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The Hegemony of Heritage: The 'Narratives of Colonial Displacement' and the Absence of the Past in Pakistani Reform Narratives of the Present

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I. Introduction

A The Post-Colonial Pantomime

If Jeremy Bentham's preserved, albeit headless body at University College London – the so-called 'Auto-icon'— was to be miraculously resurrected, and induced to visit a contemporary Pakistani appellate court, he would be well within his rights for feeling a certain sense of *déjà vu*. After all, he famously prophesized acting as the "dead legislative," of British India with James Mill as its "living executive."[1] His brilliant intellectual disciple — Thomas Babington Macaulay — if persuaded to undertake a similar escapade — would (despite his frequent narcissistic reveries) perhaps be somewhat taken aback. He will discover that his great handiwork — the Indian Penal Code of 1860 – is still *en vogue* in Pakistan, its original spirit intact beneath the veneer of periodic piecemeal amendments. Both time travelers could be excused for thinking that they have not traveled at all. Both would immediately notice that judges in Pakistan do not wear elaborate horsehair wigs like their British counterparts. However, that visual dissimilarity aside if they tarry for a while, they will realize that in most other respects Pakistani judges are the big wigs at the center of an elaborate post-colonial judicial pantomime — a pantomime that is reminiscent of the colorful, intricate and complex British judicial spectacle in colonial India.

Macaulay, while propounding the cause of establishing English as India's *lingua franca* once declaimed with obvious satisfaction that: "In India, English is the language spoken by the ruling class. It is spoken by the higher class of natives at the seats of Government." [2] More than a century and a half later, the language of the Pakistani higher classes, of its courts (especially the appellate courts), of its legislation, its administrative regulations, its law reports, and, of its cadres of successful lawyers, powerful bureaucrats and prominent NGOs, is English. However, not unlike in a pantomime, the predominant majority of the clients, disputants, beneficiaries, victims and audiences in Pakistani courtroom dramas do not understand the language. They only have the benefit of looking on at the judges' and lawyers' gestures and expressions in order to decipher the unfolding stories that directly or indirectly impact and transform their lives. This is not surprising in a country where roughly a mere 3% of the population has a graduate or higher degree and is thus expected to have some proficiency in the language.[3] However, unlike a

[1] Quoted after the title page of ERIC STOKES, THE ENGLISH UTILITARIANS AND INDIA (Oxford University Press, 1982). At the very end of his seminal work, Eric Stokes refers to Sir Alfred Lyall, who saw the colonial government in India approaching most nearly Thomas Hobbe's ideal of the Leviathan. The last sentence of Eric Stoke's book is: "A scrutiny of this Indian Leviathan, if depicted in the manner of Hobbes's frontispiece, would reveal Bentham's calm philosophic brow and James Mill's stern eyes of authority." Id. At 322.

[2] Minute by the Hon'ble T. B. Macaulay, dated the 2nd February 1835. See http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/txt_minute_education_1835.html

[3] Interestingly, the Supreme Court of Pakistan recently struck down the requirement of a B.A. degree or equivalent qualification as a prerequisite for contesting elections in Pakistan. This requirement was introduced by General Pervez Musharraf through an amendment to the Pakistani electoral laws. Musharraf also attempted to introduce a similar requirement for becoming a member of a political party in Pakistan. Certain lawyers, including the author, in pro bono representations of certain veteran workers of political parties as well as labor unionists, who had many years of political experience but did not have a B.A. degree, challenged the latter step in the Lahore High Court. The plea taken by the petitioners was that political awareness and activism is not necessarily a function of holding a B.A. degree. Furthermore, they argued that in a country with disparate and discriminatory access to education based on region, class and gender, such a restriction would disenfranchise almost 97% of the population from participation in

pantomime there is no helpful background narrator's voice to explain to the audience what is going on.

Against the backdrop of this mute drama for the pre-dominant majority of Pakistanis, I recall once being a witness to a Lahore High Court judge (a scene that might get appreciative nods from a Bentham or a Macaulay) haranguing some junior police investigation officers in his court over certain due process violations. While berating them in English he, *inter alia*, repeatedly challenged them to explain to him the meaning of the words *'audi alteram partem.'* All they could offer were some muffled words of apology in Urdu as they nervously conferred with each other in hushed Punjabi. The moment was quintessential, yet such moments are far from being rare in Pakistani courtroom dramas. In his otherwise noble zeal to reform a couple of policemen and his fond familiarity with English terms and Latin usages, the worthy judge seemed oblivious to the incomprehension on the majority of faces in the court room —other than those, of course, with knowing smiles and an English legal education in their portfolios. It was like one of those quaint caricature drawings of judicial stereotypes that adorn the offices of well-heeled lawyers everywhere that show a fastidiously wigged and elaborately robed, red-faced and goggle-eyed judge spouting fury at some befuddled wretches shuddering in their shoes. It would have been comic if it were not so tragic.

This of course merely illustrates the operational and everyday intimidatory and confounding dimensions presented by complex legal concepts and procedures in an unfamiliar language, to laypersons. At a deeper level, languages draw their ethos, form, purposes and continuing sustenance from civilizations, cultures, ideologies, value systems and politico-economic models and their dialectics, as indeed they act as a mode of communication for the same. It is hard, therefore, to decouple a language from the sociology, culture and imperatives of the legal and judicial system that employs it. Languages can obfuscate as much as they can clarify and communicate, which in itself can be a matter of political choice. When various Pakistani military dictators chose Marcus Tullius Cicero's '*Salus populi suprema lex esto'* or Hans Kelsen's *'Doctrine of Revolutionary Legality,'* as doctrinal pretexts for regime justification at the price of constitutional abrogations, the deception was not just in the unfamiliar terminology. The larger conundrum lay in the cunning cooption of ethical and legal ideas from a very different context, both historical as well as conceptual, in order to serve a political agenda. A glance back at India's colonial past further reveals that for the architects of the empire, choice of language was cardinal to the substantive contents of what it expected to impart. In post-colonial critiques of colonial Indian history, it is now clichéd to refer to Macaulay's famous 1835 Minute on Education. In this brief document, Macaulay roundly denounced the "admirers of the oriental system of education." He declared that:

> "[T]he dialects commonly spoken among the natives of this part of India contain neither literary nor scientific information, and are moreover so poor and rude that,

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politics and would thus be violative of their constitutional rights to engage in political activity. While these challenges were *sub judice*, the Musharraf government withdrew its proposed legal amendment. The B.A requirement for contesting elections, however, held sway until the recent Supreme Court judgment. It was often and widely criticized in public for the same reasons as the aforementioned reasons for the challenge to the proposed B.A requirement for joining a political party. It faced further criticism as a tactic by Musharraf to exclude some veteran politicians from electoral politics.

> until they are enriched from some other quarter, it will not be easy to translate any valuable work into them."

Then he proclaimed what was to become a throbbing barb in post-colonial discourses. He said:

> "[A] single shelf of a good European library was worth the whole native literature of India and Arabia."[4]

Language, culture, knowledge, civilization and political agenda are inextricably linked in the same diatribe. While advocating the necessity and purpose of introducing the English language and the 'intrinsically superior'[5] western knowledge to India, Macaulay infamously proposed:

> "It is impossible for us, with our limited means, to attempt to educate the body of the people. We must at present do our best to form a class who may be interpreters between us and the millions whom we govern; a class of persons, Indian in blood and color, but English in taste, in opinions, in morals, and in intellect. To that class we may leave it to refine the vernacular dialects of the country, to enrich those dialects with terms of science borrowed from the Western nomenclature, and to render them by degrees fit vehicles for conveying knowledge to the great mass of the population." [6]

If this indeed was the colonial agenda, or at least a prominent strain thereof, at first glance the English speaking elite that drives Pakistani politics and government and that rules over the predominantly uneducated masses, seems like its logical outcome. Having emerged from its colonial incubator it has fulfilled the prophesy, of an emergent '*babu*' class that of course has eventually graduated from mere 'interpreters' to actual rulers. It is clear that they have not quite succeeded in equitably and widely sharing the boons of 'knowledge,' as Macaulay tasked them to do. Are we just then left with 'Macaulay's Children'— the Pakistani politicians, bureaucrats, army generals, judges, lawyers and other members of its largely English speaking ruling elite? Or is this pejorative term both unfair and an inadequate explanation of the challenges faced by these educated Pakistanis — members of a modern, progressive and cosmopolitan fraternity — who have gleaned what was valuable and constructive from their country's colonial past and are now steadfastly steering it in new directions through the inevitable morass of any post-colonial society? A closer look at the current directions would be in order, as would of course a glance at the not so distant past.

B Twin Crises — the Din of a Crumbling Legal System and the Deafness of its Operators

The adoption of English as Pakistan's official language may be a colonial vestige and a post-

[4] Minute by the Hon'ble T. B. Macaulay, dated the 2nd February 1835. *See* http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/txt_minute_education_1835.html

[5] Ramachandra Guha has recently argued that while they revere him for other achievements, interestingly, few in England today know about Macaulay's connection to the sub-continent. Ramachandra Guha, Macaulay's Minute Revisited, The Hindu, Sunday Feb 04, 2007. See http://www.hindu.com/mag/2007/02/04/stories/2007020400030300.htm

[6] Minute by the Hon'ble T. B. Macaulay, dated the 2nd February 1835

colonial constraint or a conscious choice for reasons of efficiency, national integration, unity and access to modern modes of knowledge and markets. Stepping further back into history, it may have been cardinal to the agenda of colonial rule, or a necessary modernizing device that ultimately ushered India into the modern world. I shall enter these debates at a slightly later point in this article. Upfront, what I want to point out concisely is what is much less open to debate; what is blatantly obvious. That is the fact that English remains largely inaccessible to most Pakistanis, as indeed does proper education, whether in English or otherwise. Even though mere adult literacy rate is now looked upon as an inadequate parameter for real access to political and economic empowerment through education, with one of the lowest literacy rates in the world, one can imagine the very long way Pakistan still has to go.[7] College enrolment is low and there is great variation in access to education along parameters of gender, and regional as well as urban/rural background.[8] This immediately points to a highly differentiated level of access to education in general. Quantity aside, the actual 'quality' of education issues are also very important but beyond the ambit of this chapter.[9] There is of course a vital nexus between access to education, especially education in English and access to the Pakistani courts and its legal system.[10] This point does not really require additional elaboration, given the strong imprint of Pakistan's colonial past and its language on its legal and judicial system — a system based on the colonial tradition, structured on its model and operated in its language. Yet there is a remarkable paucity of debate in contemporary Pakistan on whether there is anything discordant, anything coercive, anything hegemonic about this tradition and the legal and judicial system inspired by it. There is a lack of engagement with the notion that the choice of language can perhaps not be decoupled from the choice of an entire legal and administrative ethos and structure that has its genesis in Pakistan's colonial past.

This is disappointing but unremarkable. Post-colonial polities, and especially those beleaguered

[7] According to statistics accumulated by UNESCO, total 'adult literacy' (which is defined by UNESCO as the percentage of persons aged 15 and over who can read and write) for Pakistan (2000 - 2007) is 55% . Primary school net enrolment/attendance (2000- 2007) is 56%. The youth literacy rate (ages 15-24) (2000-2007) for males is 80% and for females is 60%. The primary and secondary school enrolment ratios for male and female students are quite low. Adult literacy rate of females as a percentage of males is 59% (2000-07). See http://www.unicef.org/infobycountry/pakistan_pakistan_statistics.html . It should be borne in mind that there is no standard definition of 'adult literacy' provided by the relevant education ministry in Pakistan. One Canadian organization reports that Pakistan defines a literate person as "one who can read a newspaper and write a simple letter in any language." See http://www.cea-ace.ca/foo.cfm?subsection=lit&page=fra&subpage=wha&subsubpage=som which provides several international and national definitions of literacy.

[8] According to the Government of Pakistan Ministry of Education statistics (2005-2006) there are 1135 degree colleges in Pakistan that offer a B.A degree (four years of college education after ten years of schooling). There are 325,993 students enrolled in these institutions. If you divide that figure by Pakistan's population of 163902000, as reported in 2007, you get a figure of 0.0019 % of the population that is enrolled for a college degree. According to a 2009 USAID Education Factsheet on Pakistan, nearly 50 million Pakistanis (half the country's adult population) cannot read. Only 60 % of Pakistani children complete 10 years of school, and only 10 % complete 12 years. See http://www.usaid.gov/pk/sectors/education/docs/ed_factsheet.pdf

[9] On the particular issues of legal education in Pakistan *see* for example, Osama Siddique, *Martial Laws and Lawyers: The Crisis of Legal Education in Pakistan and Key Areas of Reform*, 5 Regent J. Int'l L. 95 (2007)

[10] The district judiciary in Pakistan routinely uses Urdu as well as some regional languages in court proceedings and for some basic legal documents. However, the fact remains that the laws and regulations of the country as well as its reported case law are in English and the higher one climbs in the court hierarchy, so is the advocacy and court proceedings. Translations of some of the laws in Urdu are asymmetrically available some of the time.

by military interruptions, invariably display a similar story. What is remarkable, and this is the essential point that I want to make in this article, is that despite the intense domestic and international focus on judicial and legal reform in Pakistan, especially in the last decade, the resulting analysis and discourse is by and large 'decontextualized,' 'ahistorical' and 'unimaginative.' Contemporary law reform debates in Pakistan tend to essentially focus on tinkering and tweaking the component parts of the existing legal machinery. Amazingly, this carries on in a context where, *inter alia*, the penal code, the contract act, the criminal procedure code and the civil procedure code of the country date from 1860, 1872, 1898 and 1908 respectively. Yet all the current approaches to legal reform in Pakistan adopt a starting point for their analysis that is located much later in the historical continuum. In these approaches, the received legal and judicial system firmly maintains the status of a timeless, changeless, universal and promising utopia gone slightly wrong. It is a utopia that is perceived as fixable through certain astute modifications and reforms.

As a result, the response, by and large, of those who conduct, manage, control and dominate the legal discourse in and on Pakistan — the judiciary, the lawyers, the local and international law reform consultants, and the very few and far between academic commentators — is as best tepid to any suggestions of a departure, albeit even a not too radical one, from current and established approaches. Any notions of a radical review of what is clearly old and crumbling, are ironically considered anti-modernist, intellectually regressive, unrealistic and unpragmatic. Any attempts to frame a debate on the present ills of the legal and judicial system in a historical and sociological context is essentially deemed too broad, too academic, too un-lawyerly, and too much of a distracting, irrelevant waste of time. To question the legitimacy, ethos and fundamentals of the 'received' legal and judicial system as a given and compulsory, even desirable, condition precedent, is both rare and deemed ridiculous. This 'de-contextualized,' 'ahistorical' and 'unimaginative' approach is even more striking if one looks closely at some of the exciting debates, as I shortly will, in disciplines other than law.

Take history for instance, a discipline popularly perceived as 'unadventurous' and constrained by the limitations of dependence on primary sources that are as yet unearthed, understudied or forgotten away in archival recesses. Methodologically constrained by their reliance on at times very limited primary materials, historical studies can be acutely limited in terms of time and scope.[11] Historians, if anything, should be even more sanguine about the carefully constructed edifice of received historical wisdom. They are, after all, generally not known to be awed and troubled by the commotion and chaos of contemporary events but rather expected to fit and contextualize them in careful theories built though a measured analytical schema that stretches over decades, if not centuries. Instead of being caught up in the pulls and strains of everyday social and political conflicts, it is popularly imagined that historians can be found, like some retiring and introverted species, in "libraries and archives, class rooms, and their offices."[12] It has even been alleged that, "most historical research is done because there is a known body of source material available," rather than interest in a problem, descriptive or theoretical.[13] Yet the

[11] BERNARD COHN, *An Anthropologist Among the Historians*: *A Field Study*, in BERNARD COHN, AN ANTHROPOLOGIST AMONG THE HISTORIANS 4 (Oxford University Press 1987)
[12] Id. At 3.
[13] Id. At 6.

relatively distant and detached seers of this staid discipline have displayed great ingenuity in recent years in questioning some established theories on South Asian colonial and pre-colonial history.[14]

The purpose of referring to some of the recurrent interesting debates in South Asian historiography is threefold: (1) it is to contrast the intellectual ferment that exists in say historians' attempts at understanding South Asia, with the unquestioning staleness of the legal discourse attempting to make sense of its present. (2) A more nuanced understanding of the past is surely relevant to making sense of the present as new insights can force one to revisit and question several closely guarded assumptions, theories and 'self-evident truths' about society — especially, a society which is being regulated by laws and systems based on and influenced by these assumptions, theories and self-evident truths. Closer scrutiny may reveal some of these to be nothing more than biases, misconceptions and superstitions. (3) Historians work in lifeless archives with lifeless materials. Lawyers and judges, on the other hand, work with living people. One would expect the latter to find it unavoidable to ignore what living voices have to say on a daily basis about the various travesties of the Pakistani legal and judicial system. Yet historians of South Asia in my experience seem more receptive to hearing and bringing to life the story that the echoes of long-dead voices have left in parchment. Pakistani lawyers and judges, meanwhile, cover their ears to block out the din of protest around them, intent on finding continuing meaning in the dead letter of the law.

The fundamental purpose of this article is to highlight the dramatic gap between Pakistan's largely 'inherited' laws from its colonial legacy (in some cases intact in their original form and in most cases molded in the colonial mode and ethos even if promulgated after independence), and the common people of Pakistan. To the extent that this gap exists due to inaccessibility caused by language has already been pointed out above. To the extent that it is caused by various additional problematic aspects of the Pakistani legal and judicial system is also a matter of consensus in a

[14] For instance, recent South Asian historiography focusing on India's pre-colonial history of the controversial period between the fall of the Delhi Sultanate in 1398 and the rise of Mughal power in sixteenth century has questioned the allegedly tyrannical character of Muslim rule as a 'despotism' and highlighted hitherto overlooked aspects of considerable religious tolerance in the fifteenth and sixteenth century regional states, as well as the cross-fertilization of local cultures with the larger 'Indic' and 'Islamicate' ones. *See* CATHERINE B. AHSER & CYNTHIA TALBOT, INDIA BEFORE EUROPE 291 (Cambridge University Press 2006) At 84, 85, 104, 113. Similarly, another prominent theme of academic discord between historians of India has been the nature of India's political situation between the Mughal and the British empires — the debate between those who see 'decline' and others who find 'decentralization' instead. A new perspective now stresses that: "it is important in any study of India between empires not to confuse the erosion of power of the Mughal court and army with a more general political, economic and societal decline." See SUGATA BOSE & AYESHA JALAL, MODERN SOUTH ASIA: HISTORY, CULTURE, POLITICAL ECONOMY 38 - 44 (Routledge 2002) At 38. The other important debate between the old model of nineteenth century historiography and the more recent "revisionist histories" is on the extent to which the colonial *raj* 'invented' or 'reinvented and reformed' 'tradition' — in other words, whether there was any 'change' under colonial rule or was it 'continuity' from the past. Contemporary research asks whether the disagreement is really about the "kind of social change" under the Raj and given the, "… existence of multiple and occasionally contradictory social currents and cross currents," whether there is a need for "… a finely tuned historical perspective as well as balance in attempts to assess the nature and direction of social change." Id. At 60-61. Thus such recent research encourages a greater need for periodization; greater focus on "complex interconnectedness of developments in economy and society," greater importance to making a distinction between social change in rural interior and urban centers; and, the greater value of a more nuanced appreciation of the social resistance to colonial rule. Id. At 61-69.

plethora of domestic and international evaluations of the Pakistani laws and its legal system. These evaluations point out acute and wide-ranging issues of delay, complexity, dysfunctionality, corruption, overload, incompetence, lack of impartiality, overt discrimination that result in lack of access to justice for the politically, socially, economically and legally disempowered sections of Pakistani society.[15] Operational shortcomings and service delivery breakdowns of the extant legal and judicial system, however, are not the preoccupation of this article, though they do foreground and justify its specific focus of inquiry. What this article attempts to explore is the problem of deeper incongruity and incompatibility of the Pakistani laws and legal system with its society; a crisis of institutional inertia and disengagement with historical, cultural and social context; and a perpetuation of a hegemony of a formal legal system that is disassociated and delinked with its end-users. These are fundamental issues, which this article argues are, caused by and persist, due to the fact, that since its independence in 1947, the Pakistani justice sector discourse has essentially disengaged with and ignored the colonial context, ethos and antecedents of its legal and judicial system.

One could argue that issues of access to justice caused by language difficulties could be potentially overcome by making laws more accessible in local languages, but that is insufficient panacea for the complex and variegated nature of the problem that this article is trying to identify. Convinced or pretending to be convinced that the inherited colonial legal heritage was the triumph of modernity and evolutionary progress over the antiquated and fragmented remnants of the legal system(s) of a pre-colonial society; and unpersuasively proclaiming that since Pakistan's independence, this heritage has been adequately indigenized and augmented to meet international standards as well as local aspirations, the Pakistani justice sector discourse makes several leaps of faith. These leaps of faith help evade and overlook possibilities of meaningful recognition that there actually exist several levels of disengagement between the state rhetoric of legal empowerment, rights and remedies and the common citizens' possession,

[15] See for instance, the USAID, 'STRENGTHENING JUSTICE WITH PAKISTAN' REQUEST FOR PROPOSALS document at https://www.fbo.gov/download/f82/f825702026376a491b252180155ff40e/Pakistan_Justice_RFP_Final.pdf; CAROLINE WADHAMS, BRIAN KATULIS, LAWRENCE KORB, and COLIN COOKMAN, Partnership for Progress: Advancing a New Strategy for Prosperity and Stability in Pakistan and the Region, (CENTER FOR AMERICAN PROGRESS November 2008) at http://www.americanprogress.org/issues/2008/11/pdf/pakistan.pdf; CRISIS GROUP ASIA REPORT N°160, REFORMING THE JUDICIARY IN PAKISTAN,16 October 2008 at http://www.ssrnetwork.net/uploaded_files/4248.pdf ; CRISIS GROUP ASIA REPORT N° 86, BUILDING JUDICIAL INDEPENDENCE IN PAKISTAN, 10 November 2004; CRISIS GROUP ASIA REPORT N° 137, ELECTIONS, DEMOCRACY AND STABILITY IN PAKISTAN, 31 July 2007; CRISIS GROUP ASIA BRIEFING N° 70, WINDING BACK MARTIAL LAW IN PAKISTAN, 12 November 2007; GOVERNMENT OF PAKISTAN'S NATIONAL RECONSTRUCTION BUREAU: SOCIAL AUDIT OF GOVERNANCE AND DELIVERY OF PUBLIC SERVICES: BASELINE SURVEY 2002 — National Report; TRANSPARENCY INTERNATIONAL PAKISTAN: SURVEY ON NATURE AND EXTENT OF CORRUPTION IN THE PUBLIC SECTOR, March 2002; CORRUPTION IN JUDICIAL SYSTEMS; TRANSPARENCY INTERNATIONAL: NATIONAL INTEGRITY SYSTEMS – COUNTRY STUDY REPORT PAKISTAN, 2003; TRANSPARENCY INTERNATIONAL PAKISTAN: NATIONAL CORRUPTION PERCEPTION SURVEY, 2006; TRANSPARENCY INTERNATIONAL'S GLOBAL CORRUPTION REPORT 2007; and HUMAN RIGHTS COMMISSION OF PAKISTAN'S REPORT at http://www.hrcp-web.org/InternsDisplay.aspx?id=11

comprehension, appreciation and access to such empowerment, rights and remedies. This article tries to expose the dramatic gap between the Pakistani laws and legal system and its people by focusing attention to the history and public policy imperatives of these laws and legal system. To that end, this article attempts to identify, analyze, categorize and explain the various seemingly divergent and multi-disciplinary critiques of India's experience with colonialism and the resulting purpose, nature, and impact of its laws and legal system. This is the motivation behind this article's scrutiny of what I define and describe below as the 'narratives of colonial displacement.' Furthermore, this article offers a methodology of looking at and gauging the merit of the diverse perspectives and insights in the 'narratives of colonial displacement,' by drawing out, distinguishing and discussing three ideologically and thematically distinct narrative categories i.e. those that make a 'desirable modernization' argument;' those that make an 'inevitable modernization argument;' and finally, those that make a 'radical displacement argument."

This article contends that enamored as the Pakistani justice sector discourse is with the former two rather ubiquitous and uncritically accepted positions, what it repeatedly ignores is the vital third and most radical argument. This article puts forth the idea that the fact that the 'radical displacement argument' deeply and multifariously probes and forcefully questions the colonial legal project in India; and necessitates on-going evaluation of its continuing impact on South-Asian post-colonial states, makes its ignorance self-defeating. A detailed discussion of my three categories of the 'narratives of colonial displacement' shall follow later in this article, with special emphasis on the various facets and contemporary relevance of 'the radical displacement argument.' However, before that, it merits further discussion as to why I prescribe a sociological perspective for understanding and diagnosing the real problems of the ailing Pakistani legal and judicial system in the first place. This is important for this article asserts that unless the current reform gaze on the Pakistani legal and judicial system is broadened to encompass the societal context in which it exists, myopia leading to complete blindness is more likely to occur rather than a dazzling reformative revelation.

II. The 'Narratives of Colonial Displacement.'

A 'Remembrance of Things Past' – What do the Post-Colonials miss about their Pre-Colonial Past, if anything?

To say that British rule and its laws, regulations, legal culture and norms were 'alien' to India would be stating the obvious.[16] I shall shortly elaborate further on the several differences of style, substance and ethos that made them 'alien,' as emphasized by the 'narratives of colonial

[16] I am using the term 'alien' here in the ordinary dictionary sense of 'outside somebody's normal or previous experience and seeming strange and sometimes threatening. ' Similarly, I am using the term 'alienation' in the ordinary dictionary sense of 'to make somebody feel that he or she does not belong to or share in something, or is isolated from it.' In other words, I am not using 'alien' or 'alienation' in the particular sense ascribed to these terms by Karl Marx. *See* KARL MARX: EARLY WRITINGS, translated by Rodney Livingstone and Gregor Benton (Penguin Books 1975). Neither am I referring here to the sociological concept of 'anomie' resulting from a breakdown of a normative order in the sense postulated by Emile Durkheim. *See* EMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY, translated by John A. Spaulding & George Simpson (The Free Press 1951).

displacement.' Whether they remain 'alien,' and more importantly whether they continue to 'alienate' and are unacceptable to vast sections of post-colonial South Asian nations due to being 'alien' is a more contentious assertion and of course one of great contemporary relevance. This raises the related question of whether what has been around for several generations can still be considered 'alien' and popularly unacceptable — the notion of its 'alienation' determined by benchmarking it against distant and faded stories of another time and ethos. After all, one could reasonably argue that over a century and a half of British rule would have been untenable and unrealistic if there had been no concomitant change in Indian people's reception of British laws. This would be tantamount to asserting that there has been no osmosis; no absorption; no conscious and sub-conscious acceptance of these laws as not just inevitable and compromise laws, but perhaps, at times and in certain instances, as even good laws. Would not the sun have perhaps set much earlier on the Empire, of which it was proverbially said that 'the sun never sets on the British Empire,' had the natives not wanted to bask a bit longer in its sunshine?

Therefore, I shall attempt to approach the 'narratives of colonial displacement' while steering clear of an essentialist moral indictment of colonial laws as perennially evil laws, introduced as they were, if one takes that position, under an imperative of domination and exploitation. Surely, these laws did not exist in a vacuum and through sheer shock and awe. One could argue that there were likely to be — and indeed it has been argued in Christopher Bayly's seminal work that there were — collaborators, beneficiaries, allies and even converts during the complex period of transition from what he calls a crumbling Mughal empire and its indigenous states to a mature colonial state.[17] This perspective on the nature and degree of impact of colonial rule on indigenous Indian tradition asserts, as part of the well known 'change/continuity debate' in Indian historiography that I mentioned earlier, that colonial rule did not drastically change the basic structure and purposes of the pre-colonial tradition. Others have similarly asserted 'continuity' at several levels in the Indian polity and society to maintain that colonial knowledge of the colonized, and thus the resulting colonial rule, was not a unique colonial invention, but in fact the product of collaboration between European rulers and their "chosen and trusted indigenous informers."[18] It is indeed reasonable to consider that the dismantling Mughal governance framework and its particular patronage and dispensations did not perhaps hold the same attractions and romance of a *Belle Époque* for everyone in India. After all, there were bound to be detractors, dissenters, critics, and victims. There were also many whose daily plight was too far removed from the benevolent gaze of the imperial Mughal *durbar* for them to really care either way. There were also those who did care but whose views, attitudes, rhetoric, discourses, actions and reactions to and in the context of the grander historical drama being played around them has been traditionally neglected in grand, elite-focused narratives of Indian history. [19]While many might have seen the brutal manner of removal of the last Mughal emperor

[17] C.A.BAYLY, RULERS, TOWNSMEN AND BAZAARS: NORTH INDIAN SOCIETY IN THE AGE OF BRITISH EXPANSION 1770-1870 (Cambridge University Press, 1983).

[18] ROSALIND O'HANLON AND DAVID WASHBROOK, *Histories in Transition: Approaches to the Study of Colonialism and Culture in India, History Workshop*, Vol. 32 (Autumn 1991).

[19] In several important ways, many of the writings in the Subaltern Studies Group attempt to shift the focus from grand narratives of Indian history and its elites to its subalterns. This 'history from below' reveals the important role of Indian non-elites as agents of social and political change. See for instance GAYATRI CHAKRAVORTY SPIVAK, "Subaltern Studies: Deconstructing Historiography," from *Selected Subaltern Studies*, ed. Ranajit Guha and Gayatri Spivak (Oxford: OUP, 1988)

Bahadur Shah Zafar by the East India Company as the death of a glorious era,[20] others were as likely to have considered it either as a new dawn, or more cynically as the replacement of one type of despotism with another.

The aforementioned 'Continuity thesis' and its related emphasis on 'Indian Agency' is of course deeply contested by voices in South Asian historiography, which lay different emphasis on the stability and decline of the pre-colonial state and society in eighteenth and nineteenth century India. This logically influences their perspectives on the extent to which colonial rule actually changed the structure and functions of pre-colonial traditions; the cooperation or opposition by local elites and power groups to colonial expansion; and, the resulting impact on the power, nature, and form of the emerging colonial state during that period.[21]

Relevant though the 'change/continuity debate' is to a better appreciation of what Indian society underwent under colonialism, I want to avoid being confined by the notion that people can only have subjective and relative value judgments about the justness and goodness of the colonial legal system, whilst using its predecessor as a litmus test. A legal system can also be independently gauged by a people along several other parameters such as its accessibility; its fairness; its consistency with popular notions of what is good and just. However, while it is helpful to consider laws as a "legal order," as "the aggregate of laws or legal precepts, the body of authoritative grounds of judicial and administrative action in such a society," as "the judicial process," and, as a combination of all three formulations,[22] it merits questioning whether that is quite sufficient in the present context. In other words, can we employ the word 'law' in a sense that is devoid of any social, cultural and emotional associations in the popular imagination? Therefore, it is important to ask whether Indians gauged the displacement of their old legal order in a purely utilitarian sense, or did they perceive complex and important ideological, political, ethical, cultural and emotional associations between the displaced legal system and an earlier social, economic and political order? If the latter was indeed the case, did it play a role in the nature of their reception of the colonial legal order? To put it in Weberian terms, it merits questioning that to what extent did 'formal irrationality' and 'substantive irrationality' play a role in the legitimization of the pre-colonial legal order for the Indian populace, and thus also influence the exogenous and endogenous reasons that impacted their interface with the colonial legal order?[23]

B A Case for the Necessity of a Sociological Insight into Law

I have already said that my focus on the need for a closer look at the past, in order to understand the discontent of the present, ought not to create the false impression that all that I am attempting to do is to lead up to the argument that colonial laws were necessarily problematic, as they were the result of 'alien' rule and legislation. What was and what remains 'alien' and what is 'organic'

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[20] For instance, there are many evocative references to this in the poetry of the great Urdu poet Mirza Asad Ullah Khan Ghalib, a resident of Delhi during the tumultuous years surrounding 1857, as indeed in the writings of many others who formed the city's social and literary elite.
[21] M. ATHAR ALI, *'Recent Theories of Eighteenth Century India*,' Indian Historical Review, 13 (1986-87).
[22] ROSCOE POUND, *A Comparison of Ideals of Law*, Harvard Law Review, Vol.47, No.1. (Nov., 1933).
[23] MAX WEBER ON LAW IN ECONOMY AND SOCIETY, IN LAW IN MODERN HISTORY (Max Rheinstein, ed, 1954).

or ‘indigenous’ are very difficult questions to answer in the context of the multi-ethnic, multi-cultural and multi-religious Indian sub-continent that has been, over several millennia , the melting pot of many divergent religions, traditions, cultures and polities.[24] My focus on the past should also not suggest a partiality to equating ‘good’ law with ‘organic’ law. That the proper laws and legal systems of a people only emerge and ought to emerge organically over time from the *Volksgeist* or ‘spirit of the people’ was the idea expounded most forcefully by the German philosopher Frederick Carl Von Savigny. This was in the context of his critique of the popular and academic longing for, as well as the quality of, new legal codes in Europe from the middle of the eighteenth century onwards.[25] This can be an understandable route to follow, emphasizing as I am the importance of colonial rupture of pre-colonial societies, and trying as I am through my proposed focus on the ‘narratives of colonial displacement’ to understand the quality of this rupture.[26]

However, I shall not be heading down the Savignan route for several reasons, while also remaining cognizant of various modern criticisms of the Historical School that Savigny represents. First, as I already said in the previous section, I am not approaching the question of colonial impact on Indian society with an essentialist tilt towards moral condemnation; my interest lies in finding out what changed and how. Therefore, a nuanced condemnation of colonial law as ‘alien’ as it was against the then existing ‘spirit of the people’ is not the goal of this exercise. It occurs to me that the ‘spirit of the people’ may have undergone change, as I suggest earlier in this article. At least theoretically, one cannot rule out that colonial coercion may have evolved into something acceptable and beneficial to the people. It is conceivable that over time it may have also met some of the Savignan expectations of organically implanting and settling in the local soil, even if an ‘alien’ hand initially planted the seeds. Many post-colonial jurists and lawyers actually suggest this and I shall come to it shortly. Second, For Savigny, law, not unlike language, was an expression of the “common consciousness of the people.”[27] It was driven by “internal, silently operating powers.”[28] Thus for him, German law was an expression of the common consciousness or the *Volksgeist* of the German people.[29] In view of various historical accounts that paint the picture of an India of many diverse people, it is hard to decipher a single *Volksgeist* of a single people both pre and during colonialism. This is also true for the

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[24] This further complicates the task of identifying and giving precise shape to the structure and dynamics of pre-colonial legal orders in India — a task that is already forbidding due to the relative paucity of available archival and scholarly literature on the subject. Since this work is not a new history but an exhortation to engage with available history, I have not conducted any fresh archival work to unearth, further flesh out and add to our relatively patchy understanding of pre-colonial legal orders. I have relied instead on available literature to compare and contrast certain fundamental and broad aspects of the ethos, structure and approach of pre-colonial legal orders and the colonial system that replaced it. In many ways I gauge displacement not by providing a precise list of what was displaced, due to the aforementioned paucity of credible information, but indeed through a description and analysis of what replaced it (which is much better documented, preserved and more easily accessible and intelligible to non-historians), discoverable and implicit within which is what was being displaced.

[25] FREDERICK CARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (1814).

[26] *See* note 30 above.

[27] Id. At 28.

[28] Id. At 30.

[29] For a useful elaboration of Savigny’s use of the term *Volksgeist*, see JAMES KNUDSON, *The Influence of the German Concepts of Volksgeist and Zeitgeist on the Thought and Jurisprudence of Oliver Wendell Holmes*, 11 J. Transnat'l L. & Pol'y 407 (2002).

eventual post-colonial societies, highly diverse and heterogeneous as they were and continue to be in so many respects. The tight and limiting framework of a single 'nation' with a 'common consciousness' never fit the Indians in pre-colonial India and, many would argue, it still does not fit post-colonial Indians, Pakistanis and Bangladeshis. Third, given the sound and fury of massive and paradigmatic direct state legislation by the Colonial *Raj* in the latter half of its colonial rule from the mid-nineteenth century onwards; and, the din of constant and wide-ranging legislation in post-colonial states, it is hard to hear the faint murmur of Savigny's "internal, silently operating powers." The role of direct and non-consensus based legislation towards actualization of policies of social engineering in colonial India as well as, at times, the similar mode and manner of legislation in post-colonial states, makes legislation an unavoidable reality and focus of analysis in the present context. At the same time, one cannot lose sight of the use, misuse and abuse of laws by discordant sections or members of society, in order to indirectly shape society in ways the legislature neither intended nor foresaw.

However, given that my point of departure in this article has been to gauge how colonial and post-colonial laws have been received, absorbed or rejected by their intended subjects, a mere scrutiny and textual interpretation of legislative and judicial output does not serve the intended purpose. To gauge law's actual impact on society, a sociological analysis of law is imperative. Extraordinary as it may seem to the conventional minded that dominate the 'legal community,' it is necessary to shift the focus away from plain legal doctrine and the law's and the 'legal community's' perspective on the law and also its perception of the law, to the society's perspective on and perception of the law. This is necessary if we want to see not only how the law influences and molds society but also how society influences, molds and uses the law. It also needs determination whether a society and its members perceive the law primarily as the means to an end, or whether the law plays a much more complex role in influencing and molding the aspirations, the expectations, the apprehensions, the resulting actions and reactions, and the very warp and woof of society. Whether laws are just manifestations of the rather animalistic duality of 'reward' and 'punishment' to spur human action or abstinence in particular directions, or do they denote more complex social interplays is thus a fundamentally important question for my analysis. The notion of the law as essentially a social instrumentality to achieve certain ends is persuasively articulated in texts that describe human 'egoism' as the basic moving force (though morality is also acknowledged as an additional motivator, albeit, placed on a lesser pedestal) for all human progress. However, society is beyond doubt the primary mover in this scheme of things. It is society that molds and steers human 'egoism' through the instrumentality of laws, in order to achieve particular ends by bringing about solidarity of the interests of individuals and society.[30] At the same time, society adapts itself to the challenges of a changing environment by suitably changing the rules of the game by changing the laws — once again laws serving as an essential 'tool' for societal evolution, sustenance and survival. The State, according to this Darwinian notion of societal evolution, is merely a necessary and logical apex reached by society. Persuasive as these narratives are in explaining the instrumental role of the law in society, one is still wonders whether that is all, there is to law — a vital instrumental role? Or, as I have already suggested, does law have other existences and meanings in the ethos of a people and in the sub-conscious of a society?

[30] RUDOLF VON JHERING, LAW AS A MEANS TO AN END, translated by Isaac Husik, (The Macmillan Company 1924).

One may further ask if the law ought to be the sole object of concerted attention while looking at social continuity or change. Seminal thinking in the sociology of law alerts one against ascribing too much importance to laws and the legal practitioner and indeed to the State as the sole source of rules that actually govern society. Instead, it highlights 'social associations' and the role of morality, religion, ethical custom, decorum, tact, etiquette, fashion etc., in governing human conduct and even the so-called legal sphere, at every turn. According to this perspective, it is these normative frameworks of an organic, interrelated society that germinate legal rules, and which predate legal norms.[31] Thus, laws ultimately emerge from the life of society. It is the 'life of society', which, therefore, has to be the focal point of attention. In turn, an important additional insight by some of the leading proponents of American Legal Realism is that the essential focus of the law itself should really be on the actual disputes in a society. For it is the "doing of something about disputes," and the "doing of it reasonably" which is the business of law, which in turn makes the doings of those in charge of this business of the law — the officials — the law itself.[32] This further shifting of focus: from law as "a set of rules of conduct" to a behavioral analysis of its practitioners, its stakeholders and its affectees; from the "law in books" to the 'law in practice;" from "paper rules" to the "real rules," has of course great resonance while looking at colonial societies. That is because in colonial societies in particular one can safely imagine large gaps between the intent, the letter, the application and the actual affects of laws, due to the inherently dichotomous starting relationship between the colonizer and the colonized — the enforced ruler and the ruled.

The 'behavioral analysis of law' approach highlights the merits of looking at the 'sociology of the transactional process' (how much are rules relevant in the actual scheme of things and what really happens). It highlights the 'sociology of operation of the legal process as a way of coercing people' (in other words, the actual consequences of judgments, trials, settlements etc). It draws attention to the 'sociology of legal decisions' (the ambiguity, the gaps, and, why and how judicial decisions actually take place). It also lays emphasis on the differential impact of the application of laws on diverse groups.[33] The complex interplays of the law with society thus necessitate looking behind laws and rules to see what actually happens in and to a given society under its laws. What may matter ultimately to the people in a society may simply be that who wins under a legal system and who loses and why so. So one could argue that for societies under colonialism (not unlike any society), any set of laws, shed of its historical baggage and patriotic anti-colonialist critiques, could theoretically work as long as it upheld and promoted what people wanted it to uphold and promote. The 'narratives of colonial displacement' provide interesting insights to the important question of whether that actually happened or not in colonial societies. This is because they do not just look at the colonial laws on their paper or face value, but attempt to unravel deeper, complicated linkages with and impacts on society. I will attempt, therefore, to first, broadly examine important and recent literature on this question in order to capture the emerging picture.

[31] EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF SOCIOLOGY OF LAW (Harvard University Press 1936).
[32] KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND THE LAW SCHOOL (OXFORD UNIVERSITY PRESS 2008).
[33] KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (Transaction Publishers 2008).

C The 'Narratives of Colonial Displacement' – The Three Basic Strands

As stated before, adopting a very narrow disciplinary outlook, the Pakistani 'legal community' (I shall be using this term to describe judges, lawyers, government policymakers and law officials, as well as, local and international consultants engaged in justice sector reform advisory work) does not notice or chooses not to notice the growing multidisciplinary literature focusing on the multifaceted impact of colonial laws and legal system on Indian society. Embedded in this literature is a rich array of what I term the 'narratives of colonial displacement.' Varying as they are in their points of emphasis and coverage, their description and their normative positions, the 'narratives of colonial displacement' are also similar in that they present a complex picture of a colonized society in turmoil and transition. Major acts of colonial legislation act in these narratives as helpful signposts that identify important episodes of the whittling down or transformation of old orders. However, for a deeper appreciation of how colonial laws impacted Indian society and how society received and reacted to these impacts it is necessary to decipher the more subtle social undercurrents leading to long-term social and structural change. This in turn can provide more nuanced understanding of whether the initial incongruence of colonial laws and indeed the indigenous societal aspirations with these laws was transient, or whether it persists, and if so then why so.

The literature on the 'transformation' or alleged 'transformation' of the Indian legal system under colonialism is fascinating both for the diversity of disciplinary perspectives that it brings to the debate, as it is for the divergence of its verdict on the quality, impact and outcomes of this transformation. That significant changes did take place, more gradually from the late eighteenth century to the middle of the nineteenth century and much more rapidly in the second half of the nineteenth century with the grand introduction of several Indian legal codes, is hard to deny. Exciting recent literature attempts to show how drastically the colonial codification of Hindu civil and personal law in the late eighteenth century changed formal legal understanding and application of Hindu law in the Bengal Presidency.[34] Similarly, though the British initially embraced and applied Muslim criminal law as the criminal law of Bengal in late eighteenth century, it is argued that they set about systematically changing it. According to one study, by 1817 this incremental process had reached a stage where the transformation was essentially complete. As a result, while Islamic law was still in theory the valid law of the land, in practice, a series of significant substantive and procedural amendments ensured that on some of the most important points, the law was a British transformed version of the earlier Islamic law. According to this view, though nominally the façade was kept till 1864, Islamic law had lost its real influence by 1817. This was essentially due to unprecedented and systematic constitutional legislation by the British.[35]An equally important factor, it is alternatively argued, was the collapse of the Mughal administration of justice and the colonial "search for effective and inexpensive modalities of rule" as they "encountered a variety of legal norms and institutions

[34] NANDINI BHATTACHARYYA-PANDA, APPROPRIATION AND INVENTION OF TRADITION: THE EAST INDIA COMPANY AND HINDU LAW IN EARLY COLONIAL BENGAL (Oxford University Press, 2008).

[35] JÖRG FISCH, CHEAP LIVES AND DEAR LIMBS: THE BRITISH TRANSFORMATION OF THE BENGAL CRIMINAL LAW 1769-1817 (Franz Steiner Verlag. Wiesbaden 1983).

that varied according to the determinants of locality and community life."[36] Post 1857, British legislation became much more direct and all encompassing but we shall come to that soon. Whether the related social transformation was forced or whether certain emerging classes of Indian society actively welcomed, collaborated to bring about, and, gained from this transformation, fits in the broader aforementioned 'change/continuity' debate in Indian historiography. Whether the transformed Indian legal system was a resounding success when launched — living up to its ideals of 'justice, equity and good conscience,' that only stuttered and faltered in a post-colonial context — or did cracks start appearing fairly early on, is the other interesting facet to this debate.

In the Indian context, in my view the 'narratives of colonial displacement' reveal three broad perspectives on the impact of colonial legal systems on colonial societies. A typical and fundamentally contested position that divides for example, those looking at the impact of colonial laws on the traditional Indian village society and its problematic post-colonial reverberations manifesting in popular dissatisfaction with the colonial judicial system and processes is as follows. Is it the character of the Indian peasant society and the comprehensive clash of the values and structure of Indian society with the legal system introduced by the colonists that resulted and still results in a fundamentally flawed judicial process — a priory attitudes to British justice as a discrete system of rules and procedures?[37] Alternatively, is this conflict endemic to all societies and the way of acting out conflict will vary with the society? In other words, according to this latter view the central problem to account for is the variance between the social structure of the judicial system (and not its incongruity with traditional values) and the character of the practical judicial process — essentially internal developments within a due process system inherently susceptible to distortion by the participants in it? [38] Another perspective on the same question focuses on a third and local variable as a necessary causal and explanatory factor. It holds that it is actually the structure of the Indian village society that has pushed the court system into its peculiar mould. This perspective highlights 'land' and the significance of the character of land relations and disputes and their impact, in terms of both inhibiting the western-style courts from effectively settling land disputes (and evidence suggests that these courts have been overwhelmingly concerned with land disputes), and also shaping the judicial administration itself.[39] In other words, the fate of the courts, according to this view, was bound up with the land structure of India under British rule. Hence, a turbulent agrarian structure was reflected in an immensely problematical judicial system. Thus, the courts were thus not just settling land and agrarian disputes but were also part of a larger administrative whole that was preoccupied with the economic consequences of policy framed by other organs in the government. As a result, the courts were employed for enforcing new definitions and allocations

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[36] MICHAEL R. ANDERSON, *"Islamic Law and the colonial encounter in British India,"* in INSTITUTIONS AND IDEOLOGIES: A SOAS SOUTH ASIA READER (David Arnold and Peter Robb eds., 1993) at 184. *See* also, JON E. WILSON, THE DOMINATION OF STRANGERS: MODERN GOVERNANCE IN EASTERN INDIA, 1780-1835 (Cambridge Imperial and Post-Colonial Studies Series: Palgrave Macmillan 2008).
[37] BERNARD S. COHN, *From Indian Status to British Contract*, The Journal of Economic History, Vol. 21, No. 4. (Dec., 1961).
[38] ROBERT L. KIDDER, *Courts and Conflict in an Indian City: A Study in Legal Impact*, Journal of Commonwealth Political Studies, 11:2 (1973), 121-139.
[39] OLIVER MENDELSOHN, *The Pathology of the Indian Legal System*, Modern Asian Studies, Vol. 15, No. 4. (1981), at 826.

of rights and duties concerning land, as well as enforcing taxation claims of the state. [40]

One can immediately detect certain essential binary opposites emerging in these approaches in terms of both the diagnosis of the problem of dysfunctional post-colonial legal systems, as well as possible prescriptions. In the first of the three approaches briefly described above, there is a Savigny-like recognition of something 'organic' about the traditional Indian village society that was majorly impacted in a transformative clash with something from outside; something 'alien' and not 'organic.' Normatively speaking, adherents of this viewpoint also, but not always, perceive the colonial intervention as violent and complete so that the colonial agenda eradicated the earlier 'organic wholism' with highly problematic after affects, such as a dysfunctional judicial system. This to them is inevitable given that colonial law, adapted as it was to the needs of western society and governance imperatives, was not at all cognizant of the needs of Indian society. The second approach mentioned above, on the other hand, is much more reminiscent of the 'evolutionary' description of society and legal systems provided by Rudolf Von Jhering. Conflict is deemed part and parcel of growth, progress and eventual reconciliation, as human 'egoism' finds news ways to use law to meet the newly negotiated ends of society. According to this perspective, if its participants distort the functioning of the judicial system, that is not unusual. It happens everywhere and the system can be tweaked for better performance through the right adjustments. Displacement of a tradition; uprooting of what was 'organic,' has nothing to do with it as society, in any event, remains in a constant state of change and adjustment. The third approach, in emphasizing land; the structure of Indian village society; and, traditional land relations, has something of both Savigny and Von Jhering in it. While it is not adopting a position that attaches a certain normative primacy to what is 'organic' — in this case land, village structure and traditional land relations — it highlights their practical and causal primacy in the molding of the colonial as well as the contemporary Indian judicial system. At the same time, it emphasizes, Von Jhering-like, the multi-pronged use of laws and courts to meet multiple governmental policy ends, that invariably also influence their adjudication of land disputes.

It is obvious to note that all the aforementioned accounts, coming from an anthropologist, a sociologist and a legal historian respectively, are seeking to diagnose the ills of independent India's post-colonial judicial system by attempting to understand its past. It is also an interesting example of how differences in normative and descriptive stances on the impact of colonial law on Indian society can lead to very different remedial prescriptions. If we believe that history has a role to play in forming and shaping the present, any meaningful evaluation of how post-colonial legal systems function, or indeed malfunction or not function at all, would thus be necessarily affected by the fundamental premise with which we approach the colonial transformation. This, therefore, necessitates some additional elaboration of the basic positional differences of the 'narratives of colonial displacement.' I would define and categorize them as follows:

> (1) The colonial legal system as a displacer of indigenous laws and dispute resolution systems that were local, intelligible, accessible and essentially in harmony with indigenous social, political, economic and cultural understandings and aspirations (the 'radical displacement argument');

[40] Id. at 859.

> (2) The colonial legal system as an inevitable modernizing trend that created a hybrid that had its fair share of problems but that spread, evolved, was embraced and eventually embedded itself in the eventual post-colonial societies, much the same as legal systems grow and evolve elsewhere (the 'inevitable modernization argument'); and
>
> (3) The colonial legal system as a necessary modernizing trend that displaced what was paternalistic, discretionary, discriminatory, and corrupt (the 'desirable modernization argument').

In many ways, among these three strands, the 'radical displacement argument,' which is also the most anti-colonial in its nature, is of greatest contemporary interest. This is because, much more so than the other strands, it both advocates historical and sociological understanding of the colonial impact on Indian laws and also exhorts the recognition of the continuing relevance of this 'impact' on the state of law and society in post-colonial contexts. The point of departure for the 'inevitable modernization argument' and the 'desirable modernization argument,' on the other hand, is that post-colonial societies have already made important historical and sociological transitions from which points of return are essentially non-existent, and even undesirable. When the spokespersons for these perspectives are persuaded to look at the colonial past, they embrace the notion, at various levels of emphasis, that colonial policy essentially pushed forward trends that had already existed in the pre-colonial evolutionary stage of Indian society. In other words, British policy choices were not very different from those of their predecessors, the Mughals; and, while violence and coercion may have at times played a role in pursuit of certain policy objectives, so did compromise, cooperation and acceptance.

Two representative examples of the 'inevitable modernization argument' would be as follows. This argument is well captured in the lectures of an illustrious Indian Attorney-General on the theme of the reception of English law in India. A reception that place through the famous codes of the second half of the nineteenth century; the decisions of the Privy Council; and the application of the principles of 'justice, equity and good conscience' by Indian courts; as well as the continuing loyalty of Indian courts to this body of jurisprudence.[41] According to this view, modern Indian law is:

> "[N]otwithstanding its foreign roots and origin … unmistakably Indian in its outlook and operation," so that there is little sentiment within or outside the profession for the revival of "indigenous law." [42]

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[41] M. C. SETELVAD, PADMA VIBHUFAN, THE COMMON LAW OF INDIA, ATTORNEY-GENERAL OF INDIA (London: Stevens & Sons Ltd. 1960).

[42] Id. We are not quite told what this 'indigenous law' is but the very assertion that there is no contemporary support for its revival distinguishes it as something quite different from what replaced it. The additional assertion that the law of foreign origin that has replaced 'indigenous law' is "unmistakably Indian in its outlook and operation" raises the further question whether what it replaced lacked or had lost these attributes, considering that it was after all 'indigenous law." As stated earlier in this article, I am not setting out to define and illustrate the precise contours of this 'indigenous law' (which was in itself an evolving concept and varied across the vast territory and complex diversity of India). Instead, I am endeavoring to distil its essential ethos and approach from a close examination of what I have called the 'narratives of colonial displacement.'

Fifteen years after independence, a Chief justice of the Calcutta High Court wrote:

> "We owe to the British a deep debt of gratitude for the introduction of the Law-Courts and a system of dispensing justice based on the English pattern. Although our laws are molded to our needs, they are inspired by the British system of jurisprudence, which fortunately happens to be one of the best systems that the world has ever produced." [43]

At this stage, one should add the important caveat that despite inspirations and similarities, the extent to which English law was directly imported from Britain to India is highly debatable. This is in view of the fact that in many ways India was a guinea pig for legislation that was introduced much later in Britain. Furthermore, there were other important differences between British law and the law introduced by the British in India.[44] Notwithstanding this point, the aforementioned 'inevitable modernization argument' positions embrace the tradition of British law in colonial India and rejoice in its further entrenchment, development and growth in post-colonial India. In fact, it is hard to overlook an element of 'the desirable modernization argument' position in this uninhibited rejoicing. To the exponents of this or similar positions, greater understanding of the pre-colonial genealogy and genesis of the laws and legal systems of post-colonial societies may at times be of marginal intellectual curiosity and interest.[45] It is, however, of negligible relevance to them for contemporary legal analysis or law reform.

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[43] D.N. SINHA, "The Last Hundred Years," in The High Court" Centenary Souvenir, pp. 6-27. Cited from PARTHA CHATTERJEE, A PRINCELY IMPOSTER? THE STRANGE AND UNIVERSAL HISTORY OF THE KUMAR OF BHAWAL 377 (Princeton University Press 2002). It is to be noted that unlike the previous quote, this quote does not attempt to Indianize the British system of jurisprudence introduced in India by ascribing to it an Indian outlook and mode of cooperation. The 'pattern' is English, the 'inspiration' is British and there is the added good fortune that the system introduced by the British 'happens to be one of the best systems that the world ever produced.'

[44] *See* for example a comparison of the criminal legal system eventually introduced by the British in India with the criminal law *en vogue* in England at that time in both FISCH, CHEAP LIVES AND DEAR LIMBS: THE BRITISH TRANSFORMATION OF THE BENGAL CRIMINAL LAW 1769-1817 (Franz Steiner Verlag. Wiesbaden 1983); and, ERIC STOKES, THE ENGLISH UTILITARIANS AND INDIA (Oxford University Press 1982).

[45] However, it is also important to take cognizance of certain important works that highlight some of the colonial imperatives for centralization, simplification and consolidation of a modern system of administration of justice in the context of the political situation in late Mughal India. These 'modernization' positions do not necessarily endorse the ethos of colonial 'modernization' but they do make important and plausible arguments for some of the practical needs of the time for modernization. *See* for instance RADHIKA SINGHA, A DESPOTISM OF LAW: CRIME AND JUSTICE IN EARLY COLONIAL INDIA (Oxford University Press, 1998); and, also JON E. WILSON, THE DOMINATION OF STRANGERS: MODERN GOVERNANCE IN EASTERN INDIA, 1780-1835 (Cambridge Imperial and Post-Colonial Studies Series: Palgrave Macmillan 2008) which explores the origins of what it describes as 'modern' ideas about the Indian state and civil society and links them to the interaction and interface between the British rulers and their Indian subjects. Wilson's primary and also most interesting argument is the one that attempts to explain why and how the colonial administration in India (more particularly in colonial Bengal from the 1780s onwards), like many other emerging regimes of the nineteenth century elsewhere on the globe, felt the need to start treating its subject as 'strangers,' employing 'modern' techniques of objective governance (abstract rules and codes of law, categorizations, enumeration and statistics etc). This was done in order to replace the earlier preferred mode of face-to-face governance that was based on 'prior familiarity' between the ruler and the ruled. This is an argument that will be further explored in this article in the context of other writers as well.

The texts, especially those from the colonial era, that advocate the 'desirable modernization argument,' on the other hand, make no overt attempts to veil an underlying bigotry and racial superiority. Not surprisingly, they mostly appear in colonial tracts justifying colonial legislative interventions. Take for instance a typical justification for modifying Indian law from a colonial administrator of the late nineteenth century who comments on the existing Islamic law as follows: "…there were portions of the Mahommedan law which no civilized government could administer," [46] and that, "…native law often embodied rules repugnant to the traditions and morality of the ruling race. An English Magistrate could not enforce, an English Government could not recognize, the unregenerate criminal law of Indian Mahommedanism." [47] There was, at times, open acknowledgement that English magistrates and judges had been guilty of relying on imperfect remembrances of the principles of English law and their application under the name of "justice, equity and good conscience," while addressing defects in local laws.[48] This, however, was at times deemed as forgivable given the larger administrative challenges and their complexities that were being faced by colonial administrators. Therefore, while I will later elaborate more on these arguments, the bulk of the following analysis will focus on the 'radical displacement argument,' in order to gauge its various facets, complexity and level of persuasiveness.

D Colonial Rule in India: Early Anxieties and Dilemmas and the Search for 'Ancient Constitutions'

Before elaborating further on the 'radical displacement argument' it would be beneficial to briefly look at the interesting new historical insights into the inherent dilemma faced by the British whilst attempting to find both a justification and a legal edifice for their rule in late nineteenth century Bengal — the bridgehead to the eventual empire. This is also important to better appreciate the ideological impetus of the empire and to not just look upon it as *ad hoc* expansionism. In a fascinating recent book, Robert Travers argues that, "British views of the state in India were shaped by political presuppositions exported from British politics, as well as by the distinctive will to power of foreign rulers," though he concedes that these British presuppositions were also rethought in the British encounter with the local political culture.[49] Thus, British imperial ideology and the early colonial institutions were, "formed at the intersection of exported European concepts and appropriated indigenous categories that were put to new uses by the colonial state," and, importantly, this was done, "as much by translating indigenous voices into the new logic of colonial archive, as by excluding those voices." [50] Travers' central thesis revolves around how, "British strategies of colonial state building in Bengal often involved excavating the constitutional history of India to find workable models for

[46] COURTENAY ILBERT, *Application of European Law to Natives of India*, Journal of the Society of Comparative Legislation, Vol. 1. (1896-1897). At 213.
[47] Id. At 224
[48] Id.
[49] ROBERT TRAVERS, IDEOLOGY AND EMPIRE IN EIGHTEENTH CENTURY INDIA: THE BRITISH IN BENGAL 250 (Cambridge University Press, 2007)
[50] Id. At 14.

their own government."[51] He explains that drawing on the notion of the 'ancient constitution,' which he describes as, "a hallmark of early modern political thought in Britain," the "… language of ancient constitutionalism was transplanted to Bengal, where the British tried to justify their rule by reference to an ancient Mughal constitution."[52] The idea of ancient constitutionalism in this context was the notion that in order for any given sovereignty to not degenerate into license and arbitrary power, a robust idea of rights and laws enshrined in a constitution was a necessity. Travers describes extensive debates in late eighteenth century Britain between Whigs and Radicals on whether the British state still adhered to or had lost sight of its commitment to the idea of the 'ancient constitution.' These debates took place against the backdrop of growing criticism in the Metropolis of East India Company's arbitrary and rapacious governance of Bengal, raising apprehensions of tainted perceptions of British values and law.[53]

Alongside the idea of the 'ancient constitution' persisted British admiration of Montesquieu's theories about the typology of different polities and constitutions and his popularization of the notion of despotism as an ubiquitous, characteristic and even justifiable Asian phenomenon.[54] Thus the debate revolved around the question of whether the East India Company's rule in Bengal was an abrogation of some ancient constitution, or if it was (as claimed by Governor-General Warren Hastings), an attempt to resuscitate some semblance of an "Indian" ancient constitution, as it was supposed to have flourished under the great Mughals? A key interlocutor in these debates and Warren Hastings's nemesis before and during his infamous trial, the philosopher Edmund Burke was a primary champion of the view that Indians had remained for ages a civilized and cultivated people and possessed an ancient constitution, which the British were bound to preserve.[55] Warren Hastings' main ideological opponent Phillip Francis (Member of the Supreme Council of Bengal, 1774-80) also appeared to share with him a commonality in their commitment to reviving some notion of the 'ancient constitution.'[56] What was thus on offer for selection was "Hastings' absolutist interpretation of Mughal sovereignty, tempered by ancient legal traditions," and "Francis' assertion of an ancient constitution of property." [57] Eventually, it was the Cornwallis Code, with certain borrowings from the aforementioned discourse on ancient constitutions; the manner of administration of Muslim and Hindu law in Company courts; and, pre-existing forms of land tenure, that "marked a discursive break" from this rhetoric of ancient

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[51] Id. At 8.
[52] Id.
[53] Id. At 43-66.
[54] CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (1748). Montesquieu held that 'despotism' had its own rationale and justification of existence in certain geographical, sociological and cultural circumstances. ROBERT TRAVERS, IDEOLOGY AND EMPIRE IN EIGHTEENTH CENTURY INDIA: THE BRITISH IN BENGAL 48-49 (Cambridge University Press, 2007)
[55] EDMUND BURKE, *'Speech on Fox's India Bill,'* in Burke, in ON EMPIRE, LIBERTY AND REFORM. SPEECHES AND LETTERS (David Bromwich (ed.), Yale, 2000).
[56] ROBERT TRAVERS, IDEOLOGY AND EMPIRE IN EIGHTEENTH CENTURY INDIA: THE BRITISH IN BENGAL 138-140, 166, 177-180 (Cambridge University Press, 2007). This was despite their other major differences. Such as, for instance, whereas for Cornwallis the restoration of the 'ancient constitution' lay in his centralizing initiatives for executive empowerment in administration of revenue and justice (which was reminiscent of his view of the Mughal state); for Francis, the '*zamindars*' (the landholding rural elite) with their claim to 'ancient rights' were the real pillars of this system. Thus, to him his model of a 'country government' was the way forward. Id.
[57] Id. At 207.

constitutions in British India.[58] The decline of the Company and the strengthening of the State in the period after 1784 ushered in a more unified national imperialism in India and led to the erosion of the idea of a Mughal constitution as possible basis for British rule.[59] Thus, while being a necessary instrumentality in the early years of empire, the empire's changing imperatives necessitated that the search for the 'ancient constitution' is suspended when it started becoming a handicap.

One should add that some recent histories are critical of differentiating phases of the Company's administrative policies and certain key figures according to whether they followed an 'Orientalist' policy of looking to and relying upon indigenous political, legal and social traditions; or adopted new principles of rule in a much more assertive 'Anglicist' mode. According to Radhika Singha, for instance, there was little difference between Hastings the 'Orientalist' and Cornwallis the 'Anglicist' about extending the legal and punitive claims of the state — what was debated was the actual strategy to be used. In other words, the debate was whether the government should transact with traditional symbols of power, constantly trying to reinterpret them in ways that were more appropriate to the new premises of sovereign right; or, should the Company press forward, introduce and establish its own symbols of legitimacy, and thus actively encourage a different sort of public opinion around them?[60] Notwithstanding this critique, Robert Travers work extends persuasive evidence that the early period of Colonial rule in Bengal displays an era of unprecedented and fascinating soul-searching, as well as a highly inventive and internally divisive search for an overarching principle and justification for colonial intervention and governance. This, however, did not survive the turn of the century. One could even glibly say that by the turn of the century the British had 'found' the reasons for their presence in India. In any event, this soul-searching phase eventually passed as in the post-Cornwallis era, "the 'bureaucratic-military despotism' of the colonial state preferred to make its own rules…" [61] This move has been described as 'ethnocentric' and 'Saxonist,' [62] and one that led to "racial segregation and the rule of force." [63]

There are several reasons for this foray into describing 'the ancient constitutions' debate in the early anxious and uncertain period of Colonial expansion in India, at a time when the Crown was attempting to wrest the controlling initiative from the Company. First, this early period of colonial legal history of India seems to display a fundamental lack of clarity of justification for ruling over a large, complex and advanced civilization. It also divulges colonial uncertainty as to the most suitable form of government for India. This puts to question any notions that the Crown had stepped on Indian shores with a readily assembled ethos and design for the eventual empire.

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[58] Id. At 251

[59] Id. At 25. *See* also JON E. WILSON, THE DOMINATION OF STRANGERS: MODERN GOVERNANCE IN EASTERN INDIA, 1780-1835 (Cambridge Imperial and Post-Colonial Studies Series: Palgrave Macmillan 2008). For an interesting further evaluation and discussion of Robert Travers' thesis see the very thoughtful review of his book by Jon Wilson at Jon E. Wilson, Review of *Ideology and Empire in Eighteenth-Century India: the British in Bengal*, (review no. 697) at http://www.history.ac.uk/reviews/review/697

[60] RADHIKA SINGHA, A DESPOTISM OF LAW: CRIME AND JUSTICE IN EARLY COLONIAL INDIA (Oxford University Press, 1998).

[61] ROBERT TRAVERS, IDEOLOGY AND EMPIRE IN EIGHTEENTH CENTURY INDIA: THE BRITISH IN BENGAL 25-26 (Cambridge University Press, 2007)

[62] Id. At 26

[63] Id. At 30.

Furthermore, it comes across that the Crown and the Company were highly cognizant of the tremendous 'displacement' they were actually causing, as also their sensitivity to its myriad ramifications — both in terms of the sustainability of their fragile rule in India, as well as the possibility of adverse political reaction back in England. What also comes through is that with the search for 'the ancient constitutions' being a major early colonial preoccupation and characteristic of its initial governance strategy, this era is distinct from the subsequent self-assured colonial enterprise of professedly bringing a new and better legal and judicial system to the Indians. In many ways, the quest for 'the ancient constitutions' was motivated, propelled and characterized by agendas of cooption and reinvention of Mughal government for purposes of local acceptability; for allaying domestic criticism in England; and, for justifying strong, centralized executive power. Selective use of 'traditional' sources helped regime justification as well as facilitated the reading of aspects of English Whiggism into the revived 'ancient constitution.' This was imported Whiggism with a penchant for a property regime and possibilities of land alienation. It further paved the way for more effective, extractive revenue policies. Identification and cooption of local allies as pillars of colonial governance and creation of new forms of social and political hierarchy were as much the impetus for these debates, as was a strident quibbling over power and control between the Company and the various state representative institutions during this period.[64]

The final reason for my focus on this period and its debates is embedded in Travers' conclusion to his book. He says:

> "While the British project of reviving the ancient Mughal constitution proved to be short-lived, nostalgia for the lost empire of the Mughals remained an important element of Indian patriotism into the nineteenth century and beyond; and Indian scholars and politicians would continue to return to the pre-colonial past as a resource for a hoped-for post-colonial future." [65]

Before I revert to a detailed exploration of the 'radical displacement argument,' I will first look at a specific strand of the 'narratives of colonial displacement.' This strand critically looks at this early phase of colonial rule and the attempts made therein to 'translate' and 'codify' ancient Hindu as well as traditional Islamic texts, with a view to deriving principles consistent with a so-called 'modern' ethos in order to create a workable and locally acceptable hybrid for colonial governance.

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[64] *See* generally, ROBERT TRAVERS, IDEOLOGY AND EMPIRE IN EIGHTEENTH CENTURY INDIA: THE BRITISH IN BENGAL (Cambridge University Press, 2007). An additional reason why this early period merits discussion in the context of this article is due to the significant early struggles between the Company government and the new Royal Court of Justice in Calcutta. The latter claimed to have exposed what it thought was the Company's, "…rhetoric of regulated government, and the loosely coordinated network of power holders sheltering under the Company's sovereignty." Id. At 181. Faced with possible judicial accountability of its officers and their Indian allies in their official work, the clash had varied outcomes for the Company and, indeed, also for the indigenous legal system and its law officers. For instance, one important outcome was the Court's vilification of Muslim court officers (working under the patronage and supervision of the Company) as oppressive. This displayed the chauvinistic outlook of the English court, as well as, "…the emerging colonial attitude towards legality in India," which showed no aptitude for being "…willing or able to think through the intellectual and institutional workings of the Muslim law…" Id. At 204, 206.

[65] Id. At 253

E Lost or Hidden in Translation

The 'radical displacement argument' strand of the 'narratives of colonial displacement' emphasizes to my mind pure colonial prejudice; an inherent misfit of cultural and legal traditions; and, a vital contradiction between economic and political self-preservation policies of the colonial government and the colonial 'rule of law' rhetoric. One particular category of this strand stresses that the early colonial legal and social engineering attempts were also structurally and systemically defective, misconceived and incompetent. There was also characterized, they allege, by deliberate mistranslation. As a result, according to these narratives, a lot was lost and hidden in translation. Of particular significance in this context, according to these narratives, is a more nuanced understanding of the decline and fall of Muslim culture in India. As the heritage of the vanquished rulers of the land, the Muslim heritage, they argue, was especially misunderstood, misinterpreted and transformed into something unrecognizable. Scholars like Scott Alan Kugle, for instance, argue that it was impossible for the British to approach Islamic law on its own terms due to their ignorance of *fiqh*.[66] Further, being in direct competition with Mughal legitimacy of rule, they were, according to him, compelled to condemn Mughal jurisprudence to justify their own seizure of power.[67]

An 'anti-legal tradition' mindset also contributed as the British administrators who reshaped Islamic law also wanted to reorder English law. Their mind-set was utilitarian, rationalist and progressive — hence there was a tone of superiority towards any legal 'tradition,' may it be Islamic or English.[68] Focusing on the 'translation' phenomenon, Kugle unravels colonial attempts at rejection and appropriation through what he shows to be highly flawed processes of translation and codification.[69] He suggests that this codification is based on two essential misconceptions. The first misconception was that Islamic law was completely codified in the past, and so it could be located in a single authoritative text that was ready to be simply implemented. The second misconception was that the British could produce this code in one comprehensive text that would apply to Muslims as a single, discrete, community.[70] Significantly, according to him, what was lost sight of was that Islamic law — as the "law of the jurists" — is "an eclectic body of rulings."[71] Its approach, according to Kugle, is to actually respond to its immediate social context, through several and non-jurisdiction bound judicial authorities with multiple and overlapping responsibilities.[72] Thus, its rationality was substantive rather than formal.[73] When this substantively rational legal system was transposed, according to Kugle, into a formally rational, centralized, structured and hierarchical one, (through, for example, the introduction of the doctrine of *stare decisis* into a tradition free from binding

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[66] SCOTT ALAN KUGLE, *Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia*, Modern Asian Studies, Vol. 35, No. 2. (May, 2001). At 283.
[67] Id.
[68] Id.
[69] Id. 257-313.
[70] Id. At 270, 272.
[71] Id. At 274.
[72] Id. At 274, 284, 290, 295.
[73] Id. At 270.

precedent), [74] there was tremendous slippage and much of the creativity, flexibility, dynamism and substance of traditional Islamic law were lost.[75] This strand of the ‘narratives of colonial displacement’ is not just restricted to the theme of the alleged ‘transformation’ of Islamic law in India. Bhattacharya-Panda tells a similarly compelling story about the codification of the Hindu *dharmsastras*.[76]

Another important facet of this strand of the ‘narratives of colonial displacement’ focuses on how ‘foreign’ law was imported into colonized societies. For instance, it argues that the so-called gaps in the laws of India were filled by English judges through the amorphous doctrine of ‘justice, equity and good conscience’ — that can be critiqued as a convenient modus for direct importation of English law. As mentioned before, certain colonial administrative accounts contain a candid acknowledgement that English magistrates and judges had been guilty of relying on imperfect remembrances of principles of English law and their application under the name of ‘justice, equity and good conscience,’ while addressing ‘defects’ in local laws.[77] Thus the British Codes and British Anglo-Muhammadan courts, it is alleged, carried out a transformation of Islamic law governing the private transactions of Muslims and their religious usages, erasing at the same time the last traces of Islamic law from the areas of criminal law, evidence law and public law.[78] As Kugle says: “The effects of British rewriting have created a lens of texts, terms and experiences which continue to distort the view of shari'ah today.” [79]

Quite apart from Hindu and Muslim personal law, local customary law is another area that, at different stages, seems to have encountered deliberate colonial amnesia and neglect; as well as zealous attempts at translation, condensation, restructuring, interpretation and reinterpretation.

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[74] It has to be noted though that this clean-cut dichotomy is not completely historically accurate and is itself tainted with orientalist compartmentalization.

[75] Id. At 274, 284, 303

[76] NANDINI BHATTACHARYYA-PANDA, APPROPRIATION AND INVENTION OF TRADITION: THE EAST INDIA COMPANY AND HINDU LAW IN EARLY COLONIAL BENGAL (Oxford University Press, 2008). On a related note, some historians have also argued that the Hindu legal thought subsumed and continues to subsume the same jurisprudential development, schools of jurisprudence and theories of law as in traditional Western systems. They lament, however, that even now in American academic writing, there seems to be no getting away from categorizing the East and West as opposites. HARROP A. FREEMAN, *An Introduction to Hindu Jurisprudence*, The American Journal of Comparative Law, Vol. 8, No. 1. (Winter, 1959), pp. 29-43. at 29-30.

[77] COURTENAY ILBERT, *Application of European Law to Natives of India*, Journal of the Society of Comparative Legislation, Vol. 1. (1896-1897). At 224.

[78] SCOTT ALAN KUGLE, *Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia*, Modern Asian Studies, Vol. 35, No. 2. (May, 2001). At 300-301.

[79] Id. At 304. It is important, however, to ensure that one does not over read this argument and hence it merits further probing whether the Muslims, for instance, played a prominent subsequent role in the political contestations around and the eventual definition and development of what came to be called Anglo-Muhammadan law. Recent works such as GREGORY C. KOZLOWSKY, MUSLIM ENDOWMENTS AND SOCIETY IN BRITISH INDIA (Cambridge University Press, 2008) that look at this aspect in the context of their narrower focus of inquiry into the *Waqfs* or the Muslim concept of endowment, as well as classics on Indian Muslim Personal Law such as SAYIID AMIR ALI, THE PERSONAL LAW OF THE MAHOMMEDANS (London: W. H. Allen & Co., 1880); and MOHAMMEDAN LAW. 2 VOLS (Calcutta: Thacker, Spink & Co., 1892) highlight such a role in the late nineteenth century onwards. It is a separate project, however, to gauge the nature, quality and impact of Muslim contributions to the development of Anglo-Muhammadan law, which is beyond the ambit of this article. The purpose of highlighting works like that of Kugle here is to essentially bring to attention this particular strand of the ‘narratives of colonial displacement.’

One of the most remarkable and perhaps even unanticipated results of the British administration of indigenous law is described as "the elevation of the textual law over lesser bodies of customary law." [80] It is argued that this stemmed from a common-law hostility to unwritten and hence difficult to prove local customs and an over-reliance on primary texts, which in actuality were "subject to variable interpretation and quasi-legislative innovation at the discretion of village notables or elders."[81] The quest for accessibility, clarity, certainty and finality resulted in the demise of dynamism, discretion and flexibility — the ideals of traditional law. [82] It seems that that though it attempted to do so, the colonial mind did not quite know how to understand and tackle a plethora of customary laws and practices of different communities; as well as local, tribal, caste and family usages. The complexity of the challenge comes through even in early texts suffused with colonial pride.[83] The enormity of the task is a hurdle even when there is recognition of "the great importance of custom and usage in modifying, and in some cases in wholly superseding, the established rules of Hindu and Mohammedan jurisprudence." [84] An additional bias seems to emerge from what were found to be very different indigenous understandings of and expectations from 'custom' and 'usage,' from the sense in which those terms were employed in English law.[85] Not appreciating the nature and complexity of the rights and obligations promoted and protected by customary law in societies that put a premium on community and collectivity, customary law was found to be vague, confusing and causing 'deplorable' uncertainty to British notions of 'individual' rights.[86] Denial of customary law to entire communities, emanating from these misunderstanding and biases, could and did result in wide scale displacement. This, for instance, was the case when Muslims were denied access to customary law alongside access to Muslim Personal Law, ostensibly under the notion that custom had a much lesser role to play in Islamic Law, as opposed to Hindu law — and this happened in spite of criticisms from various Muslim communities.[87]

Statutory protection, when extended to customary law, was also disparate and fragmented. Conflict of judicial opinion was especially pronounced in various areas of Muslim law in general, and with respect to the customary law in the Punjab, especially in the rural areas, where the written Hindu and Muslim laws had not obtained the same authority as elsewhere.[88] Even where the British focused on custom, as in the Punjab, their initiatives did not bring colonial notions of customary law any closer to actual 'tradition,' as they did not preserve the practices of the community in an uncontaminated form. It is argued that in places like Punjab the romantic reverence of tradition on part of colonial administrators, unsuccessfully tried to coexist with a

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[80] MARC GALANTER, *The Displacement of Traditional Law in Modern India*, Journal of Social Issues, 1968. At 73.
[81] Id. at 73-74.
[82] Id. At 73-76.
[83] COURTENAY ILBERT, *Application of European Law to Natives of India*, Journal of the Society of Comparative Legislation, Vol. 1. (1896-1897), pp. 212-226.
[84] LINDESAY J. ROBERTSON, *The Judicial Recognition of Custom in India, Journal of Comparative Legislation and International Law*, 3rd Ser., Vol. 4, No. 4. (1922). At 218, 222.
[85] Id. At 226.
[86] Id. at 227.
[87] GEORGE RANKIN, *Custom and the Muslim Law in British India*, Transactions of the Grotius Society, Vol. 25, Problems of Peace and War, Papers Read before the Society in the Year 1939 (1939). At. 89-118.
[88] W. H. RATTIGAN, *The Influence of English Law and Legislation upon the Native Laws of India*, Journal of the Society of Comparative Legislation, New Ser., Vol. 3, No. 1. (1901), pp. 46-65.

'Benthamite' reforming zeal. Like colonial translation and interpretation of the so-called ancient texts, colonial codification of custom thus subjected tradition to a transformative process. Furthermore, different colonial officials used custom in different ways; saw different realities; and, interpreted in dissimilar ways — all the while using western concepts and classification categories in what they proclaimed as an enterprise for the preservation of indigenous custom.[89]

Though the above 'narratives of colonial displacement' focus on the particular theme of colonial attempts at discovering, preserving, translating, restructuring, interpreting and in the process 'transforming' religious as well customary law, they are also a subset of the larger category of the 'narratives of colonial displacement' that make the 'radical displacement argument.' It is to this larger category that I now revert.

F The 'Radical Displacement' Argument

In its simplest form the 'radical displacement argument' — both as an explanation of colonial design and agenda, and as a description of the impact of colonial laws and legal system on Indian society — essentially states the following. It argues that the substitution of indigenous Indian law with the high culture of western law was socially and morally profoundly disruptive.[90] This, it says, is because while western law was meaningful and acceptable in the west due to its being rooted in its historical experience (both in its evolution and in present application) it was 'alien' in several important ways to India.[91] For instance, the adversary mode of western procedure isolated the case and its litigants from their social context of family, caste and locality, and decided it in terms of victory and loss. By looking at a dispute purely in terms of a plaintiff and defendant, such an approach precluded existing imperatives of abating conflict and promoting consensus and thus harmony. The swift, cheap and intelligible justice of the village thus found itself ousted by a vexatious new system that created increased litigiousness and ensured that justice now came at a big price, with delay and at considerable inconvenience. A highly representative articulation of this position emerges in Bernard Cohn's seminal micro studies of village communities in India that analyze how complex and intricate traditional dispute resolution mechanisms in a local region were adversely affected by British rule, due to its glaring omission and neglect of the same.[92] Cohn puts forward the thesis that the contemporary 'slot-machine' attitude of the post-independence Indian peasants towards law courts is an inevitable consequence of the British decision to establish courts in India patterned on British procedural law.[93] He says:

> "The way a people settles disputes is part of its social structure and value system. In attempting to introduce British procedural law into their Indian courts, the

[89] NEELADRI BHATTACHARYA, *"Remaking Custom: The Discourse and Practice of Colonial Codification,"* in TRADITION, DISSENT AND IDEOLOGY: ESSAYS IN HONOUR OF ROMILA THAPAR (R. Champaklaksmi and S. Gopal eds., 2001).
[90] LLOYD I. RUDOLPH; SUSANNE HOEBER RUDOLPH, *Barristers and Brahmans in India: Legal Cultures and Social Change*, Comparative Studies in Society and History, Vol. 8, No.1. (Oct., 1965). At 25.
[91] Id. at 25-26.
[92] BERNARD S. COHN, *Some Notes on Law and Change in North India*, Economic Development and Cultural Change, Vol. 8, No. 1. (Oct., 1959).
[93] Id. At 90.

> British confronted the Indians with a situation in which there was a direct clash of the values of the two societies; and the Indians in response thought only of manipulating the new situation and did not use the courts to settle disputes but only to further them." [94]

To Cohn, in contemporary Indian courts based on a British model, "…law is used not for settling disputes, but for furthering them…," and "…the courts are looked upon as a place for harassment or a place in which to gain revenge."[95] Marc Galanter has also put forward very similar views. He has described post-independence Indian law as mostly, "…palpably foreign in origin and inspiration," and as "…notoriously incongruent with the attitudes and concerns of much of the population which lives under it."[96] This according to him is due to, "…the apparent displacement of a major intellectual and institutional complex within a highly developed civilization by one largely of foreign inspiration."[97] Galanter breaks up the transformation of indigenous law in India into three phases. According to him: first of all the administration of indigenous law was moved from the informal tribunals into the government's courts; then, having made this move, the applicability of indigenous law was curtailed; and finally, while being administered by government's courts, indigenous law was transformed. [98] Looking at the colonial experience across India and South-East Asia, other observers like J.S. Furnival opine that the social disruption brought about by colonial rule was further aggravated by political dissolution. In his comparative study of the region, he opines that everywhere the hereditary officer, who had formerly represented the organic village and tribal group, was absorbed into the western system and converted into an instrument of foreign rule. This, according to Furnival, broke the political and social organization in villages. There remained, therefore, according to him, no political barrier against the spread of western ideas. Furnival blames the enforcement of uniform law and other concomitants of western rule, as factors that tended to break up the village into individuals; encouraged the assertion of rights by litigation; and, multiplied lawyers and moneylenders.[99]

Another variant of the 'radical displacement argument,' one that I shall discuss in greater detail later in this article, brings forth revisionist perspectives that have focused on many aspects of colonial rule and that raise serious and poignant questions over the actual 'character' and 'direction' of social change in colonial India. [100] These perspectives essentially take strong issue with a style of narrative, still being generated up till the 1960s, that conceived, "…the coming of British rule as representing the 'beginnings of modernization,'" and wrote, "Indian history in

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[94] Id.
[95] Id. At 92.
[96] MARC GALANTER, *The Displacement of Traditional Law in Modern India*, Journal of Social Issues, 1968. At 65.
[97] Id.
[98] Id. At 69.
[99] J.S. FURNIVAL, PROGRESS AND WELFARE IN SOUTHEAST ASIA: A COMPARISON OF COLONIAL POLICY AND PRACTICE (1941).
[100] DAVID WASHBROOK, *Economic Depression and the Making of 'Traditional' Society in Colonial India 1820-1855*, Transactions of the Royal Historical Society, 6th Ser., Vol. 3. (1993). At 237. This argument will be discussed further later in this article when I look in greater detail at David Washbrook's seminal article, D. A. WASHBROOK, *Law, State and Agrarian Society in Colonial India, Modern Asian Studies*, Vol. 15, No. 3, Power, Profit and Politics: Essays on Imperialism, Nationalism and Changes in Twentieth-Century India. (1981).

terms of an 'heroic' struggle to fulfill the civilizing mission.'".[101] Directly challenging the 'desirable modernization argument,' and the 'inevitable modernization argument embedded therein,' this variant of the 'radical displacement argument,' unpacks nineteenth century Indian social history for a better understanding of what actually happened. Instead of coming across any evidence of 'modernization' their scrutiny divulges colonial rule pushing forward a process of re-definition and structuring of Indian 'tradition' into society — leading to their insistence that such 'pseudo-traditionalization' was a much more dominant social process of that period than any so-called 'modernization.'[102] This is very interesting for the following reason. While the earlier mentioned narrative strands making the 'radical displacement argument' point out displacement of tradition with foreign ideas and structures as the big problem, this variant of the 'radical displacement argument' seems to be saying the opposite. It is saying that at one level colonial rule was actually responsible for pushing society backwards to a traditional, hierarchical and pre-modern mold, even as it was naturally moving forward. However, it needs pointing out that these two positions are not necessarily at odds. The dollops of 'tradition' that were ostensibly being fed to the Indians during the early period of colonial rule, were an entirely new product, as the previous section on the outcome of colonial translation and interpretation of tradition shows. Thus it was not preservation of tradition but, as has been said, 'pseudo-traditionalization.'

The 'pseudo-traditionalization' served a purpose. While India was being re-traditionalized, it also served as a "…caricature of a typical non-western civilization," or in other words, "[T]he Indian past became re-defined as static and mindless 'tradition' to serve as '…the other' to modern Europe's self-flattering understanding of its own history."[103] The Saidian insight that in a political culture whose key value was progress, the image of oriental societies as backward and inherently static served as a ready justification for their colonial domination, influences most of these critical perspectives.[104] In other words, the underlying thesis of this particular variant of the 'radical displacement argument' is that far from promoting any 'modernization,' the colonial impact actually contained anti-modernist and regressive tendencies that arrested economic and social growth, and actually pulled Indian society back to a more hierarchical and feudal ethos and structure. Commentators describe how by the middle of the nineteenth century, the economic depression, colonial revenue collection offensive and, the "neo-colonial reconstruction of tradition" had reversed indigenous growth and development patterns.[105] As a result, "[O]ut of a once highly mobile, commercialized and contentious society," the colonists, "…had created, albeit by complex means, an agrarian structure marked now by the appearance of 'feudal' hierarchy."[106] Pointing out contradictions between formal statements of policy aims and the working practice of British rule, Eric Stokes has described the first century of colonial rule in India as one of stagnation.[107] Highlighting both inadequate capital investment as well as the

[101] Id.
[102] Id. at 239
[103] Id.
[104] EDWARD SAID, ORIENTALISM (Vintage Books: New York, 1978).
[105] DAVID WASHBROOK, *Economic Depression and the Making of 'Traditional' Society in Colonial India 1820-1855*, Transactions of the Royal Historical Society, 6th Ser., Vol. 3. (1993). At 261.
[106] Id.
[107] ERIC STOKES, *The First Century of British Colonial Rule in India: Social Revolution or Social Stagnation? Past and Present*, No. 58. (Feb., 1973).

technical instruments for a development program, such as a communication network, he says that most of the proposed colonial reform plans actually never materialized, until as late as the 1860s.[108] The impact of colonial rule on India during this period has been described as resulting in "an aborted modernization." [109] The other important point to note is the insight that the rate of colonial impact was differential and its development of its internal structure uneven.[110] According to Stokes, this made it paradoxically, "…at once free-trader and mercantilist, the fugleman of modernity and the latest of the predatory conquerors of Asia."[111]

While the aforementioned narratives making the 'radical displacement argument' have focused on deflating the 'inevitable modernization argument' and especially the 'desirable modernization argument' that have put forth colonial rule in India as an inherently 'modernizing' phenomenon, still other narratives have provided additional explanations of the actual state of indigenous economy and society prior to the colonial arrival. Studying the interplay of law and colonial agrarian policy, they opine that the contemporary perceptions of the decay and destruction of India in the eighteenth century were more than anything else, a product of British writing.[112] Consciously or unconsciously, they argue, these British narratives sought, "…to magnify and color the changes which took place in the eighteenth century to enhance the magnitude of their own 'achievements' from then onwards."[113] British pursuit of political security and steady revenue extraction from land and other taxes actually produced a situation of depression in the first half of the nineteenth century.[114] Later, the same British imperatives, they argue, led to gradual underdevelopment in India at the end of the nineteenth century and the beginning of the twentieth century.[115] British apprehensions about upsetting the early political balance that they had established with mercantile and landed groups is presented as the primary explanation as to why the British were unwilling to undertake any large-scale developmental activity in India.[116]

Displacement remains the overarching theme and lesson of these narratives. However, their focus is more on the displacement of the natural progression of Indian economy and society that they argue was stalled as colonial rule ushered in an economic, political and social model of society that helped entrench its presence.

G The 'Foucauldian Power-Knowledge Project' Variant

It is clearly emerging that the 'radical displacement argument' embraces several variants, albeit, not altogether very divergent ones in terms of their ultimate verdict. Arguably, the most radical of these variants, and also the one with the largest sweep and a clear preference to look at the entire colonial experience in India from the vantage point of a grand theory, is what I would term

[108] Id. At 146.
[109] Id. At 153.
[110] Id. At 160.
[111] Id.
[112] EUGENE F. IRSCHICK, *Order and Disorder in Colonial South India*, Modern Asian Studies, Vol. 23, No. 3. (1989). At 459.
[113] Id.
[114] Id.
[115] Id.
[116] Id.

as the 'Foucauldian power-knowledge project' argument. This argument painstakingly deconstructs various colonial legal reform endeavors as pre-meditated and blatant power-acquisition and consolidation projects, while employing a framework clearly based on Michael Foucault's power-knowledge paradigm.[117] Bernard Cohn's 'Colonialism and its Forms of Knowledge' is a prominent and path-breaking example of this deconstructive explanation. Cohn provides a fascinating examination of the development of the 'colonial forms of knowledge' as the establishment of a "discursive formation;" the definition of "an epistemological space;" and "the creation of a discourse (Orientalism)" that had "the effect of converting Indian forms of knowledge into European objects." [118] The Colonial projects of "discovering," translating, interpreting, reinterpreting, codifying, implementing and eventually replacing Indian sources of law are seen by Cohn as ultimately an appropriation of Indian languages to serve as a crucial component of its construction of a system of rule.[119]

In a similar mould, others such as Partha Chatterjee in his seminal work 'The Nation and its Fragments,'[120] postulate that the colonial project was one of 'rationalization' of administration and 'normalization' of the objects of its rule. However, the issue of race kept coming up to emphasize the specifically colonial character of British dominance, at the same time as technologies of disciplining power were being assembled and put up in the colonial state. According to Chatterjee, the period after 1857 is the important period that shows this project coming truly to fruition. During this period, the bureaucracy was rationalized; the laws codified; and surveys, classifications, and enumerations of all aspects of India undertaken. It was within this framework of universal knowledge, according to Chatterjee, that the colonial complex of power and knowledge (and its objectification and normalization of the colonized) had to reproduce the truth of colonial difference.[121]

H Displacement as a 'Negotiated Cultural Enterprise'

The overarching 'Foucauldian power-knowledge project' explanation has its detractors. Dramatically describing the essential nature and *modus operandi* of the colonial legal system as 'A Despotism of Law,' Radhika Singha explores the colonial state's negotiations with existing indigenous normative codes, in order to reorder them to colonial notions of law and civil authority, and also to establish communication circuits with the ruled.[122] Or, as she further puts it, "to build some discursive bridges with the religious and social norms of the subject population."[123] She highlights how these strategies could have unpredictable consequences as they could reintroduce, "denominators of social and ritual identity into procedures which sought

[117] MICHAEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Vintage Books, 1975).
[118] BERNARD S. COHN, COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA (Princeton University Press, 1996).
[119] Id.
[120] PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES (Princeton University Press, 1993).
[121] Id.
[122] RADHIKA SINGHA, A DESPOTISM OF LAW: CRIME AND JUSTICE IN EARLY COLONIAL INDIA (Oxford University Press, 1998). At xi.
[123] Id. At viii.

to define a universal legal subject."[124] This is in some ways reminiscent of David Washbrook's aforementioned discussion of the 'pseudo-traditionalization' of Indian society, and reintroduction and bolstering of a more hierarchical and feudal ethos and structure in the Indian polity, but Singha also provides additional important insights. Singha's essential thesis is that in its early years the Company dominion was expounded with rhetoric of reconciliation with the "laws and customs of the people," but that the mercantilist corporation eventually chose to move away from association with and legitimacy seeking from the distributive rituals of an indigenous kingship, to the model of a more centralized, institutional authority.[125] Since the Company administration had a bureaucratic centralizing tendency, it did not want seepages of revenue along branch lines of lordship, and thus certain aspects of its claim to legitimacy were now expounded through an "assertion of a difference from past regimes," which were characterized as arbitrary despotisms.[126] However, the Company's governance itself, Singha asserts, was quite clearly authoritarian (but justified with the logic that that was what the 'Orientals' were used to) though declared and presented as "bound by law."[127] Paradoxically, in other aspects, "the Company searched for cultural moorings in the traditions of rule associated with Mughal state and its regional successors. The criminal law, its machinery and procedure, was therefore tied up with earlier institutions, personnel and legal-sacral texts."[128]

[124] Id. At xi. According to Singha, "…the field of meaning invoked by the citation of a particular symbol of traditional authority could not always be controlled and restricted to the specific objectives of the state." Id. At the same time, she says that, "the Company's subjects were also impelled to accommodate themselves to the law, whether as a frame of reference to make their claims upon the ruling power, or to devise ways to avoid an encounter with its agencies." Id. Singha acknowledges that the colonial state did persistently attempt to discover reference points to 'indigenous law,' but at the same time, it also constantly endeavored to enforce its expanded concepts of a centralized state authority. Hence, the at times paradoxical and contradictory results. What thus emerged, as Singha shows, was a complex process with constant pulls and pressures, that augmented or contradicted each other, with at time unintended consequences.

[125] Id. At ix-x.

[126] Id. At x.

[127] Id.

[128] Id. Singha focuses in her study on the penal law of early Company rule in India, in order to better understand, "the range of social transactions which shaped the process of colonial state-formation." Id. At. viii. According to Singha, law-making was treated by the colonial state, " as a cultural enterprise in which the colonial state struggled to draw upon existing normative codes — of rule, rank, status and gender — even as it also shaped them to a different political economy with a more exclusive definition of sovereign right." Id. Apart from looking at arguments in earlier histories that focus on the institutional structure of British Criminal Law in India, and that largely evaluate it as a "modernizing endeavor" due to the "liberal reformist tendency of British rule," Singha points out an additional important evaluative dimension. Id. She argues that the colonial "legislative initiative cannot be traced only to the various crises of colonial order or to the inadequacy of particular laws" (which were criticized for being "expensive, time-consuming and conducive to litigiousness"), but to "a constant reworking of the ambitions and perspectives of political authority and the forms in which this was to be communicated." Id. Singha says that colonial law making was a process that was fraught with the potential of conflict. This was because, "the British definitions of criminal liability conceptualized a realm of juridical power founded, in theory at least, on a notion of indivisible sovereignty with its claims over an equal abstract and universal legal subject," with legitimate violence being the sole prerogative of the State. Id. This brought it in direct conflict with other existing sources of identity as well as other claims to legitimate exercise of violence. Id. At ix. Furthermore, British magistrates and judges felt that Islamic law was too narrowly concentrated on the "consequences of the criminal act" as well as on the "claims made by the injured parties for compensation and retaliation." Id. This perception was once again in conflict with the colonial administration's idea that it wanted to communicate, "that the criminal act affected the interests of all, i.e., the public interest which the state represented, and punishment would be meted out in those terms." Id.

Other critics of macro perspectives in the 'Foucauldian Power-Knowledge Project' vein further emphasize the above approach and perspective. For instance, according to Lauren Benton one cannot recognize, "… the systematic and pervasive elevation of state law to its authoritative position in the colonial order without losing sight of the contingent nature of this process, or of the complex interrelations of new models of governance in the West and local contests outside it."[129] She focuses, *inter alia*, more narrowly on institutional change and its meanings as well as on the complexity of colonial and metropolitan cultural relations, while drawing on the distinctive nature of nationalist movements outside the West, as enunciated by Partha Chatterjee in 'The Nation and its Fragments.' Benton analyzes jurisdictional politics and disputes and argues that, "…these conflicts simultaneously shaped the formation of the colonial state (and of the interstate order more generally) and responded to contests over cultural boundaries in colonial settings."[130] She emphasizes the significance of these disputes in marking cultural difference and their role in institution building, so that through such disputes, according to her, "the state came to assume a special authority — an authority that subsumed alternative legal authorities and also monopolized claims to definitions of political identity."[131]

Emphasizing the element of local collaboration (similar in some ways to the focus on 'collaborators' in the aforementioned 'continuity thesis,' put forward by certain historians of India), Benton says that even when 'state dominance' had received formal recognition as the ruling principle for colonial rule in India, the colonial legal order continued to be characterized with a fair amount of 'fluidity.'[132] As a result, even though the colonial government put up seemingly precise jurisdictional boundaries, these boundaries were "inherently unstable" and, therefore, "subject to frequent revision."[133] This for instance, resulted in frequent changes in colonial procedural rules as a reaction to the strategic maneuvering of these rules by 'indigenous actors,' especially by 'indigenous legal personnel.[134] This constant contestation took place for the additional reason that the disputes over the rules providing the structure of the complex colonial order had an added significance for these 'indigenous actors.' This is because they were also perceived by the disputing social actors as, "…important, even vital, symbolic markers of the boundaries separating colonial constituencies" — which boundaries then, "…signified judgments about the character of these groups and the qualities that separated them from one another." [135] Therefore, for scholars like Benton, much as there was an inevitability to an inherently unstable and "carefully crafted legal pluralism" of the colonial legal order for eventually moving to a highly centralized, hierarchical order resting on the ultimate authority of colonial courts — this path dependence or "institutional 'fix'" was not apparent to the participants in this process.[136] The upshot of Benton's thesis is as follows:

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[129] LAUREN BENTON, *Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State*, Comparative Studies in Society and History, Vol. 41, No. 3 (Jul., 1999). At 563.
[130] Id. At 564.
[131] Id.
[132] Id.
[133] Id.
[134] Id.
[135] Id.
[136] Id.

> "The construction of the colonial state proceeded haltingly and in response to myriad conflicts over the definitions of difference, property, and moral authority. Indigenous litigants helped to shape change by crafting legal strategies to exploit the jurisdictional complexity of colonial legal orders. By analyzing such challenges and the response to them, together with pressures to reform colonial administration and the resulting tensions between imperial and colonial administrators, we can arrive at a view of the construction of the colonial state not as a product of either "external" forces or "internal" conflicts but as an example of a "colonial project" — a practice and institution both perpetuated in policy and emerging out of the peculiar dynamics of colonial cultural politics."[137]

Benton thus takes issue with the 'Foucauldian Power-Knowledge Project' variant and its description, "…of nearly complete displacement of an indigenous legal system by a European legal order."[138] To her, the long and complex historical process is, though correctly outlined, but not completely captured by Marc Galanter's description of "…the 'absorption' of indigenous law into 'modern' British law," nor is it fully explicable by Bernard Cohn's explanation of "…a transition 'from Indian status to British contract.'"[139] Like Singha, Benton also draws attention to what she describes as the 'contested' nature of the change in colonial India and the 'fragmented positions' of the adversaries contesting the jurisdictional disputes that influenced and characterized this change.[140]Though Benton agrees that by the end of the nineteenth century the nature of the authority exercised by state law had changed from its nature during the early days of colonial rule, her emphasis on the cultural, racial, and ethnic contestations on and around colonial legal evolution is important for two reasons. The first obvious reason is that it throws a different light on 'displacement' as a consequence of colonialism, and highlights the role as well as the nature and extent of influence (or lack thereof) exerted by those being displaced, in impacting the eventual shape of the colonial legal project. The second reason is that the emphasis on the 'cultural,' 'racial,' and 'ethnic' nature of these contestations brings forth the significance of these non-legal dimensions to the colonized who were ostensibly encountering an essentially 'legal' paradigm change. This brings to light the complex impact of colonial law on a multi-ethnic and multi-cultural indigenous society where success and failure of a legal system cannot be merely gauged through some simplistic binary notions of economic or political winners and losers. Thus, 'displacement' has to be understood at several cultural and societal levels, and not just at economic and political ones. This is something that I point to at the start of this article where I emphasize the need to better appreciate popular ideological, political, ethical, cultural

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[137] Id. At 564-565

[138] Id. At 565.

[139] Id.

[140] Id. Though the contests, disputes and legal maneuverings were obviously influenced by conflicting stakes in the changing revenue system or the development of a market economy in land, Benton's most relevant insight in the context of this chapter is her highlighting of the non-economic and non-politically focused dimensions of this contestation. Id. At 587. The contests, as she says, were also about "cultural, racial, and ethnic boundaries." Id. These pervasive "struggles over definition of difference," tell us that colonial state formation cannot be comprehensively explained merely as the spread and enforcement of ideas and institutions emanating from the West. The enforcement of state law was reinforced, even if indirectly, "…through appeals to its authority from social actors who were situated quite differently. Id.

and emotional associations with 'law' in order to better appreciate colonial 'law's' actual impact. This once again underscores the need for a deeper sociological analysis of colonial 'displacement' of indigenous laws.

A modern variant of the above argument can also be seen in a recent study on Pakistani rural Punjab that, *inter alia*, proposes that the defining features of colonial regimes endure in post-colonial societies, not because they are embedded within the formal institutions of the postcolonial state, but rather, because petty landowners elect those with an interest in preserving them. This is so even though the strict terms of the laws may have undergone change through dramatic institutional reforms.[141] Focusing on gender, caste, kinship, and district-level democracy, Mathew Nelson's study focuses its attention on landed property based relationships; tribal kinship networks; and, the logic of local politics in colonial and postcolonial Punjab. The study overviews the debates among late-nineteenth and early twentieth century administrators in British India concerning regulation of ancestral landed property rights and the enforcement of local, tribal, and religious personal laws. It uses historical descriptions of economic and political preferences in a particular time and place, namely colonial and postcolonial Punjab, in order to illuminate the theoretical importance of individual preferences, as an explanatory heuristic. It then goes on to look at the formal demise of the colonial regime but finds a stubborn survival of its most important elements, namely collective landed property relations and tribal kinship networks, in its area of study. Thus, the cultural dimensions of the study of legal change come across as highly relevant towards a better understanding of what is displaced and what gets entrenched.

I Displacement as a Function of Shifting Political and Economic Imperatives

While the aforementioned 'narratives of displacement' highlight 'culture ' —as a variable influencing the formative periods of the colonial enterprise; as a terrain for constant contestations and negotiations between the rulers and the ruled; as well as being an eventual victim in terms of the range and depth of colonial 'displacement' — other narratives focus on displacement variables essentially economic and political. Thus these 'narratives of displacement' emphasize the important linkages between various stages of colonial legal development in India and the political and economic imperatives of the colonial government as well as the exigencies of the time and place, rather than subscribe to a grand design of monolithic and systematic domination put forward by the 'Foucauldian Power-Knowledge Project' variant. In summary, they hold that the different phases of colonial rule in India were characterized by different social forces, and the role of the law as well as the nature of property rights that it sought to uphold varied considerably. Revenue collection, for instance, was an imperative for the growing colonial state and it permeated and influenced the nature of colonial land settlements in India's predominantly agrarian economy. This in turn was responsible for diverse processes of social change. From a methodological standpoint, therefore, these analyses emphasize the importance of looking not only at the courtroom, but also to the tracing back of the arguments and forces at play in the courtroom to their various origins. Thus, they require careful consideration of the situation of the courts in the general Indian social context, in order to fulfill the wider analytical purpose of looking upon law's 'social function.'

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[141] MATTHEW JEREMY NELSON, MAKING SENSE OF PROPERTY RIGHTS: LAND, LAW, AND LOCAL POLITICS IN THE PUNJAB, 1849-1999, Unpublished Doctoral Dissertation, Columbia University, 2002.

David Washbrook's seminal work in this area, for instance, focuses on the nature of effective property rights in land — given the significance of agrarian relations in the structure of Indian society, with land remaining overwhelmingly the single most important source of wealth and base of production.[142] Washbrook defines and describes three considerably different phases of colonial rule in India. He terms them as the 'mercantilist' phase, 'the high colonial state' phase, and 'the incipient nation state' phase. These were influenced by different social forces and were distinct in terms of the nature of property rights that the colonial state wanted to preserve, and in terms of the 'use' of law for that purpose.[143] In its initial phase from late eighteenth century onwards to the middle of the nineteenth century, Washbrook finds an inherent contradiction in colonial legal policy. Washbrook emphasizes that the principles of statecraft laid down in this early phase laid the foundations of the eventual Anglo-Indian legal system in India.[144] He highlights (while looking at colonial Bengal of the late eighteenth century), at one level, the colonial policy of commercial and economic development through emancipation of the individual from the weight of taxation; and, its encouragement for accumulation of private wealth and property through the development of a free market in all commodities, especially land.[145] At another level, however, he contrasts the colonial attempts to define the bases of the private or personal law of the subjects through reliance on existing customary and religious norms.[146] This "Janus-faced Anglo-Indian legal system," a characteristic of the colonial legal system from the very start, he argues, rested on two contradictory principles, with different social implications. The colonial law, "…sought to subordinate the rule of 'Indian status' to that of 'British contract' and to free the individual in a world of market relations."[147] Meanwhile, the colonial backed personal law entrenched "caste, religious and familial" status as the basis of individual right.[148] These contradictions, Washbrook argues, deeply influenced the actual nature of effective property rights and went a long way towards rendering the early colonial legal system contradictory and ineffective, with large gaps between practice and theory.[149] While looking at colonial law reform endeavors as well as the actual functioning of the Company court system in the first half of the nineteenth century, Washbrook highlights both colonial under-funding of and ineptitude towards legal reforms and improvement of the quality of the judiciary. Furthermore, he draws attention to, *inter alia*, scandalous delays; high costs; inefficiencies; unintelligibility of procedures and laws to the illiterate litigants; corruption; paucity of manpower dedicated to the task of legal institutional development; and inadequate legal enforcement mechanisms.[150] Washbrook scathingly points out that, "Indian property rights were left to be safeguarded by a legal system which could take up to fifty years to resolve a contentious case or which could order the re-trial six times of a suit for property worth Rs 6."[151] He goes on to say

[142] D. A. WASHBROOK, *Law, State and Agrarian Society in Colonial India, Modern Asian Studies*, Vol. 15, No. 3, Power, Profit and Politics: Essays on Imperialism, Nationalism and Changes in Twentieth-Century India. (1981). At. 650.
[143] Id. 711-713.
[144] Id. At. 651.
[145] Id. At 652.
[146] Id.
[147] Id. At 653-654.
[148] Id.
[149] Id. At 654-658.
[150] Id. At 658-661.
[151] Id. At. 659-659.

(something which acutely reminiscent of critiques of the post-colonial South Asian legal systems) that:

> "[I]n these circumstances, it may not be surprising that the courts were not always used for their 'proper' purposes in seeking the speedy resolution of disputes. Often, they were seen by litigants merely as a convenient place in which to bury 'bad' cases for years at a time, which might be lost if heard before unofficial panchayati tribunals."[152]

Not surprisingly, he concludes:

> "If, after sixty years of experience in which they had come to know only too well the deficiencies of the courts, the Company government still attempted no remedy, it may be more reasonable to suppose that they were quite content with the apparent abuse of the law and intended it to be used in no other way than it was, and as its institutional structure suggested it
> should be."[153]

Washbrook's explanation for this sorry state of the early colonial court system is that, "…early colonial India operated under a 'state mercantilist' form of economy in which the institutions of the '*ancien* regime' were made more efficient, brutalized and bastardized but, significantly, not dissolved."[154] There is resonance here also of Galanter's "pseudo-traditionalization" of society. So while the early colonial government, according to this perspective, avowed a commitment to creating a free market economy supported by the rule of law; in actuality, it did nothing but entrench the existing revenue and surplus extraction regime. [155] Thus, says Washbrook, the colonial government's "… elaboration of a legal system which treated and protected landed property as if it existed at a remove from the state, as a private subject's right, was pure farce (and plainly regarded as such by the mind of local administration)."[156] All this, of course squarely challenges the 'inevitable modernization argument' and the 'desirable modernization argument.'[157]

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[152] Id. At. 659.
[153] Id. at 660
[154] Id. at 661.
[155] Id. At 665.
[156] Id.
[157] The logical question still arises as to what caused the pursuit of this farce, if indeed it was a farce. Washbrook only partially traces his explanations to existing accounts of colonial rule's apprehensions in its first century about any disturbance of existing bases of religious and traditional authority unleashing revolt against their own rule. Or indeed to the explanation that colonial rule's dependence on "ill-controlled collaborators" was a function of its administrative and political weaknesses. Id. He finds these explanations inadequate in the face of other 'risks' taken by colonial policy *vis-à-vis* local sensibilities as to religious law, as well as other interests of 'traditional elites.' Id. At 666. Similarly, he finds the colonial dependence on local collaborators argument to be 'over-estimated' and 'misunderstood' given that the colonial government otherwise demonstrated, "…ability to change the groups from which it drew its intermediaries, and regularly to change individuals within the groups." Id. Instead, he attributes colonial inability to restructure society, in order to direct it towards the 'modernizing' direction in which it claimed to be steering India, to its imperative of continuing high revenue yield and close political management of the economy, "…without which it would have risked military defeat, bankruptcy and internal collapse." Id. At 667. However, with heavy land revenue and colonial maintenance of the traditional institutions of its management, it was obvious that free market relations were not going to flourish. Id. So while it claimed to be protecting private

It is only in the post 1857 phase of colonial rule in India under the Crown Raj — in what Washbrook calls 'the high colonial state' phase — that we witness major legal reforms.[158] Property law began to undergo important changes so that the gap between the concepts and practices of Anglo-Indian law was reduced; the incidence of litigation (especially pertaining to property, tenancy, rent and debt) grew dramatically; the legal system was streamlined and expanded; and the legal process simplified and made less expensive, in order to cope with these developments. [159] Yet, in spite of this Washbrook finds evidence of the aforementioned personal/public law contradictions continuing to present ambiguities, pressures and obstacles. These in turn contributed to a slowness and timidity in the colonial governments' reforms of its laws, administrative structure and governance system in order to accommodate the social pressures of the market capitalism that it was ostensibly introducing to India's agrarian economy.[160] It needs to be clarified that the colonial policy paradox that entrenched certain agrarian hierarchies and processes (due to a complex set of reasons that Washbrook discusses), did not embrace notions of protection of any poor or vulnerable groups. The situation was quite the contrary, for they hardly figured in the policy equation or as a factor to consider while extending colonial modes of access to legal courts and processes.[161] Overall, "[T]he raj, then, was, or felt itself to be, in an acute dilemma. Having established a context for the capitalist development of agrarian society, it could see no way of allowing the corollarous social transformation to come about and survive."[162] In the context of this article, analysis such as

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interests, Anglo-Indian law, according to Washbrook, actually provided during this phase of colonial rule " … a range of secondary services for the Company, both as 'state' and as 'shield' for European business interests, which helped to translate political power into money." Id. At 668.

[158] Eighteen Fifty Seven of course marks the year of the great and eventually failed Indian war of independence against colonial rule and the year is often used as a very important signpost for a paradigm shift in colonial policies, attitudes and modes of governance. 1858 year saw the transfer of governing authority from the Company to the Crown.

[159] Id. At 670.

[160] Id. At 673-681.

[161] Washbrook also points out that colonial reforms towards introduction of a competitive capitalism were neither directed towards nor in any way wary of opposition from the poor and the dispossessed. He says, "…it was not so much the poor and the dispossessed who were going to be engaged and threatening revolt — or, if they were, the raj neither saw nor cared about them. Its advance palliative legislation did nothing for the landless and precious little for the two-acre ryot. Indeed, few of its processes and protections could be used if money and a degree of independence were not available. The archetypal occupancy tenant of the U.P. or peasant proprietor of the Punjab, whose interests were to be safeguarded, was conceived more as a substantial farmer than a marginal peasant." Id. At 688.

[162] Id. At 691. Washbrook sums up the phase of 'the high colonial state,' contrasting it with the earlier 'the mercantilist phase,' as follows: "Conditions of market competition now touched the agrarian base and the law was assuming definitions of property right more suitable to a 'free' capitalist context. Yet it clearly did not go so far as to establish a basis of equal and individualistic competition. The state was maintaining and manufacturing social prescriptions which limited the consequences of competition and was trying to keep control over the land in the hands of existing agrarian corporations. To conserve society in this way, while at the same time sustaining some market dynamic, the raj undertook a delicate balancing act. Its laws sought to guarantee a level of returns to mercantile and rentier capital but, at the same time, to restrict the pressures which they could exert on agriculture. The law of property now was meant to serve as an instrument of compromise and took on suitably confused and contradictory forms." Id At 712. Washbrook also provides important insights into the last phase of Indian colonialism. He calls it 'the incipient nation state.' He describes how it was characterized by a different set of political and economic imperatives, including most importantly political stability. Hence, there was a shift in definition and regulation of property rights from civil to criminal laws, leading to further changes in the legal governance framework. Id. At 712-713. However, for purposes of this article I stop with the brief overview above of

Washbrook's, ought to inform a re-evaluation of post-colonial statutory books, regulations and social arrangements. After all, these still largely draw their inspiration, and in many cases, even their text, from this complex period of colonial history, characterized as it was by the interplay of many social and political forces that used law as their medium of contestation.

Washbrook's narrative also sheds new light on the notions of the development and independence of judiciary in colonial India. Or one might say that given the persuasions offered by the 'inevitable modernization argument' and the 'desirable modernization argument,' that rely on such notions of a strong and independent colonial judiciary as a component of the journey towards rule of law as well as economic modernization, Washbrook quite bluntly steals the luminosity from this depiction of the judiciary. Washbrook findings are consistent with the secondary role he ascribes to law in service to colonial economic policy imperatives. He finds that:

> "…the notional independence of the judiciary from the executive, proclaimed in the Permanent Settlement, was never realized. Colonial India had no independent legislature or written constitution to act as a check on the executive, which actually appointed the judiciary as part of the civil service and changed the law as it pleased. The supposed autonomy of the judiciary was an illusion, perpetuated by colonial legitimating ideology, and the law was a department of the executive."[163]

Quite apart from exposing the gaps between the official rhetoric of colonial law and its internal contradictions of underlying policy (e.g. between public and personal law), this narrative reveals law's secondary, instrumental role in pushing forward certain agrarian frameworks and market mechanisms that constantly varied according to the colonial state's political and economic imperatives. This exposes the fallacy of looking upon British rule as 'monolithic' and 'omnicompetent,' and reveals the points of weakness and deepening contradictions in its essential structure.[164] In the context of this article, this narrative further underlines the dire necessity of avoiding any treatment of Anglo-Indian law as an autonomous piece of intellectual inquiry, thus looking at its structure and strictures in isolation from the societal context in which they existed, a mistake lawyers are apt to make. There is a need, therefore, as Washbrook proposes, that the law itself should be conceptualized differently and related to other aspects of the state and developing class structure, and that meanings need to be found in those relationships.[165] A conventional legal analytical approach, by excluding these important dimensions, can lead to reaching, as Washbrook warns, what may seem like judgments of significance in terms of abstract ideological principles, but that these may be highly misleading judgments.[166]

Washbrook's second phase of 'the high colonial state' as that it is the period from which emerged most of India's major legal codes and regulatory frameworks.

[163] Id. At 714.
[164] Id. 711-713
[165] Id. At 714.
[166] Id.

J The Fallacy of the Uniformity of Colonial Policy – The 'Narratives of Displacement' focusing on Regional Variations and Differential Societal Impact

The above category of 'narratives of colonial displacement' dispels the notion that colonial rule was 'monolithic' and omnicompetent' through its history. They also provide a fresh periodization of colonial rule and its different, at times paradoxical, policies, as a function of its shifting economic and political imperatives and its agrarian and market policies. Law plays at best the role of a handmaiden in these endeavors. What is common to some of these narratives, as well as the earlier narratives focusing on 'cultural displacement' and the 'Foucauldian Power-Knowledge Project,' however, is a tendency to treat colonial displacement and its methods as more or less uniform across colonial India. That the displacement was also geographically distinct in different parts of India in terms of its ethos, strategy and output is the fascinating focus of, to my mind, yet another category of 'narratives of colonial displacement.' A representative example is D. H. A. Kolff's work describing the diversity of colonial experimentation in different parts of India. The upshot of his work is that as diverse as Calcutta, Bombay, Madras and Punjab were in colonial times in many different ways, so was the ethos and methodology of the colonial legal engineering in these places.[167]

To Kolff, understanding post-colonial Indian law is not possible without tracing the origins of the Indian legal codes introduced by the British in the latter half of the nineteenth century. Furthermore, to him, like Washbrook, it is not just sufficient to take up a lawyer's legal positivist lens to study the policies and arguments that led to the British rules and regulations as that would just provide a partial view from the top. He deems it necessary to step outside and below the judge's courtroom to examine how these laws actually functioned in the magistrate's court; how they were actually administered and used by the police; and the role they played in managing conflict at the village level.[168] Kolff categorizes the pre-Indian legal code colonial legal system in India — the tripartite yet organically whole 'Indian Law Machine' as he calls it — as a system based on three different sources of law, namely: (1) Wisdom literature — left to Hindu theologians, Brahmins and European philologists; (2) Positive colonial law — a mix of English common law, *dharmashastra*, *sharia*, and compiled customary law —with the latter three subjected to uniform English court procedures and distorted in the process; and, what he calls, (3) Local law-ways.[169] Kolff then traces diverse philosophical influences — finding adherents of Bentham as well as Savigny in different provinces of British India — attributing to them distinctive administrative styles due to their distinct colonial histories; different cultures and social dynamics; and their administrative and executive autonomy.[170] While there is much in Kolff's analysis that provides exciting frameworks for further analysis, in the present context his most relevant insight is that of the diversity of the ethos and form of colonial legal engineering in different parts of British India.

Kolff's description of varied British strategies to create different kinds of links between the three

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[167] D.H.A. KOLFF, *The Indian and the British Law Machines: Some Remarks on Law and Society in British India*, in European Expansion and Law (W.J. Mommsen & J.A. de Moor, eds., 1992).
[168] Id. At 203 – 204.
[169] Id. at. 207
[170] Id. At 220.

aforementioned sources of law in Calcutta, Bombay, Madras and Punjab, reveal that none of the colonial approaches had really much to do with Indian cultural or intellectual past and reality. Though arguably, some of this experimentation, like the colonial focus on and primacy extended to local customary law in Punjab, were at least closer, albeit superficially, to ground realities. By the mid 1850s, however, according to Kolff and as we know, a sea change had taken place with the British relinquishing the idea of creating something out of 'wisdom literature' and they moved to the task of bringing in the great codes. What follows, according to Kolff, is transplantation of foreign law and legal concepts for commercial reasons. And also, the more formal introduction of the 'public' and 'private law distinction between law of the market and family law (personal law) as the colonial government did not want to create religious tensions, with its primary concern really being the market. The introduction of these 'Classical Legal Thought' concepts in India in the latter half of the nineteenth century has a fascinating connection with the larger intellectual debate around the historical development of Classical Legal Thought as well its globalization, and the subsequent emergence of its successor ideas in legal thinking.[171]

Narratives such as Kolff's provide very useful regional frameworks and foci for analyzing the complex diversity of British legal and social engineering in India, dispelling any misconceptions of a homogenous all-India colonial approach to law-making. It is also important to further emphasize the differential impact of these trends, as pointed out by those who have focused on this aspect. For example, one study of British attempts to codify custom in Punjab finds that etched in the codes were the voices of property-owning elites reacting to scarcity of land, its increasing value and growing population and consolidation of rural power — hence the felt need to redefine customary practices.[172] Codification was thus also a process of silencing and erasure — what was troubling or not suitable. While customs were uncodified, they remained in the collective knowledge of community, as a preserve of the community, and interpreted and recorded in it through its institutions. With codification the colonial regime, it is argued, appropriated the right of interpretation and rewriting. Now courts were to decide disputes, judges reinterpreted them — but silently, alternative practices continued underneath all this.[173] The native voice was inscribed in the imperial discourse but it was constrained, regulated and ultimately appropriated. This was a male, patriarchal voice, the voice of the dominant proprietary body speaking against the rights of non-proprietors, females and lower castes. [174] Still others point out the special predicament of women under colonial law in India, even when the colonial law was meant for social reform to the benefit of women, in favored areas by the colonists such as *sati*, widow marriage or child marriage. This is a history within a history demonstrating very different concerns for women during the colonial period of social reform.[175]

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[171] *See* for a fascinating study of this subject, DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (Beard Books 2006).
[172] NEELADRI BHATTACHARYA, "*Remaking Custom: The Discourse and Practice of Colonial Codification,"* in Tradition, Dissent and Ideology: Essays in Honour of Romila Thapar (R. Champaklaksmi and S. Gopal eds., 2001).
[173] Id.
[174] Id.
[175] JANAKI NAIR, SOCIAL REFORM AND THE WOMEN'S QUESTION, IN WOMEN AND LAW IN COLONIAL INDIA – A SOCIAL HISTORY (1996). Also interesting in this context is UMA CHAKRAVARTI, REWRITING HISTORY: THE LIFE AND TIMES OF PANDITA RAMABAI (Kali for Women, 1998) which examines how the colonial state's new institutional structures, caste contestations, class formation and nationalism transformed and reorganized gender relations. Uma Chakravarti also explores the nature of the new agendas being

Other 'narratives of colonial displacement' focus on the bifurcation of colonial criminal law's treatment of individual and collective crimes in India. This presents an additional fascinating aspect of the theme of legal and social engineering and its complex interplay with legal theory, political and economic imperatives, and sociological variables. For instance, it is argued that the bifurcation of colonial criminal law in India led to the emergence of, alongside an explicit and overt 'rule of law' based English legal structure, an almost covert legal structure (with different court procedures, different definitions of acceptable evidence and even different punishments for particular crimes).[176] The latter structure was, it has been suggested, expressly elaborated to deal with collective crime or groups of people defined by the state as anti-social and anti-state.[177]

One of the most telling impacts of this approach was that many of the cultural prejudices shown by the imperial government against groups that it now saw as criminal, were actually inherited from its local informants, and then legitimized as scholarship in subsequently constructed treatises. These treatises in turn formed the basis of special legislation for these groups of people.[178] Scholars have proposed that such bifurcated legislation was influenced by the 'Pseudo-scientific Social Darwinism' of the times that explained criminality in genetic terms, leading to stereotyping criminal tribes.[179] An additional motivation was the utility of laws to ostensibly tackle group and organized crime that could also be quite handy for curbing and punishing pro-nationalist political activity.[180] The colonial categorization of tribes and castes as criminal tribes and castes continues to thrive as a post-colonial phenomenon for purposes of policing and even adjudication, As has other stereo-typing that dates back to India's colonial era. Those who have examined the increasing transition of the colonial legal system into Indian hands after the 1930s detect a shift in the attitudes of Indians; showing a discursive, ideological and often institutional preparedness for transfer of power.[181] Yet, the views of the resurgent Indian members of the judiciary, despite being progressive nationalists, on women for instance, were strongly influenced by their views on class and rank.[182] This indicates, as Partha Chatterjee says, "… the class limits of progressive nationalism on the question of women."[183]

K Ideology, Guinea-pigging and Displacement

set for women, how these agendas were received by Indian women and in what ways and to what extent their consent to these, what she calls 'reconstructed patriarchies,' was produced.

[176] SANDRIA B. FREITAG, *Crime in the Social Order of Colonial North India*, Modern Asian Studies, Vol. 25, No. 2. (May, 1991). At 231.

[177] Id.

[178] Id. At 243.

[179] Id. At 247.

[180] Id. at 260. According to Radhika Singha, the formalization of a different standard of criminality for 'the thug gang' or the 'dacoit tribe,' was not just "an unequal application of the law," but "that these laws were also an aggressive abbreviation of judicial procedure which gave the stamp of due process to crude devices of policing and prosecution." See RADHIKA SINGHA, A DESPOTISM OF LAW: CRIME AND JUSTICE IN EARLY COLONIAL INDIA (Oxford University Press, 1998). At xv.

[181] PARTHA CHATTERJEE, A PRINCELY IMPOSTER? THE STRANGE AND UNIVERSAL HISTORY OF THE KUMAR OF BHAWAL 375-76 (Princeton University Press 2002).

[182] Id. At 380-82.

[183] Id. At 382.

Like the 'narratives of colonial displacement' that focus on variations of colonial impact according to region, gender and social class, intellectual histories of colonialism provide additional insights into the, at times, conflicting ideologies that inspired, permeated and molded the colonial agenda. They focus on the divergent contemporaneous philosophical movements in Britain, particularly that of English Utilitarianism, and their impact on law making in India. Of primary interest to these writings is the post-Cornwallis period when colonial rule had ostensibly transitioned from romanticization and exoticization of the Indian past to a more self-assured, Anglicized mode. Eric Stoke's seminal intellectual history of Indian colonialism exhaustively explores the impact of Utilitarian thinking on colonial law making in India, especially the emergence of the post-1857 Indian legal codes. It underscores the importance of appreciating the jurisprudential and political philosophy debates that influenced and permeated colonial legal engineering, especially the Utilitarian influences.[184] The debate on the ultimate impact of Utilitarian thinking in nineteenth century colonial law making in India is an on-going one. [185]

While one can continue to debate the extent to which expedience influenced theory, English Utilitarians obviously discovered India to be a much more muted and uncomplaining captive audience for their experiments than England. 'Romanticization' increasingly gave way to demonization as popular colonial misperceptions and biases about India's past helped fuel and justify transformative legal reforms. Of particular interest in this context is the role of 'myth-making' in the colonial legal and social engineering discourse on India. Notions of the inherent superiority of colonial law over India's indigenous legal systems, a view given further impetus by Utilitarian giants like Jeremy Bentham and James Mill,[186] were a major influence on English lawgivers such as Macaulay.[187] Quite apart from encouraging disdain for what was of value and utility in indigenous systems, such 'myth-making' provided righteous moral fervor and emancipatory self-congratulation to the task of treating India as a guinea pig for legal experimentation. The regular burnishing and display of a backward and inherently static image of traditional Indian society and polity served both as a ready justification for colonial domination, as well as ideological stimulus for British code-givers to India. Codification, of course, seemed to be the mantra of choice with the Utilitarians who, in some cases were as disgruntled with the state of the law in England as they were in India. As David Skuy argues:

> "The [Indian Penal] Code does not represent Britain's attempt to modernize India's criminal law, but rather its enactment reflected developments in England that led to a massive overhaul of England's criminal justice system; in effect,

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[184] ERIC STOKES, THE ENGLISH UTILITARIANS AND INDIA (Oxford University Press 1982).

[185] Some recent commentaries have suggested that the colonial law reformers pragmatically redefined their Utilitarian ideals in view of the exigencies of the Indian practical setting. Having soon recognized the difficulties of imposing an ahistorical legal framework on India that would have discarded all aspects of indigenous legal culture, the Utilitarians, they argue, soon agreed on a compromise. They accepted the limits of "…their theoretical jurisprudence," and went on to tamper, "… its promethean contours to agree with the parochial restrictions of Indian society." *See* KARTIK KALYAN RAMAN, *Utilitarianism and the Criminal Law in Colonial India: A Study of the Practical Limits of Utilitarian Jurisprudence*, Modern Asian Studies, Vol. 28, No. 4 (Oct., 1994).

[186] For instance see JAMES MILL, THE HISTORY OF BRITISH INDIA. 6Vols (London: Baldwin, Cradock, and Joy 1826)

[187] ABRAM L. HARRIS, *John Stuart Mill: Servant of the East India Company*, The Canadian Journal of Economics and Political Science / Revue canadienne d'Economique et de Science politique, Vol. 30, No. 2 (May, 1964)

defects in England's legal system motivated the codification of Indian law."[188]

Thus, while drawing a criminal code of India, according to this line of argument, Macaulay ignored both Indian tradition and avoided English law as the ultimate blue print. Utilitarian zeal as well as the prejudices against indigenous Indian criminal law embraced from his predecessors played an equally important role in Macaulay's approach to law reform, as did uniformity of law as an abiding concern for a modern state. While English criminal law of the time may not have been a convincing replicable model for Macaulay, that did not dilute his broader conviction that Anglicization was the best route to progress to modernization for Indians — described as an instance both of arrogant British provincialism as well as a strategy of imperialism.[189]

Thus India and Indian aspirations in general, and of those belonging to the non-elites, the disempowered and the disadvantaged in particular, it transpires, were rarely a factor in determining the colonial legal codification. Law reforms in the sub-continent actually mirrored developments in England, so that needs of English and not the Indian society were kept in view. And yet while indicting the sub-continent's indigenous legal system as primitive for failing to meet certain standards of certainty and humanity, the colonial law reformers omitted to mention that English law failed them as well. Scholars have, for instance, contrasted the much greater harshness and lack of sophistication — and indeed the blood-thirstiness — of the nineteenth century British criminal legal system, as compared to the Islamic criminal legal system *en vogue* in Bengal and most of India prior to colonial interventions. Interestingly, the Islamic criminal law was paradoxically condemned by colonial administrators as both too brutal (when humanitarianism was opted for as the mode of critique) as well as too mild (when administrative efficacy and deterrence was on the agenda) — both lines of arguments used as justification for reform [190]

It has been contended that British contemplation of India was characterized by a lasting tension between two conflicting ideals — one of similarity and the other of difference. While elaborating on the colonial creation and ordering of difference, Thomas Metcalf says:

> "At no time was the British vision of India ever informed by a single coherent set of ideas. To the contrary, the ideals sustaining the imperial enterprise in India were always shot through with contradiction and inconsistency. At some times, and for some purposes, the British conceived of the Indians as people like themselves, or as people who could be transformed into something resembling a facsimile of themselves; while at other times they emphasized what they believed to be enduring qualities of Indian difference. Sometimes, indeed, they simultaneously accommodated both views in their thinking, making it perilously

[188] DAVID SKUY, *Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System compared to India's Legal System in the Nineteenth Century*, Modern Asian Studies, Vol. 32, No. 3. (Jul., 1998).
[189] SANFORD H. KADISH , *Codifiers of the Criminal Law: Wechsler's Predecessors*, Columbia Law Review, Vol. 78, No. 5 (Jun., 1978).
[190] JÖRG FISCH, CHEAP LIVES AND DEAR LIMBS: THE BRITISH TRANSFORMATION OF THE BENGAL CRIMINAL LAW 1769-1817 (Franz Steiner Verlag. Wiesbaden 1983).

difficult to discern any larger system at all." [191]

However, throughout the colonial period and especially between 1858 and 1918, it has been argued, that it was the 'ideas of India's difference' that most powerfully influenced British conceptualization of India and Indians.[192] Recent scholarship has focused on this 'dynamic of difference' created under colonialism and also its new and continuing manifestations in international law and its doctrines, that evolved out of the age of colonialism. [193]

L The "Colonial Dynamic of Difference" and "Separatism as a Colonial Construct"

Four additional important and inter-related themes have received considerable attention in modern historiography of colonial India and which have great relevance to contemporary justice sector reform discourses in South Asia. One of these themes has already been touched upon above i.e. the colonial construct of pre-colonial India as a' despotism,' both as a far from nuanced and racist depiction of history, and also as a justification for colonial rule. However, this theme requires some additional attention as colonial depictions of Indian society and polity continue to impact post-colonial views of the pre-colonial past. Importantly, the colonial historiography's leitmotif of 'Indian despotism' also continues to impair post-colonial perceptions of the value of the traditional, the local and the indigenous as relevant social factors, as well as potentially useful models for gauging the purpose and impact of laws and legal systems. Post-colonial self-doubting and self- deprecatory attitudes can largely be attributed to lack of engagement with alternative historical knowledge, particularly modern Indian historiography that critiques familiar ways of looking at Indian history popularized or imposed during the colonial era.

Recent general Indian histories, for instance, criticize extant and typical depictions of the Mughal era in Indian history as, "… forged in a framework created by the British as they themselves devised a national history for their own emerging nation."[194] In this British self-vision, it is now argued, the picture that was fitted to the conquered nation was that of a "backward" and "incipient" people with a rigid culture, entrenched despotism and a gap between a native Hindu population and its foreign Muslim rulers — resulting in a fragile polity.[195] To this 'sorry' state of affairs the British claimed that they had brought "enlightened" leadership" and "scientific progress." This particular schema reflected not just in British writings on Indian past but also often showed through in anti-colonial nationalist historiography.[196] The enduring view of Indian

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[191] THOMAS R. METCALF, IDEOLOGIES OF THE RAJ x (The New Cambridge History of India: III.4 Cambridge University Press 1994).
[192] Id.
[193] ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (Cambridge University Press, 2005).
[194] BARBARA D. METCALF & THOMAS R. METCALF, A CONCISE HISTORY OF MODERN INDIA 2 (Cambridge University Press 2006).
[195] Id. At 2-3
[196] Id. At 3. This "exoticization" of the Mughal era as "Medieval India" or "Muslim India" further obfuscates, as contemporary critiques of such historiography show, the historical evidence of the flexibility and openness of Mughal institutions; the distribution of power and authority among different levels of society; and, the themes of dynamism, progress, change, and tolerance of diversity and difference that permeated society in that era. Id. At 26-29.

society, amply on display in literary output such as Rudyard Kipling's 'Kim' is that of a simplistic bifurcation of the natives as either the humble people of the road or those who assist the British in sustaining the Raj.[197] It cannot be taken for granted that the popular post-colonial imagination has overcome centuries of historical distortion to become better aware of historical output, which is now claiming that:

> "It is now emerging from scholarly research that pre-colonial empires, far from being centralized, bureaucratic autocracies, were flexible, nuanced, and overarching suzerainties. Although obviously bereft of modern democratic ideals, these empires and regional successor states had well-developed political concepts of both individual and communitarian rights as well as political theories of good governance."[198]

The second important theme that continues to attract the attention of historians of India is the briefly afore-mentioned 'colonial dynamic of difference,' permeating various phases and pieces of colonial policy and legislation. The extent to which such a dynamic ensured that the natives and the European rulers had different rights and status before the courts; as well as, immovable ceilings on the extent to which the natives could claim to be real 'citizens' under colonialism, can hardly be ignored as an irrelevant topic for our times. Not least because the post-colonial legal frameworks in the independent states continue to be influenced by colonial legal concepts, laws, and structures. Can it then be said that the 'post-colonial' notions of 'citizenship' have been completely emancipated from the much more limited concept of 'subject hood' under colonialism? Nasser Hussain, for instance, brings forth not only the intractable tension between the colonial notion of 'rule of law' and its invocation of 'emergency powers' for tackling political crises; but also, the continuation of similar notions of 'rule of law' and 'emergency powers,' as well as their tensions, in post-independence South Asia.[199] Similar historical revisionism is also focusing on existing understandings of anti-colonial nationalism. Additionally, it is being argued that the vibrancy of the politics and culture of anti-colonial modernity is not adequately captured by sharp distinctions between 'tradition' and 'modernity,' or 'Indian tradition' and 'European modernity.' Therefore, it was not just in the stark "us" and "them" or "our past" and "their modernity," that colonial intellectuals sought escape routes from colonial oppression.[200] In what has been described as the 'arena of the decolonization of South Asian history,' historians are highlighting "…many contested visions of nationhood and alternative models of decolonized states in South Asian anti-colonial discourse," that "…have gained heightened relevance in the new millennium."[201] They claim that the "… historical specificities of the post-colonial political transition generally witnessed the smothering of diversity and the inheritance of colonial structures of state and ideologies of sovereignty by

[197] Id. At 133.
[198] SUGATA BOSE & AYESHA JALAL, MODERN SOUTH ASIA: HISTORY, CULTURE, POLITICAL ECONOMY 202 (Routledge 2002).
[199] NASSER HUSSIAN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW (The University of Michigan Press 2003).
[200] SUGATA BOSE & AYESHA JALAL, MODERN SOUTH ASIA: HISTORY, CULTURE, POLITICAL ECONOMY 83 (Routledge 2002). At 90-91.
[201] Id. 201

mainstream nationalist elites."[202] There was, however, a promise of a difference so that "[C]olonial subjects, so long denied and divided along lines of religion, language, tribe or ethnicity, were to be treated to the full-blown rights of equal citizens."[203] The jury is proverbially out on whether the promise was kept.

Related to this theme is a third theme of the colonial modes of governance such as a centralized civilian bureaucracy, with a paternalistic outlook but vast iron clad coercive powers. The highly centralized and strong executive dominated form of government that continues a robust post-colonial existence, also directly traces its roots to the strong executive governance in a "distinctly colonial form," through the district "collector" in charge of a district under Governor General Warren Hastings. Themes of racial exclusion and centralized government run parallel as the establishment of centralized colonial bureaucracy was followed by subsequent racist exclusionary policies of the Company Charter of 1793. The Charter said that all civil appointments above a certain level of pay were to be held by those of British European origin. Meanwhile, the district collector was entrusted with the responsibilities of tax collection, control of police as magistrate, and, often as a judge he also decided cases in court. This converted him into a veritable omnipresent and omniscient demigod in matters to do with revenue, policing and justice.[204] Further reforms by Lord Wellesley, who in 1802 formed College of Fort Williams at Calcutta to teach local languages to new officials, and also the establishment of College at Haileybury in England in 1804 for training of the future colonial officials in India, created, it has been claimed, the "famed 'steel frame' of Indian administration," i.e., the Indian Civil Service.[205] The institution and culture of a centralized and all-powerful civil bureaucracy in Colonial India has continued resonance in the post-colonial context, forged as it was to govern natives, not 'citizens.' Under colonialism, it has been argued, the notion and rights of citizenship was not one of the boons on offer; at the same time, colonial forms of governance relied on modes of categorization and classification of the ruled, which had serious long-term divisive implications for colonial society. The crown raj made certain that it stymied any move towards the acquisition of substantive citizenship rights. In colonial India there were to be no citizens, only subjects of the empire and of 'traditional' princes."[206]

Finally, there is the important theme of the 'separatism,' of the Indian communities. One aspect of this theme is 'separatism' as a colonial construct, given sustenance by British historiography that depicted India as a land of various people who were clearly divided along religious, linguistic, and cultural lines. The other aspect is 'separatism' as a deliberate colonial policy. Some historians have recently exhorted the need to discard colonial definitions of and bracketing of Indian society as 'majority' and 'minority,' given the long tradition of rulers in pre-colonial India sharing out sovereignty along different layers of sub-continental polity.[207] They point out how these colonial constructs led to fears of balkanization in anti-colonial nationalists, as

[202] Id.
[203] Id.
[204] BARBARA D. METCALF & THOMAS R. METCALF, A CONCISE HISTORY OF MODERN INDIA 59 (Cambridge University Press 2006).
[205] Id. At 60.
[206] SUGATA BOSE & AYESHA JALAL, MODERN SOUTH ASIA: HISTORY, CULTURE, POLITICAL ECONOMY 83 (Routledge 2002).
[207] Id. At 205

'minorities' were seen as pawns in hand of colonial rulers. This contributed, they argue, to their treatment of even legitimate local and provincial concerns as distractions from issues concerning central state authority. The resulting assertions of singular, secular nationalism at the cost of legitimate religious, linguistic, and other communal rights and autonomy to diverse regions continue to deeply divide post-colonial polities. At the same time, 'particularistic identities,' however much reinvented in the mold of colonial modernity, it is argued, cannot just be wished away and needed to be accommodated.[208] 'Separatism' as a colonial construct and the colonial policies promoting a notion of and status as 'separate' communities, has been exhaustively explored in contemporary Indian and Pakistani historiography.[209] Especially, the second half of the nineteenth century evinces growing British conviction that the indigenous society was fundamentally divided along religious lines, and through their policies, they solidified and intensified a sense of religious difference.[210] Sugata Bose and Ayesha Jalal succinctly describe the aforementioned themes, colonial constructs, and the myriad resulting dilemmas:

> "The idea of unitary, indivisible sovereignty was a foreign import into Asia and Africa from post-enlightenment Europe. But there was an embargo on the export of rights of citizens of sovereign states to Europe's colonies. This distortion in the international trade in ideas of sovereignty and citizenship had large implications for the quest to achieve freedom and democracy without riding roughshod over legitimate communitarian rights. The colonial state in India claimed to occupy 'neutral' ground above indigenous society which, in its view, could do no better than squabble over the sectional interests of its component parts. Through rigid classificatory schemes employed in colonial censuses and maps, the state made it harder to maintain the peaceful co-existence of multiple social identities, even though colonial constructs never wholly succeeded in shrinking the mental horizons of colonized peoples. Once colonial modernity had redefined 'traditional' social affiliations, the way was open for the construction of divisive political categories that might deflect unified challenges of anti-colonial nationalists."[211]

All these are of course interrelated themes with great post-colonial relevance as they provide important insights into various colonial constructs, modes of governance, and institutions that continue to exist in post-colonial India and Pakistan.

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[208] Id. 203

[209] *See* FRANCIS ROBINSON, SEPARATISM AMONG INDIAN MUSLIMS: THE POLITICS OF THE UNITED PROVINCES MUSLIMS, 1860-1923 (Oxford University Press 1993); and also, AYESHA JALAL, SELF & SOVEREIGNTY: INDIVIDUAL & COMMUNITY IN SOUTH ASIAN ISLAM SINCE 1850 (New York: Routlege 2000)

[210] CATHERINE B. AHSER & CYNTHIA TALBOT, INDIA BEFORE EUROPE 291 (Cambridge University Press 2006)

[211] SUGATA BOSE & AYESHA JALAL, MODERN SOUTH ASIA: HISTORY, CULTURE, POLITICAL ECONOMY 83 (Routledge 2002). At 202. As Robert Travers says: "Indeed, the way that the language of ancient constitutions worked to entrench the idea of Muslims as 'foreign invaders, and the Hindus as the ancient 'inhabitants of India' may have been one of its most important legacies in the longer term." *See* ROBERT TRAVERS, IDEOLOGY AND EMPIRE IN EIGHTEENTH CENTURY INDIA: THE BRITISH IN BENGAL 26 (Cambridge University Press, 2007).

III. TOWARDS A NEW APPROACH

A Learning from Context

The existing Pakistani legal and judicial discourse culture is reminiscent of what Upendra Baxi describes as "juristic *dependencia*" i.e., a legal culture where legislative draftsmanship and judicial interpretation overtly relies on foreign models and remains conditioned by the development of these models. Such a culture has reduced the contemporary Indian legal and judicial system, according to Baxi, to "a subordinate, almost *vassal* legal system, thereby only *occasionally* serving the needs of Indian society."[212] What Upendra Baxi describes has much resonance for Pakistan as well. Having said that, this article has not set out to establish that there is no element of credibility to the 'inevitable modernization argument' or even the 'desirable modernization argument,' that have been discussed in this article. The ideas and ideals of the uniformity, certainty and consistency of laws; of equal treatment under the law, regardless of 'status;' of the safeguards of 'due process' and 'natural justice;' of abstract rules of universal application rather than special categories of dispensation for different groups and the rampant use of discretion; and of embedded constitutional rights for citizens etc., are all ideas that beget strides in right direction. Modern constitutional states like Pakistan are committed to these ideals; at least in principle. However, this article further argues that if the diverse 'narratives of colonial displacement' that put forward the 'radical displacement argument' are examined, it turns out that while the colonial legal project made strides towards the establishment of the aforementioned ideals, it was also often characterized and influenced by very different goals and outcomes. These were the imperatives of pure domination and subjugation; the exigencies of shifting and contradictory policies; internal ideological and intellectual paradoxes; political expedience and real politic; extractive appetites; regional variations and local imperatives; and differential as well as, at times, inhumane, treatment of colonial subjects. While it is difficult to ignore the colonial legal project's contribution towards bringing a certain level of desirable structure, consistency, uniformity and predictability to the Indian legal system, it is equally self-deceiving to ignore where it clearly deviated from or undermined these very principles. To that extent, it could be as much of a 'despotism' as the ostensible 'despotism' it was proclaiming to replace. That makes it necessary to gauge the contemporary relevance and impact of post-colonial laws and elements of its legal system that survive unchallenged from the era of colonial despotism.

In the post-colonial context, this article, therefore, posits that despite the aforementioned paradox of the colonial legal project, a scrutiny of its real context, intent and outcomes has been largely absent from the Pakistani justice sector discourse. This article argues that the 'narratives of colonial displacement,' especially those making 'the radical displacement argument' ought to necessarily, inform this discourse. This is quite apart from the independent arguments made earlier in this article for the development of a sociological insight into law. The primary additional pragmatic justification for this view is that if there is any credibility to the argument of major displacements of pre-colonial indigenous legal cultures and methods and the resulting public alienation described in these narratives, the departure of the British from India has not

[212] UPENDRA BAXI, THE CRISIS OF THE INDIAN LEGAL SYSTEM 43 (Vikas Publishing House 1982).

made this a matter of pure historical interest. Unintelligibility of law, lack of access, legal disempowerment, differential treatment under the law, abuse and indeed the coercion of law – and all of these factors leading to public alienation from the legal system – are after all recurrent themes in Pakistan's justice sector reform debates. As pointed out earlier, the structure, form, content and the process of law in Pakistan has not really undergone much change since the end of colonialism. However, it is quite remarkable that while diagnosing the ills and misfit of the contemporary Pakistani laws and legal system, its justice sector discourse simply avoids the obvious links between current laws and their actual historical ethos and underlying policy. It also ignores the narratives explaining the problematic impact of that ethos and policies under colonialism. It is a textbook case of a discourse intent upon selective amnesia.

While exploring the 'narratives of colonial displacement' above I have described how pre-colonial indigenous legal cultures and methods underwent various kinds of alterations, and even transformations, during the colonial era. While the pre-colonial system of Islamic law, for instance, underwent several important changes under colonialism, it also becomes apparent that several strains of indigenous dispute resolution mechanisms did survive the colonial period — co-opted, used, and amended as they were in various ways under colonialism. Post-independence there has been little official patience in Pakistan for these remnants of the past, but that does not preclude the fact that they survive, and even at times flourish (whether autonomously, in opposition to, or at times in complex hybrids with the formal legal system). What the Pakistani justice sector seems to be oblivious to is the arena of struggle that contains tensions and contestations between the formal legal system and the public; as well as the tensions and contestations between state run dispute resolution mechanisms and traditional as well as newly emergent notions of popular justice. Indeed one can gauge the health and outreach of the formal legal system by gauging the health and outreach of traditional and newly popular dispute resolution systems, for there exists an inverse relationship between the two. This is not to attach any value judgment to either of the two but to simply suggest that in a context where the formal and the informal are completely delinked, as in Pakistan, the fact that the informal may be gaining turf may be an indication of public lack of faith in and accessibility to the formal. As law is not just a mode of dispute resolution, but also a significant terrain for nation making; for community building; for development through distribution; and for all manners of contestations for equity and rights protections; it is imperative to see if these tasks and the expectations attached to them are shifting from the formal to the informal sphere. This is quite likely in contexts where laws have not grown and evolved with society and where the access to justice through a formal legal system is differential and discriminatory.

I should once again clarify here that when one speaks of pre-colonial indigenous legal cultures and methods, there are several obstacles to providing further detail and precision of the same. One, therefore, risks creating a romanticism and sense of longing around seemingly vague ideas. In many ways, it is very difficult to figure out what is truly indigenous and what is not and what we have is a struggle of interpretations. However, as Bernard Cohn, Marc Galanter, and many of the other authors discussed above show, though many substantive details of these diverse legal cultures and methods may have been lost over time, what is still decipherable are facets of a common ethos and process employed for dispute resolution and how that promoted intelligibility, access and reconciliation. These were and remain important societal goals that were displaced once all disputes in society became potential legal cases under an elaborate legal

and judicial system, with ultimate winners and losers. Therefore, the idea is not to revive or recreate the past – an impossible task given that society itself has evolved in many ways – but to capture what worked then for many and may still work for them now, as it resonated and continues to resonate deeply with the warp and woof of society. The idea is also to appreciate the complexity and dynamism of culture and society and its resilience to what is artificially imposed on it, and hence the resulting terrain of struggle. Finally, the idea is to acknowledge and engage with the lingering substance of colonial/post colonial social struggles. The logical follow-up questions are as to how should we interpret the post-colonial situation of law? How should we understand the common idea that reform of post-colonial law will solve (or be a prerequisite to solving) ongoing political/economic problems? An enormous literature has proliferated on these themes, debated some things, and missed others. However, the Pakistani justice sector discourse has somehow missed the essential. This is what emerges from the taxonomy of arguments from the literature of colonial displacement that are discussed in this article.

In the above context, the phenomenon of 'popular justice' emerges as a significant one due to important insights it may provide into what alternative modes of disputes resolution (that may or may not be embedded in tradition) people in a society are using and why they work for them. Even more importantly, it may point out problems with the formal legal system as well as areas of its incongruity with societal norms and aspirations. I will, therefore, conclude this article with further discussion of the concept of 'popular justice.'

B Towards a Better Understanding of 'Popular Justice' and its Contestation with Formal Legal Systems

It should be stated at the outset that the purpose here is not to essentially propose modes of 'popular justice,' as logical and desirable substitutes for the crumbling edifice of the post-colonial structure of an essentially colonial legal and judicial system. Several immediate concerns can be raised, and have in the past been raised about the viability and contemporary relevance of these informal legal structures and institutions and the prevalent modes of 'popular justice.' It is said that they are pre-modern and hence inadequate to meet the requirements of a modern society. It is argued that they are oblivious to the great strides made in international and national laws and the resulting commitment to modern understandings of and consensus on human rights and civil liberties. It is asserted that that they may at times be in violation of the constitutional ethos and values of the countries they exist in. Finally, it is claimed that they are open to manipulability and are indeed manipulated for coercion by patriarchy and caste and class hierarchies, to the detriment of the historically 'vulnerable' classes i.e. the women, the lower castes, the religious minorities and the poor. It would, therefore, be an engagement in somewhat deceptive romanticism and naivety to not to acknowledge that 'popular justice' may be constrained by the same social inequities of money, influence, honor and prestige that constrain the formal justice system. That the have-nots could be as helpless in persuading a *panchayat* to take action against a village influential as they may be shackled by prohibiting legal costs of the formal legal system.[213] While one is cognizant of these potential issues, a blanket indictment without further scrutiny would be no different from the rather unimaginative and almost slavish commitment extended to the perpetuation of the colonial legal structure and laws, with very little

[213] Muhammad Azam Chaudhry, Justice In Practice: Legal Ethnography Of A Pakistani Punjabi Village 29, 112 (Oxford Univ. Press 1999).

appreciation of their historical context and the contemporary underlying realities of the society on which they were being imposed. If nothing else (and at least I am open to the possibility that the modes of 'popular justice' could offer important insights into alternative dispute resolution models that could be further augmented to lessen the burden on the choking formal legal system) a better understanding of the structure, dynamics, operation and demand for modes of 'popular justice' could explain why certain sections of society opt for them. Implicit in this opting is a popular desire for alternatives to what the state provides and explicit in which is a rejection of the formal legal system. It would be an additional way to gauge the gap between laws and society, which is the primary theme of this article.

It would be elitist and self-defeating to ignore the long South Asian tradition, stemming from its colonial past, of celebrating the valiant 'outlaw' as a protector of the weak against the strong. Moreover, his/her depiction as the nemesis of the coercive hegemony of landlords, politicians and their instruments of coercion: the judge, the civil servant and the police. At the same time, it ought to be noted that Pakistan's contemporary political discourse is full of unsubstantiated romantic yearnings in various quarters, for a revival of traditional dispute resolution mechanisms such the *panchayat* and the *jirga*. Various artistic and literary forms of Pakistani popular culture i.e. films in Urdu and in regional languages, popular literature and street theater etc., provide important insights into the attitudes of people to what they consider to be an imposing, burdensome formal legal and judicial system, especially when official discourse and narratives suppress any deviance from what is officially ordained.[214] There are interesting studies of Pakistani popular culture that focus on its open and consistent satires and critiques of the validity, fairness and efficacy of the formal legal and judicial system and the police. Many aspects of this popular culture depict the outlaw and the rebel in a highly salutary light. Existing surveys and conversations with government officials reveal that traditional dispute resolution institutions such as *panchayats*, *jirgas* etc., are still in vogue in many parts of Pakistan as modes of 'popular justice.'[215] It turns out that these institutions also at times work in conjunction with the formal legal system. They also report the continuing importance of customary laws and traditions, especially in the rural areas. [216]

Puritanical formalists with unflinching faith in exclusively statist solutions will stridently decry any attempts to better understand these traditional institutions and value systems, as a step back into the dark ages. Adhering to a faith system that visualizes a 'perfected' full-fledged formal legal system as completely in accord with society's normative aspirations, they regard any resort to traditional notions of dispute resolution as regressive. However, given the sorry state of affairs of the formal legal system, it becomes difficult to justify this stubborn intellectual lack of curiosity and ideological dogma, especially since it is apparent that parts of society increasingly seem to prefer notions of 'popular justice' to what the state has to offer. Additionally, it has been the basic underlying theme of this article that the history, social context and aspirations of people cannot be ignored, while imagining and implementing legal systems of which they are the ultimate users and beneficiaries. Furthermore, without a socio-political and cultural

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[214] See for example FAWZIA AFZAL-KHAN, *"Street Theatre in Pakistani Punjab: The Case of Ajoka, Lok Rehas, and the Woman Question*," TDR (1988-), Vol. 41, No. 3 (Autumn, 1997), pp. 39-62 (The MIT Press).
[215] See for instance, Foqia Sadiq Khan and Shahrukh Rafi Khan, a benchmark study on law-and-order and the dispensation of justice in the context of power devolution (sustainable development policy institute may 2003).
[216] Id.

understanding of the underlying strains, tensions and disputes of society, any legal governance mechanism is bound to be caught up in a quagmire of aloofness and apathy to actual social needs and demands. Society, especially one as diverse and complex, like Pakistan, has not responded very well to its inherited, and inadequately visualized and insufficiently modified, formal legal and judicial system. A closer understanding of this society is necessary to decipher any trends and themes of strident protest and outright rejection. There is perhaps a real need to acknowledge and study within this society, as Sally Falk Moore proposes, small social fields of "semi-autonomy" that "…can generate rules and customs internally," but that are "…also vulnerable to rules and decisions and others forces emanating from the larger world by which it is surrounded."[217] Her big insight is that: "…the various processes that make internally generated rules effective are often also the immediate forces that dictate the mode of compliance or non-compliance to state-made legal rules."[218] Thus, there has to be a better understanding of these social processes and their internally generated rules, even if it is to understand what it will take to make the existing system click. In other words, to better understand why the extant state-ordained system does not work, one needs to explore whether the prevalent alternatives offered to it by society work or are perceived to work, and if so then how and why.

For instance, in the Pakistani context, one cannot ignore the role played by kinship, territorial ties, group solidarity and social organization in a village context. This is imperative for a more nuanced understanding of the causes and nature of its disputes. Especially, since many of these conflicts emerge not between individuals but between groups, or they turn into group feuds that usually have a context and a long prior history.[219] Equally important is an understanding of the more typical causes for disputes, as well as the types of disputes, which may have as much to do with material interests as with special notions of 'honor' and 'dignity,' and also the factors that bring about and influence 'forum shopping' among the disputants. [220]

'Popular justice' is not a phenomenon that can be compartmentalized as exclusively post-colonial or a special idiosyncrasy of developing countries. Sally Engle Merry has, for instance, categorized and documented a wide variety of forms of 'popular justice' in highly diverse locations all over the world.[221] She highlights the "basic temporality" and "historically formed

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[217] SALLY FALK MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH 55 (Routledge & Kegal Paul 1978).

[218] Id. At 57. The semi-autonomous social field is defined and its boundaries identified by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them

[219] MUHAMMAD AZAM CHAUDHRY, JUSTICE IN PRACTICE: LEGAL ETHNOGRAPHY OF A PAKISTANI PUNJABI VILLAGE 10 (Oxford Univ. Press 1999). The author talks about the relevant social formation categories of *ghar* (nuclear or sometimes joint family), *khandan* (extended family), *sharika* (patrilineage), *biradari* (clan or lineage), *mohalla* (quarter or street) and *pind* (village). Id, at 41.

[220] MUHAMMAD AZAM CHAUDHRY, JUSTICE IN PRACTICE: LEGAL ETHNOGRAPHY OF A PAKISTANI PUNJABI VILLAGE 112 (Oxford Univ. Press 1999) 42 – 81. The writer has some interesting observations on *zan*, *zar*, & *zamin* (women, money, land) as the root causes of most Punjabi rural disputes and the further complications contributed by deeply held notions of *izzat* (honor), *sharam-o-haya* (shame and modesty), and *ghairat* (defense of honor and women)(translations are provided in the text).

[221] SALLY ENGLE MERRY, *Sorting Out Popular Justice*, in THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES (The University of Michigan Press 1993). She categorizes them as 'reformist' (that seek to increase the efficiency of the formal legal system through streamlining it and enhancing its accessibility); 'socialist' (inspired by Marxist-Leninist theories about the potential of popular tribunals to empower the masses to deal with rule-breaking and to educate them in forms of a new socialist society); 'communitarian' (inspired by attempts to operate entirely outside the state and its institutions, and

and changing quality" of popular justice in contrast to the much greater continuity and stability of the formal legal system.[222] She also brings out the paradoxical nature of the 'use' of popular justice. It can and has served at times as part of a government strategy to make the state more accessible and to promote "law and order" by extending state authority to regions and fields previously unregulated by the state. However, it has also been frequently a form of protest against the state and its legal system by the "subordinate, disadvantaged, or marginalized groups," as "a counter legal order," or as more "spontaneous acts of collective judging and violence."[223] Thus, 'popular justice' can be described "…as a judicial institution located on the boundary between local ordering and state law with ambiguous and shifting relations to each."[224] Therefore, it is distinct from both but linked to each, though in cultural terms it is, "… similar to indigenous law and opposite to state law."[225] The underlying *raison d'état* for 'popular justice' is to provide greater accessibility to the common person in terms of intelligibility, cost (in terms of both money and time), and, proximity. As a result it has greater attraction for and is predominantly used by the more vulnerable and disadvantaged — i.e., "the urban poor, rural peasants, the working class, minorities, women," rather than the elites, which prefer the formal legal system.[226]

Sally Engle Merry's most important insight is her highlighting of the point that "…the space of popular justice, between state law and indigenous ordering, is a contested space."[227] This contestation and pull between the two orderings causes popular justice to change shape and meaning over time. As a result, "…although popular justice is often pulled under the control of state law, new forms of popular justice based on local, non state forms of ordering continually arise and challenge state law."[228] And the, "context waxes and wane through processes of reform, counter reform, bureaucratization, decentralization, informalism, refusal to keep records, refusal to participate, and user preference for state law."[229] What is also important to recognize is that in all these traditions, "…the creation of popular justice is associated with a political agenda and the vision of some form of social transformation and is supported by particular class interests." [230] Very importantly, "…popular justice introduces a new ideology of conflict resolution based on nonviolence and opposition to violence of law."[231] Most of its forms have

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maintain a separate social order and moral code; at times to create a new religious or utopian social order); and, 'anarchic' (in which popular justice takes the form of mass uprisings in which ad hoc groups assume the power to judge and punish, outside the state legal system. Ordinary people can take the forms and language of state law to oppose it). Id. At 40-49.

[222] Id. At 31.

[223] Id.

[224] Id. At 32.

[225] Id. At 35. It does have certain characteristic features though, such as it is "relatively informal in ritual and decorum;" it is "non-professional in language and personnel;" it is more "local in scope" and "limited in jurisdiction;" and it more typically applies "local standards and rules" and employs "commonsense forms of reasoning," rather than the state law. Id. At 32.

[226] Id. At 33.

[227] Id. At 60.

[228] Id.

[229] Id. At 61.

[230] Id. In contexts where the more radical forms of popular justice have been 'colonized' and 'domesticated, reformist popular justice paradoxically has greater potential for social transformation through its use of a "hegemonic liberal legal order," than anarchic popular justice pursuing more revolutionary aims. Id. At 62.

[231] Id.

"…a commitment to consensual, amicable resolution of conflicts."[232] Whether it can transform power relations or not, one has to acknowledge that it is "…ideologically powerful in its capacity to imagine a nonviolent ideology of managing conflict."[233]

As an existing reality; as a proposed substitute; as a component of possible complex hybrids of the formal and the informal; as an indictment of *status-quo*; and as an insight of what people really want from a justice system, modes of 'popular justice' in a society merits close examination. Ignoring 'popular justice' neither makes it go away, nor does it extinguish the deeper societal discontentment and disharmony that the formal legal system fails to address. This makes it necessary to further understand whether and how a gap can exist between popular aspirations and official judicial dispensations. In other words, a gap between peoples' actual 'legal experience' and their 'legal consciousness.'

C The 'Cultural Hegemony of Law' — the Gulf between Legal Experience and Popular Legal Consciousness

Recent legal anthropological work has shown that a purely lawyerly and judicial approach to peoples' 'problems' can tend to lose sight of the intent, the aspirations and the expectations of ordinary people who bring their private problems to the public domain of the courts. As Sally Engle Merry shows in her fascinating legal ethnographic study of two New England towns and their lower courts, what litigants may consider as genuine problems meriting a legal remedy may end up being perceived and treated by court officials as: "… "garbage cases," "junk cases," shit cases," "difficult, troublesome and often frivolous," "low-status cases," "murky," "muddy," and evidence that people "use" the courts.[234] It is important to understand what people mean by their "problems," which, according to Sally Engle Merry, is a "…folk-category and may be their term of choice for "disputes," which is an analytic category.[235] It is necessary to appreciate the "folk concept of problem" as "…problems are part of social relationships which contain many features besides those of the conflict. They are moments in an ongoing process of exchange of offense and counter offense, which stretches back in time. Problems are thus multifaceted and emotionally intense."[236] A contradiction, however, emerges, as it turns out even in highly developed formal legal system like the United States, between the peoples' actual "legal experience" and their "legal consciousness."[237] The "legal consciousness" of the people, i.e. "…the ways people understand and use law," may be very different from how the lawyers and courts perceive the law. People of course react to and resist what they see as their claims being "…deflected, transformed, extinguished" and access thus denied to legal remedies, and try and shape the legal system to their needs rather than be shaped by it.[238]In the process, it has been argued; people's consciousness of the law undergoes change as they accumulate their realistic experience of dealing with the legal and judicial system.[239] This of course also underlines, as I

[232] Id.
[233] Id.
[234] SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 1, 14-15 (The University of Chicago Press, 1990).
[235] Id. At 89.
[236] Id. At 96.
[237] Id. At 134.
[238] Id. At 180.
[239] Id, at 5.

have indicated in the previous section, the significance of the situations in which individuals 'use' the law.

However, what motivates these people to approach the court in the first place? According to Sally Engle Merry, in the American context, they are motivated by a "sense of legal entitlement" that is based on "a broad sense of rights."[240] She highlights a desire on part of sections of American society to escape from the community and use the law to challenge social hierarchies in families and communities; to create space within established social orders; and hence positively embrace the services and entitlements available through the state.[241] She further elaborates on the historically positive role of law to invite personal problems to courts, and to make the courts more accessible to all social classes. The fact that courts have at times positively and effectively intervened on behalf of the disadvantaged (as reflected in the history and stages of legal rights activism in the USA) for protecting the weak and vulnerable; for social justice; and, against big business and corporate power; are further positive motivations for the people.[242] This of course inspires a closer look at post-colonial legal systems, and whether they have managed to instill such confidence in the disadvantaged and marginalized citizenry of these countries.

Though the participants in Sally Engle Merry's study think of themselves as entitled to the help of the courts, their experience with the courts can be disappointing as they encounter the complexity and inaccessibility of the judicial system, as well as the lightness of penalties in comparison with their expectations. Their problems are not taken seriously as "legal problems," but treated "as issues of morality or therapy."[243] This is an important insight. What it highlights also, as she says, is the "cultural domination" of the court as the courts use their legal authority to frame problems in other discourses and offer non-legal solutions, thus denying the protections and help promised by the legal system.[244] The "cultural domination" of law comes from the fact that it does not just impose rules and hand out punishments, but "…also by its capacity to construct authoritative images of social relationships and actions, images which are symbolically powerful." [245] The law thus provides "…a set of categories and frameworks through which the world is interpreted," making it "… a discourse, a way of talking about actions and relationships," and a limiting discourse in that it can assert some meanings and silence others.[246] There can thus be a contest between the different discourse of law and its categories and remedies, the discourse and the categories and remedies of morality, and, then the categories and remedies of the helping professions.[247] This vital discordance between what is a legitimate issue meriting a legal resolution in the popular imagination and what courts consider to be 'justiciable,' is often lost sight of. Ultimately, and very importantly, not taking cognizance of people's perceptions is potentially problematic and disruptive to the larger social order.[248]

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[240] Id. At 172-176.
[241] Id.
[242] Id. At 176-179
[243] Id, at 2 – 3, 8.
[244] Id. At 180.
[245] Id. At 8
[246] Id. At 8-9.
[247] Id. At 10.
[248] Id.

What should also not be lost sight of is that people may keep away from the courts in the first place as recourse to the courts can have paradoxical consequences for them. By accessing courts, they may discover empowerment *vis-à-vis* the person being complained against but then they also the risk of social stigmatization and/or reprisal. Most importantly, they may also fear loss of control through greater state intrusion of state power that may "…reformulate and reinterpret these problems' meaning and consequences." [249] This is highly relevant in post-colonial contexts like Pakistan where the relative position of power of a vast bulk of its citizens is quite weak as compared to the community as well as the state. The relative location in power relationships after all depends on strength, the willingness to use violence, and access to economic resources etc. Weakness in these spheres contributes to a sense of powerlessness, as do factors such as gender and class — though it can be argued that at times these weaknesses may also draw some more than others to the courts, as they may lack any viable alternatives.[250]

The question to ask, particularly in post-colonial societies that face an even deeper discordance between their legal systems and their end-users is whether "… law serves as an ideology with hegemonic characteristics — that it not only enforces compliance but also constructs a world which is accepted because it is legally ordered, even though some groups are privileged over others."[251] This hegemony of law lying in the "…domination inherent in the imposition on subordinate groups of a persuasive image of a social order as being *just*…"[252] This is not hegemony through force, but a hegemony that relies on "…legitimacy rather than force, on the consent of the governed rather than on coercion."[253] This is not to deny that as an ideology, law can have both "elements of domination and the seeds of resistance," so that it can be both the source of domination but may also contain opportunities for challenge to that domination."[254]

Why has law provided far less seeds of resistance to domination for the 'vulnerable' groups in Pakistan than it has created opportunities for domination by its elites is the fundamental question? That is a question which will remain unanswered unless ways are found around the 'cultural hegemony of law' to better understand the impact of law on society. By necessity, this endeavor will have to shed its ahistoricity, as well as become better appreciative of the complex sociological nuances of the interplay of law and society.

Routinely scorned advertisements ascribed to the ambulance-chaser variety of law firms often entice potential customers with the promise: 'Get the law on your side.' Perhaps it needs to be recognized that for many people and groups in post-colonial societies, who have historically never gotten the law on their side this is a deeply devastating phenomenon at several levels. Their historical and on-going 'displacement' is undecipherable to an outlook made myopic by the 'cultural hegemony of law.'

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[249] Id. At 2-3.
[250] Id. At 4.
[251] Id. At 7
[252] Id.
[253] Id..
[254] Id. At 8.

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