



BOOK REVIEW

## The Colonial Constitution

By Arghya Sengupta, Juggernaut, 2023. 296 pp. ISBN 978-9353451929 £10.64, (paperback)

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Arghya Sengupta's (2023) book, *The Colonial Constitution*, provides a succinct historical-legal account of the Constitution of India's origins. It does so by emphasising the document's colonial roots and delineating the logic employed by its framers during the Constituent Assembly hearings. It was during this crucial period that the foundation for India's extant democratic framework was debated and defined.

Divided broadly into two parts, the first section, *Decisions*, examines, questions and occasionally commends the decision-making process employed by the framers in determining those aspects of the Constitution that today serve as a blueprint for India's governance. The second part, *Alternatives*, presents three versions of the Constitution, each outlining distinct visions for India. One by Mahatma Gandhi, another by the Hindu Mahasabha and the last by Dr. Ambedkar. The book concludes with a compelling call to decolonise the Constitution by first, challenging the imposition of its colonial legacy into the fabric of India's modern polity and second, by calling to question its depiction as a harbinger of social revolution (Austin, p. xi) and a product of 'profound historical rupture' (Khilnani, p. 38). Even after rounds of deliberations during the Constituent Assembly debates, the final outcome was, in Sengupta's words, a 'constitutional hodgepodge' consisting of provisions and clauses borrowed from other countries that were, in some cases, questionably adapted into the Indian context (p. 36). While certain provisions of the Constitution were indeed transformative, such as the chapter on fundamental rights, they were also adapted from elsewhere and cut from old cloth – the colonial Government of India Act, 1937. So similar were the Indian Constitution and the Government of India Act that 150 of the 239 articles of the first draft of the Indian Constitution were based on or copied directly from the Act, as were multiple chapters of the Indian Constitution as they stand today – including chapters on the Union and State Executive, Parliament, State Legislatures, and the powers of key institutions like the Supreme Court, and the Attorney General of India, among others (pp. 26–27).

While some scholars, like Krishnaswamy (2019), have already questioned the Constitution's liberal origins in their analyses, others, such as Choudhry, Khosla and Mehta (2016), have offered a more positive perspective, praising the Constitution's cosmopolitan character and commanding ability to reflect and imbibe the global constitutional cross-currents of the time. Sengupta's analysis occupies a middle ground, viewing the Constitution as neither worthy of uncritical praise nor vehement lamentation. He contends that because the Constitution is inherently colonial, it necessitates a re-examination (p. 216). While not advocating for adopting a new constitution, Sengupta urges readers to ponder what more the existing Constitution can offer its citizens and questions why it hasn't fulfilled some of its original promises.

The inherent tensions between modernity and coloniality within the Constitution should strike a resonant chord with queer rights activists in India. In recent times, they have invested significant

effort and time in advancing queer advocacy through the courts, relying primarily on the Constitution's liberal and transformative ideals.

Ever since the Supreme Court decriminalised homosexuality in *Navtej Singh Johar v. Union of India*<sup>1</sup> by reading down Section 377 of the colonial Indian Penal Code, members of the queer community have been approaching high courts across the country to seek recognition of queer relationships and enforce their fundamental rights. These demands reached a pinnacle in the much-publicised marriage equality case: *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*.<sup>2</sup>

On the ninth day of the hearings, a lawyer (J Sai Deepak) representing a women's rights group opposing marriage equality, called into question the purported liberal basis of the Constitution. Deepak argued for a socially conservative interpretation of the law, asking the bench rather pointedly: 'Does it mean that social conservatism has absolutely no place within the meaning of the Constitution? Does it mean that society does not have the right to draw a few red lines, to basically say thus far, and no further? That is a central question' (Transcript of WP (Civil) 1011 of 2022 Hearing Dated 10.05.2023, 2023, p. 35). As it turns out, that argument carried the day, for the majority on the bench eventually declined to grant any legal recognition to queer couples.

Interestingly, the petitioners in the case staked their claim on the fundamental rights chapter of the Constitution, contending that their right to marry was embedded in Articles 14 (Right to Equality and Equal Protection Under the Law), 15 (Prohibition of Discrimination), 19 (Freedom of Speech and Expression) and 21 (Right to Life and Personal Liberty). These fundamental rights were intended to be the 'crown jewels' (Sengupta, p. 76) of the constitutional framework, promising political, cultural, spiritual and economic freedom. However, even during the drafting period, each of these freedoms was heavily restricted by the inclusion of numerous caveats and regulations. And while there is nothing wrong with adding restrictions to rights *per se*, some of them were so excessive that Somnath Lahiri, a member of the constituent assembly debates, strongly criticised them, saying that the Constitution seemed to have been drafted from a 'police constable's' perspective (Sengupta, p. 76). The Court's declaration in *Supriyo* reinforces Lahiri's description of the Big Brother police state. The majority opinion, while acknowledging the discrimination endured by queer couples, deferred to the legislature on the grounds of complexity and the need for further deliberation (See paragraph 113 of Justice S. R. Bhatt's and Justice Hima Kholi's opinion in *Supriyo*). The majority effectively shirked judicial responsibility, leaving the queer petitioners without any actionable legal recourse, as it did not mandate that the legislature act in the community's favour; the legislature need only deliberate on the issue, not grant recognition if it deems fit. Given the government's hostility during the hearings, any hope for recognition seems far-fetched.

The ruling took a further divisive turn. While denying recognition to same-sex couples, the majority surprisingly granted transgender individuals the right to have their marriages recognised under both secular and religious law, with the caveat that these unions be heterosexual (see paragraph 149 of Justice S. R. Bhatt's and Justice Hima Kholi's opinion in *Supriyo*). In short, non-heterosexual queer unions could not be granted state-recognition under the majority holding in *Supriyo*.

Homosexuality and same-sex marriages were not acceptable in colonial India, and that sentiment was reflected in the Supreme Court's now-infamous 2013 judgment on homosexuality in *Suresh Kumar Koushal v. Naz Foundation*,<sup>3</sup> which maintained the colonial status quo of the Indian Penal Code (IPC) Section 377 under the law. In *Suresh Kumar Koushal*, the Supreme Court upheld those provisions of IPC Section 377 that criminalised consensual same-sex activity among private adults. Despite overturning *Suresh Kumar Koushal* five years later in *Navtej Singh Johar*, the Supreme Court, in *Supriyo*, limited the scope of that reversal. The *Supriyo* judgment denied

<sup>1</sup>AIR 2018 Supreme Court 4321.

<sup>2</sup>Writ Petition (Civil) No. 1011 of 2022.

<sup>3</sup>Civil Appeal No. 10972 of 2013.

recognition to same-sex couples, even though the Court itself had previously acknowledged the transformative nature of the Constitution and the Court's duty to protect everyone's rights, regardless of the petitioner's sexual orientation (see paragraph 98 of the *Navtej Singh Johar* judgment by Dipak Misra and A.M. Khanwilkar).

This apparent contradiction raises questions about the Court's commitment to true constitutional transformation. The Court seemingly recognised the potential for the Constitution to evolve and safeguard queer rights in *Navtej Singh Johar*. However, the *Supriyo* decision contradicts this notion by upholding a restrictive view of marriage based on colonial heteronormative ideals.

It is a well-documented fact that the legal and social systems imposed by British colonialism continue to influence Indian law today. This is particularly evident in how sexuality and family are currently defined. Colonial rule promoted a narrow view of family, focused on reproduction and heterosexuality, and notions of homophobia, biphobia and transphobia were also introduced during this period. These ideas, along with the notion of a traditional heteronormative family structure, became embedded in India's legal frameworks (Mbaru, Tabengwa and Vance, 2018, p. 189; Morgan and Wieringa, 2005, p. 72; UN Human Rights Office, 2023). This colonial influence is eerily evident in *Supriyo* and makes one wonder if the Court's proclamations on transformative constitutionalism in *Navtej Singh Johar* were misleading. After all, if the Constitution were genuinely transformative and not static, one would expect *some* remedy to be granted to the queer community.

But the shadow of British colonialism extends far beyond queer rights in India. Many provisions within the Constitution itself retain a distinctly colonial stench. The broad emergency powers granted to the government (pp. 106–107) raise concerns about potential abuses. Similarly, the removal of 'due process' from Article 21 during the Assembly debates, which guarantees the protection of life and liberty (p. 89), continues to weaken individual rights. Additionally, preventative detention provisions (p. 87) allowing authorities to detain individuals suspected of future crimes raise concerns about justice and fairness.

Critics of Sengupta's work, like Tundawala (2024) argue that the Constitution isn't truly colonial, but rather reflects the aspirations of a newly independent nation. They point to the removal of group-based rights for religious minorities as an example of a shift away from colonial practices. However, this argument overlooks a key point. The Constitution's emphasis on national unity itself has colonial roots. The centralising tendency of the Constitution, which emphasises national unity, can reinforce homonationalism and homopopulism, privileging a specific type of queer identity that aligns with national norms (Banerjee, 2023; Puar, 2018; Roy, 2021).

Sengupta acknowledges the positive aspects of India's Constitution but also highlights its shortcomings. He argues that the framers missed opportunities to create a truly progressive document (p. 28). The chance to draft such a foundational document comes rarely, which is why he explores the alternative visions proposed by prominent figures like Mahatma Gandhi, Dr. B.R. Ambedkar and the Hindu Mahasabha. His purpose is not to endorse any specific alternative but rather to encourage a deeper reflection on what a modern Constitution for twenty-first-century India should encompass; he emphasises the importance of considering diverse perspectives that can shape the nation's future.

Sengupta's work is particularly relevant for queer activists; it compels them to question why colonial views on marriage and family continue to influence laws and court decisions regarding sexuality. His analysis suggests that the very Constitution that activists rely on for progress may be inherently resistant to change due to its colonial roots. Sengupta's analysis, thus, exposes the ongoing influence of colonialism on Indian law and the strategic fault line in relying excessively on the law for social change. This realisation should serve as a crucial call to action for queer activists in India, and indeed, anyone seeking a more just society. Their ongoing challenge will be to question the Constitution's colonial legacies and advocate for a vision that reflects the values of a modern, inclusive India, one that truly transcends its colonial, queerphobic past.

Sengupta's work further inspires us to critically examine other historical debates. For instance, Dr. B.R. Ambedkar believed a strong central government was necessary to protect minority rights

and handle national emergencies. In contrast, Mahatma Gandhi envisioned a decentralised India built on self-sufficient villages, with less emphasis on a powerful central authority.

The Hindu Mahasabha occupied a middle ground. They favored a strong central government but also envisioned an ‘indivisible’ Indian subcontinent, where Pakistan would not be a separate nation.

Sengupta’s work, thus, encourages us to think beyond the established frameworks and consider the full spectrum of possibilities, a valuable exercise for queer activists and anyone seeking social change.

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