



8-25-2023

## Does Today's India Need 'Decolonisation' Speak?

Salmoli Choudhuri

Moiz Tundawala

Follow this and additional works at: <https://repository.nls.ac.in/popular-media>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

# Does Today's India Need 'Decolonisation' Speak?

The proposed exercise of indigenising criminal laws – insincere at best and dangerous at worst – would only bring about a surface-level change of the imaginary through a spectacular show of rejecting the colonial inheritance.



Moiz Tundawala and Salmoli Choudhuri

History  
Politics 25/Aug/2023

In a landmark essay explaining the nature of the radical transition from Mughal rule to British colonialism, the anthropologist-historian [Bernard Cohn](#) vividly portrays how a significant shift in the existing socio-symbolic order was brought about by maintaining continuity at the level of courtly rituals and practices. In pre-colonial India, imperial subjects high enough in rank and status were symbolically incorporated into bodies of Mughal sovereigns and other native rulers through reciprocal acts of offering *nazar* and receiving *khelat* in public ceremonies. While carrying on with the show of royal durbars, this human economy of gift based on loyalty and patronage was completely transformed by the British into one of a *quid pro quo* relationship of bribery and tribute, that aided their commercial and capitalist enterprises.

Error loading media

What we are witnessing in India today with the decolonialisation talk strikingly mirrors Cohn's assessment of British colonial practices, if only in a reverse manner. To avoid being seen as disturbing prevailing social relations chastened by their experience of 1857, the colonisers retained the imaginary spectacle of the Mughal court to cover up the fundamental break that they had instituted in the symbolic world. Exactly the opposite can be discerned in the sudden noise around [decolonising law codes](#) 76 years after India's independence. The proposed exercise of indigenising laws – insincere at best and dangerous at worst – would only bring about a surface-level change of the imaginary through a spectacular show of rejecting the colonial inheritance while harbouring no aspirations for freedom at the structural and systemic level of the symbolic order itself.

#### Criminal law and justice

Three new Bills were recently introduced in Parliament by home minister Amit Shah of the ruling Bharatiya Janata Party to overhaul the criminal legal system that has been in existence since the colonial period. Colonial-era laws including the Indian Penal Code, 1860, the Indian Evidence Act, 1872 and the updated Criminal Procedure Code of 1973 are set to be repealed and replaced by the Bharatiya Nyaya Sanhita, Bharatiya Sakshya Bill and Bharatiya Nagarik Suraksha Sanhita respectively. As [expert analysts](#) in the last few days have suggested, these Bills, despite their grand posturing, largely keep intact the inherited legal edifice while introducing minimal changes to undo its multiple crises in the areas of police and prison reforms, and vaguely drafted laws and their arbitrary implementation.

Apart from dealing a blow to India's linguistic plurality by [prioritising Sanskritised Hindi](#), their titles also misrepresent the point and purpose of these laws. For instance, by translating 'penal' as 'nyaya' which is commonly associated with justice in classical Hindu philosophy, one of the Bills reduces the latter to a much narrower concern with crime and punishment. It is anybody's guess why this particular term was selected, but in their 2019 election manifesto, the Indian National Congress had come up with the 'Nyuntam Aay Yojana', also called Nyay, that is the basic income scheme. Although not adequate for the universalisation of welfare, this gesture was at least in keeping with the worldwide trend among political theorists to think about justice through the question of social redistribution. In contrast, the Bharatiya Nyaya Sanhita takes a step back in robbing justice of its redistributive thrust and equating it with the corrective problem of maintaining law and order.

#### UCC and social difference

Relative to this new development in the field of criminal law, a longstanding pet project of the BJP which it has been unable to actualise thus far is the elimination of religion-based personal family laws and the enactment of a uniform civil code (UCC) applicable to all citizens throughout the country. Undoubtedly, the normative pluralism of state and non-state laws on issues of marriage, divorce and inheritance as we know it today is a [colonial product](#). But far from being an exposition of the much-reviled policy of 'divide and rule', legal pluralism was initially in the 18th century driven by Indophilia, and subsequently since the Queen's Proclamation of 1858, by a sheer strategic necessity to maintain imperial dominion through the preservation of social differences.

Whatever the British motivation may have been with regard to respecting India's heterogeneous social life, anti-colonial thinkers had for the longest time separated their trenchant attack on the colonial administrative apparatus from a more affirmative orientation towards the empire as a political form. This is because unlike a European-style nation-state, an empire could conceptually hold together religious and cultural differences without erasing them.

It is only in 1929 that the Indian National Congress adopted the famous Lahore resolution for *purna swaraj* or complete independence, as the nationalists finally understood that India had no future in an empire which could not serve as an effective counterweight to colonial exploitation. Yet, even when British rule gave way to a new nation-state, there remained a deep intellectual investment in ancient and medieval imperial figures such as Ashoka and Akbar, who were resurrected through the adoption of iconographic motifs and history writing. Although nationalism inevitably had a homogenising influence, the celebrated idea of India as a symbol of 'unity in diversity' drawn from the imperial past sought to keep open some of its closures.

Also read: [How Consultative Was the Framing of the Three Criminal Law Bills, Really?](#)

If a UCC is ever brought into force in all sincerity, it certainly has the potential to nationalise India's legal landscape which would then be disconnected altogether from the long imperial history of accommodating religious and cultural pluralism. Without in any way giving a pass to personal laws which perpetuate discriminatory practices against women, it must however be emphasised as has amply been done in feminist scholarship and activism, that legal uniformity is **not the same as gender justice**.

#### Progressive decolonisation

The global movement of decolonisation stemmed from an ardently progressive impulse to compel European empires to reckon with their violent histories of slavery and racism that continue to mar previously colonised societies even today. But in India, the decoloniality discourse has been appropriated by Hindu nationalism which extends it back to the 800 years of Muslim imperial rule, with an intensely parochial and superficial programme of indigenisation. Those committed to a forward-looking left-liberal politics must pause and wonder whether deploying this language which has been entirely co-opted by their ideological antagonists can at all serve any emancipatory purpose in the current moment.

What makes decolonisation so attractive to Hindutva is its negative and reactionary side, which enables enjoyment simply from demolition and destruction of all kinds – from architecture to law codes. This is a complete repudiation of the legacy of modern India's founders, whose anticolonial politics was always supplemented by a more positive world-making imagination directed towards the future.

#### Democracy and the foreign

In our times, the key marker of nationalism seems to be the rejection of everything that is foreign including the English language and even the Constitution, much of which was **apparently derived** from the Government of India Act 1935. One way to respond would of course be to argue that Indians have owned up to English and the Constitution despite the colonial origins through continuous usage and customisation. But, more fundamentally, as a wide range of thinkers from **Rousseau to Freud** have indicated, a degree of foreignness is elemental to the creation of a democratic community.

While the decolonial posturing is to nativise the legal system, the hidden impulse driving this project is to do away with the idea of a society governed by law. Instead, what takes its place is the superegoic pressure of collective conscience and majoritarian justice. Lost in the debate about the British or Indian origins of our legal codes, is the law's inherently alienating capacity. Law forces people out of their immediate context of family and kinship, and enables them to forge a life in common with non-identical others. Even in this distressing period for the republic, we must have the courage to defy the nativist urge, as it is only through some kind of self-alienation that Indians can form a real political unity.

*Dr Moiz Tundawala is an Associate Professor of Law at Jindal Global Law School, Delhi NCR, India and Dr Salmoli Choudhuri is an Assistant Professor of Law at National Law School of India University Bengaluru.*

#### Also Read

politics

[NSD Postpones 'Tamas' Performance After Social Media Campaign Spurred by BJP Ex-MP](#)

politics

['Slap on Communal Harmony': English Editorials Condemn Muzaffarnagar School Incident](#)

politics

[Article 370 Hearings: Article 35A Comes Under Critical Scrutiny Before Supreme Court](#)

politics

[The Kuki Demand for a Special Administration Rises From Facing Substantial Threats](#)

[more](#)