

Readings In Indian Constitutionalism in the Context of Takeover of the Company *Bahadur* by the British Crown

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Abstract

This article undertakes a critical examination of early Indian constitutionalism by analysing the juridico-political implications of the transition from East India Company rule to direct governance by the British Crown post-1858. Framed within the evolution of colonial legal structures, the study interrogates the nature of constitutional authority exercised by the Company and the structural reconfiguration effected through the Government of India Act, 1858. It argues that the Crown's assumption of sovereignty did not merely mark an administrative shift but constituted a paradigmatic transformation in the constitutional framework of colonial India. Through a close reading of key legal instruments—particularly the Charter Acts, Queen's Proclamation of 1858, and subsequent legislative developments—the article demonstrates how the Crown's regime codified imperial centralisation, bureaucratic absolutism, and racialised legal hierarchies under the veneer of rule of law.

The analysis engages with both colonial jurisprudence and postcolonial theoretical frameworks to evaluate the constitutional continuity and rupture embedded in this transition. By situating this historical moment within the broader trajectory of Indian constitutional thought, the article provides insight into how colonial modes of legality and governance have shaped the foundational grammar of the Indian constitutional order, with enduring implications for concepts of sovereignty, state legitimacy, and legal modernity.

Key Words: Constitutionalism, colonial jurisprudence, Charter Acts, Constitutional framework of colonial India, Indian Constitutional Order

Introduction

Three scores and two years ago the freedom struggle for independent India had come to an end; it is time for every constitutional law student to closely examine, the legal and constitutional significance of events that preceded colonization of the country by the British Crown. For that purpose what is proposed is to re-look at the management of the affairs of a British company, the East India Company, popularly known as the 'company *bahadur*' in India,¹ the Proclamation war by the last Mughal Emperor, the Great War of 1857-58, his defeat, banishment and murder of his two sons, who were the heirs apparent, and the Proclamation by the Queen-in-Council converting all the possessions of the company *bahadur*, situated in India by a solemn declaration. That the Great War of 1857-58 was proclaimed on 25th August, 1857 by the last Ruler of a sovereign nation, that it was waged against the atrocities inflicted upon the people and petty rulers and chieftains of India, at the instance of a company incorporated in England, that the said foreign company won the war, that

¹ Strictly speaking the company was only an agent of the Mughal Emperor entrusted with the job to collect revenue from Bengal, Bihar and Orissa,
<http://jier.org>

another sovereign power, which supplied men, means and materials to the said foreign company to defeat the Emperor in the war, took over all the properties of that company situated in India, and that the takeover was sealed by a Proclamation dated 1st November, 1858, constituting all those properties into a colony in the name and style of British India, were not given the significance they deserve, by the historians. To call the mismanagement of the company's affairs in India as 'British Rule', to call the 'Great War of Independence' as '*sepo*y mutiny' or 'revolt', and to treat the company mismanagement, the charters issued to the company, the restrictive actions taken by the Crown to control the company from going amuck, with awe and respect they do not deserve, are all nothing but distortion of history.

The Intriguing Incident

Years back a gentleman approached one of my friends, Jose with a request to help him to incorporate and register a company in the name and style of '*West England Co. Public Limited*'. Jose was a little amused; but after a short pep talk, he found, the gentleman was serious! He was ready to bear all the expenses, however high that might be. "Why do you want to spend so much for this job?" My friend asked him. "I thought you understand what is exploitation and atrocities; I want to counter all the 'national exploitation' that had taken place in the past; the East India Company incorporated in England, had exploited Indians for about 150 years. I want to incorporate a 'counter-part' and create a company, just the reverse of it, 'The West England Company'. Don't you agree with me?" Jose sent him off with a piece of advice to approach a proper 'company lawyer'. He left my friend with a huff; but he could not stop pondering about his spirit of nationalism, with whatever hue one may look at it! As a student of constitutional law, the thoughts that were lingering on were, how can a company incorporated in UK, assume constitutional powers in India, as represented in most of the literature on the topic, and deprive millions of Indians their livelihood and basic human rights? Why do the historians distort the acts of 'mismanagement' of a company as acts of constitutional relevance?

The Discourse

For the purpose of limited discourse in this article, we intend to confine to the period of 'company rule' and exclude the 'colonial rule' from the pre-independent years of foreign domination.

The Great War of 1857-58 was sandwiched by two great 'Proclamations' in the same period, but one after the other, by two sovereign powers of the then known world. The first was the Proclamation by the last ruler of the Mughal Empire, calling for the war, the other by the Queen-in-Council, taking over all the properties, which were in the possession of the company in India, as on 1857, after the former sovereign power got defeated in the war.

The war of 1857 was not just an isolated instance in history. There were continuous rebellions, which were massive in totality, that were occurring in the length and breadth of the country. 'There was hardly a year without armed opposition or a decade without a major armed rebellion in one part of the country or the other. From 1763 to 1856, there were more than forty major rebellions apart from hundreds of minor ones.'² [Emphasis added].

The same author has beautifully summarized the peasant movements that preceded the great war of 1857, and the same is reproduced as such:

"Displaced peasants and demobilized soldiers of *Bengal* led by religious monks and dispossessed Zamindars were the first to rise up in the *sanyasi* rebellion, made famous by Bankim Chandra Chatterjee in his novel *Anand Math*, that lasted from 1763 to 1800. It was followed by the *Chuar* uprising which covered five districts of Bengal and Bihar from 1766 to 1772 and then, again,

² Cfr. Chandra, Bipin, & four others, "India's Struggle for Independence" Penguin Books, 1989, at page 43.

from 1795 to 1816. Other major rebellions in eastern India were those of Rangpur and Dinajpur, 1783; Bishnupur and Birbhum, 1799; Orissa Zamindars, 1804-17; and Sambalpur, 1827-40.

“In *South India*, the Raja of Vizianagram revolted in 1794, the Poligars of Tamil Nadu during the 1790’s of Malabar and coastal Andhra during the first decade of the 19th century, of Parlakemedi during 1813-14. Dewan Velu Thampi of Travancore organized a heroic revolt in 1805. The Vizagapatnam from 1830-34, Ganjam in 1835 and Kurnool in 1846-47.

“In *Western India*, the chiefs of Sanurashtra rebelled repeatedly from 1816 to 1832. The Kolis of Gujarat did the same during 1824-28, 1839 and 1849. Maharashtra was in a perpetual state of revolt after the final defeat of the Peshwa. Prominent were the Bhil uprisings, 1818-31; the Kitur uprising, led by Chinnava, 1824; the satara uprising, 1841; and the revolt of the Gadkaris, 1844.

“*Northern India* was no less turbulent. The present states of Western U.P. and Haryana rose up in arms in 1824. Other major rebellions were those of Bilaspur, 1805; the tahuqdars of Aligarh, 1814-17; the Bundelas of Jabalpur, 1824; and Khandesh, 1852. The second Punjab War in 1848-49 was also in the nature of a popular revolt by the people and the army.”³[Emphasis added.]

The comment by the same author clearly indicates, what preceded or what dragged the Indian population into the War of 1857, was not an isolated incident, and cannot in any way down-stated and depicted as a sepoy revolt: “These almost continuous rebellions were massive in their totality, but were wholly local in their spread and isolated from each other. They were the result of local causes and grievances, and were also localized in their effects. They often bore the same character not because they represented national or common efforts but because they represented common conditions though separated in time and space.”⁴

India as the Colonial Dominion

Percival Spear rightly observed that the “Indian society by 1850 had entered a period of stress. Tension was inevitable.....”⁵ The governor general of the company *bahadur*, Delhousie had decorated himself with an insignia of winning a bloodier Second Sikh War (1848-49); he also made sure that the Sikh did not resort to guerilla warfare, unlike the Marathas or the Burmese, after they were defeated in the war. The years that followed witnessed westernization on a war footing along with the annexation of many of the princely states, including two Maratha States and the great Muslim State of Oudh. Just before he left India, he gave *notice to the Mughal Emperor at Delhi that his title to the throne would lapse by his death*⁶. The situation was near explosive by the time he left in 1846.

As far as England was concerned, time was ripe to remove the company altogether from the Indian scene, and declare India as one of its colonial Dominion. But the American experience was staring at them. Instead, the company was allowed to initiate a vigorous westernization process that was meant to arrest formal conversion of Indian properties, then in company possession as a British colony. In England the company directors went on reminding the English about the American experience, painting a lurid picture of the fate that may befall on England, if India were to be colonized. They had perceived that there was a real danger of India following the American line, and ultimately England losing trade relation and opportunity of exploiting India in the name of trade for the exclusive benefit of the British. The monopoly status of the company *bahadur* was fading away; and if India at that stage was opened up for any Europeans to settle down, there would be a gradual repetition of American experience, the colonizing citizens from different countries of

³ Ibid, pages 43-44.

⁴ Ibid at page, 44.

⁵ Spear, Percival: “A History of India” Vol. 2, Penguin Books, 2003 (1965), at page 140.

⁶ Id. At page 141.

Europe, forgetting their mother countries, and eventually India would be lost to England forever.⁷ India remaining far away, heavily populated already, and cultural patterns firmly established, was not conducive to colonization as a practical solution to the then existing problems. It was in the interest of England to continue to exploit India as long as possible, without colonizing, through trade, finding appropriate market in India for export of finished goods from England, and westernize India as far as possible to buy apparent peace, required for continued exploitation in mass level.⁸ In any case, Delhousie vigorously followed implementation of the policy of westernization, just to ward off colonization of India by the British Crown during his period of management of the company in India.

5. But the efforts to stall colonization were not fully successful. Echoes of some obnoxious activities that followed and foreclosed both in India and in England, in the form of reports for the Crown, with of course creating high level of embarrassment both to the company as well as to Indians in general. Company's employment of two earlier Charters or Letters of Patents or Grants to the United Company of Plunder and Booty against the Indians in the Princely States especially the State of Oudh after they were annexed, was one of major reasons. The annexations were regarded by the 562 remaining princes as plunder, pure and simple with no legal or constitutional authority to do so. When Oudh was annexed, it was the *Zamindar*-s and army men who got disillusioned with the company.

The reports on the condition of slavery in India regarding the slaves the company acquired along with some estates, and the revolt of army first in 1824 at Barackpore and the imminent danger of army personnel again resorting to revolt, as it had started in Meerut on 10th May 1857, further aggravated the situation. The issuance of cartridges for the use of Enfield rifles greased with pig-and-cow fat and the discriminatory service conditions of Indian Army personals recruited from India with the British soldiers and officers were the other causes of agitation for the unrest. By that time the British Indian Army was by and large Indian, recruited as *sepoys*, while the officers were exclusively of British origin. The Indian *sepoys* were highly agitated with low pay and lack of avenues of promotion, compared to their British commanders. Besides, the Indian soldiers were called to fight battles in distant areas like Burma and Afghanistan, for furthering purely British Imperial interests.

The Background: The East India Company

The East India Company was incorporated as a commercial entity on 31-12-1600 in U.K. The company was given permission to trade with East Indies for 15 years; the permission could be terminated or extended for another 15 years. In 1612 the company became a joint stock company. Membership in the company depended upon the shares purchased for different voyages, or to anyone who contributed 100 pounds; distinguished individuals could become members by invitation. Membership was heritable to subsequent generations.

The governance of the company was in the hands of a chairman, who used to be called the 'governor'. He has to be elected annually, so too, a 24 member committee. Company could make its own rules for the purpose of running the business of trading as well as for protecting its business interests in India. On 3rd April, 1661 the company was reconstituted and became a regular permanent joint stock company and enjoyed monopoly in matters of trade with India. Voting powers

⁷ See, Dhagamvar Vasudha, "Law, Power and Justice", Bombay, 1974. at page 11.

⁸ Id at pages 11ff. A contrary view was well expressed by Macaulay, 'that it would be foolish and costly to hold on to India in such a manner as "would keep a hundred millions of men from being our customers in order that they might continue to be our slaves".....' quoted in Michael Edwards, 'The Last Days of British India', New York, 1963 Page, 5.

were restricted to those members who contributed 500 pounds to the company. The company's incorporation was further renewed in subsequent years, i.e. in 1668, 1676, and 1683.

Constitution of the company underwent a change in 1699. It now consisted of a general body (then known as 'general court') of all the members of the company, and a board of directors consisting of 24 members all elected from among the members of the company, who owned 200 in the name of each; voting rights were restricted to those whose stock was worth 500 pounds. The general body met four times a year; the board of directors looked after day-to-day affairs. There were no director from the Government, nor was there any nominee of the Government in the company. Company was purely a private commercial entity, incorporated under the relevant law, but permitted to operate over-seas for trade and commercial purposes.

Charters and Letters Patent of Grants

Even in England at the beginning of the seventeenth century the idea of a man going where he wished and indulged in trade as he thought best, was not considered to be a noble act; of course such an enterprise would be almost impossible for a single individual to undertake, yet if still ventured into, it would only be regarded as a little better than an act of a pirate.⁹ It is in this context that one has to view the formation of a company, incorporated under the relevant law, operating overseas for trade and other commercial purposes, purely as a private activity, jointly undertaken, but with legal recognition from the country of origin. It is in this context again that one has to understand the legal content of a 'charter' or 'letters patent of grants'. In modern day terms, they are directions and stipulations issued by a Company Law Board to any private or public limited company. The most appropriate way to regard these directions is as additional terms and conditions to the original letter of incorporation of a given company. Therefore the above referred 'charters' and 'letters patent of grants', are nothing but additional stipulations, terms and conditions to be read along with the original letter of incorporation of that company. Thus the charters issued to East India Company as well only contemplate that a company of merchants having factories, or business premises, at various places in India, needed special stipulations, terms and conditions to meet the requirements of different circumstances in which the company was operating. It is wrong to assume that these charters, just because they originated from an imperialist rule, were intended to seriously encroach upon the sovereign powers in India, or license to overthrow the Mughal Empire. But under the cover of these charters, the company wrongly began to assume legislative and judicial authority over Indian subjects, and mistook the authority of the charters as a license to exercise such authorities. What was permitted was to make bye-laws for a better management of the company and its affairs, or hold courts for the good governance of the company and its officers.¹⁰ The company in fact had always to get permission for undertaking a particular voyage; those permissions impliedly placed the servants of the company in much the same position as the sailors on board of a man-of-war.¹¹ But that exercise of power was strictly limited to the voyage and its servants; perhaps the company had the power to extend the same to its factories and business premises, provided it affected only the servants of the company. None of these could be made applicable to the native Indians. Sir Archbold mentions that when the English came to India, they found a 'very complete and well organized religious, social, and legal systems' in India.¹²

⁹ See the comments in this regard by Archbold, in 'Outlines of Indian Constitutional History', 1926, at page 10 of 1973 edition.

¹⁰ Id at pages 11ff. Some of these byelaws made by the company were in fact printed in 1621 and the extracts are reproduced, in the cited work.

¹¹ Id. Op. Cit. at pages 13-14, for comments.

¹² Id. Op. Cit at page 9.

The Mayor's Court

Let us have a look at the some of the subsequent charters obtained by the company. On an application by the board of directors and by the general body of the company jointly to the then King George I, the charter of 1726 was got issued, which in the first instance permitted the company to maintain forces on sea and on land for the protection of its commercial ventures of the company in India. Secondly, the company was authorized to establish a private dispute settlement forum, known as Mayor's Court, to settle all internal disputes within the company. These permissions were largely misused by the company, so much so, a new charter was issued in 1753 clarifying that the dispute settlement forum established by the company cannot entertain any case from the natives, nor sue them without consent. In 1783 the then Attorney-General at Madras gave an opinion to the company that the company had really no right to establish courts with jurisdiction over the natives of India at all.¹³

These comments reflected the sad state of affairs of the so called mayor's courts, in Surat, Bombay, Madras and in Calcutta. In 1685 when an English prisoner was sent home, a dispatch from England came to Surat, castigating the company courts and its presiding officers that they have no respect for law, nor for any evidence; the only testimony upon which the convictions were based upon, were *viva voce!*¹⁴ In Bombay in 1697, some of the travelers recommended that the pirates must be tried in India, because 'the natives in India consider that these marauders to be in league with the company, and think sending them to England for trial a mere pretense'.¹⁵ In 1671 the directors had questioned the company why it is not appointing judges well versed in civil laws; they further said that it is wrong to think that such a person might not obey the orders passed in the interest of the company. The account from Madras is more vivid: ".....The city of laws and ordinances

For its own preservation,
And a court kept in form,
The Mayor and Alderman in their gowns,
With maces on the table,
A clerk to keep a register of transactions and cases,
And attorneys and solicitors to plead in form
To the Mayor and Alderman;
But after all it is but a farce,
For by experience, I found,
That a few Pagodas rightly placed,
Could turn the scales of justice,
To which side the Governor pleased,
Without respect to equity or reputation."

".....And the Governors dispensing power of
Nulling all that the courts transacts,
Puzzles the most celebrated lawyers there
To find rules in the statute laws."

".....That power of executing pirates
Is so strangely stretched that
If any private trader is injured

¹³ Taken from Op. Cit. at pages 32-33.

¹⁴ Id. Op. Cit. at page 36.

¹⁵ Id. Op. Cit. at page 37.

*By the tricks of a governor
And can find no redress,
If the injured person is so bold
As to talk of Lex Talionis,
He is infallibly declared a pirate.*"¹⁶

The Charters of the Company

What is stated above regarding the content of the charters can be substantiated from the wording of some of the charters only. The charter of Feb. 4, 1622 is called, '*A Charter or Letters Patent of Privilege for the Governor and Company to chastise and correct all English persons residing in the East Indies and committing any misdemeanour, either with martial law or otherwise*'. Twenty-one of these charters, issued between 1604 to 1660, were called, '*License to transport money*'; and four of these charters, issued between 1677 to 1693, were called, '*Warrant to receive money*' or '*A Warrant for payment*'. The charter of Nov. 11, 1693 was called, '*A Charter or Letters Patents, prescribing orders and directions for the Governor and Company*'. Another charter of July 22, 1702 was called, '*A Charter or Letters Patents of an Indenture Quinquupartite, of the conveyance of the dead stock of the two East India Companies*'. One of the most interesting charters issued on Sept 19, 1757 was called, '*A Charter or Letters Patents of Grant, to the United Company, of plunder and booty*'. Another one in similar lines was issued on Jan. 14, 1758 and that was also called, '*A Charter or Letters Patents of Grant, to the United Company, of plunder and booty*'. One of the last charters issued was called, '*A Charter or Letters Patents of Commission to the United Company, for trying of Pirates at Fort St. George*'.¹⁷

Thus from the time the company was incorporated, for about one and half centuries, i.e., till the war of grant of *diwani*, the company was a trading company, having factories and premises in many parts of India, to house the commercial establishments and the members of the force permitted to be maintained for the safe keeping and protection of the company's establishments, all with appropriate licenses from the appropriate sovereign power, wherever such establishment was located. As for instance, in Surat, the company obtained some trading rights from the local authorities, confirmed by the then Mughal Emperor; but those rights were limited to trade, hire a house, and have self-government of their own people and not beyond. These were the pattern in almost all the licenses granted to the company in India. By 1702, the company had scores of factories and other commercial establishments all over India¹⁸, and they were mentioned in the charter of 1702, referred above. These were further expanded during the next half a century. Sir Archbold, quoting from the Imperial Gazetteer, rightly states that as the English settled in India under the license of a native ruler, the natural consequence for them was to be the subject of Indian law,¹⁹ which was according to the same author, 'very complete and well organized religious, social, and legal systems'.²⁰

¹⁶ The above account, originally written in prose is Alexander Hamilton's *New Account of the East Indies*, published in 1927, available at Archbold, Op. Cit. at page, 38. The present writer found when arranged in the form a poetry, without any changes, it reads better; and he would recommend it to be incorporated into the text books on English language for enlightening the young mind, both on the language and history with a bit of nationalism.

¹⁷ All the charters issued prior to the Regulating Act, were given in the Appendices to Archbold, Op. Cit., at pages 259 to 262.

¹⁸ For details, see Archbold, Op. Cit., at pages 27-28.

¹⁹ Op. Cit. page 43.

²⁰ See supra Note, 18.

The Company after 1757

After the war at Plassey, the company received grants in 1760 and 1765; the former was known as 'the grant of Mir Qasim' and the latter, 'the grant of *diwani*'. It was the latter grant by which the company became an agent of the Mughal Emperor, to collect revenue from Bengal, Bihar and Orissa. The final form of grant was in the form of an agreement containing several articles, according to which the *Nawab* of Bengal was to pay twenty-six lakhs of rupees to the Mughal Emperor, and the company were to guarantee that it should be done; and the *Nawab* received a fixed allowance. In the capacity of *Diwan* the company administered the land revenue, controlled and collected customs. Calcutta was held by the English in free tenure, and the adjacent 24 Parganas as *Zamindar* and the rest of Bengal as *Diwan*; and the authority of the *Nawab* continued. But the company was not under the jurisdiction of the native courts; and all ²¹cases concerning the company were controlled by Sir Robert Clive the hero of the war, and the architect of the grant to the company, by a set up at Murshidabad.

Clive, who always had recognized the sovereignty of the Mughal Emperor through the *Nawab*, had declared, that 'the company had acquired no sovereign rights and that the administration was within, and not imposed over and above, the Mogul constitution'.²² The company directors from England intimated the company in India, by a letter dated May 17, 1766 that the office of *Diwan* should be exercised only in superintending the collection and disposal of the revenues; their powers by no means shall be extended beyond the superintending the collection of the revenues, and receiving the money from the *Nawab*'s treasury to that of the *diwani* or the company.

Immediately after receipt of the grant, and after Clive left, the servants and the officers of the company grew more and more greedy and was indulging in profiteering of the first grade, resorting to all means of hook or crook. Not only that these officers and servants indulged in corrupt practices to enrich themselves, to the alarm of the political bosses in U.K., these members of the company also began to indulge in political affairs at U.K., when they returned with the ill-gotten wealth amassed in India. In spite of the illegal extortion of revenue from the landlords and natives, the servants and the officers of the company enriched themselves and the company as such was almost becoming bankrupt, and the Crown had to oblige the company with lavish loans. In return the Crown envisaged greater control over the company.

The situation in Bengal was so alarming, that one of the Resident from India wrote on May 24, 1769, that something need to be done immediately to remedy the situation. He wrote,

"It must give pain to an Englishman to have Reason to think that since the accession of the Company to the *Dewanee* the condition of the people of this country has been worse than it was before;these appear to me the principal causes why this fine country which flourished under the most despotic and arbitrary government, is verging toward its ruin while the English have really so great share in the administration."²³

In fact a committee was appointed in August 1869 to look into the matter. But that committee was busy in collecting accurate statistics, with a view to increase in revenue, when actually an awful famine struck Bengal in 1770 as predicted by the English themselves, and as a result of their own evil deeds.

Efforts to Control the Company since 1773

One of the first major attempts to control the company by the British Government was by enacting the Regulating Act of 1773, by which the structure and composition of the company was sought to drastically be altered; and the British Government thought it the best way to remedy the already

²¹ Arbhbald Op. Cit. at page 48.

²² Id. At page 46

²³ Quoted in Op. Cit. page, 49.

worsened situation that prevailed in India. The control of the affairs of the company was unified in the hands of the 'governor general' with four councilors to advise him; they could only be removed by the King on the recommendation of the board of directors, which consisted of 24 of them elected once in four years. The 'governor general-in-council' i.e., the governor general and the four councilors, would decide all matters pertaining to the affairs of the company by a majority vote and could also decide all matters pertaining to the management and control of the territorial possessions of the company, so far they relate to the affairs of the company. For this purpose and for an orderly management, the 'governor general-in-council' could formulate rules and regulations, and they shall not be unjust, unreasonable and not repugnant to the laws of England. Thus the Regulating Act, established a direct parliamentary control over the affairs of the company and its management, primarily pertaining to collection of revenue as an agent of the Emperor, and ending the 'charter-regime' for the first time in the history of the company. The 'governor general-in-council' was forbidden to declare war or conclude any treaty with any Indian power.²⁴ The officers of the company enjoying a very high salary bracket were also forbidden to engage themselves in trade or accept any present from native princes. The salaries of higher officers of the company were fixed, taking these factors into account, compensating the ensuing loss and at the same time demanding faithful discharge of their functions assigned to them in discharge of the affairs of the company and for protecting the interests of the company free of any temptations. Any crime and misdemeanor against the inhabitants of India at the instance of the officers and servants of the company were declared as punishable, and they would be awarded appropriate punishments, if found guilty of such offences, after a trial in accordance with the English law, by the Court of King's Bench Division in England. Similarly punishments could also be awarded against the officers and servants of the company, in the lesser pay packet, by the 'governor general-in-council', but can be imposed only by the Crown. On the other hand, the officers and servants of the company who defraud the company, commit breach of trust or commit offences of embezzlement while collecting revenue, irrespective of the rank and file or office one holds in the company, would be liable to be tried and punishment can be imposed in accordance with the English law, by the Court of King's Bench Division in England.

The sum and substance of the Regulating Act was to literally regulate the management of the company affairs, the misdemeanor of the its servants and officers, contain and not to let anyone repeat the malpractices that ended up destroying the wealth of a population, ending up with a widespread and totally destructive famine, and finally to regulate, restrict and punish those who defrauded the company or embezzled the revenue income for personal enrichment, and commit breach of trust against the company.

The intentions of the British Government in adopting these measures to reign in the unruly behaviour of the officers and servants of the company, because of which the company was almost becoming bankrupt, and the individuals becoming richer, are lofty indeed, but in reality, these regulations were notable more in their breach. The subsequent and actual conduct of the company in India belied all the hopes and aspirations of the framers of the Regulating Act. Lord North in U.K. did admit these facts.²⁵ What could be the legal and constitutional implications? The agents of the Mughal Emperor for collection of revenue were continuing to go amuck and inflicting horrors to the inhabitants of these regions for years together, the company and the officers and servants of the company making exorbitant income, fleecing the farmers, princes and landlords in every possible manner. Every attempt of the British Government to regulate and control came off with little consequence or effort as far as the operations of the company in India is concerned.

²⁴ See, S.K.Puri, '*Indian Legal and Constitutional History*', New Delhi, 2001, at page 197.

²⁵ It is so stated in S.K.Puri, Op. Cit. at page 198.

In spite of clear ban on declaring war and entering into treaties²⁶ with any Indian power, several wars were fought, such as those against the Marathas, incurring heavy cost on the company and quietly passing the entire burden on to the revenue paying Indian public. The intentions of the British Government should also be taken with a pinch of salt, that instead of further control over the company, allowed additional British troops to be stationed in India at the cost of the company in 1784. *The then known international law and standards do prohibit use of civilian or private enterprise to advance the cause of one sovereign power against the other, by whatever name you may describe the phenomena.* The British Government was in fact indulging in such international crime over another sovereign power in the name of trade and commerce. *All the killings at the instance of the company, of the members of army of the princes, and death of the native sepoys of the company army during the so called wars, needs to be treated as crime against humanity.* The company, its officers and servants in India were indulging in atrocities and profiteering and wrongly enriching themselves, again wrongly and under a mere pretext of exercising themselves some sort of vague sovereign powers over the inhabitants of India, while the fact was that the only power conferred upon the company was purely in the nature of trade or commerce, and revenue collection as a business venture, and never as a sovereign function, as Clive himself, the architect of that grant of *diwani* fairly conceded. Some of the western jurists had unsuccessfully ventured to justify the wrong actions of the company that happened in India because of the absence of any marked 'law of the nations' in place in India.

The decade that followed the Regulating Act, witnessed unhappy incidents, obviously triggered by the actions of the British Government. In Madras, the governor was imprisoned by his colleagues, and finally died in prison. In Bombay, the company refused to honour the commitments and waged war against the Marathas, in wanton violation of the provisions of the Regulating Act, which had clearly prohibited the company to do so. In Bengal the Indian princes were so cheated that they unanimously came to the conclusion that the company cannot be trusted any more to honour the commitments they made, because whenever the company found that commitments were to their disadvantage and inconvenience, they ignored.

Another attempt to control the company from 1784

In spite of the British Government's attempt to contain the excesses of the company in India, the affairs were only going from bad to worse. Therefore the British Parliament made another attempt in the year 1784 by passing Pitts India Act of 1784. The said Act created two separate bodies of management: the first was known as the 'board of control', and the second one was known as the 'board of proprietors' or 'court of proprietors'; the latter was created out of the proprietors of the company, to take care of the affairs of the company in India. The members of both these bodies were stationed at U.K., but the salary for these members were to be paid out of the Indian revenues. The British Government by these reasserted that the company in India should not in any manner intervene in the affairs of the Indian Princely States, since,

*"...to pursue schemes and extension of dominion are measures repugnant to the wish, the honour and policy of this nation."*²⁷ (Emphasis added)

But the company the years that followed, made quick turn around these stipulations, with the help of various self-invented doctrines of backward and forward circumventions, called the doctrine of 'subsidy alliance', doctrine of 'lapse' ...etc. and annexed vast territories of the Indian Rulers.

²⁶ Treaty is universally considered a sovereign function and no private person or a company meddle with such functions.

²⁷ Keith, '*Speeches and Documents of India Policy*', page 111, quoted in S.K.Puri, Op. Cit., pages 199-200.

Doctrine of 'subsidy alliance' means acquiring territory by surrender of a portion of a territory of an Indian Ruler, to meet the military expenses incurred for extending protection in times of need. Doctrine of 'lapse' means, annexing territories of Indian Princes, when any one of them died without a male heir; the basis of this doctrine was the theory that the Indian Princes cannot make valid adoptions without the assent from England! In fact there were some provisions in the Regulating Act that were meant to curtail the company from indulging in misuse adoptions in India. Company used those provisions to annex more properties from the Indian chieftains.

In yet another attempt to control the company operation in India, the British Government in 1786 gave special powers to the governor-general of the company to over-ride his own council members, even if the decision is supported by a majority of the members of the council present and voting. Conferment of this power was necessitated, when the British Government noticed instances of manipulation and influencing the council members with extraneous considerations, for obtaining vital decisions in a particular manner, affecting the wealth and fortunes of the company.²⁸

This was followed a series of actions by the British Government to control the company and management of its affairs in India. The Charter Act of 1793, made further improvement on the constitution of the company, the commercial monopoly was extended for another 20 years, and the members of the board of control was to be paid out of the revenue collected by the company from India. After expiry of the above stated 20 years, the British Government sought to permit British citizens to have trade with India, under a license system, by the Charter Act of 1813 and brought further improvement in the functioning of the company requiring them to separate accounts of its activities, including those expenditure incurred for maintaining and protecting the company's possessions in India. It further directed the company to create a separate fund for education, but strictly out of the revenues collected from India. The company used to pass on these additional burdens to the zamindars and landlords quietly and levied from them in the name of cess or surcharges.

This arrangement continued for another 20 years; during this period expansion of territories by the company was going on abated, Maratha power was seriously crippled, Bhopal, Jodhpur, Jaipur, Bundi,...etc were annexed, expansion of territory in the east also went unabated; these were continuing in spite of clear directions not to interfere with the affairs of the India rulers, and of prohibiting any form of expansion, declaration of war, and entering into treaties with Indian Rulers, there by meddling with the exercise of sovereign powers by the company. The malpractices and mismanagement, fleecing of Indian natives and Princes, violations of most of the provisions of the Regulation Act, all continued as before. The reaction of the British Government was very ambivalent. They saw on the one hand increase in revenue and the company asked to pay sixty thousand pounds a year to England; and on the other it was observed that company had scant respect for control and regulation from England, wanton violations of its own byelaws and regulations, most of them often contradicting, conflicting decisions coming out of its own courts, and anomalies in 'rule of law' from region to region. In the meantime the internal management of the company was also going haywire; each governor was becoming a law unto themselves. To streamline the situation, by the Charter Act of 1833, it was directed that all the laws and byelaws and regulations passed by the governor general in council or by any other authorities the assent of the British Government was made necessary. It is by this Act that the company's existence, under changed conditions was extended for another twenty years, i.e., till April 30, 1854.

As mentioned above, from 1833, the company was forced to function under a strict legal regime, and the Crown held the rein on the company in this regard. The freedom given to the company to

²⁸ Id. Op. Cit. at page 200.
<http://jier.org>

make rules and bye-laws was subject to close scrutiny. The British constitutional historians consider this as acquisition of legislative powers by the company, for the first time under the protective cover of the Charter Act of 1833, and from that time onwards, the governor-general in council could 'make, amend and amend laws and regulations', but without affecting or altering the provisions of that Act as well as 'any laws and regulations which shall in any way affect any pre-rogative of the Crown, authority of Parliament, or the construction or rights of the said Company...'etc. The company was said to have dealt with the question of legislation, entrusted to them always in a reforming spirit.

Let us take for example the legislative provisions for abolition of slavery. The Act itself contained the following provision:

"And be it further enacted, that the Governor-General in Council shall and he is hereby required forthwith to take into consideration the means of *mitigating the state of slavery, and ameliorating the condition of slaves, and of extinguishing slavery* throughout the said territories, so soon as such extinction shall be practicable and safe....."²⁹ [Emphasis added.]

It is worth noting the state of affairs as far as far as slavery is concerned, that existed at the time when the Charter Act of 1833 was passed. A letter of Warren Hastings, the then governor general, dated October 18, 1774, referring to the regulations passed on May 17, 1774, is a clear evidence of an example how slavery, till then considered abominable to the Indian tradition, was introduced indirectly, in name of regulating and finally abolishing the practice by the company officers and servants, as it was in vogue in the West and was struggling to legally abolish the practice there. He did acknowledge that 'the opinions of the most creditable of the *Musulmen* and *Hindoo* inhabitants have been taken upon this subject, and they *condemn the authorized usage of selling slaves*, as repugnant to the particular precepts both of the *Koran* and *Shaister*, oppressive to the people, and injurious to the general welfare of the country'. Yet he has noted that 'that the *practice of stealing children from their parents and selling them for slaves*, has long prevailed in this country, and has greatly increased since the establishment of the English Government in it'.³⁰

The two relevant clauses of the regulation is reproduced below

"That every person *who shall forcibly detain, or sell any man, woman or child, as a slave* without a *Cawbala* or Deed attested in the usual manner, by the *Kazi* of the place where *the slave was purchased* by the proprietor, or who shall *decoy away or steal any children from their families* or places of abode shall be punished as the law to which he is amenable shall direct....."

"That from the 1st day of July 1774 answering to the 21st day of *Rubee Asseny* or the *11th Assar Bengal* style, no person shall be allowed to *buy or sell a slave* who is not such already by former *legal purchase*, and any *Kazi* who shall grant any *Cawbala* after that date for the sale of any slave whatever, shall be dismissed from his employment and such *Cawbala* shall be invalid....."³¹ [Emphasis and italics added.]

The above referred letter continues describing how did they receive an intimation from Dacca, and what was their reply:

"In consequence of these orders, we received a reference from the Council of Dacca advising us that it was an established custom throughout the Dacca districts to *keep in bondage all the offspring and descendants* of persons who have once become slaves, and requesting therefore to be furnished with our orders whether the benefit of our 10th Regulation was to be extended to the *children of slaves* subsequent to the period mentioned in that Regulation."

²⁹ Quoted from Archbold, Op. Cit. at page, 103.

³⁰ For detailed write-up see, Archbold, Op. Cit. at pages, 102-109.

³¹ Ibid, at page 102.

“...we were of the opinion, that the *right of masters to the children of their slaves could not legally be taken from them in the first generation*, but that this right could not and ought not to extend further; and we directed the several Provincial divisions to make publication accordingly.”³²[Emphasis added.]

In 1811, the English had declared that engaging in the slave trade was a felony, and this statute was made applicable to India; and in 1824, it was made piracy, the penalty being death; and it was these legislative provisions that were in vogue in England that were sought to be incorporated into the charter of 1833.³³ Yet formal abolition of slavery in all company establishments was deferred for the time being, and that was finally abolished only in the year 1843!

The Proclamation No.1 from the Last Emperor

The several proclamations issued by the last Emperor Bahadur Shah, after receipt of notice from Delhousie,³⁴ were nothing but attempts to rally the Indians under one flag and get rid of the company's domination. All these do describe that the situation of stress was near explosion in the 1850-s.³⁵ The proclamation of war by the last Mughal Emperor will have to be seen as a culmination of a situation where Indians were left with no other options but to resort to war with whatever little resources that were available to them and that being recouped by the emperor by the said official and formal Proclamation of 25th August 1857, against the usurping company and its mismanagement Neither the Indian people nor its rulers could in any manner restrict the company nor limit its interference with legitimate rule then existed in the country, because of simple and indiscreet use of muscle power and shrewdness of mind to exploit a nation, with a remote control from England. War was the only inevitable solution. It is in this context that the great war of 1857-8 was begun and rightly described as the ‘First War of Independence’.³⁶

The first of the Proclamations was issued by the ‘last Emperor’ and it is known as ‘*Ishtahar*’. As mentioned above, this was the last one to be issued by the Emperor and the occasion for the issuance was that many of the distressed Hindu and Mussalman chiefs, who have long since quit their homes for the preservation of their religion, and have been trying their best to root out English from India, had they approached him and were already spearheading an Indian crusade against them. The present proclamation was for the information of the public, and the Emperor wished to impress upon them that it is the duty of the whole public that this proclamation should be given due consideration and abide by it. All those who were willing to participate in this common cause and at the same time did not have sufficient means to provide for themselves, would receive daily allowance from the Emperor, for participation of this common cause:

“...Be it known to all that the ancient works, both of the Hindus and Mohammedans, the writings of the miracle-workers, and the circulations of the astrologers, pundits and *rammals*, all agree in asserting that the English will no longer will have any footing in India or elsewhere....”³⁷

³² Quoted from Archbold, Op. Cit. at pages, 103.

³³ See the extract in Note above.

³⁴ Delhousie left India in 1846.

³⁵ See M.S.Ram, “Freedom of India in the Words of its Architects” East West Books, Madras, 2003, pages 10 ff.

³⁶ In fact the Emperor was defeated on June 20, 1858 and deported, his two sons who were the heir apparent were murdered, all possessions of the Company Bahadur in India were annexed by the Crown and reluctantly announced colonization of India by a formal Proclamation, which was to take effect from 1st November 1858.

³⁷ Quoted from the opening paragraph of the proclamation, reproduced in M.S.Ram, op. cit. page 13.

The proclamation further exhorted the people, that it was their duty to give up any support to the English, and promote common good under his leadership, till they achieve the final goal; if not, they will one day repent that this golden opportunity also had slipped out of their hands.

After the above introductory part, the proclamation is divided into five sections, addressing special sections of the society, before ending the proclamation with a final call for war. The first section was addressed to the *zamindars*, promising that their burden of contribution to the *Badshahi* government would be light, the dignity and honour would be safe, and they will have absolute control over their *zamindari*, with least interference from the Emperor. The dispute will be summarily decided, according to the *surrah* and *shasters* without incurring much expenditure. All those *zamindars* who will assist in the present WAR with their men and money shall be excused for ever from paying one-half of the revenue. And if any *zamindar*, who had been unjustly deprived of his land by the English, join this WAR, at the end of the war his *zamindari* will be restored, and he will be excused from paying one-fourth of the revenue.

The second section is addressed to the merchants; the Emperor is inviting all merchants to take part in the WAR and aid the *Badshahi* government with their mind and money, either secretly or openly, depending upon their present trading relation with the English; The Emperor was reminding them the fact that the infidel and treacherous British have monopolized all the fine and valuable merchandise, such as indigo, cloth and other articles of shipping, leaving only trifles to the Indians and taking away all what the Indians get by imposing custom duties and stamp fees and taxed with postage, tolls and subscriptions for welfare activities; he further promised them that there won't be any more humiliations and imprisonment, all fraudulent practices will be dispensed with, trade of every articles by land and water will be opened to all, the government steam vessels will be made available to transport their merchandise free of charge, and those merchants who have no capital of their own will be assisted from the public treasury.

The next section addressed to the public servants, sounded as if what was being announced was a HOLY WAR. The Emperor declared that all native public servants, whether they are Hindus or Mohammedans, are sure to go to heavens if they happened to die while fighting against the English; and those supporting the English are sure to go to hell. Besides, at the end of the WAR he promises all higher posts such as colonel, general and commander-in-chief, which were then denied to the Indians; similarly the posts of collector, magistrate, *sudder* judge, secretary, and governor, with lakhs of rupees of salary and presently reserved for Europeans, will be offered to Indians.

The section addressed to artisans asserts that they were entitled to both secular and eternal happiness if they assist the *majahdeens* and other members who are fighting the present WAR. The Emperor describes how the English by introducing their own finished goods into India, have thrown the weavers, cotton-dressers, the carpenters, the blacksmiths, shoemakers and other artisans out of their occupation and have reduced them to beggary. After the WAR, he promises that they will be exclusively employed in the service of the kings, the rajahs and the rich, ensuring their prosperity.

The fifth section is addressed to all learned men including the *pundits* and *fakirs*, the guardians of the Hindu and Mohamedan religions respectively, and exhorts to treat all British as enemies of both the religions, and since the present WAR is fought against the English on account of religion, it is to be treated as a HOLY WAR; if any one did not participate in the WAR, with all their power and ability, they will stand condemned according to the tenor of the *surrah* and *shasters*; on the other hand if they participated, and once the *Badshahi* government was well established, they shall receive rent free lands.

The proclamation ended with a warning to all those who would disregard this *Ishtahar* and side with the British, that all their estates will be confiscated, his property plundered, he himself with his whole family, would be imprisoned, and ultimately put to death.

The Proclamation No.2 from the British Crown

After the WAR the Emperor was defeated and was banished to Burma; and his two sons, the heirs-apparent, were brutally murdered,³⁸ and Queen Victoria issued the second Proclamation on 1st November 1858.³⁹ Even though the war was against the company, the company was not in a position to win the war without the lavish support of the British Government; in return, in fact the company lost everything; the Crown took over all territorial possessions and the company was packed back to England, 'lock stock and barrel'. A closer look at the proclamation, which contains sixteen paragraphs, besides the opening part, would reveal that it has substantial correlation with the first proclamation of the last Emperor. Paras 4 to 6 and 9 seems to have been issued as an answer to the call of the Emperor contained in the first section of his proclamation. The second proclamation is silent about the trade and Indian merchants, contained in section two of the Emperor's proclamation, except a desire to stimulate peaceful Indian industry, mentioned in the final para of the Queen's proclamation; that is perhaps in view on the monopoly in trade, the Crown was going to enjoy in future. Para 3 and 8 of the Queen's proclamation correspond to section III of the Emperor's proclamation; while section IV of the Emperor's proclamation on the artisans, finds no place in the Queens proclamation. Para 7 of the Queen's proclamation corresponds to section V of the Emperor's proclamation; and paras 10-15 of the Queen's proclamation correspond to the concluding para of the Emperor's proclamation. The way the Queen's proclamation after the war, has dealt with the issues contained in the Proclamation of war, cannot be just brushed aside as co-incidental; rather it must be taken with serious constitutional implications that followed the great war after defeat. It must be viewed in the light of the consequential take-over of a nation by a foreign sovereign power after defeating the existing sovereign power in war.

Let us look at the second Proclamation in detail and find out what were the legal and Constitutional implications involved with that proclamation. The first part is a declaration of taking over of all the properties that were occupied by the East India Company, within the four boundaries of India, and of the intention of the Crown to step into those properties as a colony of the British Government. As a consequence, the company will not have any territorial possession within the Indian sub-continent; all liabilities arising out of any of the agreements with regard to those territorial possessions, entered into by the company, shall now be that of the British Crown. The chief executive officer (the CEO) of the company is now replaced by a Viceroy, who will henceforth administer the colonial possessions in the name of the British Crown. All native Indians are advised to behave like ideal subjects of the British Colonial Power.

The proclamation deals with the princes elaborately,⁴⁰ and promises to them that the Crown shall respect the rights and dignity of the native princes, and there will not be any more encroachments of their properties, and they should enjoy their status with prosperity and for social advancement.

Another promise, the proclamation has made to all Indians, including the Indian public servants, is that the Crown will treat them with the same obligations of duty as other subjects of British origin, and the promise made in the name of God asserts that it shall faithfully and conscientiously be fulfilled. Specifically the proclamation promises that all subjects, of whatever race or creed, be freely and impartially admitted to offices, but only in accordance with their qualifications, ability and integrity that are required to be discharged.

In response to the Holy War, called in the name of religion, the Crown solemnly disclaimed what they call is their right to impose the truth of Christianity as their convictions upon their subjects after

³⁸ It was Major William Hudson who had captured, the 82 year old Emperor, Bahadur Shah Zafar from Humayun's Tomb and exiled to Rangoon. He had also murdered two sons and a grandson of the Emperor and hanged them from *Khooni Darwaza*, on September, 1857. He was also responsible for hanging 27,000 inhabitants of Delhi.

³⁹ A copy of this proclamation is available in M.S.Ram, op. cit. at pages 20-22.

⁴⁰ The Emperor's proclamation had left the princes altogether from its coverage.

defeat in the war, and promised that Christianity will not be imposed on the Indians, they shall not interfere with any religious belief or worship; anyone who interferes shall be punished; nor shall anyone be favoured in the name of religion; and all shall enjoy equality before law and equal protection of law.

The proclamation further acknowledges the feelings of every Indian regarding their attachment over the land inherited by them from their ancestors, and declares that the Crown is bound to protect those rights, and all other rights connected with them, only subject to equitable demands of the Dominion. It further promises while framing and administering law for the purpose due regard will be given to the ancient rights, usages and customs of India.

Without referring to the atrocities, plundering, brutal killings and murders that followed after the war was won, the proclamation refers to show of mercy and pardon, in paras 10 to 15 of the proclamation, which corresponds to the sanctions and consequences announced by the Emperor in the concluding para of his proclamation.

Finally invoking God's blessings and strength the proclamation had vowed to administer the Dominion for the benefit of all the subjects resident therein; and boldly declared, "*In their prosperity will be Our strength; in their contentment Our security; and in their gratitude Our best reward.*"⁴¹

Constitutional Implications

It is true that after winning the war, there was no treaty of any kind entered by the British Government with the defeated Emperor.⁴² The second Proclamation may be treated as a Treaty, not with the defeated Emperor, but with the people of India, thereby recognizing the sovereignty of the people of India, demanding and requesting to be faithful subject of the newborn British Dominion; that may be considered as the legal implications of the second Proclamation. What about the Constitutional implications? In the absence of a written constitution, as the British is known for it, the contents of the second Proclamation can be safely treated as the Constitution of the new born Dominion, with all its promises and magnanimity shown to the Indian population. Indian population had no bargaining power; all the promises in the second Proclamations were promises and concessions unilaterally granted by a sovereign power to the Indian population to live with dignity even under the British Government.

Now the question arises, were all those promises and concessions unilaterally granted by a sovereign power to the Indian population to live with dignity, actually intended to be kept up, or they were another British ploy to buy peace, and never intended to be followed. After recognizing the sovereignty of the Indian population and after making unilaterally all those promises and concessions, did the British trick the Indian mass? If they did, it must be with impunity. If most of the promises and concessions made in the second Proclamation were in fact not intended to be kept, and as stated above the second Proclamation will have to be treated as an '*in situ* Constitution' of the Dominion, the subsequent conduct of the British Government will have to be treated as 'fraud on the Constitution'.

Over the years, Indian constitutionalism operated in the strangest manner. The post 1857-58 war, the Indian population was able to get a constitution in the form of a Proclamation from the Colonial power, recognizing its sovereignty, and unilaterally the British Government was forced to issue promises and concessions, as the circumstances demanded of them to do so, and in terms of constitutionalism-at-work, these promises and concessions were in fact limitations on the Government of the Dominion as far as the Indians are concerned. Even after defeat the Indian mass

⁴¹ See, M.S.Ram, op. cit. page 22.

⁴² Mirza Ghalib describes the situation: "Delhi became a capital without a ruler, a slave without a master and a garden without a gardener." Quoted in TOI, dated, august 14, 2006.

happen to secure from the colonial power various limitations in the form of promises and concessions. Constitutionalism is nothing but limited Government impelled by nationalism.

The British Government was running the risk of declaring its colonial rule as illegal, as they could not and did not meet the promises and concessions, which were in fact the constitutional limitations on the colonial power, which they were forced to grant to the Indian population unilaterally, as the circumstances warranted. The history will testify how those promises and concessions subsequently dealt with as far as the Indian population under the colonial rule is concerned.

Gopal Krishna Gokhale, a known moderate, while giving evidence before the Royal Commission of India in 1895, i.e. nearly forty years after the second Proclamation, said,

“A kind of dwarfing or stunning of the Indian races is going on under the present system. We must live all our life in an atmosphere of inferiority and the tallest of us must bent in order that the exigencies of the existing system must not be sacrificed.”⁴³

Mahatma Gandhiji had launched the non-violent movement in 1920; but the incident of *Chauri Chaura* was a set back and he had to call back the movement, subsequently he was prosecuted for treason and was imprisoned. The immediate cause was shown as the publication of an article in *Young India*, under the title, ‘Shaking the Manes’. He wrote,

“No empire intoxicated with the red wine of power and plunder of weaker races has yet lived in the world, and this British Empire, which is based upon organized exploitation of physically weaker races of the earth and upon a continuous exhibition of brute force cannot live if there is a just God ruling the universe. It is high time the British people were made to realize that the fight that was commenced in 1920 is a fight to the finish, whether it lasts one month or one year or many years and whether the representatives of Britain re-enact *all the orgies of the Mutiny day* with redoubled forces or whether they do not.”⁴⁴(Emphasis added)

Conclusion

The two hundred fifty years that ended with a declaration by the British Crown, in 1858, heralding colonization of India, cannot be described as a period of British rule in India by any stretch of imagination. The legitimate Rulers of India during that period was the Mughal Emperor and other Indian kings and Princes. They were the sovereign power that was ruling the country, until another sovereign power, after defeat in a war declared the country as colony of the British Empire. By the above said declaration, the Crown had taken over all the properties and possessions of a British company, earned mostly by illegal means, and the company was asked to pack-up from India. All the records of the company regarding their affairs with India was asked to be handed over to the Secretary of State and the Crown left no place for the company in what so ever manner in the business of governance of the newly colonized nation. As Archbold puts it, the greatest corporation the world has ever seen, continued to possess only a shadowy existence for the purpose of winding up its affairs till 1874.⁴⁵ A foreign company born in the year 1600 in accordance with the British law died a corporate death by 1874 in Britain, with no apparent obituary.

Strictly speaking to call the incidents of 1857-58 a ‘war’ may be constitutionally wrong. A war in international law is understood as an armed conflict between two nations, or between two sovereign powers. Those incidents deserved to be described only as ‘one sovereign power asserting the royal Scepter against the thuggery and genocide committed by a corporate power in a foreign soil’. Another sovereign power, under which the said company was born, were watching carefully all its activities, made several efforts to control the unruly company, and tolerated its activities, for quite a

⁴³ Id, at page 17.

⁴⁴ Id at pages 176-77.

⁴⁵ See Archbold, op. cit. at pages 116-119.

long time, with a view to retaining India only to be exploited by trade, and using the country as a dumping ground for finished goods produced in the factories of the British companies all over the world. The Crown never wanted to colonize India, lest they may lose India altogether, thanks to the American experience. History can never tolerate, the brutality in which the forces of the company, meant only to protect the company' establishments, and for that purpose recruited *sepoys* from among the natives, went on killing thousands of civilians and allowed a large number of native militia suffer death. Making company recruited native Indians kill thousands of other native Indians is abhorrent to international norms of any kind. Civilians killings civilians, is an international crime, or crime against humanity.

The sum and total of what is described above is that activities of the 'east India company, till the receipt of grant of *diwani*, had some semblance of legality, since the company was able to perceive '*very complete and well organized religious, social, and legal systems*'⁴⁶ at work in India, and accordingly many of the activities like trade or establishing factories in India were undertaken under a license from the concerned Ruler or the Emperor. After the grant of *diwani*, Sir Robert Clive, the chief architect of the grant from the Mughal Emperor, exhorted his men to continue to respect the sovereignty of the Emperor, saying, '*the company had acquired no sovereign rights and that the administration was within, and not imposed over and above, the Mogul constitution*'⁴⁷. Therefore, till the British Crown proclaimed to colonize India in 1858, for all purposes, the Ruler and the constitutional head, as far as India is concerned was the Mughal Emperor along with other local kings and Princes.

As seen above, the company had no constitutional powers that could be validly exercised in India; nor did the British Crown indirectly exercise such powers over India. Bitten by the bitter American experience, it was a planned and deliberated decision of the Crown that India should remain only as foreign nation for exploitation through trade and for other commercial purposes, lest they lose India as they lost the America forever. The company was accordingly directed to initiate the so-called 'westernization' process on a war footing, to create a climate conducive to commercial exploitation. But inebriated with the kind of wealth and might the company was enjoying in India, they ventured to simulate constitutional powers over India with impunity. They killed thousands of Indians, thinking that they have the authority or power to do so. They started assuming judicial powers; but when the company began to establish courts for the natives in Madras, the then attorney general of Madras, opined that *the company had no right to establish courts with jurisdiction over the natives of India at all*⁴⁸.

The assumption of legislative powers needs a little more elaboration. We tend to attribute a lot of awe and respect, which they do not deserve, to the charters issued to the company from England. The true legal content of the charters has been explained in those paragraphs. It is now sufficient to state that these '*charters*' and '*letters patent of grants*' were nothing but additional stipulations, terms and conditions to be read along with the original letter of incorporation of that company. Heraldng an end of the 'charter-regime' and in a bid to control and regulate the unruly company, a series of *Charter Acts and Regulating Acts* were resorted to. But the fact remains that these English enactments only further sought to improve the constitution of the company, in an apparent bid to control illegal activities of the officers and servants of the company, and at the same time to safeguard the commercial and trade monopoly of the company, which had proved to be a 'golden egg-laying-goose' for England. It was these Charter Acts and regulating Acts that used to empower the company to pass regulations for the better management of the company as well as to facilitate

⁴⁶ See, Note 26 supra. [Emphasis added.]

⁴⁷ See, Note 28 supra. [Emphasis added.]

⁴⁸ See, Note 19 supra. [Emphasis added.]

smooth collection of revenue, which slowly was becoming their main business. These empowerments to pass regulations certainly did give them the legal status of 'bye-laws' of a company, intended for the efficient internal management. But some of the British historians treat those instances of acquisitions of legislative power by the company. We have seen at para 18 and 19 above that how assumed legislative power was brought into operation; and how the company did, go about legalizing slavery in India, a concept till then unknown to India.

The execution of this assumed legislative power by the company may need a little more elaboration, preferably with reference to a particular tribal area. In the statute book of State of Jharkhand, one can still read, '*The Sonthal Parganas Act, 1855 [Act XXXVII of 1855]*'. Which was the legislature that had enacted this piece of legislation? The answer is the East India Company! Did the company possess such legislative power to enact a law, and call it an 'Act', and that too, before India was colonized by the British Crown? Certainly not. A closer scrutiny would reveal, the circuitous route the company had taken to give expression to the assumed legislative power. A small note given at the end of the page indicates, 'Short Title-This short title was given by the Amending Act, 1903 (1 of 1903) Schedule I.' That means, this piece of legislation was called an 'Act', only by a subsequent amendment! Can it be validly done, is still a mute question. The fact is that this was not an innocent piece of legislation; it had assumed civil and criminal jurisdiction, and even dealt with death penalty, but care was taken to save all European British subjects from all such laws. The above said un-amended Act of 1855 contained the following provision,-

"The Administration of civil and criminal justice.- In the administration of civil and criminal justice, the officer or officers appointed under this Act shall be guided by the spirit and the principle of the civil and criminal laws administered in the courts of the East India Company....."

It is worth noting that even before the 'Short Title' was subsequently amended in 1903, the term 'Act' was used in this section or clause, by whatever name one may call it.⁴⁹ It also would go to show, that the administration of civil and criminal justice was confined to the company, its officers and servants only; and in other forms of regulations, only 'the spirit and the principle of the civil and criminal laws administered in the courts of the East India Company' were to be followed.

It is the hope of the author that the students while studying the Legal and Constitutional History of India, keep the above notes in mind and evaluate themselves the extent of these facts contributing to the progress of 'Constitutionalism' as far as India is concerned.

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⁴⁹ It is acknowledged that the original text as such could not be gone through.