



## THE SHADOW OF THE COLONIAL EMPIRE: COLONIAL LEGALITIES AND THE NEED FOR FURTHER DECOLONIZATION

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### Abstract:

The judicial convention of India, evolving from a lineage of religious prescriptions to constitutional charters traversing common law, is notably considered as one of the hallmarks of independent India's democratic foundation. Vestiges of its colonial legacy, however, continue to restrain India's judiciary from realising its independent dictums in line with the cultural ethos of the nation. Despite their anachronistic and foreign origins (Kanna, 2020), colonial criminal codes in the form of seditious and seditious laws coupled with procedural footprints of linguistic elitism remain persistent throughout the execution of modern jurisprudence.

After attaining freedom from their colonial power, many countries had to undergo reforms and bring change. In our analysis we have closely looked at South Africa and the post-apartheid judicial developments. Meanwhile, Canada, a former British colony uses the proportionality test to determine the validity of colonial laws which enables us to understand how the Indian judiciary is still highly influenced by its colonial legacy. It also emphasizes on the need for reforms and change by examining the exemplary features

of independent and transforming judiciaries of democratic nations.

**Keywords:** Judiciary; Colonialism; Seditious; Blasphemy; Decolonization; Reformation

### Research Questions:

1. What are the remnants of the colonial system that still persist in the Indian judiciary?
2. Is there a need for reform and further decolonization in the Indian legal system and judiciary?

### Hypothesis:

The Indian Judiciary continues to persist within a colonial mind set which necessitates the need for further decolonization.

### Introduction:

*"Colonies do not cease to be colonies because they are independent"*

*~ Benjamin Disraeli, former UK Prime Minister*

As the tricolor unfurls atop the monumental Supreme Court of India, its journey in the past 75 years of independence as an edict of sovereign, democratic ethics has been profound. However, the colonial vestiges of its history remain pertinent, despite their anachronistic origins. With an examination of the judiciary in the colonial period and the contemporary legalities, we substantiate the need for further decolonization to instill democracy at the heart of judicial proceedings.

### Literature Review:

Research on colonial laws and their influence in present times has been done by few



researchers. Through our exploration, we attempted to find the research gap and analyse secondary resources. “At independence, India was seen to be subjected to the rule of law in a modern sense. After all, the British legal system was basically maintained and a new constitution put in place that combined the principles of liberal democracy with socialist aspirations of general equality and welfare” (Dembowski, 200, p.53).

We looked at other countries which had a colonial past and tried to make connections. “The great influence exerted by English law is well-known and understandable in view of South Africa’s colonial history” (DuBois, 2004, p.51). In our findings we saw that much research on the sedition laws of South Africa have not been conducted. Although the work that had been already done in this field helped us establish a base for our exploration but it was wide and lacked specifications. With our analysis we have made an attempt to justify the need to reform with **models** of proportionality as a possible recommendation.

## Chapter: 1

### A History of Indian Judiciary during Colonial Rule:-

The East India Company had over time gained many of the features of a state in India, in European terms. It had the power of waging war, making peace, raising taxes, and administering justice to its own employees. The early Company courts would follow the principle of justice by the executive head with the Governor-in-Council taking decisions of the legal cases of the English subjects.

Bipan Chandra says, “The British laid the foundations of a new system of dispensing justice through a hierarchy of civil and criminal courts. Though given a start by Warren Hastings, the system was established by Cornwallis in 1793.” (Chandra, 2009, p. 113)

The collector was to preside over two types of courts. The first type of court would deal with revenue and civil litigation and was to be called the court of ‘*dewani*’. This was based on Hastings' understandings of Mughal practice. There was a conception that prevailed among the Europeans that although there was “law” in India, that “law” was different from the European kind. The government was seen as based on the will of the Mughal, without any underlying principles. This was seen as problematic and the British believed that this system of Mughal political justice did not depend on the rule of law but on the rule of despotic men, who could be easily guided by money and status.

The British rulers framed a new system of laws which was dependent on enactments and codifying of old laws. N.B. Halhed's "A Code of Gentoo Law" (1776) and H. T. Colebrooke's "The Digest of Hindu Law on Contracts-and Succession" (1798) were early efforts to codify the laws which were concerned with property, inheritance, succession, marriages, and castes. The colonial rulers were dedicated to standardizing these various laws. Macaulay was appointed as the chairperson of the First Law Commission (1834) to achieve the goal of removing the ambiguity in legal practices and to destroy the framework of despotic rule in India. A number of enactments established the colonial "Rule of Law".



The Indian Penal Code (1860) codified laws and pursued to eliminate social inequality. The Codes of Criminal Procedures (1872) settled the collection of evidence and the machinery of proving or disproving facts related to offenses.

The element of pliability and the principle of multiple interpretations were reintroduced in the procedure of the working of the High Courts in India. High Courts were established with the original and appellate jurisdiction in 1861 at Calcutta, Madras, and Bombay and later at Lahore and Allahabad and were fully aware of any earlier judicial decisions.

The colonial state was successful in turning English law into the law of India. They introduced the modern concept of rule of law and the Indian legal system under them was based on the equality before law. Some of the humanitarian measures taken by the British were outlawing the practice of 'Sati' in 1829 by passing regulations prohibiting female infanticide and enabling Hindu widows to remarry in 1856. These were some of the efforts made by the British officials in reforming the Indian society.

However, it is imperative to note that British colonial law systems had a dual nature which prescribed different sets of laws based on categorization of individuals as citizens located within the site of the state, and colonial subjects located within a doctrine of allegiance. Thus, the colonial state, while embracing a moral position based on the Enlightenment ideals of justice and equality for citizens, remained committed to maintaining legal distinctions of subject and citizen between the colonized and the White settler populations.

## Chapter: 2

### Colonial Continuity' in the Realm of Laws:-

Upon the Englishmen's arrival to Indian shores, they discovered a civilization built upon foundational norms of different communities. This reflected the Judicial Plan proposed by Hastings in 1772 which stated that 'Hindus' were subject to the testimonials of the 'Shastra', while 'Mohammedans' were to be adjudged by the laws of the Koran, with an emphasis on the religious interpretation of laws. The Anglicization of laws in the late 18th century deemed oriental practices despotic and led to a formal establishment of British civil and criminal jurisdiction as prescribed by the Charter of 1661. This gradually evolved into an idea of British laws serving as a guide for modernizing India.

A decade after India's independence, the Law Commission of India in its fifth report on the British statutes applicable to India suggested that an Indian legal code be established while keeping necessary provisions from British Law. Although 1200 archaic laws have been abolished, certain anachronistic colonial criminal codes remain largely intact in obsolete manners, as analyzed at this juncture.

- **Sedition Laws:**

Emerging as the Treason Act of 1795 during the reign of King Charles II penalizing acts of war against the King, the sedition law was first introduced in India in 1835 and codified as a criminal offence in 1870. The law, as materialized under Section 124-A in the Indian Penal Code, reads: "Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or



contempt, or excites or attempts to excite disaffection towards the Government established by law in [India], shall be punished with [imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.”

The continuation of the colonial heritage of sedition has been widely condemned due to its motive of origin as a tool for the British to silence nationalist aspirations. The most notorious usage of the law in history has been the conviction of Bal Gangadhar Tilak in 1897 for making a statement regarding the killing of Deccan chieftain Afzal Khan by the Maratha warrior-king Shivaji. In its adjudication, the court widened the interpretation of sedition by equating “disaffection” to “disloyalty,” and including within it hostility, contempt, and every form of ill-will towards the government. Another landmark sedition case was the conviction of Mahatma Gandhi for his publication of the Young India Magazine, who famously stated during his trial: “Section 124-A... perhaps the prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen.”

While former colonies have frequently cited the need for sedition to preserve public order and communitarian values, it is imperative to note that while other former-colonies like Australia and the United States have either abolished, restricted or modernized the constituent workings of the law, India continues to be the only nation which uses the same definition of sedition as prescribed by the British regime in 1870.

Several notable citizen-rights groups and Supreme Court advocates have vociferously called for an overhauling and comprehensive

review of such draconian colonial laws, which have been weaponized to target political dissidents and ethnic-religious minorities. Such a discriminatory application of the law finds no place in the ethics of the world’s largest democracy and requires substantive reformation, which we explore in our next sections.

- **Judge Centric Death Penalty:**

Another colonial legacy of the Indian Code of Criminal Procedure pertains to the notion of Capital Punishment introduced in 1860, with contemporary courts continuing to uphold its constitutionality while abiding by a ‘rarest of rare cases’ principle. The general ambivalence surrounding the dictum has meant that individual judges must determine whether to impose a death sentence on a case-to-case basis. While statistically the number of death penalty convictions has significantly reduced since the time of Independence, the larger question concerning its constitutionality in a democratic setup remains debatable in contemporary India.

Especially, as we acknowledge the weaponization of the law by colonial rulers to impose their hegemonic rule, it remains in stark contrast to the actualization of human rights. Several UN resolutions have stated that such death penalties ‘undermine human dignity’. Furthermore, scholars and adjudicators have also commented on the counter-productive nature of death penalties, whereby executing terrorists can brand them as ‘martyrs’ and incite further violence, a line of reasoning adopted by several nations while repealing capital punishment laws. An empirical study has revealed that: “out of around 385 existing prisoners sentenced to death for terror offences, 93.5 per cent belong to Dalit and religious minority communities



with an overall predominance of people from lower castes and religious-minority communities. They also have very low levels of education – 24 per cent of them have never stepped into school and belong to the most marginalized sections of society.”(Muni, 2016). This highlights the marginalized focus of death laws and the need for their reformation.

- **Blasphemy and the broader realm of Obscenity:**

The penalization of acts considered ‘obscene’ under sections 294 - 296 in the Indian Penal Code is another reflection of the colonial vestiges of legality palpable in contemporary judicial practices. The defining characteristic of ‘obscene’ pertains to lascivious words or acts appealing to prurient interests or tending to deprave or corrupt individuals encountering such deeds.

Debates in contemporary times have centrally focused upon the ambit of the term ‘lascivious’, with the Supreme Court utilizing several testing mechanisms, including the contemporary standards tests. However, the ambiguity surrounding the metric of ‘obscenity’ has been a contentious issue with regard to judicial rulings.

Section 294 in particular, set as a provision for obscene acts in public, was entirely characterized by British perceptions of Victorian values. As Michael Foucault listed in his book *The History of Sexuality*, “The term sexuality and obscenity were mere inventions of Victorian culture”. He states, “If sex is repressed, that is, condemned to prohibition, nonexistence, and silence, then the mere fact that one is speaking about it has the appearance of a deliberate transgression”. As a matter of fact, the ancient oriental culture on obscenity or sexuality had been

more liberating and the Khajuraho monument built by the Chandella Dynasty or the Sanskrit work “*Kama Sutra*” are living symbols that even stand today as witnesses to the sexual freedom which existed in the sub-continent long before Western influence.

The colonial origins of the Blasphemy law meanwhile dates back to 1920 during the religious uprising in Punjab owing to protests by the Islam community against a publication about Prophet Mohammed in the ‘*Rangeela Rasool*’. It led to the addition of the Section 295-A clause ostensibly to safeguard the sentiments of religious communities. While members of the drafting committee had raised their fears regarding its misuse to silence religious critiques, the law continues to prevail in contemporary jurisprudence with several controversial cases such as the lawsuit against Wendy Doniger’s book on Hindu culture raising condemnation for the curtailment of freedom of speech. Vague standards of application as in the *Devidas Ramachandra Tuljapurkar v State of Maharashtra* highlight its potential for degrading the democratic values of a nation.

- **Personal Laws:**

While several Western-inspired legal codes were implemented, the British sought to maintain the indigenous family laws dictated by religious prescriptions to serve the colonial ruler’s policy of neutrality, while effectuating the strategy of communal ‘divide and rule’. While originally the objective was for custom to prevail in case of conflicts between a community’s customs and personal laws, gradually the English adopted a ‘quest for legal uniformity’ which gave prevalence to rigid one-rule-system prescribed by religious dictums rather than adhering to a plurality of customs. Overtime,



as Western administration increasingly sought to reform and interpret laws to suit their administrative convenience, marginalized communities and women faced increasing difficulty in terms of gaining legal recognition for cultural practices related to property inheritance, among other issues.

The colonial policy of non-interference, which has continued in the post-colonial realm of jurisprudence with the codification of Hindu personal laws by a 'progressive minority' while non-interfering with the personal laws of other religions, has led to a wide disparity. Controversial judgments in terms of the 1984 Shah Bano case and the passing of the Muslim Women (Protection of Rights on Divorce) Bill have been deemed as 'unnecessary appeasement' of minority communities. The enactment of the landmark Muslim Women (Protection of Rights on Marriage) Act in 2019 has been widely hailed as a step towards ensuring gender equality and usher progressiveness in the realm of laws. However, colonial vestiges continue to linger.

### Chapter: 3

#### Colonial Practices in Contemporary Courtrooms:-

While furthering the cause for decolonization of the Indian jurisprudence necessitates reformation in the realm of legality, certain obsolete colonial practices of the linguistic elitism of courtroom languages or administrative sluggishness remain omnipotent.

Perhaps the harshest critique of the colonial presence in contemporary jurisprudence remains the work of renowned legal scholar Upendra Baxi, who in his book titled 'The Crisis of Indian Legal System' traces the

colonial roots of the Indian judiciary. He noted that "in so many of its normative, institutional and cultural aspects, the Indian legal system remains burdened with its colonial past". Some of the persistent colonial features of the system he highlighted were its non-participatory, top-down model of law making, with limited access of the Indian people to legal information, legal services and the overall courts. Baxi argued that "in such a situation, one should have no hesitation even in characterizing the entire legal system as colonial".

The persisting colonial traditions have been debated in contemporary times with regards to the official dress robes of judges - officiated when the Inns of Court were mourning Queen Mary's demise - which are highly unsuitable for weather conditions in India. Antiquated manners of courtroom etiquette also persist in the present framework such as addressing judges as "My Lord" or "Your Lordship" which are far-removed from the notions of equality and need to be dispensed with, a step undertaken by the Rajasthan High Court in 2019.

The perseverance of linguistic elitism in modern courtrooms extends beyond cordialities. According to Article 348(1) of the Indian Constitution, the proceedings of the Supreme Court and High Courts are required to be conducted in English. While Article 348(2) permits proceedings in High Courts in other languages with the consent of the President of India, the appeals of state governments of Chhattisgarh, Gujarat, Tamil Nadu and Kerala to permit the use of regional languages in their respective high courts was denied. The prominence generated to the Queen's English in the practical context of India where surveys reveal that a mere 10-15% of the population are fluent in English is



an exemplar of the hindrance to Indian people while accessing legal information. In 2019, as the Supreme Court undertook the task of translating 100 important judgments into regional languages to promote accessibility, it inched courtroom proceedings a step closer towards decolonization and democratization.

However, several internal manifestations of the Indian court system are reminiscent of a colonial psyche. The process of administering justice under colonial rule was founded upon Thomas Hobbes' philosophy of sovereign absolutism which conditioned the protection of its subjects to the surrendering of rights, where "justice could not be demanded, but allowed by the state as a matter of concession". This lies in stark contrast to the ancient Indian concept of inbuilt justice, where justice could be demanded by anyone. The reality as reflected today reveals how the ordinary litigant is often unable to bear the expenses of pursuing legal actions in distant high courts. Moreover, according to reports from the National Judicial Data Grid and the Supreme Court, at present there are 3.9 crore cases pending in district and subordinate courts, 58.5 lakh cases in high courts and 69,000 cases in the Supreme Court. The mounting backlog of cases and overall administrative disorganization are highly reminiscent of the Privy Councils of yore.

#### Chapter: 4

##### **Contrarian Nature of Colonial Laws in the Realm of Democracy:-**

The key elements of democracy recognized across nations prescribe citizen involvement in political decision-making; some degree of equality among citizens; some degree of freedom to citizens (speech, press, religion); a system of representation; and an electoral

system of majority rule. This is further embedded within the structures of constitutionalism and civil society.

Sedition law is a colonial legacy that has no place in a modern democratic state like India because it assumes public support for the state as a normal order and expects citizens to display no opposition towards the government established by law. The need for revoking the sedition law lies entrenched in the impact of India's sedition statute on citizens' freedom to freely express themselves, constructively critique or express discontent against their government due to the subsequent criminalization of "disaffection with the state". These regulations are unmistakable colonial relics, having their origins in the colonial government's harsh repression of nationalists fighting for Indian independence.

Colonial continuities are used to criticize modern laws and institutions that are contrarian to the democratic nature of our country or can be used to suppress dissent in a democracy. A law or institution which was inherited from the colonial period naturally gains a reason to be abolished or undergo a change in its nature. One of the arguments against section 377 of the Indian Penal Code (which criminalizes sexual practices that are "against the order of nature") had been that it was a residue of the colonial order.

#### Chapter: 5

##### **Judicial Decolonization in Democracies Around the World:-**

- **Republic of South Africa:**

After gaining freedom from colonial rule, several countries had to undergo reform, one of which is the nation of South Africa. The preamble of the constitution states that the



people of South Africa recognize the injustice of the past and aim to lay foundations for a democratic society. Thus, the judiciary has the crucial role of interpreting the Constitution as well as protecting the values which had the motive of laying down the structure for transforming the country. The transformation of the South African judiciary has occurred relatively quickly during the last decades. Race and gender diversity have been incorporated and judges have established themselves to be committed to promoting constitutional provisions.

There still exist major challenges to the transformation of the judiciary. Some of them include inadequate representation from all sectors of the country, obstacles in accessing the justice system, absence of efficiency, poor court management. These factors have led to the belief that the justice system of South Africa still reflects the country's colonial and apartheid legacy and has not been able to culturally find its belongingness to all South Africans.

#### **Legal system:**

The duality of colonial society itself - Dutch along with the English - acted as a manifestation of locally applying the significant bodies of principles. South African law took its form over a stretch of 80 years. In the due course the country saw the duality of the colonial rule (English and Dutch) which gave birth to the racial hierarchy known as apartheid. This apartheid was then replaced by a constitutional order based on democratic principles, the rule of law and equality.

According to Francis de Bou "The principles and institutions of contemporary South African law are strikingly diverse in origin,

containing not only laws with African and European roots, but also (within the latter category) elements of both the civil law and the common law traditions."

He further says that parts of the law are in a hybrid form because of the friction created by the varied heritage that has created a mixed legal system. From a cultural outlook this legal system lies in the 'shadow of colonization, Anglicization and globalization'. The population of South Africa mainly consists of indigenous people, but the structure of principles of law and basic institutions are of Anglo-European origin and have gained increasing influence from North America as well as other commonwealth nations. English finds its place as the dominant language in the field of legal education, the Courts and legal practice, and even the sources of law.

With the beginning of democracy in South Africa (1994), the death penalty was abolished on 6 June 1995 by the Constitutional Court. The ruling of the court established that capital punishment, under the then Criminal Procedure Act, was in conflict with the country's 1994 constitution.

The crimes related to sedition exist as common law in the country. According to Article 19 Global Campaign for Free Expression (London; July 2003) "Under the modern post-apartheid Constitution, section 16 of which explicitly guarantees freedom of expression and the press, the courts have articulated a robust defense of freedom of expression, especially in the political realm."

- **Barbados:**

On another spectrum of the geographical order, the Caribbean Court of Justice granted the landmark decision of overturning the



death penalty in Barbados in 2018, which they believed to be a colonial holdover. The Court's mandate came in light of its resolution to "ensure that the laws conform to the supreme law of the Constitution and are not calcified to reflect the colonial times".

- **Canada:**

Several former colonized states have further resorted to a means-end proportionality test to "consider a law's colonial origins as a factor weighing in favor of its invalidation" (Kanna, 2020). In light of this, we analyze the case of sequential proportionality in Canada, where the court considers the constitutionality of a rights-limiting law with the burden of proof lying on the government to attest to the importance of the concerned law, the formulated means to implement the law and finally the rational connection between the law and its stated objective. With the fundamental objective of comprehending the rationality behind limiting freedoms, the Canadian model serves an instructive for former colonial nations.

In particular, as we examine the non-sequential manner of proportionality adopted in India where courts sporadically refer to sequential standards within the ambit of judicial reviews, the lack of coherent standards has led to a wide disparity between judicial dictums. The lack of a consistent approach has "led to ad-hocism in the Court's rights adjudication, giving rise to legal uncertainty and lack of accountability for judicial decisions" (Chandra, 2020). In the *Puttaswamy (I) v Union of India* case of 2017 regarding the Right to Privacy, the court placed minimal evidential burdens on the State, with differing substantive standards of scrutiny within and across cases. The need of the hour is therefore the development of a

structured mechanism of proportionality to "bridge the gap between cultures of authority and cultures of justification" (Chandra, 2020).

### **Conclusion: Need for Reformation and Decolonization of the Indian Judiciary**

The criminal justice system in India is a remnant of the British colonial jurisprudence and the need for reform has been acknowledged. As stated by Gandhi in his Hind Swaraj:

"Lawyers have enslaved India, have accentuated Hindu-Mahomedan dissensions and have confirmed English authority".

This is reflective of the colonial power's effort to control the native population and maximize exploitative profits. The vestiges of colonial systems after formal decolonization continue habituating under the guise of neocolonial alternatives of western universal and economic rights.

As mentioned at the beginning of the paper the codification of criminal laws in India was done during British rule and not much change has been brought to it. This reflects that serious reforms and activeness are required. The sedition law in particular has come under widespread condemnation by civilians and the apex court alike, which recently issued a notice to the Centre asking, "Is this law still needed after 75 years of Independence?" Former Supreme Court judge Justice Deepak Gupta has also opined on the misuse of the law by contemporary governments, while highlighting on the need for reforming the same which accords extensive interpretation to the term 'offence' by way of not solely explicit disturbance, but also 'bad feelings'. Other legislations such as the death penalty have also warranted reformations as



elaborated by the 2015 Law Commission of India Report, which demonstrated that: the penalty does not serve the goal of deterrence, that it diverts attention from the ailing criminal system and that it is applied arbitrarily and disproportionately on the most vulnerable members of society.

In July of 2020, the Ministry of Home Affairs (MHA) constituted a committee for reforms in criminal laws to undo its colonial foundations. As stated by Prof. Sri Krishna Deva Rao, Chairperson of the Committee for Reforms in Criminal Laws: “The hallmark of any civilized society lay in the maturity and the erudition of its Criminal Justice System. Criminal Law like every other law has to meet the pace at which society is evolving.”

Thus, the focus is being brought to reformative justice and it is important to acknowledge that decolonization is a continuous process.

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