Law- History of India VI

Deedhiti Das

Race and Law

Kolsky challenges the view that British law and order swept across and transformed a chaotic pre-colonial legal landscape by revealing the disorder and lawlessness at the very centre of the colonial project itself.

White violence on indigenous population was one of many problems to come to the attention of the colonial authorities in the early nineteenth century. Colonial officials were not opposed to such acts on humanitarian grounds. What bothered them was the way in which such men challenged their exclusive authority by wrongfully assuming the state's power to punish and monopoly over legitimate means of violence. It was these non-officials, private traders, and free- merchants, pejoratively referred to as "interlopers" in the eighteenth century who played an extremely important part in the history of colonial law because of the legal, political, and moral challenges they posed to colonial authority.

As a global empire, Britain linked the legitimacy and lawful- ness of its power to promises of law and order. Law played a foundational role of law in the construction of the British colonial state. Charter Act of 1661 permitted the Company to exercise civil and criminal jurisdiction over all residents within the boundaries of its factories according to the laws of England. The Company's early legal system, which rested on a sharp line of distinction between Company servants and native Indians, had no means to deal with non-Company Europeans in India. Indeed, the very presence of these "interlopers" was a violation of the Company's royal trade monopoly which authorized only servants of the Company to do business in India.

In the eighteenth century, the Company established a parallel system of laws and law courts. By 1793, the entire European community in Bengal had grown, especially the Company's military and the non-official population of Calcutta.

Until 1793, European British subjects could not be tried in the Company Courts in most civil and criminal matters. Although a European British subject could sue an Indian in a mofussil court, Indians had to take their grievances against European British subjects to the Crown Courts in the Presidency. Depending on where you were in India, this could be upwards of 1,000 miles away. For financial and other reasons (including be spent away from work and the difficulty of transporting witnesses), Indians in the interior were generally unable to bear the burden of bringing their cases to trial in the Presidency and were therefore extremely vulnerable to abuses by European British subjects in both civil and criminal matters.

In 1793, the Bengal Government passed two **Regulations** designed to address the problem of British misconduct in civil matters in the mofussil.

- The first prohibited all non-official European British subjects from living further than 10 miles outside of Calcutta without a license and required that they agree to make themselves amenable to the local civil courts.
- The second required Europeans not in the Company's service to report their names, professions, and application for licenses to remain in the country to the Governor-

> General and to provide two securities for good conduct and testimonials of good character. Licensed Europeans found more than 10 miles outside of the Presidency without written permission could have their licenses withdrawn, have their property seized.

In practice, the Company found it extremely difficult to enforce its license system. Hard as it was to control the oceanic passage to India, there was little way for the Company to control the movement and behaviour of both licensed and unlicensed Europeans once they left the Presidency.

In 1813, when the Company's trade monopoly was abolished, **European British subjects in the mofussil were placed under the local jurisdiction of all civil courts higher than the zillah level. Even so, Indians could appeal only to the Sadr Diwani Adalat, while Britons could appeal directly to the Calcutta Supreme Court.**

However, Concern about the behaviour of non-officials and the lack of local criminal jurisdiction sparked off a **debate about the opening of free trade and the prospects of a permanent white settlement in India.** From 1764 to 1813, there was steady opposition in London and Calcutta to the open colonization of Indian land by European settlers. The opinion shared by administrators in England and India was that non- officials would oppress the natives, offend their religious sensibilities, degrade the imperial image by their drunkenness and misconduct, and weaken local confidence in the benefits of British governance. Ardent supporters of colonization, such as Charles Metcalfe, a Member of the Supreme Council, insisted that European settlement was necessary to civilize the mofussil and provide much-needed remittances at little cost to government. Governor-General William Bentinck asserted that India's improvement could only be achieved through an extensive European settlement. In Bentinck's view, the only way the government could maximize and encourage "the productive powers of the country" was through the diffusion of European capital, skill, and example.

The official record of "European Misconduct in India, 1766- 1824" presented a picture of British power and society in early colonial Bengal. Here we see the terror and desperation of the many European vagabonds, imposters, robbers, burglars, beggars, frauds, planters, loafers, escaped convicts, and absconding soldiers and seamen who wandered about the Town of Calcutta and the Indian mofussil.

The Court of Directors sent a stinging missive to the Governor-General reminding him "that all Europeans who are permitted to remain in the interior must be taught, practically, that obedience to the law is an indispensable condition of their licence to reside there.'" The insistence that Europeans be taught "obedience" to the law was reinforced by Thomas Macaulay in his famous parliamentary speech of July 10, 1833.

Soon after arriving in India, Macaulay discovered that many of his countrymen were unwilling to submit to the implications of having a black man and a white man stand on equal footing in court. Non-officials rallied loudly around the rights of the "freeborn Englishman" and protested all measures to subject them to laws framed for a subject population. Although colonial administrators had decided to create and codify a non-discriminating and universal law, the codified law of India delivered something different. Modem liberal political ideas were frequently distorted in their application in the colonies, where "special conditions" were

said. Such laws expanded legal distinctions, exceptions, and inequalities, and thereby normalized the very problems of white violence and lawlessness that the codified law was supposed to solve.

On February 1, 1836, Macaulay introduced a Bill into the Legislative Council that divested Europeans in the mofussil of their exclusive appeal to the Supreme Courts in the Presidencies in civil matters." Dubbed the "Black Act" by its detractors, Macaulay's Bill gave European British subjects a right of appeal to the Sadr Diwani Adalat, as all other people in the mofussil had. The Bill elicited enormous controversy, especially in Calcutta, where raucous meetings and strident articles gave voice to the growing power and privilege of the non-official community.

On May 9, 1836, Macaulay's Bill was passed. The non-official community was enraged by the violation of what they viewed as their inalienable rights and privileges. The fierce protest against the "**Black Act**" would serve as the historical benchmark for all future opposition to uniform legal jurisdiction in India.

The most intense phase of codification in India lasted for roughly fifty years, from 1833 to 1882. The **Code of Criminal Procedure (1861)** provides an apt case study to explore the colonial subversion of legal equality and the legal construction of racial difference. Instead of establishing formal legal equality, the Code of Criminal Procedure institutionalized racial inequality by delineating race-based rights and privileges, including: juries with European majorities for Europeans, but not for Indians; Presidency trials for Europeans, but local trials for Indians; and a racially differentiated schedule of punishments. Amendments to the Code in the following decades confirmed and expanded these racial distinctions under pressure from non-officials who insisted that formal legal equality was impossible in a caste-saturated and backward place like India.

Answer on Law

The process of law formation in colonial India also came to represent a coexistence of modern western ideas and colonially perceived notions of traditional Indian law. During the Mughal period and the 18th century, local definitions of criminal and civil laws existed; while the former involved the state directly the latter was based on the community in question. Hindus were subjected to their own laws which were backed by the authority of the scriptures and the interpretations offered by the Brahmans while Muslim law was interpreted largely by the **qazis** and other learned members of the **ulema**. Along with the traditional intellectuals of the Indian communities, law was also defined and imposed by the village and caste panchayats which were generally led by powerful rural patriarchs. During the Mughal period criminal cases were brought before the state functionaries like the faujdars who held courts regularly. Upon the decline of the Mughal empire powerful intermediaries like the zamindars, jagirdars, **talukdars** and **poligars** began to implement the law in many parts of India.A clear separation of the legislative, executive and judicial functions characteristic of a modern democratic order was absent in medieval India.

The question of defining and implementing law in India arose among the British once the English East India Company began the transition from being a commercial organization to becoming a state in Bengal. After the Battle of Buxar, and following the ideas of early Orientalists began to gain widespread acceptance and influence.

1st phase

The English, with the aid of new researches influenced by ideas of Orientalism, found themselves discovering an ancient civilization which had well defined codes of law and caste behaviour imprinted upon its social organization. Indians, it was found, knew how to rule themselves and all the British needed to do was to codify their laws. Men like Hastings and William Jones, therefore, saw no reason in trying to interfere in this scheme of things. The understanding was that as long as a community or any group of people or an individual *did not oppose* British rule the colonial state would leave them to their practices. Hastings's encouragement of oriental scholarship and, in particular, of Halhed's translation of Hindu laws was part of this attitude. When he interfered to reorganize the whole judicial system, he claimed that 'no essential change was made in the ancient constitution of the province. It was only brought back to its original principles.

In Hastings' Judicial plan of 1772, he laid down that 'Hindoos' were subject to the law as laid down in the 'Shaster', while 'Mohammedans' were to be adjudged by the laws of the Koran. . The idea that both Hindus and Muslims in India were governed by their own laws which derived legitimacy from their respective sacred texts came to prevail over the British minds of that age. In addition to not applying common law to the Indians, this Plan also called for a disregarding of local customs in favour of laws found in ancient texts. For the interpretation of Sanskrit texts, these scholars turned to the Brahmins, whom they associated with the priests of religions familiar to them. These texts were seen seen as a source of law. The basic tenet of this ideology was that the conquered people had to be governed by their own laws.

2nd phase

The second wave in the gathering tide of anglicization came with Cornwallis, the Governor-General from 1786 to 1793. it was oriental principles of government which in Cornwallis's eyes were fundamentally at fault. He saw in the Company's adoption of Asian despotism the source of every ill.

The Permanent Settlement of Bengal (1793) was a frank attempt to apply the English Whig philosophy of government. Cornwallis sought to reduce the function of government to the bare task of ensuring the security of person and property. He believed this could be achieved by permanently limiting the State revenue demand on the land; for he was convinced that the executive arm of the Government would always abuse its power so long as the State demand was variable from year to year.i Once the settlement was fixed in perpetuity, the Boards of Revenue and the collectors could be deprived of all judicial powers, and their functions confined 'to the mere collection of the public dues'.^ The executive would thus be divested of all discretionary authority, and would be subject to the rule of law as framed into formal legislative enactments by the Supreme Government and enforced by a judiciary entirely independent of the ordinary executive authorities.

In this spirit Cornwallis carried through a sweeping anglicization of the British power, removing Indians from all but the petty offices.

Wellesley still defended the abandonment of the native tradition and the separation of the judicial from the executive authorities by the Whig argument that all power was inherently

liable to abuse. the movement of anglicization was still defensive in outlook. It was not designed to effect a wholesale revolution of Indian society; its purpose was rather to limit the interference of government.

3rd Phase

The idea that law could be used to improve, civilize and modernize India following the example of Britain can be dated to the days when Utilitarianism began to influence British colonial policy in India. This began to happen from the early 19th century. The process was also not divorced from the critique of Indian society developed by the Christian missionaries who began to enter India in ever greater numbers during the decades preceding the revolt of 1857.

Mills, one of the foremost utilitarian thinkers believed what India needed was not a return to some glorious mythical past, but improvement and change to be effected in the present through wise governance, accompanied by good legislation. In England, under influence of Enlightenment, Mill supported representative government as the only way to keep power hungry elites in check. he made clear his view that this 'ideally best polity', as he called it, was not suited to all peoples. Only those capable of fulfilling its 'conditions', he argued, were entitled to enjoy the benefits of representative government. For the rest, subjection to 'foreign force', and a government 'in a considerable degree despotic', was appropriate, and even necessary.

Mills was an important driving force behind the appointment, under Lord Macaulay, of a Law Commission (1833), which drew up an Indian Penal Code (1835) on the model of a centrally, logically and coherently formulated code. The period between 1828-56 saw the coming into play of the doctrine of Liberalism, embodied in Thomas Macaulay's vision that the British administrator's task was to civilise rather than conquer, thereby setting a liberal agenda for the emancipation of India through governance. In Macaulay's view, the duty of the British was "to give good government to a people to whom we cannot give a free government."4 At the core of Macaulay's good but not free government stood what he saw as one of England's greatest potential gifts to the people of India: a codified rule of law.

Almost simultaneously in India a new class of English educated Indian intellectuals began to grow as a consequence of British rule and its interaction with sections of the Indian elite. Intellectuals like Ram Mohan Roy, for instance, perceived British rule in India as an excellent opportunity for Indians to reform a traditional society in which many inhuman customs like **sati** prevailed. The interests of reform minded liberals like William Bentinck and Indian reformers like Roy converged on the point of enacting new laws or banning certain traditional practices in an effort to create a progressive liberal society in India.

debate on education, sati and Hindu widow remarriage located in the first half of the 19thcentury. The results were Macaulay's famous minute on education (1835), abolition of sati (1829) and the enactment of the Hindu widow remarriage act (1856).

However, the broad degree of consensus between Indian elites and the colonial state, established early in the nineteenth century, and reinforced in the years after the wars of 1857, that for all routine civil purposes domestic and family questions were outside the purview of the state, except in so far as it was necessary to 'administer' the appropriate community and religious law.

In a similar vein Tanika Sarkar argues that colonial law reinforced the resistance of revivalist nationalists to state intervention in the domestic sphere, because of the distinction between law which had territorial scope and dealt with the public world and personal law, which was equated with religious law and held sway over family relationships, family property and religious life.

Singha argues that colonial governance sought to domesticate patriarchal authority to reconstitute the boundaries between household, state and market. Certain manifestations of patriarchal prerogative were rejected as excessive because these were bound up with an older political order which clashed with the ideological, fiscal imperatives of the colonial state. The preceding chapters elaborated the argument that the Company's legal claims over the person of its subjects set out a crucial terrain for the redefinition of sovereign right. At the same time, the judicial credibility given to male narratives of 'shame and disgrace', 'sudden anger' and 'great provocation' as a mitigatory factor, readmitted patriarchal prerogatives.

Intervention was also limited by the state's concern to conserve, police and judicial agencies for its own priorities of rule. When the company's government did not want certain kinds of complaints clogging the criminal courts, it justified its procedural or fiscal restrictions on prosecution by arguing that such charges were usually 'unfounded, misrepresented, or greatly exaggerated....'. Largely due to the mass reaction to colonial intervention in Indian religious matters symbolized by the revolt, the British decided upon a policy of non-intervention, unless absolutely necessary, in matters of personal law.

Following the revolt of 1857, which underlined the urgency of defining and controlling crime in India from the British perspective, and based on the work accomplished by official reformers like Macaulay, the Indian Penal Code (1860), Criminal Procedure Code (1872) and Civil Procedure Code (1909) were brought into force.

The imposition of new legal codes on a colonial society did not mean the arrival of juridical modernity in India. Alongside the nature of laws prevalent in the princely states patronized by the British, the colonial legal system in India represented a compromised colonial modernity working in the interest of the ruling and comprador elites of British colonialism in India. In the event, the system of delivering justice remained skewed in favour of the rich and powerful, most of whom were upper class and upper caste at the same time. For the poor, the process of seeking justice remained complicated, time consuming and expensive.