COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS

Edited by

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The colonialist heritage

UPENDRA BAXI

The 'word' and the 'world'

Notions of 'heritage', no matter howsoever nuanced, privilege certain moments of domination as inaugural. Implied in these notions are constitutive ideas about historic time flattened by certain orders of narrative hegemony. Who fashioned the colonial heritage, with what means of violence and exclusion, what elements were constitutive of 'its' core and who 'received' it, which aspects of 'it' were imposed by force and who resisted 'it' and how, are questions that, once posed, open up vistas of heterogeneity of historic time and space that we symbolize by the words 'colonial'/'post-colonial'. The matter of 'winners' and 'losers' forces our attention to the shifting character of the calculus of interests that animated the imposition and/or the 'reception' of metropolitan legality as well as patterns of resistance. The missing middle term between *traditions* and *transitions* (the thematic of this book) is *transactions*. The addition of this 'dangerous supplement' enables a more differentiated understanding of the sources of violence inherent in patterns of the dominant historiography that silence the voices of the subordinated.

Genres of comparative legal studies determine what may be meaningfully said concerning 'the' colonial inheritance. The positivistic genre of comparative legal studies strictly addresses forms of normative and institutional diffusion of dominant global legality. Instrumentalist approaches, principally the Old and the now 'New' law-and-development genre, remain concerned with issues of efficient management of transition from 'non-' modern to modern law. The sociological genre explores production of difference within, between and across legal cultures, especially through the prisms of legal/juridical pluralisms. The critical comparative genre provides frameworks for understanding the spread of dominant legal-ideological

traditions and the transformations within them. Each of these, and related, genres develops its own kinds of (pre-eminently Euro-American) epistemic communities sustaining the practices of inclusion/exclusion that define the distinctive domain of comparative legal studies. My approach in this essay, which is concerned with comparative colonial legality, derives much from these traditions of doing legal comparison but also seeks to go beyond them in mood, method and message. Of necessity, it runs many a narrative risk.

Colonial legal/jural inheritance, at best a bricolage of alien ideologies and institutions, may be viewed at least in three distinct but related modes: as an ethical enterprise, an affair of history and an ensemble of practices of violence.

Kant's 1784 essay 'What is Enlightenment?' (at least in the version offered by Michel Foucault)[1] may be read as constructing an ethical notion of colonial inheritance in terms of a process in which certain 'guardians have so kindly assumed superintendence' over 'so great a portion of mankind'. Kant highlights the tension between *sapere aude* (the courage to use one's own independent reason) and a 'lower degree of civil freedom' (which allows 'the propensity and vocation to free thinking'). This creative tension between autonomy and obedience 'gradually works back upon the character of the people, who thereby gradually become capable of managing freedom', through invention of 'principles of government, which finds it to its own advantage to treat men [...] in accordance with dignity'. Much within the theory and practice of comparative legal studies simply recycles the Enlightenment notions of the moral roots of legal paternalism.

Savigny, in contrast, helps us to think about inheritance in historical rather than ethical terms, as a historical process of social (intergenerational) transmission of law. He suggests that law, like language, is what people inherit as well as invent. Like language, law is necessarily a collective heritage of the people, embodied in *lived* and, therefore, transformative modes of experience (to evoke the Saussurian distinction between *langue* and *parole*) that Savigny, somewhat tragically, identified as *Volksgeist*. In his dispute with Thibaut, Savigny conceptualized this notion as signifying a double split.[2] On the one hand, *Volksgeist* stands for that 'spirit' already

[1] Immanuel Kant, 'What is Enlightenment?' ['*Was ist Aufklärung?*'], in Michel Foucault, *The Foucault Reader*, ed. by Paul Rabinow (New York: Pantheon, 1984), pp. 32–50 [1784] (hereinafter *Foucault Reader*). The translation from Foucault's French rendition is by Catherine Porter.

[2] See F. K. von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, transl. by Abraham Hayward (New York: Arno Press, repr. 1975) [1831].

reconstituted by historic intrusions of the received/imposed law; on the other hand, resistance to further imposition/reception is made legible and legitimate by the invocation of that reconstituted spirit of the people. That 'spirit', in turn, is further split as manifesting a 'popular' dimension and a 'technical' one in ways suggestive of the presence of limits to effective legal change.[3] This notion brings home the insight that the power of epistemic communities to legislate social change must remain bound to the career of popular resistance. The fact that something which constitutes the 'people', in turn, homogenizes/totalizes the law 'givers' and the law 'receivers', not to mention the notion of 'law' itself, is, however, another matter.

Perceived in terms of practices of violence, colonial legality enacts various scripts of the politics of desire for global domination and complicates the notion of 'inheritance'. Too much of the early history of colonial law stands marked by the law and politics of violent exclusion.[4] When all is said and done, the 'character' or the 'spirit' of the 'people' is reshaped by violent imposition of governance practices. The history of the practices of a politics of cruelty seems of very little interest to comparative *jurisprudes* (as Karl Llewellyn was fond of describing 'jurisprudents'). But this history of 'inheritance', when not fully genocidal, disinherits the 'people' at least doubly by divesting them of any epistemic capability to know/create 'law' and by imposing upon them forms of law that, instead of proceeding from domination to liberation, proceed 'from domination to domination' (to quote words from Foucault which he used in another context).[5] The character of modern law's 'infamy'[6] archives for us the violent making of colonial jural and juristic inheritance. At the threshold of the edifice of comparative legal studies, then, lies the Althusserian logic of *indifference*, an order of knowledge/power relation in which all concrete differences are regarded as 'equally indifferent'.[7]

[3] On the question of limits to effective legal change, see Julius Stone, *Social Dimensions of Law and Justice* (Sydney: Maitland, 1966), pp. 101–18.

[4] See Upendra Baxi, *The Future of Human Rights* (Delhi: Oxford University Press, 2002).

[5] Michel Foucault, 'Nietzsche, Genealogy, History', in *Foucault Reader*, *supra*, note 1, p. 85. The translation from the French is by Donald F. Bouchard and Sherry Simon.

[6] Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), pp. 63–86.

[7] Louis Althusser, *For Marx*, transl. by Ben Brewster (New York: Vintage, 1970), p. 203. In contrast, the pluralization of the notion of 'inheritance' seeks to combat this ' "indifferent" epistemology', assigning a 'primacy of identity' and constructing an 'identitarian logic' which imposes 'ceaseless subordination of the differentiated [. . . and] of the non-integral'. I borrow this striking phrase regime from another context: Wai Chee Dimock, *Residues of Justice: Literature, Law, Philosophy*

To further complicate the picture, colonial inheritance affects not just those who 'receive' it since those who 'gave'/'bequeathed' it also continue to reproduce themselves. Comparative legal studies, understood as the narratives of the making of 'modern' law, still stands marked by the 'Caliban syndrome', the construction of colonial/post-colonial narrative voices in ways that comfort and confirm the Euro-American images of progress and 'developmentalism'.[8] Caliban is a being, or a history of being, that 'is the excluded, that which is eternally below possibility [...]. He is seen as an occasion, a state of existence which can be appropriated and exploited to the purposes of another's own development.'[9]

This is a complex story. The colonial juristic mind-set survives even as colonies have disappeared. The dominant tradition of doing comparative law still reproduces the binary contrasts between the 'common'- and 'civil'-law cultures or the 'bourgeois' and 'socialist' ideal-types, thus reducing the diversity of the world's legal systems to a common Euro-American measure.[10] In every sphere, the 'modern' law remains the gift of the west to the rest. The large processes of 'westernization', 'modernization', 'development' and now 'globalization' of law present the never-ending story of triumphant legal liberalism despite the recent powerful stirrings of the internal post-socialist, post-modern critiques of the 'modern' law and messages from the worlds of legal pluralism. The only history that can guide the future of law is that of the 'modern' law; our common juristic future resides in a world without alternatives. The 'law' is modern or post-modern; it was not and cannot be anything else.

Thus emerges a history of mentality that maps a unidirectionality of legal 'development' within which pluralism may often construct the logic of difference and expose the late modern law's neo-colonial core. Expressed in the contemporary hi-tech idiom, the image of the modern law as a juridical human genome project, or at least as universal 'cultural software',[11]

(Berkeley: University of California Press, 1996), p. 74. Comparative legal studies practices remain, simply, insensible outside this heterogeneity.

[8] Patrick Chabal, 'The African Crisis: Context and Interpretation', in Richard Werbner and Terence Ranger (eds.), *Post-colonial Identities in Africa* (London: Zed Books, 1996), pp. 45–6.

[9] George Lamming, *The Pleasures of Exile* (London: Alison & Busby, 1984), as cited and further developed in Edward W. Said, *Culture and Imperialism* (London: Vintage, 1994), pp. 256–8.

[10] See Gyula Eörsi, *Comparative Civil (Private) Law: Law Types, Law Groups, The Roads of Legal Development* (Budapest: Akadémiai Kiadó, 1979); Pierre Legrand, *Fragments on Law-as-Culture* (Deventer: W. E. J. Tjeenk Willink, 1999).

[11] J. M. Balkin, *Cultural Software* (New Haven: Yale University Press, 1998).

continues to dominate the performances and uses of comparative legal studies. Unidirectionality leads to perfectibility of global epistemic hegemonic practices which consolidate the view that the masters and makers of the modern law have nothing worthy to learn from the discursive traditions of the Euro-American tradition's Other. For example, strategic comparatists guiding the legal/juridical reconstruction of the so-called 'transitional' post-communist societies resolutely forfeit any possibility of learning from the juristic and juridical traditions of the decolonized worlds (for instance, from India in the middle of the last Christian century and from southern Africa at the end of it).

In this sense at least, comparative legal studies that affords equal discursive dignity to non-Euro-American traditions has yet to emerge. Put another way, comparative legal studies continues to happen, as ever, as decisions centring on the Euro-American world. The importance of these decisions is not in doubt for they determine universes of law: the ways of *seeing* (that constitute the realm of the invisible), of *speaking* (that determine the regimes of silence) and of *feeling* (that devalue the suffering of the colonial Other). Can this book finally enable the inauguration of an *epistemic break*?

Different registers

The making of 'modern law' is almost always presented as a saga of the Idea of Progress. The rule of law, the doctrine of separation of powers, the relative autonomy of the legal profession and the Bill of Rights are usually offered as moral inventions of Euro-American political and legal theory *without* any lineage elsewhere and whose dissemination is then constructed as a Kantian civilizational good. In this first register, the colonial legacy and inheritance mark a decisive discontinuity with the 'pre-colonial' tradition, one that constitutes at once the ways of domination as well as of resistance. Thus, E. P. Thompson was able to write as late as 1975 that even if the 'rules and rhetoric' of modern law were a mask of imperial power, 'it was a mask which Gandhi and Nehru were to borrow, at the head of half a million masked supporters'.[12] In this discourse, the post-colonial mission merely allows the potency of the modern law to unfold, prompting the Eternal Return of the Same as a 'pillar of emancipation' (to borrow a phrase from Santos).[13] As

[12] E. P. Thompson, *Whigs and Hunters* (London: Penguin, 1975), p. 266.

[13] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2d ed. (London: Butterworths, 2002), pp. 21–61.

the *spaces* of the post-colony transit to *places* in the emerging global 'order', it becomes the mission of the law's late modernity to arrest deflections from the path of legal liberalism by persuasion when possible and through justified armed intervention when necessary.[14] That mission reworks and harnesses the colonial legacy and the post-colonial experience in the pursuit of visions of the globalizing world's iconic images of 'democracy', 'good governance', 'economic rationalism' – the goal being, in truth, to make the world safe for the foreign investor.

In a second register, these 'irreversible' and 'rational' legacies and inheritances emerge as the mythology of the modern law, as an aspect of the wider phenomenon of White Mythologies.[15] This discourse presents the progress of modern law in terms of the foundational and reiterative violence of 'modern law'.[16] From Walter Rodney to Mahmood Mamdani,[17] we read the modern law's biography as a brutal history of ways of combining the *rule of law* with the *reign of terror*. 'Post-colonial reason' contests in a myriad of modes the notions of 'rationality' that constitute the 'legacy' and the 'inheritance'.[18]

A third register scatters the narrative hegemony of the modern law through devices of legal pluralism. *Activist* legal pluralism contests the 'justice' of meta-narratives of all-pervasive colonial and contemporaneous 'globalizing' modes of domination. *Sedentary* forms of legal pluralism are content to tell us what actually happened, leaving evaluation to the realm of ethical sentiment. For present purposes, both discourses suggest that colonial appropriation of 'customariness' resulting in hybrid legal pluralism,[19] whether of the kind that entailed the creation of bodies of Anglo-Hindu and Anglo-Muslim law in colonial India or the reconstruction of the African chieftaincy, was a function of many, often contradictory, interests of the colonizing and indigenous elites. These distinctive domains of

[14] See John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999).

[15] See Robert Young, *White Mythologies: Writing and the History of the West* (London: Routledge, 1990).

[16] See Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority" ', in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds.), *Deconstruction and the Possibility of Justice* (London: Routledge, 1992), pp. 3–67.

[17] See Walter Rodney, *How Europe Underdeveloped Africa* (Dar-es-Salem: Tanzania Publishing House, 1976); Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1995).

[18] See Gayatri Chakravorty Spivak, *A Critique of Post-colonial Reason: Towards a History of a Vanishing Present* (Cambridge, Mass.: Harvard University Press, 1999).

[19] Mamdani, *supra*, note 17, pp. 109–37.

customariness have always troubled the patterns of colonial and post-colonial legality.

In a fourth register, modern law's comprehensive violence stands narrated in very different genres. Feminist narratology constructs the colonial 'legacy'/'inheritance' as so many ways of entrenching the male in the state.[20] This subaltern genre struggles to give a place to the voices of suffering and to the authentic practices of resistance to domination without hegemony. Eco-feminism and eco-history empower us with critiques of the ways of colonial and post-colonial legality that commodified the commons.[21] Psycho-history invites us to consider the ways in which 'modernity' reconstitutes the colonial and post-colonial self.[22]

The constitutive elements of colonial heritages of the modern law thus emerge very differently in these various registers. When we add to this the combined and uneven processes of colonization, the *making* of colonial law presents very different histories, too. In the high-colonial period of the British Empire in India, the presiding deity was Jeremy Bentham, whose utilitarian project finds the highest expression in the 'scientific' reform of law which proves impossible for the metropolitan power at home.[23] The Anglo-French rivalry went so far as to encourage the French dreams of an 'India-in-Africa' form of colonizing,[24] a mimetic desire that would, even

[20] For example, see Ann Laura Stoler, *Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things* (Durham: Duke University Press, 1995); Rajeswari Sunder Rajan, *Real and Imagined Women: Gender, Culture and Post-coloniality* (London: Routledge, 1993).

[21] See Maria Meis and Vandana Shiva, *Ecofeminism* (London: Zed Books, 1993); Ariel Salleh, *Ecofeminism as Politics: Nature, Marx and the Postmodern* (London: Zed Books, 1997); Ranajit Guha, *Savaging the Civilized: Verrier Elwin, His Trials and India* (Delhi: Oxford University Press, 1999).

[22] For example, see Ashis Nandy, *The Savage Freud and Other Essays on Possible and Retrievable Selves* (Princeton: Princeton University Press, 1995); *id.*, *Exiled at Home: Comprising at the Edge of Psychiatry, the Intimate Enemy* (Delhi: Oxford University Press, 1990). Observe that human-rights activism speaks to us not just about the genealogies of governance but also addresses colonial-legality modes of production of the 'absent subject' (see Fitzpatrick, *supra*, note 6) and the contradiction and complexity in the construction of 'subject-citizen' or even the constitutive career of a *citizen-monster*. See Veena Das, 'Language and Body: Transactions in the Construction of Pain', in Arthur Kleinman, *id.* and Margaret Lock (eds.), *Social Suffering* (Berkeley: University of California Press, 1998), pp. 67–91. Colonial law, politics and administration also constitute future histories of post-colonial violence. See E. Valentine Daniel, *Chapters in Anthropology of Violence: Sri Lankans, Sinhalas and Tamils* (Delhi: Oxford University Press, 1997); Donald Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985).

[23] For references and materials, see Upendra Baxi, *Towards a Sociology of Indian Law* (Delhi: Satvahan and Indian Council of Social Science Research, 1985).

[24] Thomas Pakenham, *The Scramble for Africa: 1876–1912* (London: Abacus, 1992), p. 168.

more outstandingly than the common law, arrange for the reproduction of a civil-law regime in francophone Africa. In contrast, the Portuguese in Mozambique simply exported their laws, decrees and lawyers as they did any other commodity.[25] Despite overarching commonalities in the leitmotiv of domination, colonial legality offers not one but many histories, both on the plane of ideas and institutions. It also offers multitudinous registers of resistance, especially when the life of literature is regarded as mirroring the images of law.[26]

Colonial inheritances make it almost impossible to disengage the 'colonial' from the 'post-' and the 'neo-' colonial. The 'legacies' and 'inheritances' of colonial legality persist in an era of decolonization. Most markedly, they persist in the forms and apparatuses of governance and in the accoutrements which adorn manifestations of the supreme executive power. The neo-colonial consolidates itself in the many phases of the Cold War, a phenomenon that is coeval with the processes of liberation from the colonial yoke. The juridical and legal histories of the Cold War formations of imposed neo-colonial legality await Foucault-like labours in comparative legal studies. It must suffice, for present purposes, to stress that the colonial and neo-colonial legal formations form a seamless web.[27]

Without purporting to be exhaustive, there remains, even for the 'progressive' Eurocentric tradition of doing comparative legal studies, the problem of what can only be referred to as *epistemic racism* – a term less politically correct than Althusser's 'logic of indifference'. This *habitus*, entirely comprehensible in the era of colonial comparative legal studies, has become puzzling since the middle of the twentieth century. A Jürgen Habermas, a John Rawls or a Ronald Dworkin thus remains able to expound theories of justice, public reason or judicial process *as if* the *living law* of the Third World or the south, transcending colonial inheritances, simply does not exist or is supremely irrelevant to theory-construction. The revival of comparative constitutionalism studies almost always ignores the remarkable achievements of decolonized public-law theory, whether as regards the fifty years of Indian judicial and juridical creativity or the extraordinary developments of the South African constitutional court. Outside Laura Nader's pioneering corpus which interrogates the range of hegemonic

[25] Albie Sachs and Gita H. Welsh, *Liberating the Law: Creating Popular Justice in Mozambique* (London: Zed Books, 1990), p. 3.

[26] See Said, *supra*, note 9, pp. 320–40.

[27] See Upendra Baxi, 'Postcolonial Legality', in Henry Schwarz and Sangeeta Ray (eds.), *A Companion to Postcolonial Studies* (Oxford: Blackwell, 2000), pp. 540–55.

presuppositions undergirding the practices of comparative jurisprudence, there has been no effort to follow Max Gluckman's studies on Barotse jurisprudence.[28] To the best of my knowledge, even the flowering of legal-pluralism studies remains unmarked by any interest in understanding the ways in which pre-colonial legality may have informed and shaped the legal imagination in the metropolitan cultures.

In the main, when comparative legal studies goes beyond the inner histories of the formation of the western legal tradition, it attends to the pressing and vital needs of doing business abroad as reflected in the so-called new *lex mercatoria* and the corresponding grammars of 'good governance'. Comparative legal 'theory' increasingly assumes an instrumentalist character, forgoing the reflexive richness that informed many of its foundational figures from Max Weber to Max Rheinstein.

The constitution of a *juristische Weltanschauung*

No understanding of the 'colonialist heritage' as a 'progress' narrative seems sensible outside the construction of a 'juridical world outlook'.[29] The juridical world outlook, or JWO, constructs 'modern' law, with all its complexity and contradictions, as a constitutive condition for human emancipation. Marked by a *juridisme* (the notion that, given good laws, all will be well with the world) which replaces 'the rule of the people by the rule of law',[30] the JWO celebrates the maxim that 'all law is bourgeois law'.[31] Indeed, the maxim may well provide a foundation for comparative legal studies in this era of globalization.

The JWO remains hostile to patterns of 'pre-modern' law, thought to be antithetical to 'progress'.[32] The work of 'progress' organizes *double* genesis amnesia. First, the JWO organizes the oblivion of the origins of the making of the western legal tradition from the tenth to the fifteenth century and the multiple histories of class-, race- and gender-based aggression. This effacement/defacement enables an idealistic presentation of the 'modern' law as inherently superior to all pre-colonial legal formations. Second, colonized people have to learn to forget their own genius for law and to forget that

[28] See Max Gluckman, *The Ideas in Barotse Jurisprudence* (New Haven: Yale University Press, 1965).
[29] V. A. Tumanov, *Contemporary Bourgeois Thought: Marxist Evaluation of Basic Concepts* (Moscow: Progress Publishers, 1974), p. 30 [referring to Friedrich Engels].
[30] *Id.*, p. 43. [31] *Id.*, pp. 50–1.
[32] On this count, at least, the socialist reconstruction converged with the bourgeois outlook.

not a shred of evidence exists (if I may be so bold) to suggest that a 'highly developed law' in the lawyerly sense has anything to do with economic and social development.[33]

Of course, neither order of organized amnesia fully achieved what was intended.[34] Many a nationalist critique of colonial legality, notably that of Mohandas Gandhi (in his still inspiring *Hind Swaraj*, written around 1911),[35] in fact invoked its inglorious past, living on in the acts and feats of colonization. In the process, the communitarian virtues and values of the pre-colonial law formations were reconstructed as combating orders of imposed legality.

Even when the 'handiwork of legality' drove the 'panic-stricken bourgeoisie' to 'a general debacle of its principles' (imperialism abroad and fascism at home), the complacencies and complicities of *juridisme* and *Rechtsstaat* reigned triumphant overall.[36] Similarly, in ways unnecessary to archive here, the Marxist–Leninist JWO was also shaped by its own 'debacle of principles'.

The 'debacle of principles' further complicates notions of programmed colonialist inheritance. The imposition of colonial 'law' signified, for the most part, conscious departures from the emergent metropolitan scripts of the rule of law. Colonial governance, in the main, was not (to use Foucault's words in another context) 'a matter of imposing laws on men, but rather of disposing things, that is to say employ tactics, rather than laws, and if need be to use laws themselves as tactics'.[37] Contrary to the progress narrative, the gift of law[38] inscribed as a heritage emerges as a repertoire of 'tactics' of repressive governance.

[33] Lawrence Friedman and Stewart Macaulay, *Law and the Behavioural Sciences* (New York: Bobbs-Merrill, 1977), p. 1060.

[34] See Upendra Baxi, 'The Conflicting Conceptions of Legal Cultures and the Conflict of Legal Culture', in Peter Sack, Carl Wellman and Mitsukuni Yasaki (eds.), *Monismus oder Pluralismus der Rechtskulturen?* (Berlin: Duncker & Humblot, 1991), pp. 267–82.

[35] This text may perhaps most conveniently be found in A. J. Parel (ed.), *Gandhi: Hind Swaraj and Other Writings* (Cambridge: Cambridge University Press, 1997).

[36] Tumanov, *supra*, note 29, pp. 63–6 [referring to Lenin].

[37] Michel Foucault, 'Governmentality', in *The Foucault Effect: Studies in Governmentality*, ed. by Graham Burchell, Colin Gordon and Peter Miller (Chicago: University of Chicago Press, 1991), p. 95. The translation from the French is by Rosi Braidotti and Colin Gordon. For a critique, see Alan Hunt and Gary Wickam, *Foucault and Law: Towards Sociology of Law as Governance* (London: Pluto Press, 1994), pp. 39–58.

[38] The proud British boast was that India knew no law and that it was the British Rule which imparted law to India. See Susanne Rudolph and Lloyd Rudolph, *The Modernity of Tradition* (Chicago: University of Chicago Press, 1969), p. 253.

Entailed in all of this is a popular distrust of law in most, if not all, ex-colonial societies. When law itself appears as 'political tactic', it invites Gandhian opprobrium that the law is nothing more than the 'convenience of the powerful'.[39] Moreover, histories of insurgency, the orders of 'popular illegality', present the face of legal nihilism, which leave active residues in the timespace of the post-colony. Statist constructions of these, in turn, become inchoate when national resistance movements variously, and vigorously, contest the colonial right to rule, the natural right to an Empire, the variously embodied ruses and performances of 'legal tactics' of governance.

Comparative legal studies remains unconcerned with the histories of resistance to the formative practices of the JWO which performed a double function: the delegitimation of colonial/imperial legality and its ongoing profound reconstruction. Histories of power and order analytically disengaging 'law' from 'politics' can present narratives of resistance in the lexicon of 'order' and 'security' only as acts and events of 'insurgency', 'treason' and 'political criminality'.[40] The practice of comparative legal studies (at any rate as demonstrated by the taught tradition) thus de-symbolizes peoples' struggles for an alternative legality. Indeed, any acknowledgement of these would necessarily disorient the master-narrative of the progressive Eurocentric legality.[41]

The results are astounding in their ways of reinforcing progress narratives of the colonial inheritance. We are, incredibly, asked to believe that orders of resistance to colonial/imperial legality *owe* their moral/ethical origins, from a Mahatma to a Mandela, to the orders of imposed colonial *juridisme*. The non-Euro-American Other thus stands narrated in a *mimetic* relation to constitutive traditions of the JWO forbidding *in limine,* as it were, 'its' potential to renovate histories of comparative legal studies.[42]

[39] See Upendra Baxi, *The Crisis of the Indian Legal System* (Delhi: Vikas, 1982).

[40] See Ranajit Guha, *The Elementary Aspects of Peasant Insurgency* (Delhi: Oxford University Press, 1973).

[41] Thus, fifty years after Indian independence, the dominant juridical historiography still tends to describe the transition as a mere *transfer of power*. Struggles for self-determination are scarcely read as germinal texts providing critiques of colonial/imperial notions of legality and of the felicitous ways of domination these notions sheltered.

[42] For an examination of how the juristic genius of anti-colonial struggles shaped the histories of contemporary human-rights movements, see Baxi, *supra*, note 4. Even Gramsci (by no means the staple cognitive diet of most practitioners of comparative legal studies) was moved to describe the anti-imperial/colonial legality resistance of Gandhi in the image of 'passive revolution' or 'revolution without revolution': Antonio Gramsci, *Selections from the Prison Notebooks*, ed. and transl. by Quintin Hoare and Geoffrey Nowell Smith (New York: International Publishers, 1971),

The JWO, whether bourgeois or socialist, with all its internal variations, combines a profound rejection of the juristic creativity and energies of 'peripheral' peoples, the 'core' being constituted by Euro-American (now including transient socialist) traditions. What it denies *wholesale* stands often conceded in *retail*. Colonial/imperial legal pluralism accepts 'pre-colonial' legal traditions, which either conform to its ideological configuration (such as patriarchy mirrored in systems of family or 'personal' law or in the practices of agrestic serfdom) or tolerates these when they do not threaten patterns of domination (such as an indigenous law-merchant). What its formations *deny* is the notion that subordinated peoples possessed any potential for conceptions of legality, the rule of law, equality and human rights. The 'civilizing gift' of law was uniquely theirs to bestow. But the gift thus bestowed, as has already been glimpsed, is also a curse.

The first 'legacy': mercantilist governmentality

What has been 'inherited', through the ways of colonial legality, is then both the corpus of practices of freedom and the practices of management of freedom and, simultaneously, the repertoire of the *means* and the *ends* of the law's violence. I have noted elsewhere, in some detail, this history of 'continuities' and 'discontinuities' between the 'colonial' and the 'post-colonial' legality formations.[43] What I require to do here is to expand upon the notions of governmentality inherent in the colonial inheritance.

Of the many 'moments' of colonial imposition (the word 'rule' would legitimate the formation through its excess of meaning), the most intense and enduring is the one which fashions governmentality in sheer mercantilist terms. In the main, the colonized peoples and territories emerge as *commercial* possessions of joint-stock private companies. In so far as any idea of 'public' authority is discernible, it is overlaid with the privileges associated with profit and plunder which are considered as 'moral' ends in themselves. This archetypical moment is the marker of notions of governmentality in which politics becomes commerce and commerce politics. Its institutional form is the multinational corporation, the British East India Company providing a paradigm case. And the 'law' marks its birth as the command of an Austinian sovereign, as a code (to adopt Niklas Luhmann's

p. 100. The same imagery animates E. P. Thompson whom I quoted earlier (*supra*, note 12). Even the modes of empathetic understanding thus stand inescapably located within the JWO.

[43] See Baxi, *supra*, note 27, p. 540.

terminology) of 'positivization of arbitrariness'.[44] Men of commerce (there were, of course, no women) who became law-makers as well as judges and enforcers had little or no knowledge of the profound normative and institutional changes shaping metropolitan legality.

Force and fraud provided the techniques of governance for mercantile state power. The values and virtues of dominance *without* hegemony codifying both the violence of law and the law of violence are institutionalized in the incipient notions of 'state' and 'law'.[45] This phenomenon marks the colonial constitution of the *absent* subject. The 'strength' of early colonial governance also (as is true of all schizoid/paranoid formations of power) lay in its vulnerability, which arose in many contingent combinations. If the rivalry among European powers (truly illustrative of the Hobbesian state of nature) shaped the nature and future of this form of governmentality, so did the emerging conflicts of interest within the factions of merchant capital. And that combination was further riven by a conflict between those (to use Foucault's distinction) who sought governance over bodies and those who struggled for the governance of souls[46] – the emerging conflict between missionaries and merchants was not inconsequential in the period of mercantilist governance. Finally, and without claiming to be exhaustive, the ways of resistance offered by the subordinated peoples fomented political practices of fierce, and catastrophic, cruelty.[47] Governmentality thus *constitutes* the colonial heritage in a myriad of ways, some of which persist in the space and time of the post-colony.

The second legacy: 'high'-colonial legality

The second moment of 'high'-colonial law, very uneven in its historic spread across the colonial possessions, occurs when colonial sovereignty migrates to the 'duly' constituted metropolitan sovereign.[48] Inevitably, some ideas and ideals constitutive of the orders of metropolitan legality then also

[44] Niklas Luhmann, *A Sociological Theory of Law*, transl. by Elizabeth King and Martin Albrow (London: Routledge & Kegan Paul, 1985), pp. 147–58.

[45] See Baxi, *supra*, note 23.

[46] See Foucault, *supra*, note 37, pp. 87–104.

[47] For examples of archiving, see Guha, *supra*, note 40; Mamdani, *supra*, note 17; Oliver Mendelssohn and Upendra Baxi, *The Rights of Subordinated Peoples* (Delhi: Oxford University Press, 1994); Pakenham, *supra*, note 24; Rodney, *supra*, note 17.

[48] See David Washbrook, 'Law, State and Agrarian Society in India', (1981–2) 15 Modern Asian Stud. 157.

migrate, though with profound ambivalence, to the orders of colonially constituted space and time. This conjuncture marks many historic beginnings that shape also the beginning of the ends of the Empire.

But the practitioners of comparative law rarely recall the fact that the formative contexts of colonial legality follow the lines of imperial conquest, even when they narrate the resultant juridical spheres such as the 'anglophone' and 'francophone', or more generally the 'common-law' and 'civil-law' legal territories. From the subjectivities of the colonized, however, high-colonial state 'diffusion' of the western legal tradition emerges as a process of continual conquest. Law itself is seen as conquest by other means. It reinvents communitarian legal traditions and puts them to work toward the ends of colonial administration and adjudication. This 'expropriation of law' (to use a Weberian phrase-regime) results in a hybrid legality which, in turn, reconstitutes public memory as well as colonizing the normative means of the production of law and, crucially, the very structures of time and space. *No error in the doing of comparative legal studies is more egregious than that which remains complicit with the politics of organized amnesia of law as a form of conquest*.

In this way, various orders of construction of the colonial legal pluralism arise. If high-colonial law emerges early in some possessions (for example, in British India or in Pondichéry in French India), it does so rather late in others (as in east Africa and south-east Asia) and almost never at all in yet others (I have in mind mostly colonies under Portuguese domination, whether Goa or Mozambique). Almost half a century after decolonization, we still lack a map of the combined and uneven spread of high-colonial law. And an undifferentiating 'cartography' of law, in turn, reproduces the potential for *geographies of injustice* in the constitutive modes of doing comparative law and jurisprudence.

High-colonial law also presents us with a complex of inter-legality (as illustrated, for instance, by Sri Lanka, the former Indochina or Indonesia). This inter-legality becomes a veritable labyrinth when colonially manufactured laws are exported from one jural territory to others (as happened, for example, with the imposition of Indian codes to colonial possessions in anglophone Africa). Control over the interpretation of colonial law by the appellate courts in the metropolis adds further levels of intricacy to the scenario of high-colonial law. Colonial legal pluralism, a salient feature of high-colonial law, appears as a necessity whose mother was imperialism, even if its multitudinous midwives were located in the grid

of colonial administration, whether managed through the natives or from Europe.

Hybridity is thus a constitutive feature of high-colonial law and of the colonial legal inheritance in the post-colony. The contradictions between liberalism and the Empire shape conflicted practices of governmentality and influence the career of 'modern' law.[49] The mercantilist practices of governmentality are no longer permissible wholesale; their production and deployment in retail, however, needs to be re-constituted by metropolitan legal theory and practice. Control over land and agrarian relations of production is now to be articulated not by 'force without phrases' but by the 'force of phrases' (to evoke Marx's distinction).[50] Planned de-industrialization of the colonies and the enforced dispersion of its labouring population are to be achieved through languages of rights to property and equitable governance within the Empire. Maintenance of the colonial 'law-and-order', vital to rule by property, stands presented as an aspect of good, even benign, governance. Thus, high-colonial law archives the foundations of legal paternalism in an almost Kantian mode and projects the image of a *caring* colonizing self.

Yet, high-colonial law may never presume the fidelity of colonial subjects. All subjects, by definition, threaten imperial sovereignty. And many, even by the mere fact of their *birth* in legally proscribed social communities (as with British India's Criminal Tribes Act) constituted threats to colonial sovereignty. High-colonial law is a paradigm case of the schizoid/paranoid state seized by its periodic crises of nervous legal rationality. Never unwilling to strike, and not wholly afraid to wound, high-colonial law develops along the grids of obedience and sedition. The construction of a 'loyal' subject of colonial law thus always remained an excessively hazardous enterprise. There were real limits to what 'legal' sanctions and 'co-legal' terror could achieve under conditions of high-colonial legality.

Thus, the colonial legal subject was summoned not only to duties of *obedience* but also to duties of *affection*. The British Indian Penal Code, in a provision that travelled well to other imperial possessions and whose repressive potential has outlasted even the Golden Jubilee of Indian constitutionalism, defines the crime of sedition (a cousin of treason) as inciting *disaffection* toward the lawfully constituted government. All colonial subjects also stand conceived as potential spies. The widely-exported colonial Indian Official

[49] See Uday Mehta, *Liberalism and Empire* (Chicago: University of Chicago Press, 1998).

[50] See Karl Marx, *Capital*, vol. I (Moscow: Progress Publishers, 1976), pp. 671–93 [1867]. See also Upendra Baxi, *Marx, Law and Justice* (Bombay: N. M. Tripathi, 1993), pp. 85–94.

Secrets Act renders criminal any spatial movement by the subject within an ascribed 'place' as notified, say, by the executive. Once an area has thus been delineated, the subjects are liable to being treated as 'spies' and exposed to summary military trial. Colonial penal legality is rife with such notions of crimes against the state. It abounds in models of legislation that constitute the political *geographies of injustice*.

Formations of colonial legality, with all the 'normative' weight of their institutional apparatuses, also structure notions of *time*. Colonial legality triumphs by control over rhythms of time. Its law of evidence and procedure sets boundaries as regards what stories may be told concerning human violation and suffering, thus fragmenting and disorganizing narrative voice – a facet of 'modern' law which Ranajit Guha has poignantly archived.[51] In thus (dis-)organizing the time of the subjugated peoples, high-colonial law eliminates all formative contexts of insurrection against public authority.

Colonial law as adjudication confines and often makes impossible the telling of genealogical stories concerning human violation and violence by forces in civil society acting at the behest of state power. In the mightily uncommon 'common-law' jurisdictions, a number of varied devices (in particular, the so-called hearsay-evidence rule) typically structure notions of relevancy and admissibility in ways that strike at the very roots of lived social memory. Meanwhile, contract law provides mechanisms that legalize forced labour and debt bondage. The vaunted distinction between 'public' and 'private' makes familial violence and abuse invisible and inaudible in ways that comfort patriarchy. Revenue law, while promoting large landholdings, encourages the loyalty of the propertied classes (I am thinking of Nietzsche's slave morality) and legitimates the worst excesses of agrestic serfdom. Forest laws degrade, desexualize and dehumanize indigenous peoples. Laws of limitation render ineligible any 'belated' movement for the redress of wrongs. (Even an English judge, writing on the subject, wondered why it required the Indian Limitation Act to prescribe 163 ways in which a human being can be said to be 'sleeping' on her actionable claims.[52]) Also, the administration of criminal justice structures, in complex ways, the fading of testimonial memories through proverbial adjudicatory process delays while the patterns of penality visit crimes against property and the state with

[51] Ranajit Guha, 'Chandra's Death', in *id.* (ed.), *Subaltern Studies V: Writings on South Asian History and Society* (Delhi: Oxford University Press, 1989), pp. 135–65.

[52] See Upendra Baxi, 'Conflict of Laws', in (1967–8) Annual Survey of Indian Law 227, p. 284, n. 305.

savage repression. The colonial subject, constituted by a marked incapacity for truth-telling, is to be socialized, whether by persuasion or coercion, in the ways of production of colonial legal truths. Perjurer by 'nature,' as it were, the colonial legal subject is now destined to another incarnation of life in perjury.

The high-colonial law-and-governance project of construction of a loyal subject has proved, unsurprisingly, of little interest to comparatists concerned as they are, for the most part, with the 'introduction', 'diffusion' and 'reception' in colonial possessions of western laws' norms and institutions. The notion of colonial 'inheritance' as a series of violent and catastrophic practices that constitute the colonial state and the colonial law, however, remains the foundational premise for any meaningful tradition of *subaltern* studies in comparative jurisprudence.

The third legacy: the 'lower degree of civil freedom'

The violence of law and governance stands celebrated, whether overtly or covertly, in the dominant narratives of comparative jurisprudence. This violent penetration, this forced entry, this 'prizing open', is often represented, *pace* Foucault, not as movement from domination to domination but from domination to progress. Progress stands defined in relation to the development of capitalism. Modern law is progressive because it has enabled movement from status to contract (I have in mind Maine's idea), that is, from the 'charismatic'/'traditional'/'patrimonial' forms of domination to a legal-rational domination in the Weberian sense and from the repressive sanctions of 'mechanical' solidarity to regimes of restitutive sanctions of 'organic' (Durkheimian) solidarity.

Despite the foundational colonial politics of social Darwinism, this progress narrative has its roots in Marx's dialectical notion of human emancipation where forces and relations of production generate, simultaneously, the immiseration of the working classes as well as their 'once-upon-a-time' privilege as bearers of the future history of human emancipation through an inversion of the means of 'progressive' bourgeois legality. And, although Marx's own project was confined to the future history of capitalism in the regions of its birth, it furnished several new twists and turns in the life of colonial and post-colonial legality through different modes of nationalist self-assertion in colonized regions. This is too large a theme to be addressed here. But it remains worthy of mention that the spectres of Marx (to invoke

Jacques Derrida) haunted high-colonial law formations. Incipient notions of socialist legality, and their underlying critiques of bourgeois legality, contributed in some measure to the renovation of colonial legal practices, albeit in a way consistent with the overarching patterns of legal imperialism. Comparative histories of high-colonial law, informed by competing and contradictory notions of progressive Eurocentric legality, are as yet unwritten.

The high-colonial/imperial-law formation reflects this movement of law through the installation in the colonies of at least a 'lower degree of civil freedom'. Whereas pre-colonial formations had only notions of authority, high-colonial law brought along the idea of *legality*.[53] Whereas the pre-colonial formations lacked the rudiments of differentiation in the spheres of power, high-colonial law carried with it the notions of separation of powers and of a relatively autonomous judiciary. Whereas 'priestly' knowledge/power combinations sustained the 'legitimacy' of pre-colonial law, the high-colonial state remained increasingly secular, allowing for religious pluralism. The interpretive monopolies established to sustain revealed law gave way to an idea of law as being made contingently by some human beings to govern others. If law still constituted 'fate', it was a provisional destiny rather than an unalterable cosmic force. Networks of professional knowledges validated by state law – known as 'certificatory' knowledges within Foucault's discursive framework[54] – steadily crafted new power/knowledge combinations and new conceptions of the 'common good' which, for one thing, marginalized orders of organic knowledges. The epistemic communities constituted by professional lawyers and adjudicators, the civil service, police and security forces, the public-health professions, revenue and forest officials, practitioners of colonial forensic medicine and census officials, for example, formed power/knowledge grids that combined disciplinarity with sovereign forms of power, imparting the project of construction of the loyal subject with increasing orders of cogency and efficacy.[55]

These stark and generally well-known contrasts should suffice to foreground at least partially the evangelical fervour that animated the discourse

[53] See Robert Lingat, *The Classical Law of India*, ed. and transl. by J. Duncan M. Derrett (Delhi: Oxford University Press, 1972).

[54] See generally Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, ed. by Colin Gordon (New York: Pantheon, 1981), pp. 77–108.

[55] The growing contemporary literature concerning the intensification and diversification of bureaucratic development in the high-colonial era is too rich to warrant even summary citation. However, the next two sections of this essay contain various illustrative references.

of high-colonial law-makers and reformers[56] – which, interestingly, is of the same order as that which now characterizes the discourse purporting to bring 'law' to the post-Soviet-Union federations and republics. The law-makers and reformers' original intent was benign and paternal, not amorally sinister. From the explorer-missionary David Livingstone onwards, the original intent was to bring the three Cs: Commerce, Christianity and Civilization (in *that* order, of course) – or, to use Bronislaw Malinowski's three Cs: Codes, Courts and Constabulary.[57] Conquest and belligerent occupation offered, in the high-colonial era, only a vague context of memory within which the original intent had now to be performed (not unlike the Cold War for the 'transitional societies' of eastern and central Europe today). Implicit to their labours, however, was an unproblematized social Darwinism, the imperialism of the Same and the 'ceaseless subordination of the differentiated, [...] of the nonintegral'.[58]

We are all too familiar (thanks to the endless debate among US constitutionalists) with the 'impossibility', as it were, of 'originalism'. But the originalism of high-colonial law (far from representing the hermeneutic hobby of citizen–scholars from a society dedicated, after all, to the 'pursuit of happiness') acted as a *material* force shaping many practices of power over the colonized peoples. Detraditionalization of the communitarian traditions of peoples' law was the first step toward the development of colonial legal authority. The creation of an adjudicative monopoly and a colonial penality constituted further processes aiding the construction of the loyal colonial subject. The colonial prison not only created conditions for the production of 'controlled delinquency' and the management of 'popular illegalities', but it also provided the context in which 'docile bodies' constructed many a truth for high-colonial legality.[59] The colonial police and assorted security forces implemented regimes of surveillance, and at times of terror, which served to contain the emergence of an insurrectionary 'self'. The grid of power/knowledge that gave rise to the modern legal professions, including the adjudicatory vocations, not to mention the 'overdeveloped'

[56] For example, see Eric Stokes, *The English Utilitarians and India* (Oxford: Oxford University Press, 1959).

[57] For the reference to Livingstone, see Pakenham, *supra*, note 24, p. xxv. For a general reference to Malinowski, see Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Kegan Paul, Trench, Trubner, 1926).

[58] Dimock, *supra*, note 7, p. 74.

[59] See generally Michel Foucault, *Discipline and Punish*, transl. by Alan Sheridan (New York: Pantheon, 1977).

civil service, served the material interests of an upwardly mobile indigenous elite providing generational loyalties for the Empire.[60]

This being said, we need to attend to the 'objective' legacy constituted by the 'lower degree of civil freedom'. I describe the legacy as 'objective,' *only* in the sense of the *material effects* that overrun many high-minded colonial-authorial intentions.

Predatory legality and the 'lower degree of civil freedom'

In contrast to the mercantilist colonial formation, high-colonial law seeks to construct, or at any rate to present, the law as a public good. But the notion of 'law' is severely qualified. Designed to structure colonial violence and to promote the prosperity of the Empire, high-colonial law emerges above all as a form of *predatory legality*.[61]

Predatory legality confronted the law with various contradictory tasks. The law was assigned the simultaneous tasks of legitimating the fact and force of colonization and of performing a whole variety of tasks that facilitated massive metropolitan gains from domination. A certain order of legitimation was required if only to produce a class of loyal subjects who not only benefited from the system of domination, but also became convinced missionaries extolling the progressive nature of high-colonial law. The law (whether as norm, policy or administration) had to apportion rewards and sanctions, distribute social opportunities and enhance life choices and

[60] One must not ignore the formation of the armed forces that fought many imperial wars on behalf, and at the behest of, colonizing elites. The Sandhurst- and, later in the Cold War era, the West-Point-trained armed forces, provided, at least for the British Empire, the warp and the woof for post-colonial military coups, regimes and dictatorships. These now generate a myriad of forms of western public lamentation at the demise of democratic forms of governance. This complaint masks the bases of 'western' affluence based partly, but substantially, on the arms industry and informal arms trafficking. The complex transactions of material interests thus constituted under the auspices of high-colonial law also sustain, unsurprisingly, the *re-colonization* of the very legal imagination.

[61] In conversations on the role of law in the development of middle- and low-income countries at a conference organized by the Institute of Development Studies on 1–3 June 2000, where I addressed the theme of 'Rights amidst risk and regression' – a notion that has had no takers since I first enunciated it (Baxi, *supra*, note 39, pp. 348–58) – Professor Laura Nader suggested that 'predation' might prove a more acceptable notion. The swift currency the term began to enjoy reminded me of the lamented Julius Stone's constant advice which, alas, I have never been able to internalize, that one ought to learn to respect what he inimitably termed the ways of the 'diplomacy of scholarly communication'.

material gains. High-colonial law also distributed symbolic capital in terms of recognition (without redistribution).[62]

At the same time, predatory legality constructed the logic of colonial *thrift*. Resources, natural and human, had to be harvested for optimal metropolitan gain. Thus emerges high-colonial law's chief concern: to design legal policy and administration in ways that command and control natural resources. General categories of contract and property law were, while important, simply not enough. Specific regimes of natural-resource law were needed, and developed,[63] in which the role of law in the rule of law was not designed to meet the basic needs of the colonial impoverished, except, and circumstantially, as a series of accumulated unintended side-effects. These legal regimes were robust enough to survive decolonization.

The colony furnished a storehouse of raw materials, a surplus industrial reserve army and a conscriptible mass of natives that sustained the consolidation of colonial frontiers and imperial wars. Predatory legality had also to pursue the rather difficult aims of organizing exactions of land revenue and the 'extractive' management of natural and human resources. It had to facilitate the constant supply of 'unfree labour' (both within and across the colony) and create structures allowing for the de-industrialization of the colonial economy. Moreover, colonial law, policy and administration had to achieve somehow the balance of payments within a rather complex pattern of inter-colonial extraction of surplus value.

These were tasks not wholly unfamiliar to the development of capitalist law within the metropolitan tradition. But the means to achieve these goals in metropolitan spaces had to address the formation of progressive legality, which had elaborated, over long stretches of historical time, the notions of the rule of law, human rights and democratic governance. The mission of high-colonial law was, however, to legitimize whenever possible the denial of these ideas to the 'native' subjects or to make them available in severely attenuated forms when necessary – a process which has rightly prompted

[62] I refer in particular to Nancy Fraser's rich work, most recently summarized in her 'Rethinking Recognition', (2000) 3 New Left R. (2d) 107.

[63] I have in mind relations of property in agricultural land, the appropriation of the public commons, uses of eminent-domain power for 'public works' serving the pressing needs of colonial capital movement such as irrigation, railways, ports and coastal shipping, mining, power generation and road transport, the productive management of forests and export-driven commodity production (notably, the plantation economy).

Guha to refer to 'mediocre liberalism'.[64] Predatory legal regimes thus invented different forms of *quarantine legality* which empowered local administrators to contain the spread of these novel ideas at the frontiers of the colony.[65] I cannot develop the history of these processes except to say, speaking of predatory legality from the standpoint of British high-colonial law in south Asia, that they varied enormously depending on the law-regions and on the circumstances of colonization.[66]

How, then, was this high-colonial legality constructed? Such question leads us to vastly different response trajectories, each privileging a particular perspective on governance, rights, development and justice.

The subaltern perspectives

On one deeply subaltern view, high-colonial law constructs, yet again, the law as a kind of *fate*. For the colonized masses, long accustomed to law as the desire of the sovereign backed with potentially limitless coercion, high-colonial legality is more of the same experience. John Austin, a name unbeknownst to them, paradigmatically confirms their own lived experience of the *ultimate* social meaning of the law. The law is an order of experience in the shaping of which they have no say or voice; it just *happens* to them as do floods, droughts, famines and being born to a cradle-to-grave struggle for subsistence. High-colonial law, through its invention of new forms of suzerainty, languages, institutions and professional forms of expropriation of just grievances, claims and disputes, added to the repertoire of their immiseration. Even when considered as a 'weapon of the weak' (to evoke Scott James), the experience of law as fate did not undergo any profound shift: it

[64] See Ranajit Guha, *Dominance Without Hegemony: History and Power in Colonial India* (Cambridge: Cambridge University Press, 1997), p. 5.

[65] In a sense, the maintenance of colonial legality echoes tasks which the north now faces in genetic policing as it seeks to discipline and punish horizontal gene transfers from genetically modified seeds, plants and foods. Ideas, much like genetic mutations, cross-fertilize in unanticipated and ungovernable ways. When they do, they expose the inherent vulnerability of law.

[66] Notions of European progressive legality varied in their internal evolution among European powers (as any reader of A. V. Dicey's 'rule of law' corpus well knows). There was considerable differentiation in notions concerning separation of powers, judicial autonomy, legislative primacy or supremacy, definitions of criminality and the theory and practice of punishment. Likewise, there were marked differences in the ways of negotiating the circumstance of colonization: the French differed from the British, and these both stood in contrast to the Dutch, Belgian, Portuguese, Italian and Spanish. Not merely is this comparative history of colonial inheritance yet to be fully written but also the ways of constructing different narrative voices in the writing of these colonial histories have yet to be fully addressed.

amounted, at the end of the day, to no more than one more distinct mode of experience for cheating one's ways into rudimentary human survival.

Yet, with some persuasion, and in some colonial contexts, a few subaltern voices have endowed high-colonial law with a liberative potential. This is particularly true as regards India's perennially deprived 'outcasts'.[67] The Dalit leader, a founding figure of the Indian Constitution, Dr B. R. Ambedkar, was a powerful voice applauding colonial legal liberalism as a harbinger of social equality, even emancipation, for millions of '*atisudras*', as he named the social and economic proletariat whom various practices of Hinduisms relegated to a permanent order of disadvantage and dispossession.[68] According to this conception, high-colonial law emerged as the very antithesis of fate, which pre-colonial legality represented for the *atisudras*.

The colonial mode of production

High-colonial law constituted people under its sway as *subjects*, not as slaves. In political-theory terms, this marks a normative shift away from the 'slave' mode of production and even from the somewhat nebulous 'Asiatic' mode. Legal modernization was not, however, a means of instituting industrial capitalism and its superstructures of legality. Rather, it occurred under the auspices of the colonial mode of production. A highly complex and contradictory affair of history, this mode introduced changes in property relations and forms of dependent industrialization in ways that facilitated the ends of colonial predation. All this now stands amply documented.[69] High-colonial law was the principal instrument in the installation of these processes which 'hindered the development of capitalistic production in agriculture' in ways that promoted systematic de-industrialization and economic growth favourable to the metropolitan economy.[70]

[67] See Oliver Mendelssohn and Marika Vicziany, *The Untouchables: Subordination, Poverty and the State in India* (Cambridge: Cambridge University Press, 1998).

[68] See Upendra Baxi, 'Justice as Emancipation: Babasaheb Ambedkar's Legacy and Vision', in *id*. and Bhikhu Parekh (eds.), *Crisis and Change in Contemporary India* (Delhi: Sage, 1995), pp. 122–49.

[69] For example, see Elizabeth Whitcombe, *Agrarian Conditions in Northern India in Late Nineteenth Century* (Berkeley: University of California Press, 1972); Kumar Ravinder, *Western India in the Nineteenth Century* (London: Routledge, 1968); Washbrook, *supra*, note 48. For further references, see Baxi, *supra*, note 23.

[70] Utsa Patnaik, 'Capitalist Development in Agriculture', (1971) 6 Economic & Political Weekly A-123, p. A-146. See also Paresh Chattopadhyaya, 'On the Question of the Mode of Production in Indian Agriculture', (1972) 7 Economic & Political Weekly A-39; Baxi, *supra*, note 23,

State differentiation

High-colonial law introduces significant levels of differentiation in the state apparatuses and modes of governance. The notion of separation of powers emerges as a whole series of ways of constructions of 'decentralized despotism';[71] the apparent *dispersal* of power, the shifting range of distribution of opportunities to coerce and command, the ever-growing diffuse location of powers of *enumeration* (through district gazetteers, census and land records),[72] all these, as well as related devices of separation of powers, merge into the centralized unity of the colonial state.

State differentiation also entails the growth of what Foucault names as the 'certificatory' sovereignty of the state.[73] All professions (whether in the public service, medical and legal practice, town planning, architecture and public works, journalism and education, policing and prisons) now require the imprimatur of the state, negotiated in fine detail through legal norms and processes. It also signifies, to evoke Gramsci, the subjugation of the organic by means of erudite knowledges. High-colonial law shapes, and is in turn shaped by, the bureaucracies it necessarily creates. In this way, it further concretizes the project of construction of the loyal subject, progressively empowered to curb, crib and confine the disloyal.

The ceaseless drive of the Will to Adjudication, a necessary entailment of expanding sovereignties everywhere, assumes in high-colonial law at least two historic forms: the destruction of remnants of pre-colonial adjudicatory forms where necessary and their cooptation where expedient. By dint of the orders of administrative exigency, a relatively autonomous adjudicature becomes a necessary adjunct of the project of high-colonial law. It creates a sorting-out state apparatus for specific disputes among fractions of indigenous and metropolitan capital; enables the rise of the learned legal professions with the attendant creation of whole frameworks supportive of the overall ends of the colonial regimes; provides an arena for the enactment of interest formations congealed in the constructions of crime and punishment (I have in mind Althusser's repressive state apparatuses); and,

pp. 29–40. For Africa, see also Rodney, *supra*, note 17; Mamdani, *supra*, note 17; Issa G. Shivji, *The Concept of Human Rights in Africa* (Harare: Africa World Press, 1989).

71 Mamdani, *supra*, note 17, pp. 37–61.

72 See Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis: University of Minnesota Press, 1996), pp. 114–38.

73 *Supra*, note 54.

above all, sustains the 'production of belief' (to quote Pierre Bourdieu)[74] in the production of *legitimate* colonial law.

This comes to pass, in turn, in a whole variety of ways: the introduction of the indeterminate 'certainty' of law through legislation and codification; the insertion of minimalist notions of fairness in the administration of criminal justice and of differential standards of 'proof' in civil and criminal justice; the erection of hierarchies of courts and judges. All these, in other words, provide various modes for the production of colonial 'truths' of law. This realm of contestation, in the main, passes by (to evoke John Austin) the 'bulk and generality' of the duly constituted obedient colonial subjects. In its construction of a hierarchy of jurisdictions governing the adjudicatory process and the regimes of *legal* rights, high-colonial law's limits of fairness and of rights stand necessarily determined by the need to sustain the *Grundnorm* of imperial rule. When we bear in mind these features of colonial 'rights', we are better able to discern the nature of 'freedoms' available in a high-colonial era.

Languages of rights

In so far as a reflexion on rights enables a glimpse into the history of imperial colonial formation, it remains useful to undertake a few risky journeys across this enchanting realm. The languages of rights served several measurable functions. They helped to mediate and protect the interests of the competing factions of capital. Necessary as a means of redressing the foundational legitimation deficit, the languages of rights also provided grammars of governance.[75]

The sheer administrative compulsions to raise revenue from agriculture, establish a hegemonic judicature, protect and promote regimes of unfree labour (to different degrees) and foster free markets across colonial boundaries required recourse to languages of rights as aspects of high-colonial governance. So did, in diverse ways, the needs of the construction of a loyal colonial subject. The legal professions, as well as hegemonic judicatures, afforded the subjects some sort of stake in the imperial legal orderings. These projects beset many an authorial intention. Rights, however, served well the functions of *signposts*, even when their logics and paralogics constructed

[74] Pierre Bourdieu, *The Field of Cultural Production: Essays on Art and Literature*, transl. by Randal Johnson (Cambridge: Polity, 1993), pp. 40–61.

[75] See Baxi, *supra*, note 4.

wholly ambivalent directions. As signposts, somewhat summarily configured, the congeries of high-colonial rights had the following manifest attributes.

First, rights emerge as *favours* or *concessions* provided, for a whole variety of reasons, by the colonial sovereign to the subject. The bases of colonial rights lie in the will of the colonizer, not in the affirmation of the equal worth of all human beings. *Imperial legality abhors the notion of human rights* – that is, the right of human beings everywhere to share in the order of universal human rights – as any recognition of this entitlement will stultify imperialism. The favours or concessions may be represented as being progressive, in contrast with the mercantilist governance traditions. *Mon Dieu*, this marks *some* progress indeed!

Second, differential rights, being concessions or favours, become legitimate. The state does not have to justify unequal distribution of rights among the various social strata as between owners of land and landless labour, moneylenders and the indebted, industrialists and the working classes. Indeed, some people may not be invested with any rights at all (as with so many varieties of unfree labour). Rights, thus, do not set real boundaries to supreme executive power; rather, they serve as markers of the executive largess.

Third, the grant of rights is all too often a grant of *powers* directed to sustain certain patterns of governance. The rights of *zamindars* over tenants, in late nineteenth-century India, were in effect powers to raise revenue for the state. The power to rule (that is, the performance of sovereign functions) often went hand in hand with the grant of such rights.

Fourth, all rights, of whatever nature, must derive from the established 'sources' of law. In one foul swift stroke, this demand disinherited masses of First Nation peoples. At a technical comparative jurisprudence level, the issue of what aspects and which corpus of imperial law was transferred to the colony has always been a contested site in the history of high-colonial law. Certain rights available in the metropolis have often been transported to the colony through judicial interpretation (I am thinking, for instance, of equitable rights and of their transfer to the British colonies). But, on the whole, it was axiomatic in high-colonial law that the function of judicial processes was to enforce rights where they could be said to exist (albeit with a wide margin of appreciation) and not to enunciate new rights under the guise of interpretation.

Fifth, claims that cannot be legally protected are then not 'rights' and what ought to be legally protected as 'rights' must vary with every order of contingent as well as foundational exigency of colonial administration.

Sixth, no natural rights may be said to exist in a colony. Outside the foundational natural right inherent in colonialism (the *natural right to an Empire for European nations*), colonial legal tradition repudiates firmly any *jusnaturalist* construction of rights.

Seventh, rights stand conceived in the image of a universalistic imperial order of *patriarchy*. High-colonial law enforces this order in somewhat uncomprehending but still comprehensible ways. It finds a grand ally in the pre-colonial patterns of legality that sanctify the myriad of practices purporting to subjugate women. At the same time, it responds to the urge for progressive reform through the formation of lineages of colonial legal paternalism. The latter stands achieved, for example, by suppressing the outrageous practices of female infanticide[76] or by regulating the practice of *sati*. Legal paternalism serves the function of legitimating a 'progressive' high-colonial state formation as well as promoting the reach and sway of colonial administration. The former is achieved through the performative acts of colonial legal pluralism. Among these, the preservation of *personal-law* systems ranks high (for instance, the perpetuation of oppressive systems from the pre-colonial era discriminating on the basis of gender). The colonial inheritance is, in many ways, a narrative of the combinatory ways of production of *legal bodies in pain* which survive in the spaces of the decolonization struggle and beyond, in the timeplace of post-colonial law.[77]

The unintended heritage

Life, even that of high-colonial law, does not quite move according to the original intention of hegemonic projects. In any event, there is simply no *single* trajectory of colonial intention. The historic unfolding of European hegemony was deeply fractured by a mix of 'noble' and savage intentionalities. Radical critiques of colonization from the standpoint of the oppressed address the former as the fables and parables of the Enlightenment project. Meanwhile, the latter live on in the killing fields of many a post-colony. But the mixture of 'noble' and savage intentionalities makes recounting large stories about unintended consequences particularly difficult.

[76] See Lalita Panigrahi, *British Social Policy and Female Infanticide in India* (Delhi: Munshiram Manoharlal, 1972).

[77] See Bina Agarwal, *A Field of Their Own: Gender and Land Rights in South Asia* (Cambridge: Cambridge University Press, 1994); Urvashi Butalia, *The Other Side of Silence: Voices from the Partition of India* (Delhi: Viking, 1998); Das, *supra*, note 22.

A first way of telling the story is to opt for a Kantian mode in which 'the character of the people' is shaped by colonial governance in such a way that native subjects collectively seek a higher form of freedom. High-colonial law educates subject peoples in the vocabulary of self-determination and decolonization, in a sense marking the very triumph of the Enlightenment project. On this view, the Other of Europe can learn languages of freedom and rights only through the necessitous visitation upon 'it' of various orders of brutalizing violence and deprivation. In this sense (if the proposition is sensible at all), the latent function of colonial legality as conquest was *jurisgenerative*.[78] This logically fallacious, historically inaccurate and ethically problematic mode of narrating unintended consequences is, however, still in vogue, even as regards human rights. Phoenix-like, it continually reproduces itself.[79]

A second mode of narrating histories of unintended impacts eschews large polemical motifs, concentrating instead on the institutional materiality of the 'modern'/late-modern law. By this, I mean the proliferation of institutions possessed of the power to enunciate norms and standards of law (including models of law reform), administer and implement (or ignore and subvert) these, and enforce (or ignore) dominant legality through the means of state coercion. The development of a sociological structure of coercion (to invoke the distinction that enables Weber to differentiate 'modern' from 'pre-modern' law)[80] entails considerable mobilization of state resources so as to maintain specialized bureaucracies. The construction

[78] See Robert M. Cover, '*Nomos* and Narrative', (1983–4) 97 Harvard L.R. 4, pp. 11–23 and 40–5.

[79] This is demonstrated by the current talk about 'good governance' and economic rationalism linking foreign aid to conditions of democratic governance as well as by the related discovery of the late-modern law's global mission to empower the world's impoverished in a world simultaneously, and vigorously, declared safe for direct foreign investment. The failure of decolonization, as it were, put at the doorstep of the political elites and regimes of the developing countries (not wholly unfairly), is now an urgent 'global' concern, so pressing that even the World Bank is moved to define conceptions of good governance and an agenda for institutional legal reforms. The exogenous causes of this failure (for example, the many phases of the Cold War, 'structural' adjustment programmes, the organized effort to replace the paradigmatic Universal Declaration of Human Rights by a Trade-Related, Market-Friendly Human Rights paradigm and arms traffic) are rarely matters that invite attention or cause anxiety. I am aware that a compact footnote is scarcely a vehicle for sustained analytical communication. But it remains possible to observe that the global movement of power and law is still from domination to domination, with the difference that predation now invents the processes of a colonized without a colonizer through the globally sustained structures of 'lower degrees of civil freedom'.

[80] See generally Max Weber, *Economy and Society*, ed. by Guenther Roth and Claus Wittich, t. II (Berkeley: University of California Press, 1978), pp. 880–900 [1922].

of the materiality of the law thus implies a whole range of recursive concrete labours of governance. And the spread of social costs remains uneven among the beneficiaries and victims of legal order. The languages of imposed legality are also a material force, if only because these determine the orders of speech and silence of the colonized subject in ways perhaps more determinative than what gets said by way of literature.

The materiality of the law also introduces the relative autonomy of institutions that seek to carry out high-colonial law's project of domination.[81] The forms of relative autonomy vary with each domain of high-colonial law depending on the intention of the hierarchies of power thus constructed by the labours of governance. Typically, the level of autonomy is relatively highly socially visible in interpretive monopolies gradually established through adjudication and lawyering. It also exists, in less visible forms, in the administration of law and policy through a specialized civil service (such as revenue and forest services) which introduces spaces for indigenous doings within a colonial hierarchy. Even prisons and other fora of detention under vicious security laws develop their own distinctive orders of immunity and impunity.

And the story is not merely one that involves state differentiation for it also explores the autonomy that the people's legal formations develop *inter se* as well as in a counter-hegemonic relation to high-colonial law. The colonial subject emerges in these stories not just as a passive recipient of the truths of high-colonial law but also as its strategic critic and subverter, as an active agent resisting, ambushing, waylaying, dis-orientating the megastructures of high-colonial law. The inaugural figure of a Mohandas Gandhi or a Nelson Mandela leaps to mind as embodiment of the most powerful deconstruction of the claims of colonial law. But there were also (to borrow a phrase from V. S. Naipaul) the 'million mutinies' of everyday life that jeopardized the law's basic structure or essential features through subaltern struggles deploying the imposed norms as social opportunities of resistance to their inner logic.[82]

[81] Here, domination assumes at least five forms, highlighted by Roy Bhaskar, *Plato Etc.* (London: Verso, 1994), pp. 212–13: suppression, exclusion, marginalization, idealization and 'tacit complicity'.

[82] V. S. Naipaul, *A Million Mutinies Now* (New York: Viking, 1981). Legal anthropologists have archived memorable examples. My own favourite is the narrative of how the British complained about the *cannibalization of the high-colonial rule of law*. The North Bengal Tenancy Act 1889 sought to order relations of property in the agrarian realm. The petty landholders deployed the new legality to clog the courts through means of what is now termed 'docket' or 'litigation'

A third way of narrating colonial inheritance is to trace the continuities and discontinuities between the colonial and post-colonial legality (a task I have recently attempted).[83] What constitutes these often remains elusive and problematic, mapping the levels of juristic inertia and political intent. To the extent that the normative and institutional continuities persist in ways that perpetuate habits and styles of governance which appropriate the resources to the ruling clique (or even to a single tyrant), one may speak of the failure of decolonization even though it is the more diffuse and generalized exclusion of the impoverished masses from the benefits of decolonization that names it in a far-reaching way. However, the discontinuities, disruptions and departures mark the emergences of wholly new (almost self-originating) forms and functions of legality.

In lieu of conclusion

At the end of the narrative enterprise of colonial inheritance, we begin and end in the middle. In other words, the 'beginnings' of colonial legal experience have no discernible endings. The inheritance/disinheritance processes possess a power of origin without a *terminus*, marking the very successes of decolonization simultaneously as a source of its failure.

All the same, narrative power is not bereft of future emancipatory potential. Just as there exist narrative modes empowering various colonial legacies, the subaltern genre is always at hand to fragment their hegemonic domain. Comparative legal studies needs to resort to a historiography that does not simply thrive on the sound of the trumpet. It needs also, and more than ever before, to listen to the power of lamentation of the millennial losers.

explosion. On one single day, they filed 60,000 civil suits asserting competing, often mythical, claims over ownership of land. The so-called Indian 'litigiousness' provides, in another idiom, an archive of collective ways of rendering inoperative the paradigm of 'legal-rational' authority. See generally Bernard S. Cohn, *An Anthropologist Among the Historians and Other Essays* (Delhi: Oxford University Press, 1987), pp. 608–23.

[83] See Baxi, *supra*, note 27.