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Transition from Traditional to Modern Legal System in India: Socio Legal Analysis

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Abstract

Contemporary legal system of India is called modern legal system mostly foreign in origin and different from traditional legal system of India. But nothing can be done in one night and similarly, modern legal system which is followed in present India has experienced a phase of transition where India was struggling with its traditional beliefs and values system along with new implemented modern legal system. This paper firstly gives a brief introduction on how colonist changes traditional legal system in India which can be studied with the help of writing of Lakshmi Subramanian. This case. Analyse the tradition period how the courts and merchant's identities changed during 1800. This was the era of transition when company rule began in administrative, civil and criminal matters but in order to keep the support of public in terms of finance and to avoid conflict English east India company did not fully denied the importance of traditional legal system. To order to better understand the social transformation from traditional to modern legal system it is necessary to understand as what constitutes traditional legal system. It is later on used to compare modern legal system with traditional legal system along with the compromises made during transition. This can be easily done by understanding and analysing writings of Marc Galanter. The writing of Lakshmi Subramanian analyse the compromises made during the transition period. It is the time when though company rule was applicable in some parts of India but because company understood the fact that culture, values and tradition of India cannot be separated from its people, it still followed some aspect of traditional legal system. During the transition period, Britishers has realised that they cannot go away with the Indian tradition and hence in order to have a better control over Indian legal system they began the project of codification of customary practices prevalent in India. However it differed from the actual practices because they could only codify those practices which is in written form. Later, this paper analyse how codification project led to less friendly legal system in India which was different from traditional customary practice. Lastly, paper conclude with the analyses whether social transformation brought by codification of customary practices is advantageous or not?

Introduction

The modern legal system is a complex vision of foreign legal system and traditional legal system. It is often called as modern legal system where the word modern has referred to legal system of industrial societies of past centuries. The salient feature of modern legal system includes uniform territorial rules based on universalistic norms. These rules are administered by hierarchy of courts. This system included revising of rules and procedure and enjoys government ensures monopoly.

On the contrary before colonial rule, there were innumerable overlapping jurisdictions in India. Though Dharmasastra existed but it did not serve to unify the system in a way the national law was unified in western countries. Hindu law mainly did not enjoy political support to become a unified law. One of the reason for non-uniform law is existing diversity in India. The other reason which made the unification of law difficult was absence of written records.

Traditional Indian legal system were formerly based on the words or principles interpreted by religious superiors. It does made changes in the written text, but it did not impose it. It allowed the old to remain alongside the new. This is one of the reasons why it was easy for company to codify the law mentioned in text. Also, it made the base of modern Indian legal system somewhere unacceptable because it lacks the progressive change made by the elderly and head of the community.

The britishers took the decisive step toward a modern legal system by initiating a process that might be called the expropriation of law. This expropriation was not to ease the justice delivery system or too civilised but it is the method which made the power to find, declare and apply law a monopoly of government and control the trade and commerce. However, it was not a one night journey and witnessed overlapping of both the legal system and often referred as transition period.

But Britishers knew that in order to rule over India and Indians it is necessary to follow non interference policy which is why they never interfered with the personal laws of the country. And it is only civil and criminal laws which faced the codification based on the combination of written codified west law and Indian traditional legal system called as Hindu law. However, this came after a long transition period.[1] The transition period could be studied with the help of famous 1800 trial.

Case overview

Before going through the transition made during this time period, it is necessary to first learn the socio-economic relations existing that time which led to the cause of transition. During company rule Anglo-Bania partnership existed in Surat and this negotiation between Indian merchants and the English East India Company was the reason of period of transition.

The induction of the English East India Company into the power structure of Surat was largely supported and sponsored by the city's merchants called as Bania Community. They are high caste Hindus who participated inc commerce and adhered to certain common social and ritual values. Bania was a caste cum occupational category.

The facts of the case starts from the time when Dyarchy ended in Surat in 1800 and English East India Company secured official control over the city and its adjacent dependencies by pensioning off the ruling Nawab, Nasir al-Din. The Treaty and the takeover formalised what had been de facto Company control.

Earlier settlement of substantial property disputes, The Adalat Hazur worked in association with the caste elders, whose counsel was taken into consideration and on the basis of which a settlement was finalised. There was also a court of petty disputes under the Nawab's brother. The Amini was specifically entrusted with the maintenance of municipal order and was expected to look into acts of sedition, murder, theft and rioting, and to report on the

[1]Marc Galanter, "The Displacement of Traditional Law in Modern India," Journal of Social Issues 24:4 (1968), 65-88.

movements of strangers.

During the riots of 1788 and 1795 when Bania merchants were targeted, and their property and accounts were damaged by Muslim mob they remind company of its contractual obligation and hence company made the first move towards the construction of a judicial and municipal order for the city. Negotiation was made in terms of individual rights or an abstract concept of equality before the law. As beneficiaries of transition politics, their immediate concern was the restoration of civic order and public administration, which would enable them to run their business concerns with ease and regulate their social relationships in accordance with the existing norms of caste, patriarchy and patronal relationships. [2]

However, merchants' perception of the Company was largely informed by their sense of the Company as their overall protector and patron, the Bania collaborators enjoyed a measure of confidence and assertiveness that evidently found reflection in changing social equations in the city. This was represented at two levels: in the perceptions of the city's Muslim groups and in the Banias' representations to the Company urging better arrangements for the protection of their property.

In Surat, Tarwady of Surat is a Wanee by profession, by caste a Nuggur Braman; but the word seems to be distinctively applied to those castes who are by law and shaster directed or allowed to gain their livelihood by trade. Tarwadi Arjunji Nathji, who had incidentally secured the farman for the Company in 1759, there by legitimising their assumption of office as Qiladar, was even more exceptional. But the same person was accused for murder charge of his servant and was brought before English Court.

The Treaty of 1800 provided for the establishment of courts for the administration of justice, while ordinances and regulations were to be framed with 'due regard to the existing usages and laws of the country. Earlier it was prohibited from taking up criminal issues, but the 1800 treaty formalised these changes even as the Magistrate assumed powers of administering cases with criminal liability. Chief as Justice of the Peace was to exercise all the powers of a Magistrate prescribed by law to those living under Company protection. Also, relatives of the deceased and caste elders demanded justice from English Adalat.

Tarwadi was restrained under Section II Regulation III of the Act of 1800, and the whole torturous process of proving guilt and deciding on punishment was set in motion. The Company was from the very beginning hesitant about pushing charges to severely. Even though an eyewitness gave the testimony gist the accused, but Court passed a conflicting decision in favour of the accused. The reasons used by the court to decide in favour of accused shows the transition period from traditional legal system to modern legal system.[3]

Compromises made during Transition

In December 1800, the city of Surat witnessed an important trial involving its leading citizen, Shri Krishna Arjunji Nathji Tarwadi, who was charged with the murder of a man servant on his premises. The trial lasted in the Sessions Courts of the English East India Company for about a month. This case witness the transition from traditional legal system to modern legal system. On one hand company was trying to monopolised by imposing rules and regulations in form of law but on the other hand company was unable to impose the idea of

[2] Ibid.
[3] A trial in transition: Courts, merchants and identities in western India, circa 1800, Lakshmi Subramanian, Indian Economic Social History Review 2004 41: 269 DOI: 10.1177/001946460404100302, The online version of this article can be found at: http://ier.sagepub.com/content/41/3/269 .

written law or abstract law due to existing tradition and customary practices. Therefore, in this company used Indian traditional practices in its favour.[4]

Company was struggling with the issues like how were social relationships expressed in this period of transition from mercantile engagement to colonial subordination-did these continue to adhere to custom and convention or did these reveal new inflections of a different legal presence? Where did British law, as it was being introduced and experienced, stand in the template of Company merchant relations? To what extent was the Company's legislative initiative compromised by the need to reconcile with the laws and customs of the people, so as to balance their own immediate financial and political interests by drawing upon existing normative codes of caste, rank and privilege?

This case witnessed range of social transactions that the English Company had to enter into with the subject population as a precondition to the framing of law and the construction of the legal subject and complexities of negotiation between Indian merchants and the English East India Company during the half century of transition. [5]

As the scope of judicial arbitration, which the Company undertook on behalf of their client merchants, was not substantial in terms of conception and remained tied up with existing channels of the late Mughal establishment. The trial in many ways embodied the anomalies that accompanied transition politics, and the uneasy negotiation that ensued between the domain of custom and that of the 'rule of law'.

It is in this context that the trial of 1800 assumes a special significance. It was during the trial that a brief, even tentative, dialogue was initiated between the Company and its indigenous associates about the concepts of an abstract law, the construction of a legal subject and the bounds of admissible punishment within the household. [6]

The pardon the Company came up with for the Surat banker in 1800 had as much to do with considerations of material advantage as it had to do with the state's ambivalence on the issue of criminal jurisdiction in a society where there were multiple sources of authority and regulation. Transition and compromise can be seen when courts and pundits came face to face and conflated impersonal notions of English justice and Hindu custom.

The question raised was the Company's function to arbitrate societal norms and ritual codes and obligations on the lines of caste panchayats? Or was it the Company's duty to set out certain abstract norms that defined intention and motive and then on that basis suggest punishment irrespective of the caste councils' decisions?

Compromises were made when questions were raised like did the banker intend the servant's death, and was he in fact completely unaware of the seriousness of the prisoner's situation on the night of 9 December? Justification was given in the name of question whether, could an act of private punishment inflicted by a Brahmin master enter the domain of the new legal system that the Company was trying to put in place?

For whatever the nature of the Company's political presence and the legal system they

[4] Lauren Benton, Colonial law and Cultural difference: Jurisdictional Politics and the Formation of the Colonial State, Comparative Studies in Society and History, 41:3, 1999,
[5] Rudolf and Rudolf, "Legal Cultures and Social Change," in The Modernity of Tradition: Political Development in India, Chicago, 1984, 251-95.
[6] John L. Comaroff, "Colonialism, Culture, and the Law: A Foreword", Law and Social Inquiry, 26 (2001), 305-314.

were trying to implement in the city, it was important to consider the social realities of the contemporary situation. Tarwadi was Brahmin notable whose influence was not as yet subordinate to the rule of law. Also, in order to confirm with traditional legal system Baba Shastri Pandit was asked to comment on the rules of prohibition

The Court was not in a position to institute an order that fully responded to the complexities of the situation to the banker's status as a notable in local society; as a Brahmin whose ritual rank could not be superseded in any penalty that ignored such distinction so frank and position; as a banker whose purse strings were vital to the Company's political existence; and was a close associate of English officials like the Governor of Bombay and the Chief of Surat whose private dealings enjoyed a degree of concurrence with local networks of influence. As such, under Mughal law, where the victim or his heirs signed a razanamah, the question of capital punishment simply did not arise.[7]

In Surat, the Company was anxious to establish the centrality of intention in any matter of punishment, but it was also more than willing to rest the case with the senior caste elder whose opinion could be incorporated into the Court's endorsement. Then question that was put to Shastri as an exponent of Hindu law was as follows: 'What punishment do the legal prescriptions of the Hindu law assign for Tarwady Sree Crushna commonly called Tarwady Arjunjee Nathjee Brahmin.

Lastly, Serveh Praischittik, Shiddhi with Praischittik or the punishment for killing a shoodreh must be added to them. Serveh Praischittik is a description of punishment, and which is variously prescribed. Tarwady's case requires in the opinion of the said Shastree Mayral Bhatt Baba and Anand Ram the performance of Dwadahshadabah or twelve abdhas. He must pay to Brahmins the price of one hundred and sixty cows.[8]

The Court endorsed this prescription and Tarwady was honourably acquitted of the charge of murder but enjoined to conform to the traditional prescriptions of dharma that redeemed his status within the city. Dharmasastras stated clearly that if a Brahmin administers moderate corporal punishment to his son, pupil or wife for some fault, and the son, pupil or wife suddenly dies, he incurs no sin. Thus, from the perspective of the Dharmasastras, the banker was at no risk of sin, much less of guilt.

As it happened, the enforcement of the penalty or prayascitta seemed to strike a halfway house, a compromise of sorts. Judging the accident to have been an unintentional sin, the Court endorsed the sanction prescribed by the caste elders, which obliged the banker to perform an expiration of his sins. The adaptation of Dharmasastra norms to local contingencies had been a long and complicated process, and in reordering these norms as Hindu law, the early colonial state was in fact responsible for creating what H. Kotani calls a legal fiction.

The authorities could hardly ignore the ramifications of the incident and dismiss the case as outside the purviews of its interest or jurisdiction. Herein lay the dilemma of transition between principles of fair trade and safeguarding the interests of the fair trader, and with it the ancillary conditions of justice and an impersonal law that the Company courts claimed to enforce.

[7] Singha, Radhika, A Despotism of Law: Crime and Justice in Early Colonial India, Delhi, 1998, 1-35.
[8] Subramaniam, Lakshmi. "A Trial in Transition: Courts, Merchants and Identities in Western India circa 1800." Indian Economic and Social History Review 41:3 (2004), 269-9.

The Company on its part was caught on the wrong foot and had no option but to sit on the fence. On the one hand, the logic of the dispensation required intervention, it obliged them to take up the issue of a murder and apply notions of justice on the offender, while the imperatives of real politics necessitated a deference to customs and sanctions. [9]

While the imperatives of real politics necessitated a deference to Early colonialism fully accommodated the older notions of caste, status and honour, each of which continued to constitute the hallmarks of individual and collective identity. But later state also realised that the state could hardly claim for itself the monopoly of taking life and had to share it with other traditional codes of authority, religious, patriarchal or patronal as the case may be. Hence the idea of codification began.

Project of codification of Customary Practices

The colonial interaction with traditional Indian legal tradition varied across space and time. From relying on Sastric scriptures in its Orientalist phase to first chronicling the customs under the guise of Romanticism of the mid nineteenth century and then ultimately codifying it for the benefit of the officials in the influence of Henry Maine's philosophy. This spatial and temporal variance was the byproduct of many factors such as the strength of the empire, the penetration of the colonial state in the Indian society, intellectual environment in Europe and last but not inconsequentially the response of the natives themselves towards these developments.

When the English East India Company established it's rule over Bengal they relied on pundits and maulvis interpreting Sastric and Sharia law for them to pronounce judgements on personal matters of the natives such as in the case of inheritance etc. This was a time when the company was still largely a trading institution with its' prime motive being the profits rather that organising a modern legal system for their subjects. Another important factor was that most of the officials of the time believed in Orientalist ideas about Indian society. They of course had separate courts and laws to be followed if the parties to a dispute were Europeans. [10]

Slowly as they grew more surefooted of their power in the subcontinent and transformed from a company to an empire, they started resenting the power of these native collaborators in legal domains. The pundits exercised this power through their prerogative to interpret traditional texts on a case-to-case basis with personal as well as caste interests frequently making themselves a factor in their final suggestion. This was intellectually annoying to the English judges who were brought up on the culture of precedence in the English common law system.

Things came to a head with the spark of 1857 revolt being attributed to cultural insensitivity in the form of greased cartridges and rise of Henry Maine who divided the world in categories of on where individual rights inspired by Roman law reigned supreme and others where there was prevalence of communitarian rights. India was firmly put in the latter half. Romanticism in its quest for the wild and the authentic laid the bedrock of future codification by Europeans running around the 'exotic' countryside chronicling the folklore, proverbs and

[9] Anderson, Michael and Guha Sumit, eds, "Wrongs and Rights in the Maratha Country", Changing Conceptions of Rights and Justice in South Asia, Delhi, 1997,14-29.
[10] Neeladri Bhattacharya, 'Remaking Custom: The Discourse and Practice of Colonial Codification', in R. Champakalakshmi and S. Gopal (eds), Tradition, Dissent and Ideology: Essays in Honour of Romila Thapar, Delhi. 1996, 20-51.

customs of the natives.

As with all things human, the process of codification was neither uniform nor did it leave the customs uncontaminated. Neeladri Bhattachraya contends that it 'Hybridized custom' through its mixing of western notions with heterogeneous traditions to employ it in the service of their colonial project. The discourse was also influenced by the the nature of dialogues with native sources and their position in the society.

As Lata Mani in 'Contentious Traditions' explains these tended to be upper caste and almost exclusively property-owning men thus the narrative received by chronicler was a blinkered view of the prevalent custom. It marginalised the customs of wide swathes of the Indian society while also strengthening the hold of patriarchal notions on the codified customs. This was especially in cases of women's rights in the lower caste communities where traditionally they had enjoyed a wider latitude of freedoms, the codification process clearly failed to account for them.

The search for the 'authentic' custom was framed in the questions informed by western thought while being conducted in background of the power dynamics of the coloniser and the colonised. The classificatory practices also became a site of silencing and erasure of the 'unreasonable' and 'antiquated'.

One has to remember that in mid nineteenth century thinkers such as Marx himself believed in an unchanging Asiatic society, thus the drive towards codification of 'authentic ' custom. As JDM Derrett in 'The Administration of Hindu Law by the British' points out this intervention by the British 'fossilized' Sastric learning and perverted the meaning of the texts themselves as it divorced the law from the ever-evolving mores of the society.

On the other hand, oral traditions were fluid and sensitive to the them. Orality was a communitarian terrain where power relations underlying the customs, whether it was between castes, gender or generations, could be interpreted and reinterpreted continuously. After codification this terrain was shifted to the legal courts and the power to reinterpret these traditions were captured by the authority of the State. In Neeladri Bhattacharya's words "The custom of the community was to be decided by courts; conflicts over understanding were to be resolved through the mediation of courts." [11]

The customs outside the codes then became the a vast arena of 'illegality' where much of the society functioned as before. This 'cultural confrontation' came to a head when 'violation' of norms became so common place that the Colonial State in order to preserve it' s authority was forced to reinterpret the codified customs while also acknowledging the validity of non-codified customs.[12]

Conclusion

Here, we can conclude that codification is neither good nor bad but codified law must abide the basic human rights. By comparing the situation like Nagaland is convulsed over a contradiction of India's Constitution by itself. Last year, the Supreme Court upheld an appeal by the powerful Naga Mothers' Association (NMA), to allow 33% reservation for women in

[11] Aparna Balachandran, "The Many Pasts of Mamul: Law and Custom in Colonial Madras in Anne Murphy (ed.), Time, History and the Religious Imaginary in South Asia, Routledge, London, 2011, 84-99.
[12]Galanter, Marc. "The Aborted Restoration of 'Indigenous' Law in India." Comparative Studies in Society and History, vol. 14, no. 1, 1972, pp. 53–70. JSTOR, www.jstor.org/stable/178060.

urban local body elections.

The government of chief minister T R Zeliang wanted to conduct municipal polls on February 1, with such reservations. Various tribal organisations immediately swung into action. They cited Article 371(A) of the Constitution, which says, "No Act of Parliament shall apply to Nagaland in relation to religious or social practices of the Nagas, Naga customary law and procedure, administration of civil and criminal justice involving decisions according to the Naga customary law, ownership and transfer of land and its resources."

This contradicts Article 243(D) that guarantees reservations for women. Opposition, including from the Naga Hoho, the apex council of tribal chiefs, led to cancellation of the polls. The chief minister might be evicted. Yes, our Constitution does allow tribes to observe customary law in many social and economic spheres, a recognition of the diversity of our population.

Not all customary law — mostly codified in colonial India from oral representations — fits 21st-century India. Naga customary law has created a political society dominated entirely by men. Since its first elections in 1964, there has never been a single woman representative in its assembly. Its sole woman MP was the late Rano Shaiza, elected in 1977.

This glass ceiling is an anachronism in Nagaland, where the likes of NMA play a vital public role. Half the population cannot be kept out of democratic representation. The Hoho must amend customary law to end women's subordination. Else, the constitutional guarantee of basic rights must prevail over customary law.

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