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Geetanjali Srikantan

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Introduction: Law, History, Culture and the Problem of Comparison

There appears to be a need to develop new approaches to the history of law in a comparative and global context. Such a need arises from dissatisfaction with current approaches that do not allow for conceptual clarity in cross cultural and global contexts. Some of these problems have been pointed out by Robert Gordon (1984) who observes that there are certain fixed notions around which the writing of the history of law revolves around. This involves a singular conception of the relationship of law to historical change based on the idea that the natural and proper evolution of a progressive society is towards the type of liberal capitalism seen in the Western world and that it is law's function to aid such evolution.[1]

Gordon is particularly critical of what he calls legal functionalism. He remarks that this functionalism operates in an evolutionary context. He characterises five kinds of propositions that make up this functionalism. The first is the view that law and society are separated from each other. This leads to questions about the relationship of law to society and the autonomy of law. The second is that all societies have universal needs which involve developing along the appropriate social path. The third is that there is a predetermined evolutionary path and the fourth is that legal systems should be described and explained in terms of functional responsiveness to social needs. The fifth, which draws from the others, is that the legal system adapts to changing social needs. He also speaks of variations to this dominant tradition of studying legal history which, among others, involves the use of

1 Gordon (1984) 59.

social theory such as Marxism which relates the fulfilment of social needs to forms of domination. He adds that even if functionalism is rejected as an approach, some of the other modes of study that are adopted, such as disengagement or the reiteration of the autonomy of law or understanding law as legitimating ideology, also prove to be unsatisfactory. Gordon's aim in critiquing functionalism and the dominant tradition is an attempt to show the usefulness of critical historiography (inspired by the field of critical legal studies) in providing a new basis for the study of legal history. Critical historiography seeks to move beyond the evolutionary functionalist approach which sees uniformity in social processes, such processes being labelled as "modernisation".[2] In making the set of critiques that he sees as partial, Gordon seeks to outline the mode and manner through which legal history could be studied. A possible way is to understand how law is constitutive of social relations and the multiple trajectories of development that can be used to explain social events.

Gordon's attempt to provide a new way of studying the history of law needs to be read with a similar appraisal of comparative law and its methodology by Guenter Frankenberg (1985). Frankenberg argues[3] that comparative law's faith in objectivity allows culturally biased perspectives to be represented as neutral and that this is inconsistent with its goals. There is a lack of discussion on theory and method in comparative legal scholarship. He also identifies functionalism as being one of the problems that hinder the study of legal cultures. The comparative functionalists have a prior understanding of the nature of a legal system which lets them identify similar problems in a manner that can produce similar results. Frankenberg further suggests[4] that this form of functionalism also entertains a vision of social development which is evolutionary in nature, i.e. that law adapts to social needs and develops through interaction with its environment. Such a perspective marginalises legal ideas in the realm of consciousness paying attention only to the formal aspects of the law, such as the decisions and actions of courts and legislatures. Neutrality becomes a stance to use terminology that will identify universal problems. Frankenberg concludes that one can re-imagine comparative legal studies by re-examining the

2 Gordon (1984) 71.
3 Frankenberg (1985) 411.
4 Frankenberg (1985) 438–439.

relationships that arise from the use of legal concepts and categories (an illustration of the same would be terms within property law such as "tenant" or "lease" and the social phenomena that one identifies with these terms).

What are the possibilities for such re-imagination? In order to do so one needs to analyse the current conceptual frameworks that are prevalent in comparative law, such as legal transplants, transfers, borrowings and diffusion. As David Nelken (2001) argues, these metaphors also use a functionalist model which sees law as part of an interdependent whole and the language of legal adaptation merely indicates functionalist survival. Nelken further argues that there needs to be more research done on societies which are the objects of legal transfer as part of the new agenda on comparative legal studies.

In order to begin this new agenda one needs to examine the current debates on forms of legal transfer. Alan Watson's work on legal transplants has been significant in the theorisation on legal transfers and has faced criticism of two kinds. The first criticism is that legal transplants are "impossible" and that legal rules cannot travel as they are cultural forms and they are inscribed in words which convey a variety of meanings across different cultures (Legrand 2001). The second criticism, which comes from Roger Cotterrell (2001), is far more damaging as it focuses on Watson's argument that law does not necessarily reflect a society's needs and concerns and that there is no connection between law and society.

Legrand's criticism is problematic for its suggestion that legal transplants are non-determinant in nature, i.e. that the legal institution or system of law has no influence in the culture that hosts it. He does not go into this question although in his later work (Legrand 2003) he has sought to clarify the position by reiterating the features of such incommensurability by showing how the identification of similarities is essential to doing comparative law. However, the comparativist can never understand the native's legal experience in the manner that the native himself can. Even if there is semantic commonality, cultures can be incommensurable.[5]

Cotterrell's criticism focuses on Watson and Ewald's interrogation of the relationship between comparative law and legal sociology stating that their position of there being no mirror theories of law and society (law is not a mirror of social, political and economic forces) does not take into account

5 Legrand (2003) 254.

the complexity of Western social theories (such as Marx, Weber etc.) about law. Cotterrell comments that Watson's claims emphasise that laws frame social institutions. This ignores the fact that these institutions (particularly forms of property holding) have limited value by themselves and can only be understood by an empirical inquiry into patterns of social organisation. This also shows a particular ambiguity in Watson's theses, his insistence that law is part of culture and his emphasis on positive rules.

Cotterrell maintains that:

> A legal transplant will not be considered significant (or perhaps as occurring at all) unless law can be shown to have effects on relevant aspects of social life in the recipient society. The success of the transplant will be judged by whether or not it has the effects intended, which were the reason for it. Similarly, where law is seen as an expression or aspect of culture in the sense of shared traditions, values or beliefs (either of lawyers, of society generally or of some part of it), a legal transplant will be considered successful only if it proves consistent with these matters of culture in the recipient environment or reshapes them in conformity with the cultural presuppositions of the transplanted law.[6]

In order to understand legal borrowing Cotterrell argues that legal traditions need to be understood in the context of the specific legal communities whose conditions of existence should be studied. Cotterrell proposes that the legal borrowings be studied in the context of four types of community which are instrumental community, traditional community, community of belief, and affective community. The focus on instrumental community explains the effects of certain borrowings, such as the adaptation of continental principles of good faith in contract to a British context, through the comparison of the different structures of economic organisations in the German and British contexts.[7]

It is noteworthy that Cotterrell and other critics of Alan Watson do not take into account that Watson's theses mainly applied to European societies. Watson himself makes a qualification in his discussion on codification stating that his classification of codes in the context of the gap between law and society does not apply to codes in conquered territories such as India.[8] Therefore, the key question that emerges in the re-imagination of

6 Cotterrell (2001) 79.

7 Teubner (1998) however suggests that this is a legal irritant rather than a legal transplant because of the transformations and events that it triggers.

8 Watson (2001) 136.

comparative legal studies and the writing of the history of law is the question of law in non-Western cultures. This becomes more significant in light of Watson's statement that a legal rule can only be known through its history. How does one write a history of non-Western law and what are the concepts that one uses to do so? How does one escape the functionalism that appears to be inherent in comparative legal studies in the West and how does one formulate an agenda for comparison?

In this context, Cotterrell's remarks on the conditions of legal transplantation in the host culture become relevant. In his formulation on the nature of community he mentions that when laws are transplanted, "the transplant is likely to be linked in the perceptions of the transplanters with patterns of social relations they associate with the law".[9] This raises the question of what can constitute a community and its social relations and how the viewpoint of the transplanting culture may differ from that of the host culture. This leads to a broader query. What is the mode of inquiry into non-Western law and how does one analyse it conceptually? Such a mode of inquiry has to necessarily engage with "conceptual histories."[10] One needs to understand the concepts behind the writing of such a history and whether such concepts can be articulated in non-Western cultures. This goes beyond legal transplantation as it analyses the concepts inherent within a culture and does not restrict itself to law.

Edward Said's landmark work *Orientalism* points out that there is a particular way of speaking about the East that is characteristic of Western discourse. This way of speaking embodies a conceptual framework that is applied to understand non-Western cultures. Such a conceptual framework finds itself in colonialism and the systems and categories that it uses. Said describes it as a kind of intellectual power; a library or archive of information which was bound by a family of ideas and a set of values which explained it as a phenomenon.[11] Thus, the history of law in India has to be understood in the context of the legal system that colonialism created and the concepts and categories that were used in creating it. Therefore, concepts such as "religion," society and "community" have to be interrogated in order to understand how they operate in a milieu that is different from the West.

9 Cotterrell (2001) 83.
10 I borrow this term from Koselleck (2002).
11 Said (2001) 41–42.

In order to undertake this enquiry one needs to undertake an archaeology of colonial discourse. As Foucault (1972) suggests archaeology cannot be based on causality. Discourse about any particular object cannot be based on the existence of the object but the interplay of rules that make the appearance of the object possible. One requires an understanding of the conditions that allow for the emergence of these objects, concepts and thematic choices and the rules of formation that dictate their coexistence, maintenance, modification and disappearance.

This paper seeks to make an enquiry into how the history of law in India can be studied through the illustration of the British colonial encounter with "Hindu law" due to the importance that this category itself has received from legal historians. Its objective is to outline the theoretical framework by which such a study takes place, and the categories that are relevant for its analysis. It begins by looking at the framework through which legal histories of India have been undertaken. Such a framework has been understood as a movement of custom to codification or the secularisation of religious law, legal historians stressing the arrival of modernity through colonialism. In this context the paper shows how such a framework can be formulated only within the background of Western social theory using the specific instance of Hindu Law. It uses Max Weber's sociology of religion in order to understand this framework and shows how there are inconsistencies in his account. It shows how the assumptions in his account have been shared by others, such as the British colonial administrators. It then tries to look at the logic behind these inconsistencies which are related to the European experience of "religion" in India. These inconsistencies have a certain pattern and can be used to frame certain questions for the study of Hindu law as a historical category. This necessarily involves a comparative perspective as Western theories and concepts must be interrogated for their influence on the making of Indian legal systems. In doing so, it sets an agenda for the study of Hindu law and provides for a new approach by which legal history can borrow from comparative law and not by merely understanding borrowings as legal transplantation.

Understanding the Framework Behind Legal Histories of India: The Secularisation of Religious Law Through the Movement From Custom to Codification

Legal histories of India often focus on the colonial legal system and its metamorphosis into the modern Indian legal system. Such a process is often understood as a movement from customary law to codification inherently suggesting that British colonialism brought about a process of secularisation. A standard textbook story of Indian legal history (Jain 2009) begins with the East India Company being granted a zamindary (a form of land ownership) by the Mughal emperor which involved dispute settlement as a responsibility. These responsibilities involved the setting up of judicial institutions and various courts such as Mayor's Court, the Court of Appeals, the Court of Request and the Court of Quarter Sessions.

A prominent feature of the judicial proceedings (Bhattacharyya-Panda 2008) was their reliance on arbitrators who possessed knowledge of local norms and practices. These were the pundits who were considered the expounders of the Hindu scriptures and the maulvis who were the experts on Islamic religious texts. The British had to rely on these arbitrators as they did not have any knowledge of indigenous law. In order to lessen their reliance on their arbitrators the British adminstrators embarked on a project of identifying "Hindu law" in certain religious texts known as the Dharmasastras.[12]

This perception of the law of the Hindus compelled Warren Hastings, the Governor General of that period to appoint a team of eleven pundits to compile a code on Hindu law in 1772. The Dharmasastras were characterised by the British into two kinds of literature. The original Dharmasastras, which were believed to have their origin in the Vedas, were the *Manu smrithi*, the *Yagnavalkya smrithi*, the *Narada smrithi*, the *Visnu smrithi* and others. This tradition was developed and maintained through centuries by Tikas and Nibandhas. The Tikas provided explanations of the Smritis whereas the Nibandhas were discourses that were assembled by classifying a large number of texts and extracting the rules of dharma from authoritative texts.

12 An account of the difficulties of the colonial administrators in identifying the laws of the Hindus is provided by Bhattacharyya-Panda (2008).

Thus, *Vivadarnavasetu*, also known as "A bridge on the ocean of disputes," was compiled in Sanskrit on the basis of selected legal materials from these texts. It was then translated into Persian and then into English under the title of *A Code of Gentoo Laws* by Nathaniel Halhed.

One of the key figures in this enterprise of understanding Hindu law was William Jones, the famous Orientalist who was a judge in the Calcutta High Court. The result of his collaborations with various Hindu pundits yielded another treatise, *Vivada-bhangarnava* or "Ocean of resolutions of disputes," by Jagannatha Tarkapancana, which was translated by Jones's successor H.T. Colebrooke. Many other commentaries on Hindu law, including those by British authors such as Francis MacNaughten and Thomas Strange followed. Two main schools of law were identified: the Mitakshara and the Dayabhaga. By the 1860s the British had developed a body of Hindu law and had done away with the practice of having pundits or maulvis interpret this law. Certain spheres of life were also deemed to be outside the realm of religion which led to civil and criminal legislation such as the Indian Penal Code 1869, and the Transfer of Property Act 1882, being enacted.

This narrative of colonial legal history forms the basis for the historical analysis of how various social phenomena has been understood in legal terms. An illustration of the same is Radhika Singha's account of the legal discourse around sati that finally led to its abolition. Singha makes the claim that the abolition of sati had to do with placing public authority at a transcendental level so that "public parley between the juridical claims of the state and those made on the citation of religious belief was to be curbed".[13] She comments that the government was compelled to abolish sati as it was not an imperative religious duty due to them finding it impossible to prevent its abuses. Its abolition allowed for secular legal categories, such as homicide, to become applicable. However, the application of these secular legal categories did not show the commitment to universalism and the rule of law which should have come with legal codification. This was noticeable in the category of "voluntary homicide with consent" which was included in the Indian Penal Code and was meant to cover "voluntary religious suicide." Singha seems to suggest that a certain secularisation of religious norms took place through codification which attempted to subsume religion.

13 Singha (1998) 115.

In different ways other scholars of legal history, such as Elizabeth Kolsky (2010) and Mithi Mukherjee (2010), also stress the incompleteness of codification.[14] Kolsky provides us an account of how codification did not bring about the equality promised by the rule of law but instead institutionalised race-based privileges for Europeans. Colonial law thus served to entrench racial and cultural difference providing the colonial state with mechanisms of regulation and control.[15]

Mukherjee (2010) highlights the contradictions in this process by showing how justice as equity in the figure of the monarch became the key idea in colonial governance. She argues that this category of justice was the foundational basis of the Indian Constitution unlike constitutions in the West which were based on freedom and individual rights. She then shows how the political philosophies of both Locke and Rousseau (the former being grounded in the idea of the general will and the latter in the primacy of the individual and private property) did not find place in the making of the Indian Constitution. She also shows how certain discourses, such as Gandhi's idea of transcendental freedom, were marginalised in this process.

The main question that emerges from these studies is the subsuming of religion as a category. There has been acceptance of the fact that sacred texts constitute the source of law without understanding the rationale that as religious texts they reflected the practices of the people. Whereas scholars such as Mukherjee have highlighted how certain Indic categories have been marginalised, the trend has been to understand how modernity as a discourse has overrode traditional social forms. This implicitly accepts the religious and the secular as categories. In emphasising on the powers appropriated by the colonial state (Singha 1998) and its forms of governance one is compelled to accept the narrative on secularisation and that colonial law brought about secular processes and secular ways of thinking. Another

14 There are also others who emphasise the integrity of the process, such as Eric Stokes (1989) who shows that codification had utilitarian influences. Such an argument, however, does not deal with the cultural consequences of such codification. Stokes instead chooses to emphasise the importance of a moral theory.

15 Singha (1998), in her analysis of colonial penal law, elaborates on this process by arguing that this reflected certain moral dilemmas of the colonisers in categorising Indian society (such as reconceptualising family relationships in the context of norms about the stability of the household). It also helped assert the state's position as the only source of legitimate violence.

aspect of this narrative is that certain religious laws governing family and community relationships survived in this process of codification and remain to be "secularised".[16]

There have been some studies regarding the claims of various religious communities in the context of the categories brought about by colonialism. Shodhan (2002) makes an important analysis of how the Khoja community was forced to represent its beliefs as Islamic through colonial legal processes. Sarkar (1993) and Mani (1998) show how community mobilisation took place around social practices such as child marriage and sati (bride burning). However, there is no interrogation by them as to how such practices could be perceived by the colonisers as religious. This is despite a large body of work of challenging religion as a cultural universal in religious studies and that the concept of religion is analytically redundant due to its Christian theological basis (Balagangadhara 1994; Asad 1993; Fitzgerald 2000). In this context I look at Max Weber's theory on the sociology of religion to understand the framework by which practices are seen as religious.

Hinduism as "Religion": A Critical Examination of Weber's Sociology of Religion

Max Weber's contribution to the sociology of religion has been highly influential in contemporary debates on religion and secularization. His characterisation of secular rationalisation as the "disenchantment of the world" is a prominent theme in current scholarship.[17] Weber identifies social modernisation as a manifestation of such rationalisation, law being the means of organising the capitalist economy and the modern state, these elements being constitutive of the rationalisation of society. Rationalisation is also used to designate the autonomy of law and morality. Weber explains rationalisation[18] as the institutionalisation of purposive-rational action, seeing it as a process and not as an end. Rationalisation begins with the overcoming of magical beliefs and the setting in of disenchantment. Such

16 This concern is reflected in contemporary constitutional law wherein the Directive Principles in the Constitution of India mandate the enactment of a uniform civil code doing away with personal laws for different religious communities.

17 This is particularly reflected in the work of Charles Taylor (2007).

18 Weber identifies different kinds of rationalization but relates all of them to the emergence of capitalism.

rationalisation is achieved to the extent that belief in such magical thinking is overcome. Such a process arises from the Judeo-Christian world where the pagan enchanted world had to be overcome and faith had to be reposed in God as the maker and sustainer of the world. Such a process of disenchantment freed modern structures of consciousness, reason no longer being universal but split into a number of value spheres. Therefore, rationality was something left to the individual to pursue and not to existing social orders.

In his work on the emergence of capitalism, Weber (1930) argues that the nature of the rationality that allows modern capitalism to emerge is peculiar to the Occident and is absent in other cultures such as India and China. Whereas the impulse to acquire and gain wealth has been common to all cultures, modern capitalism is dependent on the forms of rationality that have arisen in the West. This includes legal rationality, as capitalism required rational legal structures in the form of calculable legal systems which allowed certainty of calculation. This meant that legal systems had to possess a level of systemisation and coherence which was absent in law in other cultures, law in India being an example of such a lack of consistency.

Weber's conclusions about law in India are related to his understanding of the sociology of religion. He comments that Indian law had developed forms which could have served capitalistic purposes but modern capitalism did not develop till English rule and that it was adopted without any indigenous beginnings.[19] According to Weber, the social structure of the Hindu religion must be analyzed to provide an answer. In this context he focuses on the caste system and the roles of various social groups. The basis for his argument lies in his identification of the sacred texts of the Hindus as the Vedas. The acknowledgement of the Hindu tradition resting upon the interpretation of the Vedas meant acceptance of the paramount position of the Brahmins. Caste, "that is the ritual rights and duties that it gives and imposes, and the position of the Brahmans, is the fundamental institution of Hinduism."[20]

In describing the Indian social order Weber provides a lengthy account of the position of the four castes which are the Brahman, the Kshatriya, the Vaishya and the Shudra. He stresses that these groups engaged in certain prescribed, exclusive activities which implemented their styles of life as status

19 Weber (1958) 4.
20 Weber (1958) 29.

groups.[21] For the Brahmans it was the study of the Vedas and asceticism, the Kshatriyas had the task of political rule, the Vaishyas were agriculturalists and traders and the Shudras performed menial services. However, what was essential to the maintenance of social position was the central position of the Brahmins. Social rank was determined in reference to Brahmans. The principle of status and commensality in the context of social interaction was extremely complicated, spanning a range of social relations which involved dining with other communities, acceptance of food from other communities (including the food preparation by other communities). Restrictions were also based on ritually forbidden sexual intercourse between different caste groups. In respect to all these matters the Brahmans were "always at the top in such connections".[22]

Weber specifies a number of criteria to determine social rank, such as avoidance of eating meat (particularly beef) and individual traits regarding the selling of products. Such complexity of rank led him to the conclusion that the expression "church" was inapplicable. With respect to the intricacy of rank, the Brahmans were the final authorities. For him "Brahmanical and caste power resulted from the inviolability of all sacred law which was believed to ward off evil enchantment."[23]

Weber's perception that magical elements appeared in the law contributed to his impression that Indian law was underdeveloped.[24] He emphasises the connection between law and the social structure of Indian society, i.e. the caste system. He comments that the features of the caste system are elaborately described in the law books, the law itself prescribing the lifestyles of different social groups. The law holds that those who did not wear the holy belt (a reference to the sacred thread of the Brahmins) were degraded unless they acquired the same. They also recognised typical patterns of conduct for different age groups which only held true for the Brahmins.[25]

The position of the Brahmins was a specialised development from the guild of magicians into a hereditary caste with status claims.[26] This ascend-

21 Weber (1958) 56.
22 Weber (1958) 43.
23 Weber (1958) 48.
24 Weber comments that the legal literature of the Middle Ages in India is impoverished and formalistic, the law of evidence being magical and irrational (1958, 52).
25 Weber (1958) 58.
26 Weber (1958) 58.

ency to power by the Brahmins was connected to magic overriding all other spheres and due to the giving of gifts for ritual services. This led to "evil enchantment" as the Brahmins would avenge the denial of gifts through intentional ritualistic errors or curses. This ascendency was consolidated by principles, for example a judge must never adjudicate in favour of a non-Brahman against a Brahman; the respect due to a Brahmin being higher than that of a king.[27] In contrast, the law books enjoin the Shudra to dutiful service and only if he could not find such service, did he have to take up an occupation or trade.[28]

Weber's analysis of the caste system leads him to conclude that caste had negative effects on the economy. Such an order, according to him, was essentially anti-rational. Although it may be assumed that ritualism by caste may have made the large scale development of enterprises impossible, the real reason for the lack of development of capitalism in the Western sense was:

> A ritual law in which every change of occupation, every change in work technique, may result in ritual degradation is certainly not capable of giving birth to economic and technical revolutions from within itself, or even of facilitating the first germination of capitalism in its midst.[29]

According to Weber, Hinduism is characterised by a fear of innovation. Due to the emphasis on following custom there is no scope to introduce new practices. The emphasis placed on caste loyalty meant an adherence to traditional roles and the duties that befit one's caste rank. This stifled individual ability to aspire to any advances or novelties in one's life. The caste system "is a product of consistent Brahmanical thought".[30] "Ancient Indian conditions"[31] ensured that tribes and foreigners were absorbed into this system, occupational specialisation becoming hereditary status. There was no system of accepting individuals into trades, a sense of market participation or an idea of citizenship. Such phenomena had failed to develop and if they did, they were crushed by caste prohibitions.[32]

Further, Weber comments that there was no universally valid ethic but only ethics that rested on status of a private and social kind, except for a few

27 Weber (1958) 60.
28 Weber (1958) 94.
29 Weber (1958) 112.
30 Weber (1958) 130.
31 Weber (1958) 130.
32 Weber (1958) 131.

absolute prohibitions universally prohibited such as the killing of cows. It was the doctrine of karma or rebirth that determined one's status based on past births which explained the caste organisation and the order of divine, human and animal beings.[33] Therefore, it provided for the co-existence of different ethical codes for different social groups which could be in conflict. Thus, "there could be a vocational dharma for prostitutes, robbers and thieves as well as for Brahmans and kings." A conception of original sin could not therefore exist in this social order as there could only be a ritual offense against the particular dharma of a caste.

Weber then draws further conclusions about the absence of Western political concepts in India. The organisation of society in India did not display any "natural order of man" and there was no "natural law," only some form of positive law which was status compartmentalised. This did not allow for any form of "natural equality".[34] The consequences of such a social order were that there was no scope for social criticism and rationalistic thought which could lead to the idea of human rights. Since karma or the doctrine of rebirth conditioned all lives there could be no common rights or common duties, only status-conditioned dharma was recognised. The concepts of "state," "citizen" or "subject" did not appear. In further examining Indian ethics Weber comments that concepts in Christianity, such as sin and conscience, do not find place in Indian ethics. The devaluation of life was based not on evil but the transitory nature of the world.

Weber's theory of the Hindu religion with a rigid hierarchy of the four castes and a Brahmin priesthood which controls this hierarchy shows inconsistencies at certain places. He admits that the grouping of castes into Brahman, Kshatriya, Vaishya and Shudra are not equally true throughout India. In analysing data from the 1901 Census of India,[35] Weber notes that there are several gradations in caste[36] and shows that such a structure and hierarchy cannot be maintained. The confusing nature of the structure is reflected in his characterisation of how such a hierarchy could be maintained. In identifying upper castes the criteria was based on various practices,

33 Weber (1958) 144.

34 Weber (1958) 144.

35 There is no detailed analysis of the problems that the Census posed by Weber, particularly in the context of the gradations of caste. For contemporary scholarship on this issue, see Dirks (2001).

36 Weber (1958) 45.

such as widow celibacy, child marriage, ancestral sacrifice and social interaction with other castes. However, in the case of lower castes the differentiation was based on whether Brahmans could serve them or castes other than Brahmans were still willing to do so.[37] However, castes of a lower rank raised higher demands than castes of a higher standing, which showed that the standing of the caste was not an indication of the extent to which it could follow socially restrictive practices. Further one could not establish a list of castes according to rank. This was due to differences in rank, from place to place, castes being universally diffused and some castes being locally represented. Therefore, the problem that arose for the census workers was as to which unit could be considered a caste as it was rarely the case that one found complete commensalism – only the sub-castes were predominantly endogamous and had a unified regime of regulation.

This data leads Weber to remark that the rank order of castes was contested and subject to change and that castes of questionable rank tried to stabilise their position by making false claims of superior rank. Although he mentions that the question of rank was only arbitrated by Brahmans, he acknowledges that kings, although advised by Brahmans had tremendous power to make decisions regarding the ordering of caste ranks. Such decisions could include personally expelling entire castes and individuals, including Brahmans. Weber also mentions that there was a particular period in Indian history where the Shudras could obtain political power.[38]

Such a finding, however, seems contrary to the assertion that the hierarchy was determined and enforced by Brahmans, questions of social hierarchy and authority being much more complex. For instance he also mentions that the authority of Brahmans could vary considerably

> … from unconditional submission to the contesting of his authority. Some castes do contest the authority of the Brahman, but in practice, this means merely that the Brahman is disdainfully rejected as a priest, that his judgement in controversial questions of ritual is not recognised as authoritative, and that his advice is never sought.[39]

37 This shows that there is a preconceived framework by which one approaches the caste system which perceives various practices by Brahmins as being related to the hierarchy of caste itself, particularly social interaction between caste groups.

38 Weber (1958) 88.

39 Weber (1958) 29.

The complex structure of the social system was reflected in social events such as members of a group called the Sutars in Bombay (who were village carpenters) developing priests of their own and discontinuing commensalism with the other members of the group.[40] The identification of caste with Hinduism was also not completely accurate as it was not necessary that every caste is necessarily a Hindu caste and that there are castes among the Muslims and the Buddhists and that the Indian Christians are also compelled to recognise caste.[41] Although Weber makes these observations he fails to analyse it in the context of the conclusions that he has drawn about the caste system.

Another important discrepancy lies in Weber's identification and description of the sacred texts of the Hindus as the Vedas. He mentions that there is no trace in the Vedas of the structure and core of the fundamental ideas of Hinduism, such as the transmigration of souls and the doctrine of rebirth.[42] Despite commenting that the Vedas are not the source of insight into the content of Hinduism or its early historical forms,[43] Weber still persists in identifying the sacred texts of the Hindus as being the Vedas.

It appears surprising that Weber retains the idea of a Hindu religion with a cohesive caste system, and a Brahman priesthood, despite evidence to the contrary. However, he is not alone in doing so, such a conception of India being unanimous across European society, including British colonial administrators in India in the eighteenth century. Weber's perception that the legal norms of different social groups were found in the sacred texts, and his assumption that religious texts were also sacred texts, was also shared by the British. As mentioned earlier, the British embarked on an entire project of codifying "the Hindu law" that they found in the sacred texts.

In Bengal, British officials such as Scrafton, Holwell and Bolts identified the indigenous rules of governance to be in the dharma sastra, the holy texts which were monopolised by the Brahmins. Scrafton (1770) clearly identifies the source and origin of these laws:

> The Bramins say, that Brumma, their lawgiver, left them a book, called the Vidam, which contains all his doctrines and institutions. Some say the original language in

40 Weber (1958) 97.
41 Weber (1958) 29.
42 Weber (1958) 28.
43 Weber (1958) 28.

> which it was wrote in is lost, and that at present they only possess a comment thereon, called the Shastah which is wrote in the Sanscrit language, now a dead language, and known only to the Bramins who study it.[44]

Scrafton then remarks that the Brahmins have distorted the doctrines of the founder laid down in these sacred texts and exceeded the rest in their abuse of power. He makes the observation that these texts show no consistency and although the Hindus have acknowledged the Vedas:

> … they have greatly varied in the corruptions of it: and hence different images are worshipped in different parts; and the first simple truth of an omnipotent Being is lost in the absurd worship of a multitude of images, which, at first were only symbols to represent his various attributes.[45]

This narrative of sacred legal texts was carried forward by Holwell (1765) who confirms that:

> … it appears therefore that they date the birth of the tenets and doctrines of the Shastah, from the expulsion of the angelic beings from the heavenly regions; that those tenets were reduced into a written body of laws, four thousand eight hundred and sixty six years ago, and then by God's permission were promulgated and preached to the inhabitants of Indostan.[46]

Holwell also confirms that there has been some corruption in the text, different versions being in circulation. Like his contemporaries he has no doubt that the Brahmins are responsible for leading Indian society into a state of degradation:[47]

> … the Goseyns[48] and the Bramins having tasted the sweets of priestly power by the first of these Bhades,[49] determined to enlarge, and establish it, by the promulgation of the last; for in this the exterior modes of worship were so multiplied, and such a numerous train of new divinities created, which the people never before had heard or dreamed of, and both the one and other were so enveloped by the Goseyns and Bramins in darkness …[50]

44 Scrafton (1770) 4.
45 Scrafton (1770) 5.
46 Holwell (1765) 22.
47 Bolts (1772) also identifies the sacred texts of the Hindus to be the Vedas and also focuses on the role of the Brahmans as custodians of these texts. According to Bolts knowledge of these texts lay exclusively with the Brahmans due to their understanding of Sanskrit and were a closely guarded secret not to be revealed to any other caste.
48 A title given to a Brahmin priest.
49 Another word for the Shastra.
50 Holwell (1765) 16.

What could be the reason for this standard narrative across Europe despite the fact that there were factual inconsistencies that could have changed it? In order to understand this we need to use the frame of Orientalism which is the mode that the West uses to describe non-Western cultures. Such a framework yields the insight that the descriptions of a "Hindu religion," "Vedas as sacred books" and the "Brahman priesthood" are related to the conceptual framework that the West uses to understand religion. The West's idea of religion in India is related to what it perceives as religion within its own culture. Therefore, the conceptual framework that allows Europe to experience and perceive "religion" in India must be investigated. One also needs to investigate the inconsistencies in the discourse around "Hindu law." A greater study of these inconsistencies allows us to pose certain questions on an alternative way of studying Hindu law outside the European conceptual framework.

Assessing the European Experience of Religion: An Agenda for the Study of Hindu Law

In an essay on the centrality of the Brahmin priesthood within European representations of India, Raf Gelders (2009) argues that colonial discourse uses Hinduism as a category of analysis to classify an assortment of traditions.[51] The figure of the Brahman is central to the European perception of an ancient religion based on monotheism and the sacred scriptures being corrupted by forms of idolatry.[52] Gelders suggests that this image of the Brahmin is due to two modes of representation that developed in Europe. The first image was a pre-Renaissance representation wherein the Brahmin traditions were seen as proto-Christian expression. The second image was that of the Brahmin as the cunning priest in Reformation literature.

Gelders demonstrates through an analysis of various ethnographic works how these two images were juxtaposed to produce the current description of Hinduism as a religion. In the medieval period the *Collatio Alexandri cum Dindimo*, a fictional exchange of letters between Alexander and Dindimus the leader of the Brahmin ascetics, became popular being quoted by the French historian and preacher Jacques de Vitry, the Archbishop of Canter-

51 A more elaborate explanation of Gelders's argument is provided in his 2010 doctoral thesis.
52 Gelders (2009) 564.

bury John of Salisbury, and other theologians. They were known as the "Brachmanes," their religion being explained in terms of the vision of the Christian God. However, the stereotype of the Brahmin as "proto-Christian" was exemplified in the fictional travel report of the Middle Ages known as the *Voyages de Jehan de Mandeville Chevalier*, which became the most influential due to its wide distribution and translation. In this work the exemplary behaviour of the Brahmin was contrasted with prevalent shortcomings:

> The Brahmans are not given to theft, murder, or adultery, and they live "as that they were religious men." Because they are teeming with good qualities, they never suffer tempests, famines, or any other tribulations, "as we be, many times, amongst us, for our sins."[53]

What was the reason for this focus on the righteousness of the Brahmin? Gelders traces this to the transition in scholarship exemplified by Johannes Boemus who in 1520 published his work *Omnium Gentium Mores* (the customs of all nations) which outlined the benefits of learning the rites, mores and manners of all peoples in the world. The reason for this is that humankind has fallen astray from worshipping the Christian God having succumbed to the Devil which has made them worship idols and images instead of God. In his ethnographic study the "Brachmanes" were central, being the models in faith for the Christian community. The Brahmans were thus thought to exemplify the good morals and faith in the Biblical God.[54]

However, a second image of the cunning and manipulative Brahmin arose on the encounter with India in the sixteenth and seventeenth centuries which moved to another extreme of representing a defective Christianity in the East. The ethnographic text that played a key role was Ludovico di Varthema's *Itinarario*, released in 1510, based on his visit to Calicut in India. Varthema mentions in his narrative that the king of Calicut was an idolator (despite his belief in the Biblical God) who worshipped the image of a monstrous demon that he called "deumo" (most likely Narasimha the man-lion incarnation of Vishnu the god in Hindu mythology). The image of the "Calicut Devil" was multiplied through distribution, translations, and other ethnographic works and was prominent in the theological controversies of the Reformation period.

53 Gelders (2009) 570.
54 Gelders (2009) 571.

Gelders argues that the Brahmin protoganist was transformed to suit Protestant debates. The Brahmin ascetic who took part in the debates with Alexander was seen as shunning the avarice and greed of the Catholic Church who had claimed exclusive access to the Word of God and added new creeds and rites thus corrupting the message of God. The Protestant theologians constantly sought to compare the practices of the Catholic Church to pagan Rome stressing how the message of Christ has been distorted into the worship of human saints and crucifixes. In order to show how Roman Catholic Christianity and the idolatry caused by the devil were the same, the second representation of the Brahmin as a cunning priest emerged.[55]

Gelders further argues that these modes of representation were embedded in colonial discourse in India and colonial administrators, such as Holwell or Scrafton, were effectively able to use this frame in order to formulate the idea of an ancient Indian religion and a corrupt Brahmin priesthood. He concludes by saying that it is important to understand such descriptions as not merely being a product of colonialism but rooted in Christian theological debates.

How does one study "Hindu law" if the "Hindu religion" is a product of the European experience of the Orient? In India today, the Hindu religion is constitutionally recognised and protected with the freedom to practise and propagate one's beliefs and practices and set up institutions for religious and charitable purposes.[56] The colonial conception of how community or society in India is constituted in the context of the caste system, the nature of law and the structure of the family has had profound influences on post-colonial legislation and judge made law which rely on colonial precedent. Various enactments, such as the Hindu Succession Act 1956, the Hindu Marriage Act 1955 etc., are enforced relying on the colonial conception of what should constitute a Hindu religion. Cases and judgements on the Hindu joint family rely on the schools of Hindu law, i.e. the Mitakshara and the Dayabhaga which were the product of the colonial codification process. However, the description and classification of social phenomena as belonging to Hinduism or a "Hindu religion" does not mean that the Indian

55 In making this argument Gelders examines a wider range of ethnographic sources in the Low Countries, other parts of the continent and England.

56 This is granted under Article 25 of the Constitution of India.

conception of such a social phenomena is the same as the colonial conception.

What is the usefulness of understanding how Hindu law has become a category historically? As we have seen, such a category is important as it allows legal historians to be able to make their claims of the process of secularisation by colonial law. This means that Hindu law and secular law are understood as two separate legal transplants. This makes it unclear *as to what is* being transplanted. There is no clarity *as to what are the changes* that colonialism brought about except for a dissonance with indigenous categories (Mukherjee 2010), a reconceptualisation of social relationships (Singha 1998), and actions caused by their racist psychology (Kolsky 2010).[57]

If one wishes to gain greater clarity on the nature of the changes that colonialism brought about, it becomes important to analyse the European experience of Indian society and its conceptual framework which generates a number of systems and categories. We have already noticed that Weber's description of the Hindu religion is subject to certain constraints, such as the need to identify sacred scriptures and Brahmin priests as custodians. Furthermore, that these constraints are also visible in the vision of the British colonial administrators in India. Raf Gelders's account allows us to discover the conceptual framework behind these constraints which are internal theological debates in Christian Europe.

In arriving at the conceptual framework that determines European attitudes towards Indian society, one needs to unearth the various categories and concepts that allows the description of an entity called "Hindu law" and how it shapes our descriptions of social phenomena. In order to do so, I propose using the inconsistencies in the European accounts to arrive at an analysis. We have already seen in the case of Weber that there were inconsistencies in his account of a unified Hindu religion and caste system. Most British administrators were unconcerned that reality in India did not match their pre-conditioned ideas. However, there were exceptions, such as James Henry Nelson, a Madras High Court Judge in the late nineteenth century who questioned the existing consensus on legal knowledge about India.

57 The specific positions of these legal historians is described in the second section of this paper which deals with how the history of law in India is perceived as being a movement from custom to codification.

In a detailed study on the various difficulties faced by the Madras High Court's administration of Hindu law Nelson (1877) mentions how the customs and practices of various social groups whose practices are inconsistent with Hinduism had to be recognised. He also mentions that the Austinian notion of law wherein the non-Muhammadan social groups have agreed to accept and have been compelled to guide themselves by an aggregate of positive laws or rules set to them by a sovereign or other person having power over them is absent in India. Therefore, the idea of a "law giver" and primary law texts akin to the Institutes of Justinian was incorrect.

> If I am rightly informed, there is not a trace of the existence of a set of positive laws such as the twelve tables of Rome, the Code of Draco, or the commandments of the Jews: but on the contrary we have the evidence of Megasthenes, and of Strabo (quoting Nearchus), to the fact that in old times there were no written laws in India.[58]

In this context Nelson dismisses the identification of a law-giver called Manu who had set laws for the Hindus through the law text called Manu Smriti by Orientalists such as William Jones[59] on the ground that there is evidence lacking that a man called Manu actually lived and had set laws that intended to govern all Hindus. Nelson also raises questions about the nature of caste in India and the status of Brahmins in being the key interlocutors in interpreting and upholding the Code of Manu. In his letter to Justice Innes (1882) he states that the Brahmins of South India have developed their own peculiar customs and practices and therefore one should not apply the law applicable to Brahmins in the North to them. Nelson also remarks that the groups considered to be Shudra may have their own scriptures propounded by their own Gurus and priests and may not avail of Brahmanic assistance in performing ceremonies and religious services. He arrives at the conclusion that:

> There is not, and so far as appears never has been, a Hindu nation or people, in the proper sense of the term: and it would be idle to attempt to discover by research a body of positive laws based in the general consciousness of such a nation or people.[60]

58 Nelson (1877) 4.

59 As mentioned earlier in this paper, William Jones played a major role in the translation of the Dharmsastras.

60 Nelson (1877) 11.

Nelson comments that there are various contradictions and inconsistencies in the Manu Smrithi itself and that these contradictions would lead one to conclude that such a commentary did not lay down legal principles to be followed but were merely recommendatory in nature.[61] An example was the practice of niyoga or levirate wherein the manner of following the custom is laid down in an elaborate manner but was condemned in absolute terms. He criticises the functionalism present in the legal scholars of the colonial period claiming that they sought "to discover the existence of analogies between Sanskrit concepts and those of ancient Rome and modern Germany".[62] He lays down fifteen false principles that have characterised the state of Hindu law as enforced by the courts. These include (1) the existence of various schools of law which governed different parts of India (such as the Andhra country, the Dravida country etc., (2) the application of Hindu law to all Hindus and (3) the Hindu family is a state of union and is undivided.

In claiming that the Code of Manu did not apply to all Hindus (if it could be considered law) Nelson poses relevant questions such as when and in what circumstances were the Dharmasastras composed? Do Buddhism, Jainism and Brahmanism have any impact on the religious beliefs and practices of the people of South India? To what extent do Muhammadans in the Madras province follow the practices of non-Brahmin castes? What kind of powers do Gurus and caste heads exercise?[63]

Nelson further argues that the notion of property within the family was not the corporate form of the joint Hindu family described by the colonisers. Property was held individually and women could also inherit in certain cases. He comments that words do not exist in the Dravidian languages for English legal phrases such as "joint family" "coparcenary" and "co heirs". He maintains that these meet the requirements of the High Court but do not express the social life of South India. He also asserts that when division in the context of the Tamil word "pangu" (share) is mentioned, it refers to village land and not family property.[64]

In order to resolve these issues, Nelson recommended that there be an inquiry into the usages and customs of the Indian castes without using

61 Nelson (1887) 56.
62 Nelson (1882) 10.
63 Nelson (1882) 16.
64 Nelson (1887) 170–171.

concepts from existing Hindu law and that a set of practical rules should be in place instead of a manual of Hindu law. An effort should be made to ascertain the role of Gurus and caste heads in the context of authority to interpret customs.

In showing the flaws in the colonial account and a way of going forward, Nelson has set an agenda for the study of Hindu law. However, he does not comment on the manner by which such an agenda could be carried out. As we have seen a certain Orientalist framework pervades European discourse on law in India. There is a perception that religion is essential to the discovery of law in India as religious texts were also considered to be legal texts. The authorities to interpret these texts are the Brahmins. In challenging this framework, how can one ensure that one is doing so outside an Orientalist framework? How would it be possible to understand the practices or customs of another culture if the concept or idea of practice itself in Western legal culture is used to understand practice in India?

Historians of law have chosen to examine religious and secular law as two separate legal transplants, the secular coming into being due to the process of modernisation initiated by colonialism. However, our findings indicate that the European perception that law is to be found within religion itself indicates that the domain of the secular requires the idea of religion.[65] In identifying certain practices as "religious" and as others as "secular," a separate regulatory domain of secular law emerges. Such a domain can only exist in the presence of "religion" which is a category that British colonial administrators sought to bring into being through their identification of scriptures, priesthood etc. As we have seen, this category did not have any resonance with indigenous perceptions. Therefore, in locating and inquiring about practice one needs to recognise this dialectic.

The formation of Hindu law has to be considered in this light. In proceeding with Nelson's suggestion that there must be an inquiry into practices and customs of different social groups one needs to understand practice outside Western legal norms which stipulate fixed standards and forms of authority to interpret practice. In examining social relationships, categories that come from Christian theological debates, such as the idea of a

65 Some of these questions are addressed by Charles Taylor (2007) who suggests that secularity is evidence of how religion transforms itself into new forms of belief. For a more comprehensive account of how religion secularises itself see Balagangadhara (1994).

Brahmin priesthood, need to be rejected. One needs to re-examine the conflicts and dynamics of practice in order to determine social relationships. Nelson's observations about the joint family as a construct to meet British colonial judicial standards are important in the context of rethinking the nature of community in India. The colonial perception about the corporate nature of the joint family comes from certain ideas around the relationship between property and society which remain to be investigated. Such an investigation has to bear in mind the conceptions of community that have evolved in Europe and the manner in which that has influenced conceptions of community in India.

Conclusion

In trying to formulate new conceptual approaches to the study of legal history in global and comparative perspectives one is faced with the problem of functionalism. In order to overcome functionalism a far more radical approach is required than what is available within the methods and terminology available in comparative law, such as legal transplants, transfers and diffusion. In order to generate more productive explanations the frame of Orientalism or the manner in which the West looks at other cultures being drawn from debates in religious studies and cultural studies is adopted to resolve the problem. Max Weber's scholarship on the sociology of Indian religions is analysed to demonstrate the frame and its contents. One discovers that the idea of a Hindu religion with sacred scriptures and a Brahmin priesthood can be found not just in Weber but across all sections of European society. In interrogating the frame by which Europeans experience India, one discovers that that this is a product of categories and debates internal to Christianity. The inconsistencies in this account are investigated in order to arrive at a new agenda for the study of Hindu law.

It needs to be recognised that colonial discourse remains very firmly entrenched in post-colonial legal structures and the re-examination of categories poses a great challenge to historians of law. Therefore, the importance of using Orientalism as a frame for understanding European experience of non-Western cultures becomes even more significant in light of its potential to rethink existing forms of knowledge.

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