Guest Post: On the presumption of constitutionality for pre-constitutional laws

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Gautam Bhatia July 11, 2018

(As the 377 hearings continue into their second day, this is a second guest post by Professor **Tarunabh Khaitan**).

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Given the colonial pedigree of s 377, especially its effort to impose a 19th century Victorian morality on the subcontinent, the status of colonial laws in our constitutional scheme is moot. As reported on Bar and Bench's twitter feed, an interesting exchange took place between the Court hearing the challenge to s 377 and one of the lawyers: "Is there any judgment of this court that pre-independence laws will not have benefit of presumption of constitutionality?" asked CJI Dipak Misra. "No no", was Senior Advocate Datar's reply. This negative reply notwithstanding, Justice Chandrachud reportedly observed that "Courts might not have same deference for pre-constitutional laws which they have for post-constitutional laws, due to absence of Parliamentary will." In this post, I will show that Senior Advocate Datar might have overlooked some important precedents while replying to the query from the bench.

The most important case with regard to the presumption of constitutionality of pre-constitutional laws is the Supreme Court's landmark judgment in *Anwar Ali Sarkar*, decided by a bench of 7 judges in 1952. In that case, Justice Fazal Ali said that "The framers of the [impugned] Act have merely copied the provisions of the Ordinance of 1949 which was promulgated when there was no provision similar to Article 14 of the present Constitution. … Article 14 … is bound to lead to some inconvenient results and *seriously affect some pre-constitutional laws*." [22, emphasis added] He went on to say that "Article 14 could not have been before the minds of those who framed it because that Article was not then in existence." [25]

In *Sarkar*, even the dissenting judgment of CJI Sastri acknowledged that the pre-constitutional character of a law mattered, when he distinguished the case at hand from *Romesh Thapar* thus:

> "In *Romesh Thapar* case, the impugned enactment, having been passed before the commencement of the Constitution, did contemplate the use to which it was put, but such use was outside the permissible constitutional restrictions on the freedom of speech, that is to say, the Act was not condemned on the ground of the possibility of its being abused but on the ground that even the *contemplated and authorised* use was outside the limits of constitutionally permissible restrictions." [16, *italicised* emphasis in the original, underlined emphasis added]

The partially concurring opinion of Justice Bose in the same case explained the importance of the history of pre-constitutional context as well as the ethos that framed the values of the Constitution:

> "What I have to determine is whether the differentiation made offends what I may call the social conscience of a sovereign democratic republic. That is not a question that can be answered in the abstract, but … in the background of our history" [95]. He added, "I find it impossible to read these portions of the Constitution without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times." [90].

Read together, these opinions in *Anwar Ali Sarkar* set a clear, if usually ignored, precedent of a 7-judge bench that pre-constitutional laws do not deserve the presumption of constitutionality. The idea was revisited even more strongly in the Supreme Court's opinion in *Anuj Garg* (2007):

> "When the original Act was enacted, the concept of equality between two sexes was unknown. The makers of the Constitution intended to apply equality amongst men and women in all spheres of life. In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. Although the same would not mean that under no circumstance, classification, inter alia, on the ground of sex would be wholly impermissible but it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefor would be on the State." [20]

This opinion very clearly refuses to extend the presumption of constitutionality to the impugned statute. As I pointed out in this article discussing the case, "It is possible, to give it a narrow interpretation, that the case only establishes that the court shall not presume the constitutionality of pre-constitutional laws. A more radical reading will see the rule to be established in all cases where a law (whether pre- or post-constitutional) makes a classification on any article 15 ground." (p. 201-2) So, on a narrow reading of *Anuj Garg*, the notion that pre-constitutional laws do not get the presumption of constitutionality was confirmed by a 2-judge bench.

In *Naz Foundation* (2009), the Delhi High Court expressly read Anuj Garg as an authority for the following proposition:

> "At the outset, the Court observed that the Act in question is a pre- constitutional legislation and although it is saved in terms of Article 372 of the Constitution, challenge to its validity on the touchstone of Articles 14, 15 and 19 of the Constitution of India, is permissible in law. There is thus no presumption of constitutionality of a colonial legislation." [105, emphasis added]

The Supreme Court, following the High Court's progressive ruling animating constitutional interpretation with the value of *swaraj*, will do well to lay the foundations of a decisively anti-colonial jurisprudence by confirming that pre-constitutional laws are not owed the presumption of constitutionality.

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(Dr Tarunabh Khaitan is an Associate Professor in Law at Oxford and Melbourne, and the General Editor of the Indian Law Review. The views expressed are his own, and not attributable to any of these institutions.)