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Unintended consequences of early British attempts to administer "Gentoo" laws

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Meenakshi Jain

Introduction

In the years immediately following the conquest of Bengal, several officials of the English East India Company were made "aficionados of Indian culture." The "enthusiasm for India" commenced around the 1760s and continued till the early nineteenth century. That was noteworthy, given that Company officials then largely viewed India as the entryway to quick fortune, and indulged in largescale corruption.

In1757, John Grose, a Writer (employee) in the East India Company, published his *A Voyage to the East Indies: with an Account of the Mogul Government and of the Mahometan, Gentoo and Parsee Religion*. The writings of early Company-men displayed a conviction that "the benevolence of religion and laws made India a prosperous and peaceful country before foreign conquest" (Trautmann 2004: 63-65).

In 1767, the East India Company was entrusted with the work of revenue collection, in addition to judicial responsibilities, in the provinces of Bengal, Bihar, and Orissa. Numerous officials then advocated that the Company retain, and adhere to, indigenous laws.

To gain access to indigenous laws and regulations, the Company sponsored the translation of several texts into English. This paper examines four such translations - *A Code of Gentoo Laws* (1776); *Institutes of Hindu Law: or, the Ordinances of Menu* (1794); *A Digest of Hindu Law on Contracts and Successions* (1801); and *Two Treatises on the Hindu Law of Inheritance* (1810). An unintended consequence of the British endeavour to access, translate, and implement indigenous laws was to kindle numerous tensions and divisions within Indian society, which the paper discusses.

Political scenario in the mid-18th century

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As the English East India Company began to exercise effective power in Bengal, several of its officials advocated the need to respect indigenous traditions, customs, and institutions. Such a policy, they argued, would help stabilize and legitimize British power in India. Political developments added urgency to the matter.

Till 1765, the East India Company derived its territorial revenues only from the *zamindari* of Calcutta, the 24 Parganas, and the districts of Burdwan, Midnapur, and Chittagong. Those had been assigned to it by Mir Kasim, who had been appointed Nawab of Bengal in 1760 with Company backing. A Company servant, designated Resident, was placed in charge of each area. He had to work under a Committee of Lands that had been formed in 1758.

Company-granted diwani rights

The situation changed markedly on 16th August 1765 when the Mughal Emperor, Shah Alam granted the Company the lucrative *diwani* of Bengal, Bihar, and Orissa. The *Diwani* entailed the right to collect land revenue, in addition to judicial responsibilities. The significance of *diwani* could be gauged from the fact that after 1765, the revenues of Bengal alone comprised almost one-quarter of the public revenues of Britain as a whole (Marshall 1997: 91).

Early advocates of indigenous institutions

The need to adhere to native institutions was advocated by: Luke Scrafton, J.Z. Holwell, Alexander Dow, William Bolts**,** and Harry Verelst. All these five early endorsers pointed out that the "Gentoos" (i.e. Hindus) had maintained loyalty to their laws and customs even under "Tartar" rule. They proposed that "Gentoos" continue to live under the protection of their own laws, which should be administered under British supervision with the assistance of native experts.

"Gentoos" lived under their own laws while even under "Tartar" rule

Luke Scrafton, who served as Resident at Murshidabad after the battle of Plassey, was perhaps the first to note the changed status of the Company. He said Englishmen were no longer perceived as "mere merchants, they were now thought the umpires of Indostan" (Scrafton 1770: 120-121). The publication of his book, *Reflections on the Government of Indostan,* coincided with the expansion of the Company's territories in Bengal.

While perceptively commenting on the limited nature of the "Tartar" conquest, Scrafton pointed out that during "Tartar" rule Hindu rajas continued to retain vast tracts of land, and "old Gentoo laws" continued in significant parts of the subcontinent (more discussion follows under 'Warren Hastings'). He further argued that "…the Mahometan laws never extended further than the capital cities; and even there the old customs were still regarded" (Scrafton 1770: 23-24).

Luke Scrafton noted the many fallacies current among Englishmen about indigenous laws then, and observed that the "immutable Gentoo laws" had prevailed under all circumstances. The most "immutable" of those laws was the hereditary right to all lands, which extended even to tenants. Those laws were widely established, and acted as "barriers against oppression" (Scrafton 1770: 24).

John Zephaniah Holwell, temporary Governor of Bengal in 1760, also observed the altered status of the Company (Holwell 1765 Part I: 2-3). He calculated the tremendous increase in the Company's fortunes from the *diwani*, and endorsed the need to adhere to the original tenets of the people, "… we should touch only on the original principal tenets of these ancient people, the Gentoos" (Holwell 1765 Part II: 1).

Alexander Dow, Lt-Colonel in the Company's military service, underscored the link between consolidation of the Company's position and knowledge of native systems. He emphasized that under Mughal rule, indigenous laws had not been tampered with; "the great system, in most of its parts, descended from the regulations which Brahma transmitted, with his followers, from remote antiquity" (Dow 1770Vol. III: lxxxi).

William Bolts, a Dutch adventurer who was admitted into the Bengal civil service and subsequently appointed as an alderman of the Mayor's Court in Calcutta, wrote of the phenomenal rise of the East India Company from a body of mere traders to the sovereign of extensive, rich, and populous tracts (Bolts 1772: iv-v). He stressed the need to retain indigenous institutions, pointing out that the Mughals had allowed the inhabitants to retain their personal and civil laws, "according to their own Shastras, or ancient Scriptures, of which, we have but little knowledge" (Bolts1772: 19-20).

Harry Verelst (1734-1785), having served as the Governor of Bengal from 1767 to 1769, voiced his apprehensions gained from twenty years of experience, the negative consequences of introducing English laws (Verelst 1772: 132). He viewed it as unreasonable to suppose that millions of people should

renounce in an instant custom they had abided by, which habit had confirmed, and religion taught to revere (Verelst 1772: 134-135). He cautioned,

"As well might we transplant the full-grown oak to the banks of the Ganges, as dream that any part of a code, matured by the patient labours of successive judges and legislators in this island (Britain), can possibly coalesce with the customs of Bengal" (Verelst 1772: 134). He proposed that people should be left to live under their own laws, which would be administered under British supervision, with assistance of native experts. By such a measure, the Company would improve its revenues and invest more in commerce (Bhattacharyya-Panda 2008: 66-69).

British parliamentarian, Edmund Burke was in agreement with such views. He said, "Those people lived under the Law, which was formed even whilst we, I may say, were in the Forest, before we knew what Jurisprudence was … It is a refined, enlightened, curious, elaborate, technical Jurisprudence under which they lived, and by which their property was secured…" (Marshall 1991 Vol. VI: 285).

Warren Hastings

Warren Hastings, the first Governor General of India (1772-1785), was convinced it would be "fundamentally unjust and politically unadvisable" to impose alien laws upon the governed. He professed his desire to reinstate the ancient constitution of the Indian people within an improved "modern" judiciary (Dodson 2011: 20-21). Immediately on assuming office as Governor General, he prepared his Judicial Plan of 1772. Section XXIII of the Plan declared,

> … in all suits regarding Inheritance, Marriage, Caste, and other religious Usages, or Institutions, the Laws of the Koran with respect to *Mahometans*, and those of the Shaster with respect to *Gentoos*, shall be invariably adhered to: On all such Occasions, the Moulavies or Brahmins shall respectively attend and expound the Law, and they shall sign the Report, and assist in passing the Decree (Forrest 1910 Vol. II: 295-296).

Scholars have suggested that local jurists had advised Company officials that on all issues of caste, religious institutions, and related matters, the laws of the Hindus must be elicited from the *dharmasastras*, and the learnings preserved therein.[1] Hastings and his colleagues were in any case inclined towards a division of topics of law as per the contemporary English practice. That is, usages and institutions that corresponded to subjects under the purview of ecclesiastical laws and the Bishops' courts in Britain, should fall under native laws in India (Derrett 1968: 233).

Hastings explained his policy in a communication to the Court of Directors in November 1772, "We have endeavoured to adapt our Regulations to the Manners and Understanding of the People,

and Exigencies of the Country, adhering, as closely as We were able, to their Ancient Usages and Institutions" (Forrest 1910 Vol. II Appendix A:277).In a subsequent letter to the Court of Directors, in March 1773, Hastings pointed to the need to prepare digests of Hindu and Muslim laws, which would serve as guidelines to British judges (Morley 1858: 191-192). He wrote to Lord Chief Justice, Lord Mansfield, on 21st March 1774, emphasizing the right of a great nation to preserve its laws. He rejected insinuations that Hindus had been governed by the arbitrary will of temporary rulers, and had no written laws[2] (Gleig Vol. I 1841: 399-404).

A Code of Gentoo Laws

In 1772, at Hastings request, eleven Brahmins gathered at Fort William and prepared a comprehensive treatise on Hindu law, the *Vivadarnava-setu,* 'bridge across the ocean of litigation.'[3]It was translated into Persian, and in 1776, into English by Nathaniel Halhed as *A Code of Gentoo Laws* (Derrett 1968: 239-242; Marshall 1973: 250). The *Vivadarnava-setu* dealt with topics Hastings believed would arise in *mufassil* courts, like Debt, Inheritance, Partnership, Rent and Hire, Sale, Boundaries, Shares in the Cultivation of Lands, etc. The order of topics did not adhere to any *dharmasastra,* and also lacked logic, "as well as completeness" (Derrett 1968: 240-241).

Fallacies in Warren Hasting's approach

Notwithstanding the laudable intentions, Hastings and his group committed several blunders in trying to access "native laws". Of the eleven Brahmins chosen to prepare the *Vivadarnava-setu,* only two had written on the *dharmasastras* before their selection by the East India Company. Further, prior to the British arrival, the principal school of learning in Bengal was logic (*navya-nyaya*). It was only after the Company's decision to apply Hindu law in the courts that there was a resurgence in *dharmasastra* studies in the late 18th and early 19th centuries (Rocher 1993: 237).

Hastings and his associates also were erroneous in assuming that as in the west, a code could be referred to, and a law appropriate to a particular case, selected. The *dharmasastras* however, presented a variety of authoritative texts and a range of commentaries—there could be several answers to a problem, not one. Early Company-men failed to appreciate that there could be various solutions to an issue, depending on the source consulted. As a consequence of Hastings' resolve to administer Hindu law to Hindus, the administration of justice became dependent on a legal corpus "as yet unknown, and on native interpreters whose knowledge of the law the British initially had no means to assess" (Rocher 1993: 236-237).

Erroneous process of translation

The process of translation on which the *Code* was based was also riddled with defects. Sir William Jones described the *Vivadarnava-setu* as a flawed text,

> I have read the original of Halhed's book… compiled about ten or twelve years ago by eleven Brahmans … the version was made by Halhed from the Persian, and that by a Muselman writer from the Bengal dialect, in which one of the Brahmans explained it to him. A translation, in the third degree from the original, must be, as you will easily imagine, very erroneous… (Cannon Vol. II 1970: 821).

Company official and Sanskrit scholar, H.T. Colebrooke also pointed out that the *Code* "might have served as an introduction to a knowledge of the Hindu law; but even for this purpose, it is inadequate, the Persian translation from which Mr. Halhed made his version being unfaithful" (Rocher 1983: 61).

"Tartars" never undertook to implement "Gentoo" laws

The implementation of Hastings' objective also presented many difficulties. As several contemporary Company officials noted, in the past Hindus had followed their personal laws under Muslim rule which never assumed the obligation of enforcing those laws (briefly discussed above). By contrast, the judicial responsibilities the British undertook made it obligatory for them "to know, apply and enforce Hindu law." Though pandits could be deputed as assistants in British courts, it was "a cumbersome process of successive translations, not to mention recurring fears of bribery" (Rocher 1983: 48, 63).

Reception to Halhed's *Code* in Europe

Though the *Code* was a compilation on Hindu laws, it was Halhed's Preface that attracted attention in Europe, for very different reasons. In the Preface, Halhed discussed Hindu religion and its misrepresentation in the West, Hindu view of history, and also Sanskrit language and literature. He stated that Hindus had ever "laid claim to an antiquity infinitely more remote than is authorized by the Belief of the rest of Mankind" (Halhed 1776: xxxvii). Reviewers in Europe examined the *Code* to evaluate the level that Indian civilization had attained. For them the *Code* was, "… a firm step towards a more fixed knowledge of the perceived rules and ethics of Indian civilization" (Patterson 2022: 224). William Robertson (1721-1793), Scottish historian and minister in the church of Scotland, viewed the *Code* as a testimony to the highly evolved legal philosophy of the Hindus,

> …(the *Code* was) the most valuable and authentic elucidation of Indian policy and manners that had been hitherto communicated to Europe... We may conclude, that the Hindoos have in their possession treatises concerning law and jurisprudence in their country, of more remote antiquity than are to be found in other nations… That the Hindoos were a people highly civilized, at the time their laws were composed, is most certainly established by internal evidence contained in the Code itself. … with respect to the number and variety of points it considers, it will bear a comparison with the celebrated digest of Justinian; or with the systems of jurisprudence in nations most highly civilized… (Robertson Vol. XII 1817: 215-217).

The Roman Catholic lawyer, Charles Butler (1750-1832) hailed the *Code,* saying, "with the single exception of the Scriptures, it is the most valuable present which Europe ever received from Asia" (Butler 1817 Vol. I: 309).

Did Code Question Biblical chronology?

Though the *Code* was generally welcomed, Halhed's Preface in which he unambiguously dated Hinduism as the most ancient philosophical system in the world, provoked intense debate. Halhed was clear that the chronology of Gentoo ordinations far antedated the timeline of Biblical history. The *Critical Review* noted the "potential heterodoxy of his (Halhed') remarks." It said, Halhed had presented the work "from a skepticism of a Hume, or a Voltaire, as the world has not seen." The *Annual Register* commented that Halhed would have been less willing to accept the "wild extravagant chronology of the bramins,," had he "given himself but a little time to reflect upon the absurdities of their geography," which Halhed himself had described as "deplorable" in the Preface. *The Gentleman's Magazine* also refuted Halhed's arguments, especially his chronology, which, it suggested, Halhed had been "somewhat credulous in accepting" (Patterson 2022: 225).

Rev. George Costard, clergyman, vicar of Twickenham, and family friend of Halhed, refuted the proposition on the antiquity of the Hindus. He admonished Halhed, and described Hindu chronology as "fictitious and absurd." Indian records, he alleged, were so late that they had lost all memory of the Deluge. Costard stated, "…the history of the old world is lost, except what remains in the Bible" (Rocher 1983: 58). The Unitarian thinker, Joseph Priestly stated that his own researches had demonstrated the superior "wisdom of the Laws, and of the religion, prescribed in the writings of Moses." He said, "… the wisdom of the laws, and of the religion, prescribed in the writings of Moses, and in the books of the Old Testament in general … will appear to so much advantage, when contrasted with those of the Hindoos … the origin of his (Moses's) institutions cannot but be concluded to be divine …" (Priestly 1799: 2-5).[4]

The radical anti-clerical, Guillaume Thomas Francois (Abbe Raynal), however, agreed "without hesitation" with Halhed that the Gentoo scriptures were of greater antiquity than Western annals could account for (Patterson 2022: 226). The antiquity was apparent in the high perfection the Sanskrit language had attained, as also in the development of sciences, agriculture, and technique, examples of which Halhed had cited; and above all, in the provisions of the *Code* itself. Abbe Raynal declared that despite its imperfections, the *Code* justified the great reputation of ancient brahmins (Rocher 1983: 55-56, 59; Patterson 2022: 226-227).

In sum, the *Code* was evaluated as "an antiquarian and Indological document," rather than as a book of law. It was a literary success in Europe. Halhed was hailed for the information he provided in the Preface on Sanskrit letters. In India however, the difficulties in using it for legal decisions soon became apparent (Rocher 1983: 63).

Did the Code ignite a north-south divide in India?

The *Code* generated a storm among Company officials in the Madras Presidency, and perhaps sparked a north-south divide. A fierce critic of the *Code* was James H. Nelson of the Madras Civil Service. Nelson commenced his attack by disparaging the methodology adopted. He said the *Code* was prepared in a hurry by ill-informed people, "and having been badly done into Persian by Hindus, was badly done into English by Halhed" (Nelson 1881a: 13). In a scathing appraisal, Nelson pointed to several legal commentators that the *Code* had overlooked. Among them was Vijnanesvara, highly respected for the *Mitaksara*, his commentary on the *Yajnavalkya-smrti.* Shockingly, the *Code* attributed the *Mitaksara (Mitaxara*) "to one Mirtekhara-Kar." It also made no reference to Kulluka Bhatta, regarded as one of the greatest legal commentators. Further, the works of respected commentators on Manu, like Medhatithi and Govind Raja, were "merely quoted occasionally" (Nelson *JRAS of Great Britain and Ireland* 1881: 215-216).

Nelson pointed to the over-reliance on the "the Pandits of Mithila," who were repeatedly cited as authorities as opposed to other scholars. Further, the opinion of a single law giver was stated as authoritative, even though it was "at variance with that generally received…" (ibid.).

Institutes of Hindu Law: or, the Ordinances of Menu

A Code of Gentoo Laws was followed in 1794, with William Jones's translation of the *Manusmriti,* under the title, *Institutes of Hindu Law: or, the Ordinances of Menu*. In the Preface, Jones wrote that as Britain had pledged to leave the natives in possession of their laws in matters of contracts and inheritance, it was imperative that those laws be "fully and accurately known."Jones said that obligation of the Company led him to publish the "system of duties, religious and civil, and of law in all its branches, which the Hindus firmly believe to have been promulgated in the beginning of time by Menu… the first of created beings, and not the oldest only, but the holiest of legislators…" (Jones 1794: 1).

Criticism of Institutes of Hindu Law: or, the Ordinances of Menu in Madras Presidency

F.W. Ellis, civil servant in the Madras Presidency, described *Institutes of Hindu Law: or, the Ordinances of Menu* valuable as a literary work, but of little practical value. He pointed to the absence of an accompanying commentary, which should have adapted the text to the changed circumstances of later times. Ellis said, "A mere text book is considered by Indian jurists as of very little use or authority for the actual administration of justice..." (Ellis Vol. I 1827: 6-7).

Nelson, too, was critical of the work. Before Jones published his translation Nelson said that it was doubtful whether a single person "of Conjevaram or Tanjore or Madura had ever suspected the former existence of a lawgiver named Manu to whose memory infinite reverence, and to whose edicts perfect obedience, was due." Nelson wondered whether Hindus in the past "believed in the absolute truth of the supposed utterances of a mythic and mysterious Manu …" (Nelson 1881a: 11-13). Also, he castigated William Jones for having been misled by faulty information, and making the world believe that the code of Manu had been used by, and had benefitted, inhabitants of India. Nelson said, William Jones' "great reputation enabled him to do an injury to Hindu law which the ill effects have lasted to the present day…" (Nelson 1881a: 13).

A Digest of Hindu Law on Contracts and Successions

Aided by Jagannatha Tarkapancanana, a senior scholar, William Jones supervised the compilation of a new digest on Hindu law, the *Vivada-bhangarnava,* or 'Ocean of resolutions of disputes.' It was completed after

Jones's death (in 1794) by H.T. Colebrooke, and published in 1801 under the title *A Digest of Hindu Law on Contracts and Successions.*

Critics of A Digest of Hindu Law on Contracts and Successions in Madras Presidency

As in the case of *A Code of Gentoo Laws,* Company officials in Madras Presidency found *A Digest of Hindu Law on Contracts and Successions* inadequatefor its excessive dependence on only the "writers of the Gauda, or northern schools," to the detriment of lawgivers in other parts of the country (Ellis Vol. I 1827: 7).

A Digest of Hindu Law on Contracts and Successions and issue of ownership of landed property

The *A Digest of Hindu Law on Contracts and Successions* addressed the important issue of land ownership. Perhaps, it was consciously intended to address British anxieties on this particular matter. It has been suggested that "some English lawyer" put questions to Jagannatha Tarkapancanana, "guiding him as to where Hindu learning must somehow be forthcoming" (Derrett 1968: 247-248).

Certainly, the compilers of the *Vivada-bhangarnava* seemed aware of British concerns regarding ownership of landed property and the role and status of *zamindars*. *A Digest of Hindu Law on Contracts and Successions* included a section titled, "Disquisition on Property in the Soil (section II.2,1 nos. 12-24). It concluded with the statement, "…the property is his who uses the land where he resides, and while he uses it: and thus, when the land belonging to any person is sold by the king, it is a sale without ownership" (Rocher and Rocher 2012: 38).

Critics alleged sovereign's ownership of land advocated due to British political ascendancy

Mark Wilks (Political Resident at the court of Mysore, 1803-1808), a supporter of the proprietary rights of peasants, dismissed *A Digest of Hindu Law on Contracts and Successions* as promoting the sovereign's ownership of land because of the political ascendancy of the British. He also condemned Colebrooke's policy of translating the *Vivada-bhangarnava,* without any commentary (Rocher and Rocher 2012: 38).

Mark Wilks

'earlier landed property vested in the tiller'

Wilks stated that previously landed property vested in the tiller. He quoted Manu, "Cultivated land is the property of him who cut away the wood, or who first cleared and tilled it" …. (Wilks 1810 Vol. I: 127). Pressing his attack, Wilks questioned the claim to the king's right to landed property. He further said,

"…we shall find it not only difficult to prove, but equally perplexing distinctly to imagine, the existence of landed property in a king, that had not previously been the landed property of a subject" (Wilks 1810 Vol. I: 151). He further states, "Cawney Atchey in Tamil … is a compound term, each member of which signifies 'independent hereditary property'… This word (was) translated in … (revenue) records … (as) Meerass, inheritance; and its possessor by the … inflection Meerassdar, hereditary proprietor" (Wilks 1810 Vol. I: 181-184). He adds that both the terms, Meerass and Meerassdar, were continued under the British, with the sole objective of incorporating everything into the system of Bengal. He argued that in Bengal, the British had created a proprietor, previously unknown in Indian history, under the modern name *zamindar*. The British had declared the possessors of absolute control in landed property, to have only the "hereditary right of cultivation" (Wilks 1810 Vol. I: 181-184).

The issue of landownership (especially in princely families) had, undoubtedly, preoccupied revenue and judicial officers of the Company. The concluding sentence of the *A Digest of Hindu Law on Contracts and Successions* was perhaps indicative of the attempt by native authors to satisfy their British patrons. The Digest stated,

"From apprehension of offending very great persons, it is not *here* examined whether some modern princes, who are not independent in the government of their subjects, but merely employed in levying the revenue of the paramount, should, or should not, be acknowledged as kings" (section II. 4.1, no. 15) (Rocher and Rocher 2012: 39).

Two Treatises on the Hindu Law of Inheritance

In view of his own reservations about *A Digest of Hindu Law on Contracts and Successions,* H.T. Colebrooke undertook a new compilation of the laws of successions, derived from other collections of Hindu law. Intended as a supplementary digest, he selected parts of Hindu law he considered most useful (Colebrooke Vol. II 1873a: 478). The two texts of which he provided a translation were Jimutavahana's *Dayabhaga,* and *Mitaksara,* and Vijnanesvara's commentary on the *Yajnavalkya-smrti*.[5]

In the preface to *Two Treatises on the Hindu Law of Inheritance,* Colebrooke said there were two standard authorities on the Hindu law of inheritance, the schools of Bengal and Banaras (Colebrooke 1810:

iii). He said *Dayabhaga* was restricted to Bengal while the range and authority of the *Mitaksara* was far more extensive, "…it is received in all the schools of *Hindu* law, from *Benares* to the southern extremity of the peninsula of *India*, as the chief groundwork of the doctrines which they follow, and as an authority from which they rarely dissent" (Colebrooke 1810: iv-v).

Colebrooke was the first to divide Hindu law into two major schools, *Dayabhaga* and *Mitaksara.* He further divided the *Mitaksara* into the Banaras, Mithila, Maharastra, and Dravida sub-schools. There was no traditional basis for his claim of schools of Hindu law. Before him, there had never been schools of *dharmasastras* (Davis 2009: 291-292). Also, it was by no means certain that *Dayabhaga* was actually "current in Bengal," when Colebrooke translated the text. His work, however, elevated *Dayabhaga* and *Mitaksara* as the main representatives of two distinct systems of inheritance (Rocher 2002: 21).

Colebrooke's work rejected in Madras Presidency

As with earlier translations by Company officials in Bengal Presidency, Colebrooke's view on different regional schools of law was challenged in Madras Presidency. A main ground of condemnation was its heavy reliance on northern jurisprudence. Ellis said the translation of the *Two Treatises on the Hindu Law of Inheritance* was "liable to the same objection as the *Digest* of J. Tercapanchanana, that it is of authority in the Gauda schools only, and not in Southern India" (Ellis 1827 Vol. I: 8).

Absence of usage of Mitaksara in Madras Presidency

J.H. Nelson questioned the authenticity of the supposed "Schools of Hindu law". He said it would be a great gain if it could be precisely ascertained in which parts of India the *Mitaksara* was regarded an authority, and "for what purposes it commonly is referred to." He doubted if any "class of natives" in Madras Presidency ever consulted the *Mitaksara* to determine issues of succession. According to him, barring a few pleaders and others acquainted with the ways of the High Court, not a soul in Madras Presidency had ever referred to, or even heard of, *Mitaksara* as a treatise on law (Nelson 1877: 26-27).

Importance of customary law

Nelson **e**mphasized the importance of customary law in Madras Presidency. He said,

"… the conduct of an ordinary *Chetti*, or *Maravan* or *Reddi* of the Madras Province, unless indeed he happens to come into our courts as a litigant, is no more affected by precepts contained in the Mitaxara (*Mitaksara*) than it is by precepts contained in the Psalms of David" (Nelson 1877: 27).

Nelson wondered how Colebrooke came to the conclusion that the *Mitaksara* was universally respected in distant regions he had never visited, and whose languages he was wholly unacquainted with. He regarded it courageous of Colebrooke to claim knowledge of the state of affairs "in the ill-organized, make shift courts of the country around Benares."

Nelson accused Colebrooke of "temerity" in claiming that Mitaksara was accepted by all schools of Hindu law from Benares to the southern tip of India. He said no learned man should have risked his reputation by making such an incorrect statement. Nelson further pointed out that Abbe Dubois, a contemporary of Colebrooke, who had for over two decades daily conversed with Brahmins of Mysore, "appears never to have heard of the Mitaxara …" (Nelson 1881a: 65-66).

Sanskritic orthodoxy of Bengal Company-men: Nelson's criticism

Nelson was a critic of what he claimed was the influence of Sanskritic orthodoxy on Company-men in Bengal. He claimed that certain law books were being recommended as if they were the law and custom of millions of people, who had actually never been governed by them, and who were entitled to abide by their own customs. His own experience in the districts convinced him that it was absurd to apply *dharmasastra* law to people wholly unsuited to it (Derrett 1967: 365-366).

Attempt to erase local usages

Nelson alleged that the High Court in Madras Presidency had assumed the self-imposed duty of civilizing the bulk of the population, "by gradually destroying their local usages and customs" (Nelson 1887: 7; Rudolph and Rudolph 1965-1966: 37). Nelson's views on Hindu law were based on what he regarded as the gulf between castes in Madras Presidency that Ellis had earlier emphasized (Derrett 1967: 363-364).[6]

Recommendation by Nelson for Commission to determine usage of customary law in courts

Nelson urged the Government to set up a Commission to determine how much of the *dharmasastra* law was, in fact, followed by the public (Derrett 1967: 366-370). He wanted the Madras court to ascertain, and use, customary law.

Possible flaws in Nelson's assertions

Nelson's arguments, however, seemed possibly flawed in that he himself seemed not to have assessed the extent to which *dharmasastra* law had been adopted and also the degree to which judges in Madras Presidency had applied customary law (Rudolph and Rudolph 1965-1966: 37).

Other voices against Colebrooke

Without naming H.T. Colebrooke, Sanskrit scholar and judge A.C. Burnell described the "schools of law" as unnecessary, and foreign to the original texts and digests (Rocher and Rocher 2012: 115).

Archibald Galloway (1779-1850), director of the East India Company and writer on military strategy and law, criticized Colebrooke for "talking of the 'Bengal school' and the 'Benares school' holding different laws; as if the question were one of taste or of the fine arts" (Galloway 1832: 287).

Justice Innes refutes Nelson

Nelson's views on the other hand were strongly opposed by Lewis C. Innes, Senior Puisne Judge of the Madras High Court. In 1882, a year after the publication of Nelson's *A Prospectus of the Scientific Study of the Hindu Law*, Justice Innes wrote a 110 pages printed letter to the Governor of Madras. Therein, he denounced Nelson's demand for a commission on Hindu law as administered in Madras, regarding it as "not necessary or desirable." Rather, he claimed, it was calculated to produce "extreme inconvenience and public mischief, not to say deplorable disaster" (Nelson 1887: 1). Nelson reproduced part of Innes's 'Prefatory Letter' in his book, *Indian Usage and Judge-made Law in Madras.*

Innes wrote that Nelson's assumptions were ill-founded, his statements of facts often inaccurate, and his conclusions erroneous. And his constant reiterations would create doubts in the minds of the populace about the authority of the decisions of the High Court, and "foster litigation upon questions long deemed fully determined; and thus to unsettle titles and depreciate the value of property."

Innes was certain that the Government of Madras would not accept the Nelson proposal. Nonetheless, it was necessary to expose the "unsoundness of his (Nelson's) views." The constant agitation of the public mind would provoke litigation and create serious obstacles in functioning of the High Court. The possibility of freedom from all laws, "except that of the individual will" in matters of marriage, adoption,

alienation, testation, would greatly appeal to the masses, which was the prospect Nelson held out (Nelson 1881a:182).

Errors in understanding by Company officials in Bengal and Madras Presidency

Modern scholarship has established that Sanskrit texts never served as "law books" in traditional Hindu tribunals. In that respect, Nelson's critique was pertinent; and Warren Hastings and his contemporaries, Jones, and Colebrooke were "gravely misled" (Derrett 1968: 292; L. Rocher 2007: 81, Rocher and Rocher 2012: 116). But, Nelson erred in not examining the extent to which *dharmasastra* law had been accepted in Madras Presidency, and also the extent to which courts there had implemented customary law.

Two Treatises on the Hindu Law of Inheritance: Standard authority on Hindu inheritance

Criticism notwithstanding, the *Two Treatises* established Colebrooke's reputation as the principal authority on Hindu law. It became a textbook for aspiring East India Company civil servants. W.H. Morley said, "No one will for a moment dispute, that in any question of Hindu law the word of the illustrious Henry Colebrooke is worth the exposition of a thousand Pandits" (Morley 1858: 333).

From the time of the publication of *Two Treatises,* its injunctions were used at all levels of the Indian judicature in matters of inheritance for Hindus. Copies of *Two Treatises* were sent to all courts of civil judicature in Bengal Presidency. *Two Treatises* remained in use till the passage of the Hindu Succession Act of 1956.

Privy Council: 1868

Colebrooke's novel division of Hindu law into two schools was described as "the most transforming innovation in the substance of Anglo-Hindu law". The Privy Council in London, the final court of appeal for Indian cases, declared in 1868,

> … the duty of an European judge who is under the obligation to administer Hindoo law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the District with which he has to deal (Rocher 2010: 84).

All in all, the East India Company's venture into the realm of Indian jurisprudence reveals how good intentions led to unintended consequences, and perhaps played a role in impairing regional and caste equanimities.

End-notes

1. Scholars have argued that the belief of early Company officials that *dharmasastras* were the immutable legal texts of the Hindus, was an "invention of tradition" (Panda 2008: 54-55). By converting knowledge from native sources into English language, the British discovered India on their own terms. Colonialism "reorganized India politically and empirically" the two re-organizations reinforced each other (Ludden 1993: 253).

2. The other European powers then in India – the Portuguese, Dutch, French – all preferred to apply their own laws to the natives of the territories that came under their sway. The British were an exception in that regard (Derrett 1968: 228). Some scholars have argued that Warren Hastings' admiration for things Indian was possibly also influenced by the tenuous nature of British rule, which demanded adaptation to the existing order (Rocher 1983: 48-49).

3. Brahmins were initially reluctant to assist Englishmen in acquiring knowledge of Sanskrit. Hastings eventually succeeded in obtaining the services of the renowned *pundit* Radhakanta Tarkavagisa, a student of the celebrated Jagannatha Tarkapancanana (Rocher 1989: 628). In the 'introduction' to his work Nathaniel Halhed also wrote, that the *pundits* who compiled the *Code* "were to a Man resolute in rejecting all …solicitations for Instruction in this dialect" (Halhed 1776: xxxvi-xxxvii). Warren Hastings noted that was because Europeans had misused the information "to turn their religion into derision." Brahmins were also fearful that accepting recompense from "unclean" Company officials would violate their ritual status. It was Pandit Ramlochan, a Vaidya who first provided William Jones with his services and resources. By the mid-1780s, however, Jones had developed cordial relations with Brahmins of Calcutta and Nadia (Marshall 1970: 191; Ballantyne 2002: 23; Cannon 1970 Vol. II: 762).

4. William Jones declared his intention to present a concise history of Indian chronology derived from Sanskrit texts, but he was constrained to fit it within the Biblical chronological framework, as he confessed, "Either the first eleven chapters of Genesis … are true, or the whole fabrick of our national religion is false, a conclusion which none of us, I trust, would wish to be drawn. I … am obliged of course to believe the sanctity of the venerable books (of Genesis) …" (*Asiatick Researches* Vol. I: 191).

Accordingly, William Jones placed Indian civilization between Biblically-based creation date of the universe at 4004 BCE, as was advocated by the seventeenth century Archbishop Ussher, and the Great Flood, which he believed occurred in 2350 BCE (Bryant 2002:15).

The Roman Catholic lawyer, Charles Butler described William Jones' dating of the first foundation of the Indian empire and the different ages as,

> the most specious system, on these subjects, which has yet appeared… in fixing the eras of the Vedas and the Institutes of Menu, he does not speak of them as existing, at the period he assigns to them, in the form we now have them; he considers them to have been in a state of traditional existence. Such is the outline of Sir William Jones's system; but it is impossible not to wish … that … his premises, were established with more certainty, and that the conclusions he deduces from them were supported by inferences and arguments less nicely spun. … (Butler 1817 Vol. I: 309-310).

5. Vijnanesvara, who composed the *Mitaksara*, was an ascetic who lived in the reign of king Vikramaditya VI of the Chalukya dynasty (r. 1076-1127), whose capital was Kalyan (Kalyani, Bidar district, Maharashtra). Vijnanesvara's and Jimutavahana's mutual silence about each other suggested that the two authors were contemporaries or near-contemporaries working independently of one another in different parts of India at the commencement of the 12th century (Rocher 2002: 24).

6. For Ellis's views on caste, see his comments on a Pundit's dispensation on adoption after the death of a male without any issue in *Elements of Hindu Law: Referable to British Judicature in India* (Strange 1825 Vol II: 74-75).

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