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SPECIAL ISSUE ARTICLE

Perceiving law without colonialism: Revisiting courts and constitutionalism in South Asia[1]

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Abstract

This article argues that the colonial government in India was shaped by changes in property law, race relations and other institutional interests that accompanied the political and economic restructuring of the colonial state. Therefore, the development of constitutionalism was the outcome of an interplay between institutional and professional interests and larger socio-economic and political forces. Against the backdrop of empire, constitutionalism in British India was defined by a specific form of allocation of powers between the executive (which also exercised legislative powers) and the high courts. The structure that developed as a result was a strong executive government, particularly in its exercise of power in local districts with formal judicial scrutiny introduced after 1861. The relationship between the executive and the judiciary in localities generated a series of conflicts and tensions, which were exacerbated by the expansion of the bureaucracy, the legal profession and gradual inclusion of Indians in the upper strata of governance. Taken together, these factors led to the development of a hybrid model of separation of powers in the Indian subcontinent, which seems to have stood the test of time in post-colonial countries of South Asia despite political elites having invested considerable resources on constitutional reform.

Keywords: imperial constitutionalism; separation of powers; judicial independence; South Asia

1 Introduction

Separation of powers is considered to be a doctrine of nearly universal application in democratic (and sometimes not so democratic) polities, though it may vary in degree between jurisdictions. The independence of the judicial branch is a well-established aphorism that is held to be central to this tripartite constitutional scheme and towards sustaining the rule of law. The Constitutions of India, Pakistan and Bangladesh specifically recognise separation of powers and judicial autonomy but reserved these as a matter for progressive realisation (Constitution of Pakistan; Constitution of India; Constitution of Bangladesh). Regional courts have rendered judgments of both constitutional and social significance. However, they continue to have to assert their independence and authority and demarcate territory from the executive branch. Executive encroachment of judicial functions often necessitates a litany of cases requiring invocations of the writ jurisdiction of the higher courts to review everyday official transgressions and (sometimes) questions of constitutional significance (Waseem, 2012; Subramanium (ed), 2016; Howlader, 2006). Thus, a hybrid model of judicial autonomy has developed in post-colonial South Asia, whereby the upper echelon of the judiciary is generally recognised as independent and are central sites where litigants may expect to get remedies; but the lower tier is the subject of much controversy and conflict.

[1]Part of this title has been borrowed from Irfan Habib (1985).

This structural problem, which seems to be recognised but not resolved may be traced back to colonial India. A recurrent administrative issue in British India was the fusion of executive and judicial powers in localities. The administrative structure was based on a strong executive government, particularly in its exercise of power in local districts with formal judicial scrutiny introduced by the High Courts after 1861. Magistrates were the primary node of government in the peripheries of empire who were imbued with both police and judicial powers. There were objections against this system from both official and non-official circles, but it endured. The relationship between the executive and the judiciary in localities generated a series of conflicts and tensions, which were exacerbated by the expansion of the bureaucracy, the legal profession, and the gradual inclusion of Indians in the upper strata of governance. Taken together, these factors led to the development of a hybrid model of separation of powers in the Indian subcontinent, which seems to have stood the test of time in post-colonial countries of South Asia.

The colonial legal system based on Mughal law, Common Law, and other innovations unique to British India were central to sustaining the colonial enterprise. The colonial state significantly invested in law and legal institutions in its bid to secure control over territory, establish sovereignty and generate revenue (Fisch (ed), 1992). With the expansion of empire, this distinctive legal system acquired legitimacy by entrenching elite interests. Therefore, the judiciary–executive conflicts were also partly a manifestation of elite-conflicts, which cannot be fully understood solely through an examination of received legal doctrines. This article examines the history of the separation of powers and judicial independence in India during 1861–1935. It argues that the hybrid and semi-autonomous model of constitutionalism was not the result of straightforward British legal transplants. Instead, it was unique in its configuration, animated by state intervention in the realms of property relations (land law in particular), race and other institutional interests. This article defines this model as imperial constitutionalism, which was foremost driven by the fiscal imperatives of the colonial state. Constitutionalism was 'imperial' because of its inextricable link to the project of extraction from the colony to the empire. It was instrumental in protecting and securing the means (and effective channelling) of revenue back to Britain.

Until the beginning of the twentieth century, land and economic activities generated from land ownership and use was a major source of revenue for the colonial state (Bannerjee and Iyer, 2008).[2] The task of revenue collection was entrusted to local district offices presided by the magistrate, making this office the personification of the state in localities (Arnold, 1986).[3] The courts were also central to this apparatus as it was the primary forum for the resolution of land-related disputes and over time, an emergent and effective means for checking arbitrary power. This latter role was not solely motivated by the desire to establish constitutional rule. Rather, it sought to check administrative conduct so as to safeguard the revenue apparatus of the state, and to sustain colonial rule's legitimacy. Against this backdrop of empire, constitutionalism in British India was defined by a specific form of allocation of powers between the executive (which also exercised legislative powers) and the high courts. 'Imperial Constitutionalism' envisaged a clear separation of powers at the top echelon of government, while fusing judicial and executive power at the lower levels.

The importance of this legal history to a number of fields including constitutional law cannot be overstated. On account of population alone, post-colonial South Asia's legal history constitutes a significant segment of global legal history. Law and Society scholars of and beyond South Asia have already produced bodies of scholarship that speak to the relevance of history to understanding contemporary institutional configurations and legal institutions through a sociolegal lens.[4] South

[2]Land as a major source of revenue up to the twentieth century was equally true elsewhere in the world. Piketty (2014).

[3]It is acknowledged that the police played a significant role in coercive colonial governance. However, it is not possible to elaborate on the police given the limitation of space. Accordingly, only the office of magistrate (which was also in charge of local police for most of the period under discussion) is discussed in this article.

[4]This is exemplified by the copious references in this article to various bodies of work by Marc Galanter, Dezalay and Garth, Mitra Sharafi, Karpik and Halliday and Rohit De.

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Asia and its complex and dynamic legal field is ripe for not only geographically circumscribed study but also as case studies that help in the exercise of theory construction from the post-colony/Global South. British colonialism occupies nearly two hundred years of South Asia's past – a process which augmented the first industrial revolution, subsequently setting in motion development regimes that facilitated imperial globalisation (Ludden, 2005, p. 4044).[5] The legal system developed in a somewhat haphazard fashion in the late eighteenth century; but consolidated and reorganised over the course of the next century and a half. There was no blueprint of the kind of institutions that ultimately prevailed in British India. The legal institutions that emerged were the by-product of economic activities of the colonial state brought in to oversee the channelling of and the protection of capital. In the process of catering to this broader goal, legal institutions were shaped by then-prevailing theories of economic development, sociopolitical contingencies and eventual demands from the legal profession as it consolidated over the course of the nineteenth century.

This article largely focuses on the period after 1861, marking the introduction of high courts that ushered in formal and clearly demarcated mechanism for judicial scrutiny within the constitutional scheme of British India. High Courts were also an innovation with no prior precedence in Britain where the Supreme Court of Judicature was first introduced in 1873. The historical examination of the article ends in 1935, marking the consolidation of institutional development from the previous century, which carried over in the post-colony. Part 2 provides an account of courts and constitutionalism in the context of separation of powers in British India; Part 3 discusses the dynamic relationship between property rights and the legal administration; Part 4 examines factors relating to race, institutional politics and professionalisation that influenced debates on judicial autonomy; and finally, the article concludes with reflections about the relevance of this history to contemporary developments.

2 Courts and constitutionalism under colonial rule: An institutional history

British Colonial rule in India spans nearly two centuries. The first phase (1757–1857) was under the East India Company's (EIC) rule. The EIC expanded its trading activities to political governance, allowing it to establish control over resources that generated its profit. The second phase was direct rule established in 1858, which was partly a response to the uprising against the EIC and the culmination of decades of reining in the Company's activities that had been under government scrutiny for many years prior (Lees, 2013; Marshall, 1997; Misra, 1970).

The EIC was granted rights to revenue-collection (*Diwani*) in Bengal in 1765. Although the EIC had first set up factories in Surat, it is in Bengal where its rule assumed the character of a corporate or quasi-state. The *Diwani* precipitated the construction of a largely non-professionalised bureaucracy and legal administration in Bengal. Initially built on Mughal institutions of taxation and revenue-collection, the EIC administration was further infused with British laws as understood by non-specialist corporate officials, making adjustments based on their understanding of local realities (Bellenoit, 2017; Dirks, 2008; Wheeler, 1900). Britain's colonial project was obsessed with empiricism and in the Indian case, it often understood and rationalised local customs and realities based on Britons based out of India, their collaborators and the myriads of social and economic interests that defined these relationships (Cohn, 1996; Raman, 2012).

Legal institutions introduced under the EIC operated under a government with fused judicial, legislative and executive functions initially intended to deal with British settlers and Company servants – which later expanded to the general population. The EIC was forced to introduce administrative and legislative reform including the Regulating Act 1773, Cornwallis reforms etc., partly in response to allegations of misrule, corruption and corporate adventurism by its

[5]David Ludden argues that 'the British Empire organized a development regime that embraced Britain, British India, Ceylon and other colonial territories, all of which became territorially demarcated and distinctively national segments of an imperial economic design, whose legacy is still with us today'.

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officials (Jain, 1952; Lees, 2010). A dual court system was created, which included a Supreme Court in the Presidency towns and mofussil courts in the provincial towns.[6] The Supreme Court judges were trained lawyers who administered justice according to English laws and procedures, and the authority to remove them vested in the Crown (Jain, 1952, p. 124).[7] The provincial courts were staffed with Company servants who had no formal training in law and served at the pleasure of the Company. They were either assisted by local experts in matters of personal law or according to custom and usage (Jain, 1952; Misra, 1970). The jurisdiction of the dual courts often overlapped, created confusion and encouraged forum shopping among litigants (Sinha, 1969). It also generated institutional rivalry between the Company government and the Supreme Court. The circulation of writs in the provincial districts threatened the government. Similarly, the Supreme Court viewed the government's resistance to its authority as obstruction of its constitutional function i.e. scrutinizing official behaviour. Before long, the courts were mired in scandals of corruption, delays and injustice (Khan, 1866, Norton, 1853).

Successive reorganisation of the administrative system, especially those introduced after 1790 (the Cornwallis reforms and its successors) concentrated power in the office of the collector or the district officer (Jain, 1952, p. 133).[8] This office was located in the mofussil towns and was vested with revenue collection as well as judicial powers. The bureaucratic culture of a strong district office began to develop within the administration as territorial expansion within British India warranted further centralisation of power. There were frequent scandals of abuse of power in the districts and also factionalism within the Company bureaucracy (Marshall, 1997).[9] These issues occupied the administration of the EIC as it constantly needed to check official conduct to prioritise corporate over personal interest. The problems associated with a dual court system and the combination of powers was further compounded by the lack of codes regulating official conduct as well as legal training of official cadres within the EIC courts (Buckland, 1976).

The High Courts were introduced in 1861 as a measure of the reorganisation of legal institutions that accompanied direct British rule in India. Direct rule inaugurated a consolidated scheme of judicial institutions, a professionalised bureaucracy, and a greater degree of judicial scrutiny in the top tier of colonial governance. The executive and the legislative branches remained fused as the reorganised Governor General's Council operated as the colonial legislature (Misra, 1961; Misra, 1970).[10] The High Courts were initially introduced in the Presidency towns of Calcutta, Bombay and Madras through Letters Patent (and subsequently through statutory enactment in a small number of other districts). The High Courts were responsible for both vertical and horizontal accountability of institutions. These courts presided over a network of formal justice-dispensing institutions and provided judicial scrutiny against arbitrary action. Supervision of lower courts involved, among other things, monitoring judicial efficiency and carrying out disciplinary action. The High Courts' authority, however, was geographically circumscribed. Its jurisdiction existed within a spectrum depending on whether the case originated in

[6]The mofussils were the urban centres of administrative units known as districts or *zillahs* and housed government offices and other institutions.

[7]The Supreme Court superseded the mayor's court which was functioning in Calcutta earlier. The judges of the mayor's court known as mayor and aldermen) used to be junior servants of the Company who had no legal training and whose tenure depended on the pleasure of the Company government.

[8]In 1790, Cornwallis promulgated some forty-two regulations under which the entire administrative machinery was reorganised and framed. He established a judicial system and a police system with summary powers to thanadars and magistrates. It also tried to separate judicial from executive functions, though it was short-lived.

[9]The perquisites and unofficial profits attached to offices in addition to trading incentivised a great deal of employees.

[10]Colonial legislatures were gradually opened up to non-official elites and then Indian elites until the introduction of legislative franchise in the twentieth century.

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the regulation or the nonregulation provinces (Misra, 1970, p. 273).[11] Its original jurisdiction i.e. issuance of writs extended to the Presidencies; but beyond those areas, it could only review lower court decisions so long as it was within the Regulation Districts. Therefore, the high courts possessed original jurisdiction in the Presidency towns, exercised supervisory and appellate powers in relation to mofussil courts and cases on appeal from those courts; and generally had no power in the courts of commissionerships in the non-regulation districts.

With the introduction of the high courts, partial separation of judicial functions materialised. In geographical terms, this meant that outside the Presidency towns, judicial power was not formally separated, though the High Court could in some instances assert its authority. Notwithstanding the expansion and delineation of judicial power, the High Courts had to overcome significant resistance. These courts inherited an apparatus of bureaucratic power, which had entrenched a model of authoritarian rule in the localities of empire. The new courts had to carve out their operational sphere. The Calcutta High Court was the first out of the three main high courts to be established in British India in 1861. Its relationship with the provincial government in its first decade of operation was marked by significant hostility, resulting in the intervention of the central and metropolitan authorities to the extent that high courts and provincial governments were officially declared to have equal status (Moore, 1966; Judicial Proceedings, 1865). The high courts emerged as a model of judicial independence by resorting to public law jurisprudence of established British jurists whom British rule in India claimed to emulate. Over time, the practice of consulting high courts on matters of appointment, promotion and transfer developed. All subordinate judges were to report to the high courts and all magistrates exercising judicial powers were accountable to them by way of revisional powers. If a magistrate was found to be in error as to an order, the high courts could step in and exercise several supervisory actions including declaring such order to be illegal and transferring cases to another magistrate. The provincial governments, which had historically controlled all aspects of executive services saw this as a partial loss of control (Misra, 1970, p. 215; IOR/Q/2/3/219).

The question of separation of judiciary from the executive and judicial independence was a recurring discussion in official circles under the EIC as well as direct rule, particularly as legally trained officials came into the orbit of colonial governance. However, these ideas never materialised, and were often brushed aside on account of the unique conditions of India where despotic governance was deemed necessary. James Fitz James Stephens – empire's legislator extraordinaire and held to be an eminent jurist in his own right – endorsed non-separation of powers, differentiating Indian conditions from Britain and emphasised the need to maintain a tight grip over the districts (McBride, 2016; Fitzjames Stephen, 1872).

3. Land law and legal institutions (1793–1858)

Land was a major (though not the sole) source of revenue until at least the twentieth century. The expansion of colonial territory fundamentally changed the character of property relations increasingly determined by the mode of revenue-collection. Property law was unevenly legislated for British India with different regimes for each province. Bengal relied on middlemen landlords known as *zamindars* for revenue collection under the Permanent Settlement, which was a law introduced in 1793 (Guha, 1996; Islam, 1979).[12] It fixed rent in perpetuity for the landlords, hoping to incentivise land use and development in consequence, thereby inducing the creation

[11]British India was geographically diverse. Regulation provinces, as the name suggests, were administered based on enacted regulation by the Governor-General. Non-regulation provinces were generally situated in the peripheries of empire and administered by Commissioners who were wholly responsible for governance of those territories without any bifurcation of their authority.

[12]Permanent Zamindari settlements were made in Bengal, Bihar, Orissa, Banares division of U.P. This settlement was further extended in 1800 to Northern Carnatic (north-eastern part of Madras) and North-Western Provinces (eastern U.P.). It roughly covered 19 per cent of the total area of British India.

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of wealth. Madras devised a system known as *ryotwari*, which endeavoured to collect revenue directly from the peasants, though in some areas the land revenue was imposed indirectly (Dutt, 1906).[13] The state entered into agreements with Zamindars but unlike Bengal, these landlords were not intermediaries for rent collection between the government and the farmer. North Western Provinces adopted a system known as *Mahalwari*, which collected revenue from the headman of a collective such as a village. Under this system, the village itself was jointly and severally liable to the state but it acted through a middleman (Dutt, 1906).[14] Therefore, each system involved interest in land that was distributed across the state and the landlord or the state and the cultivator, or all three parties along with intermediate tenants.

These were largely hybrid systems inspired by European experience and superimposed on pre-colonial customs (Baden-Powell, 1892). Many of the variables that helped generate economic surplus through property rights in Europe, however, were absent in British India. There was imperfect understanding among officials about the intertwined nature of customs and authority. Complex agrarian customs and practices were simplified under a uniform legal scheme but did not produce the intended result of land use. Relations with tenants had roots in pre-colonial tradition in which the rate of rent was fixed by established customs and usages of the local territory and not solely market forces (Islam, 1988). These land systems paved the way for commercialisation of land which did not previously exist (Cohn, 1960; Washbrook, 1981). Consequently, modes of land use and the contractual apparatus for engaging cultivators also changed (Kling, 1982).[15] Many landlords and tenants engaged in revenue-farming, thereby producing a tenurial tree that extended across several intermediate tiers between the landlord and the cultivator (Islam, 1989; Rothermund, 2003). Many officials, particularly under Company rule engaged in land speculation and purchase, which they knew to be under-assessed, and therefore profitable – leading to a new class of elites who were attached to the bureaucracy or otherwise engaged in commerce (Lees, 2019; Lees 2015). The traditional values attached to land otherwise driven largely by social status was gradually replaced by profit considerations. Middlemen such as Zamindars or Headmen who initially served as intermediaries for the political dominance of British rule lost their traditional authority over time due to these structural changes in agrarian life. Instead of encouraging land use and development, the restructuring of property relations displaced traditional authority by introducing greater intrusion of the state.

Over time, the colonial state assumed control of vast swathes of land through its forestry department, regulatory restrictions on transfer and acquisition of land, and other institutions such as the Court of Wards allowing it to manage estates of landholders who were minors or otherwise lacked capacity (Parashar, 2019; Johnson, 2015; Gupta, 2011; Krishnan, 2012; Yang, 1979).[16] The colonial state could in some provinces auction off the right to collect rent in the event of failure to meet revenue demands or mobilise the criminal justice administration in order to facilitate revenue collection (Singha, 1998). The key to this intrusive state apparatus was the local district office presided by the collector-magistrate. The colonial state retained its preference for the 'man-on-the spot' officer in charge of districts who could – in official opinion – be trusted with integrity when compared to the native population – a policy that was prevalent in parts of British African colonies too with some variation (Kirk-Greene, 2006; Kirk-Greene 2000; Misra, 1977). The district

[13]The Raiyatwari system envisaged a contract between the cultivator and the state and granted rights of sublet and transfer. The Raiyatwari settlements were made in major portions of Bombay, Madras and Sindh provinces.

[14]The Mahalwari tenure was introduced in major portions of U.P., the Central Provinces, the Punjab (with variations) and the central provinces, while Oudh villages were placed under taluqdar or middlemen with whom the government dealt directly.

[15]For example, the farming of cash crops like indigo and cotton replaced staples like rice and wheat. A major part of the mid-nineteenth century was occupied by peasant unrest related to forced/coercive Indigo cultivation practices.

[16]The Indian Forest Act of 1878 facilitated rights over forest land, dispossessing traditional owners by bringing in immigrant settlers, and disrupting traditional social systems by extending market economy and land revenue administration into hitherto secluded areas.

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office subsumed multiple functions of revenue collection as well as magisterial duties. Often these functions went hand in hand, particularly when revenue collection required the use of coercive powers as the magistrate was also in charge of policing and prosecuting crimes.

Changes to the agrarian and the associated local power structures made the agenda of separation of judiciary from the executive particularly intractable. First, new economic interests and elites that directly or indirectly profited from the commercialisation of land required a centralised state apparatus to protect the sources of revenue. The district office with its executive, judicial, policing and prosecutorial authority was the locus of power for the colonial state in the localities. While these broad changes circumvented otherwise hostile power struggles, it also protected powerful economic interests. Chief among these were the landowning elite including both Indian and British population. The latter category also included a powerful commercial class made up of planter population from Britain that continued to populate India until much of the nineteenth century. Planters leased land and utilised Indian labour for commercial agriculture (Roy and Swamy, 2016). The exploitation involved in the oppressive contractual regime that replaced traditional agrarian customs frequently stoked discontent as well as racial violence. White violence in particular, in these situations was the norm. Despite the exploitation and violence, the law generally protected these powerful interests with local courts issuing light sentences if they were prosecuted at all (Kolsky, 2011; Bailkin, 2006).

Secondly, the social churning that accompanied changes to the agrarian structure generated claims and counter claims attached to property rights that were settled through colonial institutions. The judicial system, being the chief adjudicator that settled these disputes afforded legitimacy to the colonial state by working in tandem with (and sometimes against) it, with substantial social implications. The overhaul of direct rights between state and subjects created intra-subject conflicts, intermingling public-private distinctions in law. Caste and religious status had deep entanglements with economic activities. Interventions in the domain of property did not adequately account for this link. For example, social prescriptions derived from caste or relations within the Hindu joint family affected the possession and acquisition of property, particularly land (Washbrook, 1981, p. 654).[17] Consequently, it led to a proliferation of legal claims in colonial courts that directly or indirectly involved property disputes (Rothermund, 1994; Rothermund 1971). Land related disputes would also often involve civil and criminal proceedings. Violence over land claims could trigger criminal proceedings in some cases; while in others it led to civil disputes over land title and other entitlements.

Finally, this regime of conflicts was further compounded by a complicated system of land registration, unwritten leasehold and tenancy agreements, and money-lending arrangements. The revenue systems in British India developed based on partial adaptations of ideas of British political economists and policies based on exigencies of colonial rule. The administration was concerned less with the security of individual titles to land and more with fixing responsibility for payment of revenue demand. The land records often did not reflect changes of ownership. Land revenue codes were systematised after 1870, though it only went so far as defining powers of revenue officers and the courts. The civil courts were kept out of the revenue jurisdiction and could not entertain appeals from the decisions and assessments of revenue courts. Moreover, individual titles to land were treated as presumptive proof of ownership in the official records, which meant that it was open to challenges in court for the determination of conclusive rights to title. This policy also

[17]There were anomalies associated with the legal definition of the family. Interpretations differed based on schools of thought. Some suggested, with regards to property, infinite jointness of kindred; family property as collective, where members of a family could have rights to shares and maintenance; family members could constrain the rights of other members; prospective heirs and beneficiaries might partition family property or invalidate alienations of their patrimony for other than religious purposes. Local custom could also potentially affect access to land or trade with other communities. These social and caste prescriptions in many cases interfered with property right.

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shielded the revenue courts from any responsibility i.e. title remained valid unless challenged in a civil court. All these factors made legal enforcement difficult (Roy and Swamy, 2016).

The high stakes involved in land transactions led the relatively stronger parties to capitalise on a system that was specifically designed to protect property and other economic rights. Courts were often used as places to bury bad cases (Washbrook, 1981, p. 659). Therefore, as the porous nature of land-related disputes demonstrate, the state – at least at the local level – was at the service of the propertied classes through a patchwork of laws and legal institutions.[18] The colonial bureaucracy intersected with these various economic and political interests. It drew significant power from the countryside where executive action took place away from public or judicial scrutiny. After 1861, the High Courts offered a regime of judicial scrutiny but with limited powers. Overtime, these High Courts found themselves at the centre of constitutional conflicts generated by the fusion of local structures.

4 Professionalisation and institutional competition

This section will explore certain endogenous aspects of professionalisation within the legal profession i.e. competition within and between the Bar and the civil service, which animated institutional rivalries that underlay the conflict between the judiciary and the executive. By 'legal profession', this article includes professions within the judicial branch (as a civil servant or a judge, though judgeships in the high courts were drawn from a mixture of the bar and the civil service cadre) as well as the bar. The High Court Act 1861 and later the Legal Practitioners Act of 1879 entrusted the high courts with the responsibilities of governance of the bar and standardised examination and admission processes, with a view to improving standards of practitioners in the district courts (Schmitthener, 1968; Sharafi, 2014; Kozlowski, 2008; Misra, 1970, p. 214).[19] By 1861, several grades of practitioners and pleaders existed in British India (Schmitthener, 1968, pp. 357–359). These included higher categories such as advocates and lower classifications such as vakils and mukhtars. The practice of attorneys (solicitor) and advocates (barrister), who until the 1860's were exclusively Europeans, developed around the crown courts in the presidencies but later extended to all courts. Vakils had rights of audience in the mofussil courts, but after 1857 were given rights of audience in the appellate side of the High Court. Mukhtars provided services similar to solicitors but were considered as inferior agents. Inter-rank conflicts on account of racial identity continued to be pronounced until larger number of Indians could travel to Britain for legal training.

The expansion and systematisation of the bureaucracy after 1858 coupled with the proliferation of legal codes to regulate official conduct necessitated greater professionalisation of cadres. Civil service which was known as 'the covenanted service' under the EIC was reconstituted as the Indian Civil Service (ICS) after 1858. The High Court drew a third of its judges from the ICS and the rest from the bar. The magistracy and the district and sessions judgeships also drew candidates in higher posts from the ICS; while the rest of the subordinate judiciary were drawn from the provincial service or appointed from the bar consisting mainly of Indian and Eurasian officers (Misra, 1970, p. 538).

The legal profession provided coveted channels for upward mobility (Sharafi, 2014).[20] It made possible the acquisition of income and status independent of other socioeconomic categories such

[18]The examples suggested are propositions that may not hold in each and every case. These are simply suggested as examples of an overall dominating trend.

[19]High Courts streamlined six grades of legal practitioners including advocates, attorneys (solicitors), and vakils (with right of appearance in the High Courts; and pleaders, mukhtars and revenue agents in the lower courts. The High Courts set up and gradually raised the standards of admission for vakils which were much higher than requirements for the old vakil-pleader of the zillah courts. To be a vakil, the prospective lawyer had to study at a college or university, master the use of English and pass the High Court vakils' examination.

[20]Parsis excelled in this route.

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as caste or landownership. It also did not require the investment of capital unlike other commercial endeavours. Legal credentials provided a competitive advantage for securing government jobs, particularly in the judicial and revenue departments (Sharafi, 2014, p. 103). A career in private legal practice offered ideal gateways to politics, and generally allowed some autonomy from the colonial state (De (ed), 2018). Overtime, lineages developed, whereby, social and family capital converted to legal capital (Sharafi, 2014, pp. 101–102). Many would-be entrants for the bar and the ICS abandoned tradition by crossing the ocean to Britain for legal training (Gandhi et al: 2018; Mohammed; 2002).[21] The ICS examinations only took place in London until well into the early twentieth century. It was exceedingly difficult and there were many barriers to entry for Indians, including institutional obstacles such as deliberate and frequent changes to the age limit, higher marks assigned to subjects such as Latin and Greek, putting Indians at a significant disadvantage (Bannerjea, 1925; Spangenberg, 1971). Accordingly, many aspiring Indians would prepare for the ICS and also appear for bar examinations during their time in Britain. British credentials provided a competitive edge when they returned to India. As ICS graduates, they would share (theoretically) equal status with their European counterparts; and as barristers, they would outrank their vakil colleagues and exclusively traverse a domain traditionally reserved for Europeans.

3.1 Bar politics and ICS recruitment

The ICS was exclusively reserved for the European elite until the 1860s when its racial composition began to change with the entrance of Indian officers. Further reform of ICS policies after 1876 created two parallel lines of promotion, and officers were given the option to choose between executive and judicial service five years into their service (IOR/V/23/13). The control of all appointments resided with the executive branch – though judicial appointments were made in consultation with the High Court. Executive service, because of its diverse functions such as revenue, irrigation, agriculture and famine relief activities, promised more prospects of promotions to many higher posts of government as opposed to the judicial service where the highest achievable post was that of a High Court judge. Executive service was jealously guarded from Indians, the majority of whom opted for the judicial service. Indians generally excelled in the judicial track as they were able to operate as cultural intermediaries with their legal training (Sharafi, 2014). However, they were also pushed to the judicial track by default as most English officers opted for the executive service or it was difficult to lure legally trained professionals from Britain to India for these posts.

Racial strife generated by this interbranch differentiation led to a particularly protracted set of conflicts around the fusion of judicial and executive powers in the localities when there were attempts to amend the Criminal Procedure Code. In 1872, section 72 of the Criminal Procedure Code (CRPC) read 'no Magistrate or Sessions Judge has jurisdiction to inquire into a complaint or to try a charge against a European British subject unless he is a Justice of the Peace and himself a European British subject' (Criminal Procedure Code, 1872, Ch. 4). An exception to this rule was allowed within the limits of Presidency towns where a Presidency magistrate, regardless of race, had the same jurisdiction over Europeans and Indians (Criminal Procedure Code, 1861, sections 39, 40, 41).[22] In 1883, a draft bill, the Ilbert Bill as it came to be known, was introduced in the Indian Legislative Council. It sought to provide Indian magistrates and judges jurisdiction over Europeans in the districts at par with their British counterparts

[21]Gandhi's autobiography refers to the crossing of the ocean and subsequent *prayashchitta* (repentance) upon his return to India from his legal studies in Britain in chapter 12.

[22]By section 3, Act II of 1869, the Government was empowered to appoint any Covenanted Civil Servant to be a Justice of the Peace.

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(IOR/LP&J/6/115; IOR/LP&J/6/122; Home, Judicial Proceedings, 1882). A choice had to be made between preserving the legitimacy and authority of the judiciary and racial privileges.

What followed was outrage in the non-official European community. The nucleus of what became an India-wide agitation was Calcutta in Bengal, particularly among commercial interests including indigo and tea planters (Hirschmann, 1980, p. 110). Many of them believed that the legislation would destroy the special status of the non-official community and found 'no anomaly in the existing system beyond the natural anomaly that races differ, with the result that the subject race is unfit to govern the dominant race' (IOR/LP&J/6/100/978). The agitators against the Bill considered it as the Viceroy's concession to Westernised Indians' demands for equality in the imperial system (The Ilbert Bill, 1883). Openly supported by members of the provincial services, Anglo-Indians mounted a vociferous campaign to defeat the legislation (Furedy, 1973). Many angry memorials made their way to the colonial administration (Hirschmann, 1980, p. 110). Opening the door to the Indians would leave especially vulnerable lonely planters in the countryside who did not live among their countrymen, and whose insecurities were likely to affect trade and commerce in India. The security of civilised European women, according to some of these groups, was also at stake if they went to seek justice from Indian magistrates in the countryside who were men 'who have done little or nothing to redeem the women of their own races' (Hirschmann, 1980, p. 110; Sinha, 1997; Dobbin, 1965; Whitehead, 1996; Kaul, 1993).

Shocked by the overt racism even towards the educated middle classes, Indian response was equally scathing. Indian newspapers began to cover specific instances of miscarriages of justice in the mofussil by European ICS officers (Bannerjea, 1925, p. 81). The popular agitation against these laws was complemented by institutional acquiescence for maintaining the racial distinctions. The High Courts and Anglo-Indian lawyers of the Bar were vocally opposed to the Bill (Letter of the Judges, 1883). The Calcutta High Court issued a memo arguing that the meagre numbers of Indian ICS officers at the time (only six) did not substantiate such an amendment in the face of European agitation. The Government's position at the time supported the bill owing to the liberal disposition of the Viceroy who viewed administrative participation by Indians as the best source of political education (Weinstein, 2018). According to Ripon, gradual change was inevitable on grounds of administrative convenience and justice to suitors (IOR/LP&J/100/963). However, considering the intense opposition to the Bill, the government reached a compromise. It removed the racial distinction but allowed Europeans to retain the privilege of impanelling a jury that consisted of majority Europeans.

The Ilbert Bill crisis not only stoked racial tensions but also revealed the extent to which race stratified the profession and was tied to commercial interests (Hirschmann, 1980, pp. 104–105).[23] European lawyers dominated high court practice and also enjoyed a monopoly over clients of European descent as well as other commercial interests who flocked to court for their legal business. The hierarchical system of grades among lawyers, however, intensified racial prejudices between races and within ranks in the bar. The English-trained minority retained a monopoly on the original side of the high court, thereby depriving the vakils of a lucrative area of practice (Schmitthener, 1968, p. 359).[24] Their fluency in English coupled with the social networks and professional associations helped sustain the confidence of litigants, facilitated the acquisition of briefs and increased their prospects of elevation to the bench (Buckee, 1972, p. 97). However, Indian barristers were subjected to both race differentiation as well as rank

[23]However, an alternative theory emerged as reported by the Superintendent of Operations for the Suppression of Thugee, C Lambert. He surmised that the root cause of the agitation squarely lay with the capitalists with significant commercial interest.

[24]'Attorneys who had practiced before the Supreme Court of Judicature in England could be directly admitted into the High Courts. Attorneys from Ireland could be admitted after passing an examination. Attorneys from other High Courts were admitted if they had served a period of five years as attorney's clerk, and this was a requirement for fresh candidates as well. A graduate of an Indian university, with five years' service as an attorney's clerk, was admitted after paying a fee and passing the required examination.'

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rivalries. Despite the privileges that accompanied English legal training, securing apprenticeships with European barristers – critical to success at the bar – was extremely difficult (McLane, 2016, p. 57). Indian barristers were a novelty in the 1860s and they struggled to win client confidence about their prospects of winning cases in the high courts against their European counterparts. As a result, the mofussil or district courts provided better opportunities for legal practice. Many Indian barristers turned to the mofussil courts; while others established successful practice by leveraging personal connections and professional networks (McLane, 2015, p. 59).

Rank differences also led to grievances among the vakils, cultivating long-standing divisions between them and barristers irrespective of race. Junior barristers, because of their British legal training and status as advocates, had precedence over senior vakils (Buckee, 1972, p. 100). The differentiation within the profession produced grievances which were addressed through associational efforts, thereby paving the way for changes in rules of appearance in the high courts (Schmitthener, 1968, p. 359).[25] Subsequently, the Legal Practitioners Act of 1879 considerably extended the ambit of practice of the advocates and vakils.[26]

The fallout from the Ilbert Bill significantly influenced political formations and associational efforts of Indians across British India. For instance, the Indian National Congress (INC) was formed in 1885, which provided a political platform for advocating a greater share of governance for Indians (McLane, 2015). Many individuals, legally trained through the English bar or the ICS and with first-hand experience of institutional obstacles, also began to dominate the press as editors of newspapers (Narain, 1970, p. 154). The issue of separation of judicial and executive powers gradually made its way on to the list of formal demands from the INC as well as demands from the colonial state. Given that the INC was fast becoming an India-wide political body, it was able to highlight the hardship associated with the fusion of powers across all the presidencies.

Congress lawyers also capitalised on institutional issues affecting high courts in order to secure tacit support from the judicial branch. For example, the Calcutta High Court had locked in a conflict with the provincial executive over the review of legislation that removed certain non-regulation districts out of its jurisdiction in 1869 (*Queen v. Burah*, 1873). The case reached the Privy Council, which ruled in favour of the executive. Similarly, the Bombay Revenue Act of 1875 and the Madras City Civil Court Act of 1892 enhanced executive powers and limited the jurisdiction of the Bombay and Madras High Courts (Dacosta, 1892, p. 272).[27] These legislative acts were roundly condemned by the bar and other quarters including the Indian press as the High Court's autonomy, supervisory functions over subordinate courts and most importantly, its constitutional role were compromised.

Indian ICS officers such as R.C. Dutt produced carefully thought-out schemes for implementing the separation of powers in the districts (Dutt, 1893). Monomohun Ghose, one of the earliest (and an influential) Indian barristers of the Calcutta High Court collected twenty cases from Bengal documenting how the fusion of judicial and executive powers led to significant hardship for litigants by impeding the delivery of justice (Ghosh, 1896, pp. 31–40). Moreover, the Bengal criminal justice administration was allegedly operating under a 'no-promotion without a conviction' policy within the executive magistracy in the 1890s (IOR/LP&J/6/351/1893). These cases were particularly important in highlighting the state of criminal justice in the mofussil. It also illustrated the administrative mischief which resulted from investing executive officers with

[25]In Madras, vakils began to practice on the original side as early as 1866. In Bombay and Calcutta vakils of ten years' standing were eligible for practice on the original side, provided they successfully undertook the advocates' examination.

[26]This Act consolidated various regulations and acts enacted in 1827, 1846 and 1853 that dealt with eligibility and licensing of lawyers. An additional law was also enacted for lower rank practitioners, namely, the Indian pleader, mukhtar and revenue agents act 1865. These extended to non-chartered high courts in 1884.

[27]In the Bombay Revenue Jurisdiction Bill, the government removed all revenue matters from the jurisdiction of courts, granted judicial powers to revenue officers who would be immune from judicial review. The Madras City Civil Court Bill proposed to transfer suits of a certain pecuniary value from the jurisdiction of the High Court to the Small Causes Court and empowered the government to fix that value as it saw fit.

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judicial powers in criminal cases. This booklet of cases produced by Ghose became the basis of the Hobhouse memorial to the British Government in 1901, led by several former higher officials including Richard Garth, former Chief Justice of the Calcutta High Court – though it did not lead to much progress on the separation issue (Craddock, 1913).

3.2 Solidifying judicial independence

By the turn of the twentieth century, lawyers had emerged as a powerful force. By the 1920s the bar consolidated its own institutional autonomy through the Indian Bar Councils Act of 1926, which gave it greater control over legal education, criteria for enrolment and discipline and control of the profession (Chamier, 1924). Internal stratification within the bar notwithstanding, lawyers' interests converged over the autonomy of high courts. Many high court practitioners turned to politics, and some were even elected to legislative assemblies. Since the high courts and judicial independence were central to autonomy of the bar, recruitment within the judicial branch i.e. appointment of judges was another area of contention as there were intragroup competition among the various grades of lawyers for their elevation to the bench. These lawyers competed with each other as well as candidates drawn from the ICS and subordinate services for these posts.

Just as barristers and vakils shared traditional rivalries, judicial posts in the high courts generated competition between judges recruited from the bar and those from the ICS. In 1929, the Government of India proposed to open up the office of the Chief Justice, hitherto reserved for lawyers, to High Court appointees drawn from the ICS (IOR/L/P&J/6/1857). The bar had traditionally opposed the recruitment of civilian judges on account of their lack of legal training. There were numerous petitions to the government from different district bar associations, all unanimously opposing this proposal. It was also vigorously opposed in the imperial legislative council. Eventually, due to the volume of protest, the government dropped the proposal. The ability of lawyers to traverse official, political and other civic public platforms, including the press, greatly strengthened the force of their collective protest.

The interwar period intensified nationalist demands for greater share of governance to Indians. The Councils Act 1909 opened up the Executive Council to Indians and introduced separate Muslim electorates in an effort to appease both the INC and Muslim leaders (represented by the Muslim League). Subsequently, a series of large-scale constitutional reforms were introduced in India through the two Government of India Acts of 1919 and 1935 – increasingly moving towards a federal design which would best allocate powers between the centre and provinces and simultaneously balance communal representation within government. Some key changes from these acts included authorisation of simultaneous civil service examinations in Britain and India for 33 per cent of superior posts (previously the ICS examinations were only held in Britain); the introduction of ministerial cabinets around 1919, which allowed further mobility of Indians in key positions of governance; the establishment of a Federal Court (under the final Government of India Act 1935); entrusting administrative control of high courts to the provincial governments with certain safeguards (that its budget would be non-voteable in provincial legislatures); and extension of concessions to the bar by opening up the higher judicial offices to *vakils* of the same experience as barristers and sustaining much of the ICS privileges associated with judicial service (Muldoon, 2009; De (ed), 2012; IOR/L/P&J/9/65).[28] Taken together, these broad constitutional changes sought to increase executive accountability through legislative checks in the

[28]Some of the provisions included: (i) Tenure of judges should be during good behaviour with power vested in the Crown to remove them for inability or misbehaviour; but this power was to be exercisable only in accordance with proceedings laid down by HM by Order in Council or only after reference to the privy Council; (ii) 60 years was the age limit of retirement with power in the Crown to extend to 62; (iii) power to appoint temporary judges lay with the Governor-General; (iv) the jurisdiction of the high courts should be alterable by Indian legislation enacted by the Federal or provincial legislature depending on whether the alteration involves a federal or provincial subject.

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assemblies and general participation in government, while retaining broad powers of judicial review for the High Courts and the newly established Federal Court.

The separation agenda might have been a foreseeable area of reform under these changes. However, none of the twentieth-century reforms addressed actual schemes for separation – in fact, this issue did not get resolved under colonial rule (Bengal, India *et al.*, 1922).[29] The new constitutional framework renegotiated the autonomy of legal institutions based on political strategies and compromises, operating under the assumption that the higher tribunals (high courts and federal courts), through their appellate and original jurisdiction, would correct administrative transgressions. This partially-separated framework of courts retained the privileges of high court lawyers, many of whom were its authors with professional interests in the centre where the calculus of power had shifted in their favour tied to the provincial high courts and the Federal Court.

These reforms addressed judicial independence to the extent necessary for protecting the material interests of Indian legal elites, though other political contingencies were also at play given the long-drawn-out contestation between the state and leaders of nationalist movements, and among such leaders and other groups. The courts were, no doubt, worth protecting because they provided an arena for struggle, helping to level the playing field between the races as well as the weak and the powerful. However, political liberalism was not the sole motivator of this kind of judicial politics (Halliday, 2008; Halliday, Karpik and Feeley, 2014). Overall, the legal profession was motivated by a combination of its own internal logic inspired by learned doctrines, ideological moorings and material advantages that sustained professional privileges. The twentieth-century reforms showed that legal elites conceded strategically and opted for incremental reform, indicating that both constitutionalism and political liberalism may be susceptible to compromise.

After 1947, judicial independence became the lynchpin of constitutionalism with a uniquely South Asian configuration that emphasised strong-form judicial review (Art. 50 Constitution of India; Art. 175 Constitution of Pakistan; Art. 22 Constitution of Bangladesh).[30] South Asian supreme courts are often revered for their role in judicialisation of politics or addressing social justice issues through public interest litigation (Epp, 1998; Hoque (ed), 2015; Ali (ed), 2015; Siddique (ed), 2015; Thiruvengadam (ed), 2012). Across the region, civil service matters continue to generate voluminous litigation, which indicates the continuing influence of the bureaucracy and the role of courts in checking everyday bureaucratic power (De (ed), 2018). The many milestones of post-colonial courts deserve to be celebrated but with some caution. The sweeping success of public interest litigation has attracted criticism (Bhuwania, 2017). Courts across the region have also been mired in controversies over appointments, supersessions and conflicts of interests. While courts and constitutional schemes in the region recognise separation of powers and judicial independence as foundational to democratic rule, the conditions necessary to realise and sustain these goals have been less than stable (Arts. 175(3), 203 Constitution of Pakistan; Art. 50 Constitution of India; Art. 22 Constitution of Bangladesh).[31] As a result, many of the structural legacies of colonial rule persist and the administrative independence of the judiciary continues to be under threat from the executive, which historically determined appointment, transfer and

[29]Instead, committees were set up to devise recommendations on how best to affect such a scheme. In Bengal, the Greaves Committee was tasked to consider this question in 1923. It recommended, *inter alia*, complete separation by allowing appeals from second and third class magistrates before a judicial officer only; the inspection of criminal courts to be made by the District and Sessions judge instead of the magistrate; magisterial staff who perform purely judicial work to be under the supervision of judicial authorities and the High court to exercise same control and supervision over them as they do for civil staff; the recruitment for Bengal civil service and subordinate civil service to be made direct to the judicial branch instead of rotation between the two branches.

[30]India, Pakistan and Bangladesh have specifically provided for the separation of judicial from executive functions in their constitutions; additionally, Sri Lanka recognises judicial independence as a fundamental principle in its preamble.

[31]The Constitutions of India, Pakistan and Bangladesh specifically recognise separation of powers and judicial autonomy but reserved these as matters for progressive realisation.

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promotion of judges. Supreme Courts in India, Pakistan and Bangladesh carved out their autonomy and operational spheres of the judiciary through judicial pronouncements on the separation of judiciary from the executive and related issues of executive control over judicial affairs (*All-India Judges Association* v. *Union of India*, 1992; *Government of Sindh* v. *Sharaf Faridi PLD*, 1992; *Ministry of Finance* v. *Masdar Hossain*, 1999). Post-colonial courts have also innovated doctrines such as the basic structure doctrine, which paved the way for a more pronounced role for the courts to negotiate and maintain their salience (Mate, 2010). However, as historical discussion above has illuminated, the complexity of upholding and maintaining judicial autonomy is a dynamic process causally linked to socioeconomic and political factors, and a plethora of actors including the bar. Thus, it is no surprise that South Asian courts continue to experience ebbs and flows in the exercise of their judicial power.

4 Conclusion

Founding constitutions in post-colonial countries of South Asia, in one form or another, constitutionalised the ideal of separation of powers and judicial independence. This is also a common feature with some variation in other Common Law jurisdictions in Asia and Africa (Jhaveri and Ramsden, 2021). Many of these constitutions have enumerated prerogative writs, thereby assigning strong powers of review to the courts (Crouch, 2018). In contemporary South Asia, courts often find themselves at the centre of constitutional and administrative politics. More importantly, Courts have been instrumental in generating rights-based judicial discourse through fundamental rights and public interest litigation; and have played a significant role in the judicialisation of politics.

The pre-eminence of courts in the post-colonial constitutional scheme is not simply the result of enumerated powers of review in particular constitutions but also the product of historical experience. Separation of powers in theory and practice was as much a colonial problem as it is a post-colonial one. Institutional autonomy and independence are not static spaces created by doctrine. Rather, shifting terrains of contestations and negotiations between institutional actors have determined the breadth of this autonomy. Politics of the legal profession also complicate this space. Accordingly, interested scholars ought to consider not just doctrine and case law but also institutional history and politics that have shaped the field.

Situated against the broad sweep of South Asian legal history, the study of legal institutions may also aid potential agendas for reform. Contemporary law reform projects and law and development scholarship as it relates to the Global South tends to lack historical (as well as social and cultural) sensibility (Stephen, 2018; Bayly *et al.*, 2012). Such reflections help discern how vested interests and power relations have historically stood in the way of real institutional change; and where formal reforms did come to fruition, informal cultural and sociopolitical processes have determined how authority was exercised in practice, resulting in structural arrangements that ultimately favoured elite interests.

Competing interest. None.

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