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## The Principle of Constitutional Competence: Rethinking Legality, Power, and Corporate Sovereignty in the Making of British Bengal

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### ABSTRACT

The Agreement of June 1757, in which an English East India Company official and Mir Jafar Ali Khan agreed that the Nawab of Bengal, Siraj ud-Daulah, should be removed, is a recurring problem in the study of the constitutional law of Bengal: a document with two main parties who, on their own merits as analyzed under Mughal administrative law, Hanafi jurisprudence, and English chartered-corporation law, lacked lawful power to enter into it, but which triggered one of the most dramatic transfers of government in history. This article elaborates the Principle of Constitutional Competence as a tool of general analysis that can initially be used to address this paradox. The doctrine is that the political effectiveness and the later legal recognition of an act of government are independent of the constitutional validity of it; that it can be legally recognized at any time, but not at any time, and that it can be politically successful without being constitutionally valid. The article aims at depicting the transformation of the province of Bengal from Mughal rule to British rule in terms of a series of analytically separable achievements, control, recognition and institutionalization in which different actors and legal logics are at work, rather than as a single act of usurpation, legitimated after the fact. The relevance of the principle to the current discussions on corporate power, sovereign authority and the legal liability of non-state actors performing governmental functions is then discussed at the end of the article.

**Keywords:** constitutional competence; legal pluralism; corporate sovereignty; delegated authority; Treaty of 1757; Mughal constitutional law; East India Company; sovereignty theory; legal history; comparative constitutionalism

### 1. Introduction: A Constitutional Paradox

In the summer of 1757, representatives of the EIC secretly came to terms with Mir Jafar Ali Khan, Bakshi of Bengal, who promised to support the EIC's then Nawab in return for being recognized as the Nawab the following year and receiving a large financial and commercial package from the EIC.<sup>1</sup> This agreement was instrumental in the success of the Battle of Plassey the following month and in the events of the next thirty six years which culminated in the development of a distinctly colonial administrative system in Bengal by the time of the Cornwallis Code of 1793, the subject of the other two companion studies to which this article is the theoretical synthesis.

But taken as a legal instrument alone, the Agreement is an obvious paradox. The Mughal Constitution provided for a position of high military responsibility for Mir Jafar known as

<sup>1</sup>William Dalrymple, *The Anarchy: The Relentless Rise of the East India Company* (London: Bloomsbury Publishing, 2019), 69–106.

Bakshi, which, based on the evidence available, did not include the right to select a successor for a sitting Nawab.<sup>2</sup> The classical Hanafi jurisprudential doctrine of delegated authority, public trust and public interest arrives at the same result by an independent pathway.<sup>3</sup> On the English side, the Company's powers were granted under a series of royal charters issued over a period of time, all of which were based on the idea of protecting and promoting trade, and which did not explicitly or by necessary implication include powers to interfere in the political destiny of a foreign monarch or to become involved with the political reorganization of the whole province.<sup>4</sup>

In other words, neither party to the Agreement had clear constitutional power to enter into the Agreement. But the Agreement did work. It resulted in the removal of Siraj ud-Daulah, the installation of Mir Jafar, and in the next few decades, the transformation of a chartered trading corporation into the most powerful governing body for one of the richest provinces of the Mughal Empire. What can constitutional legal history say about an act which was, on the best possible analysis, unconstitutional under all laws to which it was subject, and yet played a historically determinant role?

The answer to this article is, for this reason, the Principle of Constitutional Competence (PCC): a principle that speaks to the difference between constitutional validity, political effectiveness and later legal recognition, and posits that each of these is a distinct analytical question that must be evaluated independently of the others and at an independent moment, meaning that success on one dimension does not depend upon success on the other, and shouldn't either feed into the success of the other.<sup>5</sup> In the rest of this article the principle is developed in more general terms, applied to the Agreement of 1757 and its institutional consequences, and examined in light of the case of eighteenth-century Bengal.

The article is continued in five other parts. In Part 2, the principle is placed in the context of existing scholarship on legal pluralism, corporate sovereignty and law and political power. In Part 3 the Principle of Constitutional Competence is stated formally, with a distinction of the three analytical steps. In summary, the principle is applied to the Bengal case in part 4, building on the more in-depth doctrinal analysis done elsewhere. Part 5 examines the implications for legal pluralism and comparative legal and constitutional history, while Part 6 explores its relevance to current issues of corporate power and sovereign authority, and concludes.

## **2. Situating the Principle: Legal Pluralism, Corporate Sovereignty, and the Limits of Existing Frameworks**

### **2.1 The Historiography of 1757 and Its Analytical Gap**

There have been several approaches to the study of 1757, each of which highlights a different aspect of the year, and none of which directly challenges the constitutional dilemma discussed above. Colonial, nationalist, Marxist and economic approaches to the study of 1757 have emerged.<sup>6</sup> British expansion was seen as a result of the decay of the Mughals and

<sup>2</sup>Muzaffar Alam, *The Crisis of Empire in Mughal North India: Awadh and the Punjab, 1707–1748* (Delhi: Oxford University Press, 1986), 22.

<sup>3</sup>Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd ed. (Cambridge: Islamic Texts Society, 2003), 350.

<sup>4</sup>Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford: Oxford University Press, 2011), 39.

<sup>5</sup>Cf. Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), 159.

<sup>6</sup>Cf. P. J. Marshall, *Bengal: The British Bridgehead: Eastern India, 1740–1828* (Cambridge: Cambridge University Press, 1987), 61.

colonial historiography did not explore issues of authority. The episode was redefined by nationalist historians, who classify it in terms of moral allegiance, not constitutional. Economic historians placed the Agreement in the evolution of commercial capitalism, while revisionist historians (among others, Bayly, Marshall, Travers) saw it as a process of negotiation and continuity rather than of rupture.<sup>7</sup> None of these traditions, useful as other uses, provides a structure of explanation of how an unauthorized act came to be a foundational act.

## 2.2 Legal Pluralism and the Company-State

Two more recent literatures are more closely related to the present interest. In this account of a “fragmented, overlapping” legal geography of the early modern empires, Lauren Benton shows that the problem of sovereignty in the colonial world was not always resolved through a single legal order, but that more than one, and sometimes conflicting, legal system, operated at the same time in the same space.<sup>8</sup> The Company-state is also described in a way that is consistent with the development of the hybrid nature of the Company over many years, even before 1757, according to Philip Stern’s account.<sup>9</sup> Both literatures shed light on the context in which the Agreement of 1757 was made and put into effect, and both are in accord with, but do not tell us of, a clear distinction between the right to act, the ability to act, and the legal effects of having acted. This article’s special contribution is that mark.

## 2.3 Sovereignty Theory and the Problem of Effective Control

In the doctrine of state recognition in international law, an effective control over territory is considered to be relevant to, but not necessarily sufficient for a government to be recognized as a sovereign state, there has long been a debate about the relationship between the two.<sup>10</sup> The distinction between a “practical” and a “normative” form of power is explored in Martin Loughlin’s account of the foundations of public law.<sup>11</sup> In the eighteenth century, Bengal was a state and a prime claimant to the status of a state, but these frameworks are usually applied to states and international recognition; the present article brings a structurally similar distinction to the domestic and imperial constitutional context of eighteenth-century Bengal, and to a non-state corporate actor, the East India Company, rather than to a state claimant.

## 3. The Principle of Constitutional Competence

### 3.1 Three Separable Questions

The Principle of Constitutional Competence is that every action which claims to exercise or transfer governmental power gives rise to three analytically separate questions that are often treated as one in the historiography.

The first is whether the actor at the time of the act had lawful authority under the legal order or orders under which he acted to perform the act in question. It is reviewed only on the basis of the power which was available at the time of action and no retrospective extensions of powers are allowed based on what later turns out to be successful or acceptable.<sup>12</sup>

<sup>7</sup>Robert Travers, *Ideology and Empire in Eighteenth-Century India: The British in Bengal* (Cambridge: Cambridge University Press, 2007), 41.

<sup>8</sup>Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2010), 197–245.

<sup>9</sup>Stern, *The Company-State*, 95–168.

<sup>10</sup>Cf. Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2001), 174.

<sup>11</sup>Loughlin, *Foundations of Public Law*, 159.

<sup>12</sup>Cf. M. Athar Ali, *The Mughal Nobility under Aurangzeb*, rev. ed. (New Delhi: Oxford University Press, 1997), 143.

The second is political effectiveness: did the act (legal or not) result in the desired practical effect, and how, through military, financial, diplomatic or institutional means? The answer is an empirical and does not depend on the answer to the first one.<sup>13</sup>

The third is the subsequent legal recognition: was the practical outcome given some subsequent, independent legal or constitutional process, whether in the nature of an imperial grant, a law, a judicial decision or an act of institutional accommodation, a legal status it did not have at the time of its initial accomplishment? This question, importantly, does not relate to a new legal act, is performed by an actor or institution with its own independent authority and is not performed to validate retroactively the original defective act.<sup>14</sup>

### 3.2 Why the Three Questions Must Be Kept Separate

The analytical power of the principle is in overcoming the following two errors. The first mistake is to assume that, once an act has been seen to have proven politically successful, constitutional validity becomes irrelevant, and to leave constitutional history with nothing but a blank and empty record of successful power. The other mistake is to assume that if there is no legal sanction, then it's not politically effective, a mistake that doesn't explain why politically unsanctioned actions often have enduring institutional effects.<sup>15</sup> The Principle of Constitutional Competence prohibits both mistakes and says it is essential that the three questions are asked and answered separately that an act can be constitutionally invalid, politically effective, and then the subject of legitimate legal recognition, all without contradiction.

### 3.3 The Role of Subsequent Recognition

The third part of the principle is of particular concern, as it is in this part that the danger of mixing up the analytical categories is greatest. Subsequent recognition on this model is not evidence that the original act was valid from the outset; it's another, autonomous exercise of authority by another actor, which is reacting to a different set of facts. The grant of the Diwani in 1765 is a model case: the Mughal Emperor had transferred to the Company a specific governmental role in a constitutional act that had an undeniable legal pedigree under the Mughal law, but did so in 1765 when the situation was as it was and did not assert that the Company's previous actions in 1757 were lawful when carried out.<sup>16</sup> The same is the case with both the British Parliament's Regulating Act of 1773 and Pitt's India Act of 1784, which were designed to address a given situation by establishing new supervisory bodies but not to establish the legality of the situation that had led to them.<sup>17</sup>

### 3.4 Anticipating Objections

There are two objections that can be made to the principle as stated. One is that, in its abstraction, it becomes an old and commonplace maxim: Strength isn't identical to justice, and covers too much technical jargon. This is a modest assessment of the contribution of this principle. The Principle of Constitutional Competence does not really bring anything new; it is only a method of analysis to be applied to a general proposition, namely that power and

<sup>13</sup>Dalrymple, *The Anarchy*, 106.

<sup>14</sup>Loughlin, *Foundations of Public Law*, 205.

<sup>15</sup>Cf. Benton, *A Search for Sovereignty*, 220.

<sup>16</sup>Cf. John F. Richards, *The Mughal Empire*, *New Cambridge History of India*, vol. I.5 (Cambridge: Cambridge University Press, 1993), 312.

<sup>17</sup>H. V. Bowen, *The Business of Empire: The East India Company and Imperial Britain, 1756–1833* (Cambridge: Cambridge University Press, 2006), 71.

legal authority can be divergent. It is a structure for the sequence of constitutional history, rather than just a restatement of the difference between law and power in the abstract.

The second objection is that the principle is seen as analytically flexible, as any future act of recognition would then be counted as a separate and legitimate step, no matter how dubious its origin, and thus could always be redescribed as such. The answer is that while the principle may hold true that all acts of purported recognitions are lawful, each act of recognition must satisfy stage one of the analyses, as judged against the constitutional authority of the person acting on it.<sup>18</sup> The principle does not assume the authority of either the Mughal Emperor or the British Parliament, and could not have been denied either of these constitutional orders. When a purported act of recognition is an act performed by an actor who cannot act it, the principle comes to the same negative conclusion as in the original act, not creating legitimacy by repeating it. The framework is therefore falsifiable in the relevant sense: it can and does flag sequences that never created an authority and when Bengal's own history is examined, in isolation, it is obvious that there were such sequences.

#### **4. The Principle Applied: Bengal, 1757–1793**

The Principle of Constitutional Competence is most effectively illustrated in the application of the principle in a summary fashion throughout the entire episode this article's companion studies examine in doctrinal detail.

##### **4.1 Stage One: Constitutional Validity at the Moment of Action (1757)**

Assessed under Mughal administrative law, Hanafi jurisprudence, and English chartered-corporation law, the Agreement of June 1757 fails the first stage of the principle on independent grounds under each legal tradition considered. Mir Jafar's office of Bakshi carried military and administrative responsibility but not competence over succession or provincial resources; the Company's charters authorised trade, defence of trade, and incidental administrative functions, but not the determination of a foreign ruler's succession. The convergence of three independent legal traditions on the same negative conclusion is itself analytically significant: it suggests the deficiency was not an artefact of any single tradition's particular assumptions but a genuine absence of authority under the standards applicable in eighteenth-century Bengal generally.

##### **4.2 Stage Two: Political Effectiveness (1757–1765)**

The Agreement of June 1757 is assessed under Mughal administrative law, Hanafi jurisprudence and English chartered-corporation law. Each of these is evaluated independently, and the Agreement fails in all three. The Bakshi of Mir Jafar was responsible for military and administrative matters, but had no competence in succession or provincial resources; Mir Jafar's charters empowered him to engage in trade, to defend trade, and other incidental administrative duties, but not to determine who would succeed the foreign ruler or manage provincial affairs.<sup>19</sup> The fact that three separate legal traditions agree on the negative outcome is analytically significant: it indicates that any lack in authority was not due to the unique expectations of a single legal tradition, but a true lack of authority within the expectations of the legal traditions applicable to eighteenth-century Bengal as a whole.

<sup>18</sup>Cf. Loughlin, *Foundations of Public Law*, 172.

<sup>19</sup>Alam, *The Crisis of Empire in Mughal North India*, 22; Stern, *The Company-State*, 39.

### 4.3 Stage Three: Successive and Distinct Acts of Recognition (1765–1793)

The third stage was not a one-off action of ‘back-covering’ validation, but was repeated, as a series of independent legal and institutional responses to a developing factual situation. The Diwani of 1765 provided constitutional status to the Company from the Mughals, but it did not sanction the way the Company had acquired this role.<sup>20</sup> The Regulating Act of 1773 and Pitt’s India Act of 1784 provided parliamentary oversight of a government which the Company had taken *de facto* over.<sup>21</sup> In 1793, the Cornwallis Code of rules provided institutional structure for authority which was by now acknowledged and controlled, but not formally organized.<sup>22</sup> Every one of these was a separate legal operation, performed by a separate constitutional actor, the Mughal Emperor, the British Parliament and the Company’s administration, respectively, in relation to a different problem. No one said the events of 1757 were legitimate; each spoke about the reality of the situation in the time it was happening.

### 4.4 What the Staged Analysis Explains

The principle applied thus is the reason why, despite the best legal knowledge of the time, an agreement that was not, by any side, authorised to be made at all, was nonetheless the launching pad of a lasting, internationally acknowledged, even parliamentary controlled pattern of government. The explanation is not that the Agreement was, after all, perfectly legal, nor that legal power is moot when it comes to historical events. It is that constitutional history is a series of discrete actions, each carried out by different agents, with different types of authority, and without any of those actions being constitutional at all times, that when taken together, result in a stable, eventually well-constituted, governmental order.

## 5. Implications for Legal Pluralism and Comparative Constitutional History

This is a confirmed case of the legal pluralism in the narrow sense: that is, the existence of a variety of administrative systems and legal principles over the same land and the same individuals, and even over the same particular individuals at the same time.<sup>23</sup> The Principle of Constitutional Competence is a solution to the frequent challenge in legal pluralism scholarship how to determine the validity of an act whose several legal systems, none explicitly dominant over the others, apply to it concurrently and reach the same or different results.

When the applicable legal orders are homogeneous, as in the case of Bengal, then, because of that homogeneity, the convergence of the orders provides a form of validation for the assessment that a single-tradition analysis could not the conclusion is not open to the objection that the conclusion only reflects the particular normative commitments of one legal system.<sup>24</sup> Where the relevant legal orders conflict, at least the principle helps specify what grounds for conflict there are: not just where one law is applicable, or another, but where the actor has authority under any of the laws, as independent legal systems.

The use of the staged difference between the concepts of validity, effectiveness and recognition also has a more general methodological significance for comparative constitutional history. Contested and irregular transfers of governmental power, colonial cessions, revolutionary transfers of power, coups, and negotiated transfers can be narrated in such a way that the eventual outcome seems to validate the initiating act, or in the opposite

<sup>20</sup>Richards, *The Mughal Empire*, 312.

<sup>21</sup>Bowen, *The Business of Empire*, 71.

<sup>22</sup>Cf. Bowen, *The Business of Empire*, 210.

<sup>23</sup>Cf. Benton, *A Search for Sovereignty*, 197.

<sup>24</sup>Cf. Kamali, *Principles of Islamic Jurisprudence*, 350.

direction, that the illegality of the initiating act is proof of the eventual outcome's lack of genuine legal standing. The third alternative is the Principle of Constitutional Competence, which suggests that the constitution's validity, effectiveness and recognition are three empirical and normative questions that can be studied independently of each other regardless of the outcome of any given case.<sup>25</sup>

## 6. Contemporary Relevance: Corporate Power and the Limits of Delegated Authority

The analytical framework set forth here is applicable to current, ongoing debates, but the Agreement of 1757 is a product of the eighteenth century. The history of the East India Company's evolution from a chartered trading enterprise into the ruling body of a large population in a vast province is one of the most dramatic cases in history of a private profit-seeking organisation gaining and assuming the powers of a sovereign state.<sup>26</sup> Today's discussion regarding the responsibility of multinationals, private military contractors, technology platforms that regulate public discourse in a quasi-regulatory fashion, and other non-state actors that act in functions that are normally reserved to public government brings up an analogous question: from where does the authority of a body established for one purpose stem to perform a function of a public government without its consent, and what are the legal consequences of this?

The Principle of Constitutional Competence holds that these are today's questions that should also be disaggregated. The question whether or not a corporate body has lawful authority to exercise any power is to be determined by reference to its constituting instruments or charters, articles, statutes or licences as the case may be at the time of the exercise referred to. That actor's exercise of power is, of course, a different empirical one, one that must be determined through the exercise of practice. The third and independent question is whether the subsequent regulation or licensing or legislative accommodation is in itself legally recognising an unauthorised practice based on the specific terms of the regulatory act itself, and not on the basis of the success of the practice in the past.<sup>27</sup> The preemptive claim that regulatory green-lighting of a powerful private party is ex post vindication of how this power was attained, and the counterintuitive claim that a party's initially unapproved activity precludes any legitimate possible future use of it, are both equally counterproductive.

## 7. Conclusion

In this article, the Principle of Constitutional Competence has been elaborated as a general approach to the analysis of those situations in which governmental power is gained, exercised and then institutionalised in a series of legally and analytically distinguishable steps. In the context of the Agreement of June 1757 and its institutional legacy of nearly three decades, the principle dispenses with two common misconceptions: that the deed was secretly legal or that the problem of its historical significance lapsed into oblivion; rather it shows that the question of constitutional validity, the one of political effectiveness, and the one of subsequent legal recognition are separate in the case of the accord, and that the shift from Mughal province to colonial administration was a process that took place through all three in succession but not at the same time.

The worth of the principle goes beyond this instance. The same three-stage analysis can be used for all actors, whether they have been delegated to exercise authority on behalf of the

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<sup>25</sup>Cf. Loughlin, *Foundations of Public Law*, 159.

<sup>26</sup>Cf. Stern, *The Company-State*, 3.

<sup>27</sup>Cf. Paul L. Davies and Sarah Worthington, *Gower and Davies' Principles of Modern Company Law*, 10th ed. (London: Sweet & Maxwell, 2016), 137.

state, a chartered trading corporation, a revolutionary government or a contemporary non-state actor whose functions have traditionally been reserved to the state. In this respect, the history of British Bengal not only provides an unusually documented case study to reflect upon, but a model for thinking carefully about the interaction between law and power, wherever it is contested.

But this article's contribution is that it makes explicit the single analytical structure that unites them: three legal questions, three moments, and three actors, all three of which, and no one else, account for how a constitutionally ambiguous agreement of June 1757 became the constitutional basis of British rule in Bengal.

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