The Possibilities of Anti-Colonial Constitutionalism – Commentary on *State of West Bengal v. Anwar Ali Sarkar and others* AIR 1952 SC 75

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Abstract: The case of Anwar Ali Sarkar has been a founding precedent for equality jurisprudence in India and elsewhere. The case is most cited for the two-step reasonable classification test. Yet over the years, it has become increasingly clear that there are limitations to the test as a doctrinal framework to adjudicate equality. This article is a comment on Tarunabh Khaitan's accompanying rewritten judgment on Anwar Ali Sarkar, which seeks to offer a more robust doctrine of equality grounded in the anti-colonial character of the Indian Constitution. In this piece, I locate the original judgment in its historical and socio-political context to understand the possibilities of building an anti-colonial jurisprudence of equality for and of the Indian Constitution, and to evaluate the differences between the original and rewritten judgments. I argue that the rewritten judgment offers a more robust defence of equality, in line with strands of anti-colonial ideas that shaped the framing of the Indian Constitution, as well as offering a restrained method for judicial interpretation that acknowledges historical context while centering the interpretation of law and rules.

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A. Introduction

The judgement of the Indian Supreme Court in *State of West Bengal v. Anwar Ali Sarkar,*[1] has become a founding precedent for equality jurisprudence both within India and across the globe.[2] It is most often cited as the basis for deciding whether a legislation makes an

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1 AIR 1952 SC 75.

2 For a recent review of the centrality of this case, see *Tarunabh Khaitan*, Equality: Legislative Review Under Article 14, in: Sujit Choudhry / Pratap Mehta / Madhav Khosla (eds.), *The Oxford Handbook of Indian Constitutional Law*, Oxford 2016, pp. 699-719. The case emerged as an early referent in the emerging field of comparative constitutional law, for instance see, *Justice William O. Douglas*, From *Marshall to Mukherjea*—Studies in American and Indian Constitutional Law, Calcutta 1956; *P.N. Sapru*, The Relation of the Individual to the State under the Indian Constitution, Calcutta 1959; *H. E. Groves*, Equal Protection of the Laws in Malaysia and India, American Journal of Comparative Law 12 (1963), p. 385.

intelligible differentia for classifying different categories of people for unequal treatment and whether this differentia has a rational nexus with the purpose that the legislation is seeking to achieve.[3] Unsurprisingly, when legal advocates seek to widen the jurisprudence on equality, whether seeking to challenge LGBT and gender discrimination, expand groups for affirmative action, or examine the relationship between private corporations and public institutions, they often begin with the decision in *Anwar Ali Sarkar*.[4] Such doctrinal analysis focuses on creating abstract and generalizable rules out of a complex situation and parsing a polyvocal judgement. However, the process of turning *Anwar Ali Sarkar* into a legal precedent often erases both context and complexity.

B. Rebels as Litigants

The ideal standard bearers of equality jurisprudence are imagined to be virtuous citizens who face obvious discrimination. Indeed, advocates bringing test cases often search for candidates who would attract wide sympathy and support. The men, whose lives were directly affected in the *Anwar Ali Sarkar* case and the circumstances were starkly different.

Anwar Ali Sarkar and his associates had been involved in a militant raid upon the police armory in Barasat and an ammunition factory at Dum Dum near Calcutta, as part of an uprising led by the Revolutionary Communist Party of India ("RCPI") in February 1949. The raids had led to the brutal murder of factory officials (who had been thrown in alive into a blazing furnace), destroyed an airplane, and killed police constables during a shootout. The accused had allegedly secured 33 rifles, a revolver, a Sten gun, large quantities of ammunition, bombs and grenades, and a number of vehicles in order to mount a challenge to the government. While some of the assailants were apprehended in a shootout, most escaped across the new border into East Pakistan.[5]

These raids were part of a decision by the RCPI to launch an armed struggle to overthrow the government of India. The RCPI, founded in 1936, denounced the Indian independence as "false" and a conspiracy by the bourgeois- led Indian Congress party. In response to the creation of the Constituent Assembly in Delhi, they had begun the process of organizing workers and peasant's panchayats, as the basis for a Workers and Peasants Constituent Assembly that would build a socialist India.[6] While this critique was mirrored by other left groups, including the Communist Party of India and the Socialists, the RCPI rejected "nonviolence as a technique of struggle," dismissed the Congress Socialists as

3 *Khaitan*, Rewritten Judgement.

4 For a recent selection see, *Gautam Swarup,* Heightened Constitutional Scrutiny of Affirmative Action Measures: A Commentary on Anuj Garg v. Union of India, NUALS Law Journal 5 (2011); Aishwarya Singh / Meenakshi Ramkumar, Rajbala v. State of Haryana: Panchayati Democracy v. Imperatives of Executive Policy, NLIU Law Review 5 (2015).

5 The Times of India, Calcutta Raids, Work of Two Red Parties, 5 March 1949, p. 1.

6 *Robert J Alexander*, International Trotskyism, https://www.marxists.org/history/etol/writers/alex/works/ in_trot/india.htm (last accessed on 1 February 2023).

"petty bourgeois," and denounced the Communist Party of India as "Stalinist traitors."[7] While the leadership of the RCPI were educated, upper class men who shared the social world of other political leaders, the men charged with crimes were working class, Muslim, and lower caste.[8]

Gajen Mali and others had been charged with violence, attempted murder, and arson for their participation in the Tebhaga rebellion led by the Communist Party of India, which was an armed insurrection that had 'liberated' the region of Kakdwip near the Sunderbans.[9] The CPI had seized thousands of acres of land and redistributed it among peasants, who were armed and formed into militias. This was followed, in the words of a state prosecutor, by an "orgy of violent incendiarism, murder and firing" upon state officials and members of other political parties.[10]

The Chief Minister of Bengal, Dr. Bidhan Chandra Roy, addressing the legislative assembly argued that these raids were an "insensate orgy of violence," and the struggle was not between parties "committed to the principle of democracy" but between "confusion, violence and anarchy on one hand and orderly society on the other, between fascism and democracy."[11] Soon after, the Governor of West Bengal promulgated an ordinance, empowering the government to constitute Special Courts to try criminal cases to secure "speedy disposal of cases arising out of subversive activities in the province."[12]

While the government asserted that the trials in these courts would be "almost like" a sessions court, except for the privilege of a jury trial, the ordinance deviated from the regular criminal procedure in several other ways.[13] Judges could proceed with trials in the absence of the accused in court, they could refuse to call witnesses if they felt their evidence would not be material, they could also exclude the public or any persons from the courtroom.[14] Special Courts as an institution were a recognized feature in Indian law, and

7 *Saumyendra Nath Tagore*, Bourgeois Democratic Revolution and India (1938), https://www.marxists.org/archive/tagore/1938/bourg-demo.htm (last accessed on 1 February 2023); Politburo, Revolutionary Communist Party, Historical Development of the Communist Movement in India (1944), https://www.marxists.org/archive/tagore/1944/development-communism.pdf (last accessed on 1 February 2023).

8 Saumyendra Nath Tagore, the founder of the RCPI was a nephew of Rabindranath Tagore, and was brother-in-law to Nehru's sister, Krishna Hutheesingh.

9 For more on the Tebhaga struggle, see *D N Dhanagare*, Peasant protest and politics—The Tebhaga movement in Bengal (India), 1946–47, The Journal of Peasant Studies 3(3) (1976); *Susnata Das*, Ideology and Organisations of Rural Protest: Tebhaga Peasant Movement in Bengal (1946-49), Proceedings of the Indian History Congress 69 (2008).

10 The Times of India, Red MPs Trial Begins, 7 March 1958, p. 3; The Times of India, Outrages by Red Terrorists, 23 January 1950, p. 11.

11 The Times of India, note 5.

12 The Times of India, Special Courts to Try Raid Cases: New West Bengal Ordinance, 19 August 1949, p. 1.

13 Id.

14 Para 6 of Revised Judgment.

very recently, the Privy Council had upheld administrative and constitutional challenges to Special Criminal Courts.[15]

The ordinance was soon replaced by the West Bengal Special Courts Act of 1950, and Anwar Ali Sarkar and Gajen Mali were among the hundreds of accused who were tried before them.[16] Political will, public discourse, and legal precedent were all seemingly operating on the side of the government. However, the Calcutta High Court in a unanimous five-judge decision struck down the West Bengal Special Courts Act and dismissed the conviction and sentences against the appellants and 48 other persons.[17] The West Bengal government brought an appeal before the full bench of the newly constituted Supreme Court of India. It was represented by a battery of lawyers led by the Attorney General for India, M.C. Setalvad. The legal team for Sarkar and Mali included Jitendra Nath Ghose, a leading member of the West Bengal Congress Party, and N.C Chatterjee, the President of the Hindu Mahasabha and MP from Bengal.

The states of Hyderabad and Mysore also impleaded themselves as interveners through their advocate generals. The stakes were high as this was one of the first opportunities for the Supreme Court to adjudicate on what equality means under the new Constitution. N.C Chatterjee, Gajen Mali's lawyer, was also a leading figure and future president of the All India Civil Liberties Union, marking this as an important test case for civil liberties in independent India. Further, similar Special Court legislations had been enacted in several states, including Mysore and Hyderabad, giving other provincial governments a particular interest in the result.

The Supreme Court, with a majority of six to one, struck down s. 5 (1) of the West Bengal Special Courts Act as "ultra vires" the Constitution, quashing the convictions of 50 persons.[18] However, the impact of the decision continued to be debated. While three judges led by Justice Vivian Bose had held the entire act to be void, three others had held that the defect applied only to s. 5 (1). The Chief Justice of India, Patanjali Sastri had strongly dissented, citing a chain of American Supreme Court cases which "lean strongly towards sustaining state action in both legislative and administrative spheres against attacks based on hostile discrimination."[19] Curiously, Justice Bose in his partial concurrence, and Chief Justice Sastri in his dissent expressed their doubts about the applicability of the test for classification that was laid out in the majority opinions.[20] While Sastri took an empirical approach and reviewed a range of US case law to underscore that an increasing respect for

15 *King Emperor* v. *Benoari Lal Sharma* (1945) 47 BOMLR 260.

16 For a detailed engagement with the case see, *Rohit De*, Rebellion, Dacoity, and Equality: The Emergence of the Constitutional Field in Postcolonial India, Comparative Studies of South Asia, Africa and the Middle East 34(2) (2014).

17 *Anwar Ali Sarkar v. State of West Bengal* AIR 1951 Cal 150.

18 The Times of India, West Bengal Special Court Act Held Void, 12 January 1952, p. 5.

19 *State of West Bengal* v. *Anwar Ali Sarkar*, note 1.

20 For a discussion of this see, see, *J K Mittal*, Right to equality and the Indian Supreme Court, The American Journal of Comparative Law 14(3) (1965).

the state's regulatory powers "underline the futility of wordy formulation of so called 'tests' in solving problems presented by concrete cases," Justice Bose's critique was epistemic as he said it was "impossible to apply rules of abstract equality to conditions which predicate inequality from the start," and that there was a "grave danger in endeavoring to confine them in watertight compartments made up of readymade generalizations like classification."

Despite the steady judicial avowal of the classificatory tests, the Supreme Court's immediate jurisprudence on the subject was conflicting. Within a month of the *Anwar Ali Sarkar* decision, in a case that was partly heard along with *Anwar Ali Sarkar*, an almost identical bench of the Supreme Court would uphold the validity of the Saurashtra State Public Safety Measures Ordinance of 1948, which also permitted the setting up of similar Special Courts.[21] While the majority of the court would rule that the Saurashtra ordinance was more detailed focusing on regions where "tribes of marauders" were concentrated, during the hearings, the judges had asserted that the Saurashtra law appeared to be worse than the one under challenge in *Anwar Ali Sarkar*.[22] Justice Chandrasekhara Aiyyar was particularly scathing as he noted that the preamble "merely stated the need to provide public safety….this by itself indicates no classification," and that several crimes of a similar type had been tried by ordinary criminal courts.[23]

A couple of years later, in *Kedarnath Bajoria* v. *The State of West Bengal,*[24] the Supreme Court would apply the test even more broadly, upholding s.4 (1) of the West Bengal Criminal Law Amendment Act which provided for a schedule of offences to which the government could by notification allot cases for "speedy trial" by a special judge.[25] Chief Justice Patanjali Sastri, the lone dissenter in *Anwar Ali Sarkar,* would find himself in the majority accepting broad administrative discretion in classifying offences. Justice Vivian Bose found himself in the minority, calling out the arbitrary power of the West Bengal government to select cases for the Special Courts and holding that it was "objectionable to make an arbitrary sub-classification."[26] By 1965, legal scholars were noting that the efficacy of the *Anwar Ali Sarkar* judgment had been "whittled down."[27]

The question that both scholars and commentators began to increasingly ask was whether the classificatory doctrine was at all useful? On the one hand, despite the expanding deference given to administrative discretion between *Anwar Ali Sarkar* and *Kedarnath*

21 *Kathi Raning Rawat* v. *The State of Saurashtra* AIR 1952 S.C. 123, paras. 136-137. See *De*, note 16.

22 *Barun K Sen*, Six Decades of Law, Policy and Diplomacy: Some Reminisces and Reflections, Lincoln 2011.

23 *Kathi Raning Rawat* v. *The State of Saurashtra* AIR. 1952 S.C. 123, paras. 136-137.

24 *Kedarnath Bajoria* v. *The State of West Bengal* AIR. 1953 S.C. 404.

25 Ibid.

26 Ibid, para. 410.

27 *J K Mittal,* Special Criminal Courts and the Supreme Court of India, Journal of the Indian Law Institute 7(1) (1965).

Bajoria, the challenges based on a broad reading of the classificatory test continued to be made with widely divergent results before the courts.[28] This was in part because governments continued to ignore even the narrowest reading of *Anwar Ali Sarkar,* leading even a conservative newspaper like the Times of India to complain about "Lawless Laws."[29] The editorial identified that the Madhya Bharat Public Order Amendment Act virtually reproduced s. 5 (1) of the West Bengal Special Courts Act which had been held unconstitutional by the Supreme Court in *Anwar Ali Sarkar.* This demonstrated either that the government's legal advisors were not acquainted with the decisions of the Supreme Court or believed what it says about other states is not applicable to Madhya Bharat.

Despite the repeated reiteration of the precedent, the "nexus" prong of the classificatory test began to be critiqued by Indian legal scholars. Prof. P.K Tripathi in his lectures to Bombay University laid out a substantive challenge to the entire doctrine noting that the classificatory test fails to meet the threshold to protect equality under Article 14, since it ignores both the quality and extent of discriminatory treatment that the classification results in.[30] Harry Groves, Dean of the Faculty of Law at the University of Malaya, reviewed Indian cases and argued that the main issue with the classification test is that society is not static, and "what might be an acceptable classification in a country in one era may cease to be so in another."[31] As an African American lawyer, he was acutely conscious of the fact that reasonable classification on the basis of race was seen as acceptable in the United States for two centuries and had only recently begun to succumb to "a concerted legal attack."[32] Given both doctrinal force ceded to the classificatory test, and the long-standing confusion and critiques of it, Prof Khaitan's reengagement with the judgement is an immensely valuable feminist intervention.

Prof Khaitan offers a robust standard for determining 'reasonable classification,' recognizing that reasonability is often determined by social conditions and prejudices. The Indian Constitution explicitly recognized that formal equality had little meaning in a society that was deeply hierarchical on the grounds of caste, class, and gender. Therefore, the equality clause under Article 14, is followed immediately by a non-discrimination clause that permits the state to make special provisions for women, children, and socially and educationally backward classes. The article emerged from the political struggle against

28 For a quick survey see, *Lachmandas Kevalram Ahuja and Others v. State of Bombay* 1952 SCR 710; *Habib Mohd v. State of Hyderabad* 1953 SCR 661; *Syed Kasim Razvi v. State of Hyderabad* 1953 SCR 589.

29 The Times of India, Lawless Laws, 5 March 1953, p. 6.

30 *P K Tripathi*, Some Insights Into Fundamental Rights, Bombay 1972.

31 *H E Groves*, Equal Protection of the Laws in Malaysia and India, American Journal of Comparative Law 12(3) (1963), p. 392. Harry Groves had met Justice Vivian Bose at the International Conference of Jurists in Geneva in 1960 and had stopped over in Delhi in July 1960 to speak to the judges of the Indian Supreme Court on developments in US Civil Rights law. Series 2.1, Folder 47, Harry E Groves Papers, UNC Chapel Hill.

32 Id.

untouchability and for women's rights and recognized the resistance of society and state practice to legislative change.

It is unsurprising that feminist engagements have argued that the equality clause under Article 14 needs to be interpreted inter-textually keeping the purposes of Article 15 in mind. Kalpana Kannabiran argues that under the dominant doctrinal understanding of the Constitution, state arbitrariness violates equality but non-discrimination is caused through a "systematic, planned and systemic deployment of power."[33] Prof Khaitan's judgment, in developing the interpretive rules for the Constitution, reiterates that its "anti-colonial essence lies in the deep awareness of the missed opportunities...[that] allowed (and, sometimes, caused) so many of our people to remain uneducated, poor, marginalized, and excluded…not only inflict[ing] its own share of injustices, [but] also tolerat[ing] justice inflicted by others," thus leading to the constitutional goal of constructing a state that would "not only do justice but also protect it's people from injustice."[34]

C. The Anti-colonial Jurisprudence of Justice Vivian Bose

The governing principle of the rewritten judgement is the statement laying out the proper approach to interpreting a constitution that has a revolutionary and transformative character. This is a central point alluded to in the partially concurring judgement of Justice Vivian Bose in *Anwar Ali Sarkar* which rejected abstract doctrinal tests. Bose argued, "Constitutions are not mathematical formulae which have their essence in mere form. They constitute a frame-work of government written for men of fundamentally differing opinions and written as much for the future as the present. They are not just pages from a text book but form the means of ordering the life of a progressive people."[35]

Moreover, constitutions could not be interpreted without the background through which they arose, they were not "just dull, lifeless words static and hide- bound as in some mummified manuscript, but, living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present."[36] The Indian Constitution emerged from a fight for freedom, and the "memory of grim trials by hastily constituted tribunals with novel forms of procedure set forth in Ordinances promulgated in haste because of what was then felt to be the urgent necessities of the moment."[37]

Justice Vivian Bose was unusual among his contemporaries for actively engaging with the meaning of being a judge in a constitutional republic emerging from colonialism. How-

33 *Kalpana Kannabiran*, Tools of Justice: Non-discrimination and the Indian Constitution, New Delhi 2012, p. 457.

34 *Khaitan*, Rewritten Judgement, para. 20.

35 *State of West Bengal v. Anwar Ali Sarkar* AIR 1952 SC 75.

36 Ibid.

37 Ibid.

ever, as J.K Mittal observed, he found no support for his historical interpretation of Article 14 in the Supreme Court and had to give up his stand reluctantly.[38] K.G. Kannabiran, the pioneering civil liberties lawyer, described Bose as the "alone of all the judges present and past," who "understood the Constitution in terms of the people, their struggles and the necessity of ensuring the rights secured by them in course of their struggles."[39] It is not surprising that there is a recent turn to appreciate Justice Bose's legacy as India's first activist judge, as a decolonial international lawyer, and a "rockstar."[40]

The rewritten judgment channels the spirit of Justice Bose and clearly defines the revolutionary and transformative logic of the Constitution's anti-colonialism. Central to this is the argument that unlike the colonial principles of classification which were set up to divide and rule, in the new republic, classification may only be permitted to be inclusive i.e. to accommodate differences and equalize status. Colonial excesses thus act as aversive precedents, i.e. as Justice Bose's judgment notes, special tribunals and deviations from the ordinary criminal procedure were frequently resorted to, to suppress Indian movements for independence and revolutionary change by the British imperial regime. During the drafting of the Constitution, members of the Constituent Assembly repeatedly brought up reminders of their own sufferings under the arbitrary and draconian legal processes implemented by the British.[41]

Indeed, special criminal courts were a regular tool of colonial governance, making appearances in Ireland, Africa, and India over the course of the 20th century.[42] They had largely been used in political trials, most prominently in the case of Bhagat Singh and his fellow accused in the Lahore Conspiracy Case.[43] In India, during the 2nd World War, 39 people had been sentenced to death and 23,000 persons had been imprisoned after being tried before special criminal courts.[44]

Special criminal courts had also been the subject of public critique, and there was an expectation that this regime would end with independence. These critiques were also

38 *Mittal*, note 27.

39 *K G Kannabiran*, The Wages of Impunity: Power, Justice and Human Rights, Hyderabad 2004, p. 37.

40 *Suchindran B N*, Vivian Bose and the Living Constitution: A Tribute, Indian Journal of Constitutional Law 5 (2011-2012); *Prabhakar Singh*, Finding Foreign Relations Law in India: A Decolonial Dissent, in: Helmut Philipp Aust / Thomas Kleinlein (eds.), Encounters Between Foreign Relations Law and International Law: Bridges and Boundaries, Cambridge 2021; *Sanjoy Ghose*, Why Can't a Judge be a Rockstar? A Study of the Interesting Life of Justice Vivian Bose, https://www.barandbench.com/columns/why-cant-a-judge-also-be-a-rockstar-a-study-of-the-interesting-life-of-justice-vivian-bose (last accessed on 17 February 2023).

41 *Aparna Chandra / Mrinal Satish*, Criminal Law and the Constitution, in: Sujit Choudhry / Pratap Mehta / Madhav Khosla (eds.), The Oxford Handbook of Indian Constitutional Law, Oxford 2016.

42 *Fergal Davis*, The History and Development of the Special Criminal Court, 1922-2005, London 2007.

43 *A G Noorani*, The Trial of Bhagat Singh: Politics of Justice, New Delhi 2005.

44 National Archives of India, Home Department Political Files, File No 8/20/43.

made internally by the judiciary. Justice B. Malik of the Allahabad High Court would write to the Constituent Assembly in response to the draft Constitution making his first priority a new provision to restrict the practice of setting up Special Tribunals, which took away jurisdiction from the courts, particularly in political cases. These Special Tribunals were not bound by the procedural safeguards and rules of evidence that governed ordinary courts. Chief Justice Malik quoted Article 70 of the Irish Free State Constitution, which provided that "no one shall be tried save in due course of law and extraordinary courts shall not be established."[45] He argued that the Constitution should provide that "extraordinary courts" should be only for the duration of a presidentially proclaimed emergency.[46] Malik criticized the continuation of the colonial practice of special legislation and ordinances that allowed for arrest or detention without trial.[47] He also demanded that the Constitution should guarantee to all accused the right to counsel. The Socialist leader, Jayprakash Narayan had suggested an amendment to the draft Constitution of India that stated that extraordinary tribunals shall not permitted, except military tribunals authorized by law.[48] Prof P.A. Wadia, addressing the Bombay Civil Liberties Conference in 1949, attacked the Bombay Public Safety Measures Act for giving the power to the executive to detain and restrict the liberty of persons and to subject them to special courts and procedures.[49] Justice P. R. Das, addressing the Indian Civil Liberties Conference in Madras in the same year, critiqued the Constitution in the making as "suppressing civil liberty" and pointed out that special courts had been a subject of criticism since the terror unleashed by the British in Amritsar in 1919.[50]

It is not surprising, then, that the rewritten judgment engages substantively with this legacy by comparing the impugned West Bengal Act with the notorious Anarchical and Revolutionary Crimes Act, 1919 (Rowlatt Act) which was the turning point for mass nationalist agitation. As the judgement points out, while sharing many features, ironically the Rowlatt Act was better in specifying the "offences that could be tried using the special procedure it prescribed, rather than leaving it to the whims of the Executive of the day."[51]

45 National Archives of India, Comments of the Draft Constitution by Chief Justice B Malik, Allahabad HC, 24 March 1948, CA/21/Cons/48 I.

46 Ibid.

47 The retention of preventive detention after independence, despite being critiqued by the nationalist parties for decades, was the subject of both public critique and litigation. See, *Charles Henry Alexandrowicz*, Personal Liberty and Preventive Detention, Journal of the Indian Law Institute 3(4) (Oct. – Dec. 1961).

48 Comments and Suggestions on the Draft Constitution, *B. Shiva Rao* (ed.), The Framing of India's Constitution: Select Documents, Volume IV, Indian Institute of Public Administration, New Delhi 1968, p. 39.

49 *Prof P.A Wadia*, Presidential Address, The Bombay Provincial Civil Liberties Conference, 1949, Gokhale Institute of Economics and Politics, Pune.

50 *Justice P.R Das*, Presidential Address, Indian Civil Liberties Conference, Madras, 15-17 July 1949, Gokhale Institute of Economics and Politics, Pune.

51 *Khaitan*, Rewritten Judgement.

The Rowlatt Act was the turning point in how Indian thinkers would imagine their legal rights and privileges. V.S. Srinvasa Sastry in his 1926 lectures on Indian Citizens: Rights and Duties pointed out the continuing legacies of the Rowlatt Act, as its clauses were copied in ordinances and legislations across the country. He argued that they offended the rights of Indians, even as colonial subjects.[52]

Recognizing the critical role of the judgment in shaping future directions of equality jurisprudence, the rewritten judgment also lays down a revised classificatory test, importantly stating that the differentia must be based on "constitutional ethos," the objectives must be genuine and most significantly that the courts will have to consider the disproportionate impact of the classification between different categories of people.

D. What is Colonial About Colonial Laws?

Recognizing the constitution as anti-colonial and revolutionary, raises questions about how to interpret the legitimacy of laws enacted during the colonial period. The idea that colonial laws have a lower threshold of constitutionality has begun to appear in judicial pronouncements, most recently by Justice Nariman in the Indian Supreme Court ruling on the legal challenges to Section 377 of the Indian Penal Code.[53] Echoes of this view appear even earlier, when the Allahabad High Court struck down a 1947 law holding that a law enacted when India had dominion status has "shadows of the Raj on it."[54]

The rhetorical power of such an argument is attractive, but the critique of the special tribunals and their violation of equality was that they allowed deviations from the rights and procedures under the ordinary criminal laws, laid out in the Criminal Procedure Code 1882, the Indian Penal Code, 1861 and the Indian Evidence Act, 1872. These legislations were crafted by a colonial government at a time when there was even more limited Indian representation and public consultation than in India after 1947. Yet, the procedural protections under English common law and the colonial criminal codes were tools that advocates had relied upon to define the principles of fair trial, and deviations had been criticized through the colonial period and after. Both legal professionals and the wider public recognized the

52 *V S Srinivasa Sastri*, The Indian Citizen: His Rights and Duties, Bombay 1948.

53 *Navtej Singh Johar* v. *Union of India* (2018) 1 S.C.C. 791. For a broader argument see, *Anil Kalhan / Gerald P Conroy / Mamta Kaushal / Sam Scott Miller*, Colonial continuities: Human rights, terrorism, and security laws in India, Columbia Journal of Asian Law 20 (2006). Arguably, the Supreme Court of India's binding precedent remains its decision in *Madhu Limaye,* which rejects the idea of a lower presumption of constitutionality for colonial laws. See: *Madhu Limaye v. Sub-Divisional Magistrate, Monghr* AIR 1971 SC 2486.

54 *Pradhan Sangh Kshetra Samiti* v. *State of UP* AIR 1993 All 162. For a longer discussion of the challenges of constitutional time see, *Rohit De*, Between midnight and republic: Theory and practice of India's Dominion status, 17(4) (2019) International Journal of Constitutional Law. For an alternative view, see *Arudra Burra*, The Cobwebs of Imperial Rule, Seminar 615 (2015); *Arudra Burra*, What Is Colonial about Colonial Laws, American University International Law Review 31 (2016).

standards in the colonial code and the common law as the bare minimum protections that were owed by a state to the people.[55] M.C Setalvad, who both had experience arguing against Special Courts during the colonial period and in favour of them after independence as Attorney General, praised the Indian criminal codes for their clarity and precision compared to English criminal law, and stated that while the Indian Constitution guaranteed the individual his freedom, "the Indian criminal law helps him enjoy and uphold it."[56]

This is why a number of lawyers and civil liberty activists have raised concerns about some new initiatives to 'decolonize' Indian criminal laws, such as the newly constituted Ranbir Singh Committee for Reform of Criminal Laws which seeks to overhaul the entire criminal justice system.[57] Dr. Ranbir Singh suggests that the government had sought to constitute the committee recognizing that "these laws being colonial laws—they were drafted when there was no Universal Declaration of Human Rights, and we didn't also have our own Constitution—now we should look at the laws to examine whether they are compatible with international covenants and our Constitution."[58] However, as the number of letters challenging the process and motives behind the consultation suggest, it is unclear that the recommendations will necessarily improve procedural and rights protections that already exist under the Codes. As Rajeev Dhawan and Mihir Desai have argued the "Criminal Procedure Code is in one sense a part of the constitution, and it's inner morality."[59]

A reason for the skepticism has been the trend in postcolonial criminal justice reform across governments, to create exceptional laws and procedures, lower requirements for evidence, limit bail, and reduce the possibilities of appeal and review to secure a 'speedy trial.' These include not only the more conventionally draconian laws involving national security, but also laws relating to management of the economy and laws relating to the protection of women, children, and other marginalized groups. Indeed, feminist legal scholars have begun to critically question the ease of mobilizing the state to address questions of violence against women through draconian and exceptional regimes of criminal process and punishment.[60]

These concerns highlight a tension in postcolonial constitutionalism, where a popularly elected government justifies continuing colonial procedures and laws on the grounds that the problem lies not in the instruments of government but in the purposes to which they

55 I am grateful to Aparna Chandra for emphasizing this point. For a discussion of the Constituent Assembly Debates and criminal process, see *Chandra / Satish*, note 41.

56 *M C Setalvad*, The Common Law in India, London 1960, p. 167.

57 *Ritika Jain*, Controversy Dogs Reform of 160 year Old Criminal Law, https://article-14.com/post/india-tries-to-reform-160-year-old-criminal-law-in-6-months (last accessed on 17 February 2023).

58 *T K Rajalakshmi*, Ranbir Singh: Reforms were Long Overdue, https://frontline.thehindu.com/the-nation/reforms-were-long-overdue/article32531365.ece (last accessed on 17 February 2023).

59 Sabrang, The Constitution is a Miracle: Rajeev Dhawan and Mihir Desai, https://www.sabrangindia.in/interview/constitution-miracle-sen-adv-rajeev-dhawan (last accessed on 23 February 2023).

60 *Prabha Kottiswaran*, Feminist Approaches to the Criminal Law, in: Markus Dubber / Tatjana Hörnle (eds.), The Oxford Handbook of Criminal Law, Oxford 2014.

are put. Backed by electoral legitimacy and ostensibly acting on behalf of the people, they claim to be absolved from critiques of using draconian colonial legislation, be it preventive detention or emergency laws. These arguments date back to defenses offered for the retention of preventive detention and restrictions to fundamental rights within the Constituent Assembly. Indeed, while colonial-era special criminal courts focused upon political crimes, in the years immediately after independence, special criminal courts were set up to try those accused of communal violence, corruption and bribery, smuggling, tax fraud, and black marketeering. Even legal scholars who criticized the Supreme Court's approach in the classificatory test, justified special courts as an "infant democracy like India which had to face certain acute law and order problems" would be justified in "extending different treatment to potential saboteurs and other miscreants."[61]

Another issue with the temporal definition of colonialism is that it erases administrative and ordinary legal tactics that were used before the coming of the Constitution to challenge special criminal courts. These tools remain at the disposal of lawyers and judges even after the commencement of the Constitution. During the 2nd World War, the Governor-General issued a Special Courts Ordinance in 1942 which was struck down by both Calcutta High Court and the Federal Court on grounds ranging from the legality of the emergency, retrospective operation of criminal law, and improper delegation of power.[62] More strikingly, it was challenged before a range of High Courts, including by M.C Setalvad, who would later go on to defend Special Criminal Courts in *Anwar Ali Sarkar*.[63] It is important to acknowledge and remember that even under the most restrictive rights regimes, lawyers and judges retain the ability to marshal the law, facts, and precedents to achieve rights protective outcomes.

Prof Khaitan steers us away from defining colonial laws through temporality, by broadening the question from the "manner " or "democratic pedigree" of the legislative body to a number of procedural and substantive factors, like "the egregiousness of the law's impact" and the judiciary's competence to evaluate it.[64] Further, he increases the threshold of scrutiny to laws that have "grave implications for personal liberty of the individual".[65]

61 *Mittal*, note 20.

62 *Emperor* v. *Benoari Lall Sharma* (1943) FCR 96, 140.

63 The Times of India, Special Courts Ordinance: Validity Challenged in Bombay Application, 20 January 1943, p. 4. For a detailed engagement with the Benoari Lal Sharma case see, *Rohit De*, The Federal Court and Civil Liberties in Late Colonial India, in: T Halliday / L Karpik / M Feeley (eds.), Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex, Cambridge 2012.

64 *Khaitan*, Rewritten Judgement, para. 28.

65 *Khaitan*, Rewritten Judgement, para. 29.

E. How to Interpret an Anti-Colonial Constitution

> *"Brush aside for a moment the pettifogging of the law and forget for the nonce all the learned disputations about this and that, and "and" or "or ", or "may" and "must ". Look past the mere verbiage of the words and penetrate deep into the heart and spirit of the Constitution. What sort of State are we intended to be ? Have we not here been given a way of life, the right to individual freedom, the utmost the State can confer in that respect consistent with its own safety ? Is not the sanctity of the individual recognised and emphasised again and again? Is not our Constitution in violent contrast to those of States where the State is everything and the individual but a slave or a serf to serve the will of those who for the time being wield almost absolute power ? I have no doubts on this score. I hold it therefore to be our duty, when there is ambiguity or doubt about the construction of any clause in this chapter on Fundamental Rights, to resolve it in favour of the freedoms which have been so solemnly stressed."*
>
> *Justice Vivian Bose, 1951* [66]

The recognition of the Indian Constitution as a transformative document throws up several interpretive challenges. Is the Constitution anti-colonial? What makes it anti-colonial? How do we apply this to the actual act of interpretation? And does an anti-colonial constitution necessarily address concerns of equality, liberty and justice?

While several scholars and commentators have argued that the Indian Constitution is revolutionary and transformative, yet there remains considerable difference of opinion as to what makes it thus, and the role that this would play interpretively. Shibani Kinker Chaube in his foundational work, described the Constituent Assembly as a "Springboard of Revolution" and dismissing the charges of borrowing from the Government of India Act, pointed out that India in 1949 was far ahead of her constitutional position in 1937.[67] His reading of the potential for transformative change comes from a textual comparison of both documents. Others such as Sarbani Sen have argued that the revolutionary character of the Indian Constitution has its roots in a mass-based freedom struggle led by the Indian National Congress and the charismatic authority of its "founding fathers."[68] Sen's assumption centers on the "existence and value of revolutionary constitutional politics as a part of the Indian constitutional tradition, and as the primary mode of political change which led to the founding, and subsequent constitutional transformations."[69] What happens when political parties that sustained a founding vision no longer have mass support, or when charismatic

66 *S. Krishnan v. State of Madras* AIR 1951 SC 301.

67 *Shibani Kinker Chaube*, Constituent Assembly of India: Spring Board of a Revolution, New Delhi 1973, p. 275.

68 *Sarbani Sen*, Popular Sovereignties and Democratic Transformations: The Constitution of India, New Delhi 2007; *Bruce Ackerman,* Revolutionary Constitutions: Charismatic Leadership and the Rule of Law, Cambridge, MA 2019.

69 *Sen*, note 66, p. 32.

leaders have lost their sheen? Is the Indian Constitution's revolutionary vision the legacy of a single political party or a set of individuals? Moreover, how should judges adjudicate this legacy?

Gautam Bhatia and Kalpana Kannabiran in their accounts of transformative constitutionalism make a case for pluralizing sources for constitutional interpretation, drawing from the writings and actions of those engaged in struggles of social and economic change over a century, from the writings of early Indian feminists to contemporary Adivasi protests against the forest rights act.[70] Both are powerful interventions, and offer new ways of revising and challenging doctrine, but require that the judge find and recognize a range of eclectic sources as well as their transformative potential. Secondly, recognizing that judicial interpretation must require a consideration of the Constitution's revolutionary and transformative ethos creates a challenge about how to evaluate pre-constitutional laws. Sujit Choudhury suggests a way of reconciling the applicability of differential standards to colonial legislation which served "imperial interests," while acknowledging a different standard for laws for social and economic transformation enacted between 1946 and 1949, as well as the mass of colonial legislation that undergird India's economic systems. He argues that the test for proportionality takes into account whether the "colonial era law that served imperial interests was basic to the post 1857 constitution order," if so, its purpose was unconstitutional.[71] While Prof Choudhury's conception of a" colonial basic structure" that the postcolonial order has to respond to is a powerful one, as practice it relies far too much on historical interpretation, or a historian's nightmare, a judge adjudicating on questions of historiography and historical evidence.[72] Moreover, reading colonial law and precedent simply as a projection of imperial interests does not always acknowledge the ways in which actors could use legalism to protect liberty or carve out spaces of freedom.

Prof Khaitan in his rewritten judgement offers a robust response to these questions through analytical reasoning which can be adopted by future judges, despite changed circumstances and differential understanding of the historical past. It is striking that several elements of Prof Khaitan's model require the determination of impact, not only how the objective is connected with the diffrentia, but also whether the same objective could have been achieved without limiting rights. What is colonial about a colonial law is not its temporality, but its impact, both on the immediate persons affected but *also the polity at large*. What is the real danger posed by particular Special Courts? As Prof Khaitan points out this gives arbitrary and unrestricted power to a state official, allowing them to "cast

70 *Gautam Bhatia*, A Transformative Constitution: A Revolutionary Biography in Nine Acts, New Delhi 2019; *Kannabiran*, note 33.

71 *Sujit Choudhry*, Postcolonial Proportionality: Johar, Transformative Constitutionalism and Same Sex Rights in India, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020.

72 For instance, it could be argued that the Transfer of Property Act or the Indian Contract Act, did more to serve "imperial interests that were basic to the post 1857 constitutional order", than standard detention legislation.

their net wide", and place political dissenters and opponents at risk, limiting not just the exercise of constitutionally guaranteed rights but threatening to end the democratic process itself.[73] In doing so, he follows Justice Vivian Bose's advice in his judgment in *S.Krishnan,* that "in each case judges must look straight into the heart of things and regard the facts of each case concretely much as a jury would do; and yet, not quite as a jury, for we are considering here a matter of law and not just one of fact: Do these "laws" which have been called in question offend a still greater law before which even they must bow?"[74]

Such focusing on impact, moves away from fetishizing founding fathers and mothers towards identifying a constitutional ethos embodied in the constitutional text *and* (emphasis mine) contemporary needs. As Prof Khaitan argues, the "moral inheritance" of the Constitution does not "lie personally" with the men and women who wrote the Constitution, but in the larger ideals and values they represented. Thus, the sophistry of the suggestion that because these same men and women in other circumstances might have enacted legislation that took curbed constitutional rights, the constitution itself stands on a less enduring footing is firmly rejected.[75] The Indian Constitution was not "founded and granted from above" but reflected the expectations and struggles of the Indian public, which did not cease simply with the enactment of the Constitution.[76]

Most significantly, it also clearly lays out that the anti-colonial nature of the Indian Constitution was not a parochial, conservative move to return to some imagined "indigenous form", as some commentators wearing the garb of decoloniality have argued.[77] Both the founders and the public imagined a future with wide horizons, and drew from their experiences under colonial rule and society to demand an order that would allow them to live with the ideals enshrined in the preamble. While Vivian Bose might have complained that Khaitan's too was a "mathematical formula," he would have approved that this was anchored within his understanding of a revolutionary transformation.

73 *Khaitan*, Rewritten Judgement, para. 46.

74 *State of West Bengal v. Anwar Ali Sarkar and others* AIR 1952 SC 75

75 *Khaitan*, Rewritten Judgement, para. 27.

76 *Rohit De / Ornit Shani*, Assembling India's Constitution: Towards a New History, Past and Present (2024) (forthcoming).

77 *Jai Sai Deepak*, India that is Bharat: Coloniality, Civilization, Constitution, New Delhi 2021; *Arghya Sengupta*, Why India must revisit its 'colonial' Constitution, https://timesofindia.indiatimes.com/india/reconstituting-our-rights/articleshow/97322296.cms?from=mdr (last accessed on 1 April 2023).