

EMASCULATING THE EXECUTIVE: THE FEDERAL COURT AND CIVIL LIBERTIES IN LATE COLONIAL INDIA: 1942-1944

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On the 7th of September, 1944 the Chief Secretary of Bengal wrote an agitated letter to Leo Amery, the Secretary of State for India, complaining that recent decisions of the Federal Court were bringing the governance of the province to a standstill. “In war condition, such emasculation of the executive is intolerable”, he thundered². It is the nature and the reasons for this “emasculatation” that the paper hopes to uncover. This paper focuses on a series of confrontations between the colonial state and the colonial judiciary during the years 1942 to 1944 when the newly established Federal Court struck down a number of emergency wartime legislations. The courts decisions were unexpected and took both the colonial officials and the Indian public by surprise, particularly because the courts in Britain had upheld the legality of identical legislation during the same period. I hope use this episode to revisit the discussion on the rule of law in colonial India as well as literature on judicial behavior.

Despite the prominence of this confrontation in the public consciousness of the 1940’s, its role has been downplayed in both historical and legal accounts. As I hope to show this is a result of a disciplinary divide in the historical engagement with law and legal institutions. Legal scholarship has defined the field of legal history as largely an account of constitutional and administrative developments paralleling political developments³. Law is treated as a self contained coherent world with little insight to offer on other developments. On the other hand, historians have largely treated law and the legal archive as yet another body of evidence to make larger historical arguments about

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² IOR/L/PJ/8/633/9

³ M.P Jain, *Outlines of Indian Legal History* (Bombay, N.M Tripathi, 1996), Abdul Hamid, *Constitutional and Legal History of India*; A.B. Keith, *Constitutional History of India 1600-1935* (Edinburgh: University of Edinburg Press, 1936); Rama Jois, *Legal and Constitutional History of India* (Mumbai, N.M Tripathi, 1990) Vol. II (New Delhi: Universal Law, 2008)

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race, caste or the nation, leading to the questions of law being plotted around broader thematizations of Indian history⁴. As Kunal Parker has recently argued, this has led to a lack of attention to the “quiddity of law”⁵. One of the casualties in the process has been an overemphasis on legal texts, legislation and executive records and a corresponding lack of attention to caselaw and legal practice.

The paper begins with a narrative of the events of the 1942, the decisions by the Federal Court and the response by the colonial government. It proceeds to explain why the decisions were unpredictable and how they challenge conventional narratives of law in colonial India. Finally, the paper offers three interconnected themes which arise from the episode, the politics of institutions, the relationship between the rhetoric and reality of law and the professionalization of legal culture. This paper is also framed by my concerns as an Indian lawyer. Legal education and training makes little distinction between a law enacted in 1872 and one in 2008. How useful are the categories of colonial and postcolonial to scholars of the legal system? How does independence impact legal practices and legal cultures? The answers in this paper are merely suggestive and I hope to answer some of them through my dissertation project.

The Wartime State: 1939-1945

⁴ The body of work is too large to cite here, but some representative works would include; Bernard Cohn, *Colonialism and its Forms of Knowledge: The British in India*, (Princeton, 1996), David Washbrook, ‘Law, state and agrarian society in colonial India’ *Modern Asian Studies* 15, no. 3, (1981), pp. 649-721, Nicholas Dirks, *The Hollow Crown: Ethno-history of an Indian Kingdom*, (Cambridge, 1987), , Lata Mani, *Contentious traditions: the debate on sati in colonial India*, (Berkeley, 1998); Sumit Guha, “Wrongs and Rights in the Maratha Country: Antiquity, Custom and Power in Eighteenth-Century India”, in Michael Anderson and Sumit Guha (eds), *Changing Conceptions of Law and Justice in South Asia*. (Delhi 1997), pp. 14-29; Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India*. (Oxford University Press, 1998), Janaki Nair, *Women and Law in Colonial India: A Social History* (Delhi, 1996); Jörg Fisch, *Cheap Lives and Dear Limbs: the British Transformation of the Bengal Criminal Law 1769-1817* (Wiesbaden, 1983); Michael Anderson, “Islamic Law and Colonial Encounter in British India”, in *Institutions and Ideologies: A SOAS South Asia Reader* (David Arnold and Peter Robb eds., 1993) 165-185; Scott Kugle, “Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia” *Modern Asian Studies* 35 (2) (2001) 257-313. I also recognize that there are important exceptions to this trend such as the work of Lucy Carroll, Mark Galanter, Upendra Baxi and recent monographs by Partha Chatterjee and Sudhir Chandra.

⁵ For a debate over the state of Indian legal history see, Kunal M Parker, *The Historiography of Difference*, 23 *Law & History Review* 685 (2005) (Fall 2005 Forum. Colonial Order, British Law: The Empire and India), Elizabeth Kolsky, “A Note on the Study of Indian Legal History” 23 *Law & History Review* 703 (2005) (Fall 2005 Forum. Colonial Order, British Law: The Empire and India)

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The war years saw the government of British India being challenged on multiple fronts. The Japanese army was advancing through Asia and by 1943 had captured Burma and were at India's borders posing the greatest external threat to British since the late 18th century. The fear of invasion was all pervasive, there were blackouts in the Calcutta, evacuation of Madras, rationing and army patrols of streets and even the slaughter of dangerous animals in zoos who might escape during a bombing.⁶ The declaration of war without consulting nationalist opinion had led to a breakdown in relations between the British and the Indian National Congress. In August, 1942 the Congress launched a massive civil disobedience movement demanding that the British 'Quit India'. While the top leadership of the Congress was swiftly placed under arrest, the movement went underground leading to widespread popular unrest. Workers at factories, including those involved in the war effort struck work en masse. In several districts, protestors turned violent and set fire to government buildings, cut telecommunications lines and disrupted transport. The colonial government had lost control over several districts, where parallel administrations had been set up by the nationalists⁷. Bengal saw the greatest famine in living memory leading to the deaths of over a million people causing widespread resentment against the government⁸.

The nature of modern war is said to cause a sensational increase both of the range and intensity in the authority exercised by the state over daily life.⁹ Scholars contend that increased military recruitment, provisions of allied armies, requisitioning and rationing, censorship and detentions during the war years caused the colonial state to penetrate more deeply into Indian society than ever before. The colonial government reacted swiftly to dissent. With the resignation of Congress ministries in nine provinces, the central executive found itself able to govern unchecked by the constitutional safeguards set up under the Government of India Act, 1935. The most important legal instrument aiding the government was the Defense of India Ordinance, 1939, which was later enacted into legislation¹⁰. The act empowered the central government to make 'such rules as appeared to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining

⁶ Indivar Kamtekar, 'The Shiver of 1942,' *Studies in History*, 18: 1, 200

⁷ Francis Hutchins, *India's Revolution: Gandhi and the Quit India Movement* (Harvard 1973)

⁸ Amartya Sen, "The Great Bengal Famine" in *Poverty and Famines*

⁹ R.H Tawney, 'The Abolition of Economic Controls, 1918-1921'. *Eco. Hist. Rev.*, xiii (1943)

¹⁰ The ordinance itself was an almost verbatim reproduction of the British Emergency Powers Act, 1939.

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supplies and services essential to the life of the community.¹¹ Section 3 of the Act provided that orders made under this rule would override all other legislation, including the ability to deprive ordinary civil and criminal courts of their ordinary powers. Further, the Act was insulated from judicial review as it provided that no order made in exercise of it could be questioned in a court of law.¹² These rules came to govern almost all aspects life of the citizens. Probably the most utilized provision was Rule 26 which provided for preventive detention in the interests of the “defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war”. By the summer of 1943, some 11,700 people including Mahatma Gandhi and the Congress High Command were under detention¹³. The discretion of making an order for detention could be delegated to subordinate officials. As it was later admitted, junior officials were given signed blank orders of detention so that they could fill in the names as and when required¹⁴. In 1943, the Viceroy promulgated the Special Criminal Courts Ordinance, making provision for the trial of certain offences by Special Courts from which there would be no appeal to the High Courts. The provincial governments were delegated the power to decide what offence would be tried by these special courts. The government withdrew grants from welfare organizations with suspected nationalist sympathies and made criminal symbolic gestures such as saluting the Congress flag. Most chillingly, the Punjab government and the intelligence branch urged the adoption of scientific interrogation procedures.¹⁵ It has been suggested that behind the force of the government’s measures lay an eagerness to provoke the Congress into open confrontation and then to strike with all its wartime military and legal might to destroy the organization.¹⁶

THE NEW BATTLEFRONT: THE FEDERAL COURT OF INDIA

From the summer of 1942 the Federal Court of India at New Delhi issued a series of judgments which challenged the actions of the colonial government and forced colonial authorities to rescind or rethink several of their actions. The judgments dealt with the question of sedition, the limits to the ordinance making powers of the viceroy and the legality of the exclusion of judicial review.

¹¹ S.3 (1), Defence of India Act, 1939.

¹² S. 16 (1), Defence of India Act, 1939

¹³ Reply by Mr E. Conran Smith, Official Report of the Council of State Debates, 2nd Aug 1943

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¹⁵ Parthasarathy Gupta *Power, Politics and the People: Studies in British Imperialism and Indian Nationalism* (New Delhi: Permanent Black, 19) 74.

¹⁶ Sarvepalli Gopal, General Editor’s Preface, *Towards Freedom*, Volume II.

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In 1942, the court overturned the conviction of Niharendu Dutt Mazumdar for sedition¹⁷. Mazumdar had delivered a speech in the Bengal Legislative Assembly attacking the Governor and the elected Suhrawardy Ministry for the failure to maintain law and order during the Dacca riots. The court went into the merits of Mazumdar's speech and held that the "*the time is long gone when a mere criticism of government, even abusive language, was sufficient to constitute sedition*". Overturning years of accumulated judicial opinion it recognized that the right to "utter honest and reasonable criticism" of an existing system of government or even the expression of a desire for a different system of government was a source of strength to a community. It argued against the literal interpretation of the sedition clause suggesting that the way it was framed in the Indian Penal Code was sufficient to make a surprising number of persons guilty of sedition.

The more startling confrontation with the executive came in the case of Keshav Talpade, where the Federal Court directed the Bombay HC to issue a writ of habeas corpus to a petitioner detained under R.26 of the Defence of India Rules on the grounds that Rule 26 was ultra vires the Defence of India Act and was hence invalid¹⁸. S.2 (2) of the Defence of India Act had granted the power to the government to make rules providing for the apprehension and detention in custody of any person *reasonably suspected* of being of hostile origin or acting in a manner prejudicial to the safety and interest of the empire. The rule as framed under the act however required the provincial government to be satisfied that the detention of a person was necessary. The court struck down R.26 on the grounds that it merely required the satisfaction of the provincial authorities and an 'evidently reasonable ground for suspicion' as required by the enabling legislation.

Acknowledging, that "courts of law ought to abstain from harsh and ungenerous criticism of acts done in good faith by those who bear the burden and the responsibility of government, especially in times of danger and crisis", the judges decided that they were not on that account relieved from "the duty of seeing that the executive government does not seek to exercise powers in excess of those that the legislature has thought to confer upon it, however drastic the powers and however great the emergency be". The court recognized that their decision may inconvenience and embarrass the

¹⁷ *Niharendu Dutt Mazumdar v. King Emperor*, AIR 1942 Federal Court 22

¹⁸ *Keshav Talpade v. King Emperor*, 30 AIR 1943 Federal Court 1

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executive, but stated that it hoped this would mean that greater care is taken to ensure that powers that limit the liberty of the King's subjects are defined with greater precision and exactitude.

The court confessed to be particularly shocked at the “non application of mind” that went into making these detention orders. This was evidenced by the practice of verbatim reproduction in the order of detention of all the objects in relations to which such an order may be made, instead of specifying a particular ground for suspicion¹⁹. The consequences of this decision greatly alarmed the viceroy, for if Rule 26 was invalid so were all the detentions made under it. To forestall the applications for habeas corpus from 8,000 persons detained under Rule 26, the British government presented the view that the Federal Court had merely pointed out a legal technicality which would be corrected by subsequent amendment²⁰. Since the legislature was not in session, the Viceroy issued an ordinance amending the legislation to make the subjective satisfaction of the officials the only requirement to justify an order of detention, and this was given retrospective effect²¹. Thus, all detentions that were made invalid by the Federal Court judgment were revalidated. The Viceroy used his emergency powers under the Government of India Act to make the ordinance, the emergency as the press pointed out being a “judicial decision”.²² The India Office stated, “there is no reason why Mahatma Gandhi or any of the other Congressmen detained as result of last year's detentions should be set free”.²³

However, encouraged by the attitude of the Federal Courts, lawyers all over India began challenging the validity of the new ordinance. Various High Courts issued conflicting decisions with the Calcutta High Court striking down the new ordinance and the Allahabad, Lahore and Madras High Courts upholding its validity²⁴. The Federal Court collectively heard all the appeals. While they upheld the validity of the new ordinance they ordered the release of all the appellants on the ground that R.26 required that the provincial government should have applied its mind and become satisfied that the

¹⁹ Express Letter from Home Member to all Provincial Governments, 1st May 1943, IOR/L/PJ/8/633/196

²⁰ Letter from Secretary of State to Viceroy, IOR/L/PJ/8/633/289

²¹ Special Ordinance

²² *Hindustan Times*, August 26, 1943

²³ *Hindustan Times*, April 24, 1943

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detention was necessary²⁵. Further, they interpreted the act to hold that the personal satisfaction of the governor was necessary and this role could not be delegated to subordinate officials. While the decision only led to the acquittal of nine prisoners, the court noted since the requirements of R.26 had been grossly violated, it would not be safe to make any presumptions on the validity of the thousands of detentions that had been made.

The court upheld a decision of the Calcutta High Court declaring the Special Criminal Courts Ordinance to be void and inoperative.²⁶ The ordinance empowered the provincial governments to constitute special criminal courts, specify the sentences which each of these courts might impose, prescribe certain rules of procedure to expedite these trials and made the convictions immune from appeal to the High Court. The special courts set up under the Ordinance had convicted 23,710 people within a year.²⁷ The most strenuous objections of the Federal Court were against the sections which attempted to which attempted to remove or modify certain provisions of the Criminal Procedure Code such as trial by jury, summoning of witnesses, grant of bail etc. There was a limited right of appeal to special magistrates, and an even more limited right of review to a judge of the High Court selected by the executive. The court also held that only the central legislature and not the Governor General exercising his ordinance making powers could create a special court to hold a criminal trial.²⁸

During the oral arguments the courts extensively reviewed evidence on the working of the special courts and were particularly disapproving of the method of determining which cases were to be tried before the special courts. They discovered that in Bengal, the District Magistrate followed the recommendations of the police in all the cases, “making the police the arbiter of a man’s rights...and not predetermined by law”²⁹. Finally, they made a scathing attack on the attempt to remove the jurisdiction of the High Court.

²⁵ *Emperor v. Shibnath Banerjee*, AIR 1943 Federal Court 75

²⁶ *Emperor v. Benoari Lall Sharma*, (1943) FCR 96

²⁷ Council of State Debates, II (1943) August, 2, 1943, p.19.

²⁸ *Emperor v. Benoari Lall Sharma*, (1943) FCR 96, 140.

²⁹ The former Home Member for Bengal had stated that the only two conditions that were to be satisfied. Namely that the arrest had been made under the specific rule and that the police had recommended the detention. *Hindustan Times*, August 25, 1943.

Once again the Governor-General responded by repealing the 1942 Special Courts Ordinance, but simultaneously promulgating another with the same name.³⁰ The new ordinance gave retrospective validity to all ongoing trials and detentions and also attempted to address some of the Federal Courts criticisms, most significantly by making the provision of appeal to the High Courts. The new ordinance was challenged on the grounds that it could not give validity to sentences that had been passed under a previous invalid ordinance. The court after extensive review of the government of India act and comparisons with the American due process clauses came to the conclusion that personal freedom was not protected constitutionally in India and could be subject to legislative power.³¹ Though the court held the new ordinance to be valid, it proceeded to examine each case in the appeal and on discovering the failure to meet procedural guarantees ordered the release of some detenus and retrial or review for the others. The war ended soon after and the political situation in India was transformed bringing this particular episode to a close.

UNLIKELY CHAMPIONS

Before we consider the effects and reasons for these decisions it is important to not the shock and surprise these judgments caused to the colonial government and the nationalists. In the late 18th and early 19th century the colonial judiciary had often clashed with executive authority in an attempt to impose order over an unruly legal frontier.³² In Bombay relations between the judiciary and the executive had often broken down with Governor Elphinstone challenging Chief Justice Erskine to a duel, and Chief Justice Grant suspending the Bombay High Court and going on strike for five months when the government refused to obey its writs of habeas corpus.³³ However, much of this confrontation was framed around the opposition between a judiciary that represented the interests of crown and parliament against a corrupt and unruly Company. With end of the Company state in 1857 and the enactment of the Indian High Courts Act, 1861 the powers of the High Courts were pruned and these confrontations became rarer. Just a decade before these events, the Indian courts had failed to respond to similar violations of the rule of law in the Bhagat Singh case. The trials of

³⁰ Special Courts Ordinance, XIX of 1943.

³¹ *Piare Dusadh and others v. The King Emperor*, (1944) F.C.R. 61

³² Lauren Benton, "Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State" *Comparative Studies in Society and History*, Vol. 41, No 3 (July, 1999) 563-588; Robert Travers, *Ideology and Empire in Eighteenth Century India : The British in Bengal*. (New York: Cambridge University Press, 2007) 181-206.

³³ see P. B. Vachha, *Famous Judges, Lawyers and Cases of Bombay: A Judicial History of Bombay during the British Period* (Bombay: N M Tripathi, 1962) 191-199

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Bhagat Singh and his co-accused had violated almost all norms of natural justice and administrative law. When the accused refused to defend themselves, the Viceroy used his emergency powers to create a Special Tribunal which was empowered to try them in absentia. When the sole Indian judge on the tribunal was perceived as sympathetic to the prisoners, he was replaced with no explanation given.³⁴ The High Courts of Lahore and Bombay rejected all legal challenges to the procedures adopted.³⁵ The Privy Council confirmed that the Governor General was best equipped to deal with an emergency and his decisions could not be challenged in court.³⁶ Even after the *Dutt Mazumdar* and *Talpade* judgments, the government of India felt that the chances of the Federal Court striking down the Special Courts Ordinance were remote³⁷. Confounded by the decisions, Lord Linlithgow wrote to the Viceroy complaining about the quality of his legal advisers and asking for the British government to send him an experienced British High Court judge³⁸.

Not only were judicial challenges to executive decisions unprecedented, the Federal Court was a particularly unlikely institution to have taken up such an activist role. The Court itself had been established in 1938 as part of a structure set up under the Government of India Act, 1935³⁹. While it was at the apex of the judicial system, it had a very limited jurisdiction. Despite Gandhi pleading that the court be invested with the “widest jurisdiction” the Act provided that its main jurisdiction was over “any dispute between the Federation, any of the provinces and the federated states” which came to be even more limited by the refusal of the princely states to join the Federation.⁴⁰ Its appellate jurisdiction gave it the power to consider on appeal any civil or criminal case that involved a “substantial question of law as to the interpretation of the Constitution Act of 1935”, this was not automatic and was dependent of the High Court granting a certificate of appeal⁴¹. Should the High Court refuse the certificate, the Federal Court had no authority to investigate the reason for such

³⁴ For a detailed study see A.G Noorani, *The Trial of Bhagat Singh: The Politics of Justice* (New Delhi: Oxford University Press, 1996)

³⁵ *Des Raj v. Emperor*, AIR 1930 Lah, 78; *Emperor v. Channappa Shantirappa*, 1930 32 Bom LR 1613 at 1646

³⁶ *Bhagat Singh and Others v. The King Emperor*, 58 *Indian Appeals* 169.

³⁷ Government of India to Secretary of State for India, 3rd August, 1943, IOR/L/PJ/8/633/184

³⁸ Memorandum by Sir Kenneth Kemp, IOR/L/PJ/8/633/194

³⁹ George H. Gadbois, *Evolution of the Federal Court of India: An Historical Footnote* (Durham: University of North Carolina Press, 1963).

⁴⁰ M.K Gandhi, *The Law and Lawyers* (S.B Kher eds, Ahmadabad: Najvijan Trust, 1962) 255; M.V Pylee, *The Federal Court of India* (1966) 106.

⁴¹ Pylee 1966, 110

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refusal⁴². Even when it was alleged that the refusal of a High Court to grant a certificate was “perverse, deliberate, illegal and oppressive” and that its refusal was contempt of the FC because of the HC had “deliberately deprived this of a jurisdiction which parliament has entrusted to it”, the Federal Court merely acknowledged its complete inability to interfere.⁴³

The court had given only a hundred decisions in the ten years of its existence, and had only heard some 20 odd cases by 1942 (in contrast to the hundreds of cases the succeeding Supreme Court was going to decide in its early years). It heard no cases in the first two years of its inception and was continually criticized as being an unnecessary expense, particularly given the fact that the Federation had not come into place⁴⁴. Indeed, it was testimony to the ingenuity of the litigants and the court that several of these cases actually reached the Federal Court. In *Keshav Talpade* for instance the “constitutional question” was whether the government could enact a Defence of India Act, since “defence of India” was not explicitly mentioned in the legislative lists. Given that the lists enumerated “preventive detention” and “public order”, the High Court’s certificate of appeal was considered flimsy.

Further, the constitution that the Federal Court was authorized to interpret was not a liberal document with a bill of rights. The structure of the imperial polity it represented has been described as legal authoritarianism⁴⁵. The imperial constitution was prepared not with an intention of transferring power but to retain control over British India in a new form. It explicitly conferred such broad emergency powers upon the Viceroy, that Winston Churchill was driven to remark that they would “rouse” Mussolini’s envy⁴⁶.

None of the six judges who served during this period were known for their nationalist sympathies. Sir Maurice Gwyer, the first Chief Justice was the chief counsel for the House of Commons and the

⁴² Kishori Lal v. Governor in Council, Punjab (1940) FCR 12.14.

⁴³ (1941) FCR 54, 55. For further analysis of the jurisdiction of the court, see George H. Gadbois, *The Paramount Judiciary in India, 1937-1964*, Duke University, unpublished PHD dissertation, 1965.

⁴⁴ *Legislative Assembly Debates*, 12th February, 1941.

⁴⁵ Bipan Chandra, *Indian National Movement: The Long Term Dynamics* (New Delhi, 1988) 18.

⁴⁶ Venkat Iyer, *States of Emergency: The Indian Experience* (New Delhi: Butterworths, 2000) 80.

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mains draftsman for the government of India Act. His successor Patrick Spens who had been handpicked for the absence of any pro Indian sympathies was a Conservative party M.P whose only legal experience had been in commercial cases. Of the Indian judges, Varadachariar had distinguished but fairly non controversial judicial career. Sir Shah Sulieman was the seniormost Muslim judge who had famously upheld the conviction of the revolutionaries in the Meerut Conspiracy Case. M.R. Jaykar had been leading moderate politician, and his decision to leave active politics and join the bench “surprised and disappointed” the Secretary of State for India who would have preferred to see him play a more active role in national politics⁴⁷. Finally, Zafrullah Khan before his appointment had led the government benches in the central legislative assembly and had been a member of the Viceregal cabinet⁴⁸.

Political scientists who work on rational actor models of strategic decisionmaking by judges argue that new courts are unlikely to challenge the legislature or executive unless they are certain that they will prevail⁴⁹. The efforts of the executive to frustrate the decision show that it could not have been a reasonable expectation. Moreover there was no immediate tradition of judicial challenges that the Federal Court to be expected to draw upon. To place the decisions in a comparative perspective, one should also note that while the Federal Court in India had struck down R.26, the courts in Britain had upheld the validity of detentions made under the identical rule of the Defence of the Realm Act.⁵⁰ If the House of Lords in the *Liversidge* case could uphold the validity of detaining a Jewish RAF intelligence officer for harbouring Nazi sympathies, it was difficult to imagine the weak Federal Court setting free confirmed nationalists⁵¹.

⁴⁷ Telegram to Viceroy from Secretary of State, 23rd March, 1937. IOR/L/PO/8/89(Ii) L/PO/203(Ii) (Gwyer to Varadachariar).

⁴⁸ Gwyer Strudwick Papers, MSS EUR F506/11/; IOR/L/PO/8/98(I) L/PO/203 (I) [(Kania- Spens),

⁴⁹ William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 *GEO. L.J.* 523 (1992); Lee Epstein and Jack Knight, “Institutionalizing Constitutional Democracy: A Strategic Analysis of the Role of the Courts”, in *Politics from Anarchy to Democracy* (Morris Oppenheimer and K.E.Soltan eds) (2004).

⁵⁰ *Liversidge v. Sir John Anderson* [1942] AC 206, *Greene v. Secretary of State for Home Affairs* [1942] A.C. 248.

⁵¹ For a thick description of the *Liversidge* and *Green* cases see A.W.Brian Simpson, *In the Highest Degree Odious: Detention without Trial in wartime Britain*, (Oxford: Clarendon Press, 1992)

LEGAL MEMORIES AND HISTORICAL MEMORIES: REVISITING THE RULE OF LAW IN COLONIAL INDIA

Despite the excitement these judgments caused in their time they have merited little analysis, being reduced to yet another event during the very eventful Quit India movement. I do not mean to suggest that these legal challenges have been ignored, indeed Indian Council of Historical Research devotes space documenting the various cases. This episode is almost universally mentioned but rarely discussed beyond a glib comment on how by moving the courts “nationalists opened a new arena to challenge the executive”⁵². But nationalist leaders had been moving the courts with little success for several decades? What exactly had changed in the 1940s?

Constitutional lawyers have reduced this episode to a footnote. For some this episode is seen as a marker of the great Indian tradition of judicial activism and of further evidence of the Indian legal professions commitment to liberal ideals⁵³. A majority of scholars however treat these individual judgments as precedent in other cases on the executive’s use of emergency powers. Few of these judgments would be considered “liberal” rulings, since they have overwhelmingly been cited to support the petition of the state. This is partly due to the nature of legal reasoning which allows ‘legal rule’ to be taken out of its context and reapplied in another situation. Judges are not passive actors who go about their business with neither the intent nor ability to influence their political fate⁵⁴. In a fraught political situation, they often attempt to “split the difference” between the two parties choosing to compromise on either the legal rule or impact on the parties before them⁵⁵. In *Talpade* and *Bannerjee* the courts accepted explicitly and by implication the powers of the Viceroy to retrospectively amend legislation by ordinances to correct legal defects. Thus, even though they released the detenu’s in question, the state was left with a formidable defence to future legal challenges.

⁵² Towards Freedom, Volume III

⁵³ Pylee, Gadbois 69.

⁵⁴ *Judicial Independence at Crossroads: An Interdisciplinary Approach* (Stephen B. Burbank and Barry Friedman eds, Thousand Oaks, CA: Sage Publications 2002) 6

⁵⁵ For a discussion of how this plays out in independent India and Pakistan, see Rohit De, “Constitutional Dictatorships and Unconstitutional Democracies: The Supreme Courts and Political Crisis in India and Pakistan” (forthcoming 2010)

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The released detenu's themselves did not enjoy a long period of freedom. On R.26 being struck down as illegal, several were rearrested under other legislations. Most dramatic was the arrest of Niharendu Dutt Mazumdar under the infamous Regulation III of 1818 on the premises of the Calcutta High Court minutes after the court had declared R.26 invalid and set him free⁵⁶.

However, these decisions had an impact on public consciousness of the period. The trials occupied centre stage in the contemporary newspapers accounts. The daily transcripts of the debates in court in case of each trial were published in the front pages of both vernacular and English language newspapers, which the judicial criticism of the executive actions often highlighted. Since court debates and decisions were matters of public record, these could avoid the demands of colonial censorship. The judgment also alarmed officials in other colonies with the Prime Minister fearing that the decision might lead to a movement to release political detainees in Egypt⁵⁷. The correspondence between the India Office and the Foreign Office on this matter also indicates that reports of these cases were in circulation internationally. The government was embarrassed by questions in parliament and critical letters and opinion pieces were published in prominent British dailies. The decisions of the Federal Court encouraged a flood of litigation before the District Courts and the provincial High Courts, several of whom found for the petitioners. For instance, the Bombay High Court struck down a ban on a pamphlet which described indiscriminate police firing, the Allahabad High Court dismissed charges against political prisoners who were refusing to work in prison, a court in Delhi commuted death sentences and set aside imprisonment of several members charged with being part of a demonstration that turned violent, courts in Allahabad and Benares refused to accept the possession of objectionable literature as a ground for arrest, courts in Wardha declared that the reading of the Congress Independence Pledge was not prejudicial to peace and security, the district court in Sylhet held that hoisting the Congress flag could not be a ground for arrest and the district court in Kurnool quashed the sentences of those convicted under the DIR. Even the small sample of decisions mentioned above indicates that there was emerging a widespread judicial consensus on the nature of the emergency. Moreover, there was a concerted by lawyers defending the detenus to create awareness of these judgments across India. Congress leader and leading barrister, Dr. Kailas Nath Katju published a large number of these decisions in a widely

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⁵⁷ Telegram from Lord Kilearn, OR/L/PJ/8/634/37

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circulated pamphlet⁵⁸ Since lower court judgments were not published, these reports became the main source of information for lawyers and the press.

That judges like Chief Justice Gwyer came to be viewed as radical heroes best comes through a cartoon in the Hindustan Times captioned “if wishes were horses” and shows a dream Viceregal cabinet with Gwyer in the company of Manabendranath Roy and a Chittagong Armory Raid prisoner⁵⁹. By late 1943, the government began to make virtue of necessity by releasing several prisoners on “compassionate grounds”. The High Courts equipped with greater contempt powers were more combative of executive attempts to disobey their judgment. When Niharendu Dutt Mazumdar was re-arrested on court premises moments after the court had set him at liberty, Chief Justice Derbyshire asked the Chief Secretary of Bengal and the Superintendent of Police to show cause as to why they should not be charged with contempt of court. The attitude taken by the Calcutta High Court caused alarm amongst government circles⁶⁰. The Chief Secretary complained that while emergency regulations could not be challenged on merit, they could be challenged on grounds of procedure leading to the High Court assuming authority over all government officials through writs of quo warranto making orders under the Defence of India Act infructuous through delay. There was real fear that the Calcutta High Court might find senior civil servants in contempt of court. A panicked Viceroy wrote to London asking for special letters patent to grant him power of pardon over contempt cases⁶¹. There was a flurry on anxious correspondence when it was discovered that the Royal Prerogative in England did not cover pardon for offences of contempt, therefore it was impossible for the King to delegate such powers to the Viceroy through letters patent⁶². The Home Member of the Viceroy’s council lobbied for the removal of judges who were hindering the war effort, a suggestion that was turned down after some consideration⁶³.

⁵⁸ Dr Kailas Nath Katju ed., *Recent Judgments in India: A Collection of Judgments of legal and political interest delivered during 1943-44 by the Federal Court, High Courts and smaller courts together with authentic records of hearings*, Vol.1 (Hindustan Times Press, New Delhi, 1943). Motilal Setalvad, *War and Civil Liberties* (Bombay: Oxford University Press, 1946).

⁵⁹ Hindustan Times, April 18.

⁶⁰ The Times, 5th June 1943 (London)

⁶¹ Letter from Viceroy to Secretary of State, 22nd June 1943, IOR/L/PJ/8/633/223

⁶² IOR/L/PJ/8/633/215

⁶³ Extract of Letter from Viceroy to Secretary of State, 22nd June 1943, IOR/L/PJ/8/633/191; see also Memorandum of Legal Adviser Sir Kenneth Kemp, IOR/L/PJ/8/633/194

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The curious position of the government comes out most poignantly in a letter by Sir John Hubert, the Governor of Bengal, who as a result of the Federal Court decision was told that he had to consider the validity of each detention order personally writes. He writes, “between 5th and 12th July I was presented with 393 cases of security prisoners, each of which I was informed must be disposed by me in the exercise of my individual judgment...over the next six months I am instructed that I shall be presented with more than 1,300 similar cases”⁶⁴. Finally in 1944, the government reframed a number of the ordinances with several safeguards to protect civil liberties.

RETHINKING THE ‘RULE OF LAW’ AND LEGAL NATIONALISM

I hope to argue that this episode pushes open the question of the rule of law in colonial India. Triumphalist accounts emphasizing the “rule of law” as one of the few indisputable goods attempted by British colonialism in India have been convincingly challenged by historians at two levels. First that the rule of law must be understood in the context of its domination-based aspirations, particularly in the colonial context; and second, that in many instances the rule of law failed at the level of implementation, proving less practicable than its architects anticipated⁶⁵. The emerging consensus seems to be that the rule of law was bound to fail in a colonial context, since colonial difference marked by race determined the relationship between the state and the individual. The failure of projects like the Ilbert Bill for Partha Chatterjee highlights the “inherent impossibility of completing the project of the modern state without superseding the conditions of colonial rule⁶⁶.” Attempts to rationalize the administration and make it less arbitrary would constantly run up against the question of race and the relationship between the colonizer and the colonized, as can be seen by the work of Jordana Bailkin or Elizabeth Kolsky.⁶⁷ Indeed logic of the colonial state can be evidenced from the ways in which the provision for exercise of arbitrary power was incorporated

⁶⁴ Letter to Secretary of State for India from Sir John Hubert, Governor of Bengal, 11th September, 1944. IOR/L/PJ/8/633/7

⁶⁵ For the contrasting views, see Ranajit Guha, “Chandra’s Death” in Guha, ed., *A Subaltern Studies Reader, 1986-1995* (Minneapolis and London: University of Minnesota Press, 1997) and David Washbrook, “Law, State and Agrarian Society in Colonial India.” *Modern Asian Studies* 15, 3 (1981): 649-721

⁶⁶ Partha Chatterjee, *The Nation and Its Fragments; Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993) 14. The Ilbert Bill was a proposed legislation which would give Indian magistrates the right to try cases involving Europeans. It provoked widespread opposition from Europeans in India forcing the government to retract, leading it to be termed the “White Mutiny”

⁶⁷ Jordana Bailkin, *The Boot and the Spleen: When was Murder possible in British India* *Comparative Studies in Society and History* (2006), 48: 462-493; Durba Ghosh, “Household Crimes and Domestic Order: Keeping the Peace in Colonial Calcutta” *Modern Asian Studies* (2004), 38: 599-623

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into legal codes and normalized.⁶⁸ Scholars from the subaltern studies collective have been scathing in their critique of the rule of law narrative pointing out how law in the colonies functioned as the iron fist of the state crushing its colonial victims through a penal machine set in motion by “abstract legalism.”⁶⁹ Even scholars like Nasser Hussain who see exceptionalism and the state of emergency as a condition of modernity and question the liberalism of law at the metropole concede that the fragility of the rule of law emerges most sharply in the colony with the invoking of difference to explain emergency measures⁷⁰.

The cases discussed above require us to rethink and reperiodize our conceptions about the rule of law. Most scholars recognize that while the drafting of legal codes and regulations was ultimately controlled by the interests of the colonial state, the daily exercise of law had a “peculiar, if partial, autonomy of government, which sometimes frustrated the drafters of legislation⁷¹.” Yet, this operational autonomy is seen as lacking any real significance, and David Washbrook represents the prevailing consensus when he remarks, “law was far from autonomous in practice, its autonomy nothing more than a legal fiction, its practice ‘pure farce’.”⁷² Nasser Hussein’s study of habeas corpus finds that the “writ of liberty in the regime of conquest was a contradiction” and the ability of the courts of issue writs was continually circumscribed⁷³. Studies by Mitra Sharafi and John Rogers have evidenced courts acting at cross purposes to the executive but these have dealt with areas more marginal to the continuation of colonial rule, such as Islamic dower and gambling regulations⁷⁴.

⁶⁸ Elizabeth Kolsky, Codification and the Rule of Colonial Difference: Criminal Procedure in British India," *Law and History Review* 23, 3 (September 2005)

⁶⁹ Ranajit Guha, “Chandra’s Death” in Guha, ed., *A Subaltern Studies Reader, 1986-1995* (Minneapolis and London: University of Minnesota Press, 1997), 55.

⁷⁰ Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, (Ann Arbor: University of Michigan Press, 2003) 83-95.

⁷¹ Nicholas B. Dirks, “From Little King to Landlord: Property, Law, and the Gift under the Madras Permanent Settlement” *Comparative Studies in Society and History*, Vol. 28, No. 2 (Apr., 1986), pp. 307-333

⁷² Washbrook (1981) 665.

⁷³ Hussein’s study is troubling because it is based on a reading of three cases from differing jurisdictions over a span of a hundred years. A more compelling account of the writ of habeas corpus in late 18th century Bengal can be found in Paul Halliday, *The Liberty of the Subject: Habeas Corpus, from England to Empire* (forthcoming 2010).

⁷⁴ Mitra J. Sharafi, “Reshaping Islamic Dower and Divorce: Chivalric Imperialism and Judicial Authority in Late Colonial India” , *Indian Economic and Social History Review* 2009 (forthcoming); John D. Rogers, “Cultural and Social Resistance: Gambling in Colonial Sri Lanka.” *Contesting Power: Resistance and Everyday Power Relations in South Asia*, ed. Douglas Haynes and Gyan Prakash.(Berkeley: University of California Press, 1991) 195-201

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I am not proposing to suggest that this episode marks the achievement of the “rule of law”. The few attempts by the court to bring about some form of equality was continually resisted and attacked by the colonial state and the advances reversed. If anything, it forces the colonial state to deny claims of due procedure most explicitly, damaging its claims of rule by law. What it does bring out are sharp differences between the higher judiciary and the executive in late colonial India. Both institutions while being part of the same governmental structure perceive the colonial state and the role of law differently.

So how can we explain this judicial liberalism? Partha Chatterjee in his incisive study of the Bhawal Sanyasi case locates judges in late colonial India in a nationalist space as representatives of a generation of Indians who had discursively, ideologically and institutionally prepared themselves for the transfer of power⁷⁵. He suggests that significant shift takes place between the 1920s and the 1930s towards the dismantling of structures of colonial rule from within the institutions of the colonial state as a result of indigenization of government services. Since the nationalists affirmed the universal principles of the modern state their critique of the colonial state was focused on the arbitrary and unchecked power of the bureaucracy which was held incompatible with a properly constituted modern state. In the public history of Indian nationalism politicians challenged the dominance of the colonial bureaucracy in the streets, while the secret history consisted of Indian nationalism lawyers and judges were asserting themselves more quietly and laying the discursive foundations of the constitution of the independent nation state.⁷⁶ It has been suggested that this suspicion of Indian judges led to the Viceroy appointing an ‘uncontaminated’ British lawyer as the second Chief Justice instead of promoting Justice Varadachariar according to convention.

Chatterjee’s account is an attractive one but raises several questions. The marks of nationalist consciousness are found in the refusal of Indian judges from being overawed by ICS testimony and their contempt from Indians who are seen as too subservient to colonial officials. But most importantly, he finds their nationalism in the assumption of a “certain interpretive position with

⁷⁵ Partha Chatterjee, *A Princely Impostor? The Strange and Universal History of the Kumar of Bhawal*. Princeton, NJ: Princeton University Press, 2002. 376

⁷⁶ Id.

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respect to cultural beliefs and practices of different types of Indians” which was not open to Europeans⁷⁷. In a way, this mirrored the ways in which 19th century social nationalists claimed sovereignty over the inner domain of national life i.e. women, religion, family and religion and excluding the colonial state from that domain.

However, a closer examination would show that Chatterjee thesis seems to fit uneasily on the judiciary in these cases. Most significantly, the judges and their decisions challenge any neat categorization into the nationalist/colonial binary. Racial identity or professional backgrounds do not seem to provide a guide to legal positions. Sir Harold Derbyshire, a decorated soldier and barrister with Indian experience and Maurice Gwyer, a civil servant and the architect of the GoI Act all frequently found against the government while Justice Chagla, a “nationalist” Muslim and later member of Nehru’s cabinet dismissed Talpade’s High Court petition and Justice Muneer, supported of the Muslim League and future Chief Justice of Pakistan, upheld the government position on the Lahore High Court. Zafrullah Khan, the most strident critic of the government from the bench had always been viewed as a reliable government ally. Before his appointment to the Federal Court, he had led the government in the Central Legislative Assembly, served as a member of the Viceregal Executive Council for almost a decade, been the Minister for Railways and was appointed Agent General to China. The plurality of government posts occupied by Zafrullah is best represented by a cartoon in the Hindustan Times showing him embracing four women (including Lady Justice and a Chinese woman) with a caption reading “the Shariat permits me four wives”.⁷⁸ But perhaps the greatest anomaly is Sir Patrick Spens. After their experience with Gwyer, the authorities were anxious to appoint a Chief Justice who was European and did not have any Indian sympathies. They avoided consulting Gwyer about his successor, as was mandated by the Government of India Act, 1935. Spens was seen as a safe choice, a commercial lawyer who had practiced at the Chancery and a Conservative member of parliament who had “never been a conspicuous figure in the cut and thrust of parliamentary debate”⁷⁹. The only decision where the pro and anti government positions mirrored the racial divide was in the Shibnath Baneerjee case which was Spens’s first decision after coming to India. Spens did not dissent in subsequent cases.

⁷⁷ Chatterjee (2002) 377.

⁷⁸ Hindustan Times, April 20, 1942.

⁷⁹ Secretary of State for India to Viceroy, [IOR/L/PO/8/98\(I\) L/PO/203 \(I\) \[\(Kania- Spens\)\]](#)

There is no distinction made between European and Indian interpretive positions in these cases which deal with seemingly universal questions. Moreover, there is clearly a shift in the judiciary-executive relationship in the 1940's which cannot be explained by Chatterjee's generational thesis. As Mitra Sharafi and Assaf Likhovski have shown native judges across the British Empire used legislation, legal education, case law, and legal treatises to give state approval to their personal visions of communal identity.⁸⁰ Indian judges were claiming a special interpretive position since the earlier appointments in the late 19th century, undermining Chatterjee's claims of a "significant shift" in the 1920s.

So what other lenses can we use to understand the role played by the Federal Court. In the next section I identify three interlocking explanations. The first is to place the history of the court against a larger scholarship on institutional behavior, the second to revisit seriously the Thompsonian moment when 'rhetoric becomes reality' and finally to examine the solidarities and the self image of the legal profession.

BETWEEN THE PRIVY COUNCIL AND THE HIGH COURT

Alexander Bickel noted that the chief dilemma facing a constitutional court is the "fact of foreseeable opposition"⁸¹. Since courts have no significant police power, both in practice and in theory the executive is obliged to come to the judiciary's support in such crisis. The absence of institutional support makes courts risk averse, suggesting that a newly established body like the Federal Court would be unlikely to take on the executive. However, I hope to show that it was its peculiar jurisdictional location and its relative newness that made it active.

⁸⁰ Mitra Sharafi, *Bella's Case: Parsi Identity and the Law in Colonial Rangoon, Bombay and London, 1887–1925*. PhD diss., Department of History, Princeton University. 2007; Assaf Likhovski, *Law and Identity in Mandate Palestine* (Chapel Hill: University of North Carolina Press: 2006)

⁸¹ ALEXANDER M. BICKEL *The Least Dangerous Branch* (New Haven, Yale, 1965)

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The Federal Court was India's first apex court exercising jurisdiction over all the provinces. It was inserted into the judicial hierarchy between the provincial High Courts and the Privy Council. The setting up of the court itself caused some anxiety to the High Courts, particularly the older High Courts of Bombay and Calcutta. Darbyshire of Calcutta refused to invite the new Chief Justice to Calcutta, while Chief Justice of Bombay Sir John Beaumont on his retirement published an address decrying the needless expense of maintaining the Federal Court⁸². The High Courts were extremely suspicious of this new arrangement which made it possible for their judgments to be overturned at New Delhi. Chief Justice Darbyshire of Calcutta wrote a strongly worded memorandum challenging attempts to enlarge the Federal Court's jurisdiction on the grounds that the Indian public had confidence in the High Courts and Privy Council and "to interpose a new untried court in Delhi between them could only diminish the status and authority of the High Court and make the Privy Council more remote....diminishing the confidence of the Indian public in the administration of justice in this country"⁸³. Viscount Simon, Privy Councillor and Lord Chancellor argued that the Privy Council had a special responsibility towards India because "the special conditions which prevail in India with the contrasts in outlook and sympathy between different communities" make the substitution of the Privy Council by an untried court staffed by members drawn from different communities a risk. Such a court would not succeed to the goodwill of the Privy Council where judges could be decided untinged by fear or favor. He challenged the charges that appeals to London caused expenses and delay by stating that Indians were naturally litigious and nothing that he had seen made it likely that the procedure would be any faster in India⁸⁴.

The split between the High Courts and the Federal Court came into the open with the Talpade case where the Bombay High Court refused to release Talpade on the FC invalidation of his detention order, on the curious ground that they hadn't received a specific order to do so. The FC had to rehear the case and sent an order back to the Bombay HC by which time Talpade had been re-

⁸² Letter from Sir Patrick Spens, Chief Justice to E.M Jenkins, 10th May, 1944, IOR:L/PJ/8/460

⁸³ Memorandum from the Chief Justice of Bengal on the Proposed Enlargement of the Appellate Jurisdiction of the Federal Court, 21st March 1940 IOR: L/PJ/8/458/381

⁸⁴ Memorandum from Viscount Simon to Leo Amery, Secretary of State for India on the Proposed Enlargement of the Appellate Jurisdiction of the Federal Court, 29th August, 1941, IOR: L/PJ/8/458/321. In 1929, Lord Simon had chaired the controversial Commission for India's Constitution.

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arrested under a different legislation⁸⁵. The Federal Court was furious at the Bombay High Court's defiance, with the usually mild Justice Varachariar angrily retorting that "if they abuse us, we can also abuse them if we are so minded". On the Bombay High Court's request for a clearer order, Zafrullah Khan caustically remarked that the Federal Court could "only give them a reasoning and not an understanding"⁸⁶.

The Federal Court was therefore trying to carve an institutional space for itself. Every judge actively lobbied the government to expand its very limited jurisdiction⁸⁷. It asserted itself against both the Privy Council and the High Court's by emphasizing its role as the India's apex court. Explaining why the court had rejected four consecutive leaves to appeal to the Privy Council, Gwyer stated "that we were not a subordinate court, and we also said that we could not at present to ignore the evolution of a political thought in India....we were not disposed to encourage Indian litigants to seek for decisions on constitutional questions other than in their own Supreme Court, the first Court sitting on Indian soil with jurisdiction over the whole of British India"⁸⁸. In the *Benoari Lal Sharma* case the court refused to consider the Attorney General's plea for adjournment of the grounds that the government would be appealing directly to the Privy Council.⁸⁹ Early in its career the Court had held that once the jurisdiction to hear an appeal was vested by the court, no subsequent event could divest it of its jurisdiction. A certificate appeal was "the key which unlocks the door of the court and a litigant who has once passed through the door cannot afterwards be rejected by the happening of events outside his control"⁹⁰.

Gwyer had spelt out his position as early as 1938 on the inauguration of the Federal Court stating that its establishment recognized the unifying influence of a central judicature and the "recognition

⁸⁵ *Keshav Talpade v. Emperor*, AIR 1943 FC 72

⁸⁶ *Hindustan Times*, June 1st, 1943.

⁸⁷ Memorandum by Sir Maurice Gwyer, Chief Justice of India to Leo Amery, Secretary of State for India, 2nd December, 1942, IOR: L/PJ/8/458/293; Memorandum by Sir Patrick Spens, Chief Justice of India on the expansion of the Federal Court's Jurisdiction to the Viceroy, 4th February, 1944, IOR: L/PJ/8/458/293

⁸⁸ Sir Maurice Gwyer to Lord Linlithgow, 9th November, 1942, IOR/L/PO/8/98(I) L/PO/203 (I)/149

⁸⁹ Extract of Letter from Lord Linlithgow to Leo Amery, 1st June, 1943 IOR: L/PJ/8/458/251

⁹⁰ *Subhanand Chowdhury and Another v. Apurba Krishna Mitra and Another* (1940) F.C.R. 31, 35-36.

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of the fact that a new and perhaps final stage of constitutional evolution of India has begun". His desire to play a pivotal role in late colonial India comes through clearly in his inaugural speech,⁹¹

“Obeying the old maxim that it is the *part of a good judge to enlarge his jurisdiction*, I have for a moment looked far into the future. I do not forget the main tasks of the court, independent of governments and parties and unaffected by the vicissitudes of politics, its primary duty is to interpret the constitution and to provide a peaceful and rational solution of differences which, in the absence of an impartial and independent arbiter, might inflame passions and even issue in violence. A second and not less important duty...when you expressed hope that the court might be inspired by an enlightened liberality.

The FC will declare and interpret the law, and that I am convinced in no spirit of formal or barren legalism. This court can, and will secure that those political forces and currents which alone can give vitality to the constitution have free play within the limits of the law, but it cannot under the color of interpretation alter or amend the law, that must be left to authorities. I do not doubt that the FC can make a unique and perhaps even decisive contribution towards the evolution of India into a great and ordered nation, a link between the East and the West but with a polity and civilization of its own.”

Five years later, Gwyer's successor made a similar speech to the Madras Bar Association arguing that a central court with a wide jurisdiction was essential for India's national development.⁹²

The Federal Court faced opposition from both the Privy Council and some of the High Courts to their attempts to extend jurisdiction. The Privy Council reversed the decision of the Federal Court in all appeals reinforcing case of the colonial government, though the delays in the process made the effect of the reversal redundant.⁹³ The role of the Privy Council in strengthening the hands of the colonial state through the language of law requires further study, but as Mitra Sharafi had pointed out they almost never dissented from the view stated by the local government. The decisions of the

⁹¹ Sir Maurice Gwyer, *Convocation and Other Addresses* (New Delhi: Cambridge Printing Workds, 1942)

⁹² Hindustan Times, 26th September, 1943.

⁹³ *Emperor v. Benoari Lall Sharma*, (1943) FCR 161 (Privy Council), *Emperor v. Sibnath Banerjee*, (1945) FCR 195 (Privy Council)

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Federal Court over the Defence of India Regulations led to the Viceroy aggressively pushing for the government to shelve all questions about the expansion of the court's jurisdiction⁹⁴. Some High Court judges expressed outrage at attempts by litigants to ask for certificate of appeal directly to the Federal Court from the decision of a single judge rather than ask for it to be considered by the Full Bench of the High Court.⁹⁵

Despite the hostility from other institutional actors, the Federal Court was able to carve out a niche for itself in the public space. During its early years of relative inactivity, it came to play the role of a neutral arbitrator between the colonial government and various parties. In a conflict over the composition of the Rajkot Praja Parishad, Gandhi invited Chief Justice Gwyer to act as the arbitrator between the Maharajah of Rajkot and Sardar Patel⁹⁶, when the Muslim League charged provincial Congress governments with tyranny over Muslims Rajendra Prasad suggested that the Federal Court examine the parties conduct and in 1943 when Gandhi decided to fast unto death the Viceroy himself appealed to the Chief Justice to intercede⁹⁷. This led an editorial in the Dawn to caustically remark, that "CJI has been put in the form of a moral mentorship next to only to the position occupied by the Metropolitan of India."⁹⁸ This idea of neutrality continued even when the Congress formed government in 1946 and referred contentious decisions over the INA to the Federal Court.⁹⁹ The courts themselves seemed invested in this role, as can be seen by the appointment of judges to virtually all sensitive positions in the late 1940s. Chief Justice Spens went on to head the Arbitration Commission between India and Pakistan, Justice Fazl Ali sat on the Enquiry Commission of the Calcutta Riots, Mehr Chand Mahajan was a member of the Naval Mutiny inquiry and eight judges manned the partition boundary commissions. The appointment of judges to commissions of inquiry by the colonial is not unique, but what is interesting is that the demand often came from parties opposed to the colonial government.

⁹⁴ Extract of Letter from Lord Linlithgow to Leo Amery, IOR: L/PJ/8/458/252

⁹⁵ Wodeyar v. Province of Bombay, Suit No. 8 of 1940, 20th January, 1944 IOR: L/PJ/8/458/147.

⁹⁶ *The Hindu*, Madras, 18 May 1938. Rajkot was one of the 500 odd nominally autonomous princely states that composed a third of the territory in British India

⁹⁷ *Civil and Military Gazette of India*, Tuesday, April 4, 1939

⁹⁸ "What is he after", *Dawn*, Dec 18, 1943. The Dawn was an English language daily published by the Muslim League and was critical of the Congress.

⁹⁹ Maybritt Jill Alpes, *The Congress and the INA Trials: A Contest over the Perception of Nationalist Politics* *Studies in History* 2007; 23; 135

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Parikh and Darnell in their study suggest that new courts take risks in order to establish their legitimacy and issue decisions that are unpopular with other branches of government in order to shape the law to their institution's greatest advantage. Rather than waiting until they are more established and safer, courts confront the preferences of other branches directly¹⁰⁰. Parikh and Darnell's neat division into executive and judiciary results from a comparison of the Supreme Court of Calcutta, the Federal Court and the Supreme Court of India. I would argue that the Federal Court presents a distinct case as it complicates the question of simple executive/judiciary paradigm since its institutional struggles involved multiple judicial bodies. Secondly, its temporal location is important since it enabled the court adopt the language of constitutional evolution.

RHETORIC, REALITY AND THE REVERSING THE RULE OF COLONIAL DIFFERENCE

It is difficult to ignore that colonial law in the 1940s bore no resemblance to a "rule of law". As Justice Varadachariar was driven to remark, it seemed there was emergency all year around¹⁰¹. The question of "colonial difference" featured prominently in the arguments before the court. However, while the executive argued that it was this difference which made it necessary to suspend the rule of law, the Federal Court implied that this difference made it essential for the judiciary to play a particularly active role in protecting the rule of law.

The judges, particularly those who had practiced in Britain were aware that the Indian emergency legislation was an identical reproduction of British emergency legislation. Their cross examination of the lawyers reveal a deep awareness of the difference in practice in the two jurisdictions. In Britain comparatively few detainees were held after their cases had been personally considered by the Secretary of State, a situation which the government counsel argued would be impossible in India because of the vast number of detainees. Oswald Mosely had been released on the grounds of ill health whereas Gandhi was in prison despite three heart attacks. Britain despite being under actual siege had at the maximum 1348 subjects under detention compared to the 1,500 prisoners in Bengal

¹⁰⁰Sunita Parikh and Alfred Darnell, "Interbranch Bargaining and Judicial Review in India" www.law.northwestern.edu/colloquium/politiceconomy/parikh_darnell.pdf (as accessed on 14th May, 2008).

¹⁰¹ Arguments in Benoari Lal Sharma, Hindustan Times, August 25, 1943.

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alone.¹⁰² During the oral arguments, in order to explain the powers of the governor general the lawyers appearing for the government often drew comparisons with comparable instances in Britain and the other colonies. This maneuver drew out even more clearly the differences between India which had no effective separation of powers and Britain and the dominions which enjoyed representative government.

Gwyer on being asked to consider English precedents on executive power on the grounds of similarities between Rule 26 under the Defence of India Act and the corresponding Rule 18 B under the Emergency Powers Act in Great Britain was driven to remark that “it is one thing to confer a power to make a regulation empowering the Home Secretary to detain any person if he thinks it expedient to do for a number of specified reasons, it is another thing altogether to confer a similar power on any person whom the Central government may choose to select, or to whom the Central government may by rule give powers for the purpose.”¹⁰³ The failure of Indian constitutional development to mirror that of the other dominions was often remarked upon by the judges. Gwyer even before the war had argued that the creation of a Supreme Court marks a certain attainment in the constitutional development of a nation and it was ironic that even New Zealand had a privilege that was being denied to India.¹⁰⁴ Zafrullah Khan argued that there was no utility in comparing the laws of Britain and India, except to urge that the law was more drastic in India and therefore *should all the more be carefully applied*¹⁰⁵. (emphasis mine). When the government advocates attempted to portray the absence of the provision of appeal from the special criminal courts as an improvement upon the corresponding British legislation as it reduced delays, the bench caustically asked “whether Indian conditions required hanging more quickly”.¹⁰⁶ In another interchange over the Special Courts ordinance Sir B.L Mitter, the Attorney General for Bengal’s attempt to draw an analogy to a similar law in Australia which did not circumscribe the discretion of the Australian Governor General was shot down by the judges who pointed out that the Australian parliament had the power to strip the

¹⁰² M.C Setalvad, *War and Civil Liberties* (New Delhi, OUP, 1946) 25.

¹⁰³ *The Times*, 24th April, 1943

¹⁰⁴ Memorandum by Sir Maurice Gwyer, Chief Justice of India to Leo Amery, Secretary of State for India, 2nd December, 1942, IOR: L/PJ/8/458/293

¹⁰⁵ *Hindustan Times*, August 26th, 1943.

¹⁰⁶ *Hindustan Times*, May 27th, 1943.

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Governor General of his discretion while the Indian legislative assembly did not¹⁰⁷. Justice Khan observation that in the dominions elected representatives in the legislature controlled the executive was met with an exasperated Mitter stating, “neither your Lordships can help that, nor can I”¹⁰⁸. But as judges of the apex constitutional court, they could help and they did.

In the Bhagat Singh case the Privy Council had refused to question the reasons behind the Viceroy's decision on the grounds that they could not presume to understand the realities in India¹⁰⁹. The Privy Council sitting in London may hold that the Viceroy was the best judge of the situation in India, but could a judicial body based in India comprising of Indians and Englishmen with Indian experience take the same position?

E.P Thompson in his magisterial review of the rule of law had argued that the essential precondition for the effectiveness of law was its function as an ideology, for which it had to display an independence from gross mishandling. Law could be rhetoric but not empty rhetoric¹¹⁰. For law to function as ideology in colonial India, there were moments when the rhetoric of the rule of law was forced to become a reality. The courts did not, and could not, challenge the fact that the state of emergency was required. Neither did they question the idea of preventive discretion or the exercise of arbitrary powers. What they objected to the absence of any guidelines to regulate this discretion and the attempts to exclude judicial review. Justice Zafrullah Khan declaring the Special Criminal Courts ordinance held that “a legislation even though it be an emergency legislation must bear the stamp of legislation”¹¹¹. Justice Varachariar labeled the emergency ordinances as “press-the-button” legislation where there had been little application of mind. The legislations were invalidated not on any abstract conception of fundamental rights but on the failure to conform to the basic principles of administrative law. These principles were also mediated to some extent by class. The judges were horrified not just by the fact that the Governor delegated his powers to the lower officials, but also by the fact that the head constable was exercising discretion over detentions.

¹⁰⁷ The Central Legislative Assembly and some of the provincial assemblies continued to meet during this period but their membership was severely depleted since an overwhelming majority of elected representatives were detained under Emergency legislations. The handful of elected non official members crossed party lines and formed a united front in challenging the government over the question of civil liberties.

¹⁰⁸ *Hindustan Times*, May 27th 1943

¹⁰⁹ *Bhagat Singh and Others v. The King Emperor*, 58 *Indian Appeals* 169.

¹¹⁰ E.P. Thompson. *Whigs and Hunters: The Origins of the Black Act* (New York: Pantheon Books, 1975)

¹¹¹ *Hindustan Times*, May 27th 1943.

The judges were conscious that the basis of authority of the legal system in colonial India rested upon a core set of principles which was their special responsibility to uphold in the absence of a legislature. This comes through the repeated citation of Lord Atkin's dissent in the *Liversidge* case stating that he viewed with apprehension the attitude of judges "who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive".¹¹²

THE BROTHERHOOD OF THE BAR

Finally, and this is a very tentative thesis, it seems important that of the defendants in three of the four celebrated cases that came before the Federal Court were lawyers. Niharendu Dutt Mazumdar was a barrister and came from a large legal family, Shibnath Bannerjee was a lawyer and trade unionist and Talpade was a petition writer in the Insolvency division on the Bombay High Court. Further, several of the higher court decisions dealt with unlawful detention of lawyers often on the grounds that they were defending others detained under emergency legislation. The Chief Justice of Allahabad hearing a case on the detention of Pandit Bajinath Bajoria, a lawyer who had been representing several people detained under the Defence of India Act spoke in vehement terms to the effect that under cover of Rule 26 there was an attempt was being made to destroy the liberty of the bar.¹¹³ Similarly the arrest and imprisonment of Pardivala, a leading Bombay lawyer who was defending Jaiprakash Narayan, minutes before he was going to court was strongly condemned by the Lahore High Court¹¹⁴. In *Beonari Lal Sharma*, the petitioners were police constables, but the case dealt with an attempt to curtail the jurisdiction of the Indian judiciary and not surprisingly was responded to by the longest judgment issued by the Federal Court. There was a sense of the Indian legal profession coming under attack from the colonial state.

¹¹² *Liversidge v. Sir John Anderson* [1942] AC 206

¹¹³ *Quarterly Survey of the Political and Constitutional Position in British India*, para 44 NMML No 3267 10-10-90

¹¹⁴ *Quarterly Survey of the Political and Constitutional Position in British India*, para 55 NMML No 3267 10-10-90

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Sociologists studying the legal profession have argued that professions strive collectively for a secure and preferably rising mobility with both material and symbolic rewards.¹¹⁵ A market model for the legal profession suggests that lawyers have a vested interest in promoting rights consciousness. The Indian legal profession by 1940 had come to constitute a professional public with common journals, associations and meetings which cut across racial, religious and regional lines. With the passing of the Indian Bar Councils Act of 1921, India trained vakils and London trained barristers had been placed at an equal footing. It also allowed British and Indian lawyers and judges to find a common ground across racial lines.¹¹⁶ An assault on certain members of the profession could be an assault on the system as a whole. By denying detainees the right to counsel and removing judicial review, the government was not just hurting rights of citizens but putting the cohesiveness of this system into question.

CONCLUSION

"I believe that the all India court which stands firm and aloof amid the ebb and flow of politics and political theories, the victory and defeat of parties, the restless and eager questioning and the intellectual ferments of each successive generation- a court sympathetic to all but allied to none, may play a great part in the building up of a nation, by proclaiming and cherishing those things which lie at the root of all civilization; the eternal principles and verities which ...have their origin in the bosom of God."

Sir Maurice Gwyer, Chief Justice of India, Inaugural Address of the Federal Court¹¹⁷

This paper aimed to explain how a weak court established by the British government could emerge as an important site for resistance against the colonial state. Explanations based on neat binaries of executive/judiciary or colonial/national fit uneasily with the Federal Court. It is important to see the Federal Court as a creature of the late 1930s and early 1940s and avoid generalizing about the judiciary and the rule of law across the geographical and temporal limits of colonial India. It was the relative newness of the Federal Court and its lack of institutional supporters which allowed it play a

¹¹⁵ Terence C., Halliday, and Lucien Karpik, eds. 1997. *Lawyers and the Rise of Western Political Liberalism* (Oxford: Clarendon Press., 1997), Terence C. Halliday, "The Politics of Lawyers: An Emerging Agenda". *Law & Social Inquiry* 24 (4): 1007–11.

¹¹⁶ John Jeya Paul, *The Legal Profession in Colonial South India* (Bombay: OUP, 1991)

¹¹⁷ Sir Maurice Gwyer, *Convocation and Other Addresses* (New Delhi: Cambridge Printing Works, 1942)

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potentially disruptive role. The Federal Court attempted to maximize its jurisdiction through several ways including carving out space occupied by the High Courts and the Privy Council. They did so by asserting their status as the first court which enjoyed jurisdiction across India, thus at one move provincializing the High Courts and claiming a degree of authenticity vis a vis the Privy Council. Yet, this move was not assertion of indigeniety or of nationalism, but of the politics of location.

As historians of law in South Asia, it is important for us to be suspicious of legal rhetoric but at the same time recognize that the legal public i.e. the professional sphere of lawyers and judges, had deep faith in it. Both the British establishment and subaltern groups could view the process of law with a degree of cynicism, but legal professionals trained and invested in the process saw the system and their role in differently. By the 1930's, the legal public was well aware of the "rule of colonial difference" i.e. that there were exceptions to the rule of law in India due to its status as a non-white colony. While there was a broad range of opinions over the need for exception, there seemed to be an emerging consensus that the lack of representative government placed a special responsibility in the hands of the higher judiciary. All courts were extremely jealous of their jurisdictions and resisted any attempt by the executive to curtail it. Thus, even the most compliant High Courts came down strongly on attempts to exclude judicial review.

The Federal Court was the immediate predecessor of the Indian Supreme Court and consisted of the same judges. Justice Kania served on the Federal Court before taking office as the first Chief Justice of India. At the inauguration of the new Supreme Court he reflected similar concerns as Gwyer when he said "*In view of the fact that parliamentary opposition is negligible, the position of the judiciary becomes all important*".¹¹⁸ Thus, India's constitutional court and judicial culture both predated its constitution making its prehistory even more relevant to those who study the present

BIBLIOGRAPHY

PRIMARY SOURCES

¹¹⁸ Chief Justice Kania, *Inaugural address*, AIR 1948(Jour) 13.

Archival Collections

India Office Records, Public and Judicial, Oriental and India Office Collection, London

Gwyer Strudwick Papers, MSS EUR F506/11, Oriental and India Office Collection, London

Linlithgow Papers, Oriental and India Office Collection, London

Government of India, Home Department Files, National Archives of India, New Delhi

Legislations

The Defence of India Act, 1919

The Defence of India Act, 1939

The United Kingdom Emergency Powers (Defence) Act, 1939

Cases Cited

Cases are listed alphabetically by first name of plaintiff following the convention of South Asian case reporters. ILR stands for Indian Law Reports, AIR for All India Reporter, FCR for Federal Court Reporter and AC for Appeals Cases.

Bhagat Singh and Others v. The King Emperor, 58 *Indian Appeals* 169.

Des Raj v. Emperor, AIR 1930 Lah, 78;

Basanta Chandra Ghosh v. Emperor (1944) F.C.R. 295

Emperor v. Benoari Lall Sharma, (1943) FCR 96

Emperor v. Benoari Lall Sharma, (1943) FCR 161 (Privy Council)

Emperor v. Channappa Shantirappa, 1930 32 Bom LR 1613

Emperor v. Shibnath Banerjee, AIR 1943 Federal Court 75

Emperor v. Sibnath Banerjee, (1945) FCR 195 (Privy Council)

Greene v. Secretary of State for Home Affairs [1942] A.C. 248.

Liversidge v. Sir John Anderson [1942] AC 206

Keshav Talpade v. King Emperor, 30 AIR 1943 Federal Court 1

Keshav Talpade v. King Emperor, 30 AIR 1943 Federal Court 72.

Kishori Lal v. Governor in Council, Punjab (1940) FCR 12.14.

Draft. Please do not cite, quote, or circulate without permission.

Niharendu Dutt Mazumdar v. King Emperor, AIR 1942 Federal Court 22

Piare Dusadh and others v. The King Emperor, (1944) F.C.R. 61

Subhanand Chowdhury and Another v. Apurba Krishna Mitra and Another (1940) F.C.R. 31

Newspapers and Periodical Literature

The Civil and Military Gazette

The Manchester Guardian

The Hindu

The Hindustan Times

Quarterly Survey of the Political and Constitutional position in British India

SECONDARY SOURCES

Alpes, Maybritt Jill "The Congress and the INA Trials: A Contest over the Perception of Nationalist Politics" *Studies in History* 2007; 23; 135

Bailkin, Jordana ."The Boot and the Spleen: When was Murder possible in British India" [*Comparative Studies in Society and History*](#) (2006), 48: 462-493

Benton, Lauren. *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*. Cambridge: Cambridge University Press. 2002

Bickel, Alexander. *The Least Dangerous Branch* (New Haven, Yale, 1965)

Brian Simpson, A.W.. *In the Highest Degree Odious: Detention without Trial in wartime Britain*, (Oxford: Clarendon Press, 1992)

Chandra, Bipan .*Indian National Movement: The Long Term Dynamics* (New Delhi, 1988)

Chatterjee, Partha. *The Nation and Its Fragments; Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993)

Chatterjee, Partha .*A Princely Impostor? The Strange and Universal History of the Kumar of Bhowal*. Princeton, NJ: Princeton University Press, 2002.

De, Rohit "Constitutional Dictatorships and Unconstitutional Democracies: The Supreme Courts and Political Crisis in India and Pakistan" (forthcoming 2010)

Draft. Please do not cite, quote, or circulate without permission.

Cohn, Bernard. "From Indian Status to British Contract" in Cohn, *An Anthropologist among the Historians and other Essays* (Delhi: Oxford University Press, 1987)

Dicey, A. V. *Introduction to the Study of the Law of the Constitution*, 5th edn (1855, London: Macmillan and Company, 1897)

Dirks, Nicholas B. "From Little King to Landlord: Property, Law, and the Gift under the Madras Permanent Settlement" *Comparative Studies in Society and History*, Vol. 28, No. 2 (Apr., 1986), pp. 307-333

Epstein, Lee and Jack Knight, "Institutionalizing Constitutional Democracy: A Strategic Analysis of the Role of the Courts", in *Politics from Anarchy to Democracy* (Morris Oppenheimer and K.E.Soltan eds) (2004).

Eskridge, William N. . Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 *GEO. L.J.* 523 (1992)

Gadbois, George H. *Evolution of the Federal Court of India: An Historical Footnote* (Durham: University of North Carolina Press, 1963).

Gadbois, George H. *The Paramount Judiciary in India, 1937-1964*, Duke University, unpublished PHD dissertation, 1965.

Gandhi, M.K. *The Law and Lawyers* (S.B Kher eds, Ahmadabad: Najvijan Trust, 1962)

Ghosh, Durba. "Household Crimes and Domestic Order: Keeping the Peace in Colonial Calcutta" [Modern Asian Studies](#) (2004), 38: 599-623

Guha, Ranajit "Chandra's Death" in Guha, ed., *A Subaltern Studies Reader, 1986-1995* (Minneapolis and London: University of Minnesota Press, 1997), 55

Gupta, Parthasarathy. *Power, Politics and the People: Studies in British Imperialism and Indian Nationalism* (New Delhi: Permanent Black, 1998)

Gwyer, Maurice Gwyer, *Convocation and Other Addresses* (New Delhi: Cambridge Printing Works, 1942)

Halliday, Paul. *The Liberty of the Subject: Habeas Corpus, from England to Empire* (forthcoming 2010).

Draft. Please do not cite, quote, or circulate without permission.

Halliday Terence C., and Lucien Karpik, eds. 1997. *Lawyers and the Rise of Western Political Liberalism* (Oxford: Clarendon Press., 1997)

Halliday, Terence C. "The Politics of Lawyers: An Emerging Agenda". *Law & Social Inquiry*

Hussain, Nasser *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, (Ann Arbor: University of Michigan Press, 2003)

Hutchins, Francis *India's Revolution: Gandhi and the Quit India Movement* (Harvard 1973)

Iyer, Venkat .*States of Emergency: The Indian Experience* (New Delhi: Butterworths, 2000)

Jain, M.P. *Outlines of Indian Legal History* (Bombay, N.M Tripathi, 1996),

Jois, Rama *Legal and Constitutional History of India* (Mumbai, N.M Tripathi, 1990) Vol. II (New Delhi: Universal Law, 2008)

Judicial Independence at Crossroads: An Interdisciplinary Approach (Stephen B. Burbank and Barry Friedman eds, Thousand Oaks, CA: Sage Publications 2002)

Kamtekar, Indivar. 'The Shiver of 1942,' *Studies in History*, 18: 1, 200

Kalhan, Anil. "Colonial Continuities: Human Rights, Terrorism and Security Laws in India" 20 *COLUM. J. ASIAN L.* 93 (2006)

Kania, Sir Harilal," Inaugural address", AIR 1948(Jour) 13.

Katju, Dr Kailas Nath ed., *Recent Judgments in India: A Collection of Judgments of legal and political interest delivered during 1943-44 by the Federal Court, High Courts and smaller courts together with authentic records of hearings*, Vol.1 (Hindustan Times Press, New Delhi, 1943).

Keith, A.B. *Constitutional History of India 1600-1935* (Edinburgh: University of Edinburg Press, 1936)

Kolsky, Elizabeth "A Note on the Study of Indian Legal History" 23 *Law & History Review* 703 (2005) (Fall 2005 Forum. Colonial Order, British Law: The Empire and India)

Kolsky, Elizabeth." Codification and the Rule of Colonial Difference: Criminal Procedure in British India," *Law and History Review* 23 (September 2005)

Draft. Please do not cite, quote, or circulate without permission.

Landes, William and Richard Posner, "The Independent Judiciary in an Interest Group Perspective", 18 *Journal of Law and Economics*, 875-901.

Likhovski, Asaf, *Law and Identity in Mandate Palestine* (Chapel Hill: University of North Carolina Press: 2006)

Metcalf, Thomas. *Ideologies of the Raj. The New Cambridge History of India*, series III, vol. 4. Cambridge: Cambridge University Press. 1995.

Oguamanam, Chidi, and W. Wesley Pue. Forthcoming. Lawyers' Professionalism, Colonialism, State Formation and National Life in Nigeria, 1900–1960: "The fighting brigade of the people." *Social Identities*.

Noorani, A.G. *The Trial of Bhagat Singh: The Politics of Justice* (New Delhi: Oxford University Press, 1996)

Parker, Kunal M. *The Historiography of Difference*, 23 *Law & History Review* 685 (2005) (Fall 2005 Forum. Colonial Order, British Law: The Empire and India)

Parikh, Sunita and Darnell, Alfred "Interbranch Bargaining and Judicial Review in India" www.law.northwestern.edu/colloquium/politiceconomy/parikh_darnell.pdf (as accessed on 14th May, 2008).

Paul, John J. *The Legal Profession in Colonial South India*. Bombay: Oxford University Press. 1991

Pylee, M.V *The Federal Court of India* (1966)

Rogers, John D. "Cultural and Social Resistance: Gambling in Colonial Sri Lanka". In *Contesting Power: Resistance and Everyday Power Relations in South Asia*, ed. Douglas Haynes and Gyan Prakash. Berkeley: University of California Press. 1991.

Sarkar, Mahua *Justice in a Gothic Edifice: The Calcutta High Court and Colonial Rule in Bengal*, Calcutta: KLMP Private Ltd, 1997

Scheingold, Stuart. "Taking Weber Seriously: Lawyers, Politics, and the Liberal State Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries". *Law & Social Inquiry* 24:1061–81. 1999.

Draft. Please do not cite, quote, or circulate without permission.

Setalvad, M.C. *War and Civil Liberties* (New Delhi, OUP, 1946)

Sharafi, Mitra. *Bella's case: Parsi identity and the law in colonial Rangoon, Bombay, and London, 1887-1926.* — PhD dissertation, Princeton University (2006)

Sharafi, Mitra J. “Reshaping Islamic Dower and Divorce: Chivalric Imperialism and Judicial Authority in Late Colonial India” (forthcoming publication *Indian Economic and Social History Review* 2008)

Simpson, A.W.B.. “Round Up The Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights”, 41 *LOY. L.REV.* 629, 639-42, 646 (1996)

Sreenivas, Mytheli. ‘Conjugality and Capital: Gender, Families, and Property under Colonial Law in India,’ *Journal of Asian Studies* 63: 4 (Nov. 2004), 937-60.

Tawney, R.H ‘The Abolition of Economic Controls, 1918-1921’. *Eco. Hist. Rev.*, xiii (1943)

Towards Freedom, Vol III, Parthasarathy Gupta eds (Delhi: Oxford University Press, 1997)

Thompson, E.P. *Whigs and Hunters: The Origins of the Black Act* (New York: Pantheon Books, 1975)

Travers, Robert *Ideology and Empire in Eighteenth Century India : The British in Bengal.* (New York: Cambridge University Press, 2007)

Vachha, P. B. *Famous Judges, Lawyers and Cases of Bombay: A Judicial History of Bombay during the British Period* (Bombay: N M Tripathi, 1962)

Washbrook, David. “Law, State and Agrarian Society in Colonial India.” *Modern Asian Studies* 15, 3 (1981): 649-721.