Asymmetrical Lawfare of the British Indian Empire

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Abstract

The history of the Indian subcontinent is replete with conquests and the ensuing empires. The last was the British Indian Empire secured and legitimized through various administrative and legal measures. Importantly, the control within and the projection of power without was armor-plated with lawfare as an instrument of statecraft. For example, after the victory in the Battle of Plassey in 1757 which was followed by the Mughal defeat in the Battle of Buxar in 1764−besides the Ring-Fence policy creating buffer zones− the British initiated strategy of lawfare and inducted legal pluralism to defend commercial and strategic interests beyond their administered territories. The lawfare and legal pluralism allowed British to continue ahead after their initial policy of Ring-Fence that had restricted their rule to Bengal, Madras, and Bombay, as they advanced towards the high-perch in Delhi. And after securing Delhi in 1804 and the subsequent annexation of Punjab in 1849, the British likewise took actions to shelter British interests legally too. Lawfare in addition to its defensive nuances was deployed as an offensive apparatus to annex territories. The Doctrine of Lapse that challenged the traditional succession law was applied coldly and indifferently to enforce this policy. The Islamic laws administered under the Mughals as also Muslim and Hindu personal laws were targeted and changed. These ultimately paved the way for 1857 uprising and its crushing. This was followed by the consolidation of British laws that in essence displayed the sense and meaning of British lawfare. For the British lawfare, in fact, was part of British warfare.

Keywords: Colonial Rule, Lawfare, Ring-Fence Policy, Legal Pluralism, Doctrine of Lapse, Islamic Law, Anglo-Indian Law.

Introduction

Historically, those wielding power have been applying laws to enforce order in a given society. In the process, world has seen the rise and fall of unlike legal systems in history. The passage of time not only underpinned legal systems by ancient empires and religions but also the rise of modern secular laws, and over and above common

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people as subjects and citizens. For law gives an identity too. Legal systems and by extension laws defined communities, regulated trade and built great ancient and modern civilizations. The sophistication in the variety of laws has been as great as the complexity and style in the diversity of societies. What is ultimate vis-à-vis the idea of law is that it delivers justice and fights back against oppression, not to mention its creativity that creates order out of chaos. The panoramic view of legal history gives one an awareness of the ascending and descending legal systems along with civilizations, empires and modern-day nation state system. The laws over the centuries were broadly wrapped up in delivering social justice against the abuse of power. However, law has also been used to serve the powerful as an instrument of political, social and economic control, especially in case of conquered societies.

In the context above, the use and misuse of law for an advantage in statecraft is lawfare. It substitutes for fighting and is an unconventional legal-tactic. As an asymmetric tool, lawfare is a legal-means to an end. Although the term lawfare was popularized in 2001, its application as a policy instrument is centuries old. The Dutch were the first to use law as a weapon of war against the Portuguese in the early 17th century when Portugal deployed its navy to exclude the Dutch East India Company from the Indian Ocean. The legal justification for the seizure of the Portuguese vessel *Sta. Catarina* by the Dutch not only made the seizure lawful but also undermined Portugal's claim to the dominion over the whole continent and vast seas[1]. The famous Dutch jurist, Hugo Grotius, who wrote the official account of the incident, maintained the principle of *jus ad bellum* i.e., justification for war, in his book "On the Laws of War and Peace" published in 1625. The beginning of popular sovereignty following the French Revolution of 1789 that linked the legitimacy of the states with the rights of men opened up yet another door for lawfare in the realm of *jus ad bellum.* Lawfare exploits laws, treaties and conventions to strike down adversaries. And the fallout of lawfare is always an ongoing phenomenon in the world at large at any given time in history.

Take for example the British who enacted new legal doctrines and laws in British India and then manipulated these to achieve its commercial, trade and territorial objectives e.g., the East India Company under Lord Dalhousie introduced the ' Doctrine of lapse' which was used as an instrument to annex Indian states in the mid 19th century. The doctrine was the first of its kind in the history of India in the context of lawfare demonstrating British expansionist strategy, as also British consciousness to establish an empire. The doctrine challenged the traditional succession law prevailing in the princely states of the Indian subcontinent and paved the way for the annexation of native states one after another. According to the doctrine decreed by Lord Dalhousie, the rulers having no male heir were barred from appointing a legal heir to a state. Many such states by law were forfeited to the East India Company after the death of the ruler till 1854 and included the states of Satara, Jaipur, Sambhalpur, Bahat, Udaipur, Jhansi and Nagpur. The doctrine was confronted with a reaction from the natives resulting in

an armed 1857 uprising and its crushing. Subsequently, to tackle the Indian Question, the East India Company opted for a legal, political and financial mixture of lawfare to establish British Indian Empire. It succeeded.

The East India Company on behalf of British imperialists adopted a series of legal strategies in the greater context of lawfare to achieve its territorial, commercial and revenue collection objectives in India. It was a subsidized alliance system that incorporated defeated local elite to serve British interests. Those who cooperated without giving a fight were rewarded. Lawfare was the center of gravity of this effort. Laws were made to serve the purposes of British administrators. And control of the Indian subcontinent was asserted by the British through the use of military force, signing of the treaties with the native rulers, laying of railway lines, telegraph and telecommunications, military bases around India, recruitment of soldiers and police, controlling of industry, land and agriculture, and last but not the least lawfare. A bird's-eye view of the British asymmetrical lawfare strategy in the Indian subcontinent generally reveals constitutional and legal reforms, dispensation of justice, codification of public and private laws, judicial precedents and policies, dispute settlement methodologies, reorganization of the justice system, hierarchical court arrangement, unification of currency scheme, reforming tax and customs procedures and the fixing of land keeping records. The start point of the British lawfare was the introduction of English laws and the establishment of various courts under legal pluralism in the Indian sub-continent.

Legal Pluralism and Lawfare in the British India

For centuries, the indigenous law of the land effective under the Mughal rule throughout the Indian subcontinent was Muhammadan Law. Although, both the Hindus and Muslims were broadly governed by the Muhammadan Law, personal affairs of Hindus were administered by the Hindu personal laws[2], before the arrival of the British. The modern legal pluralism and lawfare in India can be traced back to the establishment of Mayor's court at Madras by the East India Company under the Charter of 1687. Concurrently, the Company got the right to self-government under the British law and the English people to live by their own religion and laws without any local interference. The British East India Company after the collapse of the Mughal Empire also got involved in the local politics and carved for itself a political power base. It, soon thereafter, introduced a legal system by establishing the Mayor's courts at Bombay, Calcutta and Madras under the Charter of 1726. While the English laws in vogue in the British settlements were extended to the natives "belonging to the Company or living under them" by the Charter of 1616, these were rarely applied to the native population. However, an important development was the establishment of Mayor's court at Madras under the charter of 1687 and its evolution as the 'General Court' administering civil and criminal justice. Nevertheless, the court under the charter of 1687 was the Court of Equity, whereas, the court under the charter of 1726 was the court of Common Law.

Sir Nathan Wright (1705) gives a brief description about the 'Equity' in the Lord Dudley vs. Lady Dudley case that equity is not part of the law but a moral virtue that qualifies, moderates, and reforms the rigor, hardness, and the edge of the law and is a universal truth[3]. Hence, the Charter of 1726 marked the beginning of Common Law legal system and is usually called the 'Judicial Charter'[4]. The charter introduced the English laws to the subcontinent; however, the courts were barred to hear individual cases of the natives under the Common Law. Take for example the Zanocky vs. Bendu case (1730) in which the Governor corrected the court by pointing out that the Company directors had instructed full respect for the native customs i.e., to recognize these as a law[5]. The Battle of Plassey proved a turning point for the British rule in India followed by the decisive British military victory in the Battle of Buxar in 1765 as a result of which the Mughal emperor delegated to the Company the responsibility for the *Diwani* of Bengal, Bihar and Orissa and handed over the revenue department and civil justice to the British[6]. The Mughal Emperor under the Treaty of Allahabad in 1765 surrendered the sovereignty of Bengal to the British and delegated to the Company not only the power to collect taxes but also the dispensation of civil justice to the native population.

Moreover, in a move to further its rule across the Indian subcontinent, the British East India Company operationalized the strategy of lawfare. The Regulatory Act of 1773 integrated the British settlements of Bengal, Madras and Bombay under the rule of Bengal. Warren Hastings, the then Governor of Bengal, was elevated to the new post of Governor General. Hastings introduced comprehensive reforms including an all-inclusive system for the administration of justice. He unified currency systems, ordered the codification of Hindu laws and digests of Muslim law books, reformed the tax and customs arrangement and fixed the land revenue and record keeping[7]. Moreover, a hierarchical system of courts was introduced that was divided into *Diwani Adalat* (civil court) and *Nizamat Adalat* or *Fozdary Adalat* (criminal court) presided over by Diwan (civil judge) and Daroga (magistrate), respectively. Similarly, appellate courts were also established i.e., *Sadar Diwani* and *Nizamat Adalat* across the presidency towns. Besides, a Crown Court i.e., Supreme Court was also established at Calcutta in 1774. The Supreme Court established in 1774 had various jurisdictions which involved national and international private and public law norms[8]. However, the general jurisdiction of the Supreme Court was extended to the English subjects and the servants of the Company only. As a result, there emerged two parallel legal systems on the basis of racial discrimination that continued until the enactment of the Indian High Courts Act 1861 that merged the Supreme Court and *Sadar Adalat* into new High Courts exercising Common Law.

Nonetheless, Hastings claimed, owing to the Company's judicial reforms, to be restoring the 'ancient Mogul constitution' following decades of dislocation, as the Company's judicial system dispensed a refined scheme of native laws i.e., Anglo-Indian Law[9]. The motive was to make the Common Law public and territorial. However, this

course was rectified by passing of the Declaratory Act of 1780 by the parliament. Section 17 of the Declaratory Act entitled the Muslims and the Hindus to be governed by the laws and customs of Islam and Hindu laws and usages respectively[10]. This rule was subsequently extended throughout the company's territories that expanded swiftly with least resistance across the subcontinent. Nevertheless, the laws pertaining to succession, caste, marriage, religious usages and institutions were singled out as personal laws; and Common Law was administered as *lex loci* i.e., law of the land. Subsequently, the court started hiring pundits and Kazis to decide cases pertaining to personal laws. As a consequence of the Pundits and Kazis issuing inconsistent *fatwas* and *Vyavasthas,* respectively, in somehow consistent cases, and the Common Law practice of taking note of precedents i.e., case law, the codification of Muslim and Hindu laws was stimulated[11]. Resultantly, there appeared the Charles Hamilton's translation of the *Al-Hidayah* (a compendium of Hanafi Muslims jurisprudence) and Nathanial Brassy Halhed's translation of *Vivadarnave-setu* or 'A Code of Gentoo laws'.

Nevertheless, owing to the influence of Western jurisprudence, to the case laws emanating from courts established and molded on English model, to the advance of modern ideas, and to the progress of education, the rules of *Shastra* and *Koran* have been gradually altered and relaxed[12]. Similarly, many principles of the Western jurisprudence appeared incompatible with the mode of life, traditions and manners of the native population. For instance, the '*Arrest on Mesne Process*' where the defendant was to be held in confinement till the final dissolution of the case was beyond all question one of the worst and most oppressive points of the law of England[13]. Likewise, the Supreme Courts were using the writs of Habeas Corpus beyond its jurisdictions and had superseded the Sadar Adalats judgments many times. Inappropriate punishments were awarded in numerous cases that shocked the natives. Take for example the case of Raja Nandkumar vs. Warren Hastings (1775) where the former had been awarded capital punishment under Forgery Act 1728. Neither the act had been ever promulgated in India nor was forgery considered a capital crime in Hindu or Muslim law. Raja Nandkumar who had brought charges of corruption against Warren Hastings became the victim of his rage[14].

Moreover, the Judicial Committee Act of 1833 entrusted the Privy Council, "the direct descendent of *Curia Regis",* with the appellate jurisdiction over the colonial appeals that was reaffirmed by the Appellate Jurisdiction Act 1876. The appellate jurisdiction of the Privy Council continued in the British dominions of India and Pakistan after the partition. The Privy Council too tried to inject the principles of equity and Common Law into the realms of Hindu and Muhammadan Law[15]. Furthermore, attempts were made to modify personal laws through direct legislations as well e.g., Bengal Sati Regulation Act 1829, Indian Slavery Act 1843, Caste Disabilities Removal Act 1850, Hindu Widows' Remarriage Act 1856 and the Doctrine of Lapse (1842). These adaptations threatened the traditional way of life of the Indian people. No wonder

the resultant feelings of discontent and despair ultimately led to the uprising of 1857 that the British successfully crushed and a new era began.

The British Colonial rule and Lawfare (1857-1890)

The British policy in India from 1765 to 1857 comprised of two phases i.e., the "policy of Ring-Fence" (1765-1818) and the "policy of subordinate isolation" (1818-1857)[16]. During the Ring-Fence period, the Company was confined to the established presidencies of Bengal, Bombay, and Madras. Subsequently, the Company started assimilating more territories that continued until 1857. However, there was no legal provision validating the holding of the new territories without attaching it to any one of the established presidencies. Besides, it was not practically possible to attach the large tract of territories to the three presidencies. Resultantly, the Governor General in Council began to administer these territories in his executive capacity under the power conferred on him by the act of cessation or conquest under the general principles of constitutional law[17]. Thus, the "Regulation" and the "Non-Regulation" systems of the government emerged in the Indian subcontinent. The regulation territories represented government by law and included the three presidency towns while the non-regulation territories represented the government by an individual; exercising executive, judicial and legislative functions in the territories that included important provinces like Punjab, Assam and Oudh. In this context, the Government of India Act 1833 designated the Governor General of Bengal as the Governor General of India and vested him with the legislative powers for the whole of India. All courts, including the Supreme Court were bound to observe the acts and regulations passed by the Governor General in Council.

Subsequently, acts and regulation were introduced for all the territories of India under the Company's rule that threatened the religious and traditional practices of the locals. Consequently, the aggrieved rulers of the annexed states mobilized the public dissent into 1857 uprising against the British. However, the traditional Indian society failed to defeat the East India Company and its military-industrial power that paved the way for the full British colonial rule. The aftermath of 1857 was austere and stern in the context of lawfare, though politically stable. And a society that stays politically stable for years with unchanged boundaries tends to accumulate all sorts of collective organizations[18]. Likewise, the British Empire liquidated the East India Company by an act of the parliament i.e., Government of India Act 1858, and India came under the direct rule of the Crown to serve the economic and strategic interests of the British Empire.

Moreover, the policy of annexation ended through the expressed proclamation of Queen in 1858 i.e., "We desire no extension of our present territorial possessions". For this reason, the territories not annexed earlier remained autonomous until the partition of the British India in 1947. However, the policy of "non-annexation with the right of an intervention" in the native states continued. Equally, the authority of a position not only entitles you to tell someone to do something, it also allows you to

create a complex of rules, procedures and systems for your own domain [19]. Subsequently, the British Empire in addition to the administrative and strategic measures like the Frontier Policy to protect its boundaries also codified laws to protect its colonial rule across the Indian subcontinent. In this context, the Provincial Small Causes Courts Act was enacted in 1860 (amended in 1887) to adjudicate Common Law in the non-regulation provinces. The justice system under the Common Law functioned under unwritten rules and legal principles as opposed to the Civil Law regimes under the codified laws. Still, the British paradoxically codified the bulk of Common Law to create the Anglo-Indian legal system.

The courts in India comprised of one third of the non-judicial Civil Service judges (Indian High Courts Act 1861). The distinct feature of the British legal system of case laws and precedents was far more difficult for the non-judicial executive officers exercising judicial functions in the non-regulation territories. The judges and magistrates in India were mostly not professional lawyers, and to them codification was always very welcoming[20]. Resultantly, the Indian Penal Code was enacted in 1862. Furthermore, the aim of codification was to promote law-making and amendments which was an easy task for the British Indian Government. Likewise, an asserting of British authority without resorting to force (i.e., Lawfare) was preferred by colonial authorities since this represented the cheapest means by which they could achieve their objectives[21]. Therefore, the Government of India Act 1870 to "*make better Provision for making Laws and Regulations*" empowered the executive arm of the British Indian government for making regulations having an effect like an act of the legislature. The Governor General (executive) Council became the supreme law-making body in India. The law was put into place as defined by Austin i.e., 'a command of the sovereign'. Many regulations for the territories, such as Assam, Andaman Islands, Aden, Ajmer-Merwara, British Balochistan, Coorg, the North-West Frontier Province and Burma, in which the hands of the executive required to be strengthened, have been made in this way[22].

Moreover, the British Empire during the second half of the 18th century was obsessed with the Russian expansions in Central Asia. The construction of the Trans-Caspian railway in 1879 and its extension to Bukhara and Samarkand in 1888 enabling Russia to bring large forces to the Afghan frontier was a further cause of worry for the British Government in India [23]. The British feared that the Russian advance into Afghanistan would not only expose its internal weakness but would also compromise its desire to control the Central Asian trade. This motivated the British to adopt a "Forward Policy" as opposed to the "Masterful Inactivity" across the North-West frontier. The policy enabled a growing military presence on the North-West frontier at the cost of increased risks of revolts in other parts of India. In the British perspective, lawfare was the way to secure the British Indian Empire domestically. Resultantly, every important aspect of the English law enforced in India was codified by 1890. The

codified laws included the Indian Penal Code and the Procedure Codes i.e., Civil and Criminal Procedure Codes. While referring to the sedition law under section 124-A of the Penal Code, Chief Justice N.V. Ramana of the Supreme Court of India said, "It was a colonial law to suppress the freedom movement"[24].

The Penal Code was a substantive criminal law based on the English Criminal Law, the bulk of which was drafted by Lord Macaulay who was the first law member of Governor General's Council. The other codified laws covered the Indian Evidence Act 1872, Contract Act 1872, Specific Relief Act 1877, Limitation Act 1877, Negotiable Instruments Act 1881, Transfer of Property Act 1882, Trust Act 1882, Company Act 1882, Easement Act 1882, Invention and Design Act 1888, Articles of War and Cantonment Act 1889, and the Guardian and Ward Act 1890. And since Hindu and Muslim laws were rarely included in these codes, the entire codification process represented the transplantation of English law to India complete with lawyers and judges[25]. Consequently, Indian nationalism emerged as a challenge to the British Empire's lawfare pursuits.

Lawfare and Constitutional Reforms

Surendranath Banerjee was one of the first Indians ever to be admitted to the Indian civil service and whose precipitous dismissal from service for a minor mistake resulted in an all-India campaign for a better representation of Indians in the Indian civil service[26]. And nationalist associations like Poona Sarvajanik Sabha founded in 1870 became the precursors and antecedents for the establishment of Indian National Congress in 1885. Consequently, the British became reluctant to induct Indians into the Indian civil service. The racial discrimination was evident even in the provisions of Criminal Procedure Code 1872 disabling Indian Judges to try British Europeans in criminal cases. From this point of view, it seemed to be a lesser evil to make some concessions to the Indian educated elite with regard to their representation in the provincial legislatures and in the Imperial Legislative Council as long as it did not lead to the control of British executive by the non-official Indian majority[27]. Concomitantly, the Indian Councils Act was passed in 1892 to increase the number of non-official members in the provincial and central legislative councils. However, the majority of the official members over the non-official members in the legislative councils and the administrative authority of the British officials was maintained. Earlier, in order "to hold the country with the full concurrence of its inhabitants and not merely by the sword"[28], the Indians were given first ever representation in the legislative councils under the Indian Councils Act 1861.

Sir Syed Ahmed Khan Bahadur K.C.S.I became the first member of the legislative council in 1861. Still, the legislative councils and the provincial administrations were paid no heed in matters of strategic importance such as the formation of the North-West Frontier Province (N.W.F.P) by Lord Curzon in 1901. Even the Lieutenant-Governor of the Punjab was by-passed in the negotiations with an

inadequate courtesy[29]. The partition of the Punjab was triggered by the 1897 tribal uprising. The scheme was to form a new frontier province and exercise a more direct control over the frontier tribes. Thus, the frontier region was further divided into settled and tribal areas resulting in the "three-fold frontier". The tribal areas became a 'protectorate' lying as a buffer between Afghanistan and the British India[30]. Moreover, unlike the "babus" and Hindu lawyers of the nascent Indian National Congress, the men of the frontier were not the type who yearned to take a civil service examination or serve on a municipal water council[31]. The British responded to this perception by subjecting the Pathans to the draconian Frontier Crimes Regulation 1901 and using a massive amount of force, in the form of blockades, military columns, or later, aerial bombardment, when dealing with the tribal unrest[32]. It took the British decades to conclude treaties with the tribes and establish normalcy.

The 1901 political development of the creation of the N.W.F.P and the 1905 radical Hindu nationalism and protests against the partition of Bengal had made Muslims conscious and mindful. The agitation by the Congress too against the partition of Bengal encouraged the formation of All India Muslim League. The defensive Muslim communalism developed due to the three factors i.e., the Hindu chauvinism of Tilak, the Hindu Revivalism of the *Arya Samaj* and the Hindu orientation of anti-Partition movement of 1905[33]. All India Muslim league was formed by the "Simla Group" of Muslim leaders who met Lord Minto in October 1906 at Simla to share proposals for prospective constitutional reforms. The Muslim leaders demanded separate representations for Muslims in the Legislative Councils. The demand for the separate electorates suited the British administrators who did not want to be dominated by the Hindu majority in the legislature. Hence, the idea for the separate electorates became a leading principle of constitutional reform in 1909. Moreover, to suppress the anti-partition unrest, the Government of India besides issuing emergency ordinances, passed the Prevention of Seditious Meetings Act 1907 to ban political meetings, the Explosive Substances Act and Newspaper Act 1908 to arrest agitation, and the Criminal Procedure Code Amendment Act 1908 to provide for the speedy trial in the context[34]. The constitutional reforms of 1909 also increased the number of members in the provincial and imperial legislative councils. However, the reforms were not extended to the frontier province in the northwest of India.

The next set of constitutional reforms was prompted by the World War I. By 1914, the Indian nationalism led by the Indian National Congress was already a potent force and the rapidly spreading nationalist sentiments were more extensive than intensive[35]. Besides, the British Empire and the "Jewel in the Crown" was faced with immense internal and external threats during World War I. The pro-Turkish sentiment and the rise of pan-Islamism, the German interest in the Indian revolution and their use of Indian nationalists and Hindustani fanatics, plus the Silk Letters Conspiracy, intensified crimes and murders of police officers and the similar revolutionary activities

troubled the British Empire[36]. The British, in order to suppress the anti-colonial activities passed the controversial Defense of India Regulations Act1915. The act was an emergency criminal law passed by the Governor General for the adjudication of cases pertaining to nationalist and revolutionary activities without trial. Similarly, in order to encourage harsher war-time revenue collection, revenue was taken out from the original jurisdiction of the High Courts by the Government of India Act 1915.

During World War I, India made direct cash contribution of £229 million and sent overseas materials amounting to at least £250 million[37]. Likewise, in a move to promote unfettered powers, the act exempted governor general, each governor, and each of the members of their respective executive councils from arrest and original jurisdiction of the High Courts. Nevertheless, to symphonize the liberal political choir on the large contribution India was making to the British war efforts, the Montague-Chelmsford reforms (1916-1919) were introduced that were promulgated as Government of India Act in December 1919. The prominent feature of the reforms was the devolution of power. It created "diarchy" at the provincial level i.e., it was a government in two halves, one for reserved and one for transferred subjects, but the halves were to associate and deliberate as a whole, only the voting being separate according to subject[38]. The provisions of the 1919 reforms were intended to rally the moderates, those among India's political classes who could be expected to govern India on Britain's behalf[39]. On the other hand, the suppressive provisions of the interim Defense of India Act 1915 became perpetual by the passing of Rowlatt Act in March 1919.

Conclusion

The British approach to India was that of the "politics of unity". However, between 1917 and 1940 India steadily advanced towards freedom and, it seemed, inexorably towards division[40]. The decentralization of power, Irwin promising dominion status to India in 1929, the round table conferences (1930-1932) leading to the Government of India Act 1935 all failed to reconcile freedom with unity. The acts of 1919 and 1935 provided substantial devolution of political power. The process of devolution generated the crises of Indian Unity[41]. The Government of India Act 1935 by introducing federal polity in India ensured provincial autonomy and "diarchy" at the center. Similarly, as an essential element of any federal constitution, a Federal Court was also established for the settlement of disputes between the federation and its constituent units. The aim of the provincial autonomy was to keep the control at the center but divide an all-India anti-imperialist front; however, on the eve of the outbreak of the war, this constitutional political strategy via constitution making had revealed some inner contradictions[42]. The British political strategy was to counter the mainstream nationalism promoted by the Congress. Instead, regional sub-nationalisms, factional politics, the imperfect nature of Congress mobilization, autonomous subaltern assertions and peasant nationalism were competing perspectives in the Indian

nationalist and freedom struggle against the British rule[43]. Moreover, to the dismay of British, the impending Congress majority at the central provinces in the 1936-37 provincial elections and its subsequent 'factional politics' to marginalize regional sub-nationalist political classes had resulted in the emergence of "mass nationalism" across the subcontinent. The Congress introduction of Wardha Scheme to promote Hindi, singing of *Vande Mataram* as the national song and hoisting of Congress tricolor flag as the national flag stirred Hindu-Muslim communal riots in India at the cost of Unitarian nationalism[44].

Furthermore, the unilateral declaration of war by the executive in 1939 without consulting the legislative councils resulted in a fresh wave of protests by the Congress. The demonstrations also occurred independent of the Congress. Neither Gandhi nor other Congress leaders had any idea how to organize and lead the struggle[45]. The British responded swiftly with the Emergency Powers Act 1939 and Defense of India Act 1939. Some 11,700 persons, including Gandhi and the members of the Congress Working Committee were held in detention under the Defense of India Act[46]. The Emergency Powers Act declared martial law and stripped the Criminal Courts of the jurisdiction over cases that fell under the Defense of India Act. However, unlike the past experience of the exercise of arbitrary powers by the executive to suppress agitations through legal instruments, the Federal Court emerged as a challenge. The Federal Court of India, besides the appellate jurisdiction, had an exclusive original jurisdiction to resolve disputes between the center and provinces, became the new battleground. The court issued a series of judgments that challenged the unfettered powers of the executive on the question of sedition and making of ordinances. For instance, in Niharendu Dutt Mazumdar vs. Emperor (1942), the Federal Court had set aside the order of the conviction of the accused for sedition. The court went into the merits of Mazmudar's speech and held that "the time is long gone when a mere criticism of government, even abusive language, was sufficient to constitute sedition"[47]. Likewise, in Keshav Talpade vs. Emperor (1943)[48], the Federal Court while directing for the production of the petitioner detained under Rule 26 of the Defense of India Rules 1939, questioned the very legality of Rule 26.

The judgments in favor of the revolutionaries had constructed a sense of "Legal Nationalism" that had added yet another feather in the cap of "mass Indian nationalism" in the British colonial India. The Unitarian Nationalism was dead. The situation was "far more serious than that of 1857" as reflected in a letter which the then Viceroy had sent to the British prime minister[49]. For the Liberation War of 1857 by the North-Indian Muslims against the British Raj had metamorphosed into a freedom struggle against the "Hindu Raj" that subsequently created the Nation-State of Pakistan. The idea of freedom not only allows the unexpected to happen, but forces it to become a reality too. Mohammad Ali Jinnah in 1945 had correctly perceived that "the united India means slavery for Mussulmans and complete domination by the imperialistic and hegemonic

Hindu Raj throughout the sub-continent, and this is what we are determined to resist with all that lies in our power". Looking at the state of affairs of Indian minorities today, especially Muslims, Jinnah was not much off the mark. The partition of the united India into Pakistan and India, agreed to by the Muslim and Hindu leaders, was disappointing for both the parties[50].

However, the relations between the leaders of Indian National Congress and All India Muslim League made it clear that the collaboration between them in any Central Government was impracticable; and when the only power which had been able to keep them together (with ever increasing difficulty) set a date for withdrawal, the two main parties were forced to accept the only arrangement they could get[51]. The rest as they say is history, that historically, never stops unfolding. It remains true for an extended South Asian region with no lessons learnt as its only truthful expression. The center-periphery relationship persists and is at the heart of continuing Anglo-Saxon lawfare e.g., the IMF imposed economic conditions and the forcing of the Pakistani state to legislate new corporate and banking laws. And the less said, about the alliance between the City of London, the neo-cons and neo-liberals and their imperialist lawfare strategies, the better it is. For law is a deceptively simple means of ordering the world and makes explicit the general rules we use to describe how our societies ought to be and those that lie behind our judges' decision[52]. The English law and the associated hierarchical legal structures remain the major thrust of law and its implementation in the post-partition India and Pakistan. The British legal implant continues to fail in the delivery of justice. It is justice internally, and non-interference externally.

Nevertheless, the two nascent states adopted the Government of India Act 1935 as their interim constitutions and continued as the British dominions. The bitter experience of partition with the British and the ideologically motivated national struggles forced them towards constitution making processes. India and Pakistan remained the federal dominions of the British Empire for a short period of time till the promulgation of their first constitutions in 1950 and 1956, respectively. British India's history until 1947 suggests that there was no clear separation between the executive and judiciary; the judiciary was under the control of the executive[53]. Law making, interpretation and dispute settlement were all dealt with by the executive. However, soon after the partition of British India in 1947, this course was rectified by the establishment of Supreme Courts in India and Pakistan under their separate constitutions. The commencement of the constitutional courts overturned the appellate jurisdiction of the Privy Council too, "the oldest surviving emanation of the royal prerogative", over the courts in India and Pakistan. It accomplished the separation of judiciary from the executive. However, the legacy of the British foreign policy in India in the form of Indian hegemonic ambitions, the Frontier Policy in case of Pakistan and the lawfare in both the countries continued. Still, Pakistan has reversed and replaced its centuries old British Frontier Policy with the New Frontier Policy; though the legacy of

lawfare leaves many questions unanswered. Inductively, it is for an inductive imaginative mind to explore answers to these unanswered questions for an addition to the existing knowledge. And imagination and interpretation remains central and critical to that.

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