



HISTORICAL ANALYSIS OF CONSTITUTIONAL DEVELOPMENT IN COLONIAL INDIA

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India has a long civilisational history dating back to ancient times. Historians have noted how the many kingdoms and dynasties that ruled over parts of the Indian subcontinent from 500 BC onwards experimented with and implemented many innovative features of law and governance.⁵⁷ As we will see later in this book, some aspects of the older traditions of the law survive in the contemporary legal system, especially in the realm of religious laws, and have influenced the nature of multiculturalism in Indian constitutionalism in significant ways⁵⁸. These ancient traditions of law and governance are often invoked in contemporary political and constitutional discourse, sometimes by judges and Cabinet Ministers, and accounting for them is important to understand contemporary constitutional discourse⁵⁹. However, all these measures were engineered while staying broadly within the structural framework of monarchical and dynastic systems, which, despite their many variations, did not impose constitutional limits upon the authority of the ultimate power holder. Nevertheless, some scholars have sought to argue that ideas similar to modern notions of constitutionalism existed in India from very early times.⁶⁰

This chapter adopts the stance that while law and governance in India have a long pedigree, and one can find instances of many innovative forms of legal thinking in ancient and medieval India until the Mughal period, constitutionalism in India, as in other parts of Asia and Africa, is a modern project, whose origins can be traced to much more recent times. The chapter thus focuses on the colonial period, particularly since 1857, when, in the aftermath of an event that the British colonial regime referred to as the Mutiny and the nationalist movement would term the First War of Independence, the British government formally took over charge from the East India Company. Soon thereafter, the demand for forms of constitutional government was increasingly articulated by leaders of the nascent Indian nationalist movement starting from the late nineteenth century. In response to such demands, the colonial authorities ceded constitutional powers to the representatives of the people of the Indian subcontinent gradually over a period of half a century, culminating in the independence of the new nations of South Asia through the Indian Independence Act

⁵⁷ M Rama Jois , Legal and Constitutional History of India (Gurgaon, Universal Law Publishing, 2012, first edition 1984

⁵⁸ Arun K Thiruvengadam , ‘ Excavating Constitutional Antecedents in Asia : An Essay on the Potential and Perils ’ (2013) 88 (1) Chicago-Kent Law Review 45.

⁵⁹ WAJ Archibald , Outlines of Indian Constitutional History (London ,Curzon Press , 1926

⁶⁰ AB Keith , A Constitutional History of India 1600 – 1935 (Delhi, Pacific Publication, 1937, reprinted 2010) and MP Singh , O utlines of Indian Legal and Constitutional History , 8th edn (New Delhi , Universal Law Publishing , 2006) .



1947. There is a rich body of work that documents this complex narrative. 3 My goal is to sketch the broad contours of that narrative, with a focus on specific parts that are relevant for the purposes of this Dissertation. Specifically, the chapter seeks to track two parallel lines of development, the gradual ceding of constitutional powers by the colonial government from 1861 onwards, and the increasingly sophisticated constitutional demands raised by the nationalist movement (represented principally by the Indian National Congress, which was formed in 1885). A focus on both tracks is essential for understanding the complex ways in which the crafting of the Constitution of India of 1950 sought, simultaneously, to achieve two seemingly contradictory objectives: the adaptation of colonial structures of governance that were premised on efficiency in achieving imperial, exploitative goals, with the insertion of new instruments and institutions to usher in an egalitarian and democratic spirit within the new constitutional order. While seeking to provide a chronological account that spans three- and-a-half centuries, my goal will be to focus on key moments that help set out the overall narrative in order not to overwhelm the reader with historical detail. Descriptively, the chapter begins with a short section on the entry of the East India Company into India towards the end of the Mughal Empire, and the legal rules and systems it established to initially supplement and eventually supplant the system that existed in India during the Mughal era. This is followed by an overview of the reforms brought about in the post-1857 era when the British government formally took over charge of the Indian colony. Section III analyses the significant period of about 90 years during which many constitutional ideas and reforms were discussed and introduced, focusing on the perspective of the colonial authorities⁶¹. Thereafter, Section IV details the early attempts at Constitution making by the Indian nationalists. Section V describes the making of the Constitution of India in the Constituent Assembly during its nearly three-year tenure between 1946 and 1949⁶². The Mughals were the last of the great empires to control large portions of the territory of modern-day India before the advent of colonial rule. The Mughal Empire was at its zenith from the middle of the sixteenth century until the early part of the eighteenth century, shortly before the death of Emperor Aurangzeb in 1707. Although it covered a vast territory across present-day India, the Mughal Empire was primarily concerned with issues of commerce, trade and taxation. Ideas of constitutional governance, as understood in the contemporary modern sense, were not well developed in any of the pre-colonial regimes in India⁶³. As in many other parts of Asia and Africa, such ideas were often developed by leaders of anti-colonial movements whose introduction to ideas of nationalism, liberalism and constitutional democracy emerged through their exposure either through education or through texts to discourses in the metropolitan centres of colonial rule. The Portuguese were the first Europeans to arrive in India in 1503, followed successively by the French, the Dutch and the English. By the early part of the seventeenth century, several European trading posts had been established in India. By the time the Mughal Empire went into active decline around the middle of the eighteenth century, the struggle for control over trade between the European

⁶¹ Ramkrishna Mukherji, *The Rise and Fall of the East India Company :A Sociological Appraisal* (New York , Monthly Review Press , 1974

⁶² Cyril Henry Philips, *The East India Company, 1784 – 1834* (Manchester , Manchester University Press , 1961

⁶³ Tirthankar Roy, *The East India Company : The World ' s Most Powerful Corporation* (New Delhi , Penguin Books , 2012

powers was largely between the British and French as other European powers had been marginalised. Eventually, the British became the dominant European power in the Indian subcontinent.

The British presence in India was established through the East India Company, which had been created through a Royal Charter issued by Queen Elizabeth in 1600 as a mercantile body that was to possess a trading monopoly in the East. Soon after its creation, the East India Company was able to obtain a toe-hold in India during the reign of the Mughal Emperor Jahangir and initially focused on expanding its commercial and mercantile activities in India. The East India Company was initially granted certain limited powers of a legislative character, including the power to impose penalties, to enable it to perform its commercial functions. As the Company's operations expanded, it demanded and obtained greater legislative, executive and ultimately, judicial powers. The initial laws issued by the Company sought to establish courts and other institutions of English/continental law in several of the territories under their control. This led later to the codification of criminal, civil and 'personal' laws of various Indian religious communities. Over time, the Company officials obtained powers similar to legislators for India, but continued to deny the responsibilities that came with exercising effective State authority in India.⁶⁴ For nearly a century before its formal control over India ended, from about the middle of the eighteenth century until the middle of the nineteenth century, the Company conducted itself as a proxy for the British government. The foundation of the colonial legal order was established in India during this period. The Company followed a practice of governing the Indian colony through a Governor-General and his Legislative Council at the Central level, and through a Governor and his Legislative Council at the level of the provinces. Appointments to these offices were based on nominations, which in turn depended on the judgement of the Company and its supervising governmental authorities. By the late eighteenth century, the East India Company adopted the coercive, administrative and financial processes typical of contemporaneous empires, and gradually took on more of the functions of sovereignty, such as collecting revenues, making treaties or fighting wars with regional potentates and exercising juridical authority. This was accompanied by high levels of corruption, acts of despotism, and a growing perception that the officials of the Company were exploitative and immoral in their extractive zeal. A decade later, to rebut the perception that the Regulating Act was not effective in its mission, the East India Company Act 1784 sought to further these reforms by establishing a Board of Control and by strengthening the British government's regulatory powers over the Company. The clamour against company misrule also resulted in the impeachment of the former Governor-General, Warren Hastings, which, while ultimately unsuccessful, ignited a heated domestic debate championed by figures such as Edmund Burke on empire, liberalism and its consequences for ideas of British governance and democracy.

⁶⁴ Jane Burbank and Frederick Cooper, *Empires in World History* (Princeton, NJ, Princeton University Press, 2010) 170 – 78, 240 – 45