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Remaking Custom: The Discourse and Practice of Colonial Codification

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In late eighteenth-century Germany, Herder and the Brothers Grimm set about recording large numbers of folk ballads. Their effort was to capture the collective creativity of people within a specific culture, and, by documenting their stories, to salvage something of the past from oblivion. Samuel Johnson and James Boswell, the eminent English couple, were driven by similar intent to look for primitive custom in the western isles off Scotland, and in fact by the 1850s a serious interest in folklore and music had matured across several countries of Europe.[1] This discovery of popular culture was part of the large sweep of a wide-ranging Romanticism which celebrated the wild and the natural, the primitive and the archaic, the simple and the sublime, the spontaneous and the instinctive. It was an offshoot of the revolt against Reason and Classicism; it was part of the new current in favour of cultural pluralism.

Like many ideas and attitudes, this interest in the ancient, the popular and the distant made its way into the colonies. Its journey there was attended by all the twists and turns and paradoxes and contortions that such travels usually entail, but all the same, within a few decades of the European folklorists, colonial officials in many parts of the empire came to be preoccupied with rather similar cultural investigations and were to be found rooting about for folk traditions in far-flung provinces. While travellers to India voyaged in search of the picturesque and the

[1] Peter Burke, *Popular Culture in Early Modern Europe*, London, 1978, pt 1; Richard Dorson, *The British Folklorists: A History*, Chicago, 1968.

exotic, the more curious among those already stationed to govern India developed an analogous interest in the social unfamiliar—in the customs, rituals and practices of native inhabitants.

Official interest in these matters assumed a specific structure in colonial Punjab. Conquered in 1948, almost ninety years after the British subdued the nawabs of Bengal, this region in north-west India experienced a form of colonial rule very different from the one established in the east. In Bengal the British saw zamindars as key figures in the countryside and the possible basis of Company Raj. In Punjab, peasants rather than zamindars were identified as the objects of imperial concern. Whereas the wet tracts of Bengal sustained a deeply stratified rural structure and a firmly entrenched caste order, Punjab, a drier tract, was in official discourse the proverbial land of peasant proprietors. If Cornwallis and his zamindari system epitomized British rule in Bengal, Lawrence's dream of Punjab showed a 'country thickly cultivated by a fat, contented yeomanry, each riding his own horse, sitting under his own fig tree . . .'.[2]

After the British conquest, peasants in Punjab's villages suddenly became aware of colonial officials recording their folk-tales, ballads, songs and proverbs, investigating their customs and codifying customary law. The nature of property rights, marriage patterns, inheritance customs and collective rights on village commons were all being enquired into. The first set of *wajib-ul-arz* (village administration paper), prepared in the early 1850s, had identified rights and customs in each Punjab village. In the 1860s, the first series of *riwaj-i-ams* of tribal customs, as distinguished from village customs, were prepared. Numerous codes, digests and manuals, as well as more than forty volumes on the customary law of different districts of Punjab, were soon produced.

These British ethnographic texts reveal as much, or rather a bit less, about Indian custom as about the official observers—their minds, the conventions of their language, the assumptions implicit in their questions, and their conclusions. It is important to understand the concepts which framed the vision of these official ethnographers and directed their gaze, the processes through which a region's customary practices were codified, and the contexts which mediated this process. In the colonial situation the rhetoric of custom becomes a new language of power and legitimation. It is of interest to examine the specificities, the logic, the ambivalences, and the implications of this rhetoric.

[2] R.N. Cust, *Pictures of Indian Life*, London, 1881, p. 255.

FROM TEXT TO PRACTICE

The *Code of Gentoo Laws*, the first major colonial digest on Hindu law, was published in 1776. About a hundred years later, in 1881, appeared Tupper's *Customary Laws of Punjab*. These works represent two different strands of colonial legal discourse. Both are tied in their opposition to Benthamite Utilitarian Positivism, yet they are very different from each other. Against the Utilitarian disdain for tradition, they celebrated tradition; against the Utilitarian argument of practical reason and the principle of Utility, they invoked the authority of custom; against the Benthamite plea for radical reform by the state, they saw the need to conserve and build on established rules; against the aggressive utilitarian projection of British rule as an enlightened alien power, they hoped to transcend the alienness by presenting colonial rule as rooted in indigenous society. Both sought to base British rule on custom and tradition, but they were involved in very different imperial projects.

The late-eighteenth-century Orientalist tradition saw ancient texts as the source of authentic knowledge about immemorial custom and tradition.[3] The Sastras and the Koran, it believed, set out the codes of conduct of Hindus and Muslims, and defined the customary laws which mediated social relationships as well as conflicts within communities. Practices were seen as legitimate only when they conformed with the injunctions of ancient texts. So, present practice was no acceptable proof of valid custom: it could represent perversions, distortions and deformations of the original principles. Practices became tainted with the passage of time, marked with the imprint of generations; the real principles were buried under the weight of history. To preserve immemorial custom a return to the original form was essential: custom had to be purged of foreign influences and Sastric law had to be consolidated where an amalgam of practices had developed. The original authoritative texts had to be identified, translated and understood; and colonial codes had to be based on and authorized through these texts.[4]

[3] On the Orientalists, *see* Javed Majeed, *Ungoverned Imaginings*, Oxford, 1993, chs 1–3. On the late eighteenth-century discovery of Indian tradition by European scholars, *see* Raymond Schawb, *The Oriental Renaissance: Europe's Rediscovery of India and the East, 1680–1880*, New York, 1984; P.J. Marshall, *The British Discovery of Hinduism in the Eighteenth Century*, Cambridge, 1970; O.P. Kejariwal, *The Asiatic Society of Bengal and the Discovery of India's Past*, Delhi, 1988; Wilhelm Halbfass, *India and Europe: An Essay in Understanding*, Albany, 1990. On law, *see* J.D.M. Derrett, 'The Administration of Hindu Law by the British', *Religion Law and Society in India* (hereafter *RLSI*), New York, 1968.

[4] Hastings ordered that 'the laws of the Koran with respect to Mohamedans and those

Since the time of Hastings, Orientalist scholars had immersed themselves in the project of discovery and the translation of authentic sacerdotal texts, and in the preparation of definitive digests.[5] After the acquisition of *diwani* in Bengal in 1757, there had been, initially, a toleration of the diverse systems of popular justice and a fluid interpretation of the Sastras by pundits. This had created some insecurity about the ambiguous basis of justice and, concomitantly, the need for a stable foundation of legal knowledge. Flexible and conflicting interpretations of Sastric injunctions had to be replaced by the certitude of definitive digests of traditional textual knowledge.

In May 1773 eleven pundits began work on the first major digest. Their work, *Vivadarnava-setu* (A Bridge Across the Ocean of Litigation), was published in 1775. This was translated by N.B. Halhead into English as *The Code of Gentoo Laws*. Subsequently, under Jones's supervision, Jagannath Tarkapancanana produced another digest, *Vivadabhangarnava*, which was translated later into English by H.T. Colebrooke. Jones, whose object was to produce 'a complete digest of Hindu and Mussulman law', published *Al Sirajiyyah: Or the Mohamedan Law of Inheritance*, in 1792, and the *Institutes of Hindu Law: Or the Ordinances of Manu*, in 1796. Colebrooke's authoritative work, *The Digest of Hindu Law*, appeared in 1798.

The Orientalist thinking on custom, tradition and law was relentlessly attacked by Utilitarian Positivists inspired by the ideas of Bentham.[6] Mill, like Bentham, criticized any 'obscurantist' reverence for tradition and linked such traditionalism to the ruling conservative ideology in eighteenth-century Britain, which was pathologically opposed to liberal reform. The task of law, for the Utilitarians, was to

of the Shaster with respect to the Gentoos shall invariably be adhered to'. Derrett, 'The Administration of Hindu Law by the British', *RLSI*, p. 289.

[5] Kejariwal, *The Asiatic Society of Bengal and the Discovery of India's Past*; Derrett, 'The British as Patrons of the Sastras'. Jones was obsessed with the question of authenticity: the right texts had to be located and properly translated. *See* Majeed, *Ungoverned Imaginings: James Mill's The History of British India and Orientalism*, Oxford, 1992, ch. 1; Rosane Rocher, 'British Orientalism in the Eighteenth Century', in Carol A. Breckenridge and Peter van der Veer (eds), *Orientalism and the Postcolonial Predicament*, Philadelphia, 1993.

[6] *See* Javed Majeed, *Ungoverned Imaginings* for James Mill's critique of Orientalism, and Eric Stokes, *The English Utilitarians in India* (Oxford, 1959) for a more general account. On Benthamite Utilitarianism there is now a rich scholarly literature. *See* L.J. Hume, *Bentham and Bureaucracy*, Cambridge, 1981; F. Rosen, *Jeremy Bentham and Representative Democracy*, Oxford, 1983; R. Harrison, *Bentham*, London, 1983; Gerald J. Postema, *Bentham and the Common Law Tradition*, Oxford, 1986.

define the basis of a new social and political order, rather than conserve the old regime; the valid concern of the law-maker was not the discovery of past custom—the law as it *is*—but rather the law as it *ought to be*.[7] Laws, in this view, did not express a deeper pre-given reality, an inner coherence of a pre-structured community with a collective history; they established that coherence by introducing order into a chaotic world of conflicting individual interests. Laws were exogenous, not endogenous, to a community; they provided a framework of fixed and public rules which made ordered life possible. Individuals were bound not by ties of community but by a commitment to clear, determinate, unambiguous public rules, systematized into a single universal code enacted by a proper legislative authority. The defining principles of this order were Reason and Utility, not shared traditions and custom.

The Punjab tradition reacted against this Utilitarianism.[8] There was, once again, an argument for basing law on immemorial custom and the authority of tradition, a concern for the collective life of communities.[9] But there was no return to the textual Orientalism of Jones and Colebrooke. Drawing on the English common law tradition, Punjab officials saw custom as embodied in practices rather than in ancient texts.[10] Injunctions within the Sastras and the Koran were not self-justifying:

[7] The criticism flowed from Bentham's crucial distinction between the 'expositor' of the law and its 'censor': 'To the province of the Expositor it belongs to explain to us what, as he supposes, the Law is: to that of the Censor, to observe to us what he thinks it ought to be. The former, therefore, is principally occupied in stating, or in inquiring after facts; the latter in discussing the reasons . . .' Cited in Postema, *Bentham and the Common Law Tradition*, p. 304. The law-maker, the codifier, had to be the censor, not a mere expositor.

[8] This critique, again, had 'conservative' roots. On the German sources of a conservative critique of Bentham, *see* P. Vinogradoff, *The Teachings of Sir Henry Maine*, London, 1904.

[9] For Tupper, as for Henry Maine, the group historically prefigures the individual: the individual emerges from the group at a specific stage of social development. Maine saw the family as the original form of social organization, while Tupper, drawing on Mclennan, traced the lineage of the individual to the tribe. The principles of tribal society tied the community internally; lineage linked the communities across generations. Custom was the expression of community life and its regulator. Custom had to be preserved; the forces leading to the disintegration of tribes had to be resisted.

[10] The reaction was not limited to Punjab. Henry Maine argued generally that the laws of Manu did not adequately represent local usages, and that 'the customary rules, reduced to writing, have been very greatly altered by Brahmanical expositors, constantly in spirit, sometimes in tenor'. Henry Maine, *Village Communities in the East and the West*, 1871, pp. 53ff. Elsewhere he criticized Jones's assumption that the laws of Manu were 'acknowledged by all Hindus to be binding on them'. It is probable, felt Maine, 'that at the end of the last century large masses of the Hindu population had not so much as heard

they were to be validated by practice.[11] The Punjab Laws Act of 1872 stated that the sacerdotal codes of Hindu and Muslim law were to be followed only to the extent that they coincided with, and had been absorbed within, customary practice.[12] When the *riwaj-i-ams* were prepared in the 1870s and 1880s, official observers were asked to carefully note the distance between actual practices and scriptures. The general tendency now was to repress the affinity between scriptures and practices, and play on the differences.

This general conception of custom was reinforced by a contextualist argument. Punjab was considered different from Bengal. In Punjab, so officials argued, Brahmans had no position of power, and customary law was 'unsacerdotal, unsacremental, secular'.[13] Hindu law which developed within the caste society of Bengal was unsuited for Punjab, where tribe and clan were defining features of the social ordering. 'Hindu law extravagantly exalts the Brahmans', wrote Tupper, 'it gives sacerdotal reasons for secular rules. . . .'[14] It derives its principles from caste rather than clan; it sees caste and not tribe as the natural order of society.

This move from text to practice was complicated. It occurred in hesitant and uncertain steps. Dalhousie's declaration in 1849 that British rule in Punjab would be based on native institutions was a statement of intent which conveyed no concrete content. How was custom to be defined and discovered? What were the sources of its authority? Such questions required time for debate. But the task of

of Manu, and knew little or nothing of the legal rules supposed to rest ultimately on his authority'. It was necessary to conserve the variety of local usages against their absorption by Brahmanical codes: 'The Sacred Law of the Hindus', in *Early Law and Custom*.

[11] In 1854, before issuing the Punjab Civil Code, the Judicial Commissioner M. R. Montgomery discussed 'how far those [Hindu and Muslim] codes are affected by, or merged in local custom, and in what places they altogether yield to that unwritten Code which is engraven on the minds of the people'. Preface to the abstract principles of law circulated for the guidance of officers employed in the administration of civil justice in the Punjab, Extract appended to Circular No. 37, dated 16 May 1854, From R. Montgomery, Judicial Comm., Punjab, to All Comms. in the Punjab, *Punjab Customary Law* (hereafter *PCL*), I, p. 59.

[12] *See* Tupper, 'Memorandum on the Means of Ascertaining the Customary Law of Punjab', dated 2 June 1873, *PCL*, I, p. 159.

[13] *See* 'Memorandum on the Customary Law in the Punjab' by C. Boulnois, Judge, Chief Court, Punjab, dated 28 November 1872, *PCL*, I; 'Memorandum on the Means of Ascertaining the Customary Law of Punjab' by Tupper, dated 2 June 1873, *PCL*, I.

[14] *See* Tupper, 'Memorandum on the Means of Ascertaining the Customary Law of Punjab', *PCL*, I.

administration could not wait. So a practical manual for officials was quickly put together by Richard Temple, drawing upon diverse textual sources: digests of European jurisprudence, and the great Orientalist texts on Sastric law produced by William Jones, T.A. Strange, W. Macnaghten, and H.T. Colebrooke—precisely those texts in opposition to which the specificities of customary practices in Punjab were later defined.

Fed on such digests and secure in the authority of their knowledge, officials went about arbitrating on matters of custom. In courts, when judges were called upon to adjudicate disputes over custom even before any serious enquiry had been undertaken, they had to fall back upon their own vague impressions of people's customs, supplemented by cursory enquiries and references to the Punjab Civil Code manual. Court decisions on issues of custom, tainted by such manuals, then became a source of knowledge about custom.[15] Later, in the volumes of Punjab Record, important judicial cases were compiled for ready reference. All customary law manuals quoted case law to prove a point about custom, and customs declared void by the courts could have no legal existence. Textual sources and judicial decisions remained important in the shaping of custom in the period between 1854 and 1872, when the Punjab Civil Code was in operation and the riwaj-i-ams were yet to be codified.

In a sense, textual authority was important even in Tupper's conception of customary law. His theory was not derived from the observation of practices; it was deductive. Drawing from the writings of English common-law theorists and nineteenth-century evolutionist anthropologists he outlined a general theory of the evolution of Punjab's society.[16] Indian evidence had no constitutive power in the making of this theory; the theory provided the frame through which the evidence was to be understood and ordered.[17]

[15] Commenting on the action of courts in transforming custom, Tupper wrote: 'How far is it probable that under the action of courts, indigenous custom has remained pure? The conjecture does not appear too rash, that if any of those parts of the lexis loci which the Punjab Civil Code treats in any detail were now to be analysed they would be found to be saturated with its influence.' Memorandum by Tupper, dated 2 June 1875, *PCL*, I, p. 207.

[16] Against Maine's, Tupper echoed Mclennan's theory that the small group emerges from the large, the family from the horde; but against Mclennan's view of the matriarchal origins of society, Tupper repeated Maine's patriarchal theory. Maine savaged Mclennan but appreciated Tupper. *See* Maine, 'Theories of Primitive Society' and 'The Sacred Law of the Hindus', in *Early Law and Custom*, 1883, rpt., Delhi, 1985.

[17] Tupper wrote: 'It cannot be too prominently stated that I pretend to offer nothing but a theory. In an agricultural population, which cannot now be less than ten millions, it is impracticable to exhaust all the facts; and even if I had time to examine vernacular documents in addition to the settlement reports and the *Punjab Record*, it would not have been possible to go beyond a theoretical statement of what the custom possibly would be under given conditions. This is what I mean by a theory of the subject; and I did not see how it could be exhibited in any general view by any other method.' Tupper, 'The Characteristics of Tribal and Village Custom', *PCL*, II, p. 77.

The shift from text to practice was thus a problematic one. There was, without doubt, a definite change in the rhetoric of custom. If the late-eighteenth-century Orientalists in Bengal were preoccupied with the discovery of ancient sacred texts, in the late nineteenth century Punjab officials were busy enquiring into customary practices. But their enquiries into such practices remained implicated within textual processes and were structured by a variety of conceptual assumptions with which these officials operated.

OF INFORMANTS AND SOVEREIGNS

The enquiry into custom depended perforce upon local informants. This dependence had a peculiar logic. When the Orientalist investigations into Indian tradition began in the 1770s, with ancient texts viewed as the dominant founts of knowledge, pundits were recognized as the custodians of that knowledge. Considered as being learned in the Sastras, they knew the language of ancient texts and could help their British masters with those texts. After the 1793 Cornwallis Code, pundits were attached to the district and provincial courts: to the Sadr Diwani Adalat in Calcutta and to the Supreme Court. They were to answer questions posed by judges on specific disputes, and inform the court about what the Sastras had to say about the class of dispute in question.[18] Sastric education in the Sanskrit colleges in Calcutta and Banaras sought to produce experts to be consulted during litigation.[19] Pundits were involved in this way in producing colonial digests on Sastric law.

This dependence on the power of pundits created a deep imperial anxiety. While a dialogue with native informants was seen as essential

[18] Lata Mani discusses the structure of the dialogue with the pundits on the question of *sati*. *See* Mani, 'Contentious Traditions: The Debate on *Sati* in Colonial India', in Kumkum Sanghari and Sudesh Vaid (eds), *Recasting Women: Essays in Colonial History*, New Delhi, 1989, pp. 88–126.

[19] At the Sanskrit colleges the following texts were read: Manu, Mitakshara, Dayabhaga, Dayakarma (Sarigraha), Daya-tattva, Dattaka-candrika, Duttaka-mimansa, Vivada-cintamani, Tithi-tattva, Suddhi-tattva and Prayascitta-tattva. *See* Derrett, 'The British as Patrons of the Sastras', *Religion, Law and State in India*, New York, 1968, p. 238.

to the production of authentic knowledge, such extreme dependence was experienced by the British as a form of disempowerment. To assert sovereign power the masters had to transcend their crippling reliance on native knowledge-brokers and claim their own superior right to represent local tradition.

In the process, the authority of pundits was both recognized and denied. The British first persuaded the pundits to prepare the digests and then made disparaging comments on their works. Jones was dissatisfied with the work of the eleven pundits who prepared *Vivadarnava-setu*. Arriving in India eight years after the presentation of the Code of Gentoo Law to the East India Company, he set about preparing a more authoritative alternative digest of Sastric learning. Jagannatha Tarkapancanana, conversant with both the Mitakshara and Dayabhaga schools, prepared the digest *Vivada-bhangarnava* to Jones's specifications. Colebrooke translated the work but criticized Jagannatha; and later other official legal experts like Thomas Strange and F.W. Macnaghten even ridiculed him.[20] Colebrooke himself undertook to prepare a work in English which would establish a uniform and accurate basis of judgment and make English judges independent of their Hindu law officers. But he too was dissatisfied with Balam Bhatta and Citrapati, the two local informants who worked with him on the digest.

The question of knowledge became linked to a discourse of morality. The knowledge of the pundits was seen as suspect since their motives and morals were questionable.[21] In Jones's attack on the pundits a feeling of impotent anger fused with a sense of moral outrage: 'I can no longer bear to be at the mercy of our Pandits, who deal out Hindu law as they please, and make it at reasonable rates, when they cannot find it ready made.'[22] Within official discourse pundits came to be represented as self-seeking, corrupt and greedy; their works were associated with fraud and forgery.[23] Company intellectuals claimed the moral

[20] F.W. Macnaghten, *Considerations on the Hindoo Law as it is Current in Bengal*, Serampore, 1824, Preface; Strange, *Hindu Law*, London, 1830, II, pp. 175–6.

[21] *See* Macnaghten's Preface to *Considerations on the Hindoo Law*.

[22] Henry Maine disapprovingly quotes Jones's assessment of the pundits, 'The Sacred Laws of the Hindus', in *Early Law and Custom*, 1883, rpt., New Delhi, 1985.

[23] *See* Derrett, 'The British as Patrons of the Sastras', *Religion, Law and the State in India*. The authenticity of important works like Dattakacandrika was widely questioned by British legal minds in the nineteenth century. Derrett, among others, argues that this was an extremely important late-nineteenth-century work. Raghumani, the probable author of the text, was a highly respectable scholar, and was unlikely to 'forge' a text, ibid. On juridical fabrication, *see* Derrett, 'A Juridical Fabrication of Early British India: The

authority to represent and record Indian tradition even when they recognized the pundits' claim to superior knowledge and their symbolic power in society.[24]

This attitude towards the pundits seems partly rooted in Benthamite ideas. Orientalist traditionalism and Benthamite radical reformism developed in opposition to each other in India, but they also influenced each other.[25] Benthamite prejudices were silently inscribed onto Orientalist legal minds. Bentham reacted against the common law tradition within which common-law judges interpreted the spirit of tradition and applied it to new situations; talked of immemorial custom but constantly modified custom; innovated and introduced new rules but pretended—through the use of judicial fiction—that they were old. Such a system, Bentham argued, sustained a regime of despotism, corruption, falsehood, dishonesty, pretence and deception. When judges innovate, establish rules and decide law, they become despots. When, through the myth of immemorial custom and through reference to judicial fictions, judges pretend that they have invented nothing, they act with dishonesty, they deceive. Since the 'muddle' of uncertain, flexible rules was known only to legal experts and not to the public, these experts could manipulate law and were corruptible.[26] It was necessary to separate judicial and legislative functions, define the proper source of law, and establish that stable and certain legal framework by which public expectations could be made secure and public justification of judicial decisions rendered possible.

Many of these ideas resonate in the writings of Jones and Colebrooke. Their fear of the pundits' corrigibility, their reluctance to accept pundits as interpreters rather than factual reporters of tradition, their

Mahanirvana Tantra', in Derrett, *Essays in Classical and Modern Hindu Law*, vol. II, pp. 197–243.

[24] While Colebrooke set out to work on his project he was aware that the knowledge of the pundits had greater popular legitimacy. 'The public have, no doubt, more confidence in the Pundits than in me,' he said. Quoted in Derrett, 'The British as Patrons of the Sastras', *RLSI*, p. 251.

[25] Javed Majeed shows how Mill's Utilitarianism can be read as a reaction to the dominant conservative British ideology of the late nineteenth century. Majeed, *Ungoverned Imaginings*, Oxford, 1992.

[26] Bentham saw 'judicial fictions' as 'lies devised by judges to serve as instruments of, and cloaks to, injustice'. The use of judicial fiction by lawyers had pernicious effects: 'it has had for its object or effect, or both, to deceive, and, by deception to govern, and by governing, to promote the interest, real or supposed, of the party addressing, at the expense of the party addressed.' Quoted in Postema, *Bentham and the Common Law Tradition*, p. 273.

search for certainty, are all part of a wider sensibility of those times. Within this tradition, inventiveness in a non-legislative body was suspect: it was the possible basis of arbitrariness, caprice, dishonesty and corruption. British masters, even the Orientalists, were prone to distrust creative informants, ignore the vibrant tradition of contemporary indigenous legal discourse, and freeze Sastric learning into old texts.[27] As the British became more and more confident of their knowledge of Indian tradition and custom, consultations with pundit informants became infrequent, and finally in 1864 they were dismissed from the courts altogether, resolving the state's insecurities about the basis of its sovereign power.

The move from text to practice as the source of custom was paralleled by the move from pundits to village elders—the new local informants on custom. In Punjab, village headmen and elders were now seen as 'the custodians of village wisdom', the 'repositories of local knowledge'.[28] They were the anchor around which the community revolved: they held the community together, disciplined its members, preserved order, adjudicated disputes, sorted out conflicts over custom. If customary practices mediated relations within the community, these practices were maintained and reproduced via the mediation of elders.

This conception of the power of elders derived from notions of Indian village communities which became popular after the second quarter of the nineteenth century. It was a conception reinforced by the theory of the tribal constitution of Punjab villages. British officials generally identified two forms of villages. In one, individual ownership and independent holdings predominated, joint rights and obligations were unknown, and the village was managed by hereditary headmen. In the

[27] *See* Derrett, 'The British as Patrons of the Sastras', and 'The Administration of Hindu Law by the British'. Derrett argues that in the pre-British period pundits incorporated local practices into Dharmasastra, and reinterpreted texts. He shows that in Sastric learning, a creative seventeenth century was followed by a flourishing, though not assertive or brilliant, eighteenth century. In fact, in the 1820s, a series of learned texts were produced by pundits, in response to the scurrilous charges of Strange and Macnaghten; but these genuine Sastric works were not relied upon by courts suspicious of recent works. 'The pandit as a professor of a living science was rejected for the more or less fossilised treatises which would head the pandits list of references.' Derrett, 'The British as Patrons of the Sastras', *RLSI*, p. 255.

[28] Wilson wrote: 'Like the judges in England, the older men of the tribe are considered to be the repositories of the common law.' They are aware of the principles which govern social life, and the general spirit behind social practices. Wilson, *General Code of Tribal Custom in the Sirsa District of the Punjab*, Calcutta, 1883.

other, the village was populated by a compact body of co-sharers who claimed a lineage, real or mythical, from a common ancestor or a group of ancestors. The land of the village was equally shared amongst the male descendants of the original founder. The claim to common lineage cemented the village collectivity, and the notion of shares regulated duties and obligations, privileges and claims. The heads of co-sharing families formed a council of elders responsible for order. This patriarchal structure, where the word of the patriarch was law, prevailed in Punjab. Henry Maine focused mainly on the first type of village, whereas Punjab officials talked a lot about the second.[29] After the 1860s, when the theory of tribal origin of primitive society became popular in evolutionist anthropology, Tupper suggested that the family and the village as institutions were preceded by the clan and the tribe; therefore tribal characteristics were inscribed into village institutions as they developed, and tribal elders were refigured as village elders.

Through these elders the British hoped to discover the customs of India's tribes, and at the same time establish power over them.[30] So British officials in Punjab, particularly after the rebellion of 1857, went in search of *chaudhris* and *muqaddams* and instituted them where none existed.[31]

[29] Maine, *Village Communities in the East and the West*; and *Ancient Law* [1861], London, 1972, particularly ch. V, 'Primitive Society and Ancient Law', for his discussion on family and patriarchal power. *See also* Baden-Powell, *The Origin and Growth of Village Communities in India*, Oxford, 1899, rpt., Jodhpur, 1985. For Punjab *see* the various memorandums and records collected in *PCL*, vols I–III. For a discussion of the different conceptions of village community in India and England, *see* Clive Dewey, 'Images of the Village Community: A Study in Anglo-Indian Ideology', *Modern Asian Studies*, 6, no. 3, 1972.

[30] Tupper: 'It is through the tribe and clan that Government can gain its firmest hold on the inclinations and motives of the people. The people can be led by their own leaders. It is much easier for a foreign Government to deal with organized bodies of men, through those who can be trusted on both sides, than with miscellaneous hordes of individuals.' Tupper, 'On the Codification of Customary Law', *PCL*, I, p. 17.

[31] 'I do not wish to create the class where it does not exist. I do not wish to maintain an idle and useless class, but . . . to a government of foreigners such as our own, such men are invaluable both in war and peace, for they are the means of communication and explanation to their more ignorant brethren, and they are the depositories of all local traditions and local statistics,' wrote the Commissioner of Lahore Division. No. 535, 16 December 1858, Commissioner of Lahore Division to Financial Commissioner, Punjab, Hissar Division Records, Basta 38, Revenue Case 21, 15 January 1859. From Sirsa the Deputy Commissioner reported: 'Hitherto this class of men do not exist, nor can I learn that such ever were recognized in this district by any of the governments preceding ours;

Could village elders inform the British about customary practices? How reliable was their knowledge within imperial perception? The process of enquiry shows that their authority, like that of Bengal's pundits, was both recognized and demeaned; they were represented as knowledgeable as well as ignorant. This contrary assessment was part of the logic of sovereign power as it came to be constituted, and it created a space for imperial intervention in the making of custom.

THE ENQUIRY

The quality of any enquiry depends crucially on the machinery employed to conduct it. The colonial machinery for generating knowledge about custom was, not surprisingly, inadequate for the purpose. Revenue officials had neither the time nor the inclination to carry out exhaustive investigations. Badly paid and overworked, they had little passion for the execution of orders which came from the top.

The village record on customs was frequently stereotyped, the questions difficult, long, and badly formulated. 'It has often been merely an elaborate Persian document in the best official language', wrote Brandreth, 'drawn up by some learned Hindustani munshi, and copied for every manor of the pargana'.[32] The imperfections of the wajib-ul-arz, prepared in the 1850s by revenue officials, were widely recognized, yet the document, being a part of the settlement record, had the same legal force as the settlement and its entries had to be accepted by courts as correct.[33] Things did not radically improve when the first set of riwaj-i-ams were produced in the 1860s. The settlement officer who was responsible for collecting the mass of evidence still had no efficient machinery at his disposal. After attesting the records for Montgomery, W.E. Purser cautioned against their reliability,[34] complaining about the

but the advantage of such men in every pergunah is too great for me not to advocate its being created at once . . .' Deputy Commissioner Sirsa to Commissioner and Superintendent Hissar Division, Hissar Division Records, Basta 38, Revenue Case 169, 2 April 1859.

[32] *Settlement Report: Jhelum*, 1864, para 296.

[33] The presumption of correctness was attached to the wajib-ul-arz under Section 44 of the Land Revenue Act. Since the custom recorded on the wajib-ul-arz was considered a 'true' custom, the onus of proof in the court was on the party contradicting it. *See*, 54 *Punjab Record*, 1867; 87 *Punjab Record*, 1868; 13 *Punjab Record*, 1875.

[34] 'I think they ought to be received with much caution. In the first place this document is always prepared first by the Superintendent. He is, of course, utterly unable to go out of the beaten track, and the track in this case occasionally leads into the slough of downright nonsense.' W.E. Purser, *Settlement Report: Montgomery*, 1878, pt III, para 10.

incomprehensible language of the questionnaire: 'it is incorrect, and is couched in the most barbarous and unintelligible Hindustani one can imagine.' And he added: 'when the questions are incorrect, the answers are likely to be the same.'[35] Attempts were made to improve records. Every new scheme characteristically traced 'anomalies' and 'errors' in the past and assured 'authoritative' records in the future. But the problems remained.

The nature of codification is defined by its framework of questions. Issues which appear relevant to colonial administrators are likely to be different from those considered important by peasants. The inclusions and exclusions within the enquiry are therefore vital. The wajib-ul-arz, prepared for settlement purposes in the 1850s and concerned primarily with allocating responsibilities of revenue payment, had restricted its enquiry into village customs to a few questions. When Prinsep prepared the riwaj-i-ams in the 1860s by separating tribal from village custom, the scope of enquiry was broadened. Yet the focus was still limited, now to a set of issues on which 'custom' was deemed to deviate from Hindu and Muslim law. Tupper's scheme, built upon his evolutionary theory of the tribal origins of Punjab agrarian society and the ordering power of the principle of agnatic succession, focused on the questions of transfer of property—through inheritance, adoption and gift—and on marriage.[36] A whole range of other issues important to the lives of the people were marginalized in the enquiry.

The evidence on customary law collected in village meetings with elders was constituted through a colonial ethnographic dialogue. Colonial officials went there not just to hear the wisdom of elders but to question and cross-examine them, sort out ambiguities and contradictions, and then interpret, decide and attest the truth about custom. In these investigations there were confrontations between colonial observers and native informants on the authenticity of practices; there were also problems of intelligibility and comprehension. When a superintendent in charge of an enquiry into customary law gathered the leading men of a village and produced a long questionnaire, many elders could not understand the implications of the questions, in part because the questions were drawn up within an alien frame of reference.[37]

[35] Ibid.

[36] In 1873 Tupper was asked to draw up a series of questions for enquiries into tribal and local customs. The draft questions submitted in 1875 were approved by the provincial government. The third volume of *Punjab Customary Law* is structured around a revised version of these questions.

[37] E.L. Brandreth wrote about his experience of such enquiries in Jhelum: 'when they

Baffled villagers produced answers which interrogators helped to mould. When community elders were asked to spell out the generative schemes implicit in their practices, they found the matter altogether difficult. When generative schemes are immanent in social practice, people act according to custom without explicitly formulating the rules of custom. In such a context social practice occurs in a world taken for granted, within a structure of experience characterized by silences and languages of familiarity. The discourse of familiarity, as Bourdieu says, leaves unsaid all that goes without saying; it cannot express that which has always remained unsaid, never been articulated.[38] Persuaded to make a reflexive return on to their practice, the native informants inevitably produced a discourse on custom which could never capture the general sensibility that informed social practice. What appears to the 'native mind as familiar, as necessary, as self-evident, as a part of the course of nature' is, as many colonial officials complained at the time, difficult for outsiders to grasp.[39]

Even when the issues were understood by native informants, their answers could still be orchestrated. The oral evidence of village elders had to be verified, and alternative modes of verification employed by different officials defined different truths about custom. Thorburn's account of his investigations into custom in Bannu is revealing. Asked about their inheritance customs, the Bannuchis at first 'unanimously' declared that, according to the Shara rule which they followed, a father

put their seals to the paper, no doubt they thought it very grand, though they did not know what it was about, as they could little understand the language . . . the villagers are confused by the long code of rules, and merely say "yes, yes", and put their seals to the paper, hoping it is nothing very dreadful . . .', *Settlement Report: Jhelum*, 1864, para 296.

The Settlement Commissioner of Multan and Derajat Divisions, J.B. Lyall, felt: 'If it is grotesque to propound these questions to a select assembly of headmen, it is much more so to propound them to the men of one village, most of whom, after listening to a few questions, will be so bored and stupefied that they will agree to anything to get away.' No. 33 S, dated 28 September 1875. From J.B. Lyall, Settlement Commissioner, Multan and Derajat Divisions, to the Settlement Secretary to the Divisional Commissioner, *PCL*, I, p. 188.

Purser reported from Montgomery: 'In many cases the people have no custom at all on the points to which the questions refer.' Among the Mohammedan jats, for instance, adoption was rare. 'Yet the chiefmen, when asked—"Can a man adopt?"—will be sure to say "yes" or "no" . . .' Purser, *Settlement Report: Montgomery*, pt III, para 10. To the British, keen on specifying different claims to the property of a sonless proprietor, adoption was an important issue.

[38] Pierre Bourdieu, *Outline of a Theory of Practice*, Cambridge, 1984, pp. 17–18.

[39] Tupper, 'Memorandum on the Means of Ascertaining the Customary Law of the Punjab', dated 2 June 1873, *PCL*, I, p. 160.

could gift his property to anyone, even if his male successors were alive. This evidence left Thorburn unconvinced and uncomfortable. He pursued the investigation, cross-questioned the Bannuchis, and was ultimately happy with the answers he helped produce:

> Asked for examples of the exercise of such powers [the right to transfer property to others, in preference to male heirs], not one was forthcoming. Had anyone so alienated half his land? No cases known. As with Bannuchis, so with the Isakhels and others. Thus reasoning from a series of negatives the people were over and over again driven to admit that their first replies were erroneous. . . . Here and there I shaped public opinion on most questions in the direction in which I myself and others of experience thought equitable.[40]

What was recorded represented Thorburn's conceptions of equity and justice, which in this case privileged patrilineal over other forms of property devolution—not that of the Bannuchis. Subsequently Arthur Roe, another colonial authority on customary law, discovered that 'what took place in Bannu, has taken place in other districts where custom was in its infancy'.[41]

When the assertions of elders conformed with the ideas of the observer, the authority of precedents could be questioned. Enquiring into Ludhiana's customs, Gordon Walker found the method of seeking proof through precedents problematic. Such a method made no distinction between 'norm' and 'exception'. Practices which operated in the past as exceptions could be cited to deny the norm. Moreover, argued Walker, practices which prevailed in an earlier stage of society could not be accepted as the legitimate basis for conditions which were widely different. There was no dearth of evidence that before British rule a daughter's husband was often a co-sharer, and a daughter's son could inherit property. But such practices, existing in a context where land was not in demand, could not be made a rule. They could only be considered 'exceptions', however numerous the instances of their practice, because in Walker's logic they 'interfered' with and 'departed' from 'the natural order' of agnatic succession. Walker was certain that, despite past practice, tribal feeling was opposed to any such rule. And in 'seeking proof of tribal custom regard should not be had merely to the few precedents . . . but rather to the general expression of tribal opinion. . . .'[42] The leading men were granted a certain power in selecting

[40] *Settlement Report: Bannu*, para 205.

[41] A.R. Roe and H.A.B. Rattigan, *Tribal Law in the Punjab: So Far as it Relates to Rights in Ancestral Land*, Lahore, 1895, p. 18.

[42] Gordon Walker, *Customary Law of Punjab—V: Ludhiana District*, 1885, p. 37.

from a range of past practices what they wanted codified, as long as their ideas did not violate those of the officials.

In these enquiries the administrator ethnographers were acting in opposed ways, proceeding from different assumptions. Thorburn used the rule of precedents to discount the authority of the elders; Gordon Walker cautioned against a slavish submission to the record of past practices. For Thorburn the authority of the elders was questionable, their knowledge of custom dubious. He drove them to admit that their replies were erroneous. For Gordon Walker the elders appeared as bearers of wisdom who unconsciously acted in accordance with the principles of custom, who knew the difference between the 'norm' and the 'exception'.

After the enquiry there began another phase in the redefinition of custom. The settlement officer in charge of the enquiry departed with the record of the custom. Back at his office, he was expected to scrutinize the answers, sort out the anomalies and ambiguities, and prepare the final authoritative version of riwaj-i-ams to be kept in the district office and consulted by the courts. This process of the translation of vernacular statements, and the re-reading of textualized records and systematization of evidence, provided a wide space for colonial authorial intervention in the making of custom. Clearly, the enquiry was a process through which the colonial state appropriated custom in specific ways. The nature of this appropriation and the reconstitution of custom was defined by the specific frames of reference through which local reality was perceived, the categories through which it was ordered. As we shall see, this frame was not marked by internal coherence: it was shot through with ambiguities, tensions and inner contradictions.

CONFLICT OF WILLS

> It is the duty of the Government to improve Native institutions as well as to uphold them. It is possible . . . to domestic[ate] primitive law: you can redeem it from barbarism without killing it down.[43]

So said Dalhousie in 1849, and the thought reappears persistently in the late-nineteenth-century discussions of customary law in Punjab. It expresses the inner tension between the two contrary impulses which lie behind colonial projects: the will to preserve versus the will to transform indigenous custom and tradition. In the 1840s the terms of

[43] Cited in *PCL*, I, p. 12.

this debate were defined by the Conservative Paternalists, with their romantic concern for village institutions, and the Liberals and Benthamite Utilitarians, with their programme of radical modernist reform. Dalhousie sought to reconcile this opposition. But this reconciliation was not easy. How could traditional institutions and customs be upheld yet improved, redeemed without being killed? How could the Enlightenment ideal of improvement be married to an anti-Enlightenment love for tradition? Such questions continued to frame discussions on customary law in Punjab. Officials continued to grapple with the problem of specifying the nature of the colonial project and the functions and limits of state intervention.

The texture of their conceptions varied. Within one tradition of English common law thinking the object of state intervention was to discover and record existing practices, not to transform them; to systematize but not invent. This language of conservation shaped the rhetoric of Punjab officials. Codification had to be an unprejudiced act based on objective observation, untainted by Western concepts and *a priori* ideas. Custom had to be presented and codified *as it was*, not *as it ought to be*. It was as if social practices were transparent, they could be seen without conceptual filters. And what was seen could be codified.

This strong demand for some pure objectivity was difficult to sustain. The argument for codification usually ended with a plea for systematization according to some deliberate plan, a deliberate design guided by principle;[44] and the argument for uncorrupted observation inevitably slipped into a demand for *understanding* and *explanation*: 'the better the people are understood, the better will they be governed; . . . Fully to understand a people you must be able to explain its institutions as well as to recount them . . .'[45]

The function of the state was to make the natives aware of the inner coherence and underlying principles of their practices. The customs of the country, it was said, were 'by no means mere chance growth', but were 'founded on principles susceptible of ascertainment on enquiry and of statement as a fairly consistent whole'.[46] These principles could

[44] 'Codification implies the Consolidation of existing law or custom', wrote Tupper. But it was useless to collect the material into a 'shapeless mass'. The material 'must admit of systematic arrangement on a definite plan . . . There must be a deliberate design, and its execution must be guided by principle.' Tupper, 'On the Codification of Customary Law', *PCL*, I, pp. 15–16.

[45] Tupper, 'Some Punjab Survivals', *PCL*, p. 98.

[46] Tupper, 'Memorandum on Customary Law', *PCL*, I, p. 21.

be grasped through modern theories. Observed facts made sense only within such a framework of explanation. Tupper was convinced: 'If the facts of rural life in the Punjab be continuously read in the light of modern ideas regarding the origin and progress of society, there is, I think no doubt that their explanation will rapidly proceed.'[47] Once the essential principles were understood, ambiguities and confusions could be ironed out and the real practices systematized into codified rules.

The search for this inner principle of customary ordering of society led colonial officials into the hazy history of immemorial custom. Drawing from the writings of English common-law theorists and nineteenth-century evolutionist anthropologists, Tupper outlined a general theory of the evolution of Punjab society which he then used to order the evidence on custom. According to Tupper's evolutionary theory, the clan originates in the tribe, the village in the clan, and the joint family in the village (tribe—clan—village—joint family). Once the village is established, property rights pass from joint ownership by all members of the community towards individual ownership. First, a jointly owned village is divided into several *tarafs* held by coparceners, each group constituting a section of the community; then each share, each taraf, held by the coparceners is further divided into individual plots according to ancestral shares; subsequently the extent of individual ownership changes and begins to deviate from the ancestral customary share; so shares are disused and in course of time forgotten. Underlying the theory is the presupposition of an ever-increasing specialization within society and a general order of progress from collective to individual property: 'The tribe is broken up into different clans, the clans into villages, the villages into lots, the lots into family holdings. The group once simple and homogeneous, becomes complex and diversified. Broadly the theory may be deduced from the general law of evolution.'[48] The common origin of property was first assumed to be 'sufficiently established' by investigations in comparative jurisprudence 'without any special reference to Punjab customary law'. The succession of orders was then deduced through a general theory of evolution. The facts, as they were revealed through enquiries, only supported these inferences.

Proceeding from such a deductive theory, interrogation only reconfirmed the validity of its initial assumptions. The theory was

[47] Ibid.

[48] Tupper, 'The Village and Severalty', *PCL*, II, p. 54.

supposed to provide the only means of ordering an otherwise bewildering mass of evidence into a meaningful pattern. The perceived coherence of customary law was thus pre-given. Evidence which did not conform to the expectation of theory was explained in a number of ways. First, a distinction was made between the 'norm' and the 'exception'. All that could not be theoretically accounted for as the 'norm' was conveniently accommodated within a spacious term—'exception'. Second, a difference was made between the general and the particular. Theory could refer only to general characteristics. Local forms of customs were bound to vary. But within these local forms, the operation of the general principle could still be discerned. Finally, Tupper's theory sought to distinguish between those customs that had the authority of 'antiquity' and those which were 'innovations' and 'novelties'. Since each specific social practice conformed to a particular stage of society, it was possible to judge whether a set of rules was logically linked to a particular stage or was a meaningless 'survival' from the past.[49] Customs which were in accordance with and tended to conserve the older forms of society were seen to possess immemorial antiquity and had to be preserved.[50] Later innovations which tended to dissolve the original tribal form, premised upon patriarchal lineage and agnatic filiation, had to be repressed as alien intrusions.

This self-image of the officials as codifiers of immemorial custom can be distinguished from their self-image as preservers of a disappearing tradition. Customs, they felt, were changing, and traditions were collapsing, inevitably, naturally. This was an inexorable process, the logic of history. Without enlightened intervention the rot could not be stemmed. Standing amongst the ruins of tradition, the noble Englishman had to salvage the past. Codification could help preserve the authenticity of tradition, allow officials and judges to spot any attempt at innovation, whether by officials or by the people themselves. And through a theoretical understanding of the inner coherence of practices, the founding practices could be differentiated from 'intrusions' which corrupted their original form.

[49] Tupper, 'The Characteristics of Tribal and Village Custom', *PCL*, II, p. 78.

[50] So it could be said: 'The rule whatever it be, that tends to preserve tribal cohesion, community of interest in the village, and the integrity of the family, must if the theory of progress from communal to several rights be sound, always have the weight of past practice in its favour, its converse is by the hypothesis, a novelty; it may be a novelty of long standing, but still an innovation on an older state of things.' Tupper, *PCL*, II, p. 78.

Many colonial officials, however, were troubled by a radical self-doubt. Could the colonial state carry through its project of preservation? Could it really see with clarity a fleeting reality and fix its meaning with any certainty? Could it resist the imprint of a new time into an immemorial structure? In 1873 Tupper was talking of preserving custom from 'distortions' through judicial reform.[51] By 1875 he was emphasizing the transitional character of Punjab customs and the 'impossibility of re-constituting the form it bore immediately before annexation'.[52] His voice now carries notes of despair:

> with all the will in the world to preserve amid the transmutation in progress, as much Punjab custom as we can, we must admit that the outline and local colouring, as they existed before the British, cannot be wholly restored. Some portion of the outline, enough of the colouring, we may yet save to show in the new combinations which are appearing, that . . . sufficient account has been taken of the traditions of localities and the peculiar practices of tribes; for more than this it seems vain to hope.[53]

Even this much was difficult to achieve.

> What are we, as judicial officers, to do when customs are fading and changing, . . . How are we to give to the fleeting forms of custom, as allegedly before us, that precision of outline which would wear a sufficiently definite look under the scrutiny of the courts of appeal? We try to photograph a dissolving view with a bad camera, and no wonder the result is rather blurred.[54]

Beneath the audible voice of the preserver was the hidden transcript of the Utilitarian reformer. The aggressive authoritarian Benthamite tone of Dalhousie was missing in the discourse of customary law after the 1860s. But the Benthamite spirit did express itself in mellow undertones, in hesitant and surreptitious ways. Officials admitted that it was important for the state to consider 'very carefully not merely what the law is but what it ought to be'.[55] Tupper, with all his talk of preserving immemorial custom, could still argue that 'it is not absolutely unmodified Native usages which are to be upheld, irrespective of their social and political effect, simply because they have existed. We are to maintain native institutions; but the British system must be, and has been, introduced.'[56]

[51] Tupper, 'Memorandum on the Means of Ascertaining the Customary Law of Punjab', dated 2 June 1873, *PCL*, I, pp. 158–74.

[52] Memorandum by Tupper, dated 2 June 1875, *PCL*, I, p. 207.

[53] Ibid., p. 208.

[54] Ibid., p. 208.

[55] Tupper, Introduction, *PCL*, I, p. 13.

[56] Ibid., p. 11.

Yet the common law mind could not easily accommodate a reforming project. It argued for change, but it cast its argument for reform in the language of continuity. Wilson said, for instance, that customs have always changed, slowly and imperceptibly. Tribal leaders were always devising new solutions to new problems and redefining practices, even while acting according to the spirit of custom.[57] By appropriating the right to reorder custom the British were in fact acting according to tradition. Past practice sanctioned present interventions.

TRADITION, REASON AND TIME

According to the Punjab Regulation Act (Section 5 of Act IV of 1872), in order to be valid custom had to be 'reasonable, continuous, not against public policy or equity, justice and good conscience and not void'.[58] This statement reveals the diverse ways in which Punjab officials sought to define the validity of custom. These conflicting modes of legitimation were implicated in a set of contradictory discourses.

First, there is the obvious opposition between the authority of tradition and the authority of reason. If continuity is the basis of validity, tradition appears as self-justifying. Then the validity of a custom lies in the fact that it has been in long use, from time immemorial; it has been an intrinsic part of collective life, a basis of social ordering, an expression of social unity. It is not to be judged through any external criteria of transcendent, universal reason. But the reference to the reasonability of custom and to notions of 'equity, justice and good conscience' shifts the grounds of validation. Enlightenment Reason is brought in to judge the validity of tradition and custom. Tradition which violates principles of justice, equity and good conscience is unreasonable and hence invalid. Here tradition is not only represented in the language of reason but is appropriated through a framework of utilitarian, liberal, modernist thought.

But the opposition between tradition and reason is often negotiated in subtler ways within the official discourse of customary law. Village elders were seen as custodians not only of tradition but of 'village

[57] Just as common lawyers in England continuously modify custom in accordance with its essential spirit, wrote Wilson, 'so the leaders of a tribe are ready, without hesitation, to extend their tribal custom, and to decide in accordance with its principles any new question that comes before them.' Wilson, *General Code of Tribal Custom in Sirsa*, pp. 33–4.

[58] For a discussion, *see* 'Memorandum on the Customary Law in the Punjab' by C. Boulnois, Judge, Chief Court, Punjab, dated 28 November 1872, *PCL*, I, p. 144.

wisdom': they were aware of the general principles through which social life was to be ordered. Wilson says: 'the tribesmen among themselves decide any new case that may arise in accordance with the principles underlying the whole body of their tribal custom, and find no difficulty in applying these principles, though unconsciously, to altogether new sets of circumstances . . .'[59] Custom expressed a collective sense of what was reasonable, just and fair—what is seen as the collective good. Persistence and continuity of a custom, its temporal depth, reveal the intrinsic reasonableness of the general principles. Customs develop over time through a process of collective reasoning. Through practice, norms become part of the common sense of a time; and the dispositions shaped in the process define what counts as reasonable. Actions which conform to this sense are therefore reasonable. Reason in such an argument refers not to a unitary concept with a fixed natural Enlightenment essence, but to a tradition-shaped sense of reasonableness. The argument of tradition is cast in the language of reason, without being subordinated to it.

All these alternative conceptions of reason were at play in the act of codification and adjudication of customary law. They were the basis of conflicting interpretations of custom and popular questionings of the codified law.

Linked to these differing notions of reason and tradition were shades of differences on conceptions of time. The discourse of custom tended to present custom as timeless, as immemorial. The validity of custom lay in its continuity over time. But how was one to define the pastness of the past, the temporal depth of immemorial custom? Some officials saw the origins of practices as lost in the mists of immeasurable time. It was impossible to specify with certitude the antiquity of a particular practice.[60] If customs are presumed to be timeless and unchanging, then present practice was itself evidence of the antiquity of custom. But in general the time of memory was considered the necessary temporal depth of valid custom: 'a custom, to have the force of law, must have

[59] Wilson, *General Code of Tribal Custom in Sirsa*, p. 33.

[60] 'There is in this province no rule of law, which prescribes any period during which a custom in order to be valid and enforceable must have been observed. It is sufficient to show that the custom actually prevails and is generally observed in the tribe to which the parties belong and there is no necessity to go further and attempt to prove the impossible, viz. that it has been preserved in the tribe from a period to which the memory of man runneth not to the contrary, the test being the uniformity of practice.' 34 *Punjab Record*, 1907, p. 151.

existed as long as the memory of the tribe extends, i.e. the memory at least of its oldest members, . . .'[61] The memory of the elders, their oral evidence on the practices of the tribe, was therefore important.

Many officials, as we have seen, recognized that customs were not frozen in time. 'On all sides transition is in progress', wrote Tupper. In every district 'the original social combinations of tribe, clan and village will be found in varying stages of reconstitution'.[62] Customs changed alongside these mutations in the social forms of society. But these changes could not be publicly recognized within the discourse of 'immemorial custom'; for this would be to admit a rupture, a discontinuity in time. Since continuity was the basis of authority, temporal breaks were misrecognized in a variety of ways. First: the rule of precedents helped to mask changes. People could always pretend that rules were not new, or that they were implicit in existing norms.[63] Through judicial fictions, a continuity of practices was traced, innovations were hidden. Time transformed was presented as time immemorial, time that knew no rupture. In this conception the collective belief in the continuity of practices was crucial to the myth of immemorial custom, not the actual empirical facts of their immutability. Punjab officials searched for a space within this process of collective myth-making in which they could insert themselves. Through the language of immemorial custom and the rule of precedents, they sought to establish the temporal continuity of their codified laws with the practices of the past.

Second: when precedents were difficult to unearth, the argument of continuity was sustained in other ways. Elders, we are told, knew the spirit which informed customs, the 'unthought' which lay within the tradition even though they could not spell out its inner principles. Elders, it was said, confronted new situations and devised new norms but conformed to the general spirit of the tradition. While particular practices changed, the general principles of social order were maintained. In this argument, a reference to precedents was neither an adequate nor a necessary guide to action. Concrete practices of the past were not as important as the *spirit* behind the practices. This sort of common-law theory informs Wilson's discussion of the customary law of Sirsa:

[61] J. Wilkinson, 1 *Punjab Record*, 1975, p. 3.

[62] Tupper, *PCL*, II, p. 77.

[63] 'When people want a rule they pretend the rule has always existed.' Memorandum by Tupper, 2 June 1875, *PCL*, I, p. 205.

In English common law, by a fiction the judges are supposed to decide each case as it comes up strictly in accordance with precedent, and yet every new decision forms a new precedent, and so modifies the law—in fact, the judges decide each new case which comes before them rather in accordance with the principles that underlie precedents than strictly according to any particular set of precedents. . . .

Often when I have put a question to the assembled headmen [in Sirsa] regarding their custom on some particular point, and received an unhesitating answer, a call for instances and precedent has, after much racking of brains, elicited the unanimous reply, 'we never heard of such a case, but our custom is as we have said'. They were unconsciously deciding the new set of circumstances in accordance with general principles of their custom, familiar to the minds of all.[64]

Wilson felt that the British could intervene in a similar tradition-shaped way to reorder society and maintain the spirit and continuity of customary practices. Again, in this view temporal breaks in custom were denied and time was presented as a continuum—an uninterrupted flow from the past to the present.

CUSTOM AND POWER

The process of codification restructured rural power relations and was also shaped by those relations. The enquiry into custom opened up a space for negotiation and conflict over the truth of practice. If the answers of village elders were framed and directed by the questions they were asked, their perspectives were also inscribed in the records of customary law which were prepared.

Codification of customary law consolidated the coparcenary community. As we have seen, officials shared a set of assumptions about the relationship between blood and soil. The rights to soil, it was believed, were defined by relationships of blood. Descendants of the original founder of the village constituted the coparcenary proprietary body: *they* had the first claim to land. Those who failed to assert such a mythical ancestry could not be members of the brotherhood. Records of rights prepared on the basis of such an assumption inevitably repressed the rights of all those who did not belong to the dominant lineage.

During the tenant enquiry it was usual to record members of the dominant lineage as proprietors and others as tenants. 'I have thought

[64] Wilson, *General Code of Tribal Custom in Sirsa*, pp. 33–4.

it quite sufficient', wrote Wynyard from Amballa, 'if he is not one of the Bhyachara, to record him as a tenant . . .'[65] In courts, the claims of lower castes and 'non-agricultural' communities to property rights in land were routinely denied. Officials also sought to regulate transfers of land through the assumptions of agnatic theory. The myth of common ancestry defined the membership of the coparcenary body and the rights to land, but it also limited these rights. Since the proprietors held land as co-sharers, they were not to sell to outsiders. Land had to be held by, and preserved within, the community of co-sharers—the brotherhood. When land was up for sale, co-sharers had the first right of purchase, a right of pre-emption. Judges who mediated conflicts over customs argued from these assumptions. And their judgments, flowing from theoretical premises, were recognized as learned observations on practice, and came to define practice. Consider the famous judgment of 1887 on the rights of a proprietor to alienate land:

> The land came to him as a member of a village community which at no distant period held the whole of their land jointly, recognizing in the individual members only a right of usufruct, that is a right to enjoy the profits of the portion of the common land actually cultivated by him and his family, and to share in those of the portion[s] still under joint management. In such a community, the proprietary title and the power of permanently alienating parts of the common property is vested in the whole body. These communities of villages in their turn spring from a still more primitive state of society in which the proprietary unit was the tribe. . . . It is not unreasonable to presume that the absence of lineal male heirs does not confer on a proprietor privileges greatly in excess of those enjoyed by his fellows. It should only be natural, that, in such a case, the next male collateral . . . shall take the place of the lineal heirs, and that his consent to the alienation of land, which by the customary rules of inheritance would have descended to him, should also be necessary.[66]

This judgment set the pattern for subsequent ones. A picture, clearly deduced from evolutionary anthropology, is presented here as an observation of existing reality. The language of judicial discourse continuously slips from the deductive to the inductive, from the mythical to the 'real', transcending such oppositions and intermeshing them inseparably. The imagined reality of the coparcenary community became part of official and judicial common sense and imposed its own specific order into the rural world of customary practices.[67] The

[65] *Settlement Report: Amballa*, 1859, para 310.

[66] 107 *Punjab Record*, 1887, FB.

[67] Justice Plowden observed: 'I think we are justified in stating, as a principle consonant

boundaries of the proprietary community were sharply demarcated, the entry of 'outsiders' into it was legally restricted. The logic of the argument led to the Land Alienation Act of 1900, when communities classified as 'non-agriculturists' were debarred entry into the rural land market.

The colonial regime of customary law thus sharpened the opposition between the outsiders and the insiders, the 'agriculturists' and the 'non-agriculturists', the proprietary body and the lower castes. This opposition was written into the very definition of customary law. Customary law was applicable only to agriculturists; non-agriculturists were governed by personal law. The argument was that agricultural groups had a tribal past and retained a tribal constitution, with all its customary principles; whereas non-agriculturists had no tribal origin, and hence no customary law. Even when the existing practices of different groups were similar, they could not be governed by the same customary law. Differences between groups were deepened by narrativizing their histories in dissimilar ways. The authenticity of the present was denied by attributing a greater significance to the assumed divergence of past origin.

The process of the codification of custom also reordered the world of women. Agnatic theory could recognize no rights of women. Patrilineal male inheritance was officially seen as a 'natural order of succession': daughters could not succeed, nor could a daughter's or a sister's son. A widow with a male child could not inherit, and one without a child had a life interest: after her death the land reverted to the control of the husband's family, her cognates had no claim. Adoption by a sonless proprietor was necessary to retain community control over land, but adoption had to be from within the male agnates, the co-sharers within the village. Since women could not own land, they could neither sell nor mortgage it. The volumes on customary law for the different districts of Punjab recorded the existence of these customs with the expected monotony.[68]

with facts, that the mere circumstance that immovable property is ancestral raises a presumption that the individual in possession as owner had not unrestricted power of disposition.' Ibid.

[68] There were, of course, exceptions. Some volumes of customary law are insightful, and record contestatory evidence that allow us to question the dominant picture. *See*, in particular, the excellent customary law volumes of Sirsa, Ludhiana, Multan, and Gurgaon. On changing rights of women in colonial Punjab, *see* Prem Chowdhry, *The Veiled Women: Shifting Gender Equations in Rural Haryana, 1880–1990*, New Delhi, 1994; David Gilmartin, 'Kinship, Women and Politics in Twentieth-Century Punjab', *in* Gail Minault (ed.), *The Extended Family: Women and Political Participation in India and Pakistan*, Delhi, 1981.

The structure of customs, derived from the framework of theory, was reaffirmed through the dialogue with informants. Village elders were invariably proprietors, and they were speaking at a time when open fields were disappearing behind the expanding agrarian frontier, and land becoming scarce and valuable. The village body closed in on itself, strengthened its boundaries, resisted competition and sought to consolidate control over land. The village elders and *lambardars* who collected to give evidence on custom agreed over time on an exclusionist policy. Did the lower castes and the 'outsiders' have a right to land? In the initial enquiries answers to such questions were ambivalent. But in the later enquiries the rights of 'outsiders' were unambiguously denied. The 'outsider', as a category, crystallized in the process.

The customs recorded were male constructs. As many officials and judges recognized, the riwaj-i-am was a document 'prepared at the dictates of males only', and was particularly unreliable on questions of women's succession.[69] As the demand for land increased and prices soared, landholders became 'more and more anxious to exclude female succession', and were 'ready to state the rule against daughters as strongly as possible'.[70] Women could not come forward to talk about their rights.

In short, the discourse on custom reveals a dialogue between masters and natives. The native voice was inscribed within imperial discourse, but it was constrained, regulated and ultimately appropriated. This was a male, patriarchal voice, the voice of the dominant proprietary body speaking against the rights of non-proprietors, females, and lower castes.

At the beginning of British rule rights were ambiguous and practices fluid. In a situation of land abundance, villagers wanted additional hands

[69] Badr-ud-din Kureshi, *The Punjab Customs*, 1911, p. 43.

[70] 86 *Punjab Record*, 1908. Such observations were repeatedly made in judicial records. 'The record before us shows that the male relations, in many cases at least, have been clearly more concerned for their own advantage than for the security of the rights of the widows and other female relatives with rights, or alleged rights . . .' *Punjab Law Report*, 1901, p. 466. Another judge reflected on the general politics of representation: 'Such evidence, in defeasement of the rights of females, recalls to one's mind the remarks attributed in the fable to a tiger when he was shown the picture of a tiger running away from an old woman: "If a tiger had painted the picture, he would be eating the woman".' 11 *Punjab Record*, 1901, p. 79.

to work the land and pay the revenue. In practice, non-agriculturists held land, and so did women. We have extensive evidence of a daughter's husband and sons inheriting. Both the agnatic and cognatic principles operated at different levels, and in complicated ways. This complexity could not be accommodated within the dominant official theory, and ambiguities had to be ironed out into coherent, rational codes. Once a 'natural order' was defined, conflicting evidence was classed as anomalous.

Naturally, though, the official discourse was not monologic: the dominant voice could not repress all others. Through the cracks opened up by contestation, evidence of alternative practices becomes visible.[71]

THE DISCOURSE ON CUSTOM: CONCLUDING COMMENTS

The argument against Anglo-Indian law is often premised upon the assumption that the British ignored customary practices and based their law on an amalgam of Sastric learning and Western legal tradition. The gap between custom and law widened when scriptures were privileged within colonial discourse as the source of authentic tradition.[72] I have tried here to argue that the colonial relationship with native tradition was more complex, ambiguous and varied—spatially and temporally. If, in late-eighteenth-century Bengal, scriptures were seen as synonymous with tradition, in Punjab a century later custom was pitted against sacred texts. But this did not make colonial law any closer to 'tradition', it did not preserve the practices of the community uncontaminated. Understanding and codifying custom was as problematic as translating and

[71] My larger work on customs, codes and colonial order examines the evidence of such practices and the contestatory logic of their transformation.

[72] Derrett argues that British intervention fossilized Sastric learning, perverted the meaning of texts and created a 'great chasm between custom and law'. Derrett feels that Anglo-Indian law would have created fewer problems if it took cognizance of customary practices. Derrett, 'The Administration of Hindu Law by the British'. Lata Mani suggests that the marginalization of custom and the sanctity accorded to scriptures defined, in fact, the specificity of colonial discourse. Mani shows with great effect that the entire debate on the abolition of sati was structured within the terms of this discourse: while the Liberals pointed to the absence of scriptural sanction for sati, the Conservatives produced a scriptural defence of the ritual. Mani, 'Contentious Traditions'.

In such arguments the specificities of one form of colonial thinking and discourse tend to be projected as a general feature of colonial India. Imperial officials were very well aware of customary practices, but their understandings had their own specific structures.

interpreting ancient texts. Both, in different ways, subjected tradition to transformative processes.

Codification, one could say, hybridized custom: it appropriated indigenous custom through Western categories and mixed heterogeneous traditions. Hybridity is an expressive concept, and a problematic one, for it suggests an amalgamation of pure essences,[73] hybridity being premised on the notion of something originally pure. The concept seeks to transcend essentialism, only to rehabilitate it.

Tupper, in despair, spoke of the bad camera through which officials took blurred shots. There are two obvious problems with this statement. No camera, we know, can ever capture reality untransformed: the point of focus and the depth of field define the nature of the pictures produced. And is there ever only one camera, one lens, one filter through which the world can be viewed? Different officials, as we have seen, looking through different lenses, saw different realities, interpreted custom in dissimilar ways. Native tradition was not appropriated through any fixed frame of Orientalist discourse which had crystallized in the West into a congealed form. This frame was not only fractured, it was continuously reconstituted. So we need to look not only at the multiple discourses of tradition and modernity but the ways in which the elements of different traditions were incessantly recombined into new forms, new languages of power and domination. Opposing principles were sought to be reconciled within the same discourse: the romantic reverence of tradition coexisted with a Benthamite reforming zeal, the language of conservation fused with that of modernization, the principle of Authority was married to that of Reason. Categories and assumptions drawn from Western traditions reappeared, but were recast. This process revealed the inner tensions and ambiguities within colonial ideology. Codification as a process of rewriting tradition was carried through not by self-assured imperial minds confident of their strategies and goals, but by minds troubled by self-doubt and anxieties.

The discourse on custom was not just a textual process, nor simply the fruit of official imagination structured by Western thought. The nature of the dialogues with local informants was crucial to the

[73] Hybridity is one of the key concepts used by Homi Bhabha in his insightful essays on colonial and nationalist discourses. *See* Homi K. Bhabha, 'Sly Civility' and 'Of Mimicry and Man: The Ambivalence of Colonial Discourse', in *Location of Culture*; idem., 'Introduction: Narrating the Nation' and 'Dissemination: Time, Narrative and the Margins of the Modern Nation, in idem. (ed.), *Nation and Narration*, London, 1990.

remaking of custom. While the utterances of the informants were often directed and overwritten by the masters, the natives did not merely cast their answers in the frames provided by imperial officials. They sought to express their perception of tradition, and resisted imperial interpretations; they reacted to changing social contexts—to the scarcity of land and its increasing value, the pressure of population, the consolidation of rural power—and then felt the need to redefine customary practices. Etched in the codes which were produced was the patriarchal voice of property-owning elites, a voice neither directly inherited nor entirely borrowed, but something creatively produced through varied dialogues.

Not all the native voices could be easily accommodated within the imperial discourse on customary law, not all the evidence was always recognized. Codification was also a process of silencing and erasure. Imperial officials defined the terms of validity of custom and the criteria of reasonability and equity; they distinguished between the norm and the exception, between antiquated and living practices. Through their classificatory practices they sought to repress troubling evidence and fix the meanings of customs in the act of encoding them.

But can custom be so easily frozen? Do codes have the power to reorder practices unhindered? Are traditions and customary practices so malleable as to succumb to the transforming power of a codifying state? The common argument that customs are frozen through codification is premised on a simple contrast between the oral and the textual. The oral tradition is seen as fluid, open to a variety of interpretations and meanings, a range of appropriations according to the contexts. When the oral tradition is textualized the fluidity disappears, meanings are fixed: put into writing, they become frozen into codes. We now recognize that this opposition is problematic. Texts too can convey a variety of meanings; and new meanings are continuously inscribed onto texts in the process of interpretation and elaboration. Codes, like all texts, are open to multiple readings, and the same code can produce different judgments. Codification may seek to fix the meanings of practices, but the original intentions do not not always materialize in the same ways. Judicial records reveal how codes were read in conflicting ways, questioned and rewritten. The search for certainty and fixity remained elusive.

Codification does shift the terrain on which conflicts over meaning are played out. While customs remained uncodified, they were embodied in the collective knowledge of the community, remaining as the

preserve of the community, interpreted and recorded within the community through its institutions. It remained, at that stage, a process through which the power relations between different castes, sexes and generations were worked out. Under the colonial regime of codes, the institutions of the state appropriated the right to interpret and rewrite custom. The custom of the community was to be decided by courts; conflicts over understanding were to be resolved through the mediation of courts.

There were, however, limits to the reach of the state. Beneath the regime of codes was the reality of uncodified practices. Inheritance rules, rights of women, and norms of marriage did not all change with codification. There were violations of rules, a public flouting of norms, a silent persistence with alternative practices. The official mind could not close itself to the pressure of this subversive evidence. Colonial officials could not continue living in a world of imagined reality, gloriously ignorant of native understanding and practices.[74] Subversion and contestation did not simply constitute a private transcript which remained hidden behind the public transcript—a code to which people submitted.[75] The private transcript persistently asserted its presence in public spaces, the language and understanding of the rulers felt the strain of contest. Challenged in courts, codified customs were reinterpreted by judges; inundated with conflicting evidence, officials acknowledged the validity of customs unauthenticated by colonial codes. In the process of this cultural confrontation, colonial structures and categories of representation were dislocated and refigured, while the public transcript imprinted itself onto the private in invisible ways.

[74] I find the theory of ideology which informs Gauri Viswanathan's fine work *Masks of Conquest* (London, 1989) problematic. Viswanathan's suggestion that it is entirely possible to study imperial ideology 'quite independent of an account of how Indians actually received, reacted to, imbibed, manipulated, reinterpreted, or resisted it' is perfectly acceptable. An author has the right to define the limits of a particular study. But Viswanathan proceeds to argue that a study of Indian reactions is irrelevant to the study of ideology because the colonizers were imprisoned within the tyrannical structure of their own representations unaware of 'how the native *actually* responds'. There is almost a suggestion that the realm of imperial imagination was sealed off from the world of the colonized. Were the two realms so hermetically sealed? Are the reactions of the natives important only as the *effects* of imperial ideologies? Did they not often force the masters to rewrite the scripts of their domination?

[75] Scott's major work on hegemony and resistance introduces the useful distinction between the public and the private transcript, but inflates the separation between the two. *See* C. James Scott, *Domination and the Arts of Resistance: Hidden Transcripts*, New Haven and London, 1990