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FINDING SUBALTERN VOICES: A CASE FOR PRESERVATION OF COLONIAL LEGAL PROCEEDINGS

Kriti Sharma*

Colonial courts are seen as places of action for the “two-facedness of colonial law” wherein the British sought to introduce universalist principles of adjudication, such as the ‘Rule of Law’, yet also appealed the native legal conservatives and traditionalists who formed the dominant class. It is realized that in this process the narratives of colonized subalterns- of adivasis, dalits, gender and religious minorities are often found to be lost. In a quest to find their voices and to register their claims, revisiting our legal history is necessary; but has been made impossible due to an inexcusable neglect of legal proceedings documentation. The author provides a detailed firsthand account of the disheartening condition of archival sections in the Bombay, Calcutta and Madras High Courts, which have been witnesses to the legal process in the sub-continent for over a century and a half. A case is then made out for digitization of colonial court records to ensure their longer sustainability for the future and ensuring possibilities for further research.

There is a certain virtue in history.¹ Of course you can quote (or rather misquote) Hegel² and believe that people and governments have never learned anything from the past. Alas, even by Hegel’s own admission we know this only from the accumulated experience of mankind! The short point being that history should

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1 See Jim Phillips, *Why Legal History Matters?*, 41 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 293 (2010).

2 "What experience and history teaches us is that people and governments have never learned anything from history, or acted on principles deduced from it". George Wilhem Friedrich Hegel.

not be ignored, particularly when it has a direct bearing on our legal system and consequently on the State and its people. Our access to the past is greatly dependent on written and oral works,³ preserved either meticulously or inadvertently, and the only way to ensure our continued learning is by safekeeping our archives. As legal historians, the colonial era is of particular interest due to the continuing impact it has on our legal thought process⁴ and the fillip given by subaltern studies,⁵ not discounting that these records were tediously preserved by the British.⁶

LEGAL DEVELOPMENTS- THE BRITISH AND BEYOND

The common law system that forms the backdrop of India's existing legal system made its way on to the Indian soil with the advent of the British Empire; to put it more precisely - with the grant of a charter to the East India Company by King George I in 1726.⁷ A plethora of legal experiments started soon thereafter and the Indian subcontinent became a "tropical factory of law"⁸ as the colonizers went about substantially altering rules, and the lives, of those they had colonized.

Today, moving beyond the trajectory of formal law making, there is growing scholarly work on colonial legal developments which attempts to account for the

3 The archival arenas are greatly expanded by combining vernacular and oral accounts, 'memories and myths, material realities and rhetorical representations' which were often not taken into account in earlier historical research. (See further Charu Gupta, *Introduction*, in *GENDERING COLONIAL INDIA: REFORMS, PRINT, CASTE AND COMMUNALISM 2* (Charu Gupta ed., 2012).

4 Upendra Baxi, *Colonial Nature of the Indian Legal System*, in *SOCIOLOGY OF LAW* (Indra Deva ed., 2005). Various colonial legislations and conventions are applicable today in original or modified forms.

5 The 'Bottom Up Approach' has led to re-looking the histories of the marginalized- women, dalits, tribals and religious minorities- hitherto unheard and unaccounted for in the dominant view of history. See for instance, Madhav Gadgil & Ramachandra Guha, *Ecological Conflicts and the Environmental Movement in India*, 25(1) *DEVELOPMENT AND CHANGE* 101, 105 (1994) on resistance 'from below' in context of Indian forest law.

6 In 1771 itself the East India Company appointed a 'Keeper' specially to preserve records. The British colonial rule thereafter became one of the most documented administrations of the time.

7 It is with this charter that in India common law principles were first formally introduced and 'Mayor's Courts' were established in Madras, Bombay and Calcutta. Though, by this time the British colonies had a functioning and intermeshed executive and judiciary and cases were going on appeal to Privy Council.

8 Nandini Chatterjee, *Religious Diagnosis: Skinner v. Orde and a Curious Problem of Legal Governance in British Empire*, 2 (May 22, 2011) (Working Paper Series) (on file with author).

colonized and their interaction with the law and its processes.⁹ Some of these interesting works challenge our limited archival records; for instance, judgments are not readily accepted as verifiable knowledge on face value.¹⁰ There is increasing literature to suggest that many were in fact modified projections that suited the British politics of that time and place.¹¹ Rummaging through these and other records gives us an insight into the judicial discourse in the courts of colonial India.

We soon discover that such discourse often led to rigid and dogmatic categorization of otherwise more fluid concepts of caste, class, religion, cultural and gender identities that were socially visible.¹² These decisions then served as judicial precedents for future cases in the same jurisdiction on the basis of the *stare decisis* principle characteristic of the common law system.¹³ In this process, several colonial legal misconceptions, for instance criminalization of

9 For an example of a subject network that studies the history of the Judicial Committee of the Privy Council, see Nandini Chatterjee, *Subjects of Law: Rightful Selves and the Legal Process in Imperial Britain and the British Empire* <http://translatingcultures.org.uk/awards/research-networking-awards/subjects-of-law-rightful-selves-and-the-legal-process-in-imperial-britain-and-the-british-empire/> (last accessed May 5, 2015).

10 There was a notion of fairness which was somewhat prevalent in colonial times perhaps due to lack of affiliation of English judges with village communities and, therefore, assumption of non-bias on caste and class factors. The agendas with which British executive/judicial officers worked with, however, have to be seen. Take the obvious instances such as when “lawyers who participated in the freedom struggle were punished and had their names removed from the bar roll. The cases of detainees” appeals during World War II were dealt with by British judges in a secret manner and records relating to appeals under the Public Safety Act are yet to be explored by historians.” Justice K. Chandru, *The High Court of Judicature at Madras at 150*, THE HINDU, August 15, 2011.

11 Well illustrated in PREM CHOWDHRY, *Fluctuating Fortunes of Wives: Creeping Rigidity in Inter-Caste Marriages in the Colonial Period*, in GENDERING COLONIAL INDIA: REFORMS, PRINT, CASTE AND COMMUNALISM 2 (Charu Gupta ed., 2012).

12 For example: “One such key process for colonial India was the creation, or at least formalization, of extra-local, horizontally conceived, and homogeneously imagined religious communities...However, in spite of their impoverished view of reality, colonial categorization projects did not fail, not only because of their endorsement by overwhelming state power, but also because they were actively embraced as indisputable representations of truth by people.” Nandini Chatterjee, *Muslim or Christian? Family Quarrels and Religious Diagnosis in a Colonial Court*, 117 AMERICAN HISTORICAL REVIEW 1101, 1104-05 (2012).

13 For the historical origins of the *stare decisis* principle in common law and its criticism, see commentary provided in THE AMERICAN LAW REGISTER, 746-756 (1st. edn., 1886), also available at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4147&context=penn_law_review.

homosexuality¹⁴ or non-recognition of marital rape¹⁵ became deeply entrenched in the judicial mindset in this way. Justice A.P. Shah, in *NAZ Foundation v. Government of NCT of Delhi*¹⁶ traces how legal tests for attracting penal provisions under Section 377 of the Indian Penal Code (which criminalizes homosexuality) “have changed from the non-procreative to imitative to sexual perversity” over time. The religious and ‘ethical’ standards introduced by Macaulay’s Indian Penal Code, whether on homosexuality or marital rape which were exempted in the draft clause by simple “sexual intercourse by a man with his wife is in no case rape”,¹⁷ have been further entrenched in the system through policies, cases and practices¹⁸ which do not allow for difference and dissent from the ‘normative’. Today, it is indeed necessary to deconstruct case laws and unearth social history to overturn such misconstrued legal positions. The new narratives by scholars therefore seek to give voice to the subaltern litigants of colonial India.

DECONSTRUCTING LEGAL HISTORY

Today, scholars look beyond merely what was palatable to the Courts, and further into the intriguing references in plaints, witnesses’ statements, court deeds and other surviving legal and non-legal evidence.¹⁹ The first reference stop is naturally the record of proceedings submitted to the court by litigants’ legal counsels, which

14 See ALOK GUPTA & SCOTT LONG, THIS ALIEN LEGACY: THE ORIGINS OF “SODOMY” LAWS IN BRITISH COLONIALISM (2008) http://www.hrw.org/sites/default/files/reports/lgbt1208_web.pdf, and Jeremy Seabrook, *It’s Not Natural: The Developing World’s Homophobia is a Legacy of Colonial Rule*, THE GUARDIAN, July 3, 2004.

15 See MRINALINI SINHA, COLONIAL MASCULINITY: THE ‘MANLY ENGLISHMAN’ AND ‘THE EFFEMINATE BENGALI’ IN LATE NINETEENTH CENTURY, 163-165 (1st edn., 1995), Varsha Chitnis & Danaya Wright, *The Legacy of Colonialism: Law and Women’s Rights in India*, 64 WASHINGTON & LEE LAW REVIEW 1315 (2007), Kalpana Kannabiran, *Sexual Assault and the Law*, in CHALLENGING THE RULE(S) OF LAW 80, 81 (Kalpana Kannabiran and Ranbir Singh eds., 2008).

16 NAZ Foundation v. Government of NCT of Delhi, 2009 (160) DLT 277, para 4.

17 Act No. 45 of 1860.

18 The Eunuchs Act, for example, was implemented in various jurisdictions at the turn of 20th century to ‘control’ the eunuchs through police crackdowns. Such laws cause more damage on the ground, forcing communities to go underground and be denied basic right to life, liberty, dignity and privacy.

19 In India, due to poor archival conditions, much reliance is placed on the description of case scenarios given by deciding judges in written judgments reported in law journals, starting from the 1st Indian law journal –the Madras High Court Reporter (1861), and newspaper reporting preserved by newspaper archival sections available in libraries and museums. See Justice Kannan, *Of Law Reports, Authors and Legislations*, JUSTICE KANNAN, BEING NON-JUDGMENTAL (March 17, 2008), <http://mnkkannan.blogspot.in/2008/03/of-law-reports-authors-and-legislations.html> for a brief history of legal reporting in India.

contain all depositions, exhibits and other legal evidence. For this purpose, the archive of the Judicial Committee of the Privy Council in London has full proceedings up to the final appeals starting from the appeal in the case of *Manuel De Lima* (Madras, 1679).²⁰

However, Privy Council appeals account for only a fraction of the litigation cases fought in the subcontinent during the colonial period. An appeal to Privy Council was neither easy nor cheap; hence it was not a viable option for most Indians. Most of the records lie in the then lower courts of Indian subcontinent, accessing which is a deceptively simple task, given the deplorable condition of our court depositories and the resultant logistical difficulties explained below.

Let us take the case of the Calcutta and Bombay High Courts which were designated Supreme Courts in 1774 and 1823 respectively till 1861²¹, and then functioned as the highest courts till the creation of a Federal Court via the Government of India Act of 1935. The Calcutta High Court has a Research and Preservation Centre in its Centenary building since 1977, which can be accurately described as a dingy room with broken window panes, serving as an open invitation for pigeon guano over rotting papers piled up in cramped stacks. This privilege is reserved only for case files and judicial records that were admitted during the period when the Calcutta High Court was the Supreme Court (1774-1861); for the time period between 1862- 1950 however, many appellate case records are simply untraceable.²² The Bombay High Court on the other hand chooses to dump record proceedings of the colonial era in the backrooms of the Small Causes Court situated at Lokmanya Tilak Road in South Bombay (now Mumbai). Though this 'repository' claims to have electronically operated racks systems, some of these have not been fully repaired since they last went out of order, making any research impossible.²³ Similar is the case with the Madras High Court which Justice K. Chandru described as:

This High Court started functioning from 1862 and we do not have a proper index as to the availability of records from that date. Rumours go around to the effect that even the original charter establishing the

20 For Privy Council Appeals Data, see Mitch Frass, *Privy Council Appeals Data: The First Fifty Appeals from East India Company to the Privy Council 1679-1774*, available at <http://angloindianlaw.blogspot.co.uk/p/privy-council-cases-from-india-before.html#data>.

21 The Indian High Courts Act, 1861 merged these Supreme Courts along with Sadar Adalats and the three High Courts at Bombay, Calcutta and Madras were established.

22 Author's notes from the field, p.4 (September 18- September 27, 2013).

23 Author's notes from the field, p.2 (June 5- June 14, 2013).

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court itself is not traceable. Manually kept records have become moth-eaten and the papers have become brittle. Further the typed documents are slowly fading away and worse is the computerized printing. We have no qualified persons to look after the records. Even while destroying the records which are of 10 years old, what is preserved is only the original petition and the judgment copy, the other papers annexed to the cases are removed and destroyed.²⁴

Thus most lamentably, since our courts have been following an indiscriminate policy of destroying a large part of the proceedings, there is little chance of finding complete case records unless someone has kept a private copy. If such is the current state of the High Courts, supposedly ‘courts of record’, one can only imagine the pitiable position of district level archives.²⁵

Then there are rare private archives maintained by private individuals and institutions, chancing upon which can be a true blue-moon events for scholars. There is of course no accreditation system in place for effective service and sustainability of such private records.²⁶ To conclude, overall “decades of neglect, underfunding and bad preservation techniques have wrought considerable damage” to these records.²⁷ Any excitement at having chanced upon a rare document subsides soon after when the paper crumbles in your hands.

24 Private interview pg.4, on file with author.

25 The ultimate responsibility of original and appellate cases is consigned to their respective Registrars or tossed to the Right to Information Cell, in case a query is made. In day-to-day functioning however, it is simply relegated to junior officers of various administrative departments and clerk staff without effective directions. In each of the high courts, a senior judge is responsible for administrative works, of which record preservation is one of the tasks. However, the judges were found to be acutely unaware of the present situation, let alone pro-actively engaging and directing staff on the issue.

26 See *Archive Service Accreditation* established in United Kingdom for independent evaluation of private and public sector archives.

27 Dinyar Patel, *Repairing the Damage at India’s National Archives & India’s Archives: How Did Things Get This Bad*, NEW YORK TIMES, March 21, 2012. A similar situation exists in the archives including the National and State Archives and Central Secretariat Library (previously known as Imperial Secretariat Library) which house legislative histories- original laws passed by Governors, draft bills, comments and official notes, reports of commissions and committees, surveys and reports, etc. These archives housed in imperial buildings are extremely underfunded but overstaffed, though very few officers actually understand the legal and historical significance of the documents they are employed to take care of. However, there have been some good intentioned initiatives by scholars like Mushirul Hasan, Director General of National Archives.

OUR COMMON FUTURE

“To comprehend the present and move towards the future requires an understanding of the past: an understanding that is sensitive, analytical and open to critical enquiry.” - Romila Thapar, noted Historian²⁸

The fact that the colonial British government meticulously recorded and preserved vast and valuable legal documents should have made research in court repositories easier for scholars. However, due to the present brittle conditions of the case documents, apart from the apathetic and bureaucratic attitude of most officials, legal scholars are dissuaded from conducting research in India. Even present court records are treated in a similar fashion. As of now, only few high courts have made serious efforts in the last two years to digitize recent case records.²⁹ The courts still do not allow for transcripts and voice recordings of oral proceedings, citing policy issues.³⁰

The root cause of the problem is that legal history is simply undervalued in the general legal and administrative circles. Very little funding trickles down to the archives department because of general lack of understanding or appreciation for these vital documents. There is then a great reluctance to show records to outsiders including researchers. It seems the Indian universities too (including law schools) are neither active in the preservation of archives nor do they extensively use these archives for their own research.

28 Romila Thapar, *In Defence of History*, Seminar 2003, (from lecture delivered at Thiruvananthapuram on March 2, 2002) <http://www.india-seminar.com/2003/521/521%20romila%20thapar.htm>.

29 As part of establishing six model (high) courts in India (A Law Ministry initiative under the Twelfth Plan), at least Delhi and Bombay High Courts have started digitization drive for the present cases, starting last year. It is to be kept in mind that while colonial judgments were written in ink or pencil, the printed typeset used in modern era have shorter life. High Courts are courts of record under Article 215 of the Constitution, yet there is no strict compliance to preservation rules (ironically called rules for destruction of records) which mention preservation of significant case laws avoiding tears (Private interview with Justice K. Chandru, p.3, on file with author).

30 Various Supreme Courts in USA, Australia, UK and Canada provide live feed or audio recording. See DANIEL STEPNIAK, *AUDIO-VISUAL COVERAGE OF THE COURTS: A COMPARATIVE ANALYSIS*, (1st edn., 2012). In India, in *Deepak Khosala v. Union of India*, 182 (2011) DLT 208, the Delhi High Court cited lack of legislative policy to deny recording of oral proceedings. Two subsequent PILs in the Supreme Court for recording proceedings have been rejected despite a similar recommendation by the Advisory Council of the National Committee for Justice Delivery and Legal Reforms in February 2014. However, on July 15, 2015 the Calcutta High Court allowed audio-video recording of a court room proceeding for assistance of the judges.

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There is a growing interest in digital preservation of historical legal documents in jurisdictions such as the United Kingdom and the United States of America.³¹ In India, at the forefront of digitization initiatives is the Delhi High Court which provides digital copies of disposed of cases, appellate or writ, without exception, in its inspection and copy branch. The full legal proceedings, except official notes for cases disposed of since the inception of the court in 1966 till 1997 can be accessed and printed by researchers and litigants alike. To make this possible the digitization process is often outsourced to private corporations³² and buttressed with a support staff of around 20-25 members. Mr. Girish Sharma, Registrar, who has been involved with the digitization process since its beginning in 2006 informs us that “the initiative is a result of the efforts of the Delhi High Court’s Computer Committee, which was then under the Chairmanship of Justice Madan Lokur. Having so far digitalized around 7 terabytes of data (7-9 crore page files), the Committee’s ultimate aim is to succeed in complete digital functioning of the courtrooms.” Though, the digitization drive was initiated for the purpose of facilitating those connected with the legal process i.e. judges, lawyers and litigants; the Court accommodates independent researchers with their requests for access. The High Court however does not co-ordinate with other archives or high courts for archiving and exhibition purposes.

Similar efforts for digitization of colonial records in India and international collaborations would be especially beneficial for Indian researchers and students who cannot easily travel to London or to other repositories in UK and USA. Therefore, at this juncture, a collaborated effort by the Supreme Court, High Courts and the universities to digitize case records of the colonial era is a requisite. Converting the information into a digital format, and ensuring multiple record copies with easy access to them would be a step towards enhancing a better understanding of our developing legal system. It would do us well to not be stuck as the man for whom history is bunk and who, as per the outspoken Texan folklorist James F. Dobie, is invariably as obtuse to the future as he is blind to the past.

31 See cataloguing of 9,368 cases decided between 1792-1998 by Appeals to the Judicial Committee of the Privy Council at <http://privycouncilpapers.exeter.ac.uk> as a pioneering effort in this area. Also see the AHRC research network project referred to in Nandini Chatterjee, *supra* note 9 and Centre for Imperial and Global History, University of Exeter, <http://humanities.exeter.ac.uk/history/research/centres/imperialandglobal/research/subjectsoflaw/>

32 At present, Ricoh India Limited has been given the responsibility to digitalize cases from 1977 onwards. There are currently 11 e-court rooms at the Delhi High Court premises. With the ultimate aim to convert all courtrooms to e-courts, the digitization section also strives to provide digital copies of new cause lists and pending cases, to the extent possible.