

ABSTRACTS

The dialectic of politics and law and the resilience of India's post-colonial governance: Ultima ratio regum?

By *Subrata Mitra*, Heidelberg

Indian democracy, with its vitality, resilience and blemishes, is puzzling. Many democrats and human rights activists find it hard to reconcile the country's democratic achievements with its tragic failures. The article analyzes the Indian structure of governance in order to identify general rules of successful democratic transition and consolidation, and formulate some policy recommendations for the Indian and other emerging democracies. In contrast to conventional theory, the article explains the 'counterfactual' nature of India's democracy and governance in terms of the ability of India's political actors to conflate the indigenous sense of *dharma* – righteous conduct – with modern concepts of rights, both individual and collective – acquired in course of British colonial rule. Several generations of political leaders who straddle the worlds of modern India – her legislatures, courts of law and sprawling bureaucratic agencies – and the traditional worlds of castes, religions, ethnic groups and regional language communities have striven to devise new rules and institutions that would connect the modern and traditional faces of this complex country. This, I argue here, has led to the deepening of democracy, which is contingent on the political process that draws as much on the indigenous norms and colonial modernity as on the extension of representation down to the level of the village community, and the empowerment of marginal social groups, lower social classes, religious minorities and women.

Neither “timorous souls” nor “bold spirits”: Courts and the politics of judicial review in post-colonial Africa

By *H. Kwasi Prempeh*, Newark

Institutionalizing credible judicial review in Africa has been a challenging project. It was especially so in the decades before the recent emergence of democracy and rights-based constitutions in the region. In most cases, judicial power in postcolonial Africa, even where it included the power to review the constitutionality of legislation and presidential action, has been used to legitimate, not restrain, authoritarian excesses. Within African legal communities, the dominant view blames the poor record of judicial review in postcolonial African states on judicial timidity and other judge-centered factors. According to the conventional narrative, Africa's judges have failed to play a credible countervailing role in national political and constitutional governance because they have been “timorous souls,” not “bold spirits”. This essay challenges this judge-centered explanation for the failure of

judicial review in postcolonial Africa. In place of the conventional narrative, which views judicial review as a purely legal phenomenon, I offer an alternative thesis that highlights the primacy of political and social contexts. Judicial review has had a difficult time in postcolonial Africa primarily because the times and the politics have (at least until very recently) been inauspicious. Unlike postcolonial Africa's political managers who built legitimacy for their authoritarian projects in the name of nation-building and development, Africa's judiciaries have lacked comparable social legitimacy and influential domestic constituencies to support the use of judicial power as a counter-authoritarian check. Comparative support for this alternative narrative comes from the experience of judicial review in the United States, where contemporary scholarship on iconic cases like *Marbury v. Madison* and *Brown v. Board of Education* reveals the triumph of judicial review in those cases to be far more about the underlying contemporaneous social and political forces than about judicial heroism. The prospect of credible counter-authoritarian judicial review in Africa will, therefore, depend, in large measure, on sustained support from influential social and political constituencies (popular and elite alike) and on favorable social and political changes external to the courts. In short, judges *alone* cannot undertake the project of political and constitutional change. Law and politics must move in tandem if credible judicial review is to be realized in contemporary Africa.

Postcolonial Legality: A Postscript from India

By *Upendra Baxi*, Warwick

The term "postcolonial" itself is a "hegemonic" term of art that embodies many of colonialism's legacies – unlimited in time, yet strangely limited to the "darker nations" in Africa and Asia. Postcolonial "legality" in turn has an uneasy relationship to constitutionalism, which was perfected in Europe when colonialism flourished elsewhere. The enunciation of constitutionalism in the colonies thus indicated a historic rupture, and not a colonial legacy. Yet colonial legal cultures did affect forms of constitutions, such as the imperial presidencies in Africa, and both socialist and capitalist forms of imperial hegemony affected the text and context of constitutionalism in decolonized societies. The postcolony is thus not a coherent public place but rather reflects the difference and diversity of formative colonial contexts and struggles for self-determination. Postcolonial law registers continuities as well as breaks: In many ways, the new nation-state reproduced the dialectics of repression and insurgency. Yet postcolonial constitutions comprise not only texts of governance, but also texts of justice permeated with the ideologies of human rights and redistribution. This constitutionally anchored contradiction sets them apart from many "Western" counterparts, as do certain inaugural examples of constitution-making not under the auspices of an elective oligarchy but through the means of widespread popular participation. Similarly differing, yet diverse, patterns and practices can be found in the fields of human rights,

religious neutrality of the state, property relations. In addition, judicial activism has emerged as a powerful site and ally to social movements, as in India, and gender equality provisions at least succeed in making persisting traditions of patriarchy deeply problematic. In the end, postcolonial legality produces its own pathologies, in the forms of military constitutionalisms or toleration of political corruption. Eventually, globalization supports a form of global economic constitutionalism in international regimes and networks of power that deeply affects the post-colonial dialectic of rule and resistance.

Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law

By *Luis Eslava* and *Sundhya Pahuja*, Melbourne

Third World Approaches to International Law, or 'TWAIL', is a response to both the colonial and postcolonial ethos of international law. It is also one of the most explicitly articulated juridical and political spaces in which to think about an international law beyond its (post)coloniality. In this article, we describe TWAIL as having a characteristic 'double engagement' with the attitudes of both reform and resistance *vis-à-vis* international law and scholarship. This double engagement has the potential to provide us with the tools both to delineate the (post)colonial character of international law, and to work actively toward a meaningfully plural international normative order. This latter possibility arises from a nascent conceptualisation within TWAIL scholarship of a universality that is compatible with an understanding of international law as an agonistic (and not imperial) project. To make good the tantalising potential of this 'new' universal, we suggest an explicit methodological move for TWAIL and its fellow travellers. Such a move involves paying attention to international law as a 'material project'. By being attentive to the daily operation of international law on the mundane or '*material*' plane of everyday life, it may be possible to generate a 'praxis' of (the new) universality. Such a praxis would trouble the way places and subjects are currently constituted in the name of the international and its (post)colonial ethos. Crucially, it would make intelligible to international legal scholarship the numerous forms of resistance already at play in the struggle against the (post)colonial normative order now being institutionalised and administered across the world.