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Colonial Legality in the Post-Colonial Era: Analyzing the Influence of Colonial Laws in Indian Legal Jurisprudence

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This paper will analyze how colonial laws have transcended into the post-colonial period to influence the functioning of the present Indian legal polity. To begin with, the Government of India Act, of 1935 was one of the initial statutes that the Indian leaders were acquainted with, as the 1935 Act allowed the provincial governments to operate and exercise control before independence. Therefore, the 1935 Act was a stepping stone for the framers of the Indian Constitution. The paper will explore how the provisions of the 1935 Act, coupled with the essence of colonial governance, transcended into the Indian Constitution and the functioning of the Indian State. In Part III, the paper will emphasize aspects of public law that affect the personal liberty of individuals. Personal liberty is an indispensable facet of life. While the state is required to safeguard such a fundamental right, excesses committed by the rulers and governments in the colonial and postcolonial periods have contributed to the abrogation of such integral rights. In Part IV, a comparative analysis between a restrictive colonial law (such as sedition) propagated during that period and sustained by the Indian Parliament after independence shall be compared to draw a correlation in the operation of the law between the colonial and post-colonial state. In conclusion, the post-independence legislature always had the liberty to obliterate colonial laws but chose to retain laws that granted the State power to exert its dominance symbolizing the Indian government as an all-encompassing superior authoritative figure.

Keywords: *colonial laws, personal liberty, fundamental rights, archaic laws.*

INTRODUCTION

The colonial rule over India has had a long-lasting impact on the country. Even after the lapse of colonial power in India, British influence has transcended subjects such as art, architecture, and culture. One of the fascinating subject matters which reflects colonial influence is Indian legal jurisprudence. Being a common law country, the framers of the Constitution have placed heavy reliance on colonial legal statutes and principles. The colonial powers had instituted rules and regulations in the name of governance and maintenance of law and order, which is a crucial tenet of modern civilized society. The implementation of the law was highly questionable and did not correspond to the intention of the colonial framers.

The colonial power had established an executive and judicial order which was purportedly in the nature of the rule of law, but the establishment of such laws was primarily driven by the motive to collect revenue and maintain law and order.¹ It was during this period that, for the first time, India witnessed a uniform regime of laws caused by the implementation of codified statutory laws. These statutory laws premised the backbone of the British administration and governance. When India secured its independence, the laws formulated by the colonial power were already in existence to assist the Indian self-governance. To name a few, the Indian Penal Code, 1860; the Indian Evidence Act, 1872; and the Transfer of Property Act, of 1882 were carried forward into the Indian legal jurisprudence post-independence.

THE GOVERNMENT OF INDIA ACT, 1935

The Government of India Act, of 1935 (hereinafter, the "Act") played a crucial role in integrating the Indians into the Constitutional scheme.² It acted as a point of reference for the framers of the Indian Constitution. This section will highlight specific laws, legal principles, and incidents that portray how the Indians were initially skeptical about the Government of India Act but subsequently went on to adhere to the institutions established and propagated by the colonial rulers.

¹ Harish Narasappa, *Rule of Law in India: A Quest for Reason* (Oxford Academic, 2018)

² Arudra Barra, 'What is "Colonial" About Colonial Laws?' (2016) 31(2) American University International Law Review <<https://core.ac.uk/download/pdf/235410229.pdf>> accessed 18 April 2023

The debate regarding the continuity of colonial legality emerged not after independence but immediately after the implementation of the Act, way before the initiation of Indian independence. The Act had received severe criticism from all corners of the spectrum, especially from nationalist leaders directly involved in the freedom struggle.³ Many termed the Act as an attempt by the Britishers to further degrade the status of Indians by statutorily compelling them to submit to the British authority. Notwithstanding the criticisms, several Historians and political scientists have expressed their view that the Act was meant to integrate the colonial way of functioning into the Indian administrators and representatives.⁴ The Act institutionalized methods that were once employed by the Britishers, leading to the influence of the colonial powers beyond independence. For instance, the actions of C. Rajagopalachari (“Rajaji”) can be used to illustrate the above point. Rajaji was heavily criticized by his contemporaries within the Congress since he prioritized the opinion and advice of civil servants over his own elected representatives.⁵ These were the same set of civil servants who, as per the instructions of the colonial rulers, were responsible for suppressing various independence-related movements.⁶ A few other actions of Rajaji prove the subtle influence of the colonial era. The Press Act, of 1931, was a tool in the hands of the Britishers to censor and restrict any protest initiated by the Indians against the colonial power.⁷

The same statute was used by Rajaji to initiate proceedings against individuals for the apparent use of seditious speeches.⁸ Any government or organization is not immune to criticism, and the essence of democracy is to keep a check on different authorities by raising your voice. Although Rajaji was merely utilizing the machinery inherited from the Britishers, the institutionalization of the British processes may be referred to as being colonial.

³ W H Morris-Jones, *Parliament In India* (Longmans Green and Co. London 1957)

⁴ Sumit Sarkar, *Modern India 1885-1947* (Pearson Education India 1983)

⁵ David C Potter, *India's Political Administrators: 1919-1983* (Oxford Clarendon Press 1986)

⁶ T.H.Beaglehole, 'From Rulers to Servants: The I.C.S. and the British Demission of Power in India' (1977) 11(2) *Modern Asian Studies* <<https://www.cambridge.org/core/journals/modern-asian-studies/article/abs/from-rulers-to-servants-the-ics-and-the-british-demission-of-power-in-india/ED10E22F1E0D4197FD01C39A0F909528>> accessed 18 April 2023

⁷ Arudra Barra (n 2)

⁸ Reginald Coupland, *The Indian problem: Report on the Constitutional problem in India* (Oxford University Press 1944)

The colonial rulers would always attempt to usurp power and restrict the final discretion of their decision-making. Although the Act facilitated the election of Indians to formulate a government, their powers were limited as the final discretion on certain issues lay with individuals such as the Governor-General and the Governors of different provinces.⁹ This essentially was a step that undermined an institution's democratic value since the collective opinion of the elected representatives could be overruled by titular or nominated representatives. Ideally, the titular head is required to work as per the aid and advice of the elected representatives. The colonial powers could exercise their control through these appointed representatives in every province. The nominated representatives are never equipped to gauge public interest and function unbiasedly. Anarchy and dogmatism are initiated when there is no scope to review the functions of these powerful organs. Only the legislatures can be held accountable; hence, the exercise of decision-making should exclusively flow from these elected organs. The present framework of the Indian Constitution makes it imperative for the nominated heads to exclusively act upon the '*aid and advice*' of the Council of Ministers.¹⁰

Nonetheless, India has witnessed a growing sense of apprehension expressed by different State governments due to unwarranted actions done by Governors. They are individuals appointed by the Union government and often act as the mouthpiece of the center during conflicts. The act of the colonial powers to exercise control through nominated representatives was inherited by the Indian government post-independence. In several cases, elected State governments were dismissed by the President upon the advice of the Union and the status report describing the problem submitted by the Governor. Initially, this power to dismiss a full-fledged government was mis-utilized with unfettered discretion, reflecting the similar ultra-vires power possessed by the colonial rulers during pre-independence. The constitutional court of India came to the rescue of state governments dismissed by the arbitrary exercise of power. In *S.R. Bommai v Union of India*,¹¹ the Supreme Court observed that although the decision of the President is not within the periphery of judicial scrutiny, the judiciary can assess the substantiveness of the report submitted by the Governor based on which the President has ordered the dismissal of the

⁹ Government of India Act 1935

¹⁰ Constitution of India 1950, art 74(1)

¹¹ *S R Bommai v Union of India* (1994) SC 1918

government. The misutilization of a constitutional position for the benefit of the union government is *pari materia* to how the colonial rulers functioned by appointing a favorable individual as a person responsible for overseeing a province's affairs. The animosity between the union and state governments has highly politicized the office of the Governor, and the necessity of such a constitutional position often comes under ethical questions.

One of the essential and primary notable legal principles in the Act is the formulation of a federal structure coupled with the separation of powers between the national center and the other provinces. The legislative powers were equally divided between the two different organs and encompassed various subject matters concerning governance. The list further had a third section that enumerated the concurrent list. While the federal legislative list dealt with issues at a macro level and included matters involving defense and external affairs, the provincial legislative list dealt with problems at a micro level that concerned the ground administrative working of the province – these included matters such as education, law and order, health, and agriculture.¹² The provisions segregated the responsibilities owed by different governments and curated a decentralized mechanism of delegating power. It is an essential element of the constitutional scheme that two organs of elected overarching powers do not conflict with each other. In essence, the union and state government should not be in conflict. Any conflict between the two would result in a deadlock and detriment to the development of the people. A provincial government is required to have autonomy over its respective subjects. Similar segregation still exists in the current Constitution of India to eliminate any form of confrontations. Schedule VII and Article 246 of the Indian Constitution enumerate the different legislative powers of the Parliament and the State Legislatures under their respective lists.¹³ Therefore, the segregation of power is a suitable example of productive colonial influence.

The Act portrayed how leaders reacted before and after the implementation of the Act. The resentment toward the Act was only in the initial stages; the elected representatives utilized the Act until their resignation in 1939. The framers of the Constitution were actively engaged in the execution and maintenance of the Act. Naturally, they imbibed a significant portion of the Act

¹² Keith B Arthur, *A Constitutional History of India, 1600-1935* (Routledge Library Editions: British in India 2017)

¹³ Constitution of India 1950, art 246

and subsequently used it while formulating the Indian Constitution.¹⁴ For instance, Sardar Vallabhai Patel closely worked with Section 299 of the Act.¹⁵ During this undertaking, Sardar Vallabhai Patel realized the need to acquire private property for the need of the general public, in certain instances, for preparing schools, medical and defense facilities.¹⁶ The experience shared by Sardar Vallabhai Patel in the constituent assembly contributed to the framing of Article 31 of the Indian Constitution, which refers to the right to property.¹⁷ Simultaneously, K.M. Munshi argued in one of the constituent assembly debates that India should adopt a Parliamentary system of governance since the country has partly experienced and has become accustomed to the British model of the Westminster Parliamentary mechanism.¹⁸ The Act provided Indian leaders with the essential exposure to formulate laws and administer an unorganized country like India.

SECURING PERSONAL LIBERTY THROUGH THE RULE OF LAW

In modern society, it is essential to ensure and grant certain fundamental rights to the participants of society in the form of civil and personal liberties. It is, furthermore, the duty of the state to protect and uphold these basic rights. The protection of these rights and liberties is ensured by using and implementing the 'rule of law'. The rule of law postulates that the law established by the Parliament in a sovereign country shall bind all parties equally. It is the law that will govern society and other functionaries.¹⁹ The rule of law restricts the arbitrary use of power and allows for due process to be followed. For a society to function without any hindrance, the existence of personal liberty must be coupled with the principle of the rule of law. It is undisputed that the judiciary has been utilizing the principle of the rule of law since the colonial era, and the use of the principle can be credited to the colonial rulers.²⁰ This segment of

¹⁴ David Arnold, *Police Power and Colonial Rule: Madras, 1859-1947* (OUP Press 1986) 277

¹⁵ Government of India Act 1935, s 299

¹⁶ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1999)

¹⁷ *Ibid*

¹⁸ M. Venkatarangaiya, 'Parliament in India By W. H. Morris-Jones (London, Longmans, Green and Co., 1957, pp. 417, 35 sh.)' (1957) 13(3) *India Quarterly: A Journal of International Affairs*

<<https://doi.org/10.1177/097492845701300314>> accessed 18 April 2023

¹⁹ Moiz Tundawala, 'On India's Postcolonial Engagement with the Rule of Law' (2013) 6 *NUJS Law Review* <<http://nujlawreview.org/wp-content/uploads/2016/12/moiz1.pdf>> accessed 18 April 2023

²⁰ *Ibid*

the paper shall compare the functioning of the rule of law and the safeguard of personal liberty during the colonial period and the period after independence.

The primary concern during the colonial era was related to the despotic and dogmatic use of power by the Britishers. During such use of unauthorized force, it is only the rule of law that can be potentially seen as a mechanism to rectify the excesses committed by the government.²¹ Therefore, analyzing the efficiency of the rule of law during the colonial and post-colonial periods will be critical to determine the arbitrariness exercised by governments in the pre-independence and post-independence eras. The established law responsible for governing cannot act on its own. Different organs (such as the legislature and judiciary) must provide it with the requisite agency for the law to be implemented.²²

Jurists have described the rule of law during the colonial era as a subject of dilemma.²³ The colonial rulers implemented the law according to their whims and fancies. The colonial rulers had to legitimize their rule through the use of laws, and they used the same regulations for suppressing movements and unlawfully detaining people.²⁴ In 1878, one of the Governors of a province acknowledged that the rule of law requires everyone to be treated equally, but in India's case, that is only plausible in theory.²⁵ The statement highlights the inherent discrimination that prevailed during colonial rule. The rule of law only existed as a principle for the convenience of colonial governance.

In *Keshav Talpade v King Emperor*,²⁶ the Bombay High Court dismissed a habeas corpus writ petition because the individual had been arrested under Rule 26 of the Defence of India Rules. Rule 26 allowed the detention of individuals on the grounds of apprehension that the concerned individual may breach the peace and tranquillity within the society.²⁷ The decision of the High Court was appealed before the Federal Court. The Federal Court overruled the order

²¹ Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 335

²² Ignacio Sanchez-Cuenca, *Democracy and the Rule of Law* (Cambridge University Press 2003)

²³ Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2003) 31

²⁴ Peter Fitzpatrick, *The Mythology of Modern Law* (1st edn, London & New York Routledge 1992)

²⁵ Partha Chatterjee, *The Nation and its Fragments: Colonial and Post Colonial Histories* (Princeton University Press 1993) 21

²⁶ *Keshav Talpade v King Emperor* [1943] Federal Court 1

²⁷ Defence of India Act 1939

pronounced by the High Court and observed that Rule 26 does not state the required individual or person who has the jurisdiction to sanction such detentions.²⁸ The Federal Court successfully distinguished *Keshav Talpade's* case from the decision pronounced in *Liversidge v Anderson*²⁹ since the Emergency Powers (Defence) Act, 1939, as used in the home country of the colonial rulers, allowed a specific person (the Home Secretary) to act upon his reasonable judgment. Curtailing an individual of their liberty by restricting their movement is an excessive step. Such harsh decision-making authority should be limited to senior officials who possess a sense of responsibility and have the experience to assess the need for detention judiciously.³⁰ While the colonial rulers limited such power to specific individuals in the United Kingdom, the same rulers provided similar authority to various lower-ranked officials in India.³¹ In India, the detentions in question were not vetted by higher officials such as the Governors.

Furthermore, in an attempt to circumvent the rule of law and the decision pronounced in *Keshav Talpade's* case, the Viceroy decided to issue an ordinance that would enable the detention of the same individuals on different charges.³² The above case accurately represents how the colonial rulers diluted the principle of the rule of law by delegating power to unauthorized individuals to unlawfully detain individuals without reasonable cause. The colonial rulers applied the rule of law differently for their home country and India.

Similarly, in the postcolonial era, one of the most highly contested intersections of the rule of law and personal liberty was witnessed after the proclamation of emergency in 1975. The suspension of the right to approach courts and the suspension of writs such as habeas corpus can make us draw parallels between the colonial and post-colonial periods. In 1975, the then Prime Minister instituted an Emergency on the grounds of '*internal disturbance*' under Article 352(1) of the Indian Constitution.³³ Several thousands of people were reported to be arrested, the press was censored, and the Prime Minister and her government became the sole repository

²⁸ *Keshav Talpade v King Emperor* [1943] Federal Court 1

²⁹ *Liversidge v Sir John Anderson* [1942] AC 206

³⁰ *Ibid*

³¹ Arudra Barra (n 2)

³² Rohit De, *Emasculating the Executive: The Federal Court and Civil Liberties in Late Colonial India* (Cambridge University Press 2012) 59

³³ Constitution of India 1950, art 352(1)

authority.³⁴ As stated earlier, the law cannot function independently and requires organs such as the legislature and judiciary to act as their agent. The rule of law is undermined when the administrators exercising power prohibits the process of judicial review and dissuades the usual checks and balances available in a Parliamentary system. Personal liberty and the rule of law were the most susceptible subjects during the colonial and postcolonial eras during excesses committed by rulers or elected governments. One of the criticized judgments of Indian legal jurisprudence, *ADM Jabalpur v Shivakant Shukla*,³⁵ provided a colonial connotation to the writ of habeas corpus. Courts in the colonial period refused to issue the writ of habeas corpus because the executive had amended the law or the prolonged detention was for internal security.³⁶ In doing so, the aggrieved individuals no longer had any *locus* to approach the courts. The ability of the government in the postcolonial era to circumvent the rule of law and the judicial process through the creation of ‘exceptions’ has transcended from the colonial period.³⁷ In India, the abrogation of civil liberties by the State machinery in the name of protecting the security and integrity of the country is still a popular methodology to detain individuals without the availability of any appropriate relief.³⁸

THE CONTINUITY OF SEDITION LAWS

The essential tenet of modern democracy is to be able to express oneself without any bar or hindrance. The Parliamentary system of governance allows the scope of discourse through debates and discussions within and outside the Parliament. No government has the authority to be in power for perpetuity. All governments must seek re-election after the completion of their fixed term, i.e., five years. The portrayal of dissatisfaction towards a government is a symbol of democracy that allows all stakeholders to operate in unison. The criticism directed towards the government assists them in rectifying their work and being under a constant source

³⁴ Granville Austin, *Working a Democratic Constitution: The Indian Experience* (The Oxford University Press 1999) 295

³⁵ *Additional District Magistrate Jabalpur v Shivakant Shukla Etc Etc* (1976) 2 SCC 521

³⁶ Nasser Hussain (n 23)

³⁷ Moiz Tundawala (n 18)

³⁸ C Raj Kumar, ‘Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties’ (2005) 33 *Denver Journal of International Law & Policy* <<https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1430&context=djilp>> accessed 18 April 2023

of checks and balances. With this background of Parliamentary democracy, a law concerning sedition will seem redundant and unwarranted.

Sedition as a concept was introduced and implemented by the colonial rulers. It was meant to curtail any form of opposition received by the Indians during the Indian freedom struggle. Several leaders, including Mahatma Gandhi and Bal Gangadhar Tilak, had been charged with sedition for their writings and speeches.³⁹ The Britishers intended the colonial rule to be free of any criticism and attempted to suppress any form of dissent. The colonial rulers shared a common sentiment that any opposition may incite the general Indian audience against the British authoritarian regime.

Interestingly, the same colonial rulers rescinded the sedition law in the United Kingdom in 2009. While the initiators of sedition denounced laws related to it in their own country, India continued to have sedition as a penal and non-bailable offense under Section 124A of the Indian Penal Code ("IPC").⁴⁰ The law continued to be in the IPC even after the constituent assembly had decided against the drafting of sedition as an exception to the fundamental right to freedom of expression.⁴¹ The Indian legislature, governed by different political affiliations, has never expressed its willingness to revoke sedition laws from the IPC to protect their respective governments from ostensible criticisms. The law on sedition acts as a tool to intimidate any opposition the incumbents may receive. The judiciary has shown its activism in criticizing the existence of sedition in the IPC. In several cases, the Supreme Court has attempted to narrow down the meaning of sedition and has acknowledged the abuse of power by political parties who wish to keep their reputation stagnant while in power.⁴² In the recent case of *S.G. Vombatkere v Union of India*,⁴³ the Supreme Court, while acknowledging the coloniality of the law, ordered the operation of Section 124A to be kept in abeyance. The court issued a stern order highlighting

³⁹ Suchitra Karthikeyan, 'India's sedition law, its usage, and the opinions around it' (*The Hindu*, 03 May 2022) <<https://www.thehindu.com/news/national/explained-indias-colonial-sedition-law-origins-govt-abuse-courts-take-on-it/article65375097.ece>> accessed 18 April 2023

⁴⁰ Indian Penal Code 1860, s 124A

⁴¹ Suchitra Karthikeyan (n 39)

⁴² 'Sedition in India: Colonial Legacy, Misuse and Effect on Free Speech' (*EPW engage*, 17 February 2021) <https://www.epw.in/engage/article/sedition-india-colonial-legacy-misuse-and-effect?0=ip_login_no_cache%3Dcffc92ceba33da44f22145191e0bfdd3> accessed 18 April 2023

⁴³ *S G Vombatkere v Union of India* (2022) 7 SCC 433

the existence of sedition as prejudicial to the ethos of modern democracy. The judiciary has performed its due diligence, and now it is for the legislature to alter and omit any sedition law within India.

CONCLUSION

The above segments of the paper will act as a roadmap to finally assess the centrality of the colonial influence over Indian legal jurisprudence. To begin with, the Government of India Act, of 1935 was a crucial learning lesson for the framers of the Indian Constitution. Before formulating the Constitution, several of them understood the constitutional framework while operating as Ministers within the ambit of the 1935 Act. The influence of the Act highlights that there needs to be a distinction created between the law and the implementation of the law. At times, while there is nothing improper about the law, the implementation of the law is carried out to suit the individual in power. The same point is further illustrated by the proclamation of emergency in 1975 or the appointment of the Governors in the postcolonial era. The colonial rulers are to be credited for acquainting us with the Parliamentary system of governance and other crucial principles such as the rule of law.

Notwithstanding how the colonial powers implemented the law, the postcolonial Indian legal polity should have only gathered influence from the colonial laws and not how the colonial rulers discriminatorily implemented the laws. The paper does not have the scope to cover all colonial laws that have continued in the postcolonial era. It will be incorrect to state that all colonial laws were for the benefit of society. Laws such as sedition have proven to be detrimental to the democratic ethos of a country due to the restriction it imposes on the freedom of speech and expression. Colonial laws were never uniform. They were a mixed package of productive and harmful laws combined. Nonetheless, the discretion was always with the framers of the Constitution and the constituent assembly members to continue or do away with the colonial law. For instance, Article 372 of the Indian Constitution allows for the continuance of pre-independence laws unless they are explicitly repealed and discontinued.⁴⁴

⁴⁴ Constitution of India 1950, art 372(1)

The colonial rulers can be held liable for introducing laws such as sedition, but the decision to continue with the same law, even after several decades of independence, solely rests with the successive Indian governments. Laws such as Emergency are essential in a constitutional framework. It is ideally expected that people in power will operate with integrity and honesty. Laws crucial for the country cannot be revoked merely due to apprehensions of it being abused. It is here that the role of the judiciary becomes indispensable. The court is required to keep a check on the functions of the executive and the legislature. The executive was compelled to reconsider their position on sedition as the judiciary required them to do so. In turn, the executive has vehemently promoted laws such as the Unlawful Activities (Prevention) Act [“UAPA”] to circumvent the usual judicial process and facilitate the detention of individuals for a prolonged period. The question of whether the colonial laws were detrimental to Indian legal jurisprudence may prima facie seem to be a straightforward answer, but colonial laws and their implementation had both positive and negative repercussions. The Indian legislature had the opportunity to reshape, alter, modify, or obliterate any colonial law. Still, if the Indian Parliament has decided to retain the unwarranted laws, then it is the Indian legislature imbibing the negative influences of the colonial rule of their own volition.

The following is an excerpt of B.R. Ambedkar’s statement in the constituent assembly that summarily answers the role of colonial legal influence in the postcolonial era:

*“By independence, we have lost the excuse of blaming the British for anything going wrong. If hereafter things go wrong, we will have nobody to blame except ourselves.”*⁴⁵

⁴⁵ ‘Debate on the Government of India Act (Amendment) Bill’ (*Parliament of India*)
<<http://parliamentofindia.nic.in/ls/debates/vol11p11.htm>> accessed 20 April 2023