

The cobwebs of imperial rule

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FORTY-FOUR years ago, the editor of this journal lamented the persistence of an institution which should, in his opinion, have been ‘swept away together with the other cobwebs of imperial rule.’¹ The institution he had in mind was the Indian Civil Service (ICS), ancestor of the modern-day IAS. The nationalist complaint against the ICS had been an old one. They were ‘neither Indian, nor civil, nor

servants’, as the saying went; they had formed the administrative backbone (the so-called ‘steel frame’) of British India, and played an important role in the suppression of the nationalist movement through the 1940s. So it seemed anomalous to many people that Indians in the ICS had not only survived the transfer of power intact, but had flourished in the new regime.

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In the same issue of *Seminar*, another author wrote that Nehru had been 'his own greatest enemy':

In 1947 he called his fellow-countrymen to help in building a new India at every level. He desired passionately to rouse the Indian spirit at home and to make the voice of India heard in the counsels of the world. And yet – this would be unbelievable were it not true – he sought to achieve these ends through the agency of those who had been the trained servants of imperialism.²

The charge could be made more broadly. The judges of the first Supreme Court were all serving members of the Federal Court of India, a creation of the British Raj. British judges continued in the High Courts well into the 1950s, as did many members of the armed forces.

The cobwebs of imperial rule were everywhere to be seen after Independence. The idea that India should be governed by a parliamentary system of government, on the Westminster model, was more or less taken for granted in the Constituent Assembly, whose members had themselves been elected under the terms of the Government of India Act, 1935, a British statute. The Constitution itself was modelled in large measure on this act, as Ambedkar acknowledged to the Constituent Assembly when he introduced the Draft Constitution on 4 November 1948:

One likes to ask whether there can be anything new in a constitution framed at this hour in the history of the world... As to the accusation that the Draft Constitution has produced a good part of the provisions of the Government of India Act,

1935, I make no apologies. There is nothing to be ashamed of in borrowing.³

Let me use the term 'an argument from colonial continuity' to describe any argument against an institution, an idea, a policy, or a law, in which the fact that such an idea is continuous with, associated with, or representative of, colonial rule is used as a reason that counts against it. Such arguments are a familiar feature of current legal and political discourse, and have been so since the time of Independence.

To take a recent instance, one theme in the arguments made to the court in the Naz Foundation case against the criminalization of consensual same-sex sodomy was that s. 377 of the Indian Penal Code was a 'vestige of the colonial order.' In written submissions to the court, the Alternative Law Forum (ALF) argued that, 'While disgust and revulsion may have been a valid ground for colonial rulers to legislate by decree, it is clearly not the case in a civilized society governed by a Constitution.'⁴ Similar arguments are often made with respect to repressive security and anti-terrorism laws.

I believe that the scope of such arguments is more limited than we might initially think. In this short note, I will try to make my point with an historical example from an early and particularly interesting period in Indian constitutional history: the Constitution (First Amendment) Act of 1951.

The story begins with one of the first cases to make its way before the Supreme Court – filed, appropriately

3. B. Shiva Rao (ed.), *The Framing of India's Constitution: Select Documents IV*, 427-8 (4 vols.). Indian Institute of Public Administration, Delhi, 1966-68.

4. See *Naz Foundation vs. Govt. of NCT of Delhi & Ors.*, civil writ petition 7455/2001. My thanks to Arvind Narrain and Siddharth Narrain of the ALF for making these petitions available to me.

enough, by the founder-editor of this journal. Romesh Thapar was at that time the editor, printer, and publisher of a journal called *Cross Roads*, the weekly organ of the Communist Party of India. The journal was banned by the Government of Madras under the terms of the Madras Maintenance of Public Order Act, 1949. In *Romesh Thapar v. State of Madras*, Thapar challenged the ban, claiming that the act was unconstitutional because it conflicted with the right to freedom of speech guaranteed under Part III of the Constitution.

The case was heard along with *Brij Bhushan v. State of Delhi*, in which the printer and publisher of the *Organizer*, the organ of the Rashtriya Swayamsevak Sangh (RSS), made a similar challenge to the East Punjab Public Safety Act of 1949. Under the terms of that act, the Chief Commissioner of Delhi had sought to require prior scrutiny of material before publication on 'communal matter and news and views about Pakistan including photographs and cartoons other than those derived from official sources.'

The Supreme Court cases concerned 'public safety' acts passed by provincial governments after Independence. They were accompanied by constitutional challenges in the High Courts of various provinces to provisions of other statutes which restricted press freedom: in particular the offence of 'sedition' in s. 124-A of the Indian Penal Code of 1860 and the Press (Emergency Powers) Act of 1931.⁵ These latter acts were 'colonial legacies' in a very straightforward sense: not only had they had been passed under colonial rule, but they had been crafted with a clear eye towards suppressing the nationalist movement. For instance, the so-called 'Press Act' had been passed at the height of the civil disobedience movement, and

1. 'The Problem', *Seminar* 84, 1966, p. 11.

2. 'Self Before Service', *Seminar* 84, 1966, p. 13.

gave the executive power to require owners of printing presses and newspapers to furnish security deposits, which could be forfeited upon a variety of grounds formulated in s. 4 of the act.

In 1932 the grounds for forfeiture specified in the Press Act were expanded to include, among other things the publication of material which tended, directly or indirectly, to bring into hatred or contempt' the Government of India; to 'excite disaffection' towards it; to encourage people to refuse to pay taxes or to interfere with the administration of the law; and to encourage public servants to resign to forebear or delay acts connected with their public functions.⁶ These were all clearly directed against Congress activities during the civil disobedience movement. So the government of independent India was applying and defending a law which had been used to suppress the very movement that brought independence to India, the passage of which had been among the grounds for regarding colonial rule to be illegitimate in the first place.

The laws were uniformly struck down by the courts on grounds of overbreadth. The relevant exception to the protection of freedom of speech in Art. 19(2) of the Constitution concerned laws relating to 'any matter which...undermines the security of, or tends to overthrow, the State.' The courts argued that these statutes gave

the executive power over press censorship that was much wider in scope than the Art. 19(2) exception allowed, and should be struck down on that basis. The government responded by attempting, in the First Amendment Bill, to expand the scope of these exceptions, giving them retrospective effect, by 'being deemed always to have been enacted' (s. 3(a), Amending Act). In addition, the amendment rehabilitated all laws which had been declared void because of being violative of Art. 19(2) as it was originally enacted.⁷

The First Amendment Bill was criticized in Parliament for many reasons. For one, the constitutional provisions in question had been discussed at great length during the deliberations of the Constituent Assembly in 1946-49; yet the government sought to amend them in May 1951, only fifteen months after the Constitution had been adopted. Questions were also raised about the legitimacy of this particular Parliament to amend the Constitution. Since elections under the new Constitution were not held until late 1951, the First Amendment was being debated by members of Parliament who had been elected on the basis of the restricted franchise given by the Government of India Act, 1935. Why not wait a few months until the formation of the first Lok Sabha, elected by universal franchise, so that the legitimacy of Parliament to amend the Constitution was not in doubt?

Against this, Nehru pointed out that the Parliament which debated these constitutional amendments consisted of the *very same people*, sitting as the Constituent Assembly, who had written the Constitution in the first

place. Under the terms of the India Independence Act, the power of legislation would reside in the first instance with the Constituent Assemblies of each of the new dominions of India and Pakistan.⁸ Having been elected in 1946 on basis of the Cabinet Mission Plan, the Constituent Assembly assumed legislative powers at independence, sitting as the 'Dominion Parliament' in the mornings and as the Constituent Assembly in the afternoons.⁹ Who better to interpret the Constitution, and amend it when the courts had shown themselves to interpret it incorrectly, than the very people who wrote the Constitution?

The idiom of colonial continuity played a central role in the debates around the amendment. Opponents of the bill argued, of course, that the amendment was a way of protecting the hated 'colonial laws'. But Nehru turned the argument on its head: to be suspicious of giving the government power to enact repressive laws was to be suspicious of democracy itself.

It is only here we seem not to rely on ourselves, not to have faith in ourselves, in our Parliament or our Assemblies, and rely, just as some of us may have relied on external authority like the British power of old days; we rely on some external authority – maybe geographically internal – and not perhaps have faith in this Parliament.¹⁰

It is not the government which displays continuity with the colonial

5. The cases challenging the Press (Emergency Powers) Act were *Amar Nath Bali v. The State* (AIR (38) 1951 Punjab 18), *In re Bharati Press* (AIR (38) 1951 Patna 12), and *Srinivasa v. State of Madras* (AIR (38) 1951 Madras 70). S. 124-A of the Indian Penal Code was challenged in *Tara Singh Gopi Chand v. The State* (AIR (38) 1951 Punjab 27).

6. Indian Press (Emergency Powers) Act (Act XXIII of 1931), amended by the Criminal Law Amendment Act (Act XXIII of 1932).

7. The act also sought to protect *zamindari* abolition and land reform laws, which had been held to conflict with the right to property guaranteed by Art. 31 of the Constitution, and to protect reservations by amending the non-discrimination clause of Art. 15(1).

8. India Independence Act, 1947 (10 & 11 Geo. 6).

9. After the Constitution was adopted on 26 January 1950 and India ceased to be a Dominion, the Constituent Assembly was dissolved, and what had been until then the Dominion Parliament was now known, pending elections under the new Constitution, as the 'Provisional Parliament'.

10. *Parliamentary Debates* vol. XII, pt. 2, 16 May 1951, col. 8825.

regime by trying to preserve laws enacted by the British for the purposes of press censorship. It is the opponents of the government who exemplify this continuity: just as the British did not trust Indians to rule themselves, so too these opponents do not put their trust in Parliament, but in 'external authority', i.e. the courts.

Nehru also used an argument from colonial continuity to impugn the legitimacy of the courts, claiming that the judges who presided in it were wedded to 'old ways of thinking.' The charge was echoed by N.G. Ranga, who worried about being 'condemned' to a situation in which progressive legislation would be held up until the judges of the Supreme Court either died or retired, and 'our government' could replace them with others who were more progressively minded.

Against this, the opposition pointed out that the Supreme Court should not be framed, as Nehru tried to do, as an alien institution (an 'external authority'), one which represented some reactionary element somehow opposed to the spirit of the constitution. As S. P. Mookerjee put it:

Here are a set of men who are selected by the Government. They are not foreigners coming from outside. They are our own chosen selected men holding office during their life, entrusted with the duty of seeing whether the country is being administered in the spirit of the Constitution.¹¹

And so arguments from colonial continuity were used to ingenious effect on both sides of the debate. Nowhere was this more evident than in an exchange between J. B. Kripalani and C. Rajagopalachari. Acharya Kripalani had been the Chairman of the Fundamental Rights Committee in

the Constituent Assembly and now opposed the amendment. One of his criticisms was that the proposed amendments would lead to the penalization of forms of nonviolent protest that had formed the moral basis for the independence movement:

What is not an offence? As a matter of fact, during all our struggle we were preaching against what was considered by the State laws as offences. The whole of our *satyagraha* movement was to break the law, to break such provisions of the law that created offences. Today, if you pass this amendment, even *satyagraha* can come to be legislated against.¹²

Rajaji, like Nehru before him, also turned the argument on its head. His response was that the whole *point* of civil disobedience conceived of as a form of protest was that it should be punished: it was the acceptance of the penalty which gave such protest its moral force. So to the extent that such a form of political agitation was worth preserving, it was important to allow it to be punished. To do otherwise would be like 'trying to learn to ride on a wooden horse. It must be a real horse; it must kick and throw out.'

Given the Congress majority in the house, and the Congress whip, it was a foregone conclusion that the bill would pass, despite the vociferous opposition against it. But my interest is not so much in the merits of the amendment itself, as in the form in which the amendment was debated. Those who attacked restrictions on the freedom of the press did not (by and large) couch their arguments in *institutional* terms having to do with the place of the press in a democracy; nor were their arguments generally couched in terms of free speech as a

basic civil right. Rather, they couched their opposition in terms having to do with the continuity of the new Indian regime with the one it displaced. Independence carried with it the promise of making a clean break with the past in order to ensure freedom and progress. Those who sought to protect or re-enact press laws were criticized on the grounds that they were no different from the British in this respect; that this would be a betrayal of the promise of independence.

But the sophistication of the rhetoric around colonial continuity – as seen in the responses of Nehru and Rajaji – might suggest one way in which such arguments are limited. They can be used for and against the same position, depending on the feature one isolates and identifies as 'colonial'. And deciding whether or not a feature is colonial in the relevant sense is hardly a straightforward thing. As a matter of brute historical fact, one might say that a law or an institution is colonial if it has its genesis in the colonial period. But surely this is much too crude a criterion, for if it were correct, arguments from colonial continuity would be much too general. It is true that s. 377 of the Indian Penal Code is a colonial legacy; but so is s. 300, which criminalizes murder. If we wish to keep one and scrap the other, then being a colonial legacy is not a sufficient condition of being a bad law, one needs something more.¹³

There is a more subtle reason for scepticism about the term 'colonial' as a category of legal and political criticism. This is the one provided

13. Of course, the petitioners in the *Naz* case did in fact make a number of different arguments against s. 377 in addition to the argument from continuity.

Note that there is nothing inconsistent about a completely revolutionary position, where one desires to get rid of *all* colonial legacies whatsoever and rebuild from the ground up. My

11. Ibid., col. 8855.

12. *Parliamentary Debates*, pt 2, v. XII, 30 May 1951, col. 9722.

by S. P. Mookerjee in response to Nehru's charge that the judges who struck down the press censorship laws were somehow alien to the Constitution. For the Supreme Court was after all a *creation* of the Indian Constitution. Judges of the colonial Federal Court became judges of the Supreme Court by virtue of Art. 374, one of the Transitional Provisions of Part XXI of the Constitution.

Another transitional provision, Art. 372, provided that 'all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.' If the Constitution is ours, then, given Art. 372, there is a perfectly legitimate sense in which the laws we inherited are ours as well. This is obviously not to say that they are immune from criticism, but merely to point out that it is not an easy matter to say what counts as colonial in an argument from colonial continuity.

Of course, this is not the only way in which to make sense of the 'colonial' in arguments from colonial continuity. One of the recurring themes in the parliamentary debates on the First Amendment was the fact that the laws which the government sought to protect had been enacted for the purposes of protecting colonial rule from nationalist challenge: they were *instruments* of colonial repression. But the response in defence of these laws was precisely that they were *merely* instruments of such repression. Recall Nehru's defence of press censorship laws: it is not laws but governments that repress, and the government of independent India would simply not

only point here is that if 'colonial continuity' is the instrument of critique, then it applies across the board.

use these laws to repress political dissent in the way the colonial government did.¹⁴ So according to Nehru, the historical association of a law or institution with colonial rule, even with colonial *repression*, does not provide us with a direct argument in favour of doing away with it: again one needs something more.

Finally, one might think that arguments from colonial continuity should be taken seriously because of what such continuity symbolizes: an acceptance of all that was wrong with colonial rule, for instance. In the Constituent Assembly, T.T. Krishnamachari emphasized the symbolic aspect of this debate in his discussion of K.M. Munshi's proposal to delete the word 'sedition' from among the exceptions to the right to freedom of speech. While he was in favour of the amendment, he pointed out:

The value of that amendment happens to be only, to a very large extent, sentimental. The word 'sedition' does not appear therein. Sir, in this country we resent even the mention of the word 'sedition' because all through the long period of our political agitation that word 'sedition' has been used against our leaders, and in the abhorrence of that word we are not by any means unique.¹⁵

While there is certainly something to such symbolic arguments, they too suffer from an important, and more general, limitation. For the symbolic value attached to something depends upon how one feels about that thing in the first place, and what one feels is to some extent a matter of choice and perspective, and to some

14. Here he echoed a point made by many people in the Constituent Assembly Debates around the right to freedom of speech.

15. *Constitutional Assembly Debates*, volume VII, 773.

extent a matter of argument. So for instance, when an independent country adopts a colonial legacy, one might see it symbolic of a colonized mindset that has not been able to shake off colonial rule; but one might equally see it as evidence of tolerance or broad-mindedness or strength. What makes the difference will be the content of what is adopted, not the fact that it has been adopted.

Now of course nothing I have said should be construed as a *defence* of any colonial legacies whatsoever. There are good reasons to do away with many of the laws and institutions that are in fact legacies of colonial rule; and these reasons might have to do with the reasons why that rule was illegitimate to begin with, e.g., that they are in fact repressive or fundamentally anti-democratic in some respect, that they have no place in a country that aspires to some form of social justice, and so forth. My point is that arguments from colonial continuity are only valid when we can articulate the reasons *why* we should do away with these laws and institutions. This is generally not difficult to do, and in practice – as in the *Naz* case – arguments from colonial continuity are supplemented by, or are supplementary to, these substantive first-order arguments as well.

But if we can articulate these substantive first-order arguments in this way, it's unclear what extra work is now being done by calling the impugned laws and institutions 'colonial'. Why point fingers at the origins of such laws and institutions when we can point fingers at their content? Perhaps Ambedkar was correct after all, and there is nothing to be ashamed of in borrowing – though one might add, as he did not, that there may be plenty to be ashamed of in what we have in fact borrowed.