

Fantasm of Permanence and The Monologic of Empire

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The rise of the British Empire in the late eighteenth and early nineteenth centuries resulted in new challenges to a people who had only recently attempted to grapple with their new identity as a “British nation”, instead of separate communities with English, Scottish and Welsh origins. Britain’s colonialism, as argued by Linda Colley, evoked a sense of “British patriotism” through the domination over, and in distinction from, the millions of colonial subjects beyond their own boundaries”. Accordingly, a sense of “Britishness” went along hand in hand with the empire that was in the making. This evoked a “civilizing” belief that England should assist in advancing “backward peoples” towards greater refinement, just as the early Romans were

believed to have brought civility to England. The mission originated with the conquest of Ireland, and the desire to become the “new Romans” of Europe, which justified the Irish conquest and the subjugation of foreign peoples from America to India. In exploring the motivations behind British colonialism in India, an underlying trend can be seen in the “civilizing mission” that sought to establish British institutions and ideas in place of the local political culture, through the ideological hegemony inherent in such a mission. Central to British imperial design from the early nineteenth century was the introduction of law to India and the ambition to create legal codes for British India. As Metcalf explains, the initial British attempts to change India’s legal institutions and political culture stemmed from a belief that it was in a state of “Oriental despotism”, with the legitimate royal power similar to that of a “master over a slave”. Although the ideas of “despotism” were later replaced by notions that India had been in possession of laws since antiquity, the British still sought measures to successfully govern India, through imposing changes in its political culture, a desire which could be traced to the fundamental belief that it was bringing improvement to the people in India. According to the liberal John Stuart Mill, this was because British dominion of India could rapidly

carry its people through “several stages of progress”, and “clear away obstacles to improvement”. Consequently, the liberal transformation of India meant the assimilation of central British institutions onto Indian soil. Among the most important of these, were private property, the rule of law, education in Western knowledge and the liberty of the individual.

The concept of private property was introduced by the British in 1793, which differed significantly from precolonial days, during which land was held communally and a percentage of the produce remitted to the state. By introducing private property to India, British liberals hoped to eliminate the “parasitic” intermediaries of communal property, vesting all property rights in the actual cultivators of the soil. Moreover, as expressed by Eric Stokes, the introduction of private property was fundamental in that property rights in land were now secured and maintained by a Western law system, thereby altering the traditional modes of land tenure, which were the “heart of Indian society”. Accompanying these policy shifts were the socioeconomic changes that resulted, as can be seen in the modifications within the class structure, which transformed former revenuecollecting officials such as the zamindars and the taluqdars into a landowning gentry. More

importantly, the property laws also profoundly affected India's power distribution, as whoever controlled the land could now control those who had no land. Consequently, the British could now rely on the new landed class to perform domestic administrative duties such as the collection of revenue. The rule of law was another important effect of British colonialism. Led by officials such as Warren Hastings and William Jones, efforts were made to put into place a legal system that would effectively govern India through the utilization of the ancient Sanskrit texts as the basis of Hindu Civil Law. Fuelled by a belief in India's ancient laws rather than in its "despotic" nature, these officials sought to govern India through its own laws, which were translated into English from their original form. However, as Cohn argues, the 1864 judicial system reforms resulted in a transformation of Hindu law into a form of English case law, which was because of the establishment of authoritative decisions in English. These changes instituted the authority of precedence in making law, based on the AngloSaxon legal system. Consequently, the intentions of Hastings and Jones to govern India by its own laws had been supplanted by the ruling of India with English law as the law of the land. In a sense, this codification of "procedural" rather than "substantive" law enabled the

British to incorporate the “spirit” of its “civilizing mission”. This was achieved by preserving the Indian difference expressed in the substantive codes, while at the same time assimilating utilitarian desires for precision and simplicity in law, as seen in the liberal insistence on procedural codes. Another British institution, that of Westernstyle education, was deemed crucial towards the British desire to reshape India in its image. This was because Englishbased education served to intermingle the codes of power and culture, in that it both brought prestige and status to those who had “even a slight command of the language”, as well as imparted the culture of the colonizer onto that of the colonized. As coherently explained by Guha, Westernstyle education served to teach the colonized an interpretation of the past in terms of the colonizers’ interests. This was especially since the control of knowledge served as a way to retain power in the hands of those who possessed such knowledge, establishing a relationship of authority between educator and educated. As a result, the education process sought to achieve, as articulated by Thomas Macaulay, the growth of a class that was “Indian in blood and color, but English in tastes, in opinions, in morals and intellect”. This would then enable the efficient administration of India by a local educated elite, loyal to the dictates of

the British Crown. In instituting the key changes of property reforms, the rule of law and providing Indians with a Westernstyle of education, the British “civilizing” mission hoped to impart its fourth political legacy of ensuring the liberty of the individual. This could be achieved by ensuring property rights for the individual, enacting laws to provide for the protection of the individual and making available Westernstyle education as a means to “improve” the quality of life of the individual. The modern Indian bureaucracy, like the modern economy, developed as a result of the introduction of private property, the rule of law and modern education, as these three changes facilitated the efficient government and administration of India by the British rulers. The judicial system reforms, while establishing the primacy of Britishstyle legislation and the rule of precedencebased case law in India, established merely a procedural hegemony on Indian legislation, separate from local substantive codification. Moreover, the British separation of “Hindu” and “Muslim” law, although initially instituted as a product of administrative convenience, recognized inherent differences within the Indian population. As there were no notions of distinct “Hindu” or “Muslim” communities in the precolonial era, British categorization of such distinctions in law resulted in policy

changes which ironically accentuated the differences of the two “communities”, especially due to the British perception that Hindus were “passive” and “indolent” as compared to the general suspicions imposed on Muslims, who were believed to be “violent” and “despotic”. This set the stage for factional rivalry that culminated in the postcolonial separation of the territory into India, Pakistan and Bangladesh. While it cannot be argued that the British were directly responsible for the Hindu-Muslim factionalism and conflict, they can be held responsible at least in the sense that they formalized such differences through the legal changes, allowing a heightened sense of identity within each community. On a similar note, the intercaste rivalry in Indian culture was amplified through the categorization of society under the judicial system reforms. While this promoted the legal rights of the various castes, it also raised new questions on the existing caste system, as can be seen by the debate on introducing a separate political identity for the “untouchables”. Consequently, the ideological hegemony embodied by an orderly Indian society through the rule of British-style law failed to become reality as it instead accentuated divisions within Indian society, impervious to preconceived British notions of law and order.

On the surface, British educational reforms seemed to create an ideological hegemony through its creation of an educated Indian elite who had appeared receptive to ideas of British control through performing local administrative functions. This was because an education in English was believed to “deposit” Western values into the “soul of the educated”, and at the same time detach from Westerneducated individuals discourses of traditional scholarship, thereby alienating them from their traditional way of life. However, as Guha articulates, Westernstyle education and the instruction of English in India were confined to “wordbook knowledge”, which, while sufficient for the daily administrative functions of government, could not assimilate the values and ideas of British liberalism well enough to justify the notions of British ideological hegemony.

Concurrently, when the local educated elite was able to seriously study Western scholarship of liberty, democracy and nationalism, it provided an additional difficulty for the British. This was because such educated individuals not only sought to occupy the administrative posts once exclusively reserved for Europeans, but also began to provide a direct opposition to British rule by their propagation of “hostility to the established order”. In addition,

because the British were compelled to provide Indian education of a nonreligious nature, unlike the situation in Victorian England, this reflected a compromise in the British “civilizing mission”, therefore reaffirming the lack of British total ideological control over Indian education. British notions of Indian bureaucratic control were inherent in the idea that through its institutions, there could be the creation of a local educated elite capable of maintaining the day to day functions of Indian administration, and at the same time preserving the supervisory role of the British government. In addition, the princely system of governance allowed the British to establish at worst a tolerant body of rulers who did not object violently to colonial rule by force of arms. In this sense, ideological control over the bureaucracy can be argued to have created a system of governance, which allowed the British to rule over India in a consensual contract of ruler and ruled. However, as argued by Anthony Appiah, British indirect rule and the use of “native administrations” resulted in the preservation of local elitism throughout the colonial era. This resulted in the promotion of local traditions and “customary aw[s]”, which were a legacy of the precolonial state and innately distinct from British colonial practices. Consequently, the prevailing practice of precolonial culture implied

that the British, while retaining control of the macro situation in India, did not and could not influence the micro situation in the country, an idea inherent in the very nature of British colonial rule itself. In this sense, there was therefore no ideological hegemony implicit in the indirect manner of control established by the British.

Our perception of the everyday world around us involves codes.

Fredric Jameson declares that 'all perceptual systems are already languages in their own right'(Jameson 1972, 152). As Derrida would put it, perception is always already representation. 'Perception depends on coding the world into iconic signs that can represent it within our mind. The force of the apparent identity is enormous. We think that it is the world itself we see in our "mind's eye", rather than a coded picture of it'(Nichols 1981). According to the Gestalt psychologists notably Max Wertheimer (1880-1943), Wolfgang Köhler (1887-1967) and Kurt Koffka (1886-1941) — there

1 Jameson, Fredric (1972):
The Prison House of Language. Princeton, NJ: Princeton University Press. page 152.

2 Nichols, Bill (1981): Ideology and the Image: Social Representation in the Cinema and Other Media. Bloomington, IN: Indiana University Press. page 112. are certain universal features in human visual perception which in semiotic terms can be seen as constituting a perceptual code. Confronted by a visual image, we seem

to need to separate a dominant shape from what our current concerns relegate to 'background'. What the Gestalt principles of perceptual organization suggest is that we may be predisposed towards interpreting ambiguous images in one way rather than another by universal principles.

We may accept such a proposition at the same time as accepting that such predispositions may also be generated by other factors. Similarly, we may accept the Gestalt principles whilst at the same time regarding other aspects of perception as being learned and culturally variable rather than innate. The Gestalt principles can be seen as reinforcing the notion that the world is not simply and objectively 'out there' but it is constructed in the process of perception. As Immanuel Kant famously proposed in his Critique of Pure Reason (1781) that 'objective reality is known only insofar as it conforms to the essential structure of the knowing mind. Only objects of experience, phenomena, may be known, whereas things lying beyond experience, noumena, are unknowable, even though in some cases we assume a priori knowledge of them. The existence of such unknowable "things in themselves" can be neither confirmed nor denied, nor can they be scientifically demonstrated.' Therefore, the common law is uncodifiable; a

Kant, Immanuel (1781) Critique of Pure Reason. Reprint (1999) Cambridge University Press.

code sacrifices the flexibility of the common law, trapping its reasoning

within rigid conceptual confines; a code offers clarity where the common law is vague and uncertain; the law of the legislator is better or worse, or more democratic, or more out of touch, than judgemade law; the code offers accessibility, where common law is accessible only to those trained in the artificial reasoning of the law. The code, in short, offers system, the common law adaptability—whatever the supposed merits of each.

The conventions of codes represent a social dimension in semiotics: a code is a set of practices familiar to users of the medium operating within a broad cultural framework. Indeed, as Stuart Hall puts it, 'there is no intelligible discourse without the operation of a code'(Hall 1980, 131). Society itself depends on the existence of such signifying systems.

Codes are not simply 'conventions' of communication but rather procedural systems of related conventions which operate in certain domains. Codes organize signs into meaningful systems which correlate signifiers and signifieds. Codes transcend single and isolated legal contexts, linking them together in an interpretative framework. Stephen Heath notes that 'while every code is a system, not every system is a code'(Heath 1981, 130). He adds that 'a code is

distinguished by its coherence, its homogeneity, its Hall, Stuart ([1973] 1980): 'Encoding/decoding'. In Centre for Contemporary Cultural Studies (Ed.): Culture, Media, Language: Working Papers in Cultural Studies, 1972/79 London: Hutchinson, pp. 128-38

Heath, Stephen (1981): 'Metz's Semiology: A Short Glossary' in Eaton, Mick (Ed.) (1981): Cinema and Semiotics (Screen Reader 2). London: Society for Education in Film and Television
systematicity, in the face of the heterogeneity of the message, articulated

across several codes.'

Codes are interpretive frameworks which are used by both producers and interpreters of the law. In codification of the law signs are selected and combined in relation to the codes with which the people are familiar 'in order to limit... the range of possible meanings they are likely to generate when read.' Codes help to simplify phenomena in order to make it easier to communicate experiences. In reading codified law, we interpret signs with reference to what seem to be appropriate codes. Usually the appropriate codes are obvious, 'overdetermined' by all sorts of sociolegal contextual cues. Signs within codified law can be seen as embodying cues to the codes which are appropriate for interpreting them. The medium of codification employed clearly influences the

choice of codes. In applying a code to an issue of law, we may find that it undergoes revision and transformation in the reading process; continuing to read with this same code, one can easily notice that it now produces a 'different' and 'decontextualized' context for the law, which in turn modifies the code by which we are reading it, and so on. This dialectical process is in principle infinite; and if this is so, then it undermines any assumption that once identified about the level of accuracy and perfection being reached by codification of any

ibid., p.129.

Turner, Graeme (1992): British Cultural Studies: An Introduction.
New York: Routledge. page 17.

Gombrich, Ernst H (1982): The Image and the Eye: Further Studies in the Psychology of Pictorial Representation. London: Phaidon. Page 35.

given legal issue. Therefore, Codified law could be 'codeproductive' and 'codetransgressive' as well as 'codeconfirming'.

In order to understand criminal legislation, one needs to refocus from criminal legislation to its most modern form, the code — by turning one's historical attention to the significance of criminal codes, thereby reconnecting the analysis of law to the analysis of the state,

jurisprudence to politics. Therefore, particular attention needs to be provided to two analytic distinctions — between private and public law, and between criminal and civil law.

English criminal law scholarship still treats its subject "as an adjunct of private law; that is, it is concerned primarily with the definition and protection of private rights and interests. This is a sad fact. The unreflected perception of English criminal law as the protector of one individual's interests against interference by another individual survives in such concepts as the "core criminal law," "ordinary criminal law," or "traditional criminal law." It does not help matters that all of these concepts either remain tantalizingly undefined or point in the general direction of those common law crimes that mysteriously separated themselves from torts—to which they nonetheless retain an uncomfortably close resemblance. In the above anachronistic view, the core of criminal law appears to be covered increasingly with an unsightly growth of peripheral and suspiciously modern "regulatory offenses," "malum prohibitum offenses," "public welfare offenses," "police offenses," and the like. These offenses, however, are not really crimes (they are, well, offenses, perhaps violations, or even only contraventions). Never mind that they by

now easily outnumber real crimes. It is quality, not quantity that matters. As a result, the explosion of these public, yet faux, crimes has done little to challenge the myth of the criminal law as private law. The overlap between torts and criminal law makes little difference; in fact this has nothing to do with the criminal law's protection of public interests as it is precisely the interference with individual interests that gives rise both to tort and criminal liability. There can be no tort liability for so-called victimless crimes or public offenses. Harm to the flow of commerce or the administration of justice, or for that matter to "public morals," does not constitute a tort, though it frequently makes a crime.

Modern criminal law fails to recognize the public law aspect of criminal law. The problem goes deeper. Modern criminal law scholarship fails to recognize that its subject in large part no longer represents a species of law at all. The category mistake, in other words, transcends that of law and extends to the range of coercive methods available to the modern state. Insofar as criminal law has been transformed into a mode of regulation, it has been transformed into a species of police, rather than of law.

Not only the distinction between public and private law remains

unclear and unexplored in English Criminal Law scholarship, so does the definition of law and its differentiation from other modes of state coercion. One concept that may help distinguish the law is that of legitimacy. One might think, for example, that law makes different claims to legitimacy than does, say, the regulation of air traffic. One difference may lie in the communicative nature of that legitimation: law is addressed to persons, not problems. While one can repeatedly raise the question of law's audience, one could also be anxious to separate it from that of law's legitimacy. Eager to work out the "Englishness" of the English code commissioners, it could be stressed that they did not have legitimacy in mind. Instead, they singlemindedly pursued the sole goal of deterrence. That the legitimacy question is settled, however, does not mean that it is insignificant. Therefore, the peculiar Englishness of the English codifiers of the time may have lain not in their failure to recognize the centrality of the question of legitimacy that still agitated some of their continental contemporaries well into the nineteenth century; rather, it may have been in their assumption that the answer to that question was settled.

Once the legitimacy question is settled, the question of deterrence comes into view, the political significance of codification reveals itself

as a process of constant legitimation. The codification process is the process of legitimation because it constantly subjects the power of the state to firstorder and secondorder legitimacy scrutiny. Firstorder, or internal, scrutiny is directed at the consistency or coherence of the rules of criminal law with its principles. Secondorder, or external, scrutiny, checks the principles against the ultimate ground of legitimation. In the case of nineteenthcentury England, that was the prevention of interference with the autonomy of the constituents of the British state community.

It is also undemocratic. English codification not only assumed a consensus on the legitimacy question, it also answered that question without reference to the concept of democracy. It is no surprise, then, that the greatest successes of English criminal codification would be criminal codes drafted by wise Englishmen (some of whom were experts in criminal law [Stephen], others not [Macaulay]) for various colonies, Canada and India in particular. In the English model of codification, the man on the street matters only as the object of law, not its subject. The subject of law is the panoptical legislator. The man on the street does not scrutinize the legitimacy of law. He obeys it and leaves the scrutiny to the legislaturexpert, in whose ability he trusts

(another very English thing?). The legislator thus not only scrutinizes himself without the assistance of other branches of government, but also without the benefit of public scrutiny. Unable to derive procedural or substantive legitimacy either from the process of his appointment or from the scrutiny of his actions by others within and outside government, the English codifier faces a lonely and unenviable task.



ENDNOTES

1 Thomas R. Metcalf, *Ideologies of the Raj*, Cambridge: Cambridge University Press, 1994, p. 3.

2 Ibid., p. 23

3 Ibid., p. 6

4 Ibid. p. 910.

5 Ibid., p. 33.

6 Ibid., p. 35.

Asma Barlas, *Democracy, Nationalism and Communalism:*

The Colonial Legacy in South

Asia, Boulder and Oxford: Westview Press, 1995, p. 49. Barlas notes

the transition between the pre-Mughal to Mughal

periods, during which the king's share

of the produce had increased from one sixth to one third, but communal property remained the norm.

8 Thomas R. Metcalf, *Ideologies of the Raj*, p.35.

9 Asma Barlas, *Democracy, Nationalism and Communalism*, p.49.

10 Ibid., pp.501.

11 Ibid., pp.512.

12 Bernard S. Cohn., *Colonialism and its Forms of Knowledge: The British in*

India, Princeton, New Jersey: Princeton University Press, 1996, pp.6571.

13 Ibid., p.75.

14 Thomas R. Metcalf., *Ideologies of the Raj*, pp.379.

15 Ibid., p.39.

16 Ranajit Guha, *Dominance without Hegemony: History and Power in Colonial India*, Massachusetts &

England: Harvard University Press, 1997, pp.1712.

17 Ibid., p.171.

18 Asma Barlas, *Democracy, Nationalism and Communalism*, p.57.

27 Ibid., pp.1323.

28 Ibid., pp.1334, 13940. Metcalf notes that the 1857 revolt was perceived as a product of enduring Muslim animosity

although it originated in the army and had both Hindu and Muslim supporters throughout Northern India.

29 Robert W. Stern, *Changing India*, pp. 768. Stern relates the conflict between Mahatma

Gandhi and Bhimrao Ramji Ambedkar. He narrates Ambedkar's lobbying to win for the "untouchables" a separate political identity with the approval of the British. However, when Gandhi embarked on a "fast unto death" protest, Ambedkar reluctantly withdrew his proposal.

30 Ranajit Guha, *Dominance without Hegemony: History and Power in Colonial India*, Massachusetts & England: Harvard University Press, 1997, p. 175.

31 Ibid., p. 174.

32 Asma Barlas, *Democracy, Nationalism and Communalism*, p. 58.

33 Thomas R. Metcalf, *Ideologies of the Raj*, pp. 394. Metcalf explains that because religion could not be inscribed into the Indian education system, English was instead used as the central element of the school curriculum, a move that was not subscribed to even in Victorian England.

38 Appiah, Anthony, *In My Father's House: Africa in the Philosophy of*

Culture, New

York and Oxford: Oxford University Press, 1992. p. 165. While Appiah's discussion is mainly focussed on the effect of colonialism in Africa, his ideas nevertheless also hold true in India.

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