

Law, the State and the Maintenance of Socio-Cultural Order

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The movement of all progressive societies has been *from Status to Contract*.

Sir Henry Maine in *Ancient Law* (1861)

Abstract

As currently practiced in the courts, contemporary Euro-American jurisprudence has for the most part become a matter of the application of state-sponsored regulatory black letter law. This has had two major consequences. On the one hand the legal system has become less and less concerned with arbitration and dispute settlement – activities which are now frequently hived off elsewhere; and on the other hand the ever growing force of regulatory initiatives has rendered ‘the law’ less and less tolerant of diversity, despite the fact the populations subject to its jurisdiction are becoming steadily more plural in character.

This paper seeks to explore the significance of these developments from both a comparative and a historical perspective.

From an anthropological perspective, it is self-evident that law – however one chooses to define that phenomenon – plays, and has always played, a key role in the maintenance of every social order. In the absence of an agreed-upon set of conventions as to how interpersonal interactions should be conducted in the context of any given social arena, and also as to how disputes should be sorted out as and when they arise, chaos would ensue. Several key points follow from this proposition, including

- Law is both a necessary, and an integral, part of every social order
- Law is a context-specific phenomenon, since it is a product of, and articulated within, an almost infinite range of social arenas.
- Law is no more static than the social order from within which it emerged, or than the interpersonal interactions constantly being articulated on the basis of its premises: all are constantly subject to development, renegotiation and change.
- To fulfil its order-maintenance functions, law has at least two distinct dimensions: in addition to setting out ‘the rules of the game’, it must also provide a means whereby disputes between the players can equitably resolved.
- By their very nature, complex societies include a wide range of arenas within the context of which members of specific groups and communities deploy more or less distinctive sets of rules to order their interpersonal relationships.
- It follows that legal homogeneity is the exception not the rule: the vast majority of social orders, no less in the present than the past, display at least some degree of legal plurality.

- Despite (or perhaps because of) ever greater efforts of most contemporary jurisdictions to consolidate and homogenise themselves on a nationalistic basis, manifestations of ethnic plurality, and hence demands for the formal recognition of underlying patterns of *de facto* legal plurality, are becoming steadily more salient.

These points immediately raise at least three further sets of questions. Firstly, how and by whom are the rules of the game within any given arena established, and if necessary renegotiated? Secondly and how and by whom are the rules to be enforced, and/or disputes about their applicability to be settled? Moreover, if those questions are knotty enough in their own right, the third set – as to how those questions are to be answered in the midst of societies which are *ipso facto* plural – is proving to be yet more challenging still.

The challenge of plurality

Although I write as an anthropologist, it seems to me that contemporary jurisprudence has paid remarkably little attention to the practical implications of these challenges, with result that practicing lawyers find themselves bereft of analytical tools which would enable them to cope professionally, and above all equitably, with the conundrums with which they regularly find themselves facing in proceedings in which the *de facto* presence of ethnic distinctiveness looms large on the agenda. Having prepared expert reports on the potential significance of underlying cultural issues in cases involving charges of homicide, rape, bigamy, fraud and money-laundering in the criminal courts, of childcare, custody, domestic abuse and divorce in the family courts, of issues of probate, insurance quantum and libel in the civil courts, as well as for a judicial review challenging the adequacy of the Cremation Act and its associated Regulations, and yet another focusing on whether or not school uniform regulations had been interpreted on an equitable basis, it seems reasonable to suggest that there are few areas of law in which challenges on this score cannot be expected to arise in one form or another.

In a series of recently published papers I have sought to reflect on my experience of preparing such reports from an anthropological perspective, and in doing so for the most part took the legal wicket on which I found myself batting as given. In this paper I have decided to take one step further, and this time to turn the tables by setting out to explore the structure of the legal wicket itself.

As an anthropologist – and most especially as an anthropologist instructed to express an opinion on the underlying cultural issues in the proceedings to hand – I instantly found myself attracted to the common law foundations of the English law. I welcomed the extent to which the common

law routinely insists that things said and done can only be properly understood when set within the specific context within which they occurred, as well as its reliance on the inherently flexible concept of ‘the reasonable man’ as its principal yardstick on the basis of which the significance of the events in question should be assessed. But as I soon discovered, despite regular nods towards the common-law roots of the tradition within which they operate, the vast majority of practicing lawyers operate in an arena which is primarily ordered in terms of the provisions statutory, black-letter law. As I quickly learned, everyday legal practice, especially in the lower courts, is primarily structured with reference to statutory provisions, with the result that the vast majority of lawyers take the view that law is essentially an Austinian phenomenon. In other words it is routinely assumed the arena in which they work is one in which the courts exercise jurisdiction over the activities of legal persons (who are either free-standing individuals or their fictional equivalents, formally constituted corporations), and that their actions are – or at least should be – ordered in conformity with the rules/‘laws’ set down by, and ultimately enforced by, the state.

In these circumstances, it should come as no surprise that lawyers regularly find themselves flummoxed by the third set of questions. Besides assigning a central role to the State with respect to both to the definition and to the application of law, an Austinian vision of jurisprudence leaves little or no room within which to take significant cognisance of local patterns of customary and cultural diversity, or of the prospect that members of self-governing communities might set up their own tribunals to settle disputes amongst themselves on their own preferred terms – even if it was from just such a universe of non-centralised local jurisdictions that the common law tradition originally emerged.

Hence the answers which the vast majority of practicing lawyers would give to the queries with which I began are quite straightforward: other than in the most exceptional circumstances the rules of the game are set out in statutory legislation, duly illuminated by caselaw; and that all but the most trivial disputes be settled within formally constituted tribunals, with properly qualified lawyers on hand to offer advice to, and/or to act for the litigants, all under the close supervision of the judiciary. In these circumstances, it should come as no surprise that lawyers regularly find themselves particularly flummoxed when invited to address issues arising from the *de facto* presence of ethnic plurality in their midst. How can they cope with diversity in the midst of a statutory regime which is grounded in the premise that members of the population subject to its jurisdiction all is effectively homogeneous, such that everyone can be expected to play by the same rules? Worse still, what should they do when they find themselves confronted by communities in which members of extended families regularly generate such tight-knit networks

of mutual reciprocity amongst themselves as form a corporation, even though they have not formally incorporated themselves? Can ‘the law’ safely disregard phenomena which could be – and not infrequently are – regarded as illicit and hence potentially criminal conspiracies? Worse still, how should legal institutions respond to the preference of most such communities to settle any disputes that may arise between their members on their own terms, according to their own premises, and deploying their own preferred sanctions, as and when they consider it appropriate to do so? To be sure there is nothing intrinsically illicit about the prospect of communities setting up their own private jurisdictions of this kind. However the most obvious way of dealing with such conundrums – namely to look the other way – can no longer be sustained when members of these alternative jurisdictions go ‘forum shopping’, and seek the assistance of the regular courts to overturn the decisions of private tribunals.

The bottom line in situations of this kind is plain to see. Besides assigning a central role to a presumptively homogeneous State with respect to the formulation as well as to the application and enforcement of law, an Austinian vision of jurisprudence leaves no room within which to take cognisance of local patterns of customary and cultural diversity, or of the prospect that members of self-governing communities might set up their own tribunals to settle disputes amongst themselves on their own preferred terms – even if it was from just such a universe of non-centralised local jurisdictions that the common law tradition originally emerged, and onto which Austinian principles were subsequently grafted.

This state of affairs is by no means unique to Britain. Whilst English law may have taken the best part of a millennium to move from one end of this spectrum to the other, in the contemporary world virtually all jurisdictions – whether of ancient origin, or of relatively recent construction – have homed in on this vision of law. Hence close to two hundred sovereign jurisdictions, all of which are grounded at least in principle in Austinian premises, are currently affiliated to their United Nations. The vigour with which these premises are applied varies a great deal. At one end of the spectrum lie those regions, currently dubbed ‘failed states’, in which the institutions through which those premises are expected to be implemented have entirely collapsed. Meanwhile at the other end of the spectrum we find a much larger group of more stable jurisdictions, many of which identify themselves as advanced democracies, which can best be described hyper-Austinian in character. Their legislatures have assigned the state an ever-greater range of statutorily defined regulatory powers, whose impact has begun to penetrate ever more intrusively into all aspects of the social order.

On the face of it, the grounds on which such regulatory intrusions are justified seem sensible enough: their avowed aim is invariably to promote the health, the safety, and above all the personal, physical economic, social and political security of the population over which the state in question exercises its jurisdiction. But to the extent that an Austinian regime marginalises and ultimately delegitimizes all forms of dispute settlement other than those implemented through its own procedures, commitment to regulation can all too easily become a self-reinforcing activity. Once it is suggested that in the absence of a system of regulatory restraint – whether directed at ‘consumer protection’ or at ‘Homeland Security’ – there is a danger that malfeasance might run riot, so much so that the integrity of the entire socio-economic order could be at risk, the way is open for hyper-regulation to take place. Hence even though a rising tide of regulatory requirements have begun to intrude ever more comprehensively into our personal lives – as one is immediately reminded when one passes through an airport, opens a bank account, or cashes an insurance policy – we citizens for the most part put up with these intrusions, tamely accepting the authorities’ arguments that brings incalculable benefits to law-abiding citizens, and as such are a valuable – and in indeed a *necessary* – contribution to the public good. Such is modernity.

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The growth of regulatory jurisprudence and its consequences

As one surveys the consequences of modernity, it is clear that social initiatives taken in their name often have downside consequences which are at least as significant, and sometimes more significant than their intended beneficial up-side. Austinian efforts to reform and improve social and cultural practices by regulatory means – thereby shifting responsibility for constructing, monitoring and ultimately enforcing the rules of the game from the community within which they are deployed to the state – are particularly vulnerable in this regard. Efforts to do so also have a history. The moment we place current developments in a historical context, it is obvious that regulatory regimes in the contemporary sense were once virtually unknown. By contrast the twentieth century witnessed an exponential growth in the efforts – and even more significantly the *capacity* – of nation-states to regulate, and hence to control, the behaviour of members of the population subject to their jurisdiction. Such regulatory methodologies were initially perfected by totalitarian regimes of both the left and the right. However recent developments in information technology have given rise to the construction of data-bases which are just as comprehensive, and far more readily searchable, than anything the Stasi, the KGB and the Securitate were ever able to assemble, thereby providing democratically constituted regimes with

all manner of subtle opportunities to monitor the behaviour of those over whom it exercises jurisdiction. To be sure the purposes which such monitoring initiatives are designed to serve differ sharply from those of devised by their totalitarian predecessors. Their central objectives – insofar as they are publicly announced – are not so much to detect and suppress every sign of resistance to the unchallengeable hegemony of the state, but rather to provide a means of detecting the presence of, and deterring the practice of, an immense range of less devastating forms anti-social activity, ranging from concealing one's true income to avoid the payment of tax to the downloading of pornographic material from the internet.

Just what are the consequences of these developments? That they have reinforced the powers of the state is self-evident. But at the same time they have also significantly extended the jurisdiction of the courts, given that an unremedied breach of regulatory requirements invariably becomes an offence. It follows that regulatory regimes are inherently criminogenic, in the sense that they steadily extend the range and character of the transgressions that can potentially attract criminal sanctions. Should we welcome such developments? Those responsible for their introduction routinely argue that such initiatives provide the vulnerable – no less at a collective than at an individual level – with an enhanced degree of security and protection. On those grounds it can readily be argued that all such initiatives are inherently progressive: by formally setting standards in this way, the quality of life of all those resident within the jurisdiction will of necessity be significantly enhanced – or so it is argued.

But no matter how well meaning the reformers' objectives may have been, the downsides of such initiatives also require careful scrutiny. One of the most obvious results of efforts to spell out the rules of the game in ever more detail has been the creation of more and more law. As Sir Menzies Campbell recently pointed out, between 1997 and 2007 Parliament voted to place no less than 382 new Acts on the Statute Book, including ten Health Acts, twelve Education Acts and twenty-nine Criminal Justice Acts, thereby creating more than 3,000 new criminal offences (Quoted in Bingham, 2010:40). There has also been a similar massive expansion of the statutory rulebook in almost every contemporary jurisdiction. But with what consequences?

By its very nature, law is a means of setting normative standards, beyond the boundaries of which behaviour is likely to be regarded as deviant at best, and deserving the application of some sort of sanction at worst. From this perspective, contemporary Austinian initiatives can usefully be identified as 'super-normative' in character: they set homogeneous norms with respect to an ever-wider range of behaviour, to which conformity is expected across the length and breadth of the jurisdiction. Yet more significantly still, such initiatives tend to confound the rules of the

game with the way in which it is played, whilst also insisting that when push comes to shove, it is the state and its agents of who should fill the role of referee. In doing so, the state removes the process of norm setting and norm enforcement away from the community of which the dispute occurred – and away from the negotiation disagreements to reach some sort of *modus vivendi* amongst the players themselves – in favour of intervention by an impersonal statutory agency.

This has even more far-reaching consequences. As the process of norm setting and enforcement becomes steadily more impersonal (at least from the actors' point of view), so the moral force which once underpinned them steadily drains away. As this occurs, respect for the underlying premises of the norm rapidly becomes less and less significant. Instead, compliance begins to be envisaged as a matter of devising strategies that enable actors to insist that their doings have remained within the limits of the letter of the law, regardless of what its spirit might have been. The provision of such services is an extremely fruitful source of business for many contemporary lawyers. To the extent that this is so, it follows that one of the immediate consequences of the introduction external regulatory regimes is the construction of strategies which enable those at whom the regulation is directed can limit the impact of the new rules on their own preferred modes of playing the game. A variety of routes can be deployed to achieve this outcome. The most obvious - and indeed the most legitimate, strategy is to hire a lawyers to advise how one's can be organised to keep on the right side of the regulations, whilst still leaving plenty of scope for one to continue playing the game to one's own advantage. Unfortunately professional advice of this kind, as well as the construction of strategies by means of which to fulfil such an objective, does not come cheap. Hence those with more limited resources have little alternative but to keep their heads down, and to hope that deviant strategies, which many well have been criminalised by the regulatory initiative in question, will remain unnoticed.

Reformers may act with the best of intentions; but they all too often overlook the fact that efforts to reform human behaviour by legislative means rarely, if ever, precipitates the desired result: in the absence of at least some degree of moral commitment of actors to the underlying premises of norms which have been imposed on them 'from above', there is every prospect that players will devise all manner of strategies by means of which to evade their intended purpose.

Regulation and Plurality

When such regulatory initiatives are deployed in contexts where the population at large includes a significant degree of ethnic or religious plurality, the consequences are likely to be particularly egregious. Since such initiatives invariably seek to promote and secure the normative

assumptions of the dominant majority, and more often than not the idealistic premises of members of a progressively minded elite drawn from its ranks, there will of necessity be differential levels of disjunction between the normative assumptions which underpin the regulatory and those which are routinely deployed within various sub-sections of the population at large. In these circumstances

Members of the dominant majority possess an institutional advantage which ensures that the capacities and self-respect which make their culture possible are relatively secure. This is not the case with minority cultures, however. Since the birth of the modern state, non-dominant populations have been subjected to extreme assimilationist pressures. Proponents of multiculturalism argue against such coercive practices, claiming that justice requires the state to respect group-based cultural differences. Institutionalized forms of respect are particularly needed where state policies which purport to be neutral mask a bias toward the needs, interests, and inherited particularities of the majority. Such ultimately repressive systems create a range of burdens, barriers and exclusions for members of non-dominant cultural communities. (Sachar 2001:25).

To sum up, two key points emerge from this dimension of my argument. Firstly that efforts to homogenise the moral and behavioural deployed within any given jurisdiction will by their very nature identify the behaviour of communities who whose members routinely deploy an alternative set of norms as socially deviant at best, and as unacceptably criminal at worst. Secondly, and just as significantly, as regulatory initiatives have steadily extended the scope of the jurisdictional responsibilities of the state, community-based context-specific methodologies for the resolution of interpersonal conflicts and disputes have been similarly discredited, such that the state and its formally constituted legal institutions have come to see themselves as the principal – and sometimes even the only legitimate guarantors – of social order. Yet no matter however eagerly the proponents of progress, of rationality and of enlightened modernity may press their case on this front, a further key feature of our contemporary condition is becoming increasingly obvious: that efforts to deploy such homogenising initiatives in jurisdictions which are significantly plural in ethno-religious terms invariably precipitate more or less disruptive patterns of ethnic polarisation: in other words the very inverse of the goal that the regulatory measures were designed to achieve.

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Experiments in the application of legal positivism in an Imperial context

In Britain, as in most other contemporary jurisdictions, policy makers and the public at large currently display very little awareness that this might be so. Locked into the assumption that

progress is both a universalistic phenomenon and a one-way street (a prescriptive vision which can be traced back to the enlightenment), it is taken for granted that moves towards an greater degree of behavioural, institutional, and legal homogeneity are part and parcel of the natural order of things, and a manifestation of modernity itself. That such a condition of myopia should remain so firmly entrenched, given the unmistakeably plural character of the contemporary global order, as well as of the great majority of the localised jurisdictions of which the global order is composed, is quite remarkable; and what is yet more remarkable still is that virtually every European jurisdiction remains locked in this condition even though the experience they acquired during the course of their acquisition and loss of overseas empires should have taught them otherwise. As even the briefest examination of the fate of efforts by the British Crown to extend its jurisdiction to include its newly acquired Indian Raj serves to demonstrate, Britain was well placed to draw on that experience as a source of policy inspiration when the worm turned, with the result that such substantial settlements created by ethnic colonists of South Asian origin began to emerge in the heart of its former empire during the latter part of the twentieth century. In Britain as in much of the rest of Western Europe, the challenges which have erupted in the second condition are in many respects a mirror image of those which were encountered in the first.

As Europeans began to establish trading stations in India during the course of the sixteenth century, it was plain as a pikestaff that its India's indigenous population was far too large, and its socio-legal institutions were far too sophisticated, and its rulers were far too powerful for them to be able to get away with declaring that the territory over which they had gained control to be *terra nullius*, the tactic that they routinely deployed in the course of establishing the legitimacy of colonial settlements in the Americas. Indeed for several centuries after they first arrived they found themselves largely confined to a small number of trading hubs, of Bombay, Madras and Calcutta were by far the most significant as far as the British were concerned. Within the security of these settlements they viewed the prospect of being arraigned before, or being required to settle their disputes in, 'native' tribunals with horror. But a solution was readily at hand. They simply adopted the strategy which had long been standard practice in Indian Ocean contexts: they set up their own systems of dispute settlement, ordered in terms of their own familiar forms of jurisprudence.

Over the course of the next two centuries the balance of power began to change, with the result that European traders began to break out of the hubs to which they had hitherto been confined, and from the middle of the eighteenth century began to conduct military initiatives which

delivered ever-larger swathes of ‘native’ territory into their hands. As this happened the East India Company became an ever more salient player in India’s economic, political and jurisdictional landscape. The details of what transpired deserve our close attention.

Following the defeat of Suja ud Daula’s forces at the battle of Buxar in 1764, the East India Company forced the Delhi-based Mughal Emperor, Shah Alam, to cede *Diwani* rights – the right to collect taxes, and hence *de facto* administrative responsibility for – a vast swathe of territory covering the greater part of Bengal, Bihar and Orissa. But in the course of so doing the Company did not challenge the jurisdiction of the Mughal Emperor *per se*; rather it inserted itself under the Mughal umbrella in the role = at least in principle – of one of the Emperor’s many regional satraps. But the alien cuckoo rapidly outgrew its nest. During the course of the following century the Company steadily extended the territory under its control, nominally representing themselves as the Emperor’s faithful servants as they did so. Not surprisingly, the contradiction became so egregious that could not be sustained. In 1857 the Sepoys of Company’s Bengal Army decided that they had had enough, and set off an uprising which sought to restore the Mughal Raj. However in a bloody process of repression the British authorities managed to put the uprising = which they dubbed ‘the Mutiny’ down – and having done do to despatch the last Mughal Emperor, Bahadur Shah, to exile in Rangoon, where he passed away five years later. Having overthrown the Emperor of which the Company was nominally the servant defunct, the nominal jurisdictional umbrella under which it had hitherto operated was no more: it had quite literally evaporated. Nevertheless the rule of law had to be sustained, and the anomaly was in due course rectified by means of the passage of the Westminster Parliament’s Government of India Act of 1858, which transferred responsibility for the governance of the subcontinent from the Company (or perhaps the Mughal Raj) to the British Crown. India was now subject to the jurisdiction of English law.

India becomes a test-bed for the articulation Austinian modernity

Although the ultimate driving force behind Britain’s gradually expanding to military conquest of Indian subcontinent had always been commercial in character, so much so that it came to be identified as ‘the jewel in the Crown’, from the beginning of the nineteenth century steadily growing pressures from those of evangelistic and modernising bent led to steadily more extensive efforts being made to legitimise the whole exercise. Hence even though the underlying commercial objectives of the East India Company and all its works remained as powerful as ever, its presence in the subcontinent began to be steadily more explicitly justified by suggestions

that its ultimate objective was charitable in character, namely a civilizing mission which sought to drag ‘the natives’ out of their ‘primitive’ condition of backwardness and into the light of (preferably Christian) modernity.

One of the most sophisticated articulators of this view was Thomas Babington Macaulay (1800 - 1859), whose much quoted minute setting out the role which education should be expected play in facilitating, and above all in justifying, the administration of Empire reads as follows:

We must 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 colour, but English in tastes, 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.

In other words education should be used a vehicle for social reform, by producing an anglicised elite who would in due course pass on all the benefits of English knowledge, morals and opinions to the population of the subcontinent at large. At the same time Macaulay was no less concerned to introduce a parallel system of legal reform, with the result that he applied himself to the preparation of a Penal Code which would be comprehensive and coherent enough to be applied on a uniform basis in all the territories which had been rendered subject to control of the Company and its courts.

Whilst considerable progress was made with respect to the construction of the text whilst Macaulay was there to promote it, he was never able to muster sufficient degree of political momentum to bring the project to fruition. It consequently fell temporarily into abeyance when Macaulay returned to Britain. However, everything changed in the aftermath of 1857. Once the British Crown had formally subsumed the Mughal Raj into its jurisdiction, it followed that newfound British Raj had to be provided with explicit constitutional and jurisdictional foundations, the basic principles of which were set out in Government of India Act of 1858. Whilst the central expectation of that Act was that English administrative and legal principles should be exported wholesale to the new Raj, it was self-evident that these would require all manner of adjustment to render them applicable in an Indian context, with the result that the task of generating the subordinate legislation was delegated to the Governor-General’s (and later the Viceroy’s) Governing Council, to which the Sir Henry Maine was promptly appointed to the position of Legal Member, not least in the light of the publication of *Ancient Law*, further subtitled *its connection with the early history of society, and its relation to modern ideas*. As a result Maine found himself playing a central role in a series of major legislative initiative: the

construction of a comprehensive set of laws with which all the subjects of the newly constituted Raj would in future be required to comply. One of these projects was completed before he even arrived in India to take up his post: Macaulay's draft was taken out and dusted off, and in due course promulgated as the Indian Penal Code of 1860 – a measure which is still provides the foundation of criminal law throughout the subcontinent. But whilst those implementing this initiative as well as its many successors looked as a matter of course to the premises and procedures of what they regarded as world's most advanced and sophisticated jurisdiction (in other words their own) as their principal source of inspiration, they did not seek to reproduce it in an unamended format in their new Raj. Rather they took the opportunity – in keeping with the intellectual tenor of the times – to update the whole structure, and to do so in conformity with rational Austinian premises. Hence their objective in so doing was to produce a *superior* version of English Law, with the result that Sir James Stephen was subsequently able to claim the Indian Penal Code is best understood as

The singular and most beneficial result of ... work ... by the most distinguished author possessed of as great experience and as much technical knowledge as of his time ... [to reproduce] the criminal law of England freed from all technicalities and superfluities, systematically arranged, and modified in few particulars (they are surprisingly few) to suit the circumstances of British India. (quoted in Banerjee 1984: 177-8)

Just over a decade after the promulgation of the IPC, Stephen sought to complete this exercise by drafting the Indian Evidence Act of 1872, a measure which, as he put it himself,

Reduced the whole subject to a plain, short and explicit form [which] compressed into a very short compass the whole of the English and Indian Law of Evidence. (Banerjee 1984: 185)

Nor were his efforts to implement pursue these Austinian ideals restricted to India. By 1878 he was urging the Westminster Parliament that the time was ripe to build on the rationalisation of English law and practice which had been explored and implemented on an Indian test bed, since the whole edifice could readily be used to introduce the clarifying revisions which had thereby been devised to revise and modernise English criminal law and procedure. His efforts met with little success. No matter how much such colonial experiments might provide a convenient means of extending English jurisdiction into Britain's overseas possessions, legislators in the 'mother of Parliaments', let alone the combined forces of the Inns of Court, displayed very little interest in repatriating these allegedly 'progressive' developments overseas. Sir James Stephen's efforts came to nothing. Austinian strategies of reform turned out to be far easier to implement when they were promulgated from 'from above' by an imperially-inspired Governor-General's Council than when laid before a (no matter how imperfectly) representative Parliament.

There was also another lesson to be learned here. Whilst Sir James Stephen and the Viceroy's Council may have used the power of the Raj to lay down both 'the Law' itself, as well as the rules by which the legal game should be played (the Rules of Evidence) in their newly acquired jurisdiction, it did not follow that the population for whose benefit these 'improvements' had been introduced would come to heel in the manner that the reformers so confidently expected. As Bernard Cohn remarks:

The present attitude of the Indian peasant was an inevitable consequence of the British decision to establish courts in India patterned on British procedural law. The way a people settle disputes is part of its social structure and value system. In attempting to introduce British procedural law into their Indian courts, the 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. They did not use the courts to settle disputes, but only to further them.

Nevertheless such processes invariably develop their own dynamic. Whilst the British Raj has long since evaporated, many of its key institutions still live on. The subcontinent's Legislatures continue to pump out mountains of reformist Black Letter law, the greater part of which is honoured in the breach; and its courts are quite literally overwhelmed by the volume of litigation brought to their doors – the great part of which arise from suits which are not so much designed to settle disputes, but to bring down humiliation on those against whom the claims in question have been made. The deadlock is completed by lawyers themselves, who are only too happy to collect substantial fees in return for their efforts to manipulate these arcane procedures for the benefit of their clients.

But if Stephen's efforts to precipitate legal reform did not produce the results he had hoped for either in India or Britain, Sir Henry Maine's more insightful reflections on comparative jurisprudence illuminating to this day.

From Status to Contract?

On the face of things the volume in which Sir Henry Maine articulates his much quoted aphorism to the effect that "The movement of all progressive societies has been *from Status to Contract Ancient Law*" is a study of classical legal history, although one which is also inspired by an understanding of law which is explicitly Austinian in character:

Bentham, in his *Fragment on Government*, and Austin, in his *Province of Jurisprudence Determined*, resolve every law into a *command* of the lawgiver, an *obligation* imposed thereby on the citizen, and a *sanction* threatened in the event of disobedience; and it is further predicated of the command, which is the first element in a law, that it must prescribe, not a single act, but a

series or number of acts of the same class or kind. The results of this separation of ingredients tally exactly with the facts of mature jurisprudence; and, by a little straining of language, they may be made to correspond in form with all law, of all kinds, at all epochs.

But it is curious that, the farther we penetrate into the primitive history of thought, the farther we find ourselves from a conception of law which at all resembles a compound of the elements which Bentham determined; It is certain that, in the infancy of mankind, no sort of legislature, not even a distinct author of law, is contemplated or conceived of.

The subtext of Maine's arguments come more clearly into focus once set in a wider context. Maine was writing when the scale of Britain's Imperial adventures were taking off with a vengeance, and that whilst it might have been the case that the indigenous population of the greater part of Africa, of the Americas and of Australia were 'in the infancy of mankind', such that the territories which they occupied could legitimately be regarded as *terra nullius*, such that Europeans could unilaterally establish their jurisdiction over it as an when they chose, the same could not be said of the greater part of Asia.

Hence whilst there was no way in which Maine could accept that any other jurisdiction had progressed so far as to be able to compete with the level of sophistication achieved by English law, he was equally dismissive of arguments that the whole of the remainder of humanity lagged so far behind that they could not be regarded as not having any sense of law at all. Instead he was ready to accept that many other civilisations had developed recognisable jurisdictions, even if they were all intrinsically less well developed, and hence remained more 'primitive' than those which had emerged in western Europe, and in Britain in particular. Hence immediately before he sets out his Austinian credo cited above, he notes that that

The conception of the Deity dictating an entire code or body of law, as in the case of the Hindoo laws of Menu, seems to belong to a range of ideas more recent and more advanced. "Themis" and "Themistes" are much less remotely linked with that persuasion which clung so long and so tenaciously to the human mind, of a divine influence underlying and supporting every relation of life, every social institution. In early law, and amid the rudiments of political thought, symptoms of this belief meet us on all sides.

A supernatural presidency is supposed to consecrate and keep together all the cardinal institutions of those times, the State, the Race, and the Family. Men, grouped together in the different relations which those institutions imply, are bound to celebrate periodically common rites and to offer common sacrifices; and every now and then the same duty is even more significantly recognised in the purifications and expiations which they perform, and which appear intended to deprecate punishment for involuntary or neglectful disrespect.

Everybody acquainted with ordinary classical literature will remember the *sacra gentilitia*, which exercised so important an influence on the early Roman law of adoption and of wills. And to this hour the Hindoo Customary Law, in which some of the most curious features of primitive society are stereotyped, makes almost all the rights of persons and all the rules of succession hinge on the

due solemnisation of fixed ceremonies at the dead man's funeral, that is, at every point where a breach occur in the continuity of the family.

The Hindus, he finds, have reached a stage of social and legal development well in advance of that attained by unlettered primitives: rather their achievements were much more respectable in character, since they could readily be compared with those of classical Rome.

From that perspective, the analysis he goes on to present in *Ancient Law* had a two parallel themes, one of which is quite overt, whilst the other is best identified as a quieter but much more significant subtext. On the face of it, the volume is a straightforward analysis of the progressive development of European jurisprudence from its roots in ancient Rome to the then-contemporary present of late Victorian Britain. In the course of so doing he fills out his hypothesis that this was accompanied by a steady and inherently progressive shift in emphasis from status to contract by exploring the way in which the ritually legitimated collectivities grounded in conventionally assigned relationships kinship reciprocity based around which the social order of pre-classical Rome was constructed were progressively eroded, by a growing sense of individual autonomy on the one hand, and by the growing power of the state on the other. As he puts it:

Society in primitive times was not what it is assumed to be at present, a collection of individuals. In fact, and in the view of the men who composed it, it was an aggregation of families. The contrast may be most forcibly expressed by saying that the unit of an ancient society was the Family, of a modern society the Individual.

We find in ancient law all the consequences of this difference. It is a system of small independent corporations. It is scanty, because it is supplemented by the despotic commands of the heads of households, It is ceremonious, because the transactions to which it pays regard resemble international concerns much more than the quick play of intercourse between individuals. Above all, it takes a view of life wholly unlike any which appear in developed jurisprudence. Corporations never die, and accordingly Primitive law considers the entities with which it deals, i.e. the patriarchal or family groups, as perpetual and inextinguishable.

This view is closely allied to a peculiar way in moral attributes are understood to present themselves. The moral elevation and moral debasement of the individual are confounded with the merits and offences of the group to which the individual belongs, If the community sins, its guilt is much more than the sum of the offences committed by its members; crime is a corporate act, and its consequences to many more persons than those who shared in its perpetration. If, on the other hand, an individual is conspicuously guilty, it is his children, his kinsfolk, his tribesmen, or his fellow-citizens, who suffer with him, and sometimes for him.

It thus happens that the ideas of moral responsibility and retribution often seem to be more clearly realised at very ancient than at more advanced periods, for, as the family group is immortal, and its liability to punishment indefinite, the primitive mind is not perplexed by the questions which become troublesome as soon as the individual is conceived as altogether separate from the group.

Read with without reference to the context within which Maine was writing, his discourse on these matters might appear to be wholly historically oriented. But as we have seen, Maine was

also acutely aware that customary laws and practices of this kind were not restricted to the historical past: on the contrary they were alive and well in the contemporaneous present, and routinely presented themselves to those responsible for the administration of Britain's rapidly growing range of Imperial possessions. From this perspective Maine's suggestion that "The movement of all progressive societies has been *from Status to Contract*" could be read as much more than a judicious assessment of historical processes: it could equally well be interpreted as providing a guideline to the legal premises around which contemporary civilizing missions in Britain's burgeoning Empire should be implemented. No wonder the Governor General's Council was so eager to recruit Maine as its Legal member.

Problems of application

It is one thing for those in power to proclaim that the rules of the game have been changed: but it is quite another to persuade the players to adopt them, especially when the existing rules underpin the structure of the social arenas within which the players routinely operate. From this perspective it is worth noting that the enthusiastic Austinians who prioritised the erection of a comprehensive criminal code, and with along with that an equally comprehensive law of evidence, chose – whether they were aware of it or not – to bat on a relatively easy wicket. Considered from their own perspective, their choice is easy to appreciate: given their assumption that legal proceedings of all kinds should be implemented within courts of law deploying an explicit set of procedural rules, and operating under the aegis of the crown, India's indigenous legal systems would undoubtedly have appeared in their eyes to have been in a parlous state. In his initial review of the issues, Maine offered the following commentary on how this had come about:

the codes obtained by Eastern societies were obtained, relatively, much later than by Western, and wore a very different character. The religious oligarchies of Asia, either for their own guidance, or for the relief of their memory, or for the instruction of their disciples, seem in all cases to have ultimately embodied their legal learning in a code; but the opportunity of increasing and consolidating their influence was probably too tempting to be resisted.

Their complete monopoly of legal knowledge appears to have enabled them to put off on the world collections, not so much of the rules actually observed, as of the rules which the priestly order considered it proper to be observed. The Hindoo code, called the Laws of Menu, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindoo race, But the opinion of the best contemporary orientalist is, that it does not, as a whole, represent a set of rules ever actually administered in Hindostan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, ought to be the law.

It is consistent with human nature and with the special motives of their authors, that codes like that of Menu should pretend to the highest antiquity, and claim to have emanated in their complete form from the Deity. Menu, according to Hindoo mythology, is an emanation from the supreme God; but the compilation which bears his name, though its exact date is not easily discovered, is, in point of the relative progress of Hindoo jurisprudence, a recent production.

The fate of the Hindoo law is, in fact, the measure of the value of the Roman code. Ethnology shows us that the Romans and the Hindoos sprang from the same original stock, and there is indeed a striking resemblance between what appear to have been their original customs. Even now, Hindoo jurisprudence has a substratum of forethought and sound judgment, but irrational imitation has engrafted in it an immense apparatus of cruel absurdities.

From these corruptions the Romans were protected by their code. It was compiled while the usage was still wholesome, and a hundred years afterwards it might have been too late. The Hindoo law has been to a great extent embodied in writing, but, ancient as in one sense are the compendia which still exist in Sanskrit, they contain ample evidence that they were drawn up after the mischief had been done. We are not of course entitled to say that if the Twelve Tables had not been published the Romans would have been condemned to a civilisation as feeble and perverted as that of the Hindoos, but thus much at least is certain, that with their code they were exempt from the very chance of so unhappy a destiny.

In terms of the historicist perspective which Maine deployed to underpin the arguments he developed in *Ancient Law*, whilst the Hindus had started out on the right course, they subsequently lost their way. By failing adequately to distinguish the religious domain from that of the state, by failing to draw up a suitably regulatory, as opposed to an exhortatory code of law, and most egregiously of all by failing to ensure that the state established a system of tribunals through which the rules could be enforced, the Hindus had fallen by the wayside in social, organisational and legal terms, leaving them unhappily and uncomfortably trapped in an unnecessarily primitive backwater. It followed that an Austinian regime, mildly tweaked to accommodate specifically Indian circumstances, would enable the natives of India to extract themselves from the morass into which they had fallen, thanks to the assistance of a benevolent Raj.

Unfortunately this kind of vision of governance – which is of kind still regularly deployed by all manner of contemporary progressively-minded state builders – stood sharply at odds with the radically plural character of India's indigenous social order. As such it of innumerable more or less autonomous knit self-governing communities (collectively identified as *jati*, *biraderi*, *qaum*, *bhaichara*, *akara* and so forth), each of which was ordered in terms of its own set of customary conventions. Moreover responsibility for almost all kinds of dispute settlement was routinely held to lie not with state, but in the collective consensus of each such self-governing community, in which collective decisions were taken, and disputes routinely settled, in the context of an informally constituted *panchayat* or a *jirga*, rather than a formal court of law.

However their decisions, reached much more by means of negotiation than by authoritarian fiat, were far from arbitrary. All those in any way connected with the dispute – whether young or old, male or female – were expected to attend, and the ensuing debate was conducted under the aegis of a small group of drawn from, and hence representing both the wisdom and interests of, the wider community from which the disputants were drawn. Despite a considerable degree of commonality between them, there was no expectation that the moral and behaviour conventions deployed within each such community would of necessarily be identical: rather its was taken for granted that those premises – commonly identified as the group's *dharma* or *riwaj* – would vary from community to community, as well as by age, gender, caste and so forth. It followed that such *panchayats* did not seek to 'lay down the law' on a unilateral basis: instead their principle objective was to assist, and if necessarily to coax, the disputants to towards a reconciliation of their differences.

Hence as Jonathan Duncan, British Resident in Banaras from 1787 to 1795 commented,

In this country the inhabitants have been so long habituated to settle all causes by arbitration, and to terminate all disputes by what they call the mutual satisfaction of both parties; that I am persuaded our more decisive and what they would think abrupt mode of administering justice and executing decisions so passed merely upon the proofs exhibited within a certain and fixed time, perhaps by only one of the parties, would not suit the way of thinking of a majority of inhabitants of Banaras. (Quoted in Cohn 1961: 617)

The aim, in other words, was to achieve a settlement which ensured that the threat to the integrity of the collectivity in which the dispute had given rise was removed by reordering relationships in such a way that the outcome was mutually acceptable to all concerned.

To the extent that such outcomes were routinely achieved, the state did not play an active part in these processes. Indeed the ruler's most pressing *dharmic* responsibility was of the same kind: to maintain a sufficient degree of order within his jurisdiction to enable members each such self-governing community go about their business without let or hindrance. But within this framework, the Raja was also the ultimate backstop. If processes of internal dispute resolution failed, the ruler could quite legitimately intervene with his *danda* – or in other words by force – to knock heads together, and to impose whatever he or his agents regarded as a just and equitable solution in that particular context.¹ It followed that 'law enforcement' in this sense was the last,

¹ Likewise the principal textual source of Hindu Law, the *Dharmashastras*, was equally un-Austinian in character. As Derrett puts it:

The *dharmasastra* is the Indian classical 'science of righteousness'. In spite of its character it is, in so far as it deals with law, no less characteristically jurisprudential than its coevals, the Roman and the Jewish law; and it would be a great mistake to suppose that it was founded or rooted in theology or philosophy, much as

not the first, resort of the state. A smoothly running state was not so much one in which there were no disputes, but rather one in which threats to the operational integrity of each of its component communities were all resolved internally, such that there was no need for the Raja to wield his *danda*.

It followed that as a result of the imposition of an external Raj, law in India began to follow two discrepant courses. Whilst India's British rulers sought to underpin the governance of their new-found Raj by unleashing a *tsunami* of progressive legislative initiatives inspired by Austinian principles – thereby establishing a strategically grounded tradition which their post-colonial successors have for the most part continued to follow, despite their nominal commitment to *swadesh* (Menski 2009) – at a *de facto* level India remains just as plural as it ever was: in other words despite the legal *tsunamis* which the state has regularly unleashed, the social and community landscapes – and hence the 'informal' methods of dispute settlement which they sustain – still run parallel to state-run institutions the best part of a century and a half after efforts to suppress them began (Choudhary 1999).

Whilst the scale of the *danda* which the British Raj had to hand, as well as the vigour with it was prepared to apply it was quite unprecedented – as the events of 1857 had shown – it did not take long before India's new rulers began to find themselves confronted by the unintended consequences of their well-meant initiatives in liberating rationality. Nowhere was this clearer than with respect to the issue of land tenure. As the administrators of the *Diwani* rights conferred

a truly religious way of life inspired its best teachers, and much as wide concepts of duty and humility before the divine guided their choice between customs with equal claims to recognition on practical grounds.... One need not know much about Hinduism in order to be able to handle any stage of Hindu law.

The system did not, originally, require any formal courts. It was a rationalized and systematized body of customary law and observances, a collection of (for the most part) carefully justified 'oughts' and 'should nots'. When it was expressed in written form, the reasons for the majority of the rules were omitted: the oral tradition could safely be left to supply them.

The ancient Hindus saw the 'after-life', or 'lives', as of one piece with this life, the transient with the substantial, and the individual did not exist apart from the needs, prejudices, and claims of his family, clan, occupational class, and ethnic group. As a science *dharmasastra* was not different in kind from *nrityasastra*, 'the science of music and dance', or *asoasastra*, 'the science of farriery, but its majesty as the queen of all sciences was never disputed. To be a *dharmasastrī*, or qualified exponent of *dharmasastra*, one must have mastered not only the *smritis* and their traditional glosses, but also the Vedas, This was no mean task, and it marked out the Brahman caste as the only source of jurists.

Vedic study as a preliminary to legal study was as essential for the *sastra* as knowledge of the Prophets' writings as well as of the Pentateuch for the Jewish exponent of the *halachah*, or rabbinical law, or a knowledge of the Corpus Juris of Justinian to the doctors of canon law - and for the same reasons. Without the technique of Vedic textual interpretation, and knowledge of the cruxes of Vedic practical application, the words of the *smritis*, which were believed to reproduce the gist of the Vedas, would be so much dead matter. The spirit counted no less than the letter, and the spirit was not acquired by reading alone. (Derrett 1963: 2-3)

on them quickly began to appreciate, ‘ownership’ of land in South Asian contexts could be a complex matter, especially when – as in Bengal – a substantial hierarchy of stakeholders might simultaneously claim to hold rights in the same piece of land. But when the Raj made its last great territorial expansion when it gained control of the Punjab, it found itself faced with a different version of the same problem: once again rights they regularly found that rights in land were multiplex in character, but this time typically along horizontal rather than vertical vectors.

Once again Maine is an invaluable guide to the conundrums with which the Raj’s administrators found themselves confronted, this time in a set of lectures entitled *Villages East and West*, which he prepared in the aftermath of a decade of service in India. Having noted that ‘there is no country in which Custom is so stable as it is in India’, and that ‘A nervous fear of altering native custom has, ever since the terrible events of 1857, taken possession of Indian administrators’, he nevertheless goes on to highlight the positive character of all manner of customary practices in the Punjab, despite the extent to which they often contradict the premises of English law – most particularly with respect to rights in land.

The true view of India is that, as a whole, it is divided into a vast number of independent, self-acting, organised social groups—trading, manufacturing, cultivating. Groups of [cultivators] in Indian society are very differently situated [from their English counterparts]. They are constantly dwelling on traditions of a certain sort, they are so constituted that one man's interests and impressions correct those of another, and have in their council of elders a permanent machinery for declaring traditional usage, and solving doubtful points. (p 57 - 8)

In those parts of India in which the collective holding of property has not decayed as much as it has done in Lower Bengal, the liberty of testation would clearly be foreign to the indigenous system of the country. That system is one of common enjoyment by village communities, and, inside those communities, by families.

The individual here has almost no power of disposing of his property; even if he be chief of his household, the utmost he can do, as a rule, is to regulate the disposition of his property among his children within certain very narrow limits. But the power of free testamentary disposition implies the greatest latitude ever given in the history of the world to the volition or caprice of the individual. (p 41 - 2)

The issue to which Maine is alluding is one which precipitated an intense debate amongst a highly influential group of British administrators during the whole of the latter half of the nineteenth century, which has been explored in some detail by van Dungen in a volume entitled *The Punjab Tradition*. At stake was the issue of whether plural claims to rights in land should be clarified in such a way as to vest ownership in a single identified individual, who would consequently have a right to sell it – or to raise a loan against – as and when he wished, as the idealistic supporters of utilitarianism argued was a necessary prerequisite for any kind of economic progress; or whether – as the realists saw it – an initiative of this kind would of necessity

undermine the structure of the established agrarian order, upset the peasantry at large, and in doing so precipitate the circumstances in which yet another ‘mutiny’ would erupt. As van Dungen shows, whilst the idealists were firmly in the ascendant at the outset, in the decades that followed District Officers noted far from promoting agricultural progress, the new rules – whose principal consequence was to establish a market in land – was to destabilise the social order in a manner which ran completely contrary to that predicted by the utilitarian idealists. Far from producing an entrepreneurial class of prosperous and well capitalised yeoman farmers, the established peasant farmers largely remained *in situ*, although all too often in a worse economic condition than they had previously enjoyed. Not only had a many (mostly Muslim) peasant farmers become heavily indebted to (mostly Hindu) merchants/moneylenders, given that they could now use their land as a formal surety against loans, but in significant proportion of such cases the lenders had taken their debtors to court and obtained a foreclosure order. However the new owner relatively sold the land: rather the former owner found himself reduced to the status of a tenant, and hence subject to an even more egregious degree of hegemony to the moneylender. Moreover such developments also undermined the structure of the *bhaichara*, the patrilineal descent group which claimed comprehensive rights in the entire village territory. Once a share in its territory had been formerly alienated in this way, the brotherhood of *zemindars* (holders of rights in land, and hence the core of the village *panchayat*) suddenly found that they had acquired a cuckoo in the nest: an alien *Lala*, drawn from a quite different community, and who consequently ordered his life according to premises which differed radically from their own.

Yet more significantly still, these developments precipitated a sea-change in the balance of power as between the *zemindars* and the *lalas*. In the broader scheme of things of members of these two classes had long lived together in symbiosis, for although each scorned the other they stood in a position of mutual interdependence in economic terms, such that neither was in position to out-trump the other. But whilst beefy farmers had hitherto been in a position where they could readily keep money-grubbing money-lenders at bay if their demands became too importunate, the new Raj introduced a new – and from the *zemindar*’s perspective, deeply alarming – mode of dispute settlement: if they failed to pay up their creditors could now obtain a judgement against them in the new-fangled *sirkari* (government) courts, and which the state could in due course be called upon to enforce, thereby comprehensively over-riding the customary conventions of their community.

Faced with developments this kind British administrators – who also routinely fulfilled a judicial role – regularly found themselves in an invidious position. Called upon to implement the rules of

contract which their own ‘progressive’ administration had introduced to ‘liberate’ the peasantry, they regularly found themselves in a position to issue judgements which they knew full well would seriously disrupt the structure – and above all the balance power – in the social order in a manner which would actively invite the peasantry to fall back on the tried and tested strategy used in the recent past: namely simply to eliminate bankers who they regarded as having become over-greedy. The result – as van Dungen describes in great detail – was a gradual turnaround in official thinking, which eventually led to the passage of the Punjab Alienation of Land Act of 1900, which imposed substantial restrictions on the alienation of land. Two of these were of key significance: in the first place the sale of land to anyone other than a member of a designated ‘agricultural caste or tribe’ was prohibited, thereby excluding merchants and money-lenders from the market for agricultural land. Secondly, and perhaps even more significantly, the Act introduced a complex set of rules of pre-emption, such that close agnatic kinsfolk, and beyond them all members of the wider *bhaichara*, were given rights of first refusal over the sale of landed property within the boundaries of the village. Status had triumphed over Contract – all under the *aegis* of the Raj.

That was by no means the whole story, however. Whilst the those involved in the hands on challenge of implementing everyday processes of administration in the potentially rebellious countryside soon found themselves in a position where they had little alternative but to get to grips with the *de facto* reality of Indian institutions, whatever their prior idealistic assumptions about the nature of progress may have been, by no means all those involved in the expansion, the governance, and above all in the legitimation of the institution of the Raj shared the views of those of their colleagues who appeared to have lost their ideals in favour of ‘going native’. Hence at other levels in the Raj liberal reformers were simultaneously having a field day – or so they assumed – in improving the conditions in which their benighted subjects appeared to be living by introducing measures to criminalise all those indigenous social, cultural and religious activities which could be held to be inimical to ‘Justice, Equity and Good Conscience’. Given the complex and often contradictory role which this phrase has played over the centuries, and the vigour with which this very notion has begun to be used as a means delegitimizing alterity in European contexts, the origins and subsequent use of this phrase deserves close examination.

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The legitimisation of alterity: the role of ‘Justice, Equity and Good Conscience’ in English Law

In jurisdictions in which processes of dispute resolution are comprehensively decentralised in the manner outlined above, the problem of delivering justice on an equitably basis is minimised, since the process of so doing is devolved to members of the specific community, and hence to those familiar with the particular context, within which the conflict itself erupted. Hence, as we saw earlier, when European traders established bridgeheads in the subcontinent from which to do business, they were able – and indeed expected – to continue to settle any disputes which might break out between them on their own terms. From an Indian perspective, their behaviour was unexceptional. They would simply have been regarded as yet another *qaum* of foreigners, fully entitled to get on with their business on their own terms, always provided that they paid their respects in an appropriate fashion to the local Governor, and ensured that they did not become entangled in irresolvable disputes with members of other *qaum* in the vicinity, whether of foreign or of indigenous origin. Only if they stepped over either of these marks would they find themselves subject to the ruler’s *danda*.

This state of affairs remained unchanged – at least in principle – when the grant of *Diwani* rights in Bengal radically expanded the territory, and hence the population, subject to the East India Company’s political control. Hence, whilst the Company continued to order its business on its own terms, its newfound status within the Mughal Empire meant that it had resumed the responsibilities of any other local governor. In other words, it became the local *danda*-wielder vis-a-vis the many *qaums* of which the population resident within its jurisdiction was made up. So how did the Company exercise the powers that it had thereby been granted?

Their pragmatic response was quite clear: they adopted the same policy as that adopted by innumerable Imperial satraps before them. Since the Company most immediate concern was to keep the peace, such that the land revenue it was now entitled to collect flowed swiftly and smoothly into its coffers, it sought to ensure that in all other spheres of activity their newly constituted local Raj had as little impact as possible on indigenous ideas, practices and institutions. But at the same time the internal aspects of the Company’s activities, and hence its own internal mechanism for dispute settlement, remained grounded in English Law – a jurisdiction which was intrinsically far less comfortable with the prospect of delivering justice in contexts of plurality than was the local jurisdiction into which the Company and its courts had elbowed their way.

In these circumstances the Company's Judges turned to the high-sounding phrase "Justice, Equity and Good Conscience", a concept whose roots can be traced back to 16th Century Canon Law, as a means of coping with the issues with which they found themselves confronted.

The concept was introduced into India by the East India Company under the influence of the theory that Civil law was suitable to the Company's Courts in the Presidency towns, since the Common law was not suited to the conditions in the settlements there. Much later Sir Elijah Impey introduced it into the Administration of Justice Bengal Regulation 1781, as a result of the discovery that the Company's Courts could not function in proximity with the King's Court at Calcutta without protection from the process of the latter.... In doing so set out Justice, Equity and Good Conscience as the residual law of the Company's Courts the basic, fundamental sources of western jurisprudence, *in order to avoid the application to them, or by them, of the common law.* (Derrett 1978:130)

It followed that as a result of taking aboard the concept of Justice, Equity and Good Conscience in this way, the Company's English judges were able to pluralise the character of their jurisdiction, with the result that

From 1772, the East India Company's courts applied [Hindu Law] as a matter of obligation in all suits regarding inheritance, marriage, and other religious usages. This automatically included adoption, maintenance and the joint family (Derrett 1963:7).

Likewise the Regulating Act cited above explicitly declared that

Hindu law was to be applied in suits concerning inheritance and succession to land, rent and goods, and all matters of contract and dealing between party and party Derrett *ibid*).

The result of all this is plain to see: faced with the challenge of erecting a legal system which took cognisance of the fact that the vast majority of those subject to the Company's jurisdiction ordered the personal, domestic and commercial interactions according to premises which frequently differed radically from English norms, its courts – although manifestly an extension of English jurisdiction, such they ultimately operated under the aegis of the Privy Council, found a means of coping with the *de facto* presence legal plurality. To be sure, it did not do so right across the board: such latitude was not available in the sphere criminal law. However very substantial concessions were made – and in a powerful sense, had to be made, if only for pragmatic reasons – when suits involving matters of dispute resolution in civil, and most especially in family contexts came before the Company's courts.

It is precisely the outcome of these developments, which are the focus of Derrett's still unrivalled *Introduction to Modern Hindu Law*, and which, in truth, could have been more accurately entitled *Anglo-Hindu law*. Over and above the fact that the whole edifice was – and indeed still is – a complex melange of English and Hindu principles, it is also one which emerged as an extension of England's indigenous jurisdiction into the United Kingdom's increasingly diverse

overseas possessions, under the ultimate supervision and guidance of no more august a body than the Privy Council². As Derrett puts it:

The Privy Council laid down, or confirmed, many lines of decision in which English principles were blended with or engrafted upon Hindu principles. In particular where the texts were silent, the principles of that system did not give clear, or any, guidance ... it was natural that English law should have been drawn upon. ... as it properly may be where the institution has an English origin (as, for example, nullity of marriage) or the English law has long since ruled the field (as, for example in the law of guardianship and charities) ...

But to suggest that justice, equity and good conscience must invariably be English common law is to go too far, and to betray an ignorance of the origin and purpose of that famous phrase, which was in fact to exclude common law as the residual law of the East India Company's courts. (Derrett 1963: 9)

The evangelical backlash

However the use of the concept of justice, equity and good conscience to justify the acceptability of legal pluralism – at least in the field of civil law – hardly survived the eighteenth century, largely a result of growing efforts, led by evangelical reformers, to ensure that Britain's rapidly growing Empire was underpinned by *moral* as opposed to pragmatic principles. Led by William Wilberforce, the initial target of the evangelicals was the slave trade, and beyond that the institution of slavery itself. But before long their agenda became wider still, as they began to ask increasingly searching questions about the way in which the East India Company was managing the administration of Britain's most populous Imperial possession.

In raising what would be described in contemporary terminology as a Human Rights agenda, they were deeply critical of what they saw as the lax basis on which English officials had set about administering the jurisdiction for which they had taken responsibility, and most especially the way in which they made no efforts whatsoever to eliminate all manner of egregious deviations from civilized standards. As a result the East India Company found themselves under pressure from evangelical missionaries, as well as their Parliamentary allies back in London, to take steps to outlaw a whole series outlandish practices peculiar to India, including *thuggee*, *suttee*, dedicating girls to a life of temple harlotry, human sacrifice, hook-swinging, exposing infants, burning widows, burying lepers alive, gang-robbery and sitting *dharna*. But the grounds on which the evangelicals insisted that these practices should be suppressed were precisely those on which it had been argued, only a few decades beforehand, that legitimacy should be accorded

² In legal contexts the Privy Council is effectively coterminous with the Judicial Committee of the House of Lords, which was at long last more accurately relabelled as the Supreme Court in 2010.

to India's civil and religious institution, on the grounds that to do otherwise would be contrary to justice, equity and good conscience.

Subject to increasing pressure from its critics, the East India Company found that it had little alternative but to introduce *ad hoc* measures which turned the practices which the missionaries complained about so vigorously into criminal offences. However the landscape changed entirely in the aftermath of 1857: most of the officials in the newly constituted Raj were ardent modernisers, and many of them were evangelical to boot. Both the Indian Penal Code and the Indian Evidence Act were an outcome of their activities, whilst the Punjab Laws of Act 1872 (which amongst other things criminalised female infanticide, as well as the institution which was regarded as being the immediate precipitant of that practice) in the name – once again – of Justice, Equity and Good Conscience.

Modernity: a one-way street?

Indeed as far as the evangelicals were concerned, the insurrection of 1857 came as something of a godsend. In a manner akin to the position adopted by contemporary exponents of regime change, contemporary enthusiasts from Empire took the view that the mutineering Sepoys who had so violently rejected British efforts to introduce their newfound subjects to all the benefits of modernity and enlightenment must, *ipso facto*, have been inspired by the forces of darkness and barbarism. Hence 'the Mutiny' could readily be deployed to provide a renewed sense of legitimacy to the imperial project, just as it was reaching its apogee. From an evangelical perspective, the events of 1857, no less than those of 9/11, could be understood no less as warning than as an opportunity. From a negative perspective, they provided a clear indication of the forces of barbarism which lay close beneath the surface in those parts of the globe in which the local population were still ensnared by the forces of primitive superstition. However this also provided champions of 'Christian civilisation' with an unprecedented opportunity – and in their view a sacred duty – to introduce those mired in backwardness to all the benefits of rational modernity. Viewed from this perspective, properly managed European Empires could be rendered as progressive as they were morally legitimate.

At least in broad terms, Maine's outlook chimed closely with that of his more evangelistically committed counterparts, since he took the view that progress and modernity was a one-way street, leading amongst other things from Status to Contract. However his analysis of the underlying issues was great deal more subtle than appearances might suggest. Hence his decision to identify Status as a 'more primitive' basis for the construct of social relations than Contract

was by no means so patronising – and indeed dismissive – as it sounds in contemporary usage. Closer examination of the text reveals that all he was suggesting that ancient Roman (and contemporary Hindu) ideas and practices lay some way back down one-way the street of progress than that achieved by the world’s leading civilization, also that neither the practices of the population of Ancient Rome, or of contemporary India, lay in any sense lay right at the back of the queue. A further crucial point was also implicit in this perspective. If progress was a function of time, it followed that no socio-legal order was necessity fixed in aspic. All were capable of change. Maine’s was essentially a *dynamic* vision of the development of jurisprudence; and yet more significantly still, as Oxford’s Professor of Comparative Jurisprudence he was prepared to pay as much attention and respect to the law of ancient Rome – and by extension to the contemporaneous legal practices of the indigenous population of India – as his academic colleagues did in the explorations of developments in English law.

A singular or a plural future?

Hidden behind all this was another, yet more significant debate. Was it the case, as many of the most enthusiastic supporters of the enlightenment argued, that rationally grounded improvements in our understanding of the human condition would eventually enable humanity to achieve a singular and uniform condition of absolute perfection? Or was such a goal wholly unrealistic, on the grounds that no kind of life can be the best for everyone, if only because the premises which underpin culturally constructed visions of the ‘good life’ are so diverse? If differing traditions embody values and goals which are comprehensively incompatible with one another – as empirical observation readily appears to confirm is indeed the case – it follows that humanity is much more likely to enjoy a plural, rather than a singular, future.

That was not, however, a perspective which attracted much support in late Victorian Britain. Inspired by the premises of the enlightenment, as well as the ever-expanding influence of European Empires, it was taken for granted that as the forces of progress and rationality became steadily more pervasive, every socio-legal order around the globe would progressively shed their archaic and hence ‘primitive’ characteristics, and in due course gradually converge in a singular, universal and steadily more civilised futures. Two World Wars and the subsequent collapse of all of Europe’s Empires might have been expected to have put paid to such pipe-dreams; however this hubristic schema has proved to be such a resilient component of the Euro-American cultural tradition that in the aftermath of the collapse of the Soviet Union, arguably the last of Europe’s

Empires, Francis Fukuyama (1992) took the opportunity to proclaimed that ‘the end of history’ was at hand.

Unfortunately for Fukuyama, just as much as for the progressive liberals of the late nineteenth century, global history has not taken the course which they so confidently predicted. To be sure, the Euro-American world has made far greater ‘progress’ along the track from collectivism to individualism than anything Maine is likely to have envisaged in his wildest dreams; however the inhabitants of the non-European world, in all their many variations, have proved to be much less willing to abandon their ‘primitive’ commitment to mutual reciprocity than unilineal progressivism suggested would of necessity be the case. Hence even if the Euro-American socio-cultural order world may have tracked ever further in the direction of untrammelled competitive individualism, steadily shredding kinship, marriage, the family and indeed almost all other forms of institutionalised reciprocity, the inhabitants of the non-European world has become steadily less willing to follow uncritically in their ‘progressive’ footsteps. Hence however ‘westernised’ their lifestyles may have become in material terms, at a more qualitative level they still for the most part remain heavily committed to premises of their own distinctive civilizational traditions, and above to the maintenance of close and extended ties mutual reciprocity in personal and domestic contexts. In sharp contradiction to Maine’s confident expectations, as well as of a multitude of contemporary liberal modernisers, the predicted process of unilineal progress from status to contract currently gives appearance of being stuck in tracks.

Macaulay’s vision of the route along which India might be expected progress under English tutelage has long since proved to be irrelevant. Once India regained its freedom less than a century after the establishment of Britain’s Indian Raj collapsed, its inhabitants – like all the other non-European components of Europe’s former empires – have plotted their own preferred courses of future development, and in almost every case have done so firmly *on their own* terms. To be sure the way forward often proved more challenging than was initially assumed: many, perhaps most, found they had manoeuvred themselves into a *cul de sac*, from which they had to back out – often by paying much greater attention to own ancestral conceptual and cultural resources. Moreover as more relevantly autochthonous solutions to the challenges they faced were found, they have gradually begun to precipitate a radical transformation of the structure of the global order. As we enter the twenty first century, India, China and the Islamic world have re-established themselves as significant players on the global stage; and as their economies continue to expand at breakneck speed, there is every prospect that they will be in a position to call the shots vis-a-vis their former Imperial masters within the course of the next few decades.

Secondly, and yet more significantly in this context, similar developments have also begun to occurred on both sides of the north Atlantic – or in other words in the former heartlands of Euro-America, as migrant workers emanating ‘from below’ have taken the opportunity to followed their European predecessors footsteps in reverse order to precipitate the emergence of the thriving ethnic colonies can now be found in all of Euro-America’s major urban centres, such that that the social order in which these developments have occurred has been rendered steadily more plural. To be sure, roles have been comprehensively reversed: nevertheless, the underlying contradictions remain substantially the same as those experienced in India. How, then, have lawyers, legislators and the courts responded to the resultant challenges?

* * * * *

When in Rome?

Suffering from a surfeit of guilt, the British retained few memories of, and hence preserved very few of the lessons they learned in the course of, their Imperial past. Hence despite the depth and complexity of Britain’s involvement with the subcontinent over the course of more than three centuries, the degree of intellectual amnesia which all sections of its population – including members of its academic and intellectual elite – currently displays towards developments during that period can be described as remarkable. Many paradoxes flow from this. Most strikingly, whilst the British took it for granted – and indeed still take it for granted – that they had an absolute right to reconstruct their own preferred socio-legal order within all the many overseas colonies which they established during the past half century, whilst also seeking to congratulate themselves on having a long, proud history (and largely erroneously) of treating strangers with tolerance and respect, they nevertheless simultaneously insist that the additional dimensions of plurality which the burgeoning mass of non-European ethnic colonists have introduced into Britain’s (allegedly homogeneous) socio-cultural order is morally, politically and above all legally unacceptable. Hence it is widely argued that if the newcomers which have settled in their midst – together with their locally born offspring – wish to gain comprehensive acceptance in the jurisdiction they have established themselves, they should comprehensively internalise the core values of the English way of life.

Poulter neatly captures this vision in the concluding paragraph of his monograph *Ethnicity, Law and Human Rights* in his remark to the effect that

While English law should broadly approach other cultures in a charitable spirit of tolerance and, when in doubt, lean in favour of affording members of ethnic minority communities freedom to observe their diverse traditions here, there will inevitably be certain key areas where minimum standards, derived from shared core values, must of necessity be maintained, if the cohesiveness and unity of English society as a whole is to be preserved intact (Poulter 1988: 391).

Whilst the perspective which Poulter adopts, as well as the conclusions which he reaches would be regarded as uncontentious by most members of Britain's indigenous majority, and indeed his wholly congruent with the Government's currently much advertised policy of Community Cohesion, the precise legal grounds around which he structures his argument deserved close consideration, both in terms of the sources on which he does, and which he does not, rely.

Although there is a strong sense in which Poulter and Maine cover similar ground, since they are both concerned with the application of law in contexts of plurality, the difference in the basis on which they approach the issues before them could not be more striking. Most significantly of all, Maine's historically grounded analysis (even if he was also addressing contemporaneous issues) enabled him to engage in an exercise in comparative jurisprudence, such that he has able to accord Roman (read Hindu) legal premises and institutions as much analytical respect as those of English law. By contrast Poulter's approach is much more akin to that of the evangelistically oriented administrators of the 19th century Raj, who sought to exercise the Austinian role as law makers as being to introduce measures which would serve to reform, to rationalise and above all to *modernise* the behaviour of those for whom they had taken responsibility, and in the course of so doing to persuade them to abandon a whole series of practices which – from their perspective as representatives of civilised Christianity – they regarded as wholly unconscionable. Moreover the grounds advanced to justify the criminalisation of such activities – namely that they were contrary to Justice, Equity and Good Conscience – was in this context manifestly an exercise in *moral*, rather than a legal judgement.

What is also striking is that whilst Poulter makes no reference to Maine, or to the complex processes which gave rise to Anglo-Hindu Law, he quotes one of the reformers' key legislative initiatives:

The Indian Punjab Laws Act 1872 provided in section 5

In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastards, family relations, wills, legacies, gifts, partition, or any religious usage or institution, the rule of decision shall be

(a) Any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been declared to be void by any competent authority, (Poulter 1998: 42).

Having shown that the same phrase had been used for the same purposes in a number of other colonial jurisdictions, and that its applicability had been explicitly confirmed by the Privy Council ([1962] 1WLR 1053) Poulter went on to use the concept as his key yardstick in assessing how far the practices he explores in six ethnically specific case studies fall within or beyond the bounds of legal acceptability. Whilst this approach enables him to argue that members of ethnic minorities should indeed be allowed a margin of cultural tolerance, the scale of the margin which he is prepared to allow them turns out to be remarkably limited, given his parallel commitment to the view that ‘minimum standards, derived from shared core values, must of necessity be maintained, if the cohesiveness and unity of English society as a whole is to be preserved intact’. What he does not do, however, is ask any serious questions as to why this caveat should have specifically applied to ‘questions regarding succession, special property of females, betrothal, marriage, divorce... and so forth’. This is an issue to which we will have to return in due course.

Over and above all this, Poulter’s use of the term English in his formulation is also extremely revealing, given that it blithely overlooks the existence, and above all the distinctiveness, of three remaining components of the United Kingdom’s intrinsically plural jurisdictional roots. Likewise the a-historical basis on which he proceeds with his analysis wholly overlooks the fact that additional dimensions of ethnic plurality generated by post-war labour migration were in so sense unprecedented: during the course of the nineteenth century large numbers of Irish and then Jewish migrants arrive in Britain in search of a better future, and when they huddled together in a similar fashion to form their own equally active ethnic colonies, precipitated much the same negative reactions amongst members of Britain’s hegemonic English majority as those to which current successors find themselves exposed. All this brings us back to the issue of how just the concept of ‘core values’ should be understood in the context of a plural social. What should by now be quite clear is that whilst the Hindu tradition (and many other equally ‘primitive’ traditions) took it for granted that such values were best understood as being intrinsically plural in character, their heirs of the enlightenment in general, and the English in particular, remain deeply uncomfortable with that view.

Two points follow from this. Firstly that the vigour with which the legitimacy of plurality is currently being contested in virtually all western European jurisdictions may well be a product of their historical roots in the Enlightenment – as well as of overseas Empire; and secondly that the specific grounds on the basis of which these sentiments are currently manifested in United Kingdom can also be traced to the way in which members of its English majority have routinely

arrogated to themselves the right to specify the core values with which the population of the entire jurisdiction should be expected to comply.

An encounter with cultural alterity: the case of *Khan v Khan*

Although English judges find themselves presiding over cases in which culturally distinctive ideas and practices significantly condition the issues at stake in the proceedings at hand, if only because of a steady rise in the degree of plurality to be found within the population over whose affairs they exercise their jurisdiction, they have as yet for the most part responded in an *ad hoc* fashion to the challenges with which they consequently find themselves confronted. To be sure, they occasionally receive assistance on such matters by an expert witness such as myself, but much more often than not they rely on little more than common sense, and the application of the established premises of English law as they set about the task of analysing the significance of what has been said and done. The only case of which I am aware in which a judge sought to make an explicit indication of the basis on which the courts should respond to issues of plurality is to be found in *Khan v Khan* [2007] EWCA Civ 399, in which Arden LJ ruled that

36. Where the parties are members of a particular community, then in my judgment the court must bear in mind that they may observe different traditions and practices from those of the majority of the population. That must be expected and respected in the jurisdiction that has received the European Convention on Human Rights. One of the fundamental values of the Convention is that of pluralism: see *Kokkinakis v Greece* [1994] 17 EHRR 397. Pluralism is inherent in the values in the Convention. Pluralism involves the recognition that different groups in society may have different traditions, practices and attitudes and from that value tolerance must inevitably flow. Tolerance involves respect for the different. In turn, the court must pay appropriate regard to these differences.

Yet however positive this *dictum* may seem at first sight, Lady Arden the learned judge provided no indication as to how, and from what sources a court should look for evidence which might enable them to pay appropriate regard to the traditions, practices and attitudes of members of the specific group from which those involved in any given case were drawn. Moreover a close inspection of her analysis of the facts of the case – which had arisen as a result of a dispute between two siblings drawn from a Pakistani extended family as to how the assets of a joint business enterprise should be divided between them – the learned judge appears to have paid scant regard to the premises of her own *dictum*.

The dispute in question came about as follows. Two brothers, Ashraf and Afzal, arrived in Britain in their teens in 1968, and subsequently went into business together. One of these was Khan and Co, which was engaged in property letting and management. Sometime later, the

brothers some time formed another partnership, called Chic Boutique, a retail clothing business. Afzal took the main responsibility for the running of Khan and Co and Ashraf of Chic Boutique.

Over the years, the brothers acquired a number of properties in connection with these and other ventures, some in Afzal's sole name, some in both their names, some in the names of Afzal and others and some in the name of both of them and others. In general, the finances of both businesses were controlled by Afzal, who allowed Ashraf to pay himself out of the modest earnings of Chic Boutique, and to have settled the mortgage, council tax and insurance payments due on Ashraf's residence from the funds of Khan and Co.

From 1999 onwards, the relationship between the two brothers became steadily more fractious. According to Ashraf, the breakdown began with a disagreement over a plan to refinance the business. Afzal had retained brokers for this purpose and agreed that they be paid a fee for their services to which Ashraf took exception. He began to ask questions, in particular as to who owned particular properties and why the ownership of some properties had apparently been transferred into Afzal's sole name. As Ashraf began to take the view that profits generated by the partnership business were being diverted into his own pocket by Afzal. As a result, Ashraf began to ask Afzal ever more detailed questions about the financial foundations of the business. This led to friction. For his part, Afzal regarded Ashraf's unaccustomed inquisitiveness as both irritating and impertinent. In due course Afzal countered by saying that Ashraf had never pulled his weight in the property management business, so much so that they had never really been partners at all.

Viewed from a South Asian perspective, the asking of such questions and the response they precipitated was a clear sign that the relationship of mutual trust, and hence of comprehensive reciprocity as between the siblings was breaking down: a clear sign that the coparcenary between them was in imminent danger of collapse. Matters came to a head when Ashraf turned to the resources of English law to resolve the issue: on the advice of a solicitor he went to court seeking a declaration to the existence of the partnership business between him and Afzal in the name of Khan and Co., an order for the partnership's its dissolution, and for accounts to be drawn up and enquiries made to establish the property of the partnership, and partners' respective entitlements to that property on its dissolution.

However before the matter came before the court, a family meeting was held at the instigation of the brothers' two sisters as well as their brother Aslam, who were keen to see oil poured on troubled family waters. When the meeting convened, it was quite clear that the time had come

for the two brothers to go their separate ways, at least in financial terms, and in view of that, the terms of a financial compromise were agreed. A written agreement was drawn up indicating that:

1. Ashraf would have no further interest in the business of Khan and Co and that Afzal could continue to trade under that name.
2. Afzal would have no further interest in Chic Boutique and that Ashraf could continue to run it.
3. Ashraf would have the entire legal and beneficial interest subject to mortgages in three properties then registered in their joint names.
4. Afzal would have the entire legal and beneficial interests in certain other properties then registered in their joint names.
5. Ashraf acknowledged that he had no claim on another property that he had mistakenly believed was then registered in their joint names.

At the close of the meeting, Afzal and Ashraf embraced each other in the presence of their sisters, and it seemed – at least on the face of it, that an agreement had been reached which resolved all the differences between the two siblings. Dispute resolution on an equitable basis is what family meetings are all about, and had the agreement held, the proceedings in court would have been withdrawn.

But that was not the end of the matter. Ashraf continued with the proceedings. In verbal testimony when the case came to court did not deny that the family meeting had taken place, and the agreement cited above had been reached; what he did insist, however, was that during the course the discussion he had indicated that six houses formally registered in Afzal's name as well as his own were *not* part of agreement which had been thrashed out as between the siblings. This conflicted with the witness statement prepared by the brothers' sisters, which indicated that

“We were all satisfied that they have settled their entire business affairs and Ashraf was to go his own way from then on.”

The third brother, Aslam, supported this view, and in doing so addressed the issue of the six houses. As the judge put it:

“Aslam said that the real issue at the meeting had been whether Afzal would cede to Ashraf the three properties that he did and that that and the other matters dealt with in the written documents were “the only issues brought to the table”. He also expressed the perception that Afzal would never have entered into these agreements if there had been any question of Ashraf reserving further claims against him.”

In the light of all this, the trial judge went on to observe that

“In my judgment Aslam was giving me an honest and accurate account of what transpired between the two brothers at the meeting. Accordingly, I do not accept Ashraf's assertion that it was expressly made clear at the meeting that there were issues potentially unresolved by the agreements then reached and which might be the subject of litigation in the future. I also think

that Aslam’s perception that Afzal would never have conceded the ‘three shops’ had he believed that Ashraf might in the future pursue other claims, as an accurate one.”

Nevertheless Judge went on to say that in his judgement it did not necessarily follow that there was consensus at the meeting that Ashraf had undertaken not to pursue other claims.

“It does not however ... follow that either Ashraf or Afzal believe that Ashraf had bound himself not to make such claims. If the background against which the meeting took place was one where Afzal was asserting that the only issues on which out of court agreement was possible was the partition of the jointly owned property, I think it more likely that Ashraf attended the meeting hoping to reach agreement on those issues, but without intending to abandon claims he might have in relation to other properties the purchase of which had been financed wholly or in part by the partnership and/or where the names in which the property was registered did not reflect the beneficial ownership.”

Consequently, as Auld LJ put it when the case finally came to the Court of Appeal

Hart J’s conclusion, which is to be found in paragraphs 36 and 37 of his judgment, was, as I have indicated, in favour of Ashraf; namely, that the agreement was not one of compromise on all issues, but covered only the jointly-held properties identified in the document generated and signed at the meeting:

“36. It seems to me that both brothers would have come to the meeting with the knowledge that there were potentially other issues between them than simply the partition of the jointly held properties and that the omission of Afzal to include in the paperwork produced at the meeting any formula purporting to make the agreement one in full and final settlement was not accidental. At any rate, nothing having been expressly said about the agreement being in full and final settlement I do not think that the circumstances made it necessary or obvious that such a term should be implied.

37. Accordingly I answer the first issue in the negative ...”

Given my experience of the basis on which compromises are thrashed out in family meetings, I must say that when I initially read Hart J’s arguments I was totally mystified as to what the learned judge was driving at, and why he reached the conclusion that he did. After careful reflection, I eventually came to the conclusion that two contradictory factors were at work here. On the one hand, this family meeting acted unusually – at least in terms of traditional South Asian conventions – in preparing a written resumé of the compromise at which it had arrived. In the past, when all such settlements were both negotiated and enforced internally, it would have been the *witnesses*, rather than a flimsy piece of paper, who were responsible for overseeing the implementation of the settlement. But in this case, in conformity with contemporary (‘modern’) conventions, they chose to put down the terms of the settlement in writing.

Unfortunately, this had consequences which those attending the meeting do not appear to have foreseen: namely that English lawyers would note a striking omission (at least from their perspective) of the wording of the document: namely the omission of any suggestion that the

agreement was ‘in full and final settlement’ of the dispute between the two brothers. In other words, from an English contractual perspective, it left open the prospect that there were other matters not specified in the document which were not settled and agreed upon – precisely the issue which Hart J picked up in his judgement. It was only then that Hart J’s remarks quoted above to the effect that

It does not follow that either Ashraf or Afzal believe that Ashraf had bound himself not to make such claims. the only issues on which out of court agreement was possible was the partition of the jointly owned property ... I think it more likely that Ashraf attended the meeting hoping to reach agreement on those issues, but without intending to abandon claims he might have in relation to other properties the purchase of which had been financed wholly or in part by the partnership

sprang into focus: as far as contemporary English law is concerned, relationships grounded in understandings of mutual reciprocity and hence of trust in the widest sense, and hence of Status in Maine’s terms, are routinely trumped by those of contract. This was the position taken by the trial judge, and further confirmed by Auld and May LJJ when the case arrived in the Court of Appeal.

But what about Arden LJ? This is what she had to say in the course of reviewing the issues:

The meeting between the brothers, at which they made their agreement, took place as part of a family gathering within the Muslim culture, or at least within the culture of that part of the Muslim community to which the parties in this action belong. The meeting, be it noted, was convened not by any of the brothers but by their sisters, although they played no part in the making of the agreement. The explanation for this appears to have been that the two sisters were unhappy that their brothers were in dispute and wanted all matters between them to be resolved.

Mr Foskett [of counsel] relies on the fact that the making of the agreement was immediately marked by a shaking of hands and embrace between the brothers, and other members of the family. He also relies on the fact that, within the culture of the community to which the parties belonged, matters would be resolved without litigation.

Even though these events took place after the agreement was made, and so are not in a strict sense part of the “background” to the making of the agreement, they were very much part and parcel of the making of the agreement and in my judgment evidence as to these matters is admissible.

Then having set out the *dictum* quoted earlier, she went on to argue that

In this case, the evidence did not establish that the form of celebration to which I have referred would only occur if the parties had reached a final agreement on every matter that could possibly be in dispute between them at that time. The parties might similarly have conducted themselves if an agreement had been reached which was only partial, for example if it was sufficient to resolve [only] the most pressing matters in dispute between the parties.

The agreement on both parties’ cases enabled the parties to know how they stood as regards the future management of each of the three businesses in which they were both involved, and that must have been important for the purpose of resolving the immediate problems of both a family

and business nature. Accordingly, the evidence was not sufficient in this case to lead the court to the conclusion that the agreement must have been in full and final settlement of all the claims that they had against each other.

The evidence on this point ... was, on examination, equivocal. If the evidence had been clear enough, it could have been significant, and, secondly, it was evidence which, given the principles to which I have referred, the court must pay regard. Indeed, this may be one of the first cases in which the court has had to consider a submission about the admissibility, on a question as to the interpretation of a contract, of evidence as to the cultural tradition of the parties to a contract.

From an analytical perspective, one of the most significant features of the way in which Lady Arden sets about interpreting her *dictum* is that she not only reduces her reference to ‘different traditions, practices and attitudes’ to ‘the cultural tradition of the parties’, but does so in a way which implicitly excludes law from culture. Moreover in the process of so doing, she blissfully excludes the prospect – doubtless because the matter was not brought to her attention by counsel, and in any event lay outside her own personal experience – that not so long ago these very issues were actively addressed in an overseas extension of the jurisdiction of English Law.

So far as I can see all the learned judges who considered this case appear to have accepted that before the brothers fell out with one another, they organised the financial dimensions of their more or less separate businesses on a cooperative basis as a joint family – in keeping, amongst other things, with what Arden LJ accurately identifies as their cultural tradition. But the key issue in this case was whether that cultural tradition also had a *legal* dimension. Given that the Court of Appeal decision confirmed the decision of the trial judge, this case appears explicitly to confirm that it does not. Nor is it difficult to see why they reached such a conclusion: in an arena in which it is taken for granted that relationships between persons – whether they be individual actors, or legal persons (in other words formally constituted corporations) – there is simply no space in which legal recognition can be given to corporate *families*. As Maine long ago demonstrated, the corporate character of such families was not grounded in relationships of contract entered into by autonomous individuals: rather the corporation antedated their arrival, whether by birth or by marriage. Hence persons gained their status, and hence their rights vis-a-vis one another the corporation of which they were members, not as a result of signing up as freestanding individuals, but rather by fulfilling their obligations within a pre-existing corporate whole. It followed that in such a scenario contract did not automatically trump status. Indeed as far as the coparcenary was concerned, status trumped contract – not just in customary and cultural terms, but as a matter of law. Derrett makes this abundantly clear in his commentary on the matter:

Membership of the coparcenary is confined to the male descendants in the male line from a common male ancestor... By tradition co-parceners are the masters or 'owners' of the joint family property. This consists of ancestral property and all other property which would be available for distribution at a partition.. This concept of 'ownership' is convenient, but misleading. When non-coparceners may obtain charges on any part of the property for their maintenance, and may commence actions against transferees of the property, the coparceners certainly do not exhaust between them rights amounting to ownership

No individual member of the coparcenary can claim before partition (in which he participates) that he owns a certain definite share either of the corpus or of its income. The rights of a coparcener are (i) to be maintained; (ii) to demand partition and an account of the state of the family property; (iii) to become manager if the managership is vacant and no coparcener effectively objects;

Thus coparceners have a community of interest and of possession of the joint-family property and are comparable with joint-tenants at English law with benefit of survivorship, save that their individual rights commence independently and by operation of law, not by transfer between parties. No one can create a coparcenary interest, any more than he can create, with a stranger, a joint Hindu family

If a coparcener is deprived of enjoyment of the joint family property he has a right to sue for possession and reinstatement and for mesne profits, that is to say his maintenance day by day during the period of his deprivation or exclusion. No coparcener may sue for separate possession of any particular portion of the joint-family property and if he holds some portion denying the title of the other coparceners it is possible for him to acquire it as his separate property by adverse possession: the normal presumption that one joint owner cannot hold adversely to other joint owners being rebutted by his denial and ouster of the other members.(Derrett: 248 ff)

In the light of all this it would appear that at least in principle, Lady Arden's *dictum* raised a far wider range of issues than she appears to have appreciated. If responses to amount to anything more than making nice about difference – which is all that the learned judge appears to have achieved given the basis on which she applied her *dictum* in the case in hand – some much larger *jurisprudential* conundrums will have to be addressed. Sir Henry Maine was clearly well aware of this, even if he took care to conceal his light under a historical bushel. Moreover as Professor Derrett has shown in great detail, when the jurisdiction of English Law was extended to the Raj, the Courts, no less than the legislators found that they had no alternative but to recognise the existence of, and hence the legitimacy of, the legal ideas and institutions which were indigenous to India – and most especially so with regard to any with respect to 'succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastards, family relations, wills, legacies, gifts, partition, or any religious usage or institution' to quote the explicit provisions of the 1862 Punjab Laws Act.

Against that background I can only observe that in my experience the cases which are the source of the greatest degree of confusion – no less to lawyers than Judges – are those which fall into

two interlinked classes: on the one hand those have arisen because relationships between members of a corporate family have got wholly out of control, and on the other where regulatory authorities of one kind or another – from Social Services through Customs and Revenue to the UK Border Agency have taken the view that the behaviour of some or all members of the family stand beyond the boundaries of legitimacy. Moreover in virtually every such case the principal source of confusion invariably arises with respect to one or another of the issues specified in the Punjab Laws Act, and which are in turn precisely congruent with those which Professor Derrett discusses at length in his *Introduction to Modern Hindu Law*.

Whilst it follows that a greater appreciation of the insights which were gained during the course of Britain's Imperial adventures might help to resolve the increasingly pressing legal conundra thrown up by the increasing salience of ethnic plurality, there are few if any indications that the United Kingdom's legal institutions are either able or willing to take aboard the jurisprudential challenges arising from the steadily more plural character of the population over which it currently exercises jurisdiction. With this in mind it is worth asking what the Khan family might have done – in the light of Lady Arden's *dictum* – to provide court with evidence with evidence which might have precipitated a different outcome from that which was actually arrived at.

So far as I can see from an Indic perspective, the key issue in the Khan case was as to whether a family member who was (or became) dissatisfied with the compromise solution arrived at in the course of a family meeting can legitimately turn to an English court of law to unpack and revise the result of private exercise in dispute settlement, which in this case had arisen as a result of a comprehensive breakdown of mutual trust – and hence of relationships of mutual reciprocity – as between two members of a coparcenary. But if Arden LJ's valiant efforts to cut the Gordian knot may have failed, her judgement in this case does at least reveal the shape of the underlying challenge. So long as English Law continues to insist that relationships spelt out in contractual agreements must of necessity trump those grounded in relationships of collective mutual reciprocity, South Asian families whose members choose to organise their interpersonal interactions on this basis will find themselves vulnerable to the contract-prioritising premises of English law. From this perspective it would also seem that the Khan family took inadequate steps to keep such a possibility at bay. Despite having prepared a written *aide memoire* of their collective decision, and despite having *interactionally* confirmed that a compromise which was mutually acceptable to all concerned, it turned out that they had failed to close a vital loophole. Given its format, the written record of their compromise could be, and indeed was, taken as a contractual agreement rather than as *aide memoire*. That meant that the parties could be held to

its strict terms, and that the absence of the phrase ‘in full and final settlement’ it could readily be assumed that were other unspecified matters which had *not* been agreed upon, as Ashraf’s representatives successfully argued when the case came to court.

Was justice done in *Khan v Khan*? The answer depends on the choice of conceptual premises within the context of which one chooses to address the question. If one starts from the assumption that individual, autonomous, and in that sense sovereign, individuals are the fundamental components of the social order, but that these may also be accompanied by corporate structures (such as formally constructed Limited Companies and Partnerships) which can consequently be assigned legal personalities – in other words the conceptual premises which underpin the current articulation of English law – there can be no question about the matter. If contract trumps status, it follows that any notion that a coparcenary might form a corporate whole as a result of being bound together by *prior* obligations of mutuality is reduced to a chimera. Of course, members of this family may have chosen to organise their interpersonal relationships according to an alternative set of rules of this kind; and they may even have sought to sort out their differences in these terms; but unfortunately they were playing according to outmoded and discredited rules. Hence Ashraf was wholly entitled to approach the courts in an effort to unpick what he regarded as an unfair solution devised by a chimera – and hence, as Cohn remarks of developments in the subcontinent – to manipulate the new situation in such a way as to use the courts not to settle disputes, but only to further them.

The Archbishop of Canterbury puts a cat amongst the pigeons

Whilst the leading figures in the United Kingdom’s legal establishment have for the most part kept their heads well below the parapet when it comes to addressing the consequences of plurality, the leading figure in England’s clerical establishment – the Archbishop of Canterbury, Dr. Rowan Williams – has proved to be far more politically and intellectually adventurous. Of Welsh, rather than English extraction, and a great deal more cerebral than his recent predecessors, Dr Williams recently subjected the established consensus in this sphere to careful analytical scrutiny. It follows the analysis he set out in a densely argued lecture entitled *Civil and Religious Law in England: a Religious Perspective* deserves close attention, not least because he is prepared to address the conundrums precipitated by the growing salience of plurality in the contemporary world head on:

There is a bit of a risk in the way we sometimes talk about the universal vision of post-Enlightenment politics. The great protest of the Enlightenment was against authority that

appealed only to tradition... Its claim to override traditional forms of governance and custom by looking towards a universal tribunal was entirely intelligible against the background of despotism and uncritical inherited privilege which prevailed in so much of early modern Europe. The most positive aspect of this moment in our cultural history was its focus on equal levels of accountability for all and equal levels of access for all to legal process, foregrounding and confirming of what was already encoded in longstanding legal tradition, Roman and mediaeval, which had consistently affirmed the universality and primacy of law (even over the person of the monarch).

This set of considerations is not adequate to deal with the realities of complex societies: it is not enough to say that citizenship as an abstract form of equal access and equal accountability.... Where this has been enforced, it has proved a weak vehicle for the life of a society, and has often brought violent injustice in its wake. In societies which are ethnically, culturally and religiously diverse, there is a grave danger of the authorities of a sovereign order will establish abstract level of equal citizenship, within the context of which other levels are at least in principle *allowed* to exist. But if the reality of society is plural, this is a damagingly inadequate account of common life, in which certain kinds of affiliation are marginalized, ... [and] in which particular sorts of interest and of reasoning are tolerated as private matters, but never granted legitimacy in public as part of a continuing debate about shared goods and priorities.

We have to think harder about the role and rule of law in a plural society of overlapping identities. In doing so it helps to see the universalist vision of law as guaranteeing equal accountability and access in a negative, rather than a positive sense: that is as a mechanism whereby any participant can seek protection against the loss of elementary liberties of self-determination, together with the freedom to demand a reasoned defense for any actions and policies that infringe their capacity to act as they choose.

This is not suggest that society should be reduced to an uneasy alliance of self-determining individuals arguing about the degree to which their mutual freedoms should be limited by one another, such forcible restraint is needed to prevent the outbreak of a war of all against all: that is how a narrowly rights-based culture fosters a manically litigious atmosphere, together with a conviction of the inadequacy of all customary ethical restraints and traditions, or in other words the principles of what was once called 'civility'.

The advantage of defining legal universalism on a negative basis is that it allows us to recognize that the principal springs of moral vision arise in those spheres which systematic abstract universalism routinely regards as 'private' – in religion above all, but also in custom and habit. If so, the role of 'secular' law is not the dissolution of such practices in the name of universalism, but rather their monitoring to prevent the creation of mutually isolated communities in which individual persons are subjected to restraints or injustices for which there is no public redress.

It follows that the rule of law is not just a matter of enshrining the priority of universal/abstract dimensions of social existence, but entails establishment of a space in which it is open to everyone to affirm and defend a commitment to human dignity *as such*, independent of membership in any specific human community or tradition. If and when members of specific communities or traditions claim finality for their own boundaries of practice and understanding, they need to be reminded that they also have to come to terms with the actuality of human diversity. The only way of achieving that outcome is on the basis of a non-negotiable assumption that every agent (together with his or her historical and social affiliations) must have a voice in shaping the well-being and order of the wider community in which they form a constituent part.

In the context of such a negative approach to universalism, it is not the case that the understandings of specific communities would be 'superseded' by these universal principles: rather they would be undergirded by them. The rule of law is – and this may sound rather counter-intuitive – a way of honouring what in the human constitution is not captured by any one form of corporate belonging, or any particular history, even though the human constitution never exists without those other determinations. Our need, as Raymond Plant has well expressed it, is for the construction of “a moral framework which could expand outside the boundaries of particular narratives while, at the same time, respecting the narratives as the cultural contexts in which the language [of common dignity and mutually intelligible commitments to work for certain common moral priorities] is learned and taught”.

If Dr. Williams had restricted himself solely to theoretical arguments outlining the moral necessity of taking serious analytical, philosophical and theological cognisance of the socio-legal implications of contemporary patterns of ethno-religious plurality more seriously, his learned commentary would have been most unlikely to attract much in the way of public attention. But he did not confine himself to abstract analysis. On the contrary, he went on to press the hottest political and ideological button in the contemporary Europe: the issue of Islamic law:

What at first seems to be a somewhat narrow point about how Islamic law and Islamic identity should be regarded in our legal system in fact opens up a very wide range of current issues, and requires some general thinking about the character of law. It would be a pity if the immense advances in the recognition of human rights led, because of a misconception about the significance legal universality, to a situation where a person was defined primarily as the possessor of a set of abstract liberties – such that the law's function was seen as reaching no further than an effort to secure those liberties, irrespective of the custom and conscience of those groups which concretely compose a plural modern society.

No-one is likely to suppose that a scheme allowing for supplementary jurisdiction will be simple, and the history of experiments in this direction amply illustrates the problems. But if one approaches it along the lines of what Shachar has described as 'transformative accommodation', a scheme in which provides individuals with the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters, which may include aspects of marital law, the regulation of financial transactions and authorised structures of mediation and conflict resolution. In such schemes, both sets of jurisdictional stakeholders may need to examine the way they operate; those seeking to apply a communal/religious *nomos* will need to think through the risks of alienating its people by inflexible or over-restrictive applications of traditional law, and a universalist Enlightenment system has to weigh the possible consequences of ghettoising and effectively disenfranchising a minority, at real cost to overall social cohesion and creativity. Hence 'transformative accommodation': both jurisdictional parties may be changed by their encounter over time, and we avoid the sterility of mutually exclusive monopolies.

Set in these terms, only the most academically qualified commentators would have been likely to appreciate just what it was that Dr. Williams was driving at in the midst of such a dense

analysis.³ What really put the cat amongst the pigeons, however, was an interview on BBC news in which he spelt out the implications of his musings in plain English. Having been asked to fill out his contention that in the process of seeking a greater degree of social cohesion Britain will of necessity have to take serious steps to accommodate religious diversity, including in some circumstances the application of Shari'ah law, he replied *en claire*:

It seems unavoidable. Indeed as a matter of fact, certain provisions of Shari'a are already recognised in our society and under our law; so it's not as if we're bringing in an alien and rival system. We already have in this country a number of situations in which the internal law of religious communities is recognised by the law of the land in certain circumstances, and in providing certain kinds of social relations. So I think we need to look at this with a clearer eye, and not imagine either we know exactly what we mean by Shari'a, and not just associate it with what we read about Saudi Arabia or wherever.

All hell broke loose in the Press as a result of his remarks. As the Daily Telegraph promptly reported:

The Archbishop of Canterbury was embroiled in a fierce political and religious row last night after he called for aspects of Islamic sharia law to be adopted in Britain. His comments were immediately attacked by Downing Street, religious groups and MPs from all sides. The head of the equality watchdog denounced his claims while several high profile Muslims also criticised Dr Williams.

"The Archbishop's thinking here is muddled and unhelpful," said Trevor Phillips, the chairman of the Equality and Human Rights Commission. "Raising this idea in this way will give fuel to anti-Muslim extremism and dismay everyone working towards a more integrated society."

Baroness Warsi, the shadow minister for community cohesion and social action, said: "The Archbishop's comments are unhelpful and may add to the confusion that already exists in our communities." "All British citizens must be subject to British laws developed through Parliament and the courts."

Jacqui Smith, the Home Secretary, said: "I think there is one law in this country and it's the democratically determined law. That's the law that I will uphold and that's the law that is at the heart actually of the values that we share across all communities in this country."

Conclusion: Responding to our *de facto* condition of plurality

In the light of all this there are good reasons for suggesting that the challenges which British legislators and jurists encountered in the course of administering their Indian Raj are currently being replayed in the United Kingdom as the result of development which Sir Henry Maine and his colleagues are unlikely have begun to have imagined in his wildest dreams. Britain's Imperial

³ In the excerpts of the lecture cited here I have taken the liberty of simplifying some of Dr. Williams' most tortured arguments, in the hope that this will serve to render his prose more immediately comprehensible to a wider range of readers.

chickens have begun to return home to roost. In addition to the fact that Indian Corporations have recently bought up the greater part of what remains of Britain's indigenously rooted steel and motor manufacturing companies, parallels patterns of labour migration has precipitated the emergence of South Asian presence within its jurisdiction which is now well over two million strong, most of whose members have coagulated together to form close knit and ethnic colonies – at least in personal and domestic terms.

Of course there are many differences between the situation in late nineteenth century India and twenty-first century Britain. At one level, the two situations are mirror images of one another. In India the British were a tiny minority seeking to impose their own 'progressive' values on the much larger mass of India's population. In contemporary Britain South Asian settlers form a much more substantial minority – in relative no less than absolute terms – who have arrived 'from below', and are consequently still seeking to establish a niche for themselves from a position of relative powerlessness. Other aspects of the debate are more familiar. Besides continuing to enjoy a position of political dominance in the new scenario, the public at large remain as confident as ever in the superiority of their social, cultural, ideological and legal foundations of their conceptual universe. The results are plain to see. Established British institutions – of which the system of Justice and its associate procedures are merely the specific example on which this essay focuses – remain loath to concede any kind of legitimacy to alternative premises, procedures and institutional structures. Moreover the results of all this go far further than mere demands for conformity.

In manner which runs entirely parallel to initiatives which were deployed during the course of the Raj, Parliament has gradually introduced a whole host of regulatory initiatives whose consequence – sometimes with deliberate intent, but more often than not as a result of a taken for granted the assumption that the persons subject to their impact will operate within social arenas composed of autonomous, free-standing individual – of necessity casts doubts on the legitimacy of, and not infrequently serves actively to criminalise, actions and practices which derive their logic from the more corporate and collective dimensions of minority lifestyles. Whilst the institutions practices on which these initiatives bite regularly turn out to be closely congruent with those which nineteenth century reformers sought to target in India, the grounds on which they are justified has undergone a sea-change, The term 'primitive' is no longer *de rigueur*, whilst suggestions that a practice is 'un-Christian' now cuts very little ice. Instead current modes of justification are secular in character, and grounded in appeals to Human Rights (especially in the field of marriage and divorce), to Health and Safety (with respect to a variety of established

ritual practices), to Child Protection, Adoption and Fostering, Consumer Protection, Financial Regulation and last but not least of National Security. And in all the contexts the sticking point is much the same: the presence of corporately grounded networks of mutual reciprocity and their attendant methods of internally-oriented dispute settlement, which renders them vulnerable to being perceived as giving rise to unacceptable constraints on personal freedom (especially for women) at one end of the scale, and to criminal conspiracies at the other. It also follows that the consequences of legal interventions made on this basis are frequently disastrous as far as the maintenance of equitable patterns of interpersonal reciprocity within the family are concerned: smash and grab raids by social workers, albeit implemented with the best of intentions from their own perspectives, all too often leave interpersonal relationships within the family in such a state that the prospect of reconciliation becomes diminishingly small. Should all this be followed by adversarial proceedings in court, a prospect of rapprochement is likely to disappear entirely – leaving the state to pick up the pieces.

Not that such outcomes attract much by way of public attention, let alone concern. Instead a steadily growing series of regulatory initiatives have emerged from Britain's national Parliament as well as the EU, such that those who differ have found themselves under ever increasing pressure to conform to the moral and conceptual premises of the dominant majority, with the prospect of criminal prosecution lying at the end of the line for those who fail to alter their behaviour accordingly. Moreover as popular reactions to the Archbishop's speech revealed, morally grounded arguments in favour of comprehensive assimilation are currently being reinforced by a yet more powerful political current: one which regards the growth of ethno-religious plurality as an unacceptable threat to the integrity of the established social order – a prospect which is in turn identified as intrinsically intolerable.

In pitching his lecture in the way he did, Dr. Williams adopted a position which was comprehensively antithetical to that adopted by his more evangelically oriented predecessors. Besides having no truck whatsoever with suggestion that some traditions might be 'more advanced' or 'more civilized' than others, the central thesis of his lecture was that for pragmatic no less than for theological and legal reasons, plural societies have no alternative but to face up to their condition of plurality if they were to sustain a viable condition of socio-political integrity. That assertion alone would have been enough to put the cat amongst the pigeons as far as the popular sentiments amongst the indigenous majority were concerned; however in this case he chose to wade yet more deeply into the morass. In addition posing queries about what his critics (including the Home Secretary) naively identified as 'the Law', he also went on to discuss

how one of the central purposes of any legal system – namely the equitable settlement of interpersonal disputes – might best be achieved in situations of plurality. Yet more significantly still, he not only argued that context-specific remedies were essential if equitable outcomes were to be precipitated in this sphere, but also that such solutions *had already begun to emerge* in a number of minority communities, and most particularly amongst the Jews and the Muslims. In consequence, his lecture was at least as much concerned with bringing was *already* happening in the midst of Britain’s increasingly plural social order, rather than with the articulation of idealistic assertions about what *ought* to happen. It follows that his argument was anything but radical: rather it was a wake-up call to all those who have been carefully seeking to divert their eyes from *de facto* reality. However, his efforts to do so fell flat as a pancake: his arguments were promptly dismissed on almost all sides as irrelevant blather. This can only be regarded as deeply regrettable.

Whilst ‘progressive’ thinking of a modernistic kind – of which the Austinian vision is a classic example – is intrinsically hostile to the prospect of cultural and conceptual diversity, the contemporary (post-modern?) world is becoming increasingly plural in character, no less locally than globally. Moreover, that balance of power on a global scale is now changing rapidly. Sir Henry Maine and Sir James Stephen articulated their arguments when Euro-American Empires were reaching the apogee; as we enter the twenty-first century, their position of hegemony has well nigh evaporated. ‘Ancient law’ remains with us to this day, and at an undeniable *de facto* level, is used by a members of a steadily expanding section of the population in every contemporary Euro-American jurisdiction. In these circumstances Poulter’s question as to how far the established legal order can reasonably be expected to tolerate minority institutions and practices has become wholly anachronistic. The new minorities are here to stay, and the additional dimensions of plurality which their members have introduced into every Euro-American social order are here to stay. This is having inescapable consequences in every Euro-American jurisdiction.

Given that all Euro-American jurisdictions are all strongly Austinian in character, their democratically constituted legislatures are in a position to introduce regulatory initiatives on the basis of little more than a simple majority vote; and in the face of steadily escalating popular fears that the increasing salience of plurality represents an unacceptable threat to the integrity of the established socio-cultural order, legislatures on both sides of the Atlantic have become steadily to passing legislation aimed quite explicitly at rendering the public expression of alterity illegitimate. In strict Austinian terms the initiatives are doubtless entirely legitimate. But how far

do they stand up to critical scrutiny from a wider Jurisprudential perspective? The Archbishop of Canterbury has tied his colours to the mast from a theological perspective, and found himself subjected to a systematic campaign of public mockery as a result of his efforts. Perhaps that is why senior members of the Judiciary, no less than academic lawyers, are keeping their heads well below the parapet.

But no matter how cautious, not to say equivocal, their reactions may be, the underlying issues are set to remain as pressing as ever. Just how can the objectives Justice, Equity, and Good Conscience best be facilitated in the context of rapidly changing and increasingly pluralised contemporary socio-cultural orders? Is an Austinian conceptualisation of the essence of law a help or a hindrance in course of so doing? Yet more pertinently still, to what extent is the increasingly chaotic condition of contemporary Euro-American socio-economic order rooted in project which lay at the heart of the enlightenment: the systematic replacement of hierarchical, reciprocity-grounded relationships of status with more progressive and inherently liberating relationships of contract between autonomous and free-standing individuals? Could it be that Euro-American modernity has moved so far down the track the track from status to contract that it has not just lost sight of the value of the socio-cultural resources which it has abandoned, thereby leaving itself acutely vulnerable to the prospect of finding that untrammelled individualism has led to the progressive erosion of all forms of non-contractual interpersonal social solidarity?

A blast from the past

Thus far, my analysis has largely focused on the challenges with which English Law has found itself confronted during the course of the past two centuries, and on its apparently unstoppable onward rush along what is still widely regarded – at least by lawyers – as an inherently ‘progressive’ trajectory from status to contract, guided and guarded by an ever more powerful regulation-issuing Austinian state. But as the expense of litigation has rendered the prospect of dispute settlement by formal means beyond the reach of everyone but the super-wealthy, as an ever larger number of prisoners have found themselves incarcerated for longer and longer periods, and as communities with their own informal means of dispute settlement find themselves trashed for their pains, is it the case that we are heading for a brighter future – or are we following the example of lemmings, such that our commitment to ‘progress’ is anything but?

With that in mind I’d like to conclude with a quotation from Derek Roebuck’s recently published study entitled *Early English Arbitration*. This is what he has to say:

Enforcement is all. There is no point in submitting a dispute to any form of management unless the outcome produces some step towards a resolution which the parties can rely on. Today the parties can take awards of arbitrators and mediated agreements to state courts for enforcement. That was not possible in the Anglo Saxon or early Norman Britain. Then the parties had to rely on pressures to conform which flowed from belonging to a community. They were usually enough. The parties knew that. What can be accurately described as public arbitration was the normal way of resolving any dispute which either a party or the community considered important enough.

Indeed, it is only possible to think about arbitration as an *alternative* to litigation when public arbitration in customary assemblies gives place to litigation within a state apparatus of government, as happened under the Norman kings. That is why this study does not satisfy two essential elements of modern arbitration. First, the distinction between arbitration and litigation is irrelevant; secondly, the requirement that arbitration be consensual, demanding a free choice by the parties both of the process and of the arbitrators, is anachronistic when applied to societies where such emphasis on individuality was unknown. By Norman times at least, the arbitrators must be known to the parties. They could not be strangers, and respondents could object to anyone that they had not themselves chosen.

Everything was public knowledge. The simple 'all or nothing' conclusion of modern litigation was not subtle enough for such a world. The result depended on many factors not thought appropriate for consideration today.

Everyone understood that violence and self-help resulted not just from the victim's anger, but from community pressure, and from the victim's need to respond to a wrong in a way which satisfied the community's sense of honour. A family could not easily live with shame.

But there was another countervailing pressure from the community to resolve the problem peacefully, that is without damage to the community, by methods which the community provided. If you followed the procedures set down by the community, what we call customary law, no shame could result. It was the whole community, as represented by the hundred or shire or borough which approved the outcome of these proceedings. Whoever adjudicated, whatever settlement was agreed, it was essential that the whole assembly approved the award, 'the whole shire making the decision'.

No problems were perceived in theory, or arose in practice, if witnesses took part in mediating a settlement, or even if they adjudicated as arbitrators. The more knowledge of facts and law relevant to the dispute were diffused and shared, the easier it would be to get consensus and the more likely the settlement would stick. The important difference from modern procedures is that those who were helping to bring about a settlement were considered (however far that might be from reality) to be the friends of both sides.

Much has changed during the past millennium. In Anglo-Saxon times the role of the King was much the same as that of the Indian Raja: to approve, and if necessary to enforce, the conclusions of local arbitrators. Perhaps the time has come to re-examine the utility of Austinian approaches to the phenomenon of law, most particularly when it comes to the role of law in maintaining the integrity of the everyday socio-cultural order. There can be no dispute that as a result of rampant individualism many components of the contemporary socio-cultural order are currently under severe stress: hence there is much public discussion of the disappearance of community, the breakdown of the family, and hence of 'Broken Britain'.

There is no one cause of our current condition. Nevertheless it is worth asking how far the premises of the enlightenment – however progressive they may have been in some contexts – have simultaneously generated a fearsome negative undertow, and how far Austinian visions of both law and its administration have contributed to that process. In a social order conceived of as an arena within in which autonomous individuals of equal and identical worth order pursue their interests and order their interactions with others on a narrowly contractual basis, no significant space is left to accord any kind of significance to networks of interpersonal reciprocity. Fictional legal persons – corporations whose members are bound together by formal relationships of contact – thrive as never before; meanwhile unincorporated associations based solely on relationships of trust, or in other words the institutional structures which provide the necessary underpinnings of both families and communities, have been left to wither on the vine.

So where do we stand today? At least amongst the progressive indigenes of Euro-America, relationships of contract has so comprehensively trumped those of status, so much so that the reciprocity-based institutions of the new minorities are viewed at best as suspicious, and at worst as criminal conspiracies. On the face of it, Maine's prediction of the inevitable eclipse of status by contract has come true. Just two questions remain however. Firstly has the 'progress' which has thereby been achieved been worth candle? And secondly, if the negative undertow

precipitated by these developments has been as fearsome as I suspect it has, further ‘progressive’ top-down remedies are most unlikely to provide any kind of meaningful solution. If Euro-America’s indigenous families and communities are to be restored to health, they will have to be rebuilt from the bottom up – amongst other things by rediscovering and revalidating the networks of interpersonal reciprocity and community-based processes of dispute settlement of which many members of the new minorities still remain – thus far at least – such expert exponents.

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