

REDUNDANT COLONIAL-ERA LAWS AND THEIR IMPACT ON THE INDIAN LEGAL SYSTEM

Tanishi Ahuja*

ABSTRACT

India was a European Colony for more than 200 years and during that time the Indian culture and society intrinsically inherited a British perspective which is still being carried on as a legacy even after 75 years of independence. This calls for a revisit and rethinking of many laws of the Indian Constitution which still carry an English backbone and their arbitrary ways. India, today stands as the world's greatest democracy and has carved its own path, thus, these developments need an equally competent legal system to carry the "Indian vision" forward. Hence, this article discusses such laws, their history, and their overall impact in the current context as well as their drawbacks throughout the times. The paper concludes by expressing the dire need of setting these rights.

Keywords: European colony, British perspective, revisit, legal system, Indian vision

INTRODUCTION

The native must realize that colonialism never gives anything away for nothing.

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- Frantz Fanon

Colonialism is India's past and has deep influence on every socio-political and economic aspect of the country to date. The primary aim of colonialism as very well-known was to make economic gains for the British Empire and India was very valuable in doing the same as it accounted for half of the British Empire's gross domestic product (GDP) in 1870.¹ Other motivations included exploitation of raw materials, captive markets and to earn prestige within other European countries. The European colonisers often used laws in captured territories to impose the accepted cultural norms back in their own countries. Hence, in order to achieve self-centered motives and to establish Western supremacy, the East India Company introduced various legal codes concerning administration to aid them in fostering control over a diverse land with a humungous variety of cultures. These laws were used as

¹World101, <https://world101.cfr.org/historical-context/prelude-global-era/what-colonialism-and-how-did-it-arise> (last visited May 8, 2023)

instruments of repression to silence any voices of dissent and to instill the feeling of subordination in relation to India's own culture. A few examples include The Sedition Act, The Armed Forces (Special Powers) Act, the Official Secrets Act of 1923, Section 377 modeled on the Buggery Act of 1533, etc. Though these laws have been modified and amended they still find a place in independent India and their impression is omnipresent. Thus, we need to realize the urgency of understanding the deeper impact of these laws, and their origin and not let them linger in their shadows over the country that aspires to be the world's greatest democracy wherein the statutes are implemented by the people, **by** the people and **for** the people rather than to supplement the arbitrary rule of the government. We need to realize that this is high time for our judicial system to move past our colonial legacy and let the country and its citizens be what they fought for in essence truly "FREE."

WHAT ARE LAWS?

Laws are basic principles and regulations established in a community by some authority that are applicable to its people, whether in the form of legislation or of custom and policies recognized and enforced by judicial decisions.² Commonly laws provide a framework for resolving conflicts between individuals and groups in society. They are designed to ensure that people are treated fairly. They establish a system of governance that helps to ensure stability in the society.

LEGAL SYSTEM IN INDIA BEFORE THE BRITISH

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Before the advent of colonialisation, the legal system in India found its basis in religious prescriptions. "India has a recorded legal history starting from the Vedic ages and some sort of civil law system may have been in place during the Bronze Age and the Indus Valley civilization."³ Law has been discussed with a philosophical and moralistic approach throughout the country yet the system stood out to be secular in nature which shows the equitable approach of the Indian legal system since ancient times. Though it was dispersed regions and ruler-wise the underlying idea remained ubiquitous.

²Dictionary.com, <https://www.dictionary.com/browse/law#:~:text=A%20law%20is%20a%20rule,are%20laws%20about%20not%20stealing>. (last visited May 8, 2023)

³Shivaji College, <https://www.shivajicollege.ac.in/sPanel/uploads/econtent/14511fe1ece1bc018c0ce62d1a79394d.pdf> (last visited May 8, 2023)

THE BEGINNING OF THE COLONIAL LEGAL SYSTEM IN INDIA: CODIFICATION

Once the British officially acquired the Diwani of Bengal, the need to form a formal legal code to administer the land as per their priorities was felt. This began the process of codification in the newly recognised territory of the British. “Warren Hastings⁴, who had a successful career in India as a commercial and diplomatic agent for the East India Company, was appointed in 1772, under a new parliamentary act, to the newly created position of the governor-general and was instructed by the Court of Directors to place the governance of the Bengal territories on a stable footing.” This implied the beginning of the involvement of the British parliament in the governance of the country and thus as per the orders Hastings began the process. Initially, he began the process by studying the earlier existing legal system and order in the land but soon it was well understood that the job was much more than simply creating the laws, these were to fit the English ideas and reinforce their beliefs. He had to produce a system that the superior British officials could use and operate and well, it marked the beginning of compromising our own ideas to adjust to the British. Since, the British rule expanded exponentially in the next few years and the territory was now much more widespread thus a uniform and inclusive legal system was required so Thomas Macaulay took the much-dreaded step and introduced English Law in India, first with the Indian Penal Code, drafted in the 1830s and adopted in 1872, and many more Codes followed by it, and all the efforts of the Orientalists (The Orientalist approach to governing was focused on disrupting the Indian way of life as little as possible to minimize reasons for revolt and discontent among the indigenous population.) resulted in was an absolute restructuring of the traditional and scattered legal system of India.⁵ Later in 1864 when the British thought that they had sufficient control over the natives, they abolished the practice of hiring pandits and maulvis in the courts. Under Macaulay, the India Penal Code was implemented and it stressed creating a class of Indians English in taste and opinion. Thus, all the efforts to preserve Indian law were undone and a systematic implementation of English law had officially started.

⁴Bernard S. Cohn, *History and Power in the Study of Law* 134 (Cornell University Press 1989)

⁵Sanjay, *The Beginning of Colonial Legal System in India: Codification*, Legal Service India (May 9,2023) <https://www.legalserviceindia.com/legal/article-1257-the-beginning-of-colonial-legal-system-in-india-codification.html>

BRITISH-ERA LAWS STILL IN PRACTICE AND THEIR CUMULATIVE EFFECT:

INDIAN PENAL CODE,1860: It is the criminal code of India. It is the fundamental criminal code that covers all the aspects of criminal law. This code had its origin primarily in English law but it was also based on some elements of the Napoleonic Code and Louisiana Civil Code of 1825. “Though, it did not apply to the princely states as they had their legal system.”⁶ Post-independence, India carried forward the code with minor changes and continued the process of justice on the same lines as the Britishers. Though the act has been amended several times yet not enough to stand the test of time.

VARIOUS SECTIONS OF IPC AND THEIR DRAWBACKS

SECTION 124A—“Drafted by British historian-politician Thomas Babington Macaulay in 1837, sedition was defined as an act by ‘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.’⁷ It is a non-bailable offense, punishable with imprisonment for three years.” Bal Gangadhar Tilak was the first person to be convicted due to his articles in the newspapers. In the next few years, Mahatma Gandhi was convicted and jailed under the law for writings in Young India. In court, he referred to Section 124A as “prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen”.⁸ Though this charge was abolished by the United Kingdom in 2010 yet its legacy continues in our country. For years, governments have used the colonial law, basically section 124A of the Indian Penal Code - against students, intellectuals, journalists and all those who critique the government to essentially suppress dissent and free speech. It has now been weaponised as a tool of suppression by successive democratically elected governments. There have been Six sedition cases during the farm protests; 25 during anti-CAA protests; 22 after the Hathras gangrape; 27 after Pulwama: Our study of sedition cases over the last decade reveals a 28% rise in such cases—in violation of Supreme Court guidelines—especially against critics and

⁶Pooja Arora, Need for revamping the Indian Penal Code, iPleaders Blog, (May 9,2023)

<https://blog.ipleaders.in/need-revamping-indian-penal-code/>

⁷Suchitra Karthikeyan, Explained | India’s sedition law, its usage, and the opinions | around it, The Hindu (May 9,2023)<https://www.thehindu.com/news/national/explained-indias-colonial-sedition-law-origins-govt-abuse-courts-take-on-it/article65375097.ece#:~:text=The%20Sedition%20charge%2C%20which%20was,of%20prominent%20Indian%20freedom%20fighters.>

⁸Sukriti Dwivedi, India’s Controversial Sedition Law Explained In 5 Points, NDTV (May 9,2023)<https://www.ndtv.com/india-news/indias-controversial-sedition-law-explained-in-5-points-2961509>

protesters since 2014⁹. Though there is barely a 2% conviction rate due to its nature of being a non-bailable crime and long time periods of hearing make it a tool to persecute political opposition which is futile in a country that has always stood for freedom of speech and expression.

SECTION 375-“As per this section, a man is said to have committed `rape' when he has had sexual intercourse with a woman under these conditions: a) Against her will. b) With her consent when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or hurt. c) With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. d) With her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication on the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature of the consequences of that of which she gives consent. e) With or without her consent, when she is under 16 years of age.” Various shortcomings in reference to this section include no gender-neutral definition of rape. It does not include men, transgenders, and boys as victims of rape and thus, they find themselves helpless. An exception to this section is marital rape, a man is given immunity from the crime of rape if he is the husband of the victim and she is above 15 years of age. This exception highlights the patriarchal undertones to the section and deems a woman, the property of her husband post-marriage. While marital rape is a crime in Britain and those proven guilty may get a life sentence, India still struggles to criminalise it while it remains a clear violation of both dignity and fundamental rights.

SECTION 294A- It lays down the punishment for using obscene words, songs or acts in public, which causes public annoyance. To fall within the scope of obscene it must be done in a public place and should cause annoyance to the public. Now, the issue arises in reference to the public display of affection. What may be obscene for one person may not be for another and thus, this law is often used to appropriate younger generations and leads to unnecessary policing. Though Khajuraho and Konark Temple which are a significant part of Indian heritage have erotic structures expressing love and affection yet due to orthodox attitudes and lack of initiative to change, it remains a controversial issue.

⁹Kunal Purohit, Our New Database Reveals Rise In Sedition Cases In The Modi Era, Article 14 (May 9,2023) <https://www.article-14.com/post/our-new-database-reveals-rise-in-sedition-cases-in-the-modi-era>

OFFICIAL SECRETS ACT,1923- It was launched by Lord Curzon in 1904 with strict measures targeting the Indian press and which was widely spreading the dark reality of British rule. “This law makes spying, sharing ‘secret’ information, unauthorised use of uniforms, withholding information, and interference with the armed forces in prohibited/restricted areas, among others, punishable offenses. If guilty, a person may get up to 14 years imprisonment, a fine, or both.” However, just like in the British era, it comes into the picture for booking journalists when they publish information that may cause embarrassment to the government hence ultimately it systematically attacks the freedom of speech and expression who have different views than the ruling government.

CONCLUSION

Before 2018, Section 377 of IPC brought by the British, based on the Buggery Act, criminalised homosexuality and set a narrow-minded narrative for generations to come and so do the above-mentioned laws and acts. British-era rules influence our governance till date, even the khaki uniform worn by Indian police forces was founded by Sir Harry Bernet. The colonial mindset left behind by British Imperial rule is also apparent from the way pleadings are drafted in Court, the way in which the Court is addressed, and, most importantly, accessibility to the Court itself.¹⁰ Justice is not a right yet but is *prayed for* in humble terms. Judges continue to be addressed as **Lordships** and **Ladyships**. It is a luxury for the complainant to bear the exorbitant costs of pursuing the case in distant Higher Courts, as was the case with the Privy Council during British colonial rule. Indeed, British laws provided the machinery to the Indian government so that it could carry the newly independent nation and suit it according to its needs but some of these laws need to be revisited to fit the needs of today’s India. The context in which they were set is drastically different from today’s. In British-era the laws were to control the “subjects” while today they are for the “citizens” of the highest growing economy. And as it is said that the **“Price of liberty is eternal vigilance”** but it's worth it.

¹⁰Meera Emmanuel, Independence Day: The lingering effects of the British Colonial Rule on the Indian Legal System, Bar and Bench (May 9,2023)
<https://www.barandbench.com/columns/independence-day-special-legal-system-british-colonial-rule-in-india>