of several other states including Ireland, Pakistan, Sri Lanka and Ghana, which were being liberated from the British Empire, took such a step. In doing so, they were all motivated by the same goal: that of ensuring constitutional 'autochthony.'

Constitutional autochthony

The etymological roots of 'autochthony,' which is not to be confused with 'autonomy,' are to be found in the Greek *autos* (self) and *chthon* (earth). The goal of constitutional autochthony is to deliver an indigenous Constitution, the source of whose 'authority' can be located in the new state's own soil. The dominant academic view in the middle of the 20th Century was that autochthony could not be achieved simply by drafting an original Constitution or verbally invoking *We the People* as the source of its authority, for autochthony does not so much concern the *content* of the Constitution as its *pedigree* : the chain of legal validity authorising it.

This proposition found doctrinal support in the influential theory propounded by the legal philosopher, Hans Kelsen, which had it that it was inconceivable for a legal system to split into two independent legal systems through a purely legal process. One of the implications of Kelsen's theory was that the basic norm (*grundnorm*) of the imperial predecessor's Constitution would continue to be at the helm of the legal system of the newly liberated former colony despite the legal transfer of power, precisely because the transfer of power was recognised as 'legal' by the Constitution of the imperial predecessor.

On Kelsen's account, only an 'unlawful' or 'revolutionary' act could ensure an autochthonous Constitution by rending asunder all continuity with the imperial predecessor.

Such break in legal continuity is automatically achieved where a former colony's independence is won as the result of an armed revolution, as was the case with the United States of America. Independence in such instances is not granted 'legally' by the Crown-in-Parliament and the Constitution of the newly liberated former colony is in no way authorised by the imperial predecessor. The situation is very different where independence of a former colony is not brought about by armed revolution, but is 'legally' granted by the imperial predecessor. This was the case with India, Pakistan, Ireland, Sri Lanka and Ghana whose independence was the result of the British Crown-in-Parliament's enactment of separate statutes of independence (Independence Act) for each of them. The statutes of independence also set up Constituent Assemblies authorising them to draft new Constitutions for each of these States. Following the constitution-making procedure stipulated in the statute of independence would have meant that the validity of the new Constitution could ultimately be traced to an imperial grant. The mere verbal invocation of *We the People* as the 'source' of authority in such cases would have rung hollow, apart from being jurisprudentially implausible since the source of authority of the new Constitution would continue to be the imperial predecessor's Constitution. In

such cases, it was thought that since there was no 'revolution,' one had to be deliberately made up in order to secure an autochthonous Constitution. Accordingly, as John Finnis argues, the framers of new Commonwealth Constitutions took great care to do something illegal "so as to make up a revolution, however contrived."

Irish influence

The Irish were the pioneers in conceiving the idea of a benign legal revolution geared towards constitutional autochthony. Ireland was granted independence under the Irish Free State Constitution Act, 1922 enacted by the British Crown-in-Parliament which also authorised the Irish Constituent Assembly to draft a Constitution for the newly liberated state. Thus, the Irish Constitution of 1922 was not autochthonous.

Though it was drafted by an indigenous Constituent Assembly, its chain of legal validity could be traced to an imperial statutory grant. With a view to changing this state of affairs, in 1937 the Irish Parliament amended the Constitution by deliberately violating the procedure for amendment stipulated in the 1922 Constitution and put the amended Constitution for acceptance in a referendum. Going one step further, the Irish Parliament also repealed the Irish Free State Constitution Act, 1922 enacted by the British Parliament, though it was not empowered to do so. It is widely accepted that this successfully severed the chain of validity with the Crown-in-Parliament and ensured a truly autochthonous Constitution. The framers of the Indian Constitution appear to have rehearsed the Irish route to autochthony to the extent possible in Indian conditions.

Independence was formally granted to India by the Crown-in-Parliament's enactment of the Indian Independence Act, 1947 though the executive decision to grant India independence was arrived at earlier in the Cabinet Mission Plan (1946). It was under the Cabinet Mission Plan that the Constituent Assembly was envisaged and charged with the mandate of drafting the new Constitution for India. This was legally recognised in Section 8 of the Independence Act. The Cabinet Mission Plan had envisaged that the new Constitution would be put to the Crown-in-Parliament for approval. Though the Indian Independence Act did not reiterate this requirement, it did specify that the new Constitution drafted by the Constituent Assembly would have to receive the assent of the Governor General of India, who would assent to such law in the name of the British Crown.

The framers introduced two deliberate procedural errors in the enactment of the Constitution of India in violation of the Independence Act: a) They did not put the Constitution to the approval of the either the British Parliament as envisaged by the Cabinet Mission Plan or the Governor-General as envisaged in the Indian Independence Act 1947; b) Following the Irish precedent, Article 395 of the Constitution of India repealed the Indian Independence Act — something the Constituent Assembly did not have the authorisation to do. In doing so, the framers not only repudiated the source which authorised them to enact the Constitution but it was also a denial, albeit symbolic, of Indian independence being a grant of the imperial Crown-in-Parliament. This ensured that the chain of constitutional validity did not extend all the way to the Crown-in-Parliament, thus delivering a completely autochthonous Constitution. In this fashion, *We*

the People , through the members of the Constituent Assembly, came to be the 'source' of authority of the Constitution, rather than the authority being traceable to the Indian Independence Act enacted by the British Crown-in-Parliament.

Why did it matter?

This quest for autochthony is likely to come across to some as an abstruse quibble that shouldn't concern anyone other than the most pedantic legal theorists. There were, however, two reasons why the framers of new Commonwealth Constitutions felt constrained to pay such close attention to it. Firstly, it was feared that the British Crown-in-Parliament could, however improbably, reassert its authority over the newly liberated state by repealing the statute of independence and abrogating the new Constitution. There was, of course, no immediate apprehension of the British taking such a step. All the same, the framers of new Commonwealth Constitutions would have found, as Geoffrey Marshall notes, merely prudential reassurances to be precarious pegs to hang their nation's independence on. Secondly, for sentimental considerations, the framers would have been loath to let the new Constitution be grounded in an imperial grant or be assented to by the British Crown. They would have wanted the new Constitution to be truly autochthonous, stemming from the authority of *We the People* so that an independent future could, albeit symbolically, be insulated from a troubled imperial past.

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