Imperial Constitutionalism: Judicial Politics and Separation of Powers in Colonial India (1861-1935)

Cynthia Farid, Visiting Scholar, University of Wisconsin Law School

This paper argues that the colonial government in India was shaped by changes in property law, race relations, and other institutional interests that accompanied the political and economic restructuring of the colonial state. Therefore, the development of constitutionalism was the outcome of the interplay between institutional and professional interests and larger socio-economic and political forces.

These arguments are advanced against a historical examination of the origin of courts and the judicial bureaucracy and the concomitant production of a legal professional class in British India. The account of the professional class i.e. legal elites is told through the biography of Surendranath Bannerjea as a microcosm of larger developments that facilitated social mobility. Bannerjea was from an earlier generation of Indian students who traveled to London for legal and civil service training. Bannerjea engaged with the law in multiple capacities—as a civil servant, as an editor of a newspaper, a teacher and a politician. In these roles, Bannerjea was on the receiving end of law's repressive capacity and used the law as a mode of resistance. Bannerjea's case diverges from the conventional accounts of a nationalist past that tend to focus on Gandhi as a central protagonist.

This research situates the law as an arena for struggle, an idea that is of both historical and contemporary significance. Political regimes in postcolonial contexts tend to be characterized by lawlessness and disorder, or the oppressive and violent quality of legal institutions and law enforcement. Paradoxically, the rule of law has been a founding motif in constitutions across the region. South Asian political elites have invested considerable resources on constitutional reform, whether their goals were to create national and democratic imaginaries or to consolidate state power through anti-democratic means. Accordingly, the currency of legalism in the region is striking across a variety of regimes.

Constitution-Making in the Era of Decolonization: The Case of Pakistan

Maryam S. Khan, SJD Candidate, University of Wisconsin Law School; Research Fellow, Institute of Development & Economic Alternatives (Ideas), Pakistan

Pakistan's failed experiment with constitution-making in the first decade of independence has been attributed variously to an 'over-developed' bureaucracy, a weak political party system, prioritization of national security in the process of state-making, and the geographical separation of the country into two wings on either side of a hostile neighbor. The plurality of these explanatory variables has generated a rich scholarship with its own genealogy, but one that has been dominated by historians and political scientists, not legal or constitutional scholars. Consequently, the study of law remains divorced from historical context, with little knowledge production about the historical foundations or power structures underpinning the politics of constitution-making amongst the scholars, articulators, practitioners and reformers of the law. And because the focus of the existing literature from non-law disciplines is on the larger context of the militarization of the state, not on constitution-making *per se*, there is hardly any convincing account of what constitution-making was motivated by or what it signified for Pakistan's founders in the context of 'decolonization'. Added to this is the growing currency of the 'constitutional design' school of thought in comparative constitutional law that further dulls the prospects of historicizing the field of constitution-making.

Against this backdrop, this paper locates the politics of Pakistan's first Constituent Assembly (1947-1954) on a historical continuum between the 'colonial' and the 'post-colonial' in order to foreground the reflexive relationship and the various tensions between the inherited structures of colonial rule, the socio-political conditions of partition, and the political and institutional interests of the groups, parties and forces involved in the making and breaking of Pakistan's first unpromulgated constitution of 1954. Thus, instead of viewing independence as a moment primarily of anti-colonial or nationalist rupture, it brings the prevailing colonial power structures into conversation with the material conditions and political interests emerging from decolonization in the study of constitution-making.

Recording Evidence: Police 'Case Diaries' and Legal Inquiry in Nineteenth Century British India

Uponita Mukherjee, PhD Candidate, Department of Middle Eastern, South Asian and African Studies, Columbia University

My paper examines the history of the police 'Case Diary,' a form of official record and a peculiar colonial innovation that was introduced in criminal investigative work in British India 1861. Required to be written out daily, by all police-officers investigating a crime, *in* the course of the investigation, the case diary was meant to be the "most complete" repository of information elicited by pre-trial police inquiries in criminal cases. In other words, the information contained in the case diary comprised the primary pool of information on the very basis of which legal adjudication in criminal cases could proceed in court. The procedural rules that framed the up-keep and use of the case diary, however, explicitly stated that "[s]uch diaries *shall not be evidence* of the facts stated therein, except against the Police Officer who made it." In my paper I track the colonial emergence of legal ideas of evidence in the nineteenth century common law world by parsing this cardinal ambiguity of the case diary – its status as the most complete *account* of evidence, but not evidence *proper*.

The history of legal evidence in the common law world has typically been written as a set of ideas and concepts developed by elite European and American jurists and philosophers in the metropole (Shapiro 1991, Twinning 2009). Historians of colonial India, in turn, have identified a small minority of unofficial Europeans residing in the colony as the prime driving force behind legal reforms on matters of criminal procedure (Kolsky 2010). In my paper, I wish to interrogate both these approaches by shedding light on the peculiar role that colonial policemen routinely played in criminal trials – they were the 'hunters and gatherers' of evidence for law, but not its proper architect. In my paper I attempt to show that the ambivalent relationship of case diaries (and their policemen authors) with legal inquiry was fundamental to ways in which legal standards of admissible evidence were worked out in British India.

A Privileged Practice: Study of the Legal Profession in Pakistan

Summaiya Zaidi, Doctoral Candidate, Osgoode Hall Law School

Barristers imported from England and Ireland, as well as Advocates from Scotland, to the British Raj were awarded privileges in the new judicial system as introduced in 19th century India. This paper explores the impact of this history on the social hierarchies that exist in the legal profession in Pakistan today, especially the continued elevated status of barristers over advocates, even though there is no duality of profession in the country. All licensed practitioners are governed by the Legal Practitioners and Bar Councils Act, 1973, and fall into a single category of "advocates" which is defined by the Act, 1973, as persons registered on the rolls with the Bar. However, the lived reality of the profession continues to endorse privileges that are inherently colonial in nature, and serve to further entrench the profession, and the law, in Pakistan's colonial past.

Through a review of the legal education system as introduced by the British in India from the mid-19th century and beyond, and a study of the statutes regulating lawyers in British India and Pakistan post Partition in 1947, this paper seeks to understand how privileges awarded to barristers continue to persist in Pakistan in the 21st century within the legal and societal framework. Legal education plays a big role in this since there is duality in the LLB degrees available to law students – the Pakistan Bar Council and the Higher Education Commission regulates the 5-year BA/LLB degree in the country, and the University of London distance-learning 3-year LLB through its licensed centers in Pakistan. The latter, though based on English law, continues to gain popularity amongst aspirants to the legal profession over its Pakistani alternative. A review of the statutory framework and interviews form the basis of my study, and this paper is part of my PhD dissertation on legal education and practice in Pakistan.