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Colonialism and Constitutionalism: A Realistic Duo

Introduction

The legal debate surrounding the colonial nature of Indian laws has led to resolutions by various individuals, particularly from the judiciary, to decolonize Indian laws. The Indian Constitution is inclusive, as every legislation is enacted after rigorous scrutiny to align with its principles and rule of law. However, many agree with the colonial nature of Indian laws, but judicial and legal experts deny this. The concept of colonialism and constitutionalism is often compared to a parasite worm, with the former co-habiting with the latter for survival. Decolonizing legislation aims to determine if the colonial nature is lethal to the enactment and application of Indian laws. This article is a genuine effort undertaken to crack open this exoskeleton to penetrate deeply into the nucleus to realize the definite nature of the Indian Constitution.

The concept of colonialism and constitutionalism is likened to a parasite worm, co-habiting for survival. Isolating one reduces longevity, leading to the emergence of two distinct thoughts: Colonial Constitutionalism and Constitutional Colonialism.

The aim of decolonizing the legislation has emanated as the constitutionality of most of the legislation is being challenged under an evergreen contention that legislation under challenge is still colonial in nature and needs to be mandatorily revamped. To understand the rationale behind this contention we must evaluate what constitutes colonialism. What makes colonialism look evil? The colonial nature of the Indian Constitution can be justified by a contention that the two-thirds of Constitution is derived from the Government of India Act, as the purpose of this enactment lingered around the transfer of government and territories of the East India Company to the British Crown. But is the concept of colonialism only about the transfer of power over Indian territory? If not what is occupied under the concept of colonialism? These uncovered aspects of colonialism are exacerbated in this article.

Constitutionalism

Constitutionalism is a concept that aims to define the government's authority and power, distinguishing it from that of the common people. It provides rules and regulations to supervise the government's authority over its subjects. ¹However, this function is secondary and can only be achieved through hegemonic governance. Colonialism, on the other hand, is the exercise of control over a group of people, even in sovereign governance. The Indian Constitution is influenced by colonial laws, exercising excess power with few limitations, and lacking governmental responsibility towards its people. The Constitution is also influenced by international politics and focuses on the formation and legal establishment of political society and its succession.

The main concern here is the colonial nature of the Indian Constitution and to sow deeper understanding about this, we must put efforts into the creation of such an environment that allocates an exclusive space to evaluate the following :

*The pros and cons of the prevalence of colonial constitutionalism

* Whether the constitutionalism and colonialism can be separated?

Pros and Cons of Colonial Constitutionalism

Firstly, let us not dig deep into the isolated version of the advantages and disadvantages of Colonial Constitutionalism, but a few pros of colonialism and constitutionalism that go hand in hand. One of the positive aspects of colonialism is that it aspires for socially advantageous people to guide and lead the underprivileged people towards better opportunities equivalent to that of socially advantaged people. ²This aspect of colonialism aligns with the concept of the 'Welfare State', i.e. the government is to be seen as socially superior and advantageous people who work towards creating a better environment for the upliftment of the underprivileged. Secondly, colonialism helps in the establishment of orderly and systematic government which aligns with one of the main principles of Constitutionalism i.e., the separation of powers which enables governmental functions even more sensible and fair. These are a few pros that are worth quoting.

¹ Ranabir Samaddar, Colonial Constitutionalism, Identity, Culture and Politics, Volume 3, Number 1, July 2002

² Ms. Deepika Gahatraj ,Imperialism, Neo-Colonialism and Third World, Module VIII

When looking into the disadvantages, to state few: ³The concept of “Colonial Constitutionalism” purports the rigidity in the functional mechanism of the government which results in the imposition of restriction in one of the most significant aspects of governance i.e. it forbids the state intervention in few matters which requires them and it grants non – absolute powers to state. However, these disadvantages arise only in the case of exploitation or unreasonable usage of this concept. These disadvantages are not always lethal to the constitutional mechanism as these issues arise only In the case of ultra vires of the existing powers and functions.

Colonialism and Constitutionalism: Their nature of the relationship and “Plenary Power Doctrine”

Many believe that colonialism has transformed into constitutional law through the enactment of a written constitution and judicial cases. However, this transformation is difficult to understand due to the colonialistic nature of constitutionalism. The evolution of "modern constitutionalism" has allowed for the incorporation of colonialism practices and amendments, resulting in a shift from focusing on society's nature to forming an institutional structure to regulate society. This transformation is difficult to explain without further context.

The Constitution and colonialism are interconnected, with the latter ensuring the ultimate objective of the Constitution, such as separation of powers, popular sovereignty, rule of law, and accountable government. The constitution's national government and relationships with the people are based on imperialism, and international colonialism is seen as building civilization before self-governance.⁴

Colonialism is a fundamental struggle within society, shaped by power, self-determination, sovereignty, jurisdiction, and community. In some countries, like India, it is built through law, but the term has been abandoned to political branches for more effective practices. This doctrine allows the judiciary to incorporate colonialism within constitutionalism without justification or public reason.

³ Martin Loughlin (ed.), Neil Walker (ed.) , The Paradox of Constitutionalism: Constituent Power and Constitutional Form (2008).

⁴ Blackhawk, M. (2023) The Constitution of American colonialism, Harvard Law Review.

Conclusion

Colonialism and constitutionalism are interconnected, assisting each other in better administration and infrastructure. The Indian Constitution acknowledges colonialism through hegemonic rule, overshadowing political dialogues, power configuration, emphasis on authority over responsibility, and frontier-centricity. The colonialistic nature of the Constitution ensures its validity, as it outlines the principle that "to colonize constitutionally, only by colonizing you constitute."

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