

# Introduction

## *Postcolonial Legalism*

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**W**hat is the significance of the prefix “post” in the term “postcolonial”? A minimal definition might go something like this: it is that which is temporally after the colonial but which nonetheless incorporates much of the colonial within it. But this definition would not get us very far in identifying or explaining the specific elements of the colonial that remain bound or contained, whether explicitly or otherwise, within the specific forms of the postcolonial in particular countries that were once under colonial rule. It is even less adequate in identifying or explaining those elements in particular arenas or institutions of postcolonial life. There is no general principle or set of criteria that can lead us to the elements of the colonial ensconced within such diverse fields as the postcolonial state, literature, architecture, science, or anything else. At least at our present state of knowledge, we have to find those principles and criteria for each postcolonial country and each specific institutional site of postcolonial practice.

The essays in this special section explore the specific field of postcolonial practices of the law in four countries: India, Sri Lanka, Lebanon, and South Africa. The chronology of the postcolonial transition varies in each case. India became independent from British rule in 1947 but proclaimed its republican constitution in 1950. Sri Lanka became a dominion with a constitution drafted by a British commission in 1948 and declared itself a republic in 1972. The Ottoman province of Lebanon became a French mandate in 1920. France proclaimed a Lebanese republic with a democratic constitution in 1926. Lebanon became independent in 1943 when the country was occupied by British troops and the Free French government in exile recognized the country’s independence. South Africa, with a long history of Dutch and British colonial rule, became a British dominion in 1910, independent from Britain in 1931, and a white-settler republic in 1948. Following the end of apartheid, it held its first universal elections in 1994 and promulgated a new constitution in 1996. The practices of the law, or legalism, in the four countries have interesting similarities as well as marked differences. Together, we hope to show, they describe a wide but intelligible range of possibilities within the phenomenon of postcolonial legalism.

### **Constitutionalism and Social Transformation**

The key concern in all discussions of the legal-constitutional framework of postcolonial politics is the question of social (including economic) transformation. Whatever the form of the transition from colonial rule—whether a peaceful handover of power or an armed liberation war—the new postcolonial regime almost everywhere was confronted with the pressing necessity of transforming, whether gradu-

ally or radically, the inherited institutions of colonial society. The legal-constitutional question concerned the extent to which a set of precommitted foundational laws should bind the transformative acts of the new regime. In some ways, the problem posed by postcolonial constitutions was novel. Unlike the classical examples of the United States or France, or of many countries of Europe following their nineteenth-century democratic revolutions, the postcolonial constitution could not easily be conceived of as a new compact congealing and stabilizing the results of a revolution that had been completed. In many ways, the real revolution of transforming colonial society was only being inaugurated by the postcolonial transition. What should be the appropriate constitutional form of such a transformative political order?

The first two essays in this symposium discuss this question in relation to the constitutional histories of India and Sri Lanka. Sandipto Dasgupta recounts the dilemma confronting the constitution makers of India. The political movement for independence had committed them to an agenda of transformation in the economic and social spheres. They were aware of the pressing contingency of the postcolonial moment in which social change was necessary not so much to jettison but in fact to preserve the structures of government that had been inherited from the colonial order. How were the two contradictory impulses to be reconciled within the body of the constitution? The solution, says Dasgupta, reflected a mixed strategy. On the one hand, compared to the model liberal constitutions of the West, the Indian constitution weakened some of the fundamental precommitments by placing limits to certain individual rights, especially in relation to the right of property. This was seen to be vital if a restructuring of agrarian property was to be carried out. On the other hand, by retaining substantial parts of the colonial constitutional order premised on centralized executive authority, it sought to preserve the administrative coherence and discretionary jurisdiction of the colonial governmental formation. As a result, while the discretionary powers and limits on rights did enable the legislative and executive branches of government to carry out some far-reaching economic and social changes, an emphasis on legalism and procedural propriety, enforced in particular by the courts,

served in the early decades of the republic as the means to contain the transformative impulse.

The history of constitutionalism in Sri Lanka, as Thushara Hewage shows, reflects a different strategic choice. It is too simplistic, he says, to portray the transition from the Independence constitution of 1948, dictated by the departing British, to the Republican constitution of 1972 and on to the Jayawardene constitution of 1978 (which brought in the executive presidency) as the descent of a model secular postcolony into a pathological state of tyranny of the ethnic majority. The problem has to be seen as belonging to a particular political rationality that inheres in all postcolonial democracies, namely, the urge to tackle “the social question” by means of the transformative powers of the state. Following the Janatha Vimukthi Peramuna (JVP)–led student insurgency of 1971, the victorious Sri Lanka Freedom Party and its alliance partners began in 1972 the process of resorting to the emergency provisions of the new constitution to deal with everything from food distribution to land regulation to labor laws and numerous other social issues. It led to what has been called having a “constitution without constitutionalism.” There developed a broad political consensus that legal procedures were an unacceptable fetter inherited from colonial times that prevented appropriate legislative and executive action to transform society. All major political parties subscribed to this view, even as its most articulate and sophisticated defense was provided by the ideologues of the Trotskyist Lanka Sama Samaj Party. The most telling legal-constitutional instrument was the elimination of all powers of judicial review of legislative or executive action. When justiciable fundamental rights were brought back in 1978 by what is often referred to as the neoliberal regime of J. R. Jayawardene, they were redefined not as negative individual rights against the state but as the positive democratic guarantee of popular demands. This exemplified what Hewage describes as the political rationality inherent in postcolonial democracy to address the social question by means of political action. The civil war, militarization of the state, and the current situation of the untrammled authoritarian dominance of the ethnic majority are made intelligible and justified by the same rationality.

### Legalism as a Field of Practice

But to limit the question of postcolonial legalism to the above is to look at only one side of the matter. The question is not merely what the organs of the state can or cannot do. There is the other aspect where the provisions of the law and their normative grounding in a legal discourse open up an entire field of practices where individual citizens, groups, organizations, and associations of civil society find various legal means to pursue their interests and defend their rights.

Rohit De looks at the early years of the Indian republic and finds that despite the well-known continuities with the colonial legal order, the provision in the new constitution of enforceable fundamental rights produced a plethora of new and innovative practices among lawyers and litigants to defend individual rights against the state. Nothing like this was possible under the colonial order. It also brought forth a range of responses from judges and administrators who often tried to make sense of the new field of legalism in the inherited language of colonial law but soon gave up. Postcolonial legalism took on a life of its own. De looks in particular at the new jurisdiction of the higher courts to accept writ petitions from individuals or organizations to seek protection against alleged violations by government of their fundamental rights. The curious fact is that the various writs are devices of English common law that were rarely used in British Indian courts: the legal order then was premised on what was essentially the despotic authority of the colonial administration. From 1950, writ petitions in the Supreme Court and the various High Courts increased exponentially. De's account shows in rich detail how the discourse of English common law, and with it the huge corpus of US constitutional law, became available in independent India to be mined by lawyers and judges in order to find appropriate legal arguments both to justify administrative initiative and to defend individual rights.

Maya Mikdashi's essay deals with a similar field of the strategic practices of law in Lebanon. The 1926 constitution had divided up Lebanese citizens into eighteen religious sects with fifteen sets of personal laws applicable to them. There was a separate court for each sect to deal with legal is-

sues of personal status such as marriage, divorce, inheritance, or adoption. Mikdashi describes a range of legal practices by which individuals in Lebanon today seek a change of sex in the census register or strategically convert to another religion. The motivations can vary. In the first case, it could be an attempt to officially record a socially recognized gender identity. In the second, it could be to take advantage of a provision of a personal status law different from one's own. The result is a field of legalism in which the rigid and apparently closed classifications of a colonially ordained sectarian division of society are breached and destabilized through innovative legal strategies. Curiously, when in response to a demand for nonsectarian and secular personal status laws it became possible in 2009 to strike out one's sectarian identity in the census register, those choosing to do so have to take recourse to religious authorities to certify that they qualify for one or the other sectarian personal laws for purposes of marriage, divorce, or inheritance. Instead of expanding the range of individual freedom, the move to secularize the law has paradoxically increased the jurisdiction of religious authorities.

The apartheid regime of South Africa is admittedly an extreme case in which to raise the question of postcolonial legalism. But Suren Pillay shows in his essay that the attempt in the 1970s to develop an internal critique of the apartheid legal order in terms of its lineage with the Anglo-Dutch tradition of law led to a series of courtroom resistances to apartheid. The attempt was to criticize the narrow legal positivism of nineteenth-century English jurisprudence, to appeal to an implicit norm of human rights that gave credibility to the larger Western legal tradition, and to point to its violation in the administrative acts of the apartheid regime. Pillay describes in particular the activities of the Black Sash group of white women legal volunteers who challenged in court the orders relating to the residency laws of racial segregation. He notes, of course, that the attempt was ultimately admitted to be a failure because only a very small proportion of actual violations could be adequately challenged by legal means. But the implications of the internal legal critique were significant. They laid the foundation of a human rights

critique of apartheid that led directly to the Truth and Reconciliation Commission, which was able to find only a very small number of legally identifiable victims of apartheid.

Returning to India, Anuj Bhunia in his essay deals with a somewhat unique development in the field of postcolonial legalism. This is the peculiar jurisdiction, developed since the late 1970s, called Public Interest Litigation (PIL) in which the Indian judiciary, now possibly the most powerful in the world, has taken upon itself the task of accepting petitions on behalf of citizens and issuing orders to government to provide remedies. Bhunia shows that the discourse here is one of substantive rather than procedural justice and the appeal from the courts is directly to “the people.” Indeed, in the early days of PIL, its proponents within the judiciary severely criticized the colonial legacy of procedural formality, insisting that it should not be allowed to stand in the way of providing easy access to the people to seek legal recourse against oppressive or unjust conditions in society. What has emerged with PIL is a field of legal practice in which standards of *locus standi* have been relaxed and the adversarial procedure has been abandoned. The court has taken up investigative tasks by appointing its own commissions of experts; it can then order the government to take necessary steps and follow up on what has been done. Sometimes there is not even a petitioner: the court can take cognizance of a complaint on its own and have it argued through a friend of the court. There is indeed a return here of the social question, except it is now being articulated by the judiciary against an unresponsive government.

The reader will notice implicit debates among the participants in this symposium. Hewage’s and Bhunia’s critiques of attempts to address the social question by administrative or judicial means seem to diverge from Dasgupta’s view of the historical necessity of the transformative impulse in postcolonial constitutionalism. De’s and Mikdashi’s accounts of the strategic possibilities of legal practice to defend individual rights and interests seem to be far removed from Pillay’s story of the inevitable limits of legal action against racial discrimination or indeed of human rights remedies against the wrong of apartheid. But these

are ongoing debates within a new scholarly field. I have only highlighted the main points that seem to be of interest from a comparative point of view. Within the particular fields of the study of legal-constitutional practices in each country, the essays engage with the specialized scholarship and make rich contributions of their own. ■■■■