



SPECIAL ISSUE INTRODUCTION

## ‘Law in context’ in post-colonial South Asia

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In recent years, the study of law in South Asia has come into its own as a field. While some of this work follows the doctrinal approach of traditional legal scholarship, there is also a growing interdisciplinary body of research analysing South Asian law through a variety of methods and time scales. This special issue showcases some of the most exciting new work to adopt this ‘law in context’ approach. Authors Cynthia Farid, Yugank Goyal, Gehan Gunatilleke and Maryam S. Khan are up-and-coming scholars with deep ties across South Asia. Their research examines law in the post-colonial Global South as a complex empirical reality, shaped by historical and contemporary socio-political forces.

These four articles share several traits. First, the authors see law as more than doctrine. They take the technical aspects of rules and institutions seriously, but also situate them in their broader contexts, whether social, political, economic, intellectual, or historical. How have these extra-legal forces shaped the creation and interpretation of constitutions, statutes and judicial decisions in South Asia? How are politics high and low, social movements, and legal mobilisation part of the broader story? What is the role of legal consciousness, pluralism and informalism?

In order to tackle such questions, these articles use a broader array of methods and sources than is standard in doctrinal research, which focuses on the analysis of case law. Methodological breadth is, thus, the second notable feature of this collection. Three of the articles draw on interviews with key actors and observers in multiple languages, including English, Hindi, Urdu, Sinhala and Tamil. Yugank Goyal interviewed forty divorce lawyers in India in 2017–20. Gehan Gunatilleke interviewed thirty lawyers, activists, artists, community and religious leaders, and researchers involved in Sri Lankan constitutional controversies in 2018–21. In 2017–18, Maryam S. Khan interviewed twenty-three lawyer-leaders of the Pakistan lawyers’ movement of 2007–9. Further, Goyal has observed court proceedings and analysed online legal consultation platforms. Cynthia Farid’s article draws on archival sources. In other words, the scholarship that follows is grounded in a wealth of original empirical research.

Third, this special issue reflects a commitment to ‘South Asia’ as the larger region, and not just India. There is a tendency in South Asia-oriented networks and events to neglect the study (and scholars) of Bangladesh, Pakistan, Sri Lanka, Bhutan, Nepal and the Maldives, along with two countries that are sometimes put into other area studies blocks, namely Afghanistan and Myanmar (Burma was part of British India during the colonial era). While this special issue is not comprehensive in its geographical scope, it makes a good start. These articles focus on India, Pakistan, Sri Lanka and territory that would become Bangladesh.

Fourth, this special issue poses questions that matter for socio-legal and comparative law scholars, as well as those of the post-colonial Global South. How does our understanding of judicial independence in South Asia change if we situate its origins within sites of institutional contestation and conflict in the colonial-era development of legal professions? How do formal legal actors, and the norms of authority they create, produce new imitative forms of informal legal

ordering? What role do legal institutions and actors play in conditioning the relationship between the military establishment and the civilian political elite in a post-colonial ‘hybrid’ civil-military state? And how do lawyers and judges build institutional coalitions in the process of strengthening judicial autonomy? What are the socio-political determinants of constitutional praxis, and how do majority groups shape constitutional norms in societies divided by ethnicity and religion?

These questions epitomise the contextual approach taken by the authors in this special issue and reflect the dynamism of a new generation of South Asian scholars of law in all its dimensions. The scope of these articles ranges from the colonial period to recent social movements and ongoing concerns over religious freedom. While focused on South Asia, these articles provide broader insight into debates over legal pluralism, social movements, minority rights and the legacies of anti-colonial struggles. In this way, these deeply contextual analyses of law, lawyers and those seeking legal solutions to their problems in South Asia, may help to reverse the traditional gaze, providing the basis for new theoretical perspectives on the role of law rooted in the South Asian experience that will inform our understanding of law more generally. Each of the articles, which we briefly describe, offers its own unique context and provides a lens through which we can appreciate how the contributions of these scholars advance our understanding of law in this region and beyond.

Cynthia Farid’s ‘Perceiving law without colonialism: Revisiting courts and constitutionalism in South Asia’ examines a South Asian structural phenomenon that can be traced back to the colonial era. As a product of what she calls ‘imperial constitutionalism’, the author describes a clear separation of powers creating judicial autonomy at the top of the court system (for instance, High Courts in British India), but a fusion of judicial and executive authority at lower, local levels (for instance, in the figure of the collector-magistrate in district offices across British India). The article shows that this model in British India was not a legal transplant from England but the product of distinctly South Asian developments, including institutional power struggles, land disputes, and conflicts over race and the legal profession during the rise of the nationalist movement.

Yugank Goyal’s ‘A theory of legal apparitions: Regulation and escape in Indian divorces’ proposes the concept of ‘legal apparitions’ – actions that are not legally valid under state law, but that mimic its form and procedure and seem to be accepted as legitimate by the people involved. Drawing on interviews with lawyers, court observation, case law, and online legal consultation portals, Goyal takes as his case study divorces among couples in India that are ‘law-like’ but not actually legal under Indian law. Some of these cases involve customary norms and panchayat-ordered divorces. In other cases, the couple or lawyer seem satisfied with a document that others would consider valid, even if it is technically not so. Through an exploration of legal mimicry, this article extends and combines socio-legal models of legal consciousness, legal pluralism, access-to-justice processes, and legal imaginaries in a post-colonial society navigating the formal-informal divide.

Maryam S. Khan’s ‘The lawyers’ movement in Pakistan: How legal actors mobilise in a hybrid regime’ creates a close-up portrait and analysis of the lawyers’ movement that fought for judicial autonomy against military authoritarian rule in Pakistan, 2007–9. Unlike the studies that came out in the years immediately following the movement, this article shows that it was lawyers, more than judges, who led the movement. Drawing on interviews with lawyer-leaders, Khan demonstrates the importance of the internal politics of the bar. The article rejects the legal complex paradigm as the best way to understand the lawyers’ movement. Instead, it provides a contextual account of a social movement led by lawyers as a case study of legal mobilisation in post-colonial authoritarian regimes.

Gehan Gunatilleke’s ‘Limiting fundamental freedoms in Sri Lanka: Majoritarianism in constitutional practice’ argues that the rights to the freedom of expression and the freedom of religion or belief are hardly claimable rights in Sri Lanka. Both types of constitutional rights are limited by public interests relating to security, order, health and morals. These limitations have become

powerful vehicles for majoritarian influence, specifically Sinhala-Buddhist interests at the expense of minority Tamil (Hindu), Muslim and Christian interests, and of satirists' critique. If rights are meant to protect against the excesses of the majority, then the pro-majoritarian interpretation of limitations guts these rights. Drawing on case law and interviews with key actors and observers, Gunatilleke assesses five case studies. These relate to the religious attire of Muslim women (*hijāb*); Hindu, Muslim, and Christian worship and practice; Christian proselytising; the mandatory cremation of Muslim deceased during the COVID-19 pandemic; and satire through fiction critiquing Buddhism and Buddhist clergy.

While advancing the study of 'law in context' in the post-colony and Global South, this special issue highlights the complex legal dynamics of a region that is home to almost a quarter of the world's population. These articles reflect empirical richness, methodological breadth, conceptual creativity, and analytical insight. Most of all, this collection amplifies the voices of scholars from the region, enabling them to shape the contours and character of this important field.

**Competing interests.** None.