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## ARTICLES

# WHAT IS “COLONIAL” ABOUT COLONIAL LAWS?

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## I. INTRODUCTION

To what extent have the laws, institutions, policies, and ideologies of the colonial state survived the end of colonial rule? These questions about “colonial continuity” have been of great interest to scholars of post-colonial legal systems.<sup>1</sup> Questions about colonial

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1. See, e.g., Sandipto Dasgupta, *A Language Which is Foreign to Us: Continuities and Anxieties in the Making of the Indian Constitution*, 34 COMP. STUD. S. ASIA, AFR. & MIDDLE E. 228, 228 (2014) (stating that colonial continuity plays a central role in a nation which transitions to postcolonial constitutionalism).

continuity also play a role in normative criticism of contemporary laws and institutions, since the origins of a law or institution within the colonial state are often used to attack their presence in the post-colonial state. This article argues that, despite its ubiquity in academic and political discourse, the concept of “colonial continuity” can obscure thinking about post-colonial laws and institutions in important ways. This is because the category of the “colonial” is itself a problematic conceptual category when applied to laws and institutions in India’s colonial past.

There are at least three ways in which the term “colonial continuity” (or some cognate term, such as “colonial inheritance” or “colonial legacy”) figures in contemporary discourse. In the first sense it is used to explain or diagnose some present-day ill.<sup>2</sup> Sometimes this diagnosis involves an exercise of shifting blame. Dr. B. R. Ambedkar warned against in his famous closing address to the Constituent Assembly, in which he said “[b]y 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.”<sup>3</sup> This point has been echoed more recently by scholars such as Andre Béteille.<sup>4</sup>

Colonial continuities are also invoked to criticise contemporary laws and institutions: the fact that an institution or law is a “colonial inheritance” is sometimes taken to be a reason to get rid of it, or to alter its character.<sup>5</sup> Thus, one of the challenges to section 377 of the

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2. Cf. Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 125 (2006) (claiming the extraordinary legal procedures India uses in non-emergency situations can be traced to colonial policies for preventing security threats).

3. The Constituent Assembly of India, Debate on the Government of India Act (Amendment) Bill (Nov. 25, 1949) (transcript available at <http://parliamentofindia.nic.in/ls/debates/vol11p11.htm>).

4. See Andre Béteille, *Constitutional Morality*, ECON. & POL. WKLY., Oct. 4–10, 2008 at 35 (“[M]ost [Constituent Assembly members] had by then acquired the convenient habit of attributing every Indian misfortune to the misdeeds of colonial rule. It does not speak well of us to shift the burden of responsibility for all our contradictions and dilemmas on to some external agency, acting either directly or indirectly though forces over which we ourselves never seem to acquire control.”).

5. A criticism which has been applied to the constitution as a whole. See Rohit De, *Constitutional Antecedents*, in OXFORD HANDBOOK OF THE INDIAN CONSTITUTION [hereinafter De, *Constitutional Antecedents*] (noting the criticism that the Indian constitution was merely a “slavish imitation” of Western

Indian Penal Code (criminalizing sexual activities “against the order of nature”) – has been that it is a “vestige of the colonial order.”<sup>6</sup> Interestingly, this form of political argument is compatible with a range of political ideologies. Thus, at the other end of the ideological spectrum from *Naz Foundation*, the chief of the Hindu rightwing group, the Rashtriya Swayamsevak Sangh (“RSS”) in 2000 denounced the Constitution as a whole as no more than a continuation of the Government of India Act, 1935, a colonial statute.<sup>7</sup>

A third use of the term “colonial continuity” concerns the survival within the post-colonial state of institutions such as the police or the civil service.<sup>8</sup> These institutions were instruments of colonial control and repression and had a long history of conflict with the nationalist movement. Yet this nationalist movement, whose criticism of colonial rule rested in part on a criticism of these institutions, chose to retain them after the end of colonial rule. This attempt to fulfill post-colonial ambitions through what one commentator called “the trained servants of imperialism” has seemed to some scholars to be a paradox or puzzle to be explained.<sup>9</sup>

This puzzle, in turn, leads to a lament: given the history of this anti-colonial opposition to colonial institutions, their survival into the post-colonial state is seen then as a political failure. Indeed, the failure of the post-colonial state to live up to some of its ambitions has in turn been attributed to the colonial origins of some of its institutions, thus leading us back to the first use of the term “colonial

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constitutions).

6. *Naz Foundation vs. Govt. of NCT of Delhi & Ors.*, civil writ petition 7455/2001. Many thanks to Siddharth Narrain for making the petitions available. In written submissions to the Court, the Alternative Law Forum 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.” *Id.*

7. Sumit Sarkar, *Indian democracy: the historical inheritance in THE SUCCESS OF INDIA’S DEMOCRACY* 23, 25 (Atul Kohli ed., 1966); *see also* De, *Constitutional Antecedents*, *supra* note 5, at 1-2.

8. *See generally* DAVID ARNOLD, *POLICE POWER AND COLONIAL RULE: MADRAS 1859-1947* (1986); DAVID C. POTTER, *INDIA’S POLITICAL ADMINISTRATORS: 1919-1983* (1986).

9. Seminarist, “Self before Service,” *Seminar* 84 (1966), *quoted in* POTTER, *supra* note 8, at 2. *See* ARNOLD, *supra* note 8, at 185 (context of the police); POTTER, *supra* note 8, at 2 (context of the Indian Civil Service).

continuity” described above.<sup>10</sup>

This article argues that the persistence of institutions such as the police and the bureaucracy seems puzzling only against the background of a nationalist narrative in which Indian independence is seen through the lens of conflict with the institutions of colonial rule. If the battle was fought (in part) to get rid of the institutions, then their persistence is a sign of defeat.<sup>11</sup>

This nationalist narrative takes the history of the anti-colonial movement to be primarily one of *extra*-constitutional conflict between the Congress and the British Raj, – particularly during the Gandhi-led mass agitations of 1919, 1930-31, and 1942.<sup>12</sup> In Part II, this article argues that this narrative obscures important periods of pre-1947 constitutional history which involved the nationalist leadership in the role of a constitutional party working *within* the framework of the colonial state.

This point is illustrated by two case-studies involving the workings of the Congress Ministries elected under the 1935 Government of India Act (“India Act”). On both the legislative and executive sides the nationalist leadership worked within a framework established (and confined) by the colonial state. But during this period legislatures (elected on the basis of an admittedly limited franchise) did pass laws and the Ministries did have some limited control over the police and the bureaucracy.<sup>13</sup> Were the laws passed by these legislatures or the executive decisions made by these Ministries “colonial” laws or not? To ask the question is to see that the colonial versus anti-colonial (and therefore the colonial versus post-colonial) framework is inadequate to describe the constitutional history of the late-colonial state.

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10. See POTTER, *supra* note 8; Kalhan et al., *supra* note 2, at 112 (quoting a former police officer as saying that “the Raj lives on” in the police institutions of contemporary India).

11. See Arudra Burra, *The Cobwebs of Imperial Rule*, SEMINAR 615, Nov. 2010, 79, 79-80 [hereinafter Burra, *Cobwebs*] (noting once independence was attained, many members previously serving under the British Raj became important contributors to the new regime).

12. See generally CONGRESS & THE RAJ: FACETS OF THE INDIAN STRUGGLE 1917-47 1-46 (D.A. Low ed., 1977).

13. ARNOLD, *supra* note 8, at 185.

Part III extends this argument and claims that even in the colonial period these institutions of the police, the bureaucracy, and the Courts had a life which was to some extent autonomous of their origins within the colonial state and of their role in suppressing the nationalist movement. Thus the interests of the colonial state in maintaining colonial power did not always align with the interests of the institutions through which this power was to be retained. This claim is illustrated by two case-studies, one involving a conflict between the Federal Court of India and the Executive regarding wartime legislation curbing civil liberties, and the other involving conflict within the Indian Civil Service regarding the best way to implement the 1935 Act.<sup>14</sup>

The fact that there were conflicts both *between* as well as *within* colonial institutions<sup>15</sup> suggest that the fact that they were institutions of the colonial state did not entirely determine how they functioned. To understand their functioning we must also understand their nature as *institutions*, governed by values and norms which might not always serve the interests of the colonial state. Thus to describe these merely as “colonial” is to locate them exclusively in the nationalist narrative of continuous conflict described above. But this tells less about their functioning than one might initially think. Paying attention to them as *institutions* which saw themselves as to some extent “politically neutral” gives an additional purchase on understanding their persistence into the post-colonial state; there is a logic of institutional continuity which is to some extent independent of the logic of control over political power.

It should be emphasized that the primary aim of using these historical examples is not to make a historical point about the nature

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<sup>14</sup> On the Federal Court see Rohit De, *Emasculating the Executive: The Federal Court and Civil Liberties in Late Colonial India*, in *THE LEGAL COMPLEX IN POSTCOLONIAL STRUGGLES FOR POLITICAL FREEDOM* 27-30 (Terrence C. Halliday et al. eds., 2012) (highlighting how the Federal Court over-ruled curbs on civil liberties under the Defence of India Rules, 1939) [hereinafter De, *Emasculating the Executive*]. On the Indian Civil Service, see POTTER, *supra* note 8, at 50-56.

<sup>15</sup> See De, *Emasculating the Executive*, *supra* note 14, at 27-30 (highlighting how the Federal Court supported civil liberties during wartime, through invalidating government regulations on preventive detention, not allowing special criminal courts, and reading down the law of sedition in order to restrict its application); POTTER, *supra* note 8, at 2.

of colonial rule, but rather to make a conceptual point about the best ways of describing that rule, at least in the late-colonial period. The claim is that the category “colonial” is not always a helpful term through which to do so, particularly when applied to laws and institutions. In questioning the importance of this category and thereby undermining the colonial versus nationalist binary, this article makes a contribution to what Arvind Elangovan has described as the task of providing a non-nationalist understanding of Indian constitutional history.<sup>16</sup>

## II. CONSTITUTIONAL COOPERATION VERSUS EXTRA-CONSTITUTIONAL CONFLICT: THE GOVERNMENT OF INDIA ACT, 1935

Maurice Duverger draws a helpful distinction between conflict “within a regime” as opposed to conflict “about a regime.”<sup>17</sup> Both sorts of conflict are evident in the debates around the Government of India Act, 1935.<sup>18</sup> But while the overall arc of the nationalist reading of pre-1947 history emphasizes conflict about the regime, this frame does not sit well with the experience of the elected Congress Ministries in 1935-37. This section describes some elements of constitutional history that are better seen as instances of conflict – or perhaps even cooperation – *within* the regime.

The regime in question was the result of a long period of constitutional reform and review starting with what came to be called the “Simon Commission” Report on Indian Constitutional Reforms and culminating with a period of revision and adaption of the existing laws of British India to bring them into conformity with the new Constitution.<sup>19</sup> The Constitutional framework of the India Act

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16. Arvind Elangovan, *The Making of the Indian Constitution: A Case for a Non-nationalist Approach*, 12 HISTORY COMPASS, 1-10 (2014). Thanks to Rohit De for emphasizing the importance of restricting the argument of this article to the late-colonial state. In De, *Emasculating the Executive*, *supra* note 14, at 74, De also claims that “the judges and decisions of the Federal Court challenge any neat categorization into the nationalist/colonial binary.”

17. See MAURICE DUVERGER, *THE IDEA OF POLITICS: THE USES OF POWER IN SOCIETY* (1966). Thank you to Professor Andre Beteille for drawing attention to this work.

18. See *The Government of India Act, 1935*, 26 Geo. 5, c. 2 (U.K.).

19. INDIAN STATUTORY COMMISSION, *REPORT OF THE INDIAN STATUTORY COMMISSION* xii (1930) (stating the purpose of the Commission is to inquire into

divided legislative powers into federal, provincial and concurrent lists (a scheme which survives in the present Indian constitution).<sup>20</sup> The federal lists included subjects such as defense, external affairs, currency, and customs, while the Provinces were to legislate on topics such as public order, public health, education, agriculture and excise; the concurrent legislative list dealt with issues such as criminal law and procedure, censorship, bankruptcy, and labor.<sup>21</sup>

Governors of the Provinces and the Governor-General at the Centre were advised by Ministries chosen from legislatures elected on the basis of a restricted franchise, with seats reserved for different communities.<sup>22</sup> But Ministerial control at both levels were hedged in with a number of caveats.<sup>23</sup> In the Centre, the Governor-General retained discretionary power over defense and external affairs and did not have to consult his ministers on these subjects.<sup>24</sup>

In addition there were a number of areas for which he had a “special responsibility”<sup>25</sup> and in respect of which he had the right to exercise his “individual judgment.”<sup>26</sup> Amongst these “special responsibilities” were the prevention of “grave menace to the peace

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the working system of government, growth of education, and the development of representative institutions). See Arvind Elangovan, *Provincial Autonomy, Sir Benegal Narsing Rau and an Improbable Imagination of Constitutionalism in India, 1935-38* in 36 COMP. STUD. S. ASIA AFR. & MIDDLE E. 66-82 (2016) for an account of the process of adapting the laws of British India to bring them in line with the 1935 Act. B. N. Rau, who played an important part in this process, went on to become the Adviser to the Constituent Assembly, where he played a crucial role in drafting the Constitution of independent India. *See id.*

20. *See* The Government of India Act, 1935. For the complaint that the present-day constitution borrowed too much from the 1935 Act, see De, *Constitutional Antecedents*, *supra* note 5.

21. *See* De, *Constitutional Antecedents*, *supra* note 5, at 303-08; KEITH B. ARTHUR, *A CONSTITUTIONAL HISTORY OF INDIA 1600-1935* (1936); REGINALD COUPLAND, *THE INDIAN PROBLEM: REPORT ON THE CONSTITUTIONAL PROBLEM IN INDIA* 143, 151 (1944).

22. *See* 1935 Government of India Act, *supra* note 20, at 247 (stating each territorial constituency had an electoral roll which listed who could vote, based partly on their age, competency, ethnic, and religious background).

23. *See id.* at 8.

24. *See id.* (noting that while the Governor-General had authority in regards to defence and external affairs, he did not have discretionary power when it came to matters regarding the Federation and the Majesty’s dominions).

25. *Id.* at 8-9.

26. *Id.* at 9.

or tranquility of India,”<sup>27</sup> the “safeguarding of legitimate minority interests,”<sup>28</sup> and the “safeguarding of financial stability or credit.”<sup>29</sup> In these areas he was to consult his Ministers, but was not bound to act upon their advice.<sup>30</sup> The Act also circumscribed the powers of the legislatures in terms of the subjects over which they could make laws: for instance, the federal legislature was not allowed to vote on matters concerning federal revenues, including the salaries of the Governor-General, or on expenditure on defense and external affairs. Similar restrictions applied to the Provinces.<sup>31</sup>

The 1935 Act was treated by a great deal of skepticism from a range of nationalist Indian opinion. Sir C. Y. Chintamani, a moderate liberal, wrote of it as an “anti-India Act;” Congress leaders were more forthright in calling it a “slave constitution” and a “charter of bondage.”<sup>32</sup> In a pamphlet on the Constitution, Kunwar Muhammad Ashraf, a member of the Congress and later of the Communist Party, wrote “. . . it is obvious that the New Constitution does not in any way affect the basic political relationship between India and Great Britain.”<sup>33</sup> The keystone of the imperialist domination of the country is to remain intact and India is to continue, as a subject country, to be ruled and exploited by an alien imperialist Government.”<sup>34</sup>

Despite these criticisms, the Congress chose to contest the 1937 elections and then to form ministries after forming absolute majorities in five out of eleven provinces (Madras, Bihar, Orissa,

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27. 1935 Government of Indian Act, *supra* note 20, at 8.

28. *Id.* at 9.

29. *Id.*

30. *See id.* at 8 (claiming that the Governor General had control over the minister’s salaries and the conditions of their service).

31. *See id.* at 35 (emphasizing the executive authority for each province is only allowed to impact the areas of society which the Legislature of the Province has power to affect).

32. W.H. MORRIS-JONES, *PARLIAMENT IN INDIA* 61 (1957).

33. Z.A. Ahmad, *Congress Political and Economic Studies-No. I: A Brief Analysis of the New Constitution* 3 (1937), quoted in Arvind Elangovan, *Provincial Autonomy, Sir Benegal Narsing Rau and an Improbable Imagination of Constitutionalism in India, 1935-38*, 36 *COMP. STUD. S. ASIA AFR. & MIDDLE E.* 66, 66-82 (2016).

34. Arvind Elangovan, *Provincial Autonomy, Sir Benegal Narsing Rau and an Improbable Imagination of Constitutionalism in India, 1935-38*, 36 *COMP. STUD. S. ASIA AFR. & MIDDLE E.* 66, 66-82 (2016) (describing the nationalist opposition to the Act, only the Muslim League was cautiously optimistic about its prospects).

Central Provinces, and UP) and a near majority in Bombay.<sup>35</sup> These Ministries were to stay in office for two years, until they resigned *en masse* in October 1939 to protest the Viceroy’s unilateral decision to associate India with the Allied war against Germany.<sup>36</sup> In these two years, as Sumit Sarkar puts it, “over the major part of the country, the persecuted of yesterday had become ministers, the new assemblies met to the strains of the *Bande Mataram*, and the national flag for which so many had faced *lathis* and bullets flew proudly over public buildings.”<sup>37</sup>

But Sarkar also points out the “paradoxical” nature of this choice to participate in the 1935 Act – a paradox which prefigures the later paradox of colonial continuity:

[a] party committed to Purna Swaraj and bitterly critical of the 1935 Constitution working within its framework, with powers limited by official reservations and safeguards as well as by restricted financial resources, and having to implement decisions through a civil service and a police with which its relations had so long been extremely hostile.<sup>38</sup>

While the Congress had initially decided to take charge of Provincial Ministries in order to obstruct the working of the Act “from within,” in fact, even skeptical British observers were surprised at the legislative and administrative record of the Congress ministries.<sup>39</sup> Amongst the first acts of the Congress ministries was to release political prisoners,<sup>40</sup> cancel orders curbing civil liberties under repressive legislation,<sup>41</sup> and in some cases to repeal such legislation altogether – for instance the special Emergency Powers Act of 1932 in Bombay<sup>42</sup> and the Public Safety Act of 1930 in Bihar and Orissa.<sup>43</sup>

A number of Provinces also passed legislation on agrarian and other social issues. For instance, in 1938 the Provincial Ministry of

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35. SUMIT SARKAR, *MODERN INDIA 1885-1887* 349 (1983) [hereinafter SARKAR, MODERN].

36. *See id.*

37. *See id.* at 351.

38. *See id.* at 351.

39. *See* MORRIS-JONES, *supra* note 32, at 65-67.

40. *See* SARKAR, MODERN, *supra* note 35, at 352.

41. *See id.*

42. Act No. 9, Acts of Parliament, 1933 (India).

43. COUPLAND, *supra* note 21, at 116.

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Orissa passed, *inter alia*, the Orissa Co-operative Land Mortgage Bank Act,<sup>44</sup> the Orissa Small Holders Relief Act,<sup>45</sup> and the Orissa Nurse and Midwives Registration Act.<sup>46</sup> In the same year, the Bihar legislature passed the Bihar Money-lenders (Amendment) Act, the Bihar Prohibition Act, and the Bihar Agricultural Income-tax Act.<sup>47</sup>

Were the executive acts of these Ministries and the legislation passed by the Provincial Assemblies “colonial”? They were certainly colonial-*era* acts. But they were, after all, the constitutional actions of elected members of a political party that saw itself leading the extra-constitutional nationalist agitation against British rule. Yet the constitutional framework within which they operated was one which many observers thought had been designed to perpetuate colonial rule, not to end it.<sup>48</sup>

If the term “colonial” is used not just to designate a historical period, but also to designate some particular aspect of that period (defined, for instance, by an opposition to the anti-colonial movement), then it is not easy to describe the working of the Act as either colonial or anti-colonial. And if the identification of these Acts as colonial is problematic, then their identification post-Independence as colonial *continuities* is surely problematic as well. What are we to make of the fact that, say, the Bihar Prohibition Act continued in operation beyond 1947? Is it an example of a “colonial continuity”? This question does not seem to have a straightforward

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44. See Orissa Co-operative Land Mortgage Bank Act, 1938, No. 3, Orissa Acts, 1938 (India) (granting long terms loans to landowners for a variety of individualized purposes, including agricultural improvements).

45. See Orissa Small Holders Relief Act, 1938, No. 5, Orissa Acts, 1938 (India) (rendering temporary debt relief to individual landowners who use their land for agriculture).

46. See Orissa Nurses and Midwives Registration Act, 1938, No. 7, Orissa Acts, 1938 (India) (rendering better training to nurses, midwives, and health visitors).

47. MATHA SHRU, THE BIHAR MONEY-LENDERS ACT: BEING BIHAR ACTS III OF 1938 & VII OF 1939 (1965); THE BIHAR PROHIBITION ACT, 1938 (BIHAR ACT VI OF 1938); THE BIHAR AGRICULTURAL INCOME-TAX ACT, 1938.

48. This was, for instance, the view of Lord Linlithgow, the Viceroy, who thought the Act was the best way to maintain British influence in India: “It is no part of our policy, I take it . . . gratuitously to hurry the handing over the controls to Indian hands at any pace faster than that which we regard as best calculated, on a long view, to hold India to the Empire.” See SARKAR, MODERN, *supra* note 35, at 338.

answer: there are interesting jurisprudential and constitutional questions in the neighborhood, but these tend not to be the questions of interest to those who raise the question of colonial continuities as either paradox or lament.

Turning to the issue of conflict versus cooperation, consider the relation between the Congress Ministries and two arms of the colonial state which were clearly associated with the maintenance of the British Raj: the Indian Civil Service (ICS) and the police. The ICS had played an important role in the suppression of the civil disobedience movements of 1930 to 1933.<sup>49</sup> ICS officers were at the forefront of formulating Government policy against the movement and advocated a much harsher response to it than either the Viceroy or the Secretary of State.<sup>50</sup> They played an important role in directing the suppression of the movement on the ground.<sup>51</sup> They had great discretionary powers, as well as civilian control over the police, which was accused of several excesses during this period.<sup>52</sup> And much of their work consisted in specifically political activity directed against the Congress.

The anti-Congress aspect of this activity was great enough to make the Governor of the United Provinces, Harry Haig, worry in 1932 of "the dangers in a development which would link official activities too closely with a political anti-Congress party of the future . . . . If in the politics of the new constitution . . . . officials are regarded as definitely anti-Congress, we cannot be surprised if Congress are very

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49. For more on the ICS role during the civil disobedience movement, see D. A. Low, "Civil martial law": the Government of India and the Civil Disobedience Movements 1930-34 in CONGRESS AND THE RAJ, *supra* note 12. See also T.H. Beaglehole, *From Rulers to Servants: The I.C.S. and the British Demission of Power in India*, 11 MOD. ASIAN STUD. 237, 252 (1977) (maintaining a policy whereby an organization which poses a threat through violent rhetoric or a desire to break the law were targeted for dissolution).

50. See Arudra Burra, *The ICS and the Raj: 1919-50* (2007) (unpublished monograph) (on file with author); Arudra Burra, *The Indian Civil Service and the nationalist movement: neutrality, politics and continuity*, 48 COMMONWEALTH & COMP. POL. 404-32 (2010).

51. See *id.*

52. Lord Willingdon, the Viceroy, was unsympathetic: "Most of our officials have had a pretty rough time from the Congress party in the last two or three years and it may be that in some cases they are getting some of their own back." See Low *supra* note 49, at 225-58.

definitely anti-official.”<sup>53</sup> Fears about the “anti-official” possibilities of Congress rule under the Government of India Act, 1935 led to a demand from the services for constitutional safeguards to protect themselves from possible victimization by Congress Ministries.<sup>54</sup> These demands were successful, leading to an unprecedented level of constitutional protection for the rights of civil servants,<sup>55</sup> which themselves aroused a great deal of nationalist resentment.<sup>56</sup>

And yet, on the whole, relations between the services and the Ministries were cordial, a fact acknowledged by even so skeptical a commentator as Coupland.<sup>57</sup> Consider the example of the Congress Ministry in Madras under the Premiership of C. Rajagopalachari (also known as Rajaji), later Minister of Home Affairs in independent India. As Potter puts it, the working of the Act did not suggest a complete transfer of power from the ICS to the Indian ministers: while the ICS secretaries had a great deal of say over minor matters of policy with respect to their generally more inexperienced Ministers, in major policy matters Rajaji had the final say.<sup>58</sup> But here, according to one ICS officer, he tended to side with his ICS Secretaries rather than his Ministerial colleagues, saying that he had much more confidence in the former than in the latter.<sup>59</sup>

David Arnold paints a similar picture with respect to the situation of the Indian Police Service in Madras was similar.<sup>60</sup> The police had been on the front lines of colonial repression of nationalist agitation, who were “castigated and condemned for their violent and ‘arbitrary’ conduct,” and in the years leading up to the adoption of the new Constitution, they too had expressed concern over possible victimization and had secured some safeguards under the Act.<sup>61</sup> But these concerns proved unwarranted, for in Rajagopalachari they

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53. Beaglehole, *supra* note 49, at 254.

54. *See id.* at 251 (claiming that there was a belief that areas of administration may be handed over to the Ministries at a later point in time than the transfer of political authority).

55. *See id.* at 254-55.

56. *See id.* at 254-55.

57. *E.g.*, Burra, *Cobwebs*, *supra* note 11, at 79-80. *See also* COUPLAND, *supra* note 21, at 118-20.

58. POTTER, *supra* note 8, at 48-49.

59. *See* ARNOLD, *supra* note 8, at 216-17.

60. *See id.* at 185.

61. *See id.* at 212.

found a protector rather than an opponent: in his first Budget in 1937 he asked that the police grant be passed without dissent, requesting that no “harsh language” be employed towards the Police in the process.<sup>62</sup> In his second Budget speech, in March 1938, he urged MLAs to try to understand those who performed “the most difficult and the most unappreciated part” of the work of government, and urged them and the public to put aside past “prejudices” against the police.<sup>63</sup>

This attitude did not endear Rajagopalachari to some of his Congress colleagues, who regretted that those “who were hitherto speaking the language of independence and struggle have begun to speak the language of ‘Law and Order’ of the old regime.”<sup>64</sup> This “law and order” mentality was particularly evident in matters concerning labor unrest, in which the administration sided with the employers (Rajaji was notable for his anti-communist views).<sup>65</sup> Called by the all-India Congress leadership to defend themselves against charges of “repression” following police violence against strikers in 1938, the Minister of Information claimed that the Government had followed the “normal procedure that has to be followed by any Government charged with the maintenance of law and order.”<sup>66</sup>

Indeed, this resemblance to the old regime was evident in other areas as well.<sup>67</sup> In 1937 Rajagopalachari ordered a prosecution for seditious speeches under the Press Act of 1931,<sup>68</sup> which had been formulated by the British Government for use against the civil disobedience movement.<sup>69</sup> He used the Criminal Procedure Code to forbid the opening of a factory during a strike,<sup>70</sup> as well as the Criminal Law Amendment Act to clamp down on an agitation regarding the Government’s language policy.<sup>71</sup>

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62. *See id.* at 217.

63. *See id.*

64. *See* ARNOLD, *supra* note 8, at 213-14.

65. *See id.*

66. *See id.* at 223-25.

67. For what follows, see Coupland’s somewhat gleeful account. *See* COUPLAND, *supra* note 21, at 133-34.

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

While Rajagopalachari's attitude was not uncriticised within the Congress, it is clear that it had at least the tacit approval of the Party's "high command." Consider this remarkable resolution passed by the All-India Congress Committee in 1938:

Inasmuch as people, including a few Congressmen, have been found in the name of civil liberty to advocate murder, arson, looting and class war by violent means, and several newspapers are carrying on a campaign of falsehood and violence calculated to incite the readers to violence and to lead to communal conflicts, the Congress warns the public that civil liberty does not cover acts of, or incitements to, violence or promulgation of palpable falsehoods. In spite, therefore, of the Congress policy of civil liberty remaining unchanged, the Congress will, consistently with its tradition, support measures that may be undertaken by the Congress Governments for the defence of life and property.<sup>72</sup>

Notice how much easier it is to talk of some of Rajagopalachari's actions as "colonial," though they had exactly the same constitutional status as, for instance, the act of releasing political prisoners elsewhere in India. Thus, as a term of constitutional art, the term "colonial" applies equally to the release of political prisoners on the one hand and to the prosecution for seditious speeches on the other. If the term "colonial" seems more easily applicable to prosecutions for sedition, then it is not being used in a purely descriptive sense, but stands in for something more normatively loaded – a synonym for "authoritarian" or "oppressive," perhaps. Notice, though, that authoritarian and oppressive regimes are not necessarily *colonial* in their origins.

On the historical side, three points are worth emphasizing. First, despite an initial opposition to the Government of India Act, 1935, the story of the working of the elected Ministries was *not* one of continuous conflict with the Raj; indeed, elected Ministries had to depend upon the civil service and the police to carry out their own policies.<sup>73</sup> The "Founding Fathers" who debated the shape of the new polity thus had some experience – not all of it negative – of the instruments of the old polity which they were eventually to retain.<sup>74</sup>

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72. See COUPLAND, *supra* note 21, at 134.

73. See generally ARNOLD, *supra* note 8; POTTER, *supra* note 8.

74. See generally ARNOLD, *supra* note 8; POTTER, *supra* note 8.

The point could be made more broadly. Austin points out, for instance, that Patel’s extensive experience with section 299 of the Government of India Act, 1935 (governing the acquisition of property for public purposes) played a crucial role in determining the eventual shape of the right to property in Article 31 of the 1950 Constitution.<sup>75</sup> In a similar vein, Morris-Jones points out an argument in favor of a Westminster-style Parliamentary system put forward by K. M. Munshi in the Constituent Assembly.<sup>76</sup> One of his claims was that a Parliamentary system was better suited to Indian conditions, because Parliamentary traditions had by now become familiar.<sup>77</sup>

Second, nationalist narratives of the framing of the Constitution tend to focus on the role of the Congress as an extra-constitutional anti-colonial movement; it is that history which is continuously referred to in the Constituent Assembly Debates.<sup>78</sup> What this leaves out is the history of the Congress Party as a sometime constitutional holder of political power in the Provinces, both in the period 1937-1939 as well as in 1946, when the Congress Ministries were reinstated.<sup>79</sup> There are some state interests – such as the maintenance of law and order – which are simply *state* interests, whether the state

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75. See GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 118-25 (1966).

76. See MORRIS-JONES, *supra* note 32, at 87-88 (focusing on the stronger executive in the British system, as well as Indian familiarity with parliamentary democracy after a century of British rule).

77. *Id.* (“For the last thirty or forty years some kind of responsibility has been introduced in the governance of this country. Our constitutional traditions have become parliamentary, and we have now all our provinces functioning more or less on the British model . . . . After this experience, why should we go back upon the tradition that has been built for over a hundred years and try a novel experiment framed 150 years ago and found wanting even in America?”).

78. See AUSTIN, *supra* note 75, at 8-9; SARBANI SEN, *THE CONSTITUTION OF INDIA: POPULAR SOVEREIGNTY AND DEMOCRATIC TRANSFORMATIONS* 27 (2007) (emphasizing the fact that the Assembly embodied Indian revolutionary principles and was not created by the British Parliament).

79. It is likely that Congress’ role as the party in power during the deliberations of the Constituent Assembly played a significant, and as yet underexplored, role in the formation of the Constitution. Austin does recognize that the government formed the “third point” of a tight triangle (the other two being the Constituent Assembly and the Congress Party). See AUSTIN, *supra* note 75, at 8-9. However, Austin says little about the fact that so many of the important figures in the Assembly also held positions in Nehru’s Cabinet. For a list of some of these figures and the positions they held see AUSTIN, *supra* note 75, at 19.

in question is a colonial or a post-colonial one.<sup>80</sup>

Finally, and perhaps most importantly, so long as one is in the business of exercising state power, one will have to rely on institutions such as the bureaucracy and the police. It is part of the nature of these institutions to be in some respects “neutral” with respect to politics, to serve their political masters irrespective of ideology, as long as one is functioning in a broadly constitutional framework.<sup>81</sup> The post-Independence decision to retain many of the institutions of colonial rule, such as the bureaucracy, the police, and the army, had a great deal to do with their recognition of the fact that they were supposed to be, and thought themselves to be, in some sense loyal to the constitutional structure no matter who was in charge of it.<sup>82</sup>

When questions about the persistence of colonial institutions are framed in terms of the puzzle of colonial continuity, one tends to leave out the fact that the institutions in questions were *institutions*. The fact that they were originally formed for the purposes of supporting colonial rule, and played a role in sustaining it, does not automatically disqualify them serving under an anti-colonial regime. This article revisits this point in Part III.

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80. The interesting question in India and elsewhere is why a post-colonial state would interpret “law and order” in the particularly repressive way reminiscent of the colonial power it replaced. Cf. DUVERGER, *supra* note 17, at 176.

81. See STEPHEN P. COHEN, *THE INDIAN ARMY: THE CONTRIBUTION TO THE DEVELOPMENT OF A NATION* 1, 195 (1990) (“To officers (in the Indian Army at least) profession comes first, and ‘politics’ finds no place.”)

82. See generally Arudra Burra, *The Indian Civil Service and the Nationalist Movement: Neutrality, Politics, and Continuity*, 48 COMMONWEALTH AND COMP. POL. 404, 405, 419 (2010) (quoting an officer in the army that said recruits who were politically active before joining were considered undesirable); COHEN, *supra* note 81, at 165-68 (discussing a similar point in connection with the Indian Army); Kalhan et al., *supra* note 2, at 111-12 (noting that, after independence, no significant changes were made to the way the police force functioned); B.B. MISRA, *THE BUREAUCRACY IN INDIA: AN HISTORICAL ANALYSIS OF DEVELOPMENT UP TO 1947*, 359 (1977) (arguing the merits of a separation between the government and the civil service).

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### III. THE SEPARATION OF POWERS AND INSTITUTIONAL AUTONOMY WITHIN THE COLONIAL STATE

In Part II, it was argued that the term "colonial" is difficult to apply in those periods of pre-1947 which were characterized by constitutional cooperation rather than extra-constitutional conflict. This section highlights another difficulty with the use of the term "colonial" in the pre-1947 era—the fact that the colonial state was not a unitary entity. There were disagreements between the Provincial Governments and the Government of India and between the Government of India and the Secretary of State. Similarly, there were disagreements between different organs of the State at particular points of time: for instance, between the executive and the judiciary. Even if these conflicts ended in favor of laws and policies which upheld the grip of British rule (and this was not always the case), it becomes harder, as an analytical matter, to identify as "colonial" one or the other of these sides in the debate. The point is illustrated with reference to two institutions: the Indian Civil Service (ICS) and the Federal Court of India.

#### A. THE ICS AND SECRET GOVERNMENT FILES

The ICS example relates to a question which arose in connection with the introduction of provincial autonomy under the Government of India Act, 1935, shortly before it was implemented: what was the Government to do with confidential secretariat records, which, under the new Constitution, would now be available to Indian politicians? These records were, after all, concerned with "the policy of the present Government with political movements of a subversive character, such as civil disobedience movements."<sup>83</sup> It was the leaders of these "subversive" political movements who might now come to power under the new Act. The question of what to do with these record was discussed at length over the course of six months starting in December 1934.

The file begins with a note from the Government of Bombay to the Government of India, in which it is suggested that the records be transferred to the custody of the Governor of the respective

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83. POTTER, *supra* note 8, at 50, n.79.

provinces:

If such records remain in the Secretariat at the time of the introduction of the new constitution they will become the property of the new Government to be dealt with as it likes. Containing, as they do, much highly confidential correspondence between the Secretary of State, the Government of India and the provincial Government, it can hardly be contemplated that they should be left in a position where they might fall into the hands of Indian politicians. Apart from this danger, however, I am to point out that in the past all officers have dealt freely with political questions on the assumption that what they wrote was for the use only of the Governor in Council in a reserved department, and it would be a breach of the confidence of those officers, especially Indians, to place these records at the disposal of the provincial Government which they will in future have to serve.<sup>84</sup>

The Bombay position was in a minority, with only the Madras government agreeing with its position.<sup>85</sup> The Governments of Assam, Central Provinces, Bengal, Punjab, Bihar, Orissa, United Provinces, and the North-West Frontier Province all disagreed, more or less vehemently.<sup>86</sup> Thus the Government of Central Provinces argued that access to these files was necessary for administrative continuity and efficiency, and that denying this access would imperil “the proper development of the new Constitution.”<sup>87</sup> This was also the position of Assam and the North-West Frontier Province: while there was a risk if future Ministers were given access to these records, the risk of denying them this access was greater, for it would lead to “a feeling of distrust,”<sup>88</sup> and would “from the start be a source of justifiable grievance to the [incoming Ministers] and the general public . . . the new building required to house these secret records would be a perpetual monument of distrust.”<sup>89</sup>

The Governments of Bihar and Orissa pointed out that self-respecting Ministers would feel bound to resign if they found themselves “continuously hedged in when [they] required information about past decisions of Government.”<sup>90</sup> And the

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84. *Id.* at 51.

85. *See id.* at 51-53.

86. *See id.* at 51-52.

87. *Id.* at 51-52.

88. POTTER, *supra* note 8, at 51.

89. *Id.* at 52.

90. *Id.*

Government of Punjab pointed out that “[a] minister must have access to all records of Government which will help to discharge his duties properly.”<sup>91</sup> To deny ministers access to files concerning law and order at the same time as giving them the responsibility for preserving it, it felt, would not be “practical politics.”<sup>92</sup>

There was, to be sure, a risk of “rousing the enmity”<sup>93</sup> of “vindictive”<sup>94</sup> ministers, though it suggested that such fears were overblown, for “[t]ime softens asperities, and a future minister who may chance to read a summary related to himself or his friends will view these documents with a perspective than if he had known of them at the time they were written.”<sup>95</sup> The North-West Frontier Province concurred, thinking it “advisable in such matters to trust from the start in the ministers’ good sense, aided if necessary by their oath of office and the Official Secrets Act.”<sup>96</sup>

The majority view prevailed in the Home Department, and a letter was sent to Bombay supporting this view, claiming that “[t]he British Government have agreed to the transfer of responsibility and it would hardly be consistent to refuse to make the records available to those to whom the responsibility is transferred.”<sup>97</sup> The letter did, however, acknowledge the fears of the Bombay Government and suggested that certain kinds of records – for instance dossiers of revolutionaries and Congress workers and correspondence between very high officials dealing with prominent politicians – could be transferred to the offices of the provincial Criminal Investigation Department (CID), the Governor, or be destroyed.<sup>98</sup> In the end a compromise was reached: while the general policy was to be that suggested by the various Provincial Governments, special exception might be made in the case of Bombay, where “probably possible measures against civil disobedience were discussed more freely than in other provinces where the movement was less intense” and there

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91. *Id.*

92. *Id.* at 56.

93. POTTER, *supra* note 8, at 52.

94. *Id.*

95. *Id.*

96. *Id.* at 53.

97. *Id.*

98. *See* POTTER, *supra* note 8, at 53.

was thus perhaps a greater chance of reprisals.<sup>99</sup>

### B. THE FEDERAL COURT AND CIVIL LIBERTIES

The case of the secret government files involved conflicts *within* a single colonial institution. Now consider a case of conflict between two colonial institutions, the Federal Court of India and the Political Executive, with respect to wartime provisions licensing preventive detention.<sup>100</sup> In September 1939 the Government of India passed the "Defence of India" Ordinance, which was passed into law later that month, as an "Act to provide for special measures to ensure the public safety and interest and the defence of British India and for the trial of certain offences."<sup>101</sup> Section 2 of the Act gave the Central Government the power to make rules "necessary or expedient" for "securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community."<sup>102</sup> Section 2(2) elaborated that these rules could provide for, or empower any authority to make orders providing for, a number of matters, including:

- (x) the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defence of British India . . .<sup>103</sup>

Under Rule 26 of the Defence of India Rules, the Central or Provincial Government could make an order directing the detention of a person if they were satisfied that it was necessary with a view to preventing him from "acting in any manner prejudicial to the defence

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99. *See id.* at 54 (noting how though within the Home Department there was disagreement on this point, with the Under Secretary suggesting that there was no need to make an exception for Bombay, despite disagreement on this point within the Home Department, since the situation the exception envisaged was extremely rare. In the end, the Home Secretary overruled the Under Secretary with the concurrence of the Home Member).

100. *See generally* De, *Emasculating the Executive*, *supra* note 14, at 59, 62 (describing this conflict in great detail).

101. THE DEFENSE OF INDIA ACT (1939), *reprinted in* A COLLECTION OF THE ACTS OF THE INDIAN LEGISLATURE AND OF THE GOVERNOR GENERAL FOR THE YEAR 1939 1, 1 (1939).

102. *Id.* at 2.

103. *Id.* at 4.

of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war."<sup>104</sup>

In the case of *Keshav Talpade*, the Bombay High Court had refused to issue a writ of *habeas corpus* to secure the release of the petitioner, who had been arrested and detained under Rule 26 following an order of the Bombay Government.<sup>105</sup> He appealed to the Federal Court, claiming that the Defence of India Act was unconstitutional, because "it purported to relate to the defence of India," while the Government of India Act, 1935 gave no powers to either the Central or Provincial Legislatures to legislate on this subject.<sup>106</sup>

Even though the Court saw no merit in this Constitutional argument, it drew attention to a problem which the appellant had not himself noticed: that Rule 26 might itself not be within the rule-making powers conferred by the Defence of India Act. The problem was that the Section 2(2)(x) of the Act made a provision for rules governing detention in cases of "reasonable suspicion," while Rule 26 required only the "satisfaction" of the Government. Accordingly, the Court felt itself "compelled" to ask two questions:

(1) whether "reasonably suspected" in the rule-making power means suspected on grounds which appear reasonable for the detaining authority or whether it means suspected on grounds which are in fact reasonable; and

(2) whether a statutory power to make a rule for the detention of persons reasonably suspected of having acted, of acting, or of being about to act in a certain specified way justifies the making of a rule which merely empowers Government to detain a person if it is satisfied that it is necessary to do so with a view to preventing him from acting in that way or in certain other ways also.<sup>107</sup>

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104. *Keshav Talpade v. King Emperor*, 30 A.I.R. 1943 Federal Court 1, ¶ 8. ("The references to His Majesty's relations with foreign powers or Indian States and the maintenance of peaceful conditions in tribal areas were added to the original rule by Notification dated August 3, 1940.")

105. *Id.* at ¶ 1.

106. *Id.* at ¶ 1.

107. *Id.* at ¶ 8.

In considering these questions, the Court had in mind the recently delivered judgment of the House of Lords in *Liversedge v. Anderson*,<sup>108</sup> which concerned the proper construction of a regulation made under the Emergency Powers (Defence) Act, 1939. The regulation in question allowed the Secretary to order a person detained if he had “reasonable cause” to believe that person to have been involved in a variety of prejudicial activities.<sup>109</sup>

In that case, the House of Lords had answered that the relevant standard of reasonableness was not an independent standard with respect to which the judgment of the Home Secretary could be examined by a Court; it only required him to satisfy himself that he had reasonable cause.<sup>110</sup> But the Court’s reasoning proceeded from its view that such wide discretionary power had been given “to one who has high authority and grave responsibility”; “a Secretary of State, one of the high officers of State who, by reason of his position, is entitled to public confidence in his capacity and integrity, who is answerable to Parliament for his conduct in office and who has access to exclusive sources of information.”<sup>111</sup>

The Court in *Talpade* pointed out that the Indian Act did not specify who had the authority to issue such orders.<sup>112</sup> Given that the numbers of orders issued was very large, it was unlikely that they would have had the personal attention of the Governor-General-in-Council or the Governors with their advisers; the decisions would have to be made by officials, who need not be highly placed. In such circumstances, the Court said, “it would certainly seem that the more natural construction of the words of paragraph (x) is that there must be suspicions which are reasonable in fact and not merely suspicions which some as yet unspecified person or authority might regard as reasonable.”<sup>113</sup>

However, the main grounds upon which the Court struck down Rule 26 was simply that the “satisfaction” standard of the Rule was broader than the “reasonable suspicion” standard of section 2(2)(x):

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108. *Liversedge v. Sir John Anderson* [1942] A.C. 206.

109. *Keshav Talpade v. King Emperor*, 30 A.I.R. 1943 Federal Court 1, ¶ 10.

110. *Id.*

111. *Id.*

112. *Id.* at ¶ 11 (noting that the authority should be dependent on each individual rule, and decided by the executive making the rules).

113. *Id.* at ¶ 13.

The rule would enable the Central Government or any Provincial Government to detain a person about whom it need have no suspicions, reasonable or unreasonable, that he has acted, is acting, or is about to act in any prejudicial manner at all. The Government has only to be satisfied that with a view to preventing him from acting in a particular way it is necessary to detain him. The Government may come to the conclusion that it would be wiser to take no risks, and may therefore subject a person to preventive detention against whom there is no evidence or reasonable suspicion of past or present prejudicial acts, or of any actual intention of acting prejudicially; and Rule 26 gives it power to do so.<sup>114</sup>

The Court also voiced a concern about the fact that the order of the Government of Bombay merely “mechanically” repeated the language of Rule 26 in citing the grounds upon which Keshav Talpade had been detained;<sup>115</sup> this did nothing “to remove the apprehension we have already expressed that in many cases the persons in whom this grave power is vested may have had no opportunity of applying their minds to the facts of every case which come before them.”<sup>116</sup> It concluded:

We recognize that our decision may be a cause of inconvenience and possibly of embarrassment, even though temporarily, to the executive authority. We regret that this should be so, especially in these difficult times; but we venture to express an earnest hope that greater care may be taken hereafter to secure that powers of this extraordinary kind which may affect, and indeed have affected, the liberty of so many of the King’s subjects in India, may be defined with greater precision and exactitude, so as to reduce to as small a compass as possible the risk that persons may find themselves apprehended and detained without legal warrant.<sup>117</sup>

As Rohit De points out, the decision alarmed the Viceroy, because all 8,000 detainees under Rule 26 now might be able to launch *habeas* challenges against their detention.<sup>118</sup> He promulgated an ordinance, given retrospective effect, to revalidate all orders under Rule 26 which might have become vulnerable after the *Talpade* case.<sup>119</sup> This ordinance was in turn challenged in several High

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114. Keshav Talpade v. King Emperor, 30 A.I.R. 1943 Federal Court 1, ¶ 14.

115. *Id.* at ¶ 16.

116. *Id.*

117. *Id.* at ¶ 18.

118. See De, *Emasculating the Executive*, *supra* note 14, at 59, 64.

119. Compare THE DEFENSE OF INDIA ACT (1939), reprinted in A COLLECTION OF THE ACTS OF THE INDIAN LEGISLATURE AND OF THE GOVERNOR GENERAL FOR

Courts, and was overturned by the Calcutta High Court,<sup>120</sup> though it was upheld in the High Courts of Allahabad, Lahore, and Madras.<sup>121</sup>

On appeal to the Federal Court, the ordinance was held to be valid.<sup>122</sup> But the Federal Court also ordered the release of all appellants on the grounds that under Rule 26 the provincial government should have applied its mind to each individual case to become satisfied that there were grounds for detention.<sup>123</sup> The Court claimed further that this task required the personal satisfaction of the Governor and could not be delegated.<sup>124</sup> Since the requirements of Rule 26 had been so grossly violated, the Court noted that it would not be safe to presume that the thousands of detentions already made under this Rule were valid.<sup>125</sup>

De points out that these decisions generated a great deal of publicity, even though the released detainees were then arrested on other grounds:<sup>126</sup> Niharendu Dutt Mazumdar was arrested within the Court premises itself under Regulation III of 1818, minutes after the Court had set him free from detention under Rule 26.<sup>127</sup> This in turn prompted the Chief Justice of the Calcutta High Court to threaten the Chief Secretary of Bengal and the superintendent of police with committing contempt of court.<sup>128</sup>

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THE YEAR 1939 1, 4 (1939) (providing the original textual language), *with* Shib Nath Banerjee And Ors. vs A.E. Porter, 1943 A.I.R. (Cal.) 377, ¶¶ 2-3(India) (substituting the aforementioned language from the Defense of India Act with: “the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain as the case may be suspects, on grounds, appearing to such authority to be reasonable.” Additionally noting that the Ordinance further clarified: “For the removal of doubts it is hereby enacted that no order heretofore made against any person under Rule 26 of the Defence of India Rules shall be deemed to be invalid or shall be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said rule was made be lawfully conferred by a rule made or deemed to have been made under Section 2, Defence of India Act, 1939”).

120. *Shib Nath Banerjee*, 1943 A.I.R. at ¶ 9.

121. *Id.* at ¶ 23.

122. *Emperor v. Shibnath Banerjee*, 1943 A.I.R. Federal Court 75.

123. *Shib Nath Banerjee*, 1943 A.I.R. at ¶ 69.

124. *Id.* at ¶ 116.

125. *Shib Nath Banerjee And Ors. vs A.E. Porter*, 1943 A.I.R. (Cal.) 377, ¶ 116 (India).

126. *See De, Emasculating the Executive*, *supra* note 14, at 70.

127. *See id.*

128. *See generally id.* at 70-72 (describing the context in which being held in

The fear of the Calcutta High Court holding civil servants in contempt prompted the Viceroy to ask the Secretary of State in London for a grant of special powers of pardon in such cases;<sup>129</sup> this was deemed impossible because the Royal Prerogative to issue pardons did not cover the offense of contempt and hence could not be delegated.<sup>130</sup> Eventually the Governor of Bengal was informed that he had to exercise his individual judgment with respect to each security prisoner in Bengal – some 1,700 in all over the course of six months.<sup>131</sup>

### C. CONCLUSION

The point of these examples is not to make a claim about the extent to which different organs of the colonial state were liberal or anti-colonial. It was already pointed out that the ICS, for instance, played an important role in the suppression of the nationalist agitations, both in terms of policy and on the ground; their role was very much in the nature of protecting the Raj when it was under threat. The ICS resisted the grant of Provincial Autonomy and worked in some instances against Congress in the elections after the 1935 Act.<sup>132</sup>

Similarly, De points out that the High Courts in India were not known for their willingness to defend the rule of law when it was under attack from the colonial state, most dramatically in the trial of Bhagat Singh in the previous decade.<sup>133</sup> Nor were the judges of the

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contempt of court was a serious concern for particular members of the government).

129. *Id.* at 71.

130. *Id.* (“There was real fear that the Calcutta High Court might find senior civil servants in contempt of court. For example, in 1943 a panicked viceroy wrote to London asking for special letters patent to grant him power of pardon over contempt cases. There was a flurry of anxious correspondence when it was discovered that the Royal Prerogative in England did not cover pardon for offenses of contempt; therefore it was impossible for the king to delegate such powers to the viceroy through letters patent.”).

131. *See id.* at 72 (specifying an influx of 393 of these cases between July 5-12, 1973 and an additional influx of over 1,300 cases in the six months thereafter).

132. *See POTTER, supra* note 8, at 50-51 (describing one of the most difficult issues facing the ICS under the 1935 Act: what to do with secret political records).

133. De, *Emasculating the Executive, supra* note 14, at 67-68 (using the Bhagat Singh case to highlight the Indian courts greater failure to address rule of law violations in the preceding decade, and noting the generally unprecedented nature

Federal Court known for their nationalist sympathies – Chief Justice Gwyer had been the main draughtsman of the Government of India Act, 1935 and his successor, Patrick Spens, was a Conservative MP; neither could the Indian judges of the Court be seen as anti-imperialists in waiting.

So the claim is not that these instances are *representative* of colonial rule during this period. Rather, the lessons to draw are methodological and conceptual. There are three methodological points in all. First, the location of an institution as part of the overall colonial state does not automatically dictate what decisions are to be taken in particular cases. As David Potter writes in the ICS context “[p]olicy making within the raj was rarely a simple and straightforward undertaking. Frequently there was uncertainty in the minds of the ICS men as to how best to serve imperial interests when making policy choices.”<sup>134</sup> Just as the governments of the different Provinces could disagree about what to do with secret files, the High Courts of British India did not function with one mind; one sees this for instance in the fact that only the Calcutta High Court struck down the Viceroy’s ordinance after the first Federal Court ruling.<sup>135</sup>

The second point is that different organs or institutions of the colonial state could disagree with one another. The division between the judiciary and the executive in the *Talpade* case is a stark example; but frequently even the ICS, the Government of India under the Viceroy, and the Secretary of State in London did not see eye to eye on matters of policy or practice.<sup>136</sup> Within the ICS, for instance, there had been great resistance to the Government of India Act, 1935; pressure for Provincial Autonomy came from the imperial power in London.<sup>137</sup>

It is worth pointing out that sometimes the institutional and political alignments could go in the other direction as well. For

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of judicial challenges to decisions of the executive branch).

134. See POTTER, *supra* note 8, at 55.

135. See *id.* at 46 (describing how having connections in the court was seen as beneficial in the outcome of the matter, such that it would be difficult for the courts to function as one entity).

136. See *generally id.* at 44-46 (describing how the ICS members in the secretariats, and various executive heads, shared the policy-making powers, which may contribute to internal divisions in the overall Government of India).

137. See POTTER, *supra* note 8.

instance, after the Quit India agitation of 1942, there was a heated debate within the Government of India about a proposed policy of "economic warfare" against the Congress and its supporters.<sup>138</sup> Could the government cancel licenses of "known supporters" of the Congress? Sir Richard Tottenham, the Additional Secretary in the Home Department at the Central Government, and Sir Reginald Maxwell, the Home Member in the Executive Council argued that it should, in the course of a spirited debate which lasted a little over a year.<sup>139</sup> But the policy was defeated because of sustained hostility from many provincial governments, sometimes from ICS Chief Secretaries and heads of other government departments, and at other times from their Governors.<sup>140</sup>

A third set of examples might be drawn simply from the Appeals process within the judicial system. To take just one example, in the case of *Niharendu Dutt Majumdar v. King-Emperor* (1942),<sup>141</sup> Chief Justice Maurice Gwyer of the Federal Court of India read down the sedition statute (section 124A of the Indian Penal Code) to apply only to speech which could lead to public disorder; this was a departure from the interpretation in *Tilak's* case (1897), in which Justice Strachey of the Bombay High Court argued that the offense essentially involved the exciting of bad feelings towards the Government, whether or not the bad feelings led to any public disorder.<sup>142</sup> Justice Gwyer's interpretation was in turn challenged in the case of *King Emperor v. Sadashiv Narayan Bhalerao*,<sup>143</sup> and overturned by the Privy Council, which reinstated Justice Strachey's interpretation of the sedition statute.<sup>144</sup>

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138. See *Indian Civil Service*, *supra* note 81, at 408.

139. *Id.* at 409.

140. *Id.*

141. *Niharendu Dutt Majumdar v. Emperor*, A.I.R. 1939 (Cal.) 703 (India).

142. *Id.* See The Indian Penal Code, No. 45 of 1860, INDIA CODE (1993), vol. 1 ("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"); *Queen-Empress v. Bal Gangadhar Tilak*, (1897) ILR 22, 112 (India).

143. *King Emperor v. Sadashiv Narayan Bhalerao*, 1944 A.I.R. 46 (Bom.) 459 (India).

144. See *Kedar Nath Singh v. State of Bihar*, (1962) 955 A.I.R. 1962 S.C.

Both the Federal Court and the Privy Council were colonial institutions and so in one well-defined sense their decisions were “colonial decisions.” But their status as colonial decisions in this sense does not entail that they were directed at the project of maintaining colonial rule, though of course both institutions functioned in a context which took that rule for granted. Conversely, if we identify the term “colonial” with decisions, laws, and institutions which were specifically directed at the maintenance of colonial rule, then we are forced into the uncomfortable position of saying that there were aspects of the late-colonial state which were not “colonial” in *this* sense.

The third point is the most important. Once we recognize that the colonial state consisted of different institutions whose interests did not always converge, we should also recognize that part of the decision-making within these institutions is clearly *institutional*. In the ICS case, for instance, Potter writes:

The coming of such ministries was hardly regarded with delight by senior ICS men, for they seemed to represent a threat to their own position; but that narrower interest had to give way to the general policy guideline of the state. If the state ruled that the ICS should commit decorous suicide, then that is what the ICS would do. For they were, above all, civil *servants* working under general direction from above. The existence of this broad constraint on policy making helps to explain why senior ICS men in most provinces had by the mid-1930s a rather more positive attitude towards the impending constitutional changes and increased democratization than one might have expected.<sup>145</sup>

Rohit De makes a similar point with respect to the Federal Court:

For law to function as ideology in colonial India, there were moments when the rhetoric of the rule of law was forced to become a reality. The courts did not, and could not, challenge the fact that the state of emergency was required. Neither did they question the ideas of preventive detention, executive discretion or the exercise of arbitrary powers. What they objected to the absence of any guidelines to regulate this discretion and the attempts to exclude judicial review. Justice Zafrullah Khan, declaring the Special Criminal Courts Ordinance void, held that “a legislation even though it be an emergency legislation must bear the

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(India) (reasserting Justice Gwyer’s interpretation of section 124A, in response to a constitutional free speech challenge).

145. POTTER, *supra* note 8, at 55-56.

stamp of legislation.” Justice Varachariar labeled the emergency ordinances as “press-the-button” legislation where there had been little application of mind. The legislation was invalidated not on any abstract conception of fundamental rights but on the failure to conform to the basic principles of administrative law.<sup>146</sup>

The point is that, even in a colonial context, institutions might function on the basis of norms and values which, on occasion, might go against their own interests (the ICS case), or against the broader colonial interest (the *Talpade* case); they may in that limited sense be autonomous from the broader colonial project.

These three points are once again reasons to treat the conceptual category of the “colonial” with some suspicion. A decision to prevent elected officials from access to secret files, or an ordinance to facilitate preventive detention, are what comes to mind when one uses the term “colonial” in a post-colonial context. And it is these sorts of decisions which prompt scholars to study the continuities between, say, colonial and postcolonial security laws.<sup>147</sup> But if there is room within the colonial context *both* for the destruction of these files as well as for their preservation, or for the formulation of preventive detention ordinance as well as for its striking down, then perhaps the term “colonial” does not do justice to the historical particularities of this rule.<sup>148</sup>

#### IV. CONCLUSION

Anxieties about colonial continuities into the post-colonial situation are at least as old as the post-colonial situation itself. They were expressed vividly in the Constituent Assembly Debates by members who thought that it was a mistake to model the Constitution on the Government of India Act, 1935, for instance in the much-quoted lament by K. Hanumanthaiya that “[w]e wanted the music of Veena or Sitar, but here we have the music of an English band.”<sup>149</sup>

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146. De, *Emasculating the Executive*, *supra* note 14, at 81.

147. See Kalhan et al., *supra* note 2, at 125-26 (contextualizing the interest of security laws for scholars).

148. Again, none of this is intended by any means as a *defense* of colonial rule, in the British or any other context. It is a plea for analytic clarity when deciding just what aspects of that rule are indefensible.

149. MORRIS-JONES, *supra* note 32, at 88. See also Rajeev Bhargava, *Introduction: Outline of a Political Theory of the Indian Constitution*, in THE

Another member of the Constituent Assembly, Ramnarayan Singh, expressed anguish not so much at the persistence of British institutions, but at the persistence of British attitudes: “The British have departed but I regret to say that our countrymen have not forsaken the ways of their former masters. We will experience much more difficulty in bidding goodbye to the ways of the British than we experienced in bidding goodbye to the British themselves.”<sup>150</sup>

Arguments from colonial continuity were also voiced within the Assembly by members who were concerned about the persistence in the new Constitutional order of colonial institutions such as the Indian Civil Service and also outside the Assembly by those who deprecated the decision to adopt British institutions such as a Westminster-style Parliamentary system.<sup>151</sup> In the early post-Independence period, the idiom of colonial continuity was also used to criticize Government action to repress civil liberties.<sup>152</sup>

These invocations of colonial continuities as terms of normative criticism persist in contemporary political debate. They typically take one of three forms. The first involves using the term “colonial” as a synonym for “alien” or “un-Indian”; Rajeev Bhargava calls this the

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POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 1, 31 (Rajeev Bhargava ed., 2008) (describing grievances that an Indian Constitution modeled upon the constitutions of Westernized liberal democracies may resonate solely with the minority, Westernized, upper caste, and seem radically different for the rest of India’s more traditional population); De, *Constitutional Antecedents*, *supra* note 5 (emphasizing further the general fear that India’s “slavish imitation” of typically Western constitutions would fail).

150. See MORRIS-JONES, *supra* note 32, at 88 (referencing Gandhi’s famous deprecation in *Hind Swaraj* of the desire of some Indian nationalists for “English rule without the Englishman”); M.K. Gandhi, *Hind Swaraj*, *Indian Opinion* (Dec. 18, 1909).

151. See POTTER, *supra* note 8, at 55-56 (theorizing why members of the former colonial system may be more open to increased democratization and impending constitutional change than observers may have expected); MORRIS-JONES, *supra* note 32, at 81 (quoting Professor Bodh Raj Sharma’s idea that “India has chosen [he writes] to be a camp follower of the West and is taking pride in its godless secularism and in the paraphernalia of parliamentary democracy which it has decided to adopt . . . . It is a matter of great sorrow that the new Constitution does not breathe the principles of Truth and Ahimsa” to demonstrate concern about India’s pursuit of a Western style constitution).

152. See Arudra Burra, *Arguments from Colonial Continuity: The Constitution (First Amendment) Act, 1950* (unpublished manuscript) (2008) for a discussion of this in the context of debates around the First Amendment to the Constitution in 1951.

“cultural inadaptability thesis.”<sup>153</sup> The second involves the use of the term “colonial” in a purely temporal context – as designating a colonial-era law, with the implication that such laws are anachronistic. The third involves using the term “colonial” as a stand-in for “repressive” or “authoritarian.” The following passage from a report on sedition laws in India invokes the second and third senses of the term “colonial”:

A colonial legacy like sedition law, which presumes popular affection for the state as a natural condition and expects citizens not to show any enmity, contempt, hatred or hostility towards the government established by law, does not have a place in a modern democratic state like India. The case for repealing the law of sedition in India is rooted in its impact on the ability of citizens to freely express themselves as well as to constructively criticise or express dissent against their government. The existence of sedition laws in India’s statute books and the resulting criminalization of ‘disaffection’ towards the state is unacceptable in a democratic society. These laws are clearly colonial remnants with their origin in extremely repressive measures used by the colonial government against nationalists fighting for Indian independence.<sup>154</sup>

Finally, contemporary academic discussions of the post-colonial legal situation make heavy use of the idiom of colonial continuity. The present Symposium is one example of this tendency; another is a recent special issue of the *Journal of Comparative Studies of South Asia, Africa and the Middle East*, edited by Partha Chatterjee, on the topic of “Postcolonial Legalism.”<sup>155</sup> In his introduction to this journal issue Chatterjee asks, “[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.<sup>156</sup>

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153. Rajeev Bhargava, *Introduction: Outline of a Political Theory of the Indian Constitution*, in *THE POLITICS AND ETHICS OF THE INDIAN CONSTITUTION* 1, 30-31 (Rajeev Bhargava ed., 2008).

154. Centre for the Study of Social Exclusion and Inclusive Policy, National Law School of India University, *Sedition Law and the Death of Free Speech in India*, BANGALORE & ALTERNATIVE L. F. 59 (2011).

155. Partha Chatterjee, *Postcolonial Legalism*, 34 *COMP. STUD. S. ASIA AFR. & MIDDLE E.* 224, 224 (2014); see also Sandipto Dasgupta, *A Language Which is Foreign to Us: Continuities and Anxieties in the Making of the Indian Constitution*, 34 *COMP. STUD. S. ASIA AFR. & MIDDLE E.* 228, 229 (2014).

156. Chatterjee, *supra* note 155, at 224.

The main dissatisfaction with this formulation has to do, not with the definition of the postcolonial, but with the assumption that the category of the *colonial* is an unproblematic, descriptive one, at least when applied to laws and institutions. Our imagination of the colonial state is dominated by features of the state which are of interest to us because they seem to capture something essential about colonialism – domination, control, the operation of the rule of colonial difference. But an exclusive focus on these aspects of colonial rule prevent us from engaging with those aspects of the colonial state which were not directly concerned with advancing the colonial project.<sup>157</sup>

To the extent that the term “colonial” is used to mark merely a temporal boundary, this article has argued that its use is incomplete unless one identifies *which* aspect of the colonial state is being referred to within this temporal period. To put the point another way, *if* the term “colonial” is being used to refer merely to any law or institution which owes its origins to the colonial period, then it cannot automatically identify colonial laws and institutions with the maintenance of imperial interests. Conversely, if our interest is in providing an accurate historical characterization of this pre-1947 period, then the term “colonial” is not always helpful, precisely because of its association with the maintenance of imperial interests.

A particularly vivid example of this is provided by Kalhan et. al. in their description of the colonial origins of police torture, which they cite as part of the explanation for widespread abuses by police in contemporary India.<sup>158</sup> The authors go on to discuss the various norms of admissibility in the Indian Evidence Act and the Code of Criminal Procedure which were designed to limit such abuse.<sup>159</sup> What they fail to remark is the fact that these norms of admissibility were themselves products of colonial rule: concerns about torture in

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157. Mitra Sharafi offered the following colorful analogy to illustrate the point: imagine the state as a large fried egg with a yolk in the centre and white around it, with the yolk representing aspects of the state most closely associated with colonial rule in terms of domination and racism. It is tempting to think that most of the egg consists of the yolk; this article argues that lack of conceptual clarity about the term “colonial” may lead us to ignore the white.

158. Kalhan et al., *supra* note 2, at 110 (demonstrated a classic invocation of the term “colonial continuity” in the first sense described in the introduction, as providing part of an explanation for some present-day ill).

159. *Id.* at 119.

the police were so widespread in the early 1900s that the Fraser Commission recommended strengthening the norms of admissibility to prevent abuse of power by the police.<sup>160</sup> Thus the practice of appointing Commissions to investigate police torture is as much a colonial inheritance as the torture itself.<sup>161</sup>

In order to criticize the existence of sedition laws, or the practice of police torture, surely it is enough to cite the substantive reasons which make them unacceptable in the present? The fact that sedition laws can be used to stifle dissent in a democracy, or that torture is a serious violation of human rights, is argument enough in order to get rid of them. Calling them “colonial” may provide an additional rhetorical heft to this attack, but adds little that is substantive, for the colonial *origins* of a law are by themselves normatively neutral. If the argument of this article is correct, analytical clarity will be served best if questions and arguments posed in terms of colonial continuities are re-framed so as to remove the reference to the colonial, and focus our attention on more substantive issues.

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160. *See id.* at 120 n.78.

161. *Cf. id.* at 110 (describing the complexity of post-colonial development: “While institutional continuity has served India well in some respects, in other respects India has struggled to fully reconcile the inherited institutions of colonialism with its post-independence commitment to democracy, fundamental rights, and the rule of law.”). This is not to say that the existence of these Torture Commissions necessarily redounds to the credit of the colonial state: in fact Anuj Bhawania sees their role as also undergirding colonial rule, by allowing the colonial state to distance itself from these practices of torture. *See* Anuj Bhawania, ‘Very Wicked Children’ - ‘Indian Torture’ and the Madras Torture Commission Report of 1855, 6 SUR J. ON HUM. RTS. 7-27 (2009).