ADM JABALPUR'S ANTECEDENTS: POLITICAL EMERGENCIES, CIVIL LIBERTIES, AND ARGUMENTS FROM COLONIAL CONTINUITIES IN INDIA

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"The history of personal liberty is largely the history of insistence upon procedure."

- Justice Khanna, Jabalpur v. Shukla, A.I.R. 1976 S.C. 1207, 46-47 (India)

I. *ADM JABALPUR* AS A TRANSFORMATIONAL LEGAL MOMENT

The quotation above from Justice Khanna's celebrated dissent in *ADM Jabalpur v. Shivakant Shukla*,[1] a judgment often described as the Supreme Court of India's "darkest chapter," seems to suggest that following the ebbs and flows of legal doctrine on procedural laws can effectively construct a genealogy (if not a history) of personal liberty. The text of the judgment belies the tumultuous political context in which it was decided, and which largely dictated the conclusions of the judges in the majority. Although Justice Khanna was speaking as part of an Indian Supreme Court in the 1970s - two decades of political independence from Britain in 1947 and two national emergencies later - his dissent does not note breaks or discontinuities and carries as though legal categories of personal liberty and procedure transitioned seamlessly from the colonial to the postcolonial era of Indian law.[2] It is as though the legal history that he speaks of could be written as an account of institutional frameworks—in this case, the legal doctrine surrounding procedural laws and the courts that adjudicated them. The spirit of his dissent cannot be captured in his quotation. It was far from being a flattened narrative about the insistence on legal procedure. If Justice Khanna's dissent was read and understood as a mere academic exercise in plotting out a history of criminal legal procedure, the government would not have later censored it for questioning executive action.[3]

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1. A.I.R. 1976 S.C. 1207, 46-47 (India).

2. *Id.* at 100 (discussing that the idea of the sanctity of life and liberty and the principle that no individual shall be deprived of life and liberty without the authority of the law are concepts that grew and acquired "dimensions in response to the inner urges and nobler impulses with the march of civilization.").

3. H. M. SEERVAI, THE EMERGENCY, FUTURE SAFEGUARDS AND THE HABEAS CORPUS CASE: A CRITICISM 1, 3 (1978) ("Censorship in India protected [] judgments from professional criticism . . . .").

Therefore, the dissent's implications proved to be far wider, beyond the realm of courtroom practice.[4]

Close to midnight on June 26, 1975, Fakruddin Ali Ahmed, then-President of India, declared a state of national emergency under article 352(1) of the Indian Constitution.[5] The Indian National Congress ("INC") government, led by Indira Gandhi, also ensured that a subsequent presidential order suspended all fundamental rights under Part III, including the right to approach constitutional courts for relief (under articles 32 and 226 of the Constitution) for the duration of the emergency.[6] Because the presence of "internal disturbances" in the country was the reason for declaring an emergency, it was no surprise that the government first ushered

4. *Jabalpur*, A.I.R. 1976 S.C. at 46 (criticizing the decisions by the majority and endorsing, in spirit, Justice Khanna's dissent); GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 340-43 (1999) ("[T]he [] judges either were protecting the institution from an ill-intentioned government or protecting their personal futures or both."); Henry Abraham, Note, *'Merit' or 'Seniority'? Reflections on the Politics of Recent Appointments to the Chief Justiceship of India*, 16 J. COMMONWEALTH & COMP. POL. 303, 303-08 (1978) (noting the passing over of Justice Khanna for the post of Chief Justice in the aftermath of his dissent).

5. INDIA CONST. art. 352 ("(1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by Proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation Explanation. A Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof."). *See Emergency papers found*, TIMES OF INDIA, June 30, 2013, http://timesofindia.indiatimes.com/home/sunday-times/deep-focus/Emergency-papers-found/articleshow/20839450.cms (recounting that President Fakhruddin Ali Ahmed issued a written "Proclamation of Emergency" on the eve of June 25, 1975 by imposing severe restrictions on political activities, free speech, and dissent within India and was later officially published on June 26, 1975).

6. INDIA CONST. art. 32(1)-(2), 226 ("(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions . . . for the enforcement of any of the rights conferred by this Part."). In particular, the rights under articles 14, 21, and 22, dealing with the right to equal protection under the law, the right to life and liberty according to procedures established by law, and the rights of accused persons were suspended under article 359(1) of the Constitution.

Gandhi's political opponents into prison using the provisions of the Maintenance of Internal Security Act of 1971.[7] Many of them managed to file habeas corpus petitions before the High Courts at the state level. The Indian Supreme Court, the apex court in the country, heard all these petitions together—some on appeal and some based on special permission to produce themselves before the superior court.[8] Nearly a year after President Ahmed's proclamations, the Supreme Court pronounced judgment on two issues. First, whether the petitions were maintainable, that is, whether habeas corpus petitions could be filed at all; and second, if they were maintainable, the nature of judicial scrutiny that the Court could engage in.[9] The Supreme Court's judgment was also an evaluation of the government's executive action over that past one year; though it was not recorded in the judgment as such. In *ADM Jabalpur*, the Court held that there was no mala fides involved in the presidential proclamation that suspended the right to seek constitutional remedies.[10] The "emergency," as it was commonly referred to, lasted

7. *See* Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 129-30 (2006); Mrinal Satish & Aparna Chandra, *Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror-Related Adjudication*, 21 NAT'L L. SCH. INDIA. REV. 51, 63 (2009).

8. This was not the first instance of an emergency declared under article 352, nor was this the first instance of the Supreme Court's consideration of issues relating to preventive detention under emergency legislation. *See* IMTIAZ OMAR, EMERGENCY POWERS AND THE COURTS IN INDIA AND PAKISTAN 85, 96 (2002). Nor was this the first instance of the Supreme Court discussing judicial scrutiny of presidential proclamations of emergency under article 352 and suspension of Fundamental Rights under article 358. *See* Singh v. State of Punjab, A.I.R. 1964 S.C. 381 (1952) (India) (discussing that by virtue the presidential order "bars the remedy of the citizens to move any court for the enforcement of [] rights."). The extent to which *Singh* had to be distinguished formed a critical part of the legal reasoning in *ADM Jabalpur*.

9. For the broader discussion on courts and emergency powers in Asia, see Victor V. Ramraj & Arun K. Thiruvengadam, *Introduction: Emergency Powers and Constitutionalism in Asia*, *in* EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY 1, 1-20 (2010); Arun K. Thiruvengadam, *Asian Judiciaries and Emergency Powers: Reasons for Optimism?*, *in* EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY 466, 466-95 (2010) (analyzing which judiciaries have historically performed poorly when confronted with safeguarding the rights of individuals in times of emergency).

10. Jabalpur v. Shukla, A.I.R. 1976 S.C. 1207, 25 (India) (noting that the presidential order discussed barred any investigation into the matter of whether the order of detention is "vitiated by mala fides."); AUSTIN, *supra* note 4, at 340-41

about two years, and Prime Minister Indira Gandhi called for elections soon after. Her government was displaced, and the first non-INC government since independence was appointed instead.[11] The decision in *ADM Jabalpur* was repeatedly mentioned, in commentaries and reports thereafter, as the "darkest chapter" in the Supreme Court's history.[12]

The 1975–1977 emergency is also widely accepted as a turning point in the institutional history of the Supreme Court, and in particular, its engagement with civil and political rights.[13] Paradoxically, Justice Bhagwati, one of the four Supreme Court judges who sided with the majority on the *ADM Jabalpur* decision, was at the forefront of the highpoint of the court's "activist" decade.[14] Many of the prominent judgments of the post-emergency

(quoting Justice Beg's remark that "the care and concern bestowed by the state authorities upon the welfare of detenus who are well-housed, well-fed and well-treated, is almost maternal. Even parents have to take appropriate action against those children who may threaten to burn down the house they live in.").

11. For an account of the 1975 emergency in popular literature that references the legal controversies, see Sidharth Chauhan, *Representatives of the Indian Emergency in Popular Fiction*, 5 SOCIO-LEGAL REV. 40, 51 (2009) (explaining how popular literature recounted the pressure that the Indira Gandhi government faced in the wake of the Total Revolution led by Jayaprakash Narayan and that the decision in the Indira Gandhi v. Raj Narain case led to widespread demands for Indira Gandhi's resignation).

12. Anil Divan, *A Profile in Judicial Courage*, HINDU (Mar. 7, 2008), http://www.thehindu.com/todays-paper/tp-opinion/a-profile-in-judicial-courage/article1215366.ece. *See The Supreme Court Repents for ADM Jabalpur*, LAW & OTHER THINGS (Jan. 4, 2011), http://lawandotherthings.blogspot.com/2011/01/supreme-court-repents-for-adm-jabalpur_04.html (noting that several subsequent cases by the Supreme Court have noted that *ADM Jabalpur* was a "disgraceful" decision). *See, e.g.*, I.R. Coelho v. State of Tamil Nadu, A.I.R. 2007 S.C. 861 ("During emergency, the fundamental rights were read even more restrictively as interpreted by majority in Additional District Magistrate, Jabalpur v. Shivakant Shukla (1976) 2 SCC 521. The decision in Additional District Magistrate, Jabalpur about the restrictive reading of right to life and liberty stood impliedly overruled by various subsequent decisions.").

13. CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 76 (1998). For a contemporaneous account by a sociologist of law in India, see Robert L. Kidder, Note, *Law and Political Crisis: An Assessment of the Indian Legal System's Potential Role*, 16 ASIAN SURVEY 879, 882 (1976). For an account on the development of human rights in India, see GHANSHYAM SHAH, SOCIAL MOVEMENTS IN INDIA: A REVIEW OF LITERATURE 244 (2d ed. 2004).

14. Maneesh Chhibber, *35 Years Later, A Former Chief Justice of India Pleads Guilty*, INDIAN EXPRESS (Sept. 16, 2011), http://indianexpress.com/article/

decade of the 1980s note that the right to life was not to be understood only as "animal existence" but as a right to a life with dignity.[15] Judicial innovation created enforceable state obligations by reading the Fundamental Rights along with the Directive Principles of State Policy, although the latter were previously considered guiding principles.[16] Nevertheless, this was only about a changing trend in legal doctrine through judicial decision-making. Judges did not write "activist" judgments in isolation, nor were the courts oblivious to the shifting political culture around them. Civil liberties organizations and "public-spirited" petitioners approached the courts with questions of prisoner's rights and bonded labor and workers' rights.[17] For instance, during the pendency of the emergency, the People's Union for Civil Liberties and Democratic Rights (today People's Union for Civil Liberties) was formed, which continued to be one of the important civil liberties organizations in India.[18] The

news-archive/web/35-yrs-later-a-former-chief-justice-of-india-pleads-guilty/ (quoting Justice Bhagwati: "I was wrong. The majority judgment was not the correct judgment. If it was open to me to come to a fresh decision in that case, I would agree with what Justice (HR) Khanna did . . . ."). *See* K.G. Balakrishnan, Chief Justice of India, Address on Book Release of JUDICIAL REFLECTIONS OF JUSTICE BHAGWATI at Vigyan Bhavan, New Delhi (Sept. 11, 2008) *available at* http://www.supremecourtofindia.nic.in/speeches/speeches_2008/release_of_book_on_justice_bhagwati_11-9-08.pdf.

15. *See, e.g.*, Tellis v. Bombay Mun. Corp., A.I.R. 1986 S.C. 180, 23 (India); Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802, 5 (India); Mullin v. Administrator, Union Territory of Delhi, A.I.R. 1981 S.C. 746, 3 (India) (discussing that a court should always attempt to "expand the reach and ambit of the fundamental right rather than to attenuate its meaning and content." Note however, that the petitioners in Olga Tellis were unsuccessful in getting a verdict in favor of the pavement dwellers who had been evicted from their homes.). *See* Kalyani Ramnath, *The Runaway Judgment: Law as Literature, Courtcraft and Constitutional Visions*, 3 J. INDIAN L. & SOC'Y., 1, 3 (2012).

16. INDIA CONST. art. 32 at Part IV. *See* Kalyani Ramnath, Note, *We the People: Seamless Webs and Social Revolution in India's Constituent Assembly Debates*, 32 S. ASIA RES. 57, 58-70 (2012).

17. *See, e.g.*, C. V. Subbarao, Sumanto Banerjee & Sudesh Vaid, Note, *Civil Liberties Movement*, 22 ECON. & POL. WKLY. 1260, (1987) (suggesting in a letter by civil liberties advocates to the editor of the Economic and Political Weekly that previous columns on civil liberties in the periodical had discounted the role of organizations and individuals while highlighting the importance of courts).

18. *A Short History of PUCL*, PEOPLE'S UNION FOR CIVIL LIBERTIES, www.pucl.org/history.html (last visited May 19, 2015) (describing that leader Jaya Prakash Narayan founded the People's Union as an organization free from political ideologies to bring people together from various political platforms to defend civil liberties and human rights).

post-emergency legal culture was marked by resurgence in civil society activism, a supportive and vocal trio of Supreme Court judges (Justices Bhagwati, Krishna Iyer, and Chinappa Reddy), and a renewed focus on the ways in which legal measures affected social inequality.[19]

Because this narrative about India's constitutional culture is well known, this article steps around the existing focus on the "activist" Indian Supreme Court and a post-emergency legal culture.[20] Instead, this article looks at how civil liberties fared under political emergencies that preceded *ADM Jabalpur*—its antecedents, so to speak—to understand why the decision is placed in the "anti-canon" of Indian constitutional law. *ADM Jabalpur*, after all, only reiterated the importance of preventive detention laws and constitutionally sanctioned emergency regimes, just as other judgments had done in the past.[21] So why did it acquire this notoriety? In doing so, this article re-examines the extent in which *ADM Jabalpur* was a transformative legal moment.[22]

Using this example and following the themes in this Symposium, this article intervenes in the debate on colonial continuities, as it pertains to colonial and postcolonial law in India. The argument regarding colonial continuities, broadly put, suggests that colonial-era laws or jurisprudence should not remain on statute books, owing primarily to their providence.[23] Others suggest that the argument

19. UPENDRA BAXI, COURAGE, CRAFT, AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES 33 (1985); EPP, *supra* note 13, at 76; Anuj Bhuwania, *Courting the People: The Rise of Public Interest Litigation in Post-Emergency India*, 34 COMP. STUD. OF S. ASIA, AFRICA & MIDDLE EAST 314, 314-35 (2014).

20. *See, e.g.*, UPENDRA BAXI, THE CRISIS OF THE INDIAN LEGAL SYSTEM 217 (1982) (showing that the courts in the post-emergency era encouraged prisoners to confidently appeal their matters and that the Supreme Court's expansion of socio-economic rights was born out of a sense of crisis).

21. Singh v. State of Punjab, A.I.R. 1964 S.C. 381, 29 (1952) (India) (holding that although the courts are held to be the custodians of a citizen's fundamental rights, it is important to remember that fundamental rights are ultimately governed by the Constitution itself); Gopalan v. State of Madras, A.I.R. 1950 S.C. 27 (India).

22. Kidder, *supra* note 13, at 879-80 (stating that an examination of legal institutions before and after the emergency declaration would determine the practical consequences of changed legal doctrine).

23. Kalhan et al., *supra* note 7, at 224 (observing that postcolonial governments have built on and maintained the authoritarian aspects of the colonial

regarding colonial continuities is of limited value and that legal arguments should instead be made on substantial, constitutional grounds.[24]

This article adopts two alternative perspectives to shift the terms of this debate. First, it focuses on legal and political actors rather than legal doctrine, legislation, or legal infrastructure.[25] Second, it focuses on the transition from colonial to post-colonial not in terms of a single break or moment (most commonly, the year of political independence in 1947 and the adoption of the Constitution in 1950), but rather as emerging over a longer period, i.e. what Elizabeth Kolsky referred in her presentation as a "process."[26] Using the example of the interaction between a civil liberties discourse and political emergencies preceding *ADM Jabalpur*, this article argues that historicizing arguments from colonial continuities reveals their usefulness. To rephrase, it asks the question that shifts the focus from legislation or judicial decisions alone: who used arguments from colonial continuities and why? What value did it possess to the

legacy); Durba Mitra & Mrinal Satish, *Testing Chastity, Evidencing Rape; Impact of Medical Jurisprudence on Rape Adjudication in India*, 49 ECON. & POL. WKLY. 51 (2014) (exploring the role and the significant impact of historical textbooks of medical jurisprudence that originated in the 19th century and its effects on case law on rape from 1950 to 2011); Siddharth Narrain, *'Disaffection' and the Law: The Chilling Effect of Sedition Laws in India*, 46 ECON. & POL. WKLY. 33, 33 (2011) (examining the ability of citizens to express themselves under a colonial legacy that believes its citizens should not show hatred or hostility toward the government established by law).

24. Arudra Burra, Arguments from Colonial Continuity: The Constitution (First Amendment) Act, 1951 (Dec. 7, 2008) (unpublished manuscript), http://ssrn.com/abstract=2052659. [Note: Arudra Burra is also a contributing author to this volume of AM. U. INT'L L. REV.]

25. For a model that focuses on legal actors, see Terence C. Halliday & Lucien Karpik, *Political Liberalism in the British Post-Colony: A Theme with Three Variations*, *in* FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY: THE POLITICS OF THE LEGAL COMPLEX 3-6 (Terence C. Halliday et al. eds., 2012). In my discussion, I do not presume that legal actors are necessarily committed to liberalism as Halliday and Karpick do in theirs. *See* discussion *infra* Part III text accompanying notes 109-15 (noting that Keshav Talpade's high-profile litigation proved instructive for civil liberties groups as the opposing lawyer's arguments were meant to appeal to a larger public audience).

26. Elizabeth Kolsky, *Law, Crime and Colonial Control on the North-West Frontier of British India* (on file with author); Elizabeth Kolsky, Associate Professor History, Villanova University, Presentation at the Association of American Law Schools (AALS) Panel: The Postcolonial Lives of Colonial Law in South Asia (Jan. 3, 2015).

historical actors that navigated this transition? Finally, should this perspective matter?

This article reveals the usefulness of historicizing arguments from colonial continuities by tracking historical moments when legal emergencies were imposed. In each legal emergency, this article traces legal and political actors in the events leading up to, during, and following each emergency. This article also fleshes out this political and historical context. Section II discusses *ADM Jabalpur* and in particular, the ways in which the judges discussed colonial precedents for preventive detention, executive discretion, and the writ of habeas corpus under constitutional emergencies. Section III discusses lawyers, politicians, and civil society actors during the 1930s in colonial India, against the backdrop of the formation of the Indian Civil Liberties Union. Specifically, it examines the emergency legal regimes of the Second World War in British India and the work of civil liberties lawyers and organizations that challenged it.

Section IV analyzes the drafting of the Constitution of India, its stamp of approval for preventive detention and widespread censorship through public safety laws, and the emergence of a post-1950 constitutionalism built around the question of civil liberties. Particularly, it evaluates the litigation surrounding AK Gopalan, the prominent Communist leader in Kerala and Madras, which proved to have precedential value for cases in the 1960s and 1970s. Section V reviews civil liberties organizations that employed the colonial continuities argument in a post-Emergency legal culture and argues that *ADM Jabalpur*'s antecedents demonstrate how questions of government and opposition are reflected in a civil liberties discourse. The word "colonial" in arguments from colonial continuities before and after *ADM Jabalpur* was not only a reference to a time under foreign, repressive rule, but performed an important role in carving out a space for political opposition. Legal actors, not legal doctrine, marked the decision as a transformational legal moment.

II. *ADM JABALPUR*'S PRECEDENTS AND LEGAL DOCTRINE ON THE "JURISDICTION OF SUSPICION"

One of the key legal issues in *ADM Jabalpur* was whether the petitions filed by political prisoners could be maintained, given that the presidential proclamation had suspended the enforcement of Fundamental Rights under article 359(1).[27] The primary legal argument for the petitioners was to challenge the vires of the second presidential ordinance that suspended the right to approach the courts for relief.[28] The respondents argued that such a suspension was not permissible under the Constitution.[29] The judges cited to three sets of precedents that were decided before the adoption of the Constitution in 1950. The first set of precedents related to the right to a writ of habeas corpus under common law in India; the second set related to the nature of fundamental rights in relation to emergency laws after the adoption of the Constitution; and the third set related to the nature and meaning of "rule of law" under emergency regimes.[30] This section discusses two of the opinions in the judgment: 1) specifically analyzing Chief Justice Ray's majority opinion, which overturned certain High Court decisions that permitted the petitions, and 2) Justice Khanna's dissent.

In relation to the issue on whether political prisoners could maintain their petitions, Chief Justice Ray's majority opinion ruled that rights in common law were non-existent once a written constitution enumerated similar rights. If so, he argued that no common law right to habeas corpus existed once the presidential

27. Jabalpur v. Shukla, A.I.R. 1976 S.C. 1207, 8 (India) (stating that the purpose and object of article 359(1) is that the "enforcement of any Fundamental Right mentioned in the presidential order is barred or it remains suspended during the emergency.").

28. *Id.* at 26 (discussing that the jurisdiction and the powers of the courts remain the same as before the presidential order, the order merely takes away the standing of an individual to move the courts for the enforcement of certain Fundamental Rights during an emergency).

29. *Id.* at 18 (responding that if any provision of the Constitution allows this suspension of the right to obtain relief, the power of the courts is limited).

30. *Id.* at 64 (observing that before the Constitution, the right to personal liberty was contained in statutory law, such as the Indian Penal Code).

proclamation suspended article 32 (in the case of the Supreme Court) and article 226 (in the case of the High Courts).[31] The majority opinion discussed the following case law in particular: *Girindra Nath Banerjee v. Birendra Nath Pal*,[32] *District Magistrate v. Mammen Mappillai*,[33] and *Matthen v. District Magistrate*.[34] Chief Justice Ray also distinguished *ADM Jabalpur* from the Privy Council decision in *Emperor v. Banerji*,[35] which was decided during the Second World War, as well as the decision in *Gopalan v. State of Madras*,[36] decided by the Supreme Court of India in 1950. The majority opinion discussed *Banerjee*, *Banerji*, and *Gopalan* extensively.

In *Banerjee*,[37] the petitioner, Girindra Nath Banerjee, was subjected to police surveillance under the Bengal Criminal Law Amendment Act, with his movements being restricted to a certain defined area of the city of Calcutta. One of the issues was whether the High Court had the power to issue a writ of habeas corpus under common law. Justice Rankin referenced the High Court Criminal Procedure Act of 1875, under which judges could issue writs in matters relating to their original jurisdiction.[38] These rights were consolidated under the Code of Criminal Procedure in 1882 and

31. *Id.* at 7 (arguing that the presidential order barred any claim to a writ of habeas corpus and the enforcement of article 21, the sole repository of rights to life and personal liberty).

32. 1927 A.I.R. (Cal) 496, 24 (India) (discussing the incorporation of English law over the common law in Calcutta).

33. 1939 2 M.L.J. 135, 22 (1938) (India) (holding that the case falls under Indian common law and English Law does not apply).

34. (1939) 41 BOMLR 1119, 2 (India) (looking to the procedure as to which judgments have been filed for a writ of habeas corpus).

35. (1946) 48 BOMLR 1, 2-3 (1945) (India) (outlining an appeal by leave of the Federal Court of India which dismissed eight appeals based on orders and judgments that were in the nature of habeas corpus writs directing the release of the applicants; the present Court, having regard for the English law that an order directing the release of an individual under a writ of habeas corpus is final and not subject to appeal and the importance of preserving safeguards of personal liberty, requested arguments of competency which may affect this appeal).

36. A.I.R. 1950 S.C. 27, 30 (India) (holding that the petitioner's detention was not illegal because it did not infringe on any of the provisions of Part III of the Constitution).

37. *Banerjee*, 1927 A.I.R. (Cal) at 29 (holding that the petitioner was entitled to a statutory right under the Code of Criminal Procedure).

38. *Id.* at 24 (observing that a prohibition for High Courts and judges on issuing any writ of habeas corpus beyond the Presidency Towns can not be confined to only the case of European British subjects).

extended outside the limits of the original jurisdiction in 1923.[39] The court conceded that the older writs could still be issued in cases not covered by section 491 of the 1882 Act, but the Act under which Girindra Nath Banerjee had been imprisoned stated that recourse would come under section 491.[40] The Calcutta High Court ruled that the right to a habeas corpus writ had been a statutory right, not a common law right.[41]

Similar issues came before the Privy Council in a case of preventive detention during the period of political emergency of the Second World War. In *Banerji*,[42] six detainees appealed to the Privy Council for their release, arguing that the Governor had not applied his mind to the conditions of detention even though he was legally required to do so. The state imprisoned the six detainees under Regulation III, 1818, one of the oldest regulations authorizing preventive detention in British India.[43] The Privy Council decided that the Governor's personal satisfaction was not necessary and that the detentions could be delegated to a designated official. In its reasoning, the Council referenced the Calcutta High Court's decision in *Banerjee*[44] and thereafter overturned the decision of the Federal Court in *Emperor v. Talpade*,[45] concerning the law on habeas corpus in British India. *Banerji* also referred extensively to the Defence of

39. *Id.* at 25 (discussing the history behind how the courts were finally able to make an application outside of the original jurisdiction).

40. *Id.* at 29 (highlighting that although the relief sought in the case would have been perfectly fine under the Criminal Procedure Code, the Bengal Criminal Law Amendment expressly stated that the use of section 491 could not be exercised on anyone that had been arrested or detained under the Local Act).

41. *Id.* at 27 (elaborating that the statutory common law of India has no special application to Indian individuals and that the application depends on the jurisdiction of where these individuals are from).

42. Emperor v. Banerji, (1946) 48 BOMLR 1, 23 (1945) (India).

43. Technically, this was under Company Rule in Bengal. *See* RADHIKA SINGHA, A DESPOTISM OF LAW xviii (1998) (describing the limits of the different court levels that were extended in 1818).

44. *Banerjee*, 1927 A.I.R. (Cal) at 23 (commenting on the history and condition of habeas corpus law in India and whether the High Court has the power to grant the writ of Habeas Corpus at common law independently of the Criminal Procedure Code).

45. Emperor v. Talpade (1944) 46 BOMLR 22, 16 (1943) (India) (remarking that if a detaining authority gave four reasons for detaining a man, it can never be certain to what extent the bad reasons operated on the mind of the authority or whether the authority made the detention order with only one or two good reasons).

India Rules, 1939, in the context of its precedents.[46] The Privy Council did not allow a habeas corpus-based appeal, especially an appeal relating to preventive detention, which was unlike the English law position in *Cox v. Hakes*.[47] In effect, the Privy Council held that section 491 was the repository of habeas corpus remedies in British India.

The first issue that utilized "colonial" precedents was the issue of the nature of remedies that detainees could claim under Indian constitutional law. In the majority opinion, Chief Justice Ray argued that the presidential order made under article 359(1) suspended the detainee's right to secure release from illegal detention through a writ of habeas corpus.[48] Chief Justice Ray countered the defense's argument that a right against arbitrary detention was still available in common law *outside* of the suspended article 21 and cited the decisions in *Banerji* and *Banerjee*. He argued that before the Constitution, the right to a habeas corpus was available under section 491 of the Code of Criminal Procedure, 1898, as a statutory remedy, and not a common law right.[49] Arguendo, if any common law rights existed at all outside of section 491, which was repealed, then those common law rights were subsumed into article 21 after the enactment of the Constitution. In other words, after the enactment of the written Constitution in 1950, the right to personal liberty did not exist as a natural right, besides the chapter on Fundamental Rights in Part III of the Constitution.[50] If the presidential declaration

46. *See Banerjee*, 1927 A.I.R. (Cal) at 8-9.

47. Cox v. Hakes, [1890] 15 A.C. 506 (H.L.) 506-08 (appeal taken from Eng.) (holding that the proceedings were a criminal matter; therefore, the case came before section 47 of the Judicature Act of 1873 which says that "no appeal shall lie from any judgment of the High Court 'in any criminal cause or matter.'").

48. For a historical account of the habeas corpus writ in England and the empire, see PAUL DELANEY HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 2, 4, 6 (2010).

49. Jabalpur v. Shukla, A.I.R. 1976 S.C. 1207, 10 (India) (stating that there was no common law remedy and no civil law remedy for unlawful infringement of the right to personal liberty in India before the Constitution and further expanding that there was no statutory right to enforce the right to personal liberty other than section 491 of the Criminal Procedure Code).

50. *Id.* at 292 (discussing the role of natural rights, the Court argues that natural rights have no place outside of the Constitution; it is up to the state to incorporate natural rights and subject these rights to such limitation as are appropriate).

mentioned that article 21 was suspended or if the wholesale suspension of Part III of the Constitution was declared under article 359, then there would be no recourse because constitutional remedies under article 32 in the Supreme Court and article 226 in the various High Courts would also be suspended.[51]

The second issue that viewed the adoption of the Constitution as a "break" in colonial continuity was the issue of the nature of judicial scrutiny in cases where the petitions were maintainable. Justice Khanna's dissent argued that if there was an illegitimate use of executive discretion, then it would not be protected by the presidential proclamation under article 359.[52] Unlike the majority opinion, Khanna endorsed the Court's power to look into the mala fide exercise of power, even extending the nature of judicial scrutiny to the subjective satisfaction of the President. He advocated a shifting burden of proof. The initial burden is on the detainee to show, prima facie, that there was an illegitimate exercise of power.[53] Then the State must show that there was in fact, no mala fides on its part. If the State fails to do so, then it would create a "serious infirmity" in the case for the government. Khanna also reiterated that this would mostly depend on the facts of the case. Suporting of his ruling that the judiciary should fearlessly look into executive discretion, he cited cases decided before the Constitution. He cited *Emperor v. Vimalabai Deshpande*[54] on the provisions for preventive detention under rules 26 and 129 of the Defence of India Rules, 1939. The Privy Council in this case, followed the ruling in *Banerji*, but arrived at the opposite conclusion based on the facts. The Council did not hesitate to look into whether the policeman who had arrested Purushottam Deshpande, the detainee, had "reasonable

51. *Id.* at 5-6 (observing that the respondents only had article 21 of the Constitution available to them, and in looking at the presidential order that suspended the right to move for enforcement of their right, the respondents petitions were liable to be dismissed).

52. *Id.* at 91 (discussing that the presidential order did not find favor with the High Courts; the courts found the order to be an absolute bar to the judicial security of detention orders).

53. *Id.* at 131 (elaborating on the different ways a detainee may present a prima facie case or the ways the state may disprove a detainee's case).

54. (1946) 48 BOMLR 423, 6-7 (India) (holding in part that the burden did lay on the police officer in showing to the court that his suspicions, which led to the detention, were reasonable).

suspicion" as required under rule 129. The Council ruled for the appellant and recommended his release. Both cases adopted the ruling of the Privy Council in *Eleko v. Nigeria*:[55]

> The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action; before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.

Justice Khanna's dissent noted that judges could look at the acts of the executive despite the fact that the presidential proclamation suspended the specific Fundamental Right that provided the acts. In this case, article 21 was not the sole repository of personal liberty, nor did articles 32 and 226 exhaust the constitutional courts' jurisdiction of looking into the matter. Flipping Justice Ray's reading of laws that survived the 1950 Constitution, Justice Khanna suggested that by virtue of article 372,[56] customs and usages from

55. [1931] Vol. Reporter 1, 5 (Nigeria) (deciding that a court could not fully investigate due to the question of native custom).

56. Article 372 entitled Continuance in force of existing laws and their adaptation, states:

> (1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.
>
> (2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.
>
> (3) Nothing in clause (2) shall be deemed-
>
> (a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or
>
> (b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.
>
> *Explanation I.* The expression law in force in this article shall include a law passed or made by a legislature or other competent authority in the territory of India before the

part of the common law of England also survived the Constitution.[57]

Third, and finally, the respondents in *ADM Jabalpur* claimed that the denial of legal recourse through the presidential proclamations during the emergency resulted in the negation of the rule of law. The majority opinion by Chief Justice Ray noted that there is no such negation because the emergency provisions are contained within the written Constitution, which is the supreme law. On the other hand, Justice Khanna's dissent vehemently disagreed with this view. Noting that the "illusion of the rule of law is not the same as the reality of the rule of law,"[58] he stated that the mere presence of a statute cannot be equated with the rule of law if the statute itself does not measure up to the standards of the rule of law. This reasoning escaped the self-referential nature of the other opinions and exposed how limited the application really was. In this sense, Justice Khanna's quote at the beginning of this article reads more as an ironical statement and does not capture the spirit of his dissent.

commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

Explanation II. Any law passed or made by a legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra territorial effect.

Explanation III. Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

Explanation IV. An Ordinance promulgated by the Governor of a Province under Section 88 of the Government of India Act, 1935 , and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding state earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.

INDIA CONST. art. 372 (art. 372(1) stating that all laws in force in India immediately before the commencement of the Constitution shall ocntinue in force until a competent Legislature alters, repeals, or amends the continuity).

57. Director of Rationing and Distribution v. The Corporation of Calcutta, (1961) S.C.R. 158, 11 (India) (highlighting that the Constitution is not looking to make any changes in the legal field, rather it has indicated that the laws in force continue to have validity unless they come in conflict with express provisions in the Constitution).

58. Jabalpur v. Shukla, A.I.R. 1976 S.C. 1207, 42 (India).

In addition to these pre-constitutional precedents, each of the opinions (including the concurring opinions that are not discussed here) referred to the post-constitutional cases as well. The most important cases in this regard were *Gopalan*[59] and *Singh v. State of Punjab*.[60] The majority opinion of *ADM Jabalpur* cited *Gopalan* (discussed in detail later in this article) in support of Chief Justice Ray's ruling that "law" in article 21 referred to statutory law and not to natural law, or some other equally "vague" category.[61] Justice Khanna's dissent, on the other hand, used *Gopalan* to argue that "law" did not apply merely to a procedure, but also to substantive law.[62] The concurring opinions also referred to *Gopalan* to support their proposition that rights could not be "introduced through the back door," when it had been explicitly suspended.[63] Unlike the case in *ADM Jabalpur*, however, there was no presidential proclamation under article 359 in *Gopalan*. In *Makhan Singh*, where the Court did deal with the presidential proclamation made under article 358, detainees in that case could not approach courts for remedies in cases of violation of Fundamental Rights expressly mentioned in the proclamation (as opposed to the blanket suspension available under article 359).[64]

This discussion seems inadequate in constructing a "history" of personal liberty, given that it deals largely with a teleological evolution of legal doctrine. A history, at the very least, ought to note continuities and discontinuities over time. Here, the opinions by Ray and Khanna do note that a written Constitution in 1950 changed the

59. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27, 145 (India) (discussing in part that it is not up to the Court to improve upon the Constitution; if public opinion disfavors the law that Parliament made, then the public opinion will compel Parliament to change the law).

60. A.I.R. 1964 S.C. 381, 46 (1952) (India) (stating that the presidential order of the case was a conditional order that in effect would allow an individual's right to be suspended; had the order not been conditional, the right would not have been suspended).

61. Jabalpur v. Shukla, A.I.R. 1976 S.C. 1207, 62 (India) (arguing that law must have some firmness and law means positive State made law).

62. *Id.* at 116 (establishing that article 21 covers both the existence of a substantive power that deprives a person of his rights and the procedure for the exercise of that substantive power).

63. *Id.* at 156.

64. *Singh*, A.I.R. 1964 S.C. at 14 (explaining that under article 358 anything done or not done cannot be challenged, even after the emergency is over).

institutional framework within which remedies could be claimed. In spite of the Constitution, the structure of the reasoning and their conclusions remain unchanged from the pre-constitutional precedents that they cited. Instead, the majority and concurring opinions go to extreme lengths to note why a rule of law under emergency is still a rule of law. This account gives a flattened picture of legal continuities and discontinuities. From the perspective of a legal academic or practitioner in the present, it fails to explain why *ADM Jabalpur* was a historic legal decision or why it spurred on the legal and political changes that it did.

In writing about colonial continuities, the term "colonial" usually refers to the period before 1947, the year of political independence.[65] A standard account of the colonial continuities argument would emerge from *ADM Jabalpur* and its antecedents in two ways. First, the legislation that undergirds the cases in the pre-constitution and post-constitution periods are the same, or similar—the Defence of India Act and the Rules, the Preventive Detention Act, the Indian Penal Code and the Code of Criminal Procedure were all framed and adopted pre-1947 or shortly thereafter.[66] The institutional continuity, therefore, is obvious. Second, the judgment itself refers uncritically to precedents that were decided by the Privy Council and the Federal Court, both of which functioned for the most part as courts of appeal in the pre-1947 era for India.[67] In this sense too, the Supreme Court judges in independent India do not seem to have noticed any incongruities. In both these senses, *ADM Jabalpur* seems to have endorsed a structure of judicial reasoning that would have been

65. Kalhan et al., *supra* note 7, at 126-32 (discussing the evolution of the use of extraordinary powers during times of declared emergencies).

66. For a compilation of legislation that remains similar pre and post the Constitution, see Preventive Detention Act, 1950, No. 4, Acts of Parliament, 1950 (India); The Defence of India Act, No. 35 of 1939, INDIA CODE (1915) ACT IV; Code of Criminal Procedure Act, No. 5 of 1898, CODE CRIM. PROC. § V (1898) (India); Sedition Act, No. 45 of 1860, PEN. CODE § 124A (1860) (India).

67. See judgments listed under "Privy Council" and then "India" on http://www.bailii.org for papers relating to appeals from Indian courts. For an account of the Federal Court of India, see M. V. PYLEE, THE FEDERAL COURT OF INDIA (REV. ED. 1996) and Rohit De, *Emasculating the Executive: The Federal Court and Civil Liberties in Late Colonial India: 1942-1944*, *in* FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY: THE POLITICS OF THE LEGAL COMPLEX (Terrence C. Halliday, Lucien Karpik and Malcolm M. Feeley eds., 2014).

familiar to those in the colonial era. On these grounds, the argument from colonial continuities questions its viability in democratic, independent India.

However, 1947 hardly appears as a marker of time (between say, the colonial and the postcolonial) within the judgment in *ADM Jabalpur*. Instead, the focus is on the adoption of a written constitution; notice the debate over the "merger" of common law rights into the enumerated fundamental rights in the opinions.[68] In this regard, the argument from colonial continuities still possesses some cache; the word "colonial" may still play an important role. If the focus is singularly on the continuities or discontinuities in legal institutions, statutory legislation, and courts, it fails to recognize the legal actors from whom these arguments primarily emerged—activists, lawyers, petitioners, and scholars. Colonial continuities were most starkly experienced by those whose political and social lives were affected despite independence in 1947 or the adoption of a constitution in 1950. It is to these legal actors, rather than to the legal scaffolding, that this article turns its attention. The context in which legal actors recognized the nature of colonial continuities that *ADM Jabalpur* contained, confirmed its place in the anti-canon of Indian constitutional law. It had much less to do with the providence of the legislation under challenge or the courts that decided them. This article shall now turn its attention to this unique role of the colonial continuities argument as a means for legal actors to carve out a space for political opposition.

III: THE SECOND WORLD WAR, EMERGENCY LEGAL REGIMES, AND THE BOMBAY CIVIL LIBERTIES UNION

Although the shock of the legal system's response to the emergency in 1975 is often credited with the rise of an organized civil liberties movement, activists, lawyers, and politicians began using the term "civil liberties" as part of the legal language as early as the 1930s. The 1930s in colonial India (especially in the provinces of Bombay and Madras) had all the accoutrements of a tumultuous

68. *Jabalpur*, A.I.R. 1976 S.C. at 17 (clarifying that the purpose in making certain general aspects of rights fundamental is to guarantee that these rights not be illegally invaded by executive, legislative, or judicial establishments of the State).

political time.[69] It began with the impact of the Depression years on colonial economies and ended with the declaration of another world war.[70] Major and minor political parties in India protested against Britain's declaration of war against the Axis powers, arguing that it would ruin the colony both financially and politically. But just before the War had commenced, Britain proposed and enacted the Government of India Act, 1935.[71] It was meant to be the next step in the list of constitutional reforms that would move India towards political independence, or at the very least, autonomy within the empire. As a result of the 1937 provincial elections held under this Act, Indian National Congress (INC)-led governments came to power in Bombay and Madras, as they did in other provinces of British India.[72] Non-Congress parties, such as the Communist Party of India and the Justice Party in Madras, were as concerned with the newly installed Congress ministries as much as the British Imperial State. The INC governments had not discarded any of the emergency laws that the British government had employed and did not hesitate to use these laws against its political opposition.[73] Soon after, however, the ministries in the provinces resigned and the government imposed Governor's rule.[74] The political culture of the 1930s reflected an increasing concern with the shape and form of "Indian" government, even though it was clear that many British legal innovations would be retained.

69. MITHI MUKHERJEE, INDIA IN THE SHADOWS OF EMPIRE: A LEGAL AND POLITICAL HISTORY 1774-1950 222-23 (2010).

70. For an account of the pre-war years in Madras, see CHRISTOPHER J. BAKER, THE POLITICS OF SOUTH INDIA 1920-1937 110 (1976). For a similar account for Bombay, see PRASHANT KIDAMBI, THE MAKING OF AN INDIAN METROPOLIS: COLONIAL GOVERNANCE AND PUBLIC CULTURE IN BOMBAY, 1890-1920 1, 9 (2007) (tracing the evolution of civic associations in Bombay through the late nineteenth and early twentieth century).

71. Government of India Act, 1935, 25 GEO. 5, c. 2

72. JOSEPH E. SCHWARTZBERG, SCHWARTZBERG ATLAS, A HISTORICAL ATLAS OF SOUTH ASIA 222, http://dsal.uchicago.edu/reference/schwartzberg/pager.html?object=260&view=text.

73. Sanjoy Bhattacharya, Note, *Wartime Policies of State Censorship and the Civilian Population: Eastern India, 1939-45*, 17 SOUTH ASIA RESEARCH 2, 140-77 (2001).

74. For the powers of the Governer under the Government of India Act, 1935, see K. T. SHAH, PROVINCIAL AUTONOMY: UNDER THE GOVERNMENT OF INDIA ACT, 1935 77 (2d ed. 1937) (providing a historical account and the scope, nature limits, and discretionary powers of the Governor).

In the midst of these developments, Jawaharlal Nehru proposed the formation of an Indian Civil Liberties Union ("ICLU").[75] Nehru's proposal for an ICLU drew inspiration from the National Union for Civil Liberties in England and the American Civil Liberties Union ("ACLU").[76] He corresponded with the ACLU's Roger Baldwin, although there was no formal affiliation between the two organizations. Unlike the ACLU in the 1930s, there was no constitutional Bill of Rights in colonial India around which a civil liberties organization could build a court-centric agenda. Again, the ICLU did not have, as the ACLU did at the time, an agenda to raise concerns about free speech and labor rights through litigation and lobbying.[77] Specific items or strategies were not part of Nehru's initial proposal; it was designed as an elite body that would recommend policy changes to the government.

In Nehru's opinion, the ICLU would be a non-denominational, non-partisan entity, with representation from across the political spectrum.[78] In most respects, the aims of the ICLU were in line with the aims of the Congress party, making it difficult for Nehru to answer questions about the ICLU's "anti-state" stance.[79] For a brief period between 1936 and 1938, Nehru's idea found favor with the "prominent individuals" that had received his invitations.[80] This

75. *See* Munmun Jha, Note, *Nehru and Civil Liberties in India*, 7 INT'L J. HUM. RTS. 103, 104-15 (2003) [hereinafter Jha, *Nehru and Civil Liberties*].

76. *Civil Liberties Union: Pt. Nehru Inaugurates Bombay Branch*, TIMES OF INDIA, Aug. 25, 1936, at 4; *see also* Munmun Jha, A Study of Human Rights Organizations and Issues in India 39 (Apr. 1996) (unpublished Ph.D. thesis, University of Glasgow), http://theses.gla.ac.uk/2555/ [hereinafter Jha, A Study] (explaining that Nehru was extremely impressed with the work of the ACLU after having met with its leaders).

77. Laura M. Weinrib, The Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917-1940 (2011) (unpublished Ph.D. dissertation, Princeton University).

78. *Civil Liberties Union: Mr. Nehru on Its Need, Committee Formed in Bombay*, TIMES OF INDIA, May 18, 1936, at 12 (noting that Nehru's opinion compared to countries like England and France which already had a democratic check in place; India had to depend on the public's opinion to provide the necessary checks on government, and suggesting that one of these checks could be the ICLU).

79. Jha, A Study *supra* note 75, at 104-15 (2003) (stating that Nehru visualized the scope of civil liberties as narrow in focusing purely on the functioning of government and that a civil liberties movement such as "anti-state" opposed the government).

80. *See id.* at 108 (asserting that Nehru wanted prominent individuals from all

enthusiasm however, did not sustain. By 1939, the ICLU started criticizing the actions of the provincial Congress governments especially in relation to the treatment of political prisoners.[81] By the end of this year, resignations were trickling in and dissenting voices appeared, suggesting that the non-partisan language of "civil liberties" was not enough to conceal the ICLU's alignment with the INC.

When the ICLU was formally inaugurated, it drew widespread support from both the legal profession and elected politicians. MC Chagla, a law professor at the Government Law College in Mumbai and later, judge and Chief Justice of the Bombay High Court, noted at the time of its inauguration that the ICLU believed in the rule of law and would have widespread support from the lawyering community. BG Kher, who served as prime minister of Bombay in 1937 and a lawyer by training, also lent his support to this statement.[82] On the other hand, Tej Bahadur Sapru, a lawyer at the Allahabad High Court and face of the Indian Liberal Party, entirely dismissed Nehru's claims that the ICLU could be non-partisan, given the INC's frequent dismissal of other ideological-political positions.[83] Soon enough, the INC leadership's initial disquiet with Nehru's proposal for the ICLU became trenchant criticism as their governments came under attack. Nehru continued undeterred. Dining with members of the National Council for Civil Liberties in London in July 1938, Nehru declared that civil liberties groups in Congress-

political parties and professions, but only sent letters to one hundred fifty prominent individuals, with a few individuals responding with real enthusiasm).

81. *Encroachment on Civil Liberties: Bombay Orders, Congress Cabinet Criticized*, TIMES OF INDIA, Aug. 7, 1939, at 11.

82. *About Us*, MANILAL KHER AMBALAL & CO., http://www.mkaco.com/about-us/history/ (last visited May 31, 2015) (establishing B.G. Kher's legal career); *B.G. Kher Dead*, HINDU, http://www.thehindu.com/todays-paper/tp-miscellaneous/article1807808.ece (last updated Apr. 28, 2011); *Civil Liberties Union: Pt. Nehru Inaugurates Bombay Branch*, *supra* note 76, at 4 (observing that the ICLU would have the support of lawyers because it was complimentary to the codes of law).

83. *Liberties Union: Sir T. B. Sapru Declines Invitation*, TIMES OF INDIA, May 21, 1936, at 11 (observing that differences in the approach to certain questions will arise and the answers to these questions will involve the consideration of the beliefs and political aims of some parties and that confidence and respect between politicians does not exist); *Sir Tej Bahadur Sapru*, ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/523805/Sir-Tej-Bahadur-Sapru (last visited May 31, 2015) (providing background on Sir Tej Bahadur Sapru).

ruled provinces had shown great progress.[84] On the hotly contested question of political prisoners, he suggested that any moves by provincial governments were limited by the dictates of the central government headed by the Viceroy of India, suggesting that the INC government's hands were tied.[85] He claimed that civil liberties in non-Congress provinces were dismal, and in the princely states (kingdoms not included in the territory of British India) there was a state akin to "conscious fascism."[86] By 1939, Sarojini Naidu, BG Horniman, and KT Shah were also involved in the Bombay Civil Liberties Union ("BCLU"), the provincial branch of the ICLU in Bombay. The BCLU was far more vocal in its criticism of the Congress government in Bombay, and by virtue of the people involved, took the civil liberties conversations in a different direction.

Although the BCLU was inaugurated as a branch of the ICLU, by 1942 it formulated its own constitution and bylaws. In its constitution, the BCLU left the door open for a formal affiliation with the ICLU, but that very clause suggests that it was not the default position. In its aims and objects, it noted its opposition to emergency regime of ordinances, regulations, and permits that were issued during World War II.[87] By the 1940s, the BCLU had a much narrower approach to the question of civil liberties than the ICLU. Unlike its parent organization, the BCLU was headed by NM Joshi, the Labor representative in the Bombay legislative assembly.[88] During its crucial years, therefore, it moved towards engagements at local levels. Because members of other social service organizations, particularly the Servants of India Society, also joined and supported the BCLU's effort, it enjoyed more support than the ICLU.[89]

84. *Restoration of Civil Liberties: Pandit Nehru's Review*, TIMES OF INDIA, Jul. 9, 1938, at 12.

85. *See id.*

86. *See id.*

87. The Bombay Civil Liberties Union Constitution and Rules, India – Bombay Civil Liberties Union; 1948; American Civil Liberties Union Records: Subgroup 2, Subject Files Series, Box 1149, Folder 12; Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library [hereinafter *BCLU Constitution*].

88. *See id.*

89. The contribution of the Servants of India Society is significant. *See* REPORT OF THE SERVANTS OF INDIA SOCIETY FOR 1933-34 1 (1934) (providing a historical description of the organization, describing it as an organization of

Members of BCLU were also associated with the Indian Liberal Party (VS Srinivasa Sastri) and the Servants of India Society, and they shared a belief in the achievement of dominion status by constitutional means.[90] Most strikingly, unlike the ICLU, the BCLU directly took up the issue of political prisoners and repressive emergency laws.

Apart from the ordinary criminal law in force in India at the time (the Indian Penal Code enacted in 1860 providing for offences and punishments, and the Code of Criminal Procedure, first enacted in 1862 that governed procedural aspects of arrests, detentions, and punishments), the British government enacted a series of emergency rules under the Defence of India Rules, 1939.[91] The Indian Penal Code itself contained provisions on sedition preventing speech or expression that expressed disaffection against the British government, restricted speech that had the potential to create rifts between religious communities—both of which had been previously used to curb revolutionary acts.[92] Modeled on similar legislation in Britain,[93] the Defence of India Act, 1939, and rules made thereunder reiterated several of these provisions but left their use to the discretion of executive power vested in the Governor. The detainee, in many instances, remained in the dark about the grounds upon

"national missionaries," whose goal was Dominion status by constitutional means; in addition to doing most of its work through other organizations like the BCLU).

90. *Id.* (standing for national interests rather than sectional interests).

91. The Defence of India Rules had been previously enacted during the First World War. For the official version of the Rules in force during the Second World War, see The Defence of India Act, No. 35 of 1939, INDIA CODE (1939). Several of these Rules continued after the Second World War through legislation enacted by the provisional government of India, particularly as they related to trade and commerce. *See* The Trading with the Enemy (Continuance of Emergency Provisions) Act, 1947, No. 16 of 1947, INDIA CODE (1947) (providing a continuance of certain provisions of the Defence of India Rules with relation to "trading with States, and persons and firms belonging to States at war with the Government of India.").

92. Act No. 45 of 1860, PEN. CODE § 124A (India) (containing a chapter in which it lists "Offenses toward the Government," in which it states, in part, that "[w]hoever by word, either spoken or written, or by signs, or by visible representation, or otherwise 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 . . . .").

93. *The Emergency Powers (Defence) (No. 2) Act, 1940*, 3 MODERN L. REV. 132 (1940); *see* Regulations Made Under Defence Act and Emergency Powers (Defence) Act, 2 & 3 GEO. 6 c. 62 (1940).

which he had been detained.[94] In both cases, opposition to government—now, explicitly the British imperial forces—was most deeply affected by legal action.

Affiliates of the BCLU themselves faced the consequences of the emergency legal regime during the Second World War. In 1940, the Chief Justice of the Bombay High Court, John Beaumont, decided upon the charge of sedition against a Servants of India Society member, Narayan Phadke.[95] Phadke was arrested in Kalian where he had been reportedly "planning an insurrection" against the British Government of India as he spoke to an audience of peasants.[96] He claimed in his petition that he had spoken to the peasants about planning a march to the local court to protest against the non-implementation of debt relief legislation.[97] Beaumont addressed two charges: one under section 124A of the Indian Penal Code for sedition and another under section 153A of the same code for exciting disaffection between different classes of British subjects.[98] Beaumont was unpersuaded that the speech, delivered in Marathi and transcribed by a police translator for the judges, had been entirely innocent. But he exonerated Phadke of the charges of exciting disaffection because "classes" of landlords (*zamindars*) and moneylenders (*sahukars*) could not be identified in Bombay.[99] On the other hand, he characterized the speech as seditious because Phadke had equated the interests of the moneylenders with the interests of the British Government. Beaumont struck what he

94. The Defence of India Act, No. 35 of 1939, INDIA CODE (1939) (allowing certain ordinances to remain in force).

95. Emperor v. Phadke, (1940) 42 BOMLR 861, 6 (India) (leaning on the precedent Emperor v. Maniben Kara, (1932) 34 BOMLR 1642, to point out that in accusing the government of being favorable towards one part of the community and against another part, is in its whole, "disaffection" towards the government and suggesting that the government is looking over the interest of only one part of the community).

96. *Id.* at 2 (arguing that the intention of Phadke's speech was to infuse hate of the government while Phadke argued that unless the "landlord and the money-lender were exterminated, there could be no sufficient food for the peasants.").

97. *Id.* at 2 (discussing the motive underlying Phadke's conduct).

98. Act No. 45 of 1860, PEN. CODE § 124A (1860) (India) (mandating that a person who attempts to excite disaffection towards the government shall be punished by imprisonment for life which may include a fine or by imprisonment not longer than three years and which may also include a fine).

99. *Phadke*, (1940) 42 BOMLR at 1-2 (observing the institutional relationship that the zamindars and sahukars maintained with the British Government).

considered an empathetic note in the course of the judgment, recognizing the dilemmas that a social activist like Phadke faced. He noted:

> It was obviously no good in a speech of that sort to tell the peasants that their misfortunes were partly of their own making, that they married too young produced more children than their land could support, and spent too much on marriage ceremonies. That would not have inspired any enthusiasm and induced the peasants to attend the march. So the accused in his speech made, as he was likely to do, an attack on the landlords, the money-lenders and Government . . . .[100]

In spite of this "recognition," Phadke's sentence remained unaltered. Phadke's case did not make it to the highest constitutional court at the time, the Federal Court or the final court of appeal for British India, the Privy Council in London.[101] Four years later, Sadashiv Bhalerao, a member of the Hindi Communist Party was arrested and charged under rule 34(6)(e) of the Defence of India Rules, a provision that mirrored the wording of section 124A under which Phadke had been charged.[102] The Privy Council ruled that decisions under section 124A would have persuasive value in Bhalerao's case.[103] Like Beaumont in Phadke's case, the Council in *Bhalerao* ruled that the gist of the offence of sedition was to excite hatred or contempt.[104] Both of these cases illustrated how sedition laws were used to target both existing and potential political opposition.

Between 1942 and 1946, during the latter part of the Second World War, the BCLU continued to extensively document arrests and detention of social workers and labor leaders who were subjected to scrutiny by the government.[105] Perhaps it was easier for members

100. *Id.* at 1 (discussing Beaumont's understanding of the Phadke's selection of targets for his speech to the peasants).

101. *See id.*

102. Emperor v. Bhalerao, (1944) 46 BOMLR 459, 1 (India) (specifying that the charges against Bhalerao were having made, published, and distributed copies of a leaflet containing prejudicial reports).

103. *Id.* at 1 (noting that it was not necessary to ascertain that the words complained of were likely to incite disorder or create a reasonable anticipation of disorder in order to charge Bhalerao).

104. *See id.* at 2-4.

105. Paul R. Greenough, *Political Mobilization and the Underground Literature of the Quit India Movement, 1942-44*, 27 SOC. SCIENTIST, no. 7/8, 1999,

of ostensibly "non-political" organizations like the BCLU to investigate, record, and report.[106] Several of the top functionaries of the BCLU were lawyers, and they managed to coordinate legal assistance from those working in the district courts in order to offer legal aid. A special Detenu Aid Committee was set up in 1942 to help detainees and their families with everyday needs and with legal aid.[107] Given that many of the arrests and detentions would be carried out and adjudged by district magistrates, the Detenu Aid Committee worked to improve legal aid by liaising with bar associations in different districts in the province.[108]

Ultimately, the interaction between the legal and political worlds of civil liberties activists added to the public debate on the nature of colonial laws. One of these cases was that of Keshav Talpade, mentioned by the judges in *ADM Jabalpur* many decades later.[109] Keshav Talpade, a petition writer in the Bombay High Court, and his litigation took the world of civil liberties activists and lawyers by storm. It suggested that higher courts, especially the High Courts or the Federal Court, might be a sympathetic forum to launch civil liberties challenges.[110] Talpade was arrested and imprisoned in August of 1942, during which time BCLU members might have met him and have been familiar with his case.[111] His successful challenge of rule 26 of the Defence of India Rules (being ultra vires the legislative competence of the Bombay Legislature) did not ultimately make much difference, with the executive granting them

at 11, 12 (discussing chaotic political activity during the years of the Quit India movement).

106. Nandini Gondhalekar & Sanjoy Bhattacharya, *The All India Hindu Mahasabha and the End of British Rule in India, 1939-1947*, 27 SOC. SCIENTIST, no. 7/8, 1999, at 48, 64 (discussing how relief and legal aid committees functioned in the United Provinces during the Second World War under the radar of wartime censorship).

107. BCLU Detenue Aid Committee, Report 1941 – 1942, India - Bombay Civil Liberties Union; 1948; American Civil Liberties Union Records: Subgroup 2, Subject Files Series, Box 1149, Folder 12; Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library.

108. *See id.*

109. Emperor v. Talpade, (1944) 46 BOMLR 22 (1943) (India).

110. TERENCE C. HALLIDAY ET AL., EDS., FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY 75-76 (2012).

111. *Talpade*, (1944) 46 BOMLR at 1 (describing the circumstances surrounding Talpade's arrest and high profile litigation).

retrospective validity.[112] In 1944, at the annual meeting of the BCLU addressed by MC Setalvad, one of the leading lawyers in Bombay at the time and a one-time opponent of civil liberties unions, Talpade's case was the center-stage of discussion. Noting the struggle over extraordinary police powers between the judiciary and the executive, many of Setalvad's arguments for civil liberties were on first principles, rather than on prediction of court judgments, and meant to appeal to a larger public audience.[113] Even in this context, Talpade's high profile litigation and its reception by the colonial government proved instructive for civil liberties groups.[114]

At the time of Indian independence, the BCLU and NM Joshi claimed to be an authoritative voice on questions of civil liberties in India.[115] Like Nehru, Joshi corresponded with Roger Baldwin and the ACLU, claiming to speak on behalf of an Indian civil liberties union. It sought, and was offered membership in the International League for the Rights of Man.[116] Joshi's presidential address in 1947 had stated (perhaps too optimistically) that "firings and internments" were no part of civil liberties agitations in the United States and Great Britain, and he meant for the movements in India to follow the same example. Similarly, Hansa Mehta, who began her career as an

112. Emperor v. Banerji, (1945) 48 BOMLR 1 (1946) (appealing a judgment of the Federal Court of India); *in re* Ghate, A.I.R. 1951 Bom 161 (1950) (India) (holding that there was no actual or constructive jurisdiction over the defendant when the order was made).

113. *Equality is the Idle Dream of Socialism*, TIMES OF INDIA, May 19, 1938, at 11. Interestingly, MR Masani and Setalvad had an exchange in 1938 on the differences of opinion between Socialists and Liberals on the question of civil liberties. In particular, Setalvad argued, in line with the tenets of the Liberal Party, that there was a right to work for all people. Civil liberties, especially those that upheld the rights of strikers to refrain from work, interfered with this and was therefore, a lopsided concept. "Equality is the idle dream of Socialism: Liberal Reply," *The Times of India*, May 19, 1938. Setalvad however, seems to have changed his mind about civil liberties, and civil liberties unions by 1944.

114. *Talpade*, (1944) 46 BOMLR at 9 (holding that the order is nullified and that section 16(2) has no application in this case).

115. *See generally* SAYED JAFAR MAHMUD, PILLARS OF MODERN INDIA, 1757-1947 54 (1994) (summarizing NM Joshi's political career and achievements).

116. Letter from Fuller to Joshi (Jul. 21, 1948); Letter from Joshi to Fuller (Jul. 13, 1948); Letter from Roger Baldwin to Joshi (Sept. 13 1948); Letter from Joshi to Fuller (Oct. 16, 1948), India - Bombay Civil Liberties Union; 1948; American Civil Liberties Union Records: Subgroup 2, Subject Files Series, Box 1149, Folder 12; Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library.

educationist in Bombay and then went on to participate in human rights discussions at the United Nations,[117] in her presidential address at the All India Women's Conference in 1945 that laid out the basic principles of civil liberties, especially in the light of detentions during the Second World War.[118] In the pamphlet, she expressly mentioned the courts and lawyers as being the last bastion of hope for civil liberties, given that governors in the provinces had arrogated emergency lawmaking powers to themselves. She also suggested that legal aid societies be set up to assist detainees who had been imprisoned against their will.[119] "Civil liberties" as a language may have been part of a broader discourse outside the empire, but colonial legal and political practice transformed them. As Mehta's example shows, it made an impact on global conversations as well.[120]

To take a closer look at the role that the ICLU and the BCLU played in shaping the terms of colonial legal practice, it is important to look at how they positioned themselves politically. Nehru's objective with the ICLU was disturbed as soon as the INC governments began to negotiate their position as government.[121] Although formally still under colonial rule, both government and opposition had begun to be comfortable using the language of civil liberties—freedoms attributed to citizens.[122] Nehru's adoption of the banner of civil liberties as means of engagement with government demonstrates this. On the other hand, its political opponents also used civil liberties as a means of suggesting that the INC government ought to move away from the legal measures used by the British government to deal with questions of security and economy. Since an "Indian" government had been elected to power, the expectations were different. Discontinuity, not continuity, was expected. Reality was otherwise.

Among the pre-constitutional precedents that *ADM Jabalpur* referred to, were the cases related to emergency laws implemented in British India during the Second World War. The BCLU, formed on

117. *See* MANU BHAGAVAN, INDIA AND THE QUEST FOR ONE WORLD: THE PEACEMAKERS 109 (2013).
118. HANSA MEHTA, CIVIL LIBERTIES (1945).
119. *See id.*
120. *See* BHAGAVAN, *supra* note 117, at 109-110.
121. Jha, *Nehru and Civil Liberties*, *supra* note 75, at 106.
122. *Id.* at 106.

the eve of the War, was actively engaged with the legal and political worlds of personal liberty cases. As the discussion reveals, many of these cases involved the suppression of the INC's political opposition, not the INC. Growing distrust of the methods of the leading anticolonial political party in power coupled with the participation in a global conversation about the right to political dissent meant that "civil liberties" emerged as a means of drawing attention to fissures within anti-colonialism. Even an anticolonial party like the INC broke down the British legal infrastructure during its brief stint in power.This is possibly the less interesting colonial continuity between the 1975 emergency and the Second World War. From the perspective of legal actors involved in these discussions, "colonial" continuities emerge in two ways. First, in both cases, the main target was political dissent/political opposition rather than anti-colonialism.[123] Second, and more importantly, the reference to "colonial" did not refer only to the colonial state, but to the logic with which the laws were implemented.[124]

IV. SMALL EMERGENCIES, THE 1950 CONSTITUTION AND THE MADRAS CIVIL LIBERTIES UNION

In July 1949, while the Constituent Assembly debating the provisions of the Indian Constitution was having its most heated discussions in the national capital of Delhi, activists and lawyers and gathered at St. Mary's Hall in Madras.[125] The occasion was the annual All India Civil Liberties Conference, the first of its kind (to note, the BCLU had held provincial-level conferences before).[126] While the Assembly decided upon the shape and form of the post-colonial Indian state, the participants at the Conference debated legal and political strategies to counter some of the problems that people

123. Kalhan et al., *supra* note 7, at 137-38 (summarizing the events of the 1975 emergency that resulted in the repression of political opponents of Prime Minister Indira Gandhi).

124. *Id.* at 107 (characterizing colonial-era laws as designed not to provide democratic accountability, but to ensure British control over India).

125. The Indian Civil Liberties Conference, Report of Proceedings, *in* S. G. VAZE, CIVIL LIBERTY UNDER THE NEW CONSTITUTION: FREEDOM OF ASSOCIATION, FREEDOM OF SPEECH AND PRESS, FREEDOM OF PERSON 1, 1 (1949).

126. *Id.* at 17; *Civil Liberties Union*, TIMES OF INDIA, January 29, 1944.

faced in relation to a new government.[127] Extreme police powers were justified in the name of communal violence that had broken out in the aftermath of the partition of the subcontinent into India and Pakistan.[128] Exploring the ways in which legal practice of civil liberties grappled with everyday concerns even as constitutional philosophies were being worked out, demonstrates the ways in which questions of continuity and discontinuity were negotiated.

Madras, like Bombay, had a vibrant civil society, including working-class movements affiliated with members of the Madras Civil Liberties Union ("MCLU").[129] K. Bashyam, a prominent lawyer and one of the original members of the ICLU, was responsible for the inauguration of the Madras branch.[130] He found allies in S. Satyamurthi, a prominent Liberal, and K. Santhanam, both vocal about labor and work rights. Amongst other important members, KG Sivaswamy, who was the secretary for the 1949 Conference, had also been involved in agitating food control policies in Madras and was engaged with other civil liberties unions in the country.[131] All of them had engaged with legal language and legal processes in the course of their work. For instance, in 1948, a Full Bench of the Madras High Court considered the Federal Court and Privy Council decisions on preventive detention in *Naidu v. Inspector of Police*.[132] The opinions strenuously defended the right of the High Court to use procedural criminal provisions to set aside detention orders, notwithstanding clauses in the legislation to the contrary. In the final order of the Court, deciding upon the validity of the detention orders, the lawyers for the petitioners produced a character affidavit from KG Sivaswamy, noted as a "senior member

127. *See generally* The Indian Civil Liberties Conference, Report of Proceedings, *supra* note 125, at 1-17.

128. *See id.* at 4-5.

129. D. VEERARAGHAVAN, THE MAKING OF THE MADRAS WORKING CLASS (2013).

130. Bashyam was also a member of the Madras Branch of the Servants of India Society. *Liberties Union: Pandit Nehru opens Madras branch*, TIMES OF INDIA, October 10, 1936.

131. *Readers' Views: Free Elections*, TIMES OF INDIA, July 4, 1950, at 6.

132. Naidu v. Inspector of Police, (1949) 2 M.L.J. 337 (1948) (India) (reciting instances in which a court can legally interfere with an order of detention made by the provincial government pursuant to section 491 of the Criminal Procedure Code).

of the Servants of India Society."[133] Naidu's case, in the meantime, found strong support amongst the few members of the Madras Legislative Assembly who were affiliated to the Communist Party of India, particularly P. Venkateswaralu.[134] In this way, civil liberties activists, elected politicians, and lawyers were involved with the same cases and issues, and were familiar with the latter's legal and political valences.

Many of the affiliates of the MCLU moved between the local and provincial level in dealing with legal issues, while cases such as Naidu's were raised at the provincial level. However, the local level agitations and litigation were of primary concern to the MCLU. During the 1949 Conference, for instance, each of the districts in the State of Madras had submitted its own report.[135] Assuming that these reports were comprehensive and accurately printed and reported, one of the most common infringements reported was that of the misuse of the curfew provisions in the Criminal Procedure Code, to keep protestors out of politically sensitive districts.[136] For instance, section 144 of the Code of Criminal Procedure was reportedly used in the Thanjavur district to prevent peasant struggles.[137] Many of these instances did not find their way to appellate courts, and were therefore not recorded in official law reports. But the Home Department of the Madras government assiduously documented every section 144 order promulgated, and it bears out the claim by the MCLU activists that section 144 was widely used to curb undesirable political participation. In the national narrative about constitution making, many of these local incidents fade into

133. *Id.* at 1 (emphasizing the good character of the accused in relation to his alleged conduct).

134. GO No. 2215 dated 18/7/1947 - LA Qn No. 1027 – Starred – Detention of Narayanaswami Naidu under the Maintenance of Public Order Ordinance, 1947 – Papers recorded, Proceedings of the Public Department (1947), TNSA.

135. *See* The Indian Civil Liberties Conference, Report of Proceedings, *supra* note 125.

136. *See id.*

137. Central Government Act, No. 2 of 1974, CODE CRIM. PROC. § 144 (1973) (India) (permitting a District Magistrate to issue an order directing "any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, of an affray.").

insignificance. While colonial continuities figured in theoretical terms in the discussions in the Constituent Assembly and the Madras Legislative Assembly, in practice, they were most acutely felt in the lives of civil liberties activists.

Once the Constitution came into force, the number of cases from Madras surrounding civil liberties concerns—freedom of speech, freedom of association, and freedom of movement—increasingly drew from the labor and working class movements. In 1950, things came to a head in the *Gopalan* case, the first case before the new Supreme Court. Gopalan challenged the constitutionality of the Preventive Detention Act, enacted in 1950 on the strength of the recommendations of the Constituent Assembly to allow for preventive detention as an exception to rights of detainees in the Fundamental Rights chapter.[138] Gopalan, a prominent Communist Party leader in Kerala, was imprisoned throughout the Second World War and during the first few years of independence, filed a petition before the Madras High Court challenging his detention on the grounds that the provision allowing for preventive detention was unconstitutional.[139] Gopalan was briefly vindicated when the Madras High Court upheld his right to a habeas corpus petition.[140] He challenged Nehru and Rajagopalachari to "meet us at the polls" to discuss the ways in which the new government had continued to infringe on civil liberties.[141]

On appeal, the case went up to the Supreme Court. Gopalan described the journey to Delhi (where the Supreme Court was located) when his case came up for hearing—in a special first class compartment, with two inspectors and twelve policemen. As soon as he reached Delhi, he began a hunger strike.[142] But the case did not fare well at the Supreme Court, which upheld preventive detention as a necessary restriction on constitutional freedoms.[143] Gopalan's

138. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27 (India) (challenging his detention on the ground that the Preventive Detention Act violated the provisions of Articles 13, 19, 21, and 22 of the Constitution).

139. *Id.* at 10.

140. *Id.* at 62 (dismissing Gopalan's petition and overturning the ruling of the Madras High Court).

141. *Mr. A. K. Gopalan Released*, TIMES OF INDIA, Mar. 20, 1951, at 7 (quoting Gopalan's statement which was published upon his release).

142. AK GOPALAN, ENTE JEEVITHAKATHA ch. 17 (2009).

143. *Gopalan*, A.I.R. 1950 S.C. at 42-43 (analogizing the restriction of personal

objective in setting up very public trials, often arguing as a lawyer himself, was in his own words, to expose constitutionalism as a bourgeois tool of oppression.[144] Following the Supreme Court's decision in *Gopalan*, the Madras government passed the Indian Criminal Law (Amendment) (Madras) Act of 1950, allowing for preventive detention and or unlawful associations to be banned, replicating many of the features of the Madras Maintenance of Public Order Act of 1950.[145] Cases like *Gopalan* reflected the flavor of the electoral politics of the day.[146]

Gopalan's case soon had an impact on litigation surrounding other suspected Communist workers in Madras, especially those that made it all the way to the Supreme Court.[147] The leading labor lawyer and trade unionist in Madras, VG Row, challenged the application of "unlawful association" under the Indian Criminal Law Amendment Act of 1908 as it applied in Madras.[148] VG Row's law firm, Row and Reddy, one of the oldest in Madras, almost exclusively represented trade unions and the cause of labor, including the influential Clerical Employees Association.[149] They had an influential role to play in Gopalan's case as well.

liberty in the context of internment and externment to that of preventive detention).

144. P. Govindapillai, *AKG-ikku kodathikalum oru ujjwala samaravedi*, 41 (7) CHINTA 11-14 (Oct. 1 2004) (This is a non-English source which the author has translated. It discusses how AK Gopalan used his court appearances to put forth his views on revolutionary nationalism).

145. Row v. Madras, A.I.R. 1951 Mad 147 (1950) (India) (defining unlawful association as an association that constitutes a danger to the public peace, interferes or intends to interfere with the maintenance of public order, or interferes or intends to interfere with the administration of the law).

146. Sunil Khilnani, *Fifties: Loking Back, For Lessons*, INDIA TODAY (July 2, 2007), http://indiatoday.intoday.in/story/india-faced-challenges-in-1950s/1/155687.html (noting the socialist and industrialist trends of India politics in the 1950s).

147. *See* Bombay v. Vaidya, 1951 S.C.R. 167 (India) (upholding the High Court decisions and justifying it on the grounds of article 22(5)); Vaidya v. Unknown, (1950) 52 BOMLR 856 (India) (adjudicating a key case involving a member of the All India Trade Union Congress).

148. *Row*, A.I.R. 1951 Mad at 1 (filing a petition for the issue of a writ of certiorari for calling the records and quashing the order of the State of Madras declaring the People's Education Society as an unlawful association).

149. S. MUTHIAH, A MADRAS MISCELLANY: A DECADE OF PEOPLE, PLACES & POTPOURRI (2011).

In 1952, Row was a practicing lawyer at the Madras High Court.[150] The Madras government, claiming that Row was a closet Communist, banned the People's Education Society, of which he was a member under the Criminal Law (Amendment) Act of 1908.[151] The State claimed that although the organization claimed to be about raising civic awareness, it was secretly raising funds for the Communist Party. M. R. Venkataraman, the head of the Communist Party in Madras was also implicated, but not charged in the case.[152] The legal issue was not whether the organization was legitimate, or whether it could be banned.[153] *Row* looked into whether the court could sit in judgment upon the subjective satisfaction of the Government i.e. inquiring into the provenance of their reasons for banning the People's Education Society.[154] Key to the reasoning of the court was how *Row* was marked out as different from *Gopalan*. The Supreme Court suggested that preventive detention was a constitutional restriction on article 19 freedoms, while banning of associations like the People's Education Society was not. Row had won his case.[155]

V. A POST-EMERGENCY LEGAL CULTURE CAMPAIGN AND THE ARGUMENT FROM COLONIAL CONTINUITIES

Soon after President Ahmed proclaimed a state of emergency due to "internal disturbances" on June 26, 1975, injunctions about press censorship soon went into effect.[156] As a result, much of the printed

150. *Row*, A.I.R. 1951 Mad at 1 (stating that Row was the General Secretary of the People's Education Society).

151. *Id.* at 2 (banning the People's Education Society because of its alleged status as an unlawful association under the Criminal Law Amendment Act of 1908).

152. *Id.* at 2 (remarking that the People's Education Society failed ceased functioning after March 1949 as nearly all prominent communists had been detained or gone underground).

153. *Id.* at 11.

154. *Id.* at 11-14 (asserting that an offense proscribed by the ordinary law should receive ordinary due process and procedure as opposed to a process that favors the government).

155. Row v. Madras, A.I.R. 1951 Mad 147 40-41 (1950) (India) (ruling in favor of Row by distinguishing his case from those cases concerning preventive detention).

156. *See* VENKAT IYER, STATES OF EMERGENCY: THE INDIAN EXPERIENCE 151,

material relating to the emergency went underground.[157] Justice Khanna's dissent, as mentioned earlier, was one of the casualties.[158] In many of these papers, civil liberties activists and opponents of the Gandhi government used arguments that compared the authoritarian manner in which censorship targeted political opposition during the Quit India movement of the 1940s to the "regime of terror" unleashed by Gandhi. In the unattributed article titled "Freedom of Press: 1942 and 1975" that appeared in the *India Observer* on August 13, 1976, the author reiterated this sentiment: 'all governments, whether colonial or national, acquire an adversary relationship with the Press of the country. If indeed there is a difference, it is only in the way that they manage the confrontation.'"[159] These comparisons appeared in other contexts as well.

In 1977, after the emergency was lifted, the Delhi branch of the People's Union for Civil Liberties and Democratic Rights ("PUCL & DR") held a national convention where they invited papers on the question of political prisoners.[160] The call for papers mentioned that these papers had to be presented by those who had suffered from police brutalities or possessed the experience of being political prisoners, suggesting that this was not meant to be a mere academic exercise, but one aimed at building solidarities among civil society activists.[161] The Aligarh branch of the PUCL & DR also circulated a resolution widely that demanded that the government release political prisoners, compensate families of those who had been unjustly detained, reverse amendments to the 1950 Constitution, and institute enquiries into extrajudicial killings that had taken place

157-60 (2000) (detailing the government's implementation of the press censorship injunctions enforced during the emergency).

157. Editorial, *India's Press Under Siege*, N.Y. TIMES (July 27, 2014), http://www.nytimes.com/2014/07/28/opinion/Indias-Press-Under-Siege.html (recounting the beginnings of government backed press censorship in post-colonial India).

158. Jabalpur v. Shukla, A.I.R. 1976 S.C. 1207, (India).

159. *Freedom of Press: 1942 and 1976*, INDIAN OBSERVER, Aug. 13, 1976, Madhu Limaye Papers (Reel 1), Princeton University Library.

160. PEOPLES UNION FOR DEMOCRATIC RIGHTS, PERSPECTIVE ON CIVIL RIGHTS MOVEMENT 2 (1981) (discussing how the PUCL & DR was a response to government suppression of all forms of opposition during the emergency).

161. Vishnu Dutt et al., *National Convention on Civil Liberties*, 12 ECON. & POL. WKLY. 1123, 1123 (1977).

during the declaration of emergency.[162] What did not escape the notice of these activists was the fact that the Maintenance of Internal Security Act of 1971 was built along the same lines as the Preventive Detention Act of 1950—the law under which AK Gopalan had been imprisoned and tried.[163]

If we were to follow the lines of legal reasoning through judgments alone, it would appear that the jurisprudence of the Supreme Court (and of many of the High Courts) follows an identical pattern from the colonial era into the postcolonial. Solely taking article 352 cases into consideration, it would appear that *ADM Jabalpur* followed its precedent in *Singh* and decisions by its predecessors in FC decisions. It does not explain why *ADM Jabalpur* appeared to be a watershed in some ways in the history of civil liberties lawyering, while re-energizing arguments from colonial continuities. Writing in 1985 about the National Security Act of 1980 and amendments made thereafter, KG Kannabiran, a prominent member of PUCL and civil liberties activist in Andhra Pradesh, noted that the structure of the amendments had negated the provisions that placed limits on preventive detention laws in article 22(5).[164] In particular, Kannabiran critiqued the amendments, which stated that in cases where there were multiple grounds on which arrests have been made—and one of them has been struck down as invalid—this arrest would still stand in light of the other grounds.[165]

In the end, referencing the debate in the Constituent Assembly that drafted and discussed the provisions of the Indian Constitution, he noted that the only reservations were from Mahavir Tyagi, a parliamentarian from the United Provinces who had himself been

162. Sudhir Chandra, *Movement for Civil Liberties*, 12 ECON. & POL. WKLY. 664, 664 (1977).

163. Peter D'Souza, *When the Supreme Court Struck Down the* Habeas Corpus, PUCL BULLETIN (June 2001), http://www.pucl.org/reports/National/2001/habeascorpus.htm (explaining that official press censorship prevented the publication of the arrests or detentions of political dissidents under the Preventive Detention laws).

164. INDIA CONST. art. 22 (declaring that a person who is arrested must be informed of the grounds for arrest, permitted to consult counsel, and must stand before the nearest magistrate within twenty four hours of the arrest).

165. K. G. Kannabiran, *Erosion of Constitutional Safeguards*, 20 ECON. & POL. WKLY. 786, 786 (1985) (stating that the first amendment extended the maximum period of detention by two years and that the second amendment was used by the government to prevent the release of arrested persons).

imprisoned under the Defence of India Rules in 1942. Tyagi had noted that article 22, which made an exception for preventive detention laws, would take on the character of the Defence of India Rules.[166] Kannabiran, in noting Tyagi's objection, was also employing the argument from colonial continuities, albeit without using the word "colonial."

Noting the similarities between the Defence of India Rules during the Second World War, the preventive detention laws of the immediate post-independence period, and the post-emergency legislative developments, Kannabiran's critique demonstrates why *ADM Jabalpur* became a turning point. After this decision, civil liberties activists like Kannabiran were able to note the futility of constitutional safeguards. Rather than the watershed legal moment that the majority in *ADM Jabalpur* considered the Constitution to be, civil liberties activists were able to critique the Constitution at the same time that they galvanized the courts towards progressive, liberal judgments.[167] This highlights the moral valence of the argument from colonial continuities.

Post-emergency cases and campaigns continue to engage arguments from and about colonial continuities. However, it must be noted it is never used as a standalone argument. To quote just one instance, in 2010, Binayak Sen, a doctor and healthcare activist who worked in conflict zones of the State of Chhattisgarh in India, was imprisoned and charged with sedition, along with two others, under the Indian Penal Code for supposedly aiding Naxalites (radical left adherents) who had been operating in the region.[168] His detention and trial in the lower courts in Chhattisgarh made headlines, while legal scholars and activists called for the repeal of section 124A, the provision in the Indian Penal Code that criminalized sedition.[169] A

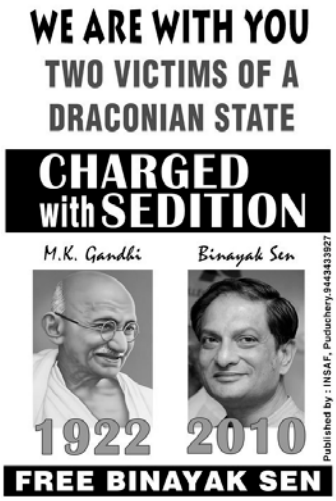
166. *Id.* at 788 (predicting that the adoption of article 22 would alter the nature of fundamental rights into a penal code which is more oppressive than the Defence of India Rules of the colonial government).

167. *Id.* at 788 (suggesting that the reasoning found in the judgments were used by the executive branch to validate unpopular and undemocratic decisions).

168. Aman Sethi, *Lawyers, Activists Shocked by Binayak Sen Verdict*, HINDU (Dec. 24, 2010), http://www.thehindu.com/news/national/lawyers-activists-shocked-by-binayak-sen-verdict/article974301.ece?css=print (displaying the widespread concern amongst legal professionals at an arrest and lengthy sentence that was obviously politically motivated).

169. PEN. CODE § 124A (1860) (India) (providing circumstances when a person

year later, a campaign coordinated by the major civil liberties organizations was formed.[170] One of the posters made for the campaign by the organization INSAF ("justice") showed Mahatma Gandhi and Binayak Sen side by side to make a point about the absurdity of the law under a democratic government.[171]



The poster attempts to show continuity between two regimes that should apparently be diametrically opposed to each other. However, it is not the sole argument used in challenging the constitutionality of sedition laws in public debate or the Unlawful Activities Prevention Act of 1976, the other legislation under which Sen and his associates were charged.[172] Aspects of the law that violated article 14 (the fundamental right to equality and equal protection), article 19 (the fundamental right to freedom of speech, expression, movement, assembly), and article 21 (the right to life) were highlighted.[173]

will not be subject to prosecution pursuant to section 124A).

170. *31st January 2012*, ALL INDIA CAMPAIGN (Dec. 27, 2011), http://www.freebinayaksen.org/?p=2886 (discussing a day-long meeting that was hosted by the PUCL to plan the launch of an All Indian Campaign against Sedition and other Repressive laws).

171. Image, *We Are with You: Two Victims of a Draconian State*, INSAF, http://www.binayaksen.net/wp-content/uploads/2011/01/Dr.-Binayak-Sen-Poster.jpg (last visited May 22, 2015).

172. *Id.*

173. Narrain, *supra* note 23, at 33-37 (observing that the sedition provisions are an example of how the imperial powers of a foreign government are transformed into the normal powers of an independent regime).

VI. CONCLUSIONS: ELECTORAL POLITICS AND THE ARGUMENT FROM COLONIAL CONTINUITIES

ADM Jabalpur's antecedents can be explored not only through tracing the evolution of legal doctrine through the cases cited by the judges, or by examining the constitutional provisions that allowed Indira Gandhi to declare a national emergency in 1975. In this article, *ADM Jabalpur* marks a turning point in the way that legal culture responded to electoral politics of its time. In particular, it suggests that questions of government and opposition were raised at the intersection of law and politics. To discuss the distinctive nature of *ADM Jabalpur* as a turning point, it is equally important to note the emergency legal regimes that preceded it, as this article does. The instances that I note here are that of the emergency legal regimes during the Second World War in colonial India and the line of cases on preventive detention in post-independence India.

By intervening in the debate on colonial continuities, this article suggests that the idea of a definitive "break" between the colonial and postcolonial, as other contributors to this symposium issue have pointed out, is limited in its value as a heuristic. Instead, the transition happens over a larger timeframe. In this instance, *ADM Jabalpur*'s antecedents—for example, the legal emergencies of the Second World War—have to be investigated as a process, one that extends from before the War, discusses the War itself, and the decolonization that followed it. By doing so, one can note the continuities and discontinuities beyond lines of legal precedent or legislation that bears a family resemblance. If the 1940s and the 1970s in India are compared from the point of view of either, it appears to be a solid case for colonial continuities. However, by focusing on the relationship between law and electoral politics, *ADM Jabalpur* is a point of discontinuity. I suggest therefore that while the argument from colonial continuities is of considerable practical and theoretical value, a focus on legal and political actors might help explain the extent to which it is so.

Additionally, the "colonial" in colonial continuities requires elaboration. Most scholars have focused on the word "colonial" as connoting a time before political independence, synonymous with undemocratic. However, there are obvious limitations to this use,

given that "undemocratic" itself can mean a variety of different things at different political moments. Therefore, the key part of the analysis ought to focus on what the political moment is and to identify the actors who employed this language. Note also that the reference to a colonial moment began as early as 1937, when the first Congress governments came to power under British rule. Thus, this article argues that "colonial" pertains to the ways in which legal and political cultures reacted to questions of government and opposition. Further, the word "colonial" in arguments from colonial continuities was not only a temporal reference in these instances, but also performed an important role in carving out a space for political opposition.

In noting the limitations of the word "colonial" as a term implying alienness or as a specific period under British rule, I agree with Arudra Burra's contentions in his contribution to this Symposium. However, he overstates his case with respect to "colonial" as a term of moral criticism. First, Burra assumes that all arguments from colonial continuity are directed at legal institutions.[174] As this piece has demonstrated, these arguments were set in a broader context than just decrying legal institutions. Second, although Burra notes the importance of disaggregating "the colonial state," he does not extend this to disaggregating the nature of anti-colonialism. One of Burra's examples is that the INC and its allies are portrayed as arrayed against a British government by the provincial ministries under the 1935 Act.[175] However, as this piece has demonstrated, the argument from colonial continuities was not the sole prerogative of an INC-led opposition. Opposition to the INC was itself the subject of many of these arguments.

Third, the argument from colonial continuities in the post-independence era rarely stands on its own, as Burra assumes in his observations. Constitutional challenges to antiterrorism laws, the decriminalizing of homosexuality, and the repeal of sedition provisions under the Indian Penal Code (all instances of litigation that has employed the argument from colonial continuities) have incorporated constitutional. The key point that Burra fails to note is

174. *See* Arudra Burra, *What Is "Colonial" About Colonial Laws?*, 31 AM. U. INT'L L. REV. 1, 2.

175. *See id.* at 4, 6.

that the argument from colonial continuities is not restricted to the work of academic scholars. It has, historically, had broader public purchase. Therefore, it is not only theoretical work that colonial continuities participate in; their practical work cannot be underestimated. Rather than viewing the arguments from colonial continuities as a matter that ought to be theorized or conceptualized before examining its use, this piece suggests that the theoretical work can be built up from historical evidence.

Unlike the situation in colonial India, 1970s legal culture, following the emergency depended largely upon judicial innovation in two respects. First, quite literally, the rights revolution in India was a product of reinterpretation of writ procedures. For instance, the public interest litigation movement in India largely depended on the relaxation of the locus standi rule, i.e. one only needed to prove that one's bona fides as a public spirited petitioner and one's claims to the Supreme Court or the High Courts would be accepted.[176] Second, the expansion of social and economic rights has largely depended upon an expansive interpretation of article 21—the right to life—of the constitution by judges.[177] The court-centric nature of making rights claims in postcolonial India is vastly different from the ways in which legislatures, electoral politics, and civil liberties unions worked together to create the legal culture in colonial India. It would not be entirely wrong to argue that socio-economic issues that do not gain electoral traction, or cannot wait around for elections, are increasingly being addressed in courts, in a textbook demonstration of the judicial role as counter-majoritarianism. Colonial continuities are reserved still, for civil liberties cases — antiterrorism laws, sedition, and sodomy. Constitutionalism, not merely the constitutional text, has changed everything else.[178] This transition from colonial to postcolonial did not occur immediately after

176. UPENDRA BAXI, COURAGE, CRAFT, AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES (1981); S. P. SATHE, JUDICIAL ACTIVISM IN INDIA 106-07, 200-09 (2003) (tracing the development of the locus standi rule in public interest law in England, the United States, and India).

177. INDIA CONST. art. 32 ("No person shall be deprived of his life or personal liberty except according to procedure established by law.").

178. Upendra Baxi, *Constitutionalism As a Site of State Formative Practices*, 21 CARDOZO L. REV. 1183, 1205 (2000) (observing that the Indian Supreme Court has utilized social action litigation to promote the disenfranchised and politically powerless segments of the Indian population to vindicate their civil rights).

political independence, but over the next three decades, transforming the relationship between lawyers, judges, activists, and politicians.