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## The making of colonial law: Society, polity and culture in India

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### Abstract

"The Making of Colonial Law: Society, Polity, and Culture in India" explores the intricate processes through which colonial legal systems were established and evolved in India. This study delves into the interaction between British colonial authorities and Indian society, examining how colonial law was shaped by, and in turn reshaped, indigenous social, political, and cultural structures. The research highlights the role of colonial law in enforcing British control and its impact on Indian society, including the transformation of traditional legal practices and the codification of laws that often reflected colonial priorities and prejudices. By analyzing various legal cases, administrative records, and contemporary accounts, the paper provides a comprehensive understanding of the symbiotic relationship between colonial legal frameworks and the broader colonial project in India, shedding light on the enduring legacies of colonial legal interventions in post-colonial India.

**Keywords:** Colonial law, British India, legal systems, indigenous practices, codification of laws, British colonial authorities, social transformation, legal history, administrative records

### Introductions

In late 18th century, the East India Company was building a State in through which it could administer the rapidly growing territories acquired by conquest or accession. In the process of this construction of state the extension of Britain's political and legal institutions can be seen in most of the overseas colonies, where Britain's law was the law of these colonies from the beginning<sup>1</sup>. Only a small legal and administrative innovation was required to relocate or subjugate the indigenous population in colonies such as North America, the Caribbean and Ireland etc. But they had to face problems due to existing complexities in social and political structures of India and others. In order to establish British Sovereignty various attempts had been made to resolve these problems through different types of measures. Historians of law such as Bernard Cohn, Lauren Benton, John L. Comaroff and others have contributed in the historiography of colonial law using different methodologies in order to understand these processes of subjugation of colonized populous by the establishment of jural and legal institutions of rule imposed by colonizers.

Bernard Cohn talks about the British's standpoint in establishing connection with native population of India through the study of culture, society, Mughal as well as indigenous legal institutions. When British came India, they faced legal and administrative challenges. Unlike America and other colonies India had written and recognizable legal system. On the one hand there were religious as well as political texts, commentaries and institutions in India and on the other hand there was subject population totally different from indigenous population of Australia, America and the Caribbean. There is this idea that colonized population became legal subject. In order to control the Indian population British wanted to create a body of knowledge as a way in which religious and social identities can be objectified. This objectification not only influenced colonizer but the colonized as well. Cohn gave references from the writings of English and Indian authors during the time of British rule in India. He talks about Robert Orme's portraiture of the process of jural and legal administration in India "General Idea of the Government and People of Indostan," in *Historical Fragments of the Mogul Empire*. He refers to an English translation of Ferishta's *History of Hindostan*, a history of the Muslim conquerors of India, by Alexander Dow and

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<sup>1</sup> Bernard Cohn, *Colonialism and Its Forms of Knowledge*, (New Delhi: Oxford University Press, 1996), 57.

an English translation of Abu'l Fazl's *Ain-I-Abari*, an account of the modes of governance under Akbar. He quotes Sir William Jones and H. T. Colebrooke's essays and letters in order to analyse the legal system of India before British and during the British rule<sup>2</sup>. Cohn talks about two perspectives; one is India as lawless: the Despotic model and the other is India as Theocracy: Classical Modes of the Indian State. In the despotic model as Dow and other English historians stressed that all power were in the hand of emperor. All property relation comes from the despotic wheel of the emperor. This idea of absolute and arbitrary power became certain kind of basis of historiography of pre-colonial India through British. This Despotic understanding was countered by Warren Hastings. The premise of Hastings' plan was the idea that during the 17<sup>th</sup> century the Mughals had an effective administrative structure, clearly not based on European principles, but nonetheless consonant with Indian theory and practice<sup>3</sup>. Hastings said India was theocratic state. People of India were ruled by religious codes of law. This is the sympathetic understanding of India that India has state and legal system but the only problem is decay. Hastings with other influential scholars were working on the task to restore India's past, with the help of Sanskrit texts and Persian texts which is a formidable example of Invention of Tradition. Invention of tradition, modernity of tradition becomes biggest projects of its time to discover this code which was there in the texts. These activities of restoring the Indian past were pointing to Eurocentric approach to impose a legal system which was European. Cohn talks about law and legal subjectivity that this kind of way in which the law and its categories become the object of study<sup>4</sup>.

Lauren Benton in her essay talks about legal subjectivity and the issue of juridification. Colonial legal system is essentially a plural society. Existence of multiple sources and forums of the law is Legal pluralism. She begins with the transformation of Indian legal authorities to one dominated by a type of state law that relied heavily and increasingly on English legal sources and procedures where we see other features of high colonialism that colonial state becomes the transcendental authority from which all legal power flows. Benton gives reference by M. Galanter to describe the long historical process as the "absorption" of indigenous law into "modern" British law and by Cohn as a transition "from Indian status to British contract." She examines a case from 1776 which is focused on colonial legal policy and revealed the ability of indigenous litigants to press individual's claims by exploiting jurisdictional confusion<sup>5</sup>. This essay is written on the bases of mainly archival sources and secondary sources (produced by Indian and European authors). In relative sources she takes up for example Bengal Law Proceedings, Fort William, works based on Criminals Tribes Act and various other secondary sources to discuss the pluralism of law.

The question of agency and historicisation of colonialism is absent in Benton's work but John L. Comaroff in his article talks about the same. Comaroff says that law is something

which is appropriated language of the institutions where colonized population became the legal subject. The resources of the law have been used to question the hierarchies of the societies but also the question of state at certain point. These questions are of comparative perspective. Comaroff begins with idea that you cannot define what colonial law and doing so is problematic. Even if you discuss the characteristic features of colonial law the situation remains the same because the outcomes are regionally, socially, culturally specific<sup>6</sup>. He talks about the dialectical point between the lawfare of domination and the revisionist focus on the counterinsurgent, contestatory possibilities inherent in even in the most oppressive colonial legal regimes, which is overdetermined<sup>7</sup>. But as far as I am concerned it's not overdetermined because these counterinsurgencies, contestatory possibilities are there whether in active form or passive.

Julia Eckert in her edited work talks about the dialectic between the transformations of social relations and subjectivities. This dialectic reflects the two sides of the sociality of law, first, law's formative impact on social perceptions and secondly, it's very constitution in the social. Law travels and different forms of law's travels rarely come alone. As David Westbrook has elaborated, 'the imperial, the fashionable, the systematic and the tribal forms of law's travels are interrelated'<sup>8</sup>.

All these historians of law are trying to understand colonial law through different types of methods. Cohn argues that in India, there wasn't any politically centralized system of law, law was not practiced as central. We see a series of overlapping forums. Caste, Kinship and different kind of social identities. As Radhika Singha talks about the process of modification within Anglo-Indian law through emerging redefinitions of the functions of state officials and institutions. Singha unravels the assumptions behind earlier legal and penal orders<sup>9</sup>. In Europe these overlapping system of law were replaced by the state but in India they were not replaced by the state because of certain kind of logistical reasons. They didn't have the system of writing, bureaucratic system linked to the political system. Because law was not conceived, conceptualized, practiced of as centralized. The question of overlapping jurisdiction is not just a question of corruption, law being corrupt and despotic it is the way law has been conceptualized. This is the basic difference between law and colonial law. Where Comaroff considers Law as a diverse object and insists on seeing it in diversity. In this diversity, there are many examples along with contestation, dominance and experimental grounds. Whether in India or Spain, the winner is colonial law everywhere, which is the objective of these law historians. As Benton sees colonial fluidity, which ultimately takes the form of hierarchy. The way in which she looks at diversity, fluidity etc. in the colonial law is methodology.

<sup>6</sup> John L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, (2001), 308, 309.

<sup>7</sup> Comaroff, *Colonialism*, 307.

<sup>8</sup> Julia Eckert, eds. al. 2012. "Law's Travels and Transformations". Chapter in Eckert, Julia *et al.* (arg.). *Law against the State: Ethnographic Forays into Law's Transformations*, 1–22. Cambridge Studies in Law and Society. (Cambridge: Cambridge University Press), 1, 2.

<sup>9</sup> Tanika Sarkar. "Book Reviews: Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India*, (Delhi, Oxford University Press, 1998), *Studies in History* 17, no. 1 (February 2001): 142.

<sup>2</sup> Cohn, *Colonialism*, 61.

<sup>3</sup> Cohn, *Colonialism*, 60.

<sup>4</sup> Cohn, *Colonialism*, 62, 63, 64, 65.

<sup>5</sup> Lauren Benton, *Colonial Law and cultural Difference: Jurisdictional Politics and the Formation of the Colonial State*, (Cambridge University Press, July 1999), 565.

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