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Law and the Economy in Early Modern India

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Abstract

The paper discusses the origins and effects of modern laws of property and contract in India. There are two available models of juridical history useful for this purpose. One of these emphasizes import of European ideas and the other the weight of Indian custom. The paper suggests that integrating the two models produces a more complete narrative. The process of legislation in nineteenth century India was driven by two different goals, political stability, which led to an accent on maintaining indigenous common law, and economic rationalization, which led to an accent on borrowing from western sources. This hybrid regime carried costs, however, and affected property rights and commercial law differently.

Law and the Economy in Early Modern India

Introduction

The present shape of economic laws, that is, laws governing property and contract, in use in India originated in the early-to-mid-nineteenth century. Where did these laws originate from? What were the consequences of the process of legislation in colonial India? The paper tries to answer these two questions.

Recent discourse on law and economic growth suggests that legal evolution in the non-European world was shaped by transplantation of European juristic theory and practice through colonization. The literature also suggests that the transplantation project sometimes created rules of law where none existed, and sometimes carried dysfunctional aspects of European law over to subject societies, and that divergence in institutional quality can be understood with reference to these dynamics. Within this broad paradigm, scholarship has discussed two ways of explaining differences in institutional quality, one laying emphasis on the motivation to create Europe-type institutions and the other on the content of transplanted ideas. What Levine (2005) calls the 'endowment view' stresses elite priorities and the drive to build institutions in the periphery (Acemoglu et al, 2001; Engerman and Sokoloff, 1997). 'The *law view* stresses that differences in legal traditions formed centuries ago in Europe and spread via conquest, colonization and imitation around the world continue to account for cross-country differences in property rights'. The law view draws on a cluster of studies suggesting that countries that adopted or received via colonization the more investor-friendly English common law system performed better than the ones that received the less investor-friendly French or German civil law systems or the socialist systems (La Porta et al, 1999; Berkowitz et al, 2003).

How useful is this literature for historians exploring the link between law and economic change in South Asia? I believe that the models of divergence in legal traditions discussed above are not particularly helpful in explaining stylized facts about early modern India, the following three facts, in particular.

First, laws in the colonial setting were, in a significant sense, of local origin. There is, of course, plenty of evidence showing that the colonial legal orders in Africa and Asia received transplants. Pieces of legislation such as court procedures, evidence, or contract, were often imported verbatim from England or late-nineteenth century India into other English colonies. And yet, few historians of comparative jurisprudence in the non-European world would consider transplants to be the key factor in the making of colonial law on

property rights, the example used by Levine in the previous paragraph. Along with transplantation, there was another process at work in colonialism, which was to accommodate and integrate the often very pluralistic legal order of the indigenous societies. This process, inevitably, involved a reconstruction of customary laws often through a vocabulary of rights that was European in origin. In the case of India, early colonial legislators made every effort to preserve indigenous common law and avoid transplants either in principle or in appearance.[1] The goal of law-making in India would thus seem to be the opposite of that presumed in the endowment or law view of institutional divergence.

Second, the outcome of the two common law systems, English and the colonial, was quite different. The scholarship on economic efficiency and law has revised Max Weber's negative views on common law.[2] The accent of the institutional school falls on the inherent flexibility, akin to the working of a competitive market, of a common law regime. This is Richard Posner's invisible hand working upon economic historians via the premise that common law judges could more easily take efficiency considerations into account in assigning rights (Posner, 1975). By contrast, studies of colonial law in India almost unfailingly stress that conservationism gave rise to paradoxes, even disasters, and that the mix between old laws and a new regime was a discordant one.

Third, the process of legal evolution through the transition from Mughal to colonial rule was fundamentally schizophrenic, and moved along two axes. The law view accents one of these, the imported element, and the Indianist scholarship accents another, the indigenous element. The focus in the latter has been upon ideologies of governance, in which maintaining social stability and co-opting the local elite played a role, hence the conservationist bias in colonial legislation. But nearly all examples of conservationism come from relations of property. What about relations of exchange? What about commercial law? Colonial legislators claimed with good reason that the Contract Act (1872) marked an important moment in juridical history, wherein English law rather than scriptural law was adopted, systematically for the first time in the history of India, as the model for legislation. Is commercial law, then, better understood in

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[1] Cohn, 1959, 1960, 1961; Stokes, 1973; Washbrook, 1981; Robb, 1988, 1994; Otter, 2001; Iliopoulou, 2001; Wilson, 2007; Menski, 2003; Kugle, 2001; Saumerez Smith, 1996; Benton, 1999; Anderson, 1993; Bell, 2006; Chakravarty-Kaul, 1996; Gilmartin, 2003; Dirks, 1986. For a fuller discussion, see the next section. For a discussion of the evolution of colonial law in Africa, see the introduction to a symposium, Roberts and Woger (1997).

[2] Weber believed that the heavy transaction costs involved in transfer of land in the English common law regime was conducive to 'accumulation and immobilization of land', and thus compatible with a rule by the wealthy (for a discussion, see Getzer, 1996).

terms of the transplant model? But why was transplant necessary in this case and not in others? What practices did it displace? Answers to these questions should depend on how we conceptualize commercial law before colonialism. On this theme, historians of India offer too few clues.

A narrative of economic legislation that could integrate these three features of colonial law - the bias for indigenous law in property, efficiency effects, and the bias against indigenous law in contract – remains absent. In order to develop such a narrative, we need to pay close attention to the systemic character of indigenous law itself. Common law traditions differ. How did the Indian tradition differ from others? Historians of colonial India have described precolonial law in relativist terms such as 'pluralism'. But this characterization neglects the conceptual foundations of the system. Beyond the early work of Bernard Cohn, the transition from Mughal to colonial law has remained poorly theorized. Cohn's own analysis of the transition, titled 'from Indian status to British contract', hints at an answer to the question, but has not survived the modernization theory.

In this paper I present a stylized narrative containing the following four arguments. The first point concerns the nature of precolonial law. The juridical system of Mughal India is perhaps better understood in terms of what Weber called substantively rational laws.[3] Common laws in this tradition did not mean professional conventions, but the conventions of communities. By being community-bound, economic laws were expressions of allegiances to family, the British understood this to be the Hindu joint family, or kinship orders. The second point is about the transition to colonialism. The colonial regime of law, of course, was a hybrid. But where was there continuity and where the change? I argue that in the early nineteenth century, the main sphere of continuity was the contents of law, and the main sphere of change was institutions of justice. Early colonial rule accepted the principle of community laws because continuity in statecraft was considered both fair and expedient. But whereas in precolonial India, the laws were also enforced by means of community courts and a decentralized system of justice, in colonial India laws were enforced by means of a hierarchical and centralized system of courts. While the contents of statutes

[3] Laws were formally rational if 'only unambiguous general characteristics of the facts of the case are taken into account.' Legal thought is substantively rational if 'the decision of legal problems is influenced by norms different from those obtained through logical generalization of abstract interpretations of meaning', in particular, ethical or political imperatives, Weber (1978: 656-7), and Feldman (1991), Kronman (1983) for discussion of formal and substantive rationality in a law context. On the 'embeddedness' of economic laws, see Swedberg (2003). Historians of colonial Indian law have used the Weberian distinction, see for example, Kugle (2001), and Ocko and Gilmartin (2006)

became very diverse, there was sustained emphasis on uniformity of court procedures.[4]

The third point relates to the costs of running this regime. The mixture between old law and modern judiciary created two types of costs. Administration of community law within a judiciary that hoped to codify and integrate diverse community conventions into one harmonized whole, carried enormous information and transaction costs. Efficiency was undermined by the fact that the judges needed to mind the origin of laws more than their effects. The attempt to preserve pluralistic rights gave rise to what Benton (1999) has called 'jurisdictional ambiguity', and created opportunities for indigenous actors to exploit these ambiguities. Furthermore, community laws were not necessarily compatible with the demands of the new economy, because these laws tended to be strong on property and succession, and weak on impersonal exchange. Commercial law still needed formalization. The fourth and final point concerns the adaptations the system went through in the late nineteenth century. By the second half of the nineteenth century, legal evolution moved along two axes, concerns with stabilizing exchange relations were addressed with transplants, and concerns with local political stability addressed with ever more detailed codification of indigenous common law.

Taking an overview of the modern history of legislation, thus, would reveal a tension within colonial (and postcolonial) law between traditionalism and rationalization, informal customs and formalization, indigenity and transplants. This dual character of legislation poses a difficulty for either the law view or the endowment view to make use of India as an easy case-study.

The rest of the paper has seven sections, the first six dealing with the historiography of law and state in colonial India, Mughal law, mercantile law in Mughal India, transition to colonialism, associated transaction costs in property, and in contract, in that order. The last section restates the main arguments.

Perspectives

From the late eighteenth century, the East India Company state in Bengal and Madras attempted two things, to divest the rural elite from political and military powers and privileges they had enjoyed in the earlier regimes, and to strengthen proprietary rights by codifying a universal framework of laws about alienable ownership. It was expected that this dual intervention would reduce political control over the use of land, and increase the economic use of land. In one interpretation, the new 'rule of property' tried to remodel Bengal in the

[4] In one interpretation, the claim to having established a rule of law was based mainly on procedural reform, see Ocko and Gilmartin (2006).

image of landed society in England, without regard to indigenous tradition (Guha, 1963). Subsequent research has shown how, in the matter of succession and inheritance of property, indigenous common law was expected to supply the guide, leading to a drive to define, codify, and preserve indigenous common law. The most significant outputs of this tradition were essayed by William Jones, Henry Colebrooke, Thomas Strange, and W.H. Macnaghten. These digests based on scriptural laws were expected to be used by judges in modern courts. After a brief experiment in persistence with tradition, the courts system was overhauled in the first half of the nineteenth century. A hierarchical system was established in place of a segmentary one, appeals and evidence procedures were formalized, and a window of English common law was opened in the mayor's and Supreme courts.

This mix of old and new has been interpreted in political terms. Wilson (2007) attributes legalizing tradition in the sphere of property to what he calls the 'anxiety of distance' between a small ruling class of alien origin and a vast and diverse mass over which it ruled. Kugle (2001) sees in the project an attempt by Company officers to 'disguise their presence' from their subjects. Cohn (1959) suggested that the reason why the British intervened more thoroughly in the courts and procedures was the sense that procedural law was missing or undeveloped in India, and the perceived threat that this might pose to expatriate businesses operating in the interior of the country.

Historians of law and society are in agreement with many contemporary administrators that this hybrid system did not work as well as expected. But the grounds for critique have tended to shift somewhat.

The older administrative view recognized that misreading of custom and the inevitable exclusion of some customs from law had made the policy iniquitous at some levels. On the other hand, activated markets, especially credit and mortgage, seemed to demand laws to protect social stability from reckless land transfer (see Kranton and Swamy, 1999, for unintended effects of mortgage laws in the Deccan). From the 1860s, legislative activity became more energetic and followed one of two routes, on the one hand a more detailed elaboration of custom and incorporation thereof into law as in Punjab (see Saumerez-Smith, 1996; and Islam, 1995, on Punjab alienation acts) or the Bengal tenancy reforms of 1859 and 1885 (see Robb, 1988), and on the other, relinquishing indigenous tradition as guide altogether, an example of which I will discuss later.

Modern discourse on colonial law begins with Washbrook (1981), who in a pioneering paper addresses the stylized fact that land changed hands to a remarkably small extent everywhere in India despite radical changes in the property rights regime. Washbrook's argument is that whereas property rights reforms were driven by an ideology of individualism, an ideology of

conservation of social structure saw the collective rights of joint families becoming codified and more secure. While land became salable, sales were difficult to effect because private and collective rights were entangled.

In later interpretations, the incorporation of 'custom' into colonial law has been seen to have distorted the spirit of customary law. This critique of the colonial project echoes a point made by Cohn (1961) long ago, that Hindu law was not a unitary system of statutes as the British imagined it to be, and that it supplied no more than general rules for interpretation. The great digests of Hindu law prepared by the European orientalists, therefore, made the judges' work harder rather than simpler. Iliopoulou (2001) argues that Washbrook's analysis overestimates the revolutionary nature of public law, and underestimates the distortions involved in codifying customary law. Other modern critics of colonial law voice similarly negative assessments. An avowedly postmodern history by Menski (2003) considers such distortions to be politically motivated. The incorporation was driven by the colonial modernization project, modernization being another name for subjugation. 'European Orientalist scholars and an emerging literate tradition .. colluded in this venture' (Menski, 2003: 75). This agenda was 'stultifying' and a 'massive distortion', having reduced a code of reighteousness (*dharma*) into a western conception of law. Lawyers 'took hold of the system' and law became an instrument of greater state control. In the name of universalizing law, colonialism robbed Hindu law of its pluralist spirit. Kugle (2001) likewise interprets Anglo-Mohammadan law as a tool in a grand project of the 'engineering of property ownership'.

This literature has a shortcoming. Attempts to conceptualize colonial law cannot be completely convincing without reference to a conception of precolonial law. While most historians rightly treat colonial law as a new ideological product, in some essential elements colonial law merely continued a Mughal tradition. The lines of continuity and change are not firmly established in the literature. Interpretations of the transition to colonialism would be easier if the precolonial regime is seen as a system integrating the distinct planes of law, justice, and statecraft.

Mughal law

Such a project should begin with a consideration of the Mughal state. There are deep disagreements among historians of medieval India on the nature of the Mughal state, the point of debate concerning the degree of centralization of power at the imperial core before British rule (see Athar Ali, 1993, and 'introduction' in Alam and Subrahmanyam, 1998, for useful surveys). The conventional view, first stated by European travellers in Mughal India, was that the precolonial North Indian polity was a despotic and centralizing one. The

Aligarh school of historiography is the sophisticated modern representative of that idea. But this view has been questioned by a revisionist perspective. Using the notion of a 'segmentary state', the revisionism argues that sectarian groupings such as caste or religion played a bigger role in forming social institutions than did the state. Originally advanced by Burton Stein for South India, the concept of a decentralized polity was later found to be a useful construct for medieval Deccan, Maratha states, and Northern India itself (Stein, 1985; Perlin, 1985; Wink, 1986; for fuller citation, see Athar Ali, 1993). The view of the precolonial polity as constituted of weak states supported by powerful local corporate groups, such as merchants, landlords and territorial chieftains, is consistent with a historiography of Northern India after Mughal decline, according to which these groups are seen to consolidate their hold in commerce and politics during the eighteenth century (Bayly, 1983).

The segmentary state idea implies a decentralized legislative process, laws being the prerogative of the territorial chiefs and 'little kings'. On this point about law, however, there is convergence between the Aligarh orthodoxy and its critics. There is little disagreement on the point that 'the Mughal state was not a legislating state'. In the words of one representative of the Aligarh school, 'No historian had ever laid claim that Mughal polity was in these aspects the equal of the European post-Reformation state.' (Athar Ali, 1993).

It is, of course, important to understand how laws were actually made and administered. The classical view owes to Henry Maine. In his works on comparative jurisprudence, Maine (1876: Lectures III, V) proposed that the relationship between kings and villages in India had long been mediated by the 'village community'. In effect the kings gave away legislative authority to the community in exchange for efficient delivery of taxes. The village community in the sense in which Maine used the concept was an artificial construct rather than a fact of history. The idea of an unchanging administrative core in the village simplifies both the political position and the process of historical change. And yet, later scholarship has not strayed very far from Maine. Bernard Cohn, a precursor to the 1980s revisionism on state formation, focused on the power of the local landed lineages with which both the pre-colonial and the early colonial states negotiated terms of taxation. These 'little kingdoms', in his view, were 'the basic jural unit of upper India in the eighteenth and nineteenth centuries.' (Cohn, 1959). This idea, of course, is in line with the segmentary state one. But it tends to be too focused on landed magnates. Personal law or mercantile law cannot be easily fitted into a conception dominated by the village, land taxes, and land rights.

A more flexible conception would be that the law-making units were social groups. In the case of India, endogamous social groups also had strong

professional identity. Indeed, these are the two essential and usually conjoined meanings of the word 'caste' relevant to the economic historian. The *right to legislation* in the Mughal state was given over to communities such as these, namely, professions that built around kinship and intermarrying families. Communities were by right and not just by common law convention the 'jural units'. I wish to frame this essential difference in terms of two distinctions. The first distinction is between sectarian and global, and the second between loyalty and agreement.

By 'sectarian' I mean a system which defines jurisdiction of state laws by community rather than territoriality. Layers of customary law co-exist, each community or ethnic group using one of these systems of common law, and statutes exist for only some or even only one of these layers. 'Despotic' is quite the wrong word to describe such a system, which made the king limit rather than encompass jurisdiction. By 'global' I mean a system that defines jurisdiction not by community but by territoriality. Global laws applied to all, usually involved a centralized and hierarchical judiciary, and in keeping with political change and continuity, needed to keep records. The Mughal institution of law can indeed be better understood as a sectarian model, wherein civil and administrative law (and a great deal of criminal law as well) was administered according to canon if the disputants were Muslims; and administered according to community-bound customary law if the disputants were non-Muslims.[5] The elements of English common law imported into India, on the other hand, were defined by territory, and in effect global law.

The second distinction useful in this context is similar to Weber's contrast between formal or calculative and substantive or value-based rationality. Hindu and Muslim common laws were ethical in character. The goal of both systems of jurisprudence was virtuous conduct and allegiance to natural relationships formed out of kinship or lineages, as opposed to synthetic relationships formed out of agreements between unrelated individuals. These systems were well adapted to promoting efficient transactions as long as the acts of trust were confined within groups that shared the allegiances. They were not well adapted to promoting transactions between communities, and formation of partnerships and contracts between communities, as the European buyers of Indian goods learnt the hard way in the eighteenth century. In other words, laws were efficient

[5] Ahmad (1941) distinguishes four kinds of law: the canon law or Muslim personal law; the common law or the Islamic law of crimes, tort, and nuisance; regulations; and local custom. The second kind of law applied to Muslims and non-Muslims alike, with some distinctions. With offences against codes of righteous conduct, such as adultery or drunkenness, Muslims could be punished more severely than Hindus.

if buttressed by loyalty, and laws tended to fail if supported only by an agreement between unrelated parties.

These two features implied one another. A sectarian system implied an allegiance-based system and vice versa. The practice of giving freedom to communities to frame their own law tended to make laws mindful of the interests of the community. And the existence of community-bound laws made it administratively simpler to practice a sectarian principle.

The Mughal conception of law, in other words, maintained a careful balance between engagement and disengagement, and it cannot be completely understood without taking these two elements together. Throughout the medieval period in Indian history, polities in Islamic north India broadly followed this dualistic system, combining a state commitment to the *shari*a with a state withdrawal from civil affairs of the non-believers. It was surely neither a consciously framed policy nor a linear evolution. Still, elements of it can be seen in nearly all the great regimes between c. 1200-c.1800, and especially in the actions of institution-builders such as Akbar. How do we explain the policy of disengagement? One obvious answer would be political realism, given that in medieval North India, as indeed in British India much later, a small and significantly non-local military-administrative elite ruled over an enormously large and diverse population. However, this answer does not completely square up with the facts. Grant of autonomy did not have a direct correlation with political power of the grantees, indeed quite the opposite. Effective autonomy was the greatest for the least powerful and the more marginal, such as the peasant or the merchant. A more plausible explanation for disengagement would be the religious foundation of medieval law. The state did not see itself as a law-maker, but rather as an agent in upholding the canons for the believers. Kingship demanded, foremost, seeing 'that the dignity of Islam and the Islamic Law is upheld in his dominions' (Al-Mawardi, jurist, cited in Akbar, 1948: 1). The state's engagement with justice being thus mediated by religion, it implied a withdrawal of the state justice from populations belonging in realms outside Islam.

Outside the explicitly ecclesiastical matters, both Hindu and Muslim law were preoccupied with personal relationships. A large part of these laws dealt with the relationship between sexes and persons linked by blood or by marriage. The core of the Hanafi jurisprudence as documented in the Indian context were marriage and divorce, slavery until the mid-nineteenth century, gifts including *wakf* or religious endowments, inheritance (including wills), titles of ownership of property (a great part of which consisted of *shoofa*, the legal title of one partner in joint property in relation to other partners, established specifically with respect to lands, houses, and orchards), evidence and procedure, and to a small

extent, debt recovery. Breach-of-contract and tort were weakly developed concepts, except in reference to marriage. The reason for foregrounding the personal as against synthetic relationships such as mercantile contract was that virtuous conduct rather than fairness or equality was the value that these legal systems sought to protect. These systems evolved by textual interpretation rather than as a response to client needs and constraints. This large and somewhat diverse body of laws could and did evolve. But historians seem to agree that the jurists and the judges by and large did not see it their duty to make and perfect laws. They were interpreters of laws to a degree, but in a manner that could be claimed to be consistent with scriptural guidelines.

The sectarian and allegiance-based Mughal regime had three characteristics. First, in the sphere of canon law, the state did not make laws but merely upheld these. In other words, justice was seen as an executive duty. The hierarchy of state courts, in turn, reflected the political order rather than the contents of law or the nature of the offence. Second, in civil matters falling outside canon law, communities both made laws and administered them. And third, this institution did not need written statutes, case laws, written court procedures, records, lawyers, and an independent community of jurists or what Weber called 'the aristocracy of legal literati'. These three features are now discussed in turn.

There was substantial convergence of the executive and the judicial. The Emperor symbolized this convergence, if not perfectly. This convergence was not necessarily an expression of 'despotism'. Rather, it was an expression of the particular jurisprudence that made the king the supreme protector of the canon. That said, the jurisprudence also admitted that the King was not above the law, and thus a tension between the courts and the judiciary was indeed present. There were episodes, such as a case that Muhammad Bin Tughlaq had fought in the Qazi's court and lost (only to re-arrest the defendant on a fabricated charge), which illustrate this tension.

The reach of the state courts was more or less confined to the major towns. Equally, the existence of courts of justice in the towns was an inducement for the relatively wealthy Muslims to settle in the town. The administration of justice was arranged in a 'concentric organisation' of courts (Jain, 1970: 82). Courts were arranged in a hierarchy, but that hierarchy did not match a hierarchy of offence, nor did it correspond to a regulated appeals system. Rather it followed the rank of the officer presiding. By this principle, the highest order of court was the imperial one. Below the imperial court, the provincial governors and other officers of comparable rank held courts. Below the governors' courts were the courts of religious law. These were presided over by the qazis, and were found in most large district towns. While there were no formal limitations to the

jurisdiction of each of these levels, it was generally taken for granted that cases of a routine nature would first be tried in courts of lower order. The imperial courts usually handled serious offences of a political nature. Punishments for rebellions, acts against the state, or misdemeanors with respect to superiors were delivered according to the wishes of the emperor or his agent, broadly constrained by certain established precedents and conventions.[6] Any client could approach any one of these levels, but the three levels cost very different amounts of money. The emperor himself was known to select and settle at random cases brought to him by ordinary people crowding outside the palace gate on fixed days of the week. A filtering process worked outside the gate, and needless to say, it was prohibitively expensive for an ordinary person to approach the palace walls from where petitions were taken to the emperor.

Disengagement touched both law and the administration of justice. Cases in villages were supposedly settled by caste courts and village panchayats. For crimes committed in larger villages, a qazi was often appointed. And yet, even as the qazi conducted investigations, the communal court was authorized to proceed on its own and take appropriate actions. There is little information on the 'village assemblies' to which the task of framing and implementing civil laws among non-Muslims was entrusted. Whether the lack of information was a reflection of an extreme degree of decentralization, or the rarity of disputes, remains open to speculation. There is a mention in one scholarly work of trade disputes being settled by trade guilds (Jain, 1970: 83), but far too little is known about the precise mechanisms by which trade disputes were settled.[7]

Case laws did have some agency in this context, but the individuals who ran this system did not and could not take precedence set by other individuals too seriously. There was apparently an explicit understanding that judgments not in conformity with scriptural direction or the ulema's opinion would be valid only in the specific case. In other words, while the legislative philosophy did

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[6] One historian argues that the governors administered justice mainly according to common law whereas the qazi was entrusted with the task of enforcing the canon law, and dealt with cases that could be in principle settled with reference to the sharia (Sarkar, 92). Other historians of Mughal justice, however, dispute this view, and believe that the distinction between the middle tier and the lower one was not associated with the kind of laws enforced (Jain, 79-81).

[7] The administrative decentralization was not a complete one, for the governors and qazis did on occasions have to hear cases of a civil nature that involved non-Muslim disputants, and decide on the basis of precedence or common law. The actual common law cases thus heard in higher courts usually involved property disputes among the Hindu political elite. By and large, the state judiciary kept a conscious distance from customary law, especially Hindu law, and the farther away one went from the district towns, the more decisive became the barrier between state institutions and dispensation of justice.

allow the judges much leeway, and the scope for referring to 'equity, justice and good conscience' (to quote a familiar refrain in early colonial law codes) in deciding individual cases, judgments had little chance of becoming common law. For the same reason, Ahmad (1941) states, documentation was deemed unnecessary and therefore weak in the Mughal court proceedings. And Akbar (1948: 13) agrees, '[j]udgment is delivered only verbally and is not recorded in writing'.

European travelers to India in the seventeenth century commented on the absence of written statutes. Indeed, the first major attempt at codification of law was undertaken not before the late seventeenth century by the last of the great Mughals, Aurangzeb or Alamgir, in the shape of *Futawa Alamgiri*. Yet, the European view was based on a fundamental misreading of the situation with regard to law. If the objective of the state instituted justice was to uphold Koranic law in its wider interpretations and applications, the Indian courts could simply rely on the extensive jurisprudence of the Arab world (Jung, 1926). All that the courts needed was the service of jurists who could form a bridge between the Arab world of theory and Indian practice. Jurists of foreign origin therefore formed a valuable component of the Mughal courtly culture.

Consistent with the sectarian character of laws, professional lawyers and judges had a marginal presence in this system. Nothing like a mandarin system could possibly develop within a rule by scripture. Lawyers were absent from the rural courts, and remained rare in the state courts. The counterparts of lawyers that we do hear about either represented clients who could not plead their own case for social reasons, such as wealthy women, or negotiated terms of transaction between parties. Thus European traders seeking trading privileges often employed *vakils* to argue their case with the state agents (Calkins, 1968-9). During Aurangzeb's reign, a systematic attempt was made to appoint vakils in local courts to carry through state business, and also to represent the poor. The scale of this professionalization of law was probably very limited.

Where was commercial law located in this grand system?

Mercantile law in medieval India

William Moreland, the great economic historian of medieval India, believed that merchant enterprise in the Mughal system was characterized by two features, the absence of commercial law in the sense of statutes, and the presence of commercial law in the sense of 'conventional morality' among merchant communities, that governed, on the whole efficiently if not always fairly, succession of property, dispute settlement, and forms of contract.

The point that global commercial laws were absent in Mughal India was a feature noted by many European travelers of that time. The absence of statutes

covering the subject of transactions, the rarity of cases of commercial disputes in the Mughal courts, and the fact that mercantile rights and obligations had to be written in particular charters drawn up between the king and bodies of merchants, have been read as features indicating the absence of global commercial laws. While the charters drawn between the Mughal emperor and the Portuguese, the Dutch or the English merchant bodies in seventeenth century India are well-known to historians, Moreland believed that the charters were not a European innovation, but the standard mode of regulating trade in South Asia.

The first proposition of the Moreland conjecture, in other words, states that juridical ties between merchants and states in medieval India were relatively weak and contingent. Historical scholarship on medieval South India suggests that the ties were not weak as such, but of a different order from that in Europe. In medieval South India (12th-14th centuries), trading communities like the Ayyavole and Nailadesi displayed unity and organization.[8] The presence of a 'samaya', or conventions about code of conduct and regulatory rules, has been noted. Some writers contend that these organizations had many features in common with the medieval European guild, except on the point that merchant bodies were more closely and seamlessly integrated within the royal-cum-sacred authority in South India (for a discussion, see Champakalakshmi, 1987). Their corporate identity, distinct from either Episcopal or territorial powers, was thus weak. Common laws in this context would function less like professional laws, and more like codes of righteousness and virtuous conduct.

Davis (2005) draws on the works of other scholars (mainly Meera Abraham and Kenneth Hall), and on textual and epigraphical sources to propose that merchant groups in medieval India (c.500-1200 A.D.) could influence the rulers and the courtly elite to incorporate mercantile conventions into particular scriptures and royal edicts. The actual contexts when this was successfully done are not many, and suggest that powerful urban merchant guilds tried this course in the presence of specific sorts of threat (from artisans, for example), or to deal with serious cases of infringement of convention by one of the insiders. These were in all likelihood notable deviations from the norm wherein merchants distinguished by locality, kin group, and community were left to follow their own codes of conduct, known in the scriptures as *achara* or practices, which differed so much according to particular groups that these were impossible to either universalize or codify.

[8] 'These communities are often described as guilds although indisputable evidence of their organisation into a well defined, structured and cohesive body is hard to find.' (Champakalkshmi, 1987)

The second proposition of the Moreland conjecture has also found qualified confirmation from recent research. In his own description, trading communities functioned according to strict rules of law, but these rules were framed and implemented by the communities themselves. '[L]ike other such systems, it was substantially fair to every one who knew "the rules of the game"' (Moreland, 249). The hypothesis raises an immediate question, how did communities handle disputes, rights, and duties, when transacting between and within themselves? Moreland proposed that functioning by community bound rules did give rise to transaction costs as well as transaction gains. A European trader might be pleasantly surprised to see that an Indian would refrain from taking an advantage that would be considered usual in Europe. And equally, actions that would never be taken in Europe might be considered fair and routine in India. Reports about honesty or otherwise were necessarily variable, and impossible to read without reference to the context. That being said, in the dealings between Indian and European merchants in early modern India, dispute settlement remained a serious problem. Indian merchants, for example, often alleged violations of custom.

How did the communities implement their own rules of law? Two mechanisms have received particular attention in recent literature, royal charters, and social legislation. Scholarship on industry in the seventeenth century discusses formal and informal collectives, almost all originating in the towns. The urban artisan was highly skilled and highly organized within collective bodies such as communities or master-apprentice teams where the respective positions of the masters and the apprentices were clearly defined. The exclusive privileges of the community and that of the master within it were maintained by the state in North India, or the king and the temple in South India (Ramaswamy, 2004). Rules about social intercourse, particularly marriage, were scrupulously maintained to preserve distinctions between communities. In turn, the promise of a good marriage or the prospect of a not-so-convenient one could become powerful instruments to enforce compliance on behalf of individual members to what Moreland called 'rules of the game'.

The mention of social networks above should alert us to an important difference between medieval Europe and medieval India. Milgrom, North and Weingast (1990) describe the economy of medieval Europe as one 'without the benefit of state enforcement of contracts or an established body of commercial law', but nevertheless containing an efficient information-sharing system of private arbitration, the system known as the law merchant (see also Berman, 1983, on the law merchant). Apparently, there is an exact reflection in the law merchant of both the Moreland conjectures. Yet, the autonomies we encounter in India and Europe were possibly of different order. Two tendencies seem to have

been present in Europe, the transformation of commercial law from community ethos to professional statutes, and the absorption of mercantile law into common law administration, especially in seventeenth century England. In India, by contrast, the tendency for commercial law and common law to converge remained weak. Commercial law stayed outside the public domain, as a part of religion and virtuous conduct, and therefore secret and uncoded. In precolonial India, autonomy of mercantile law was a characteristic not of professions but of social and religious units. If this interpretation is correct, the passage of community law to extended market exchange that brought communities into ever more complex contractual relationships would not be a smooth one.

The history of eighteenth and nineteenth century commerce does suggest that it was not.

Transition to colonial law

As Indian Ocean trade expanded in scale, increasingly transactions occurred outside the control of panchayats, communities, pandits, and ulemas. The new relationship between the European merchants, the Indian intermediary, and the artisans, was a conflict-ridden one. The source of these conflicts was systemic, persistent asymmetric information and the extreme difficulty of punishing a defaulter by any means oher than ex-communication. Delivery time was never predictable, for suppliers routinely contracted with more buyers than they could satisfy. Goods were diverted from contract sales to other bidders, from contract to spot markets, from the Company to private traders, and in Bengal the Dutch and the English were played off against one another.

Historians of the trades of Coromandel and Bengal describe how, from the middle of the eighteenth century, the Company shifted from contracts with merchants to contracts with weaver-headmen in trying to take closer control of production, a move Arasaratnam (1979) called 'a substantial revision in the Company's approach'. In Bengal, these moves were also backed by political and military power. The key point of transition was the Battle of Plassey (1757) which gave the English East India Company enormous bargaining power with local authorities. Textile history scholarship has noted that thereafter, Company merchants used company authority to coerce weavers. Om Prakash more recently has described the institutional shift 'from market-determined to coercion-based' (see also Hossain, 1989, on Bengal, and Parthasarathi, 2000, on Madras for a similar argument). Whereas historians suggest that the new regime of coercion was made possible by politics, it is useful to ask the question, was coercion made necessary because of a legal vacuum? Is it possible to turn the causality the other way around and trace the desire to play a larger political role in Bengal to these problems of contract enforcement? I believe that the inherent

weakness of community law to serve impersonal exchange does make such a thesis a plausible position.

Indian Ocean studies also reveal that Company trade was a stage in which commercial roles, and by implication community laws, were being recast in the coastal regions at least. Many among the textile merchants who supplied the Company or formed partnerships with European private merchants, and were prominent neo-rich citizens of Madras and Calcutta, did not emerge from traditional merchant communities. There are references to property and trade disputes in these contexts, but few references to the authorities empowered to settle these. In some cases, the Company resident, in others the in-charge of the port, in others the territorial power, and perhaps most frequently, loose combines of merchants themselves, intervened in trade settlement. Local rulers, as long as they had a say in the matter, referred such cases to the organization of the merchants rather than to courts of law, not usually to the satisfaction of the Europeans (for an instance from Patna, see Chatterjee, 1992).

Arguably, community codes failed in this world of inter-community dealings. This conjecture connects with another theme, relative efficiency of business organizations. Why did Indian maritime merchants and shipping declined in competition with Europeans in the Indian Ocean? One hypothesis is that the Europeans' superior military might, undeniably a resource in maritime trade, the Indians could not match. Another hypothesis considers differences in business organization. European trade was organized around a joint-stock company, whereas Indian firms developed around families, kinships, and individuals. The stability of such firms was dependent on the resources and talents in the family or kin group. The European Company brought a large number of stakeholders to work together, and had an identity independent of persons and communities, which gave it more power and stability. Being a firm, the Company and its employees also had access to the financial resources of the City of London.

A similar picture of breakdown of customary law and customary justice emerge in the agrarian setting as well. Away from the littoral trading world, the Mughal agrarian system was breaking down in the eighteenth century. Historians believe that the collapse was less of an economic catastrophe than contended in early colonial historiography. Nevertheless, the effects of this collapse on law and justice have not yet been fully researched. Cohn's studies of the Benares region showed how the authority of the state courts crumbled away in the eighteenth century, 'with litigants buying decisions' and judicial positions being 'looked upon as forms of private income for political favorites of the rulers' (Cohn, 1961, 1960). If indeed the local corporate groups and lineages became stronger, they must have also made the caste panchayats more sectarian and

more undemocratic than before. Executive power became more fragmented than before, as the power of the tax collectors and revenue farmers increased throughout India. Zamindars could now try small criminal and common law cases without challenge from any other administrator (Ahmad, 1941: 173, 279). In this political context, the East India Company acquired revenue rights to the province of Bengal (1765).

The history of colonial law had begun earlier. The first royal charter to the East India Company sanctioning it legislative powers with respect of its own dependents was granted by Charles II in 1661, and soon found a field of practical usage in the island of Bombay acquired in 1669. This privilege was renewed from time to time. The Royal Charter of 1726 established that all laws then in force in England would be valid in India. The charter also allowed three courts to be established in the three major residencies of the Company. These so-called Mayor's Courts tried cases involving European residents, so that in principle English common law applied to the English alone, except where two parties consented to subject themselves to English law. The Royal Charters became progressively more detailed from then on, and the 1774 one not only allowed Supreme Courts to be established, but also empowered this court to deal with cases of violation of contracts. The said Section 13 of this charter introduced the term contract in Indian statutes in an explicitly commercial context.

There were additions in each case of powerful exemption clauses. For 25 years after assumption of effective rule of Bengal (1765-1790), the East India Company left the exercise of criminal justice to the old laws exercised by the old regime of the Nawab Nazim. Legal and institutional innovations were confined to civil matters, and matters relating to the expatriates. On the contents of statutes in respect of locals, the policy to be followed was set out by the Governor Warren Hastings as follows:

> In all suits regarding marriage, inheritance, and caste, and other religious usages and institutions, the laws of the Koran with respect to Mohammedans, and those of the Shaster with respect to Gentus [Hindus], shall be invariably adhered to.

The Supreme Court, thus, would not try civil cases involving any local resident unless expressly desired by all disputants that it do so.

The instinct to protect indigenous common law was more than an expedient policy. It was simply in line with Mughal statecraft. But the differences between the two systems were significant too. The new state aimed to become a unitary state rather than a segmentary one. The political project involved creating a uniform system of justice and court procedures. The first major statutes or 'regulations' of the Company removed some of the sharp edges of the old penal law. The regulations allowed a larger space for contracts, debt

recovery, and provisions related to property, especially property of the expatriates.[9] The most important change though was that whereas in civil matters the Mughal system of justice created an identity between statutes, state courts, and Islam, the English departed from the practice. The state courts became sites where all community laws could be practiced. In short, community laws now became institutionalized in a manner that had no precedence in Islamic India.

The marriage between a decentralized conception of law and a bureaucratic system of courts was not a happy one. There were four types of anomalies in particular, three of these concerned property and were addressed with case laws, and the last one dealing with contract and addressed with legislative action.

Anomalies in property law

Post-mutiny colonial administration was acutely sensitive to a particular form of anomaly in property law, resulting from the fact that recognition of ownership rights in land had tended to devalue and de-protect customary tenancy rights. Tenancy legislation in the late nineteenth century redefined the concept of 'occupancy', recognized layers of customary rights using this concept, and inserted these rights into the law books. Recent research has also shown that a similar disjuncture between law and custom arose in the case of common lands (Chakravarty-Kaul, 1996). Legal recognition of the village commons encouraged enclosures and dis-empowerment of the community and customary law. While these instances of anomaly and adaptation arose in the particular context of agrarian history, there were problems that plagued the very heart of legislation itself.

Adherence to indigenous common law implied an impossibly large administrative job. The colonial project involved incorporating custom into the law-books and at the same time creating a universal system of courts. This project of preserving decentralized law within a centralized judicial system diverted the attention of the judges from efficiency, fairness, or equity, to a concern for consistency between texts, norms, and decisions. Whereas the Mughal system of justice was based on a dualistic distinction between believers and non-believers, a core state law that was coded and peripheral community laws that were left uncoded, the British system involved in principle giving equal

[9] A noticeable point of difference, for example, was in respect of maritime laws. The innovations in this regard were confined not only to laws, but extended to new institutions such as the Small Causes Courts and Insolvent Courts, both designed to deal with cases of debt and commercial contracts.

weight to all authentic claims to custom, and therefore, writing down everything. But the communities did not just consist of Hindus and Muslims, also Sikhs, Christians, Portuguese, Parsis, Armenians, Buddhists, and countless others besides. The Muslims and Hindus themselves were not homogenous communities, and the divisions within them were reflected in a highly diverse and often contradictory jurisprudence. Adherence to custom required assuming Hindu custom applied to all Hindus. These requirements were either anomalous or impossible to meet. A nineteenth century case judgment distinguished three types of authority on Hindu law: the Pandits, the texts, and the European scholars on Hindu texts. The Pandits and textual authority were frequently unhelpful, because of irreconcilable conflicts between texts, some of which were separated by hundreds of years, and the fact that each Pandit was schooled in a particular scholastic tradition and was trained to disagree with other Pandits. The dependence of the system upon cultural intermediaries was a recipe for fraudulent actions.[10] And yet it was not just the 'natives' or the lower court officials who participated in this game of misinformation. European judges were notorious for settling cases based on whim, when faced with an impenetrable point of religious law.

If Hindu law sources were thus often found unreliable, a similar problem arose with Islamic law. *Futawa Alamgiri* was not the document the British used very much in the nineteenth century as a model in deciding on customary law applicable to Muslims. The text used in practice was the substantially recreated *al-Hedaya* of Charles Hamilton. There were two problems with the *Futawa*. It was simply too large, and had remained untranslated for this reason until the nineteenth century. Secondly, the *Futawa* was a compendium of Hanafi interpretation of laws. By the early nineteenth century, an extensive region of northern India, Awadh, had emerged a strong state with institutions of its own. The rulers of this state followed the Imamite or Shia interpretations. The two institutions were similar in broad structure, but differed on important points of detail. The colonial codes, therefore, needed to move on both planes. Baillie's annotated translation of the *Futawa Alamgiri*, for example, necessitated a voluminous supplement on the Imamea code.

There was vacillation on the matter of what law should govern transactions between parties belonging to different faiths. In Mughal India, laws had an in-built bias in favour of transactions between parties following the same

[10] An early nineteenth century description of the court-room observed, 'Within these few years the natives have attained a sort of legal knowledge… This consists of a skill in the arts of collusion, intrigue, perjury, and subordination, which enables them to perplex and baffle the magistrates with infinite facility.' (Walter Hamilton, 1815).

faith. For, in disputes between Muslims and Hindus, judgments tended to be biased toward Muslims (Ahmad, 1941), and Hindu witnesses were either disallowed or carried less weight than their Muslim counterparts. The earliest rule followed in this regard was that disputes between parties following different faiths would be settled by recourse to the customary law of the defendant. But this was no more than a rule of thumb and a source of potential inequity. A particular subset of such doubtful cases related to parties who had converted to a different religion, or were professed non-believers. Apart from the vexed problem of deciding whether or not disputants might be allowed to choose the law they would be subjected to, there was an inherent problem with applying customary law to dissenters. Religious law did not recognize legal rights of apostates, converts, and outcastes, except under strict conditions.

Facing claims that referred to 'personal laws' the judiciary had to decide on a course of action in dealing with such cases. And the principle adopted time and again was to deem it 'the duty of the Court, whenever necessary, to ascertain and administer the same [personal law]' (Daya Ram v Sohel Singh, Punjab High Court, hereafter P.H.C., 1906). This disastrous rule turned every claim to personal law into an anthropological enquiry, the judge having to collect a sufficient number of instances of custom, and then to decide if these instances, when added together, justified the recognition of an established specific law.

By the end of the nineteenth century, religious benchmarks came in repeated conflict with a plethora of caste-cum-professional claims, especially in the Punjab. Master artisans of Punjab sued other master artisans alleging that a long-established artisanal custom wherein advances made by the plaintiff to a former employee would be repaid by the defendant, who now employed the same worker, was being violated (Bhajo vs Ram Chand, P.H.C., 1897; Rahiman vs Bala, P.H.C., 1909). Madaris, professional jugglers, sued an officer of the 1911 census alleging that the latter ignored their claim to be considered peasants (Bhola vs Razzap Shah, P.H.C., 1911). Chamars, leather-workers, sued their former clients demanding they be paid for customary services that had formerly been paid in kind or not at all (Partab Singh vs Baru, P.H.C., 1900). As land values increased in Punjab, jat peasants and sub-castes became drawn into disputes that linked adoption (to acquire a male heir) and inheritance. Adoption was long governed by 'custom' that prescribed certain rules and rituals making adoption valid in the eye of the court. Clearly, these rules were broken, out of a need for more flexible rules, and these acts were challenged by rival claimants to property.

Incorporation of custom into statutes, thus, gave rise to a problem already well-known to the English jurists, proliferation of case laws, which quickly became 'a luxuriant jungle' (Vesey-Fitzgerald, 1947). Qualitatively, the Indian

jungle was a different world from the English one. Attempts to universalize custom in India gave rise to a contest of assertion between religions and castes. Custom becomes effective in communities that are small enough and homogenous enough to have the means to enforce custom. The most commonly used means were the promise of profitable or prestigious marriage alliances and the threat of excommunication. These means cannot be universalized, and therefore, custom is essentially local and group-specific. To formalize and universalize community laws was an impossible project.

The second broad area of conflict in property law followed from the contradiction between allegiance and equity. A large part of the customary jurisprudence concerned the family, 'and it is this central doctrine which is in fact being gradually weakened by modern tendencies …' (Vesey-FitzGerald, 1947).[11] The connection between being virtuous and having claims to family property, between continuity of family and ownership of assets, was fundamental to both Hindu and Muslim law. This connection increasingly came under strain. A rather dramatic and early instance of such conflict was Moniram Kolita vs Kerry Kolitani (Privy Council, 1879). This case between a husband and a wife involved a conflict over whether or not an act of gift from a husband to a wife, once made, could be retracted on the ground of a subsequent act of 'unchastity' on the part of the latter. The Hindu texts were unanimous that the act could be so revoked. The court ruled against the texts. In so doing, the court valuated the act itself above the notion that a gift was a prize for good conduct.

A more famous context for disputes concerned succession in the joint family. The three types of cases where succession was particularly disputatious were adoption, wills and probates, and women's rights to property. Adoption involved a conflict between the ideology of religious law and economic imperatives. When a widow adopted a son, did she have the right to gift her husband's estate to the son overlooking the claims of the husband's family? According to some Hindu Mitakshara schools, such as the Mithila one, widows did not have such rights. Merchant families used adoption routinely to ensure the existence of a male heir, and in regions where mercantile families were numerous, customary adoption laws were more flexible than elsewhere (Juggomohun Roy vs Srimati Neemoo Dossee, Supreme Court, 1831). Which one of these regional conventions would be followed when a widow's right to adopt was challenged in court? The point was whether the religious case for adoption

[11] The text continues: 'Hindu law is dominated by a single great ideal, the continuity of the patriarchal family striding on from father to son through innumerable generations. This ideal explains not only its law of inheritance, but its theories of adoption, of the property rights of women and of the family'

(the fact that a 'son' was necessary to perform rituals for ancestors) could be given precedence over the dangers of leaving succession of joint family property to 'the caprice of a woman' (Sri Raghunadha vs Brozo Kishoro, Privy Council, 1876).

Hindu texts (and Muslim texts as well) tended to be open-ended on the subject of wills and probates, and the equivalence or otherwise between gifts and bequests. Customary laws of succession in a joint family gave a precedence to the claims of the family over the last wishes of the deceased head of the estate. Indeed, the latter was not an 'owner' of property but the head of a household and therefore a custodian. The deceased heads of households had no moral sanction to making 'executory bequests' in the style of English law. In such a system, all property rights were 'coparcener' rights rather than individual rights, and customary laws decided these coparcener claims. This notion came under strain in the nineteenth century with respect to property accumulated largely with individual initiative, until a landmark judgment in 1862 made Hindu testamentary powers equivalent to those in English common law (Soorjemoney's Case, judgment discussed by Rankin, 1945). That all succession involved coparcener claims left open the interpretation of coparcener rights. Was this an alienable right? Was this right in principle distinct from the right to property accumulated or owned by the head of the household? Until mid-nineteenth century, judges followed the principle that coparcener rights were alienable subject to consent of other coparceners. And yet, this principle was unworkable in practice, and case laws moved in the opposite direction.

Succession to property followed, in a Hindu joint family, the Mitakshara text in most parts of India, the Dayabhaga in Bengal and Assam, Mayukha in western India, and Nambudri in Kerala. The major difference between them concerned the degree of inclusion of female successors into the definition of coparceners, the most restrictive system being the Mitakshara, and most liberal the Mayukha. Nineteenth century saw sustained disputation of the most restrictive of the Mitakshara rules, and case laws that progressively expanded the claims of women in contradiction with the texts.

The third contradiction in property arose from an incompatibility between sectarian laws and ever widening networks of commercial transactions. In Punjab, the conflict between religious and professional custom was particularly serious because in this region, landed wealth was often jointly held by kin groups, a system that came under pressure with rising land values and growth of agriculture in Punjab.[12] A form of common law stipulating that all co-sharers had

[12] One judgment summed up the situation, 'the common village bond has been broken by the introduction into the proprietary body of persons of different independent tribes whose lands all

to agree before an outsider was admitted into the community of cultivators had been designed as a means to keep strangers out of the 'village community' or 'brotherhood'. It was a 'tribal' custom which might in some contexts interfere with the operation of an efficient land market. Disputes over acts of sale and preemptive actions against sale were so many that a series of case laws enacted between 1880 and 1900 ruled that no act of transfer of property would be effected solely with reference to custom and without registration under the Transfer of Property Act (1882), and also that a registration was by itself valid with or without the sanction of custom (see Rattigan, 1901, for discussion).

As former 'tribes' and pastoralist communities settled down as peasants in Punjab, their rules of succession were challenged in courts (Jowahir Singh vs Yakub Shah, P.H.C., 1906). Acts of sale or gift of land by individual proprietors was routinely challenged by relatives claiming to be co-sharers of the land according to custom among peasant communities. When rural artisans (such as Lohars, rural blacksmiths) took up cultivation, the courts had to decide whether they should be allowed their own custom in respect to inheritance and succession, or be subjected to religious law (Umar-ud-Din vs Janto, P.H.C., 1906). With migrants again, such as the Kashmiris of Punjab, similar problems arose. Rural classes who had moved to the cities were declared ineligible to receive protection of customary laws (Baij Nath vs Gulab Din, P.H.C., 1910). Urban artisan and merchant groups opposed Islamic law of inheritance, which was more favourable to females than the alleged customary laws amongst these professional groups (Maula Baksh vs Muhammad Baksh, P.H.C., 1906). 'Prostitutes' demanded special succession rights giving preference to daughters over male heirs, superseding Islamic law (Sarup Singh vs Musammat Jassi, P.H.C., 1891; Musammat Ghasiti vs Umrao Jan, P.H.C., 1893).

Finally, indigenous law fell short in settlement of impersonal exchange, the scale of which was growing rapidly.

Anomalies in contract

Neither Hindu law nor Muslim law supplied a sufficient or coherent guide on contract. We have seen a possible reason for this, transactions were bound by codes that were religious and communal in nature and were not well-adapted to impersonal dealings. Colebrooke, in particular, was very aware that this was the biggest problem in making custom work for a commercializing economy. The intellectual challenge was an enormous one, and could not possibly be handled with a mere translation job. Colebrooke embarked on a

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intermix, or where many uncontested alienations have taken place in the presence of agnate relatives or the alienors' (Fazil vs Sadan, 1910, Sanjiva Row, 1912: col. 986).

heroic and unfinished enterprise of making an annotated digest of the Hindu law of contract with the help of leading Indian sanskritists of his time. But this attempt supplied at best a very imperfect guide with respect to generalized form of contract, and was not followed except in a few limited spheres such as debt repayment. Where a particular subject of legislation did not have an obvious connection with the religious, the communal or the personal, judges and legislators faced a choice between the English common law and statutes, and Indian precedence. From the very early times, the Mayors' Courts had found that, on matters of contract, Indian disputants preferred to let cases be decided according to English law (Mukund, 2006).

Breach of contract suits presented a persistent difficulty in the first half of the nineteenth century. For an administration reluctant to legislate on civil matters, the default policy was to deal with breach of contract by means of existing criminal laws. The Act VIII of 1819, Act V of 1830, Act XIII of 1859 and the Act IX of 1860, applicable to employment in the plantations, delivery of indigo by peasants to the manufacturer of the dye, employment in the Presidency towns, and in public works respectively, terated breach of a contract as criminal offence. The advantage of criminal law was that it delivered speedy justice through the magistrates' courts. The disadvantage was that it rarely delivered justice. Criminal intent was inapplicable in a situation where breach of contract could happen due to, say, bad weather and poor crops. The magistrates' courts cost money. The disputants needed to employ lawyers, bribe court officials, hire witnesses, and pay for stamp tax. Without any one of these steps, the disputant in criminal cases had little chance of even making a fair hearing. The police report played a crucial role. The police tilted to that side which could pay more money. Nor was the magistrates' court efficient. In most breach of contract suits, the plaintiff was a merchant interested in ensuring performance of the contract rather than a prison sentence for the defendant. Criminal law had no provision for enforcing specific performance. Nor for that matter, did civil law.

The regulatory vacuum in commercial law continued through the nineteenth century, until a political crisis in Bengal supplied the push that was needed to make a complete break with both custom and criminal law in the sphere of contract enforcement.

In the first half of the nineteenth century, indigo was a major exportable from India. Indigo was grown in Bengal and processed in factories near farmlands. Many of the factories were owned by European capitalists. They engaged Bengali peasants, who possessed rights to tenancy under a zaminder (landlord), on contract to grow indigo. In March-April 1860, peasants in lower Bengal refused to cultivate the crop for the European manufacturers of the dye. At the same time, the planters-manufacturers filed a large number of suits in the

local courts alleging that the action was in breach of written contracts. Thus began the 'blue mutiny' which, like the great Indian mutiny three years before, became an occasion to question some of the key ideological foundations of British rule in India (see Chowdhury, 1964, for a general history of indigo up to the mutiny).

The nineteenth century saw many peasant rebellions in India. The indigo revolt was different from these episodes in a fundamental way. It was not about property, but about transactions. The early history of the industry in Bengal saw frequent and bitter complaints made by the planters about the ease with which peasants could break agreements for sale, prompting the government of the East India Company in Bengal to institute regulations concerning breach of contract. The specific regulations instituted by the Company hardly met the absence of a full-fledged contract law. They were ad-hoc, short-lived, controversially made breach of contract a criminal offence, lacked a specific performance clause, and defined penalty in terms of financial compensation, which few peasants were able to furnish. The actual agreements drawn up between the planter and the peasant followed no rule of law. And yet, being contracts in name, these received a measure of support from the judiciary and the administration. Day-to-day enforcement of contracts, on the other hand, was conducted by means of a system that delegated, in the name of local custom, a great deal of policing powers to the Indian functionaries of the factory. These intermediaries, who were often peasant-headmen themselves, knew individual peasants, and knew how to manipulate the system of criminal justice. This informal enforcement system, which extracted rents from both the peasants and the planters, in its turn added to the disputatious potentials of the indigo system. In the 1850s, increased profitability in rice made peasants disinterested in indigo. In informal enforcement system worked more harshly than before. Complaints of violence increased at the same pace as complaints about 'subterfuge and fraud' on the part of the peasant-debtor. From this impasse sprang 'a full harvest of assaults, plunderings, illegal detentions, and affrays', and eventually, the end of the indigo industry in Bengal (citation from U.K.H.C., 1861, p. 18, F. Beaufort, administrator, Pabna district).

The Crown found itself caught in a dilemma. The revolt did not represent a challenge to legitimate political authority. It exposed instead a legal vacuum and attempts to fill the void with ad-hoc rules, sham contracts, and unjust customs. Intervening at the level of custom was an unpopular policy, and out of the question a few years after the mutiny and the Santal rebellion. The lesson that observers drew from this stalemate was that the legal void needed to be filled by a universal contract law, the Contract Act (1872). For the first time in Indian history, the state that framed the Contract Act

> freely availed itself of its supreme power to define what shall henceforth be the law of the land in regard to a large part of the civil rights of the population of India which do not affect religious usages or institutions (Rattigan, 1901).

Other spheres where this radical principle was extended were trusts, transfer of property, promissory notes, evidence, wills and probates, and specific relief, all of which were codified in one major thrust that took place between 1870 and 1890. In the extensive discussion around the framing of the contract law (1866-72), the spectre of the indigo crisis was present.[13] It was the memory of indigo that made the debate unusually heated and protracted for so technical and straightforward a task.[14]

Conclusion

The paper discussed the origins and effects of colonial law in the sphere of property and contract. I argue that these issues cannot be completely understood in terms of the two available models of legal evolution, one from comparative history of institutional change and the other from the history of law and society in India. The former gives importance to the transplantation of European law in the colonized world, the latter gives importance to the colonial imperative to preserve indigenous law. The former explains the outcome of colonial law in terms of the composition of transplants, and the latter explains the outcome in terms of the distortions that common law underwent in the course of incorporation into administrative practice. Neither approach is satisfactory, however. A model centred on European origin of laws underplays interactions between institutions and ideologies. A model preoccupied with indigenous common law overlooks a sphere of legislation where transplants did rule.

The paper argues that the origin and effects of laws can be better understood if we interpret precolonial and colonial law as different legal regimes. In Mughal India, the right to frame and administer laws was decentralized into communities. The system was sectarian in this sense. Community law was driven by the goal of preserving allegiances toward family, kin, and lineage. Mercantile laws supplied guidelines for virtuous conduct among members of a social combine, and were not well adapted to impersonal exchange. The transition from Mughal to colonial law represented a partial change. There was, on the one hand, transition from a segmentary to a unitary

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[13] On the relevant documents and the debate between Henry Maine, the Law Member of the Council of the Governor General, and the framers of the first contract act, see U.K.H.C. (1868).

[14] More or less the only concession to custom permitted in the Contract Act was the principle of *dam-dupat*, under which arrears of interest could not be recovered beyond double the principal.

state, which led to the establishment of one system of courts and universal court procedures. On the other hand, the principle of community law was persisted with. This hybridization gave rise to two problems. First, unlike their counterparts in Mughal India, the judges in colonial India had to decide not only what action was compatible with common law, but what common law was, and whether or not it was fair, efficient, just, and in keeping with good conscience. This process gave rise to numerous conflicts. Second, there was an incompatibility between sectarian codes and the demands of impersonal exchange in a globalizing economy.

In the second half of the nineteenth century, legal evolution adapted to these two anomalies. The responses were varied. In property relations, maintaining indigenous common law was an imperative, and the response was to specify custom in greater detail. In the sphere of exchange, late nineteenth century legislation disassociated itself from custom.

The duality at the heart of colonial and postcolonial law in South Asia, and the consequent transaction costs, point at some of the specific ways that divergences might occur within common law traditions.

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