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Hindu Law and the English Law of Contract

A Century of Interaction, 1772-1872

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The Living Tradition of Indian Philosophy in Contemporary India

The image of India has recently shifted from "a country of stagnation and poverty" to "a country of great power" as a result of its growing economic strength.

India has realizedthis remarkable economic development primarily because of its relatively stable"democratic" politics. What interests us is that the norms and morals that maintain theIndian economy and politics reflect traditional Indian thought and philosophicalconcepts such as *Satya* (truth), *Dharma* (morality or duty), and *Ahiṃsā* (nonviolence),which have been formed during India's long history.

Our project attempts to integrate the knowledge and materials on Indian philosophy and Buddhism accumulated during the 370-year history of Ryukoku University with the newfindings of contemporary India studies, focusing on the "Living Tradition of IndianPhilosophy in Contemporary India". To that end, we opened the Center for the Study of Contemporary India (RINDAS), in collaboration with the National Institutes for the Humanities, for five years from April of 2010 through March of 2014.

Unit 1 Politics, Economy and Philosophy of Contemporary India

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HINDU LAW AND THE ENGLISH LAW OF CONTRACT: A CENTURY OF INTERACTION, 1772-1872[1]

Stelios Tofaris*

In 1772 the East India Company took over the administration of a vast territory in India from the Mogul Emperor. This necessitated the creation of courts for the administration of justice. In an effort not to interfere with the religious beliefs of the native population, the newly-established courts were required to apply native law in certain areas of law, which, over time, included contracts. This gave rise to a century-long interaction between Hindu law and the English common law. The interaction took various forms. This paper concentrates only on one of them, that is, the interaction of the two systems of rules in the colonial courts and the legislature. It is mainly concerned with law-theorising by Anglo-Indian lawyers. In 1872 the contract law of British India was codified on the basis of English law. This suggests a sudden end to the continuing relevance of Hindu law and its interaction with English law. In truth, however, this was a slow death. The process of applying English law to contractual disputes without examining Hindu law had started long before. The Indian Contract Act 1872 was the culmination of a gradual process of English dominance, not its beginning. The paper analyses how and why English law prevailed over Hindu law in this limited context.

1. Statutory Theory: Hastings' Plan of 1772 and the Act of Settlement 1781[2]

Colonial courts in India were divided into two categories. In the mofussil (the countryside) where almost all the inhabitants were Indians, there were courts set up by the East India Company and run by its employees, who were not trained lawyers. In the Presidency Towns, where most British settlers lived, there were courts set up by the King in Parliament and manned by British lawyers.

The plan drawn by Governor-General Warren Hastings in 1772 applied to the first type of courts originally established in Bengal. It directed them to decide "all Suits regarding Inheritance, Marriage, Cast, and other religious Usages or Institutions" according to "the Laws of the Khoran with respect to Mahometans, and those of the Shaster with respect to Gentoos... On all such Occasions, the Moulavies or Brahmins shall respectively attend to expound the Law."[3] Nothing was said about disputes in other fields. The lacuna was filled in 1781 by regulations laying down that in all such cases "the respective Judges thereof do act according to Justice, Equity and Good Conscience."[4] This model was followed in Madras and Bombay, so that by the mid-nineteenth century all the colonial courts in the mofussil had to decide contractual disputes in accordance with "justice, equity and good conscience." By itself, this

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[1] The themes in this paper are examined in greater detail in S. Tofaris, *A Historical Study of the Indian Contract Act 1872* (Delhi: Oxford University Press) (forthcoming).

[2] For more details, see M.P. Jain, *Outlines of Indian Legal & Constitutional History* (6th ed.) (New Delhi: LexisNexis Butterworths, 2009)

[3] "A Plan for the Administration of Justice, 15th August 1772" in *Seventh Report from the Committee of Secrecy Appointed to Enquire into the State of the East India Company*, Appendix II, 348-51

[4] Bengal Judicial Regulation VI.1781, ss. 60, 93

did not explain much. The formula was vague, did not point to any particular source of substantive rules and could mean as much or as little as the judges made it mean.

The second type of courts in the Presidency Towns followed a jurisdictional plan that was based on Hastings'. The Act of Settlement 1781 dictated that "all matters arising out of inheritance and succession to land and goods, and all matters of "contract and dealing between party and party" were to be determined, in the case of Mohammedans, by the laws and usages of Mohammedans, and in the case of Gentoos, by the laws and usages of Gentoos. In case only one of the parties was a Mohammedan or Gentoo, the Court was to apply the laws and usages of the defendant."[5] The unstated assumption was that English law would govern all other instances.

The ascertainment of native law was unsurprisingly a major problem for Anglo-Indian judges. Language barriers and unfamiliarity with the laws and customs of the native population made the implementation of the statutory policy "a task of epic proportions."[6] As a working solution, native "law officers" (maulvis for Muslim law and pandits for Hindu law) were appointed in the courts to expound the rules of native law. In accordance with this scheme, the judges were to hear the evidence, ascertain the facts and formulate relevant questions for the law officers to answer. In turn, they would consult the native law sources and write an opinion, to be translated back into English, on the basis of which the judges would decide the case.

2. Judicial Practice: The Anglicisation of Contract Law

A detailed examination of the courts' decisions reveals that their reasoning was to a large extent infiltrated with English legal rules, whilst at the same time there was a sprinkling of references to Hindu law. By the time contract law was codified in 1872, this was *more or less* true in both sets of courts.

The picture in the Company courts was complicated.[7] By the 1860s, it had become common among Anglo-Indian officials to describe the courts' practice in contract cases in Anglicising terms. The formula "justice, equity and good conscience" was seen as a route by which English law should be normatively, and had been factually, imported into India. In *Dada Honaji v Babaji Jagushet* (1865), Couch J held that "although the English law is not obligatory upon the courts in the Mofussil, they ought, in proceeding according to "justice, equity, and good conscience," to be governed by the principles of the English law applicable to a similar state of circumstances."[8] Comments like these were transmuted into statements of fact capable of proof by evidence. In the only textbook on contract law in the mofussil, William Macpherson contended that "the judges of the Sudder Courts, although not regarding the English Law as a rule of binding authority in itself, have generally avoided any wide departure from its principles except in cases affected by some special features of Oriental life and transactions."[9] Similarly, Henry

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[5] Quoted in M.P. Jain, *Outlines of Indian Legal & Constitutional History* (6th ed.) (New Delhi: LexisNexis Butterworths, 2009), 90

[6] L. Rocher, "Can a Murderer Inherit His Victim's Estate? British Responses to Troublesome Questions in Hindu Law" (1987) *Journal of the American Oriental Society* 107:1 at 2

[7] It is not possible to explore the full complexity of this in this paper. However, two issues need to be kept in mind. First, until the mid-nineteenth century English law played a marginal role in the Company courts. Although it became more important in later years, its dominance in those courts was never as complete as the comments of Anglo-Indian judges and administrators in the 1860s suggest. Secondly, the reasons for the lower degree of Anglicisation in those courts were institutional. A very significant fact was that the judges and lawyers were not British barristers.

[8] (1865) 2 Bombay High Court Reports 36, 38

[9] W. Macpherson, *Outlines of the Law of Contracts as administered in the Courts of British India* (London, 1860), viii

Maine claimed in 1867 that "the decisions assumed to be dictated by "justice, equity and good conscience," have of later years been much affected, as a fact, by the English Law of Contract, as gathered from the ordinary text books in use among English practitioners."[10]

The Anglicisation of contract law was more intense in the Royal courts. Although the courts did apply Hindu rules in cases involving native contracts, they did not do this in *all* cases as the Act of Settlement required. Instead, this was true only in the minority of cases, the rest being decided almost always by having recourse to English law. In addition, any utilisation of native laws took place in an erratic fashion, so that no homogeneous and predictable pattern of judicial approach emerged.

3. Decoding Judicial Practice: Judges, Jurists and the Colonial World[11]

(i) *The mechanics of dominance*

Examining the dominance of English over native law in the resolution of contractual disputes is in some respects a false start. This is dominance in a narrow sense; as a source of rules. More important was dominance in a more foundational sense, that is, the dominance of an Anglocentric model of dispute resolution and its accompanying procedural framework. This lay behind and ultimately conditioned dominance at the rule level.

The British-established courts adopted a method of asking legal questions and resolving disputes that was different to the native framework, within which native rules functioned and acquired meaning. Displacement of this broader sort ensured that any use of the native material in the courts took place in a foreign environment. To the extent that they were employed, native rules had to be squeezed through an external straightjacket, which inevitably led to distortion.

Moreover, there was the crucial question of what constituted the native law of contract. Prioritising particular sources of rules had important repercussions on what those rules could achieve and in turn how effective they could be in respect of their intended use. Viewing the shastric texts as the embodiment of uniform Hindu law was a grave misunderstanding with far-reaching consequences: not only did it set in motion a long process of distortion, but it also contributed to the displacement of native rules as sources of rules.

Against this background, the dominance of English contract law in the courts should be seen not as an independent development, but a further, though not inevitable, step in an elongated course of displacement and distortion.

"*Hindu law*" *in pre-colonial times: Dharma, "law" and dispute-settlement*

Law in the Hindu scholastic tradition was not envisaged "as an independent, separate entity, which is most impressively documented and confirmed by the absence of a parallel term "law" in the Sanskrit language."[12] It was instead elaborated as part of the broader concept of dharma. Dharma cannot be rendered precisely by any English

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[10] Statement of Objects and Reasons, 9 July 1867, Parliamentary Papers (1867-8), Vol. XLIX, 686

[11] The analysis which follows is more relevant to the Presidency Town courts. As regards the mofussil courts, what really mattered were changes in the institutional framework, especially the professionalization of those courts and the eventual amalgamation of the two judicial systems.

[12] W.F. Menski, *Hindu Law: Beyond Tradition and Modernity* (Delhi: OUP, 2003), 42. For an excellent account of the Hindu legal tradition, see D.R. Davis, Jr., *The Spirit of Hindu Law* (Cambridge: Cambridge University Press, 2010)

word, but it generally denotes "the aggregate of all the rules which a Hindu is supposed to live by"[13] if he is anxious about his future life. Therefore, it encompasses (what we would categorise as) religious, moral and legal rules of behaviour. The source material for dharma is a vast body of Sanskrit texts that were composed and transmitted by scholars of the Brahmin caste learned in the Veda throughout a period of more than two millennia, and which consist of dharmasūtras, dharmaśāstras, commentaries and nibandhas (digests).[14] Being works on dharma, these texts were intended to set down rules of "righteousness" for various society members, and to that effect embraced "moral, social, intellectual, spiritual and psychiatric problems along with those that would appear to us to be entirely legal."[15] Everything included there was dressed up by the compilers in the idiom of "religion" and was therefore imputed with metaphysical consequences.[16] Within this framework, infringement of a "legal" injunction always involved an element of sin, on top of any other "legal" and "social" implications that might have followed from it. Thus the Hindu tradition inextricably interlaced "law," "religion" and "morality"[17] so that it would be misleading to read the vyavahāra ("dispute-settlement") portions of the dharma texts, which appear legal in Western eyes, in isolation and without bearing in mind the assumptions upon which the whole dharmic system is based. The amount of "legal" information in the dharmaśāstra literature is of considerable size, ranging from material on legal procedure to an in-depth treatment of vivādapadas ("areas of dispute") where topics of "substantive law" are discussed, such as non-payment of debts, sales without ownership, concerns among partners, and non-performance of agreements.

Decoding the manner in which law was conceptualised and recorded in the Hindu literary tradition is an essential step in understanding the nature of Hindu law. A second vital step is unravelling the actual legal practice pertaining among Hindus, i.e., the mechanisms for dispute-settlement, their factual operation and the norms used for that purpose. The paucity of relevant records from pre-colonial India means that little is known of the actual legal practice. Nonetheless, a comparison between some records on court procedure, palm-leaf legal records kept by families, temples and other jurisdictional bodies in late medieval India, epigraphic evidence and the information contained in the shastric literature permits the reconstruction of a basic pattern of legal practice, though not of the actual law at any point in time.[18] Overall, it seems that in ancient and medieval India there were numerous overlapping fora for the resolution of disputes, most of which were local and non-state. Castes, families, markets, bodies of traders, guilds of artisans and villages had their own dispute-settlement assemblies, which resolved disputes by applying in no preordained manner their own customs and sometimes adaptations of the rules found in the dharmaśāstra, probably alongside custom. Royal courts existed in capitals and large towns, where the Hindu ruler or his delegate decided cases on the basis of the advice of Brahmin śāstrīs, though the customs and usages

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[13] L. Rocher, "Law Books in an Oral Culture: The Indian *Dharmaśāstras*" *Proceedings of the American Philosophical Society* (1993), Vol. 137, 254-67 at 254

[14] For more details, see P.V. Kane, *History of Dharmaśāstra* (Poona: Bhandarkar Oriental Research Institute, 1930-1962); J. Duncan M. Derrett, *Dharmaśāstra and Juridical Literature* in J. Gonda (ed.), *A History of Indian Literature*, Vol. IV (Wiesbaden: Otto Harrassowitz, 1973); R. Lingat, *The Classical Law of India* (trans. J.D.M. Derrett), (Delhi: OUP, 1998), 3-132

[15] J. Duncan M. Derrett, *History of Indian Law (Dharmaśāstra)* (Leiden: E.J. Brill, 1973), 8

[16] R.W. Lariviere, "Law and Religion in India" in A. Watson (ed.), *Law, Morality, and Religion: Global Perspectives* (Berkeley: University of California, 1996), 75-94 at 82-89

[17] L. Rocher, "Hindu Conceptions of Law" (1978) 29 *Hastings Law Journal* 1283 at 1286-7

[18] For more details, see M. Rama Jois, *Legal and Constitutional History of India: Ancient Legal, Judicial and Constitutional System* (reprint) (New Delhi: Universal, 2009), 13-18, 63-71, 489-510, 560-564; J. Duncan M. Derrett, *Religion, Law and the State in India* (New Delhi: OUP, 1999), 148-224; D. R. Davis, Jr, "Recovering the indigenous legal traditions of India: Classical Hindu law in practice in late Medieval Kerala" (1999) 27 *Journal of Indian Philosophy* 159

of the groups appearing before the court had to be observed. In theory, the Hindu ruler enjoyed a general power of supervision over all lesser tribunals, whose decisions could theoretically be "appealed" to him, but it seems that in practice disputes were predominantly decided at the local level, with appeals to the ruler's court being a rarity. In terms of dispute-settlement much remained the same for the Hindus during the period of Muslim conquest of parts of India. In Muslim-controlled cities there were state courts with the Emperor in theory at the top of the judicial ladder, though as a matter of practice the judicial authority was in the hands of a professional judge, the Kādi. Matters of civil law between Hindus were decided in those courts with the assistance of Brahmin śāstrīs, to whom the Kādi referred questions of Hindu law. However, this system was not applied in all regions (e.g. Bengal) and in any way the official Muslim courts do not appear to have been extensively used by Hindus. The overwhelming majority of their disputes were resolved by means of the same decentralised and diversified methods as before.

The dispute settlement methods followed in ancient and medieval India exhibit a number of features utterly at odds with the fundamental premises of British-run courts.[19] Tribunals at every level seem to have been more concerned with finding a compromise rather than a clear-cut decision, with promoting harmony rather than finding "truth." Moreover, they often did not limit themselves to the facts of the current dispute but considered the past history and relationship of the disputants, sometimes trying to settle a string of underlying past disputes. The existing social structure and the position of the disputants within that was taken into account and informal pressure was regularly used to support the solution reached. In many cases, the ultimate sanctions of adjudication appear to have been excommunication and boycott. Within such parameters, norm selection and application did not follow concretely predetermined patterns but were flexible and situation specific; hence similar facts did not guarantee the same solution even in the same tribunal.

On the whole, disputes among Hindus were decided solely on the basis of individual customs or by applying the prevailing customs and śāstric texts. The latter did sometimes provide actual rules but they were interpreted sensitively to local conditions and were mainly used to inform and validate the decisions of adjudicators that were based on local circumstances. Significantly, the texts did not have to be applied: the adjudicator enjoyed and employed "a power of assessment quite incompatible with our [Western] conception of judicial function," being in effect "an arbitrator rather than a judge."[20] To the extent that they were applied, the textual precepts were translated into practice through the medium of the Brahmin arbitrator who strove to find a harmonious compromise to the dispute within the social circumstances that it arose. Overall, the adjudicator's methods of resolving disputes, the discriminating use of shastric texts, their immense diversity and the gargantuan plurality of customs, resulted in a polymorphous, chameleonic and enormously varied "real law."

The relationship between dharmaśāstra and the "law of the land" remains a vexed question.[21] It can be broken down into two elements, the first of which concerns the sources of the precepts in the texts. Recent scholarship has viewed the vyavahāra portions of the dharma literature as a peculiarly Indian record of customs, local social norms and traditional standards of behaviour from various parts of India.[22] Given the specialised character of the

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[19] For details, see B.S. Cohn, *An Anthropologist Among the Historians and Other Essays* (Delhi: OUP, 1990), 554-631; M. Galanter & U. Baxi, "Panchayat Justice: An Indian experiment in Legal Access" in M. Galanter, *Law and Society in Modern India* (Delhi: OUP, 1989), 54-91; J. Duncan M. Derrett, "The Judicial Panchayat: The Future of an Ancient India Rural Institution" (1982) 42 *Société Jean Bodin* 131

[20] R. Lingat, *The Classical Law of India*, (trans. J.D.M. Derrett) (Delhi: OUP, 1998), 142

[21] See, e.g., D.R. Davis, Jr, "Law and "Law Books" in the Hindu Tradition" (2008) 9 *German Law Journal* 309

[22] R. Lariviere, "Dharmaśāstra, Custom, "Real Law" and "Apocryphal" Smṛtis" (2004) 32 *Journal of Indian Philosophy* 611 at

dharmaśāstra, this is not simply a "record" of custom, but rather "a jurisprudential, or in Indian terms, a śāstric reflection on custom."[23] The dharmaśāstra texts represent the "law of the land" in the sense that the prescriptions found in them represent customary "legal" practices followed at some unknown place and time in India, though not necessarily in the same form. The second element concerns the relationship of the dharmaśāstra texts, once written, to ongoing legal practice. The texts undoubtedly possessed great prestige among Hindus, representing their only "jurisprudence" and supplying actual, albeit locally adjusted, rules for the settlement of disputes. Nonetheless, the texts "might be used… which is not the same as asserting that the texts had to be used because they contained "the law" binding on all Hindus."[24] As Lariviere has written, "the dharmaśāstras were not composed as literary templates to be applied in toto to every situation and every dispute without differentiation. They were collections of aphorisms, guidelines, and advice which could be drawn upon when required to inform and validate a judge's or a guru's, or a king's opinion. In this way they are indeed concerned with the practical administration of law, but they are not in a modern, western sense "codes.""[25]

Procedural displacement and foundational misunderstandings

The decision to establish colonial courts with jurisdiction over the native population did not by itself effect or guarantee the displacement of the native dispute-resolution fora. The vast majority of natives never set foot in these courts and several dispute-resolutions fora continued to co-exist with the British-run courts. However, in those cases where Indians decided to use the British-run courts, they brought themselves within a different procedural framework. Because of the underlying differences, this framework could not utilise native rules in the same manner as native fora. Hence at a basic level there was a fundamental disjuncture between those rules and the parameters within which they had to function, which inevitably affected the character of those rules. In other words, within an English model of adjudication, Hindu legal rules could not operate without compromise of their character and cultural integrity.

Further distortion followed from the (mis)understanding of Hindu law by Anglo-Indian administrators in the late eighteenth century. The key event was the decision in Hastings' Administration of Justice Plan 1772 that the newly-established Company courts should administer "the Laws… of the Shaster" in certain suits among Hindus. In due course, the preservation of "Hindu law" within the colonial judicial system generated a need for a working knowledge of Hindu law, which acted as a catalyst for a long process of formulation of colonial perceptions of Hindu law. At the same time, Hastings's Plan had orientated that process along specific misguided paths. According to Derrett, "this was as if a statute had been passed requiring lemon-juice to be produced from oranges."[26]

First, by viewing the dharmaśāstra as "the repository of permanently codified legal provisions pertaining to the religious aspects of life,"[27] Hastings' Plan fixed it as the sole source of law in those disputes which in England

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612; A. Wezler, "Dharma in the Veda and the Dharmaśāstras" (2004) 32 *Journal of Indian Philosophy* 629 at 634-635

[23] *Manu's Code of Law: A Critical Edition and Translation of the Mānava-Dharmaśāstra* (tr. P. Olivelle), (Oxford: OUP, 2005), 64

[24] W. F. Menski, *Hindu Law: Beyond Tradition and Modernity* (Delhi: OUP, 2003), 164

[25] R. Lariviere, "Dharmaśāstra, Custom, "Real Law" and "Apocryphal" Smṛtis" (2004) 32 *Journal of Indian Philosophy* 611 at 623

[26] J. Duncan M. Derrett, *Essays in Classical and Modern Hindu law*, Vol. III (Leiden: Brill, 1976-78), ix

[27] R. W. Lariviere, "Justices and Panditas: Some Ironies in Contemporary Readings of the Hindu Legal Past" *Journal of Asian Studies* (1989) 48:4, 757-69 at 758

would have been within the ecclesiastical courts' jurisdiction.[28] But the segregation of the subjects and the basis for singling them out was fallacious and artificial from the Hindu standpoint. The dharmaśāstra texts did not deal merely with the "religious" portions of life, but were concerned with all aspects of life, which were seen through the lens of "religion" and were ascribed "religious" meaning.

Secondly, the establishment of the shastric texts as written sources encapsulating the entire ""law of the land" in the classical senses of lex and ius"[29] in similar fashion to Western law-codes (vis-à-vis the listed subjects), was distortive both of the "real" law of the Hindus and the true character of those texts. The supposition that all Hindus were governed by a common set of rules found in texts amounted to a flagrant transgression of the socio-legal arrangements prevalent among Hindus and was utterly blind to the immense diversity of the law actually practiced. Identifying the dharmaśāstra as a source of norms for the settlement of disputes was not wrong per se, but fixing it as the sole source of such norms was a distortion of the "real" law. Put succinctly, "there certainly is more to law than what is given in the śāstra, and it was unwise of the British to equate Dharmaśāstra with Hindu law."[30]

At the same time, the character of the shastric texts was twisted. The texts were not codes of "law" in a Western sense; they were books on dharma, and dharma "may be translated as "Law" if we do not limit ourselves to its narrow modern definition as civil and criminal statutes but take it to include all the rules of behaviour, including moral and religious behaviour, that a community recognises as binding on its members."[31] The texts, of course, were connected to "real" law, but not in the way that the British understood.

Hastings's Plan provided the backbone for the construction of a text-focused Hindu law that was to be uniformly and rigidly applied to all Hindus by the colonial courts, but it was the work of the Anglo-Indian legal Orientalists[32] which added the flesh. The real problem was how to implement the Plan's policy, given that the Anglo-Indian judges had no knowledge of Sanskrit. The Plan's solution was to appoint pandits as law officers in the courts to expound the native rules for the judges' benefit. This obviated the need to deal immediately with the more strenuous problem of acquiring knowledge of "Hindu law," but it was not long before various reasons coalesced to make that need felt. As a result, eleven pandits were commissioned to compile "from the books of their law a code which might serve as a guide to our Dewanni Courts."[33] The "code," originally written in Sanskrit and translated through Persian into English, was published in 1776.[34] But it seems that the project was perceived differently by the colonial administrators and the pandits. The first saw the resulting compilation as a legal code in a Western sense (albeit of a religious character), which would consolidate all Hindu texts, whilst the latter saw it as a traditional

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[28] J. Duncan M. Derrett, *Religion, Law and the State in India* (Delhi: OUP, 1999), 233-235; R. W. Lariviere, "Justices and Panditas: Some Ironies in Contemporary Readings of the Hindu Legal Past" *Journal of Asian Studies* (1989) 48:4, 757-69 at 758-760.

[29] R. W. Lariviere, "Justices and Panditas: Some Ironies in Contemporary Readings of the Hindu Legal Past" *Journal of Asian Studies* (1989) 48:4, 757-69 at 757

[30] *Manu's Code of Law: A Critical Edition and Translation of the Mānava-Dharmaśāstra* (tr. P. Olivelle), (Oxford: OUP, 2005), 65

[31] *Dharmasūtras: The Law Codes of Āpastamba, Gautama, Baudhāyana, and Vasiṣṭha* (tr. P. Olivelle), (Delhi: Motilal Banarsidass, 2000), 1

[32] "Orientalists" here simply designates those persons who studied Asian culture through the command of the relevant languages.

[33] "Letter from Hastings to Directors, 24 March 1774" in M.E. Monckton Jones, *Warren Hastings in Bengal 1772-1774* (Oxford: Clarendon Press, 1918), 337-338

[34] N.B. Halhed (transl. & ed.), *A code of Gentoo laws, or, ordinations of the pundits, from a Persian translation, made from the original, written in the Shanscrit language* (London, 1776)

shastric work, a nibandha, similar to the ones compiled for emperors and kings. In any case, the English version of Halhed's Code played a significant role in perpetuating, and popularising in Europe, conceptual misconceptions about the nature of Hindu law, since as the only English source on "Hindu law" until 1794, it constituted the obvious source of reference. The Code created the wrong impression that Hindu law was similar to European "black-letter law" and in the years following its publication it was seen by some as analogous to Justinian's Digest.[35]

The positivist model of textual Hindu law underpinned by the notion that shastric texts were binding legal codes was cemented in the work of the pre-eminent legal Orientalists, William Jones[36] and Henry Colebrooke.[37] Motivated by the "needs" of the colonial machinery, Jones pursued a dual project: he sought to produce a complete book of Indian laws available in English and also translate from Sanskrit into English what he regarded as the most authoritative Hindu text. The first project was important in providing Anglo-Indian judges with the necessary tools for administering native law trustworthily to natives since it would allow them to verify the recommendations of the law officers that Jones regarded as untrustworthy.[38] Related to this were Jones' criticisms of Halhed's Code. He considered it incomplete, especially on the law of contracts, and so badly translated into Persian as to be of "no authority" and of "no other use than to suggest inquiries on the many dark passages, which we find in it."[39] For Jones, the Code was not the tool needed in two senses: it was of limited use to Anglo-Indian judges, but it also did not sidetrack the law officers from their usual habit of consulting several shastric sources. Irrespective of the Code's quality, Jones' views were fuelled, in addition to colonial arrogance, by a misapprehension of the pandits' referential system. Jones expected the pandits to "speak with one voice. But in fact, of course, it was their tradition not to speak with one voice, but to rephrase and update the many-sided richness of old wisdom."[40] Jones failed to understand that finality, certainty and consistency, so valued by English lawyers, were foreign concepts for them.[41] As a result, Jones devoted the rest of his short-lived life to learning Sanskrit and superintending the production of a digest of Hindu law.

Jones approached the work with his own legal presuppositions, which had the potential of introducing a further layer of distortion into the indigenous material. Jones conceptualised the search for an authoritative textual source of Hindu law along the lines of the Justinianic codification of Roman law in two ways.[42] First, Justinian's digest provided a model for the production of the Indian digest by illustrating the advantages of such a digest and the

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[35] For details, see R. Rocher, *Orientalism, Poetry, and the Millennium: The Checkered Life of Nathaniel Brassey Halhed 1751-1830* (Delhi: Motilal Banarasidass, 1983)

[36] M.J. Franklin, *Orientalist Jones* (Oxford: OUP, 2011); G. Cannon, *Life and Mind of Oriental Jones* (Cambridge: CUP, 1990).

[37] R. Rocher & L. Rocher, *The Making of Western Indology: Henry Thomas Colebrooke and the East India Company* (London: Routledge, 2012)

[38] See, e.g., "Letter to C.W. Boughton Rouse, 24 Oct 1786" in G. Cannon (ed.), *The Letters of Sir William Jones* (Oxford: Clarendon Press, 1970), Vol. II, 720-1

[39] "Letter to the first Marquis of Cornwallis, 19 March 1788" in *ibid*, 797

[40] D.H.A. Kolff, "The Indian and the British Law Machines: Some Remarks on Law and Society in British India" in W.J. Mommsen & J.A. de Moor (eds.), *European Expansion and Law* (Oxford: Berg, 1992), 201-35 at 213

[41] On one occasion Jones "made the pundit of our court read and correct a copy of Halhed's book in the original Sanscrit, and… then obliged him to attest it as good law, so that he never now can give corrupt opinions, without certain detection" ("Letter to Sir John Macpherson, 6 May 1786" in G. Cannon (ed.), *The Letters of Sir William Jones* (Oxford: Clarendon Press, 1970), Vol. II, 699)

[42] D.J. Ibbetson, "Sir William Jones as a Comparative Lawyer" in A. Murray (ed.), *Sir William Jones, 1746-1794; A Commemoration* (Oxford: OUP, 1998), 19-42

practical steps needed for its completion. Secondly and more intrusively, it constituted a model in that production, i.e., as to the specific form that the digest of Indian law ought to take. In an official letter written in 1786, Jones set out his aim of compiling "a Digest like that of Tribonian consisting solely of original texts arranged in a scientific method."[43] That necessitated the employment of several pandits, who were to be supplied with "a plan divided into Books, Chapters, and Sections" and asked to "collect the most approved texts under each head, with the names of the Authors, and their Works, and with the chapters and verses of them."[44] Jones would then "write the Translation on the opposite pages, and, after all inspect the formation of a perfect index."[45] He believed that, like Tribonian, he could finish the work in three years. Seeking Governor-General Cornwallis' official support in 1788, Jones gave the most explicit hint that the taxonomical shape of the native data ought to be guided, at least in part, by the Roman digest. He pointed out the "expedience" of having in the Indian digest "a more ample repertory of… the twelve different Contracts, to which Ulpian has given specifick names, and on all the others, which, though not specifically named, are reducible to four general heads."[46] If pursued, this was important. Like Justinian's Digest, shastric digests consisted of extracts from earlier texts arranged under specific headings. Unlike Justinian's Digest, there was also a commentary by the digest-compiler, in which he tried to explicate and reconcile the cited extracts. In addition, the headings, under which the information was organised, were very different from those in Justinian's Digest. A strong adherence to the Roman arrangement of contracts would result in major distortions.

The Digest of Hindu law on which Jones worked was not finished until after his death, with some of the translation done by Henry Colebrooke.[47] In its final form, the Digest seems more in line with the shastric, rather than the Justinianic, model: not only did its compiler Jagannātha add a typical commentary, but the headings followed, including those concerning contracts, were similar to those in other shastric texts. In the end, the significance of the Digest lay less in the re-structuring of the shastric material along Western lines and more in the establishment of a foundational text to which the Anglo-Indian judges could turn without the fear of such inaccuracies and gaps as Halhed's Code. In time, the adherence to the shastric method of discussing various views without always conclusively resolving them was found wanting by Colebrooke and other Anglo-Indians. But there was no doubt that the Digest was seen as a far better tool than Halhed's Code. Because it was seen as such, it added even greater force to past misperceptions by concretising the notion of uniform Hindu legal texts.

At the same time, Jones pursued the different project of translating the Sanskrit text Mānava-dharmaśāstra. This was eventually published in 1794 under the title "The Institutes of Hindu Law," with "The Ordinances of Menu" serving as the subtitle. Jones was still working within the conceptual parameters of textual Hindu law, but he was now concerned with recovering original shastric texts. For sure, this was still motivated by the demands of the colonial machinery and guided by his predispositions, including the pursuance of the Justinianic model.[48] In the preface, Jones stated that the text "might be considered as… preparatory to the copious Digest… and introductory

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[43] "Letter to C.W. Boughton Rouse, 24 October 1786" in G. Cannon (ed.), *The Letters of Sir William Jones* (Oxford: Clarendon Press, 1970), Vol. II, 721

[44] "Letter to C.W. Boughton Rouse, 24 October 1786" in *ibid*, 721

[45] *Ibid*, 722

[46] "Letter to the first Marquis of Cornwallis, 19 March 1788" in *ibid*, 797

[47] Jagannáťha Tercapanchánana, *A digest of Hindu law, on contracts and successions: with a commentary* (translated from the original Sanscrit by H.T. Colebrooke) (Calcutta: Honourable Company's Press, 1798)

[48] D.J. Ibbetson, "Sir William Jones and the Nature of Law" in A. Burrows & Lord Rodger of Earlsferry (eds.), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: OUP, 2006), 619-39

perhaps to a Code, which may supply the many natural defects in the old jurisprudence of this country."[49] But like before, the analogy with Roman law was misinformed; the structural relationship of the various texts that Jones described was true in the Roman context, but was foreign to the Hindu shastric tradition.

The publication of the Institutes under that title had further cemented the notion that the shastric texts were legal in a Western sense and could be used by the colonial courts when deciding disputes among Indians. Significantly, however, it instigated a new way of investigating or "discovering" the Hindu legal past, which was actively pursued by Henry Colebrooke. Cohn has argued that Colebrooke "developed a quite different conception of the nature and function of Hindu law. He also had much firmer grasp of the nature of shastric texts and their history."[50] Colebrooke provided a different explanation for the conflicting interpretations of shastric rules by native officers, suggesting that there were regional variations.[51] Accordingly, the solution to the problem lay in uncovering those variations through the translation of more localised shastric texts. There was now a belief that the "proper" administration of native law demanded going beyond the Digest. In essence, there was a re-thinking of what constituted the best tools for the administration of justice to natives, although the re-adjustment was still rooted in textual sources.[52] The realisation that the Digest was not enough on its own and the consequent move away from one universal text was correct but the analytical lens through which it was pursued was myopic. Decoding more shastric texts and elevating them to the status of legal codes for specified parts of the Hindu population was also not an entirely faithful representation of pre-colonial Hindu legal practice or of the character of those texts.

The characterisation of the Orientalists' work has given rise to an intense historiographical debate. Some scholars, mainly literary critics and social scientists in the field of postcolonial studies, have seen them as hegemonic agents of colonial rule, whose "knowledge" of "the Other" was a rhetorical device to legitimise colonisation.[53] In essence Orientalism was a handmaiden for imperialism. Knowledge and its production were constitutive of power and Orientalist "description" enabled colonial "dominance." From this perspective, the misunderstandings of the legal Orientalists can be seen as purposeful distortions.[54] In contrast, other scholars have highlighted the fact that these Orientalists were aficionados of Indian culture, unlike many other Anglo-Indians, and have called for closer attention to the context within which the Orientalist misunderstandings arose, especially the linguistic and technological limitations of the British in the early colonial period as well as the problems that they faced on the ground. In light of these, they viewed the misunderstandings as well-intentioned.[55]

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[49] W. Jones, *Institutes of Hindu law; or the ordinances of Menu* (Calcutta, 1794), iv

[50] B.S. Cohn, *Colonialism and its Forms of Knowledge: The British in India* (Princeton: Princeton University Press, 1996), 72

[51] L. Rocher, "Schools of Hindu Law" in J. Ensink & P. Gaeffke (eds.), *India Maior, Congratulatory Volume Presented to J. Gonda* (Leiden: Brill, 1972), 167-76

[52] D.R. Davis, Jr, "Law in the Mirror of Language: The Madras School of Orientalism on Hindu Law" in T.R. Trautmann (ed), *The Madras School of Orientalism: Producing Knowledge in Colonial South India* (Delhi: OUP, 2009), 288-309 at 292

[53] The key text remains E.W. Said, *Orientalism: Western Conceptions of the Orient* (New Delhi: Penguin Books, 2001). For application of Said's thesis to India, see R.B. Inden, *Imagining India* (Oxford: Blackwell, 1990)

[54] N. Bhattacharyya-Panda, *Appropriation and Invention of Tradition: The East India Company and Hindu Law in Early Colonial Bengal* (New Delhi: OUP, 2008); J. Sharpe, "The Violence of Light in the Land of Desire; or, How William Jones Discovered India" *Boundary 2* (1993), 20:1, 26-46

[55] See, e.g., R. Rocher, "British Orientalism in the Eighteenth Century: The Dialectics of Knowledge and Government" in C.A. Breckenridge & P. van der Veer (eds.), *Orientalism and the Postcolonial Predicament* (Philadelphia: University of Pennsylvania Press, 1993), 215-49; R. W. Lariviere, "Justices and Panditas: Some Ironies in Contemporary Readings of the Hindu Legal Past" *Journal of Asian Studies* (1989) 48:4, 757-69; M. Moses & A. Moulik, *Dialogue of Civilizations: William Jones and the*

There is no doubt that the misunderstandings, intentional or unintentional, took place in the course of governmental pursuits and were part and parcel of the colonial project. Knowledge of native law arose out of the exigencies of the colonial administration and once produced aided the administration practically and ideologically in various ways. The misunderstandings were also informed by the Orientalists' conceptual biases, cultural blinders and legal presuppositions. At the same time, the difficulty of the task should be fully appreciated. As modern debates among anthropologists and comparative lawyers make clear, cross-cultural legal understanding is a very difficult exercise, which is prone to lead astray even the most well-meaning scholars. Furthermore, it should be noted that native informants played a role as well, though from an unequal power base, subject to prejudice and ultimately to cross-cultural mistranslation.[56] Overall, Orientalists' perceptions of Hindu law were multidimensional in nature, the result of a variety of factors, which cannot be adequately expressed through monolithic models that portray such perceptions simply as conscious attempts to materialise an imperialist project of suppression.

In terms of legal development, Orientalist constructions of Hindu law acquired a canonical status and provided the basis for further distortions. For most Anglo-Indian lawyers, Jones and Colebrooke were exceptional, steeped in both Oriental and legal learning. As such, their proficiency on native law was almost universally deferred to and their views were tremendously influential. This was more so when those views sat comfortably with the lawyers' own conceptual framework. Given the assumed centrality of textual sources in British juristic thought, the Orientalist works formed the nucleus around which much of the information on native law was organised and the source basis of much Anglo-Hindu jurisprudence in the forthcoming years in and out of the courts. Starting in the 1820s, that basis widened to include a new type of literature, written in English by non-Orientalist Anglo-Indian judges. These were compilations of Hindu shastric materials ordered in a thematic way.[57] Taking the form of textbooks, they sought to present an authoritative body of rules, which they derived from the translated texts. They often ignored differences in favour of unified rules and made no serious attempt to remain loyal to the native categories. In fact, the express intention of these authors was to present the material in a form that would be easily understood by British lawyers and judges. Fitted into an entirely alien structure, Hindu law could now look like a fixed body of concrete rules easily accessible to colonial judges. As such, it could put an end to diverse interpretation by distrustful law officers. As the new textbooks were increasingly used and seen as the best tools for administering justice to natives by Anglo-Indian judges, the prejudice of the text's primacy over interpretive practice was further confirmed.

One of the most authoritative books of this type was Sir Thomas Strange's Hindu Law (1825). The author's analysis of the Hindu rules on contract bears some traces of English but especially Civilian influence. Strange tried to escape the shastric categorisation and adopt instead "one more consonant perhaps to our own notions; by collecting into one point of view, the most material observations, as applicable to Contracts in general; and then considering the most unusual sorts, in order in which they may naturally present themselves."[58] His discussion of the Hindu rules relating to contracts had clearly a Romanistic flavour, which was partly the result of his reliance on

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Orientalists (New Delhi: Aryan Books International, 2009)

[56] C.A. Bayly, *Empire and Information: Intelligence Gathering and Social Communication in India, 1780-1870* (Cambridge: Cambridge University Press, 1996)

[57] For the earliest works, see F.W. Macnaghten, *Considerations on the Hindoo Law, as it is current in Bengal* (Serampore: Mission Press, 1824); T.A. Strange, *Elements of Hindu law* (London, 1825); W.H. Macnaghten, *Principles and Precedents of Hindu law* (Calcutta: Baptist Mission Press, 1829)

[58] T. Strange, *Hindu Law* (London: Parbury, Allen & Co, 1830), 271

William Jones's Essay on the Law of Bailments (1781). The cited rules were mostly taken from the translated Hindu texts, but they were mapped onto a structure that was largely non-Hindu. In the process, the rules were occasionally made to say something more or different than in their original context. Even at the most basic level of citing rules, Strange sporadically slipped in some non-Hindu ones on the basis of analogy. Overall, both Strange's analytical perspective and his discussion of Hindu rules derived from his general thesis that the law of contract was part of Natural Law and therefore similar, in its essentials, among all people.[59]

The judicial ascertainment of Hindu law introduced another layer of distortion. Decisions discussing shastric rules began to be recorded and reported. The courts gradually started treating such cases as authoritative interpretations of the shastric rules' meaning and application. Reliance was increasingly placed on earlier judgments rather than the texts themselves. The law officers were marginalised, even before their position was abolished in 1864. What mattered more was what the court interpreted the text to mean, rather than what the text actually meant. An imperfect system of precedent grew up as a source of Hindu law in the colonial courts. Driven by the need to achieve litigation results, such interpretations could be dispositive of the true nature of the rule. Moreover, to the extent that they led to wrong paths, the doctrine of precedent ensured that the way back was difficult. In the end, "the British method of deducing the law from the European textwriter's idea of what the pandits meant, coupled with whatever might be deduced from the translations of a few prominent Sanskrit legal texts, and put cheek-by-jowl with decided cases... enabled the law to be deduced in a most artificial and remote manner, the despair of scholars able to read the Sanskrit original authorities."[60] In Menski's words, with the employment of precedent, "the ridiculous cycle of reflections of chains of possible misconceptions is therefore neatly completed."[61]

Overall, this is not the totality of colonial knowledge and administration of native laws in the nineteenth century but rather a sketch of the general trend seen through a specific line of enquiry. Parallel but subsequent to the emphasis on shastric texts was an attempt to recover native customs as the source of native laws. An early official attempt to prioritise customs was made in Bombay with mixed results. Accompanying and fuelling this was the proliferation of ethnographic studies of customary rules. At the same time, after the mid-century, the courts affirmed that "good custom" took precedence over shastric texts in cases of Hindu law. Intellectually and practically there was a reaction at some quartets against the legal Orientalists' view of Hindu law, exposing some of the misunderstandings and decrying the disconnection from customary practice. However, these came too late to reverse the dominant trend. Much of the Anglo-Indian thinking of Hindu law took place on the basis of a Westernised vision of Sanskritized Hindu law. This had important consequences for the dominance of the English law of contract at rule-level. In most cases, it was the Anglicised shastric rules which were compared with English ones by Anglo-Indian lawyers and found generally inferior, at points similar and often inadequate. But the comparison was somewhat misconceived and at the heart of it lay the foundational misunderstanding that began with the legal Orientalists of the eighteenth-century.

(ii) *Dominance over rule selection*

Writing at the beginning of the twentieth century, James Bryce, Regius Professor of Civil Law at the University of Oxford, drew a parallel "between the extension of English law to India and the extension of Roman law to the

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[59] *Ibid*, 269

[60] J. Duncan M. Derrett, *Religion, Law and the State in India* (Delhi: OUP, 1999), 298

[61] W.F. Menski, *Hindu Law: Beyond Tradition and Modernity* (Delhi: OUP, 2003), 174

Roman Empire."[62] In explaining the prevalence of English law in, among others, the field of contract law, he noted the inability of native customs, originating in a different and lower civilisation, to supply the requisite materials. Some thirty years later, another Oxford professor, the famed legal historian William Holdsworth, made similar comments.[63] The underlying premise is that English law prevailed in India because, as the more advanced system, it was the only one that could meet the needs of modern civilisation.

Most scholars today would take such apologetic comments with a pinch of salt. Underpinning them is a value judgment that seems out of place in serious historical scholarship. Moreover, even if one leaves aside the inaccuracies entailed in the comparison with the reception of Civil Law in Continental Europe, the narrative of "progress" and the belief in immutable laws of historical development violate openly the need for a historicist understanding, which accepts the conditioning relativism of context, time, place and circumstances. Yet, once such comments are historicised, they can be seen as (partial) internalisations of the participant's own beliefs and in this way, paradoxically, provide some clues as to the prevalence of English law. Essentially they reflect the idea widely held by Anglo-Indian lawyers that English law was civilisationally and economically superior to, or more advanced than, native law.

Overall, no single reason can explain why the courts' adjudication of contractual disputes was dominated by the use of English law contrary to the express statutory provisions. This is best seen as the result of a complex interplay between multiple factors. Three are highlighted here.

(1) *The belief in inadequacy*

One line of argument is that English contract law was preferred to Hindu law because it facilitated the transition of Indian society along the path to modernisation. According to this view, English law was better placed to deal with the new commercial or capitalist reality since it was the law of a country that had already undergone that phase of economic transformation. By contrast, Hindu law was wanting, incapable of providing enough or adequate rules for the resolution of the disputes which arose in the new economic milieu.[64]

It might be that there is some truth in this. In general, the body of rules that the Anglo-Indians have treated as native law could not deal with all the problems that arose in the contractual disputes of the natives, at least in the Anglicised form that they were presented in the courts. Moreover, this was the way that Anglo-Indian officials made sense of the situation.

At the same time, there was influence from the growth of modern business. Natives who participated in business with the British, usually as agents of large commercial firms, found themselves operating within a British legal framework and there must have been some pressure for this to carry through even when dealing, as part of their duties, with other natives. Rankin argued that "to do business… [the native's] methods had to fall into line with the business habits and ideas of Europeans."[65] There is evidence that during the 1860s, when the codification of contract law was discussed, the mercantile community was lobbying for a uniform intelligible law of contract and it would

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[62] J. Bryce, *The Ancient Roman Empire and the British Empire in India: The Diffusion of Roman and English Law throughout the Word* (London: OUP, 1914), 81

[63] W.S. Holdsworth, "Foreword to the First Edition" (published in 1932) in A. Lakshminath & M Sridhar, *Ramaswamy Iyer's The Law of Torts* (10th ed.) (New Delhi: LexisNexis, 2007), xii

[64] J.D. Mayne, "Native law as administered in the Courts of the Madras Presidency" *Madras Journal of Literature and Science (3rd series)* (1863), Vol. I, 1-36

[65] G.C. Rankin, *Background to Indian Law* (Cambridge: Cambridge University Press, 1946), 92

not be unreasonable to think that similar demands existed before. Of course, within the colonial context with its specific power relations only English law was seen fit for that role.

(2) *The belief in superiority*

The character and consciousness of the legal personnel were also important. Most of the judges and lawyers were British. Their knowledge of English law, at least of those in the Royal courts, was much more advanced than their understanding of native laws. English law supplied the prism through which they comprehended and analysed legal problems. Within such a framework, English law could and did transform too easily from a pervasive influence on the judges' analytical thinking to a reservoir from which they drew substantive rules even in cases they were not supposed to do so.

Furthermore, invoking Hindu had always the potential of bringing into play the pandits, who were largely perceived by the British as untrustworthy and capable of rendering incongruous opinions from the "contradictory" sources they consulted, a process that could reduce the "predictability" of the outcome.

It would not be far-fetched to suggest that there was also an element of intellectual and cultural arrogance involved. Reading between the lines of the judges' comments, one comes across a firm belief in the inherent superiority of English law when contrasted with Hindu law. This is not surprising. Being members of the colonial elite, they were imbued with social beliefs and value systems which resonated with the common stock of understanding in the surrounding culture of colonialism.

(3) *The belief in similarity*

There was a third factor at work. Voiced by several Anglo-Indian lawyers on numerous occasions was the argument that English and native rules on contracts were largely similar, with the result that in most cases English law could be used to resolve the disputes without the need to consult native laws. This justification was not restricted to a particular area or a particular time period. In 1816, the chief justice of Madras Thomas Strange wrote: "it is observable that allowing for a few peculiarities... [the Hindus'] law of contracts does not vary immaterially from our own."[66] About twenty years later, the Calcutta chief justice, Lawrence Peel, expressed the view that "the English law as to contracts… is so much in harmony with the Mahomedan and Hindoo laws as to contracts that it very rarely happens in our courts, which are bound to administer to Hindoos and Mahomedans their respective laws as to contracts, that any question arises on the law peculiar to those people in actions on contracts."[67] The same argument was presented to the British parliament as empirical evidence. "In questions of contract," David Hill informed the House of Lords' select committee, "the law is the same. It is only in those peculiar excepted cases affecting religion that it differs."[68]

Empirically the argument was misinformed and was based on a superficial reading of the shastric sources. At one level, there are important differences in the English and Hindu shastric rules that deal with contracts. In truth, these are less marked than in other areas, such as family relationships and inheritance. But as Rankin observed, "we need not conclude that the Hindu, Mahomedan and English laws were found to coalesce into a workable ius gentium

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[66] T. Strange, *Notes of Cases in the Court of the Recorder and in the Supreme Court, 1798-1816* ((Madras: Asylum Press, 1816), vi.

[67] Letter from Sir Lawrence Peel to Sir Henry Hardinge (dated July 1845), Parliamentary Papers (1864), Vol. XVI, 434

[68] "Evidence by David Hill, 10 March 1853," First Report from the Select Committee of the House of Lords together with Minutes of Evidence 1852-3, Parliamentary Papers, House of Commons (1852-3), Vol. XXXI, 209

upon the subject. There is a good deal about contract in Jagannatha which would not square with the English law."[69] Differences would have multiplied had Anglo-Indian lawyers compared English law not with a "homogenised" textual law but with the variegated customary law on the basis of which Hindus resolved their disputes in practice.

Moreover, Anglo-Indian lawyers supposed that because in some formulations the shastric texts could be lifted word for word from their context and still make sense in theirs the underlying norms were the same. They were essentially involved in micro-comparison without carrying out macro-comparison. This led them to ignore the context in which the language of the native texts was embedded and consequently to misinterpret to some extent the rationale and meaning of the concepts generated within the native system.

No matter how much this criticism is elaborated, it cannot prove that the argument did not constitute a widespread belief of the colonial judiciary upon which they based their practice. In fact, the argument had deeper theoretical foundations. Chief among those were ideas associated with Natural Law theories, especially those propounded by Protestant writers in Northern Europe such as Hugo Grotius and Samuel Pufendorf.[70] Viewing law as a science, the natural lawyers believed that it could be reduced by means of rational study of human nature to a body of axiomatic principles from which all other rules could be logically deduced. A chief characteristic of Natural Law was the "deep reverence for reason," the belief that the proper way of deducing the more specific rules in accordance with the law of nature was by the exercise of reason. Also important was the conviction that the principles of natural reason were universal. This did not mean that natural law principles were necessarily to be found in the state laws of all nations, though that would probably be truer in the most "civilised" ones. During the eighteenth century, "England, like everywhere else in Europe, had been caught up in a fervour of Natural Law thinking."[71] This led some treatise writers to the belief that contract law was founded upon general principles of law and that "English contract law was a manifestation of a universal order."[72]

This intellectual environment can shed light on the views of Anglo-Indian lawyers concerning the similarity of English and native laws of contract. It essentially provides the context within which they were formulated. The need to be more specific leads us again to William Jones and Henry Colebrooke. The significance of Jones on this relates to the views he expressed in his monograph An Essay on the Law of Bailments (1781), which he wrote before going to India. Working within a Natural Law framework, Jones sought to sketch out analytically the subject of bailments in accordance with the first principles of natural reason and then empirically show how those principles were found in developed legal systems, most notably the Roman and English ones. This he achieved by twisting either or both of those legal systems. Hindu law made an appearance towards the end of the empirical section when "less developed" legal systems were considered. After examining sections from Halhed's Code of Gentoo Laws, Jones found the Hindu rules on bailment to be "consonant to the principles established in this essay."[73] "It is pleasing" he continued, "to remark the similarity, or rather identity, of those conclusions, which pure unbiased reason in all ages and nations

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[69] G.C. Rankin, *Background to Indian Law* (Cambridge: Cambridge University Press, 1946), 90

[70] For a detailed discussion, see F. Wieacker, *A History of Private Law in Europe* (trans. T. Weir) (Oxford: Clarendon Press, 1995), 213-215, 227-256; J.M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 1992), 222-227, 258-262; K. Haakonssen, *Natural Law and Moral Philosophy* (Cambridge: Cambridge University Press, 1996); T.J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge: Cambridge University Press, 2000).

[71] D.J. Ibbetson, "Natural Law and Common Law" (2001) 5 *Edinburgh Law Review* 4

[72] S. Waddams, "What *were* the principles of nineteenth-century contract law?" in A. Lewis, P. Brand & P. Mitchell (ed.), *Law in the City* (Dublin: Four Court Press, 2007), 305-318 at 306

[73] W. Jones, *An Essay on the Law of Bailments* (London: Dilly, 1781), 116

seldom fails to draw, in such juridical inquiries as are not fettered and manacled by positive institution; and, although the rules of the Pundits concerning succession to property, the punishment of offences, and the ceremonies of religion, are widely different from ours, yet, in the great system of contracts and the common intercourse between man and man, the Pootee of the Indians and the Digest of the Romans are by no means dissimilar."[74] For Jones, the similarity was no accident: it was based on the fact that the specific rules he examined in those legal systems approximated to natural reason. The theoretical underpinnings of the general similarity were explicitly rooted in the method and concepts of Natural Law. Jones was not invoking the similarity as a justification for the application of English law in disputes among Indians. The context in which he wrote was far removed from the judicial realities of British India. Nonetheless, he did think "that a clear and concise treatise, written in the Persian or Arabian language, on the law of Contracts, and evincing the general conformity between the Asiatick and European systems, would contribute, as much as any regulation whatever, to bring our English law into good odour among those, whose fate it is to be under our dominion, and whose happiness ought to be a serious and continual object of our care."[75]

In a modified form, the writing of such a treatise was pursued by Henry Colebrooke. Having translated Jagannatha's Digest of Hindu Law on Contracts and Successions in 1798 and written substantively on a variety of issues concerning Hindu culture, Colebrooke was regarded as the leading European expert on Hindu law. Importantly, like Jones, Colebrooke was learned in Civil Law and was influenced by Natural Law. In the preface to his translation of two Hindu texts dealing with inheritance in 1810, Colebrooke noted that "in the law of contracts, the rules of decisions, observed in the jurisprudence of different countries, are in general dictated by reason and good sense; and rise naturally, though not always obviously, from the plain maxims of equity and right."[76] This was to be contrasted with the law of successions or inheritance which "constitutes that part of any national system of laws, which is the most peculiar and distinct."[77] In its use of the language of reason and its overall tone this was resonant of Natural Law ideas; in its specificities, it was very similar to Jones's remarks in the Essay on the Law of Bailments. The influence of Natural Law on Colebrooke's legal thinking can be most clearly seen in his Treatise on Obligations and Contracts of 1818.[78] This pursued his previous comment to its limit. Given that the law of contract was based on reason and consisted of universal principles transcending national and cultural borders, he sought to encapsulate those in a concise treatise. Making extensive use of writers in the Civilian and Natural Law tradition, it was in essence "an attempt to state general principles of contract law in the light of English, Scots, Roman and Hindu Law."[79] As such, it epitomised most strikingly the Natural Law method of treatise writing. In common with other Natural Lawyers (and Jones), Colebrooke's synthesis distorted the rules from the legal systems that he consulted.

On the whole, Strange's and Peel's belief in similarity between English and Indian laws was not original. Analogous views are found in the works of Jones and Colebrooke where they are clearly rooted in a Natural Law framework. In fact, the views of the judges share the same underlying premises, though these are less transparent.

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[74] *Ibid*, 114

[75] *Ibid*, 116

[76] H.T. Colebrooke, *Two treatises on the Hindu law of inheritance: Dáya-bhága and Mitácsharâ* (3rd ed. by W. Sloan) (Madras: Higginbotham, 1867), i.

[77] *Ibid*, i

[78] H.T. Colebrooke, *Treatise on Obligations and Contracts* (London, 1818)

[79] A.W.B. Simpson, "Innovation in Nineteenth Century Contract Law" (1975) 91 Law Quarterly Review 247, 255. See also, J. Duncan M. Derrett, "The Role of Roman Law and Continental Laws in India" (1959) 24 *Zeitschrift für ausländisches und internationales Privatrecht* 657

This was not independent of Jones and Colebrooke. As can be seen in Strange's textbook on Hindu law, they were influenced by Jones' and Colebrooke's writings.

4. Codification of Contract Law: The Indian Contract Act 1872

The Indian Contract Act 1872 is a code of English contract law, with some minor changes to suit local circumstances. Native law is almost totally absent in it. This may appear striking to a modern reader but it makes sense against the background of the Act's preparation. The thrust of the dominant view among colonial administrators in the mid-nineteenth century was that India needed an English law of contract. Hence there was no conscious effort to incorporate native law. The Act was always designed to be a code of English law, the creation of pre-eminent lawyers in England with little or no knowledge of native law. Even so, the extent to which there was a break with the past, at least at the level of black-letter law, was limited. English law had already played a significant role in the analysis and resolution of contractual disputes in the Anglo-Indian courts. What the Act contained was not necessarily the same, but it was to a large extent part of the same stock of rules and ideas.

Paradoxically it is outside the Act rather than within it that native rules have survived most, albeit only to a minor degree. This is the result of the model of codification followed. As recognised by the Anglo-Indian courts, the Act was never intended by its compilers to be a complete code of contract law, expressly preserving legislation and customs that were not inconsistent with it. This meant that in appropriate contractual disputes between Hindus where the Act provided no solution, the courts could still seek an answer in native laws. In light of the pre-codification state of affairs, this was unlikely to lead to a widespread consultation of native law. Yet in some instances the courts did elect to follow native rules. For example, the Hindu rule of damdupat, which prevents the recovery of interest exceeding the amount of the principal, has been followed in Calcutta and Bombay.

5. Conclusion

The interaction between Hindu law and the English law of contract discussed in this paper was never a just one. It took place within an analytical terrain controlled by colonial lawyers, most of which believed in their own cultural superiority and were prejudiced in favour of their own laws. It is little surprise, therefore, that in their hands Hindu law went through a long process of distortion until it was eventually marginalised. The enactment of a contract code based on English law had just about put the last nail in the coffin. It was, however, a coffin long in the making.

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