

Western Legal Transplants and India

Jean-Louis Halpérin

▶ **To cite this version:**

Jean-Louis Halpérin. Western Legal Transplants and India. Jindal Global Law Review, 2010, volume 2 (issue 1), pp.14-40. hal-00559118

HAL Id: hal-00559118
https://ens.hal.science/hal-00559118

Submitted on 25 Jan 2011

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

Western Legal Transplants and India

Jean-Louis Halpérin*

I. Introduction

The concept of 'legal transplants' and the theory attached to it according to which 'transplantation of legal rules from one jurisdiction to another' would be the 'most important element in legal development"[1] does not seem to have been invented for colonial situations, evident while referring to Indian as a case. Alan Watson's famous book, *Legal Transplants*, first edition of which was published in 1974, focused on the Western world and its main developments were about the reception of Roman law in Europe, including Scotland, and about the direct implementation of common law in overseas territory considered as uninhabited (Massachusetts and New Zealand)[2]. India is never quoted in these pages. However, in his *Society and Legal Change* published in 1977, Watson mentioned, colonial domination as one important factor of legal transplants. Moreover, one of the predecessors of Alan Watson is Frederik Parker Walton, an ordinary lawyer teaching in Egypt at the beginning of the twentieth century and interested in comparative law (especially French Law for which he wrote an *Introduction* co-authored with Maurice Sheldon Amos in 1935), who spoke, perhaps the first to have spoken, of 'legal transplantation'[3]. The fact that Walton knew very well the situation of quasi-colonial domination in Egypt shows how this notion could easily and accurately be used for colonial situations.

There is no doubt today that India was deeply affected by legal transplants coming from Great Britain during the *Raj*. Even better, India can appear as an extraordinary laboratory for studying legal transplants, if one considers the presence of Portuguese and French legal transplants in corresponding constituencies, the development of Anglo-Hindu Law and Anglo-Mohammedan Law, the borrowing of techniques from the civil law tradition by the writers of the Indian Penal Code and the Indian Contract Law, and of course the maintenance of these laws, and many others from the colonial period, in the contemporary Indian legal order. In the British Empire, India was the first and the most important territory where colonizers experienced the principles of 'personal laws', a principle pretending to respect legal traditions of indigenous populations. As we know, this principle was beforehand applied by Islamic rulers, in all the oriental areas where Muslim law was only imposed for the purposes of public order (especially in penal matters) and where special laws of the religious communities (for example, Christian and Jewish communities in the Ottoman Empire) were left in force (often, with specialized courts, composed of members of these communities and called *millet* courts in the Ottoman Empire) for the resolution of family disputes. In India the idea to keep the customs of *Gentoos* as binding rules was first implemented by

* Directeur du département de sciences socials, Ecole Normale Supérieure, Paris. jean-louis.halperin@ens.fr.

[1] Alan Watson, *Society and Legal Change*, Philadelphia, Temple University Press, 2nd ed. 2001 (1st ed. 1977) at 79.

[2] Alan Watson, *Legal Transplants*, *An Approach to Comparative Law*, Athens-London, The University of Georgia Press, 1993 (1st ed. 1974).

[3] Henry Lévy Ullmann, introduction to *Turquie*, *La vie juridique des peuples,* vol. VII, Paris, Delagrave, 1939, at 7.

Portuguese colonizers in Goa, who decided to set up a '*foral*' of customary law in 1526[4]. Quickly, all the Western powers were convinced that in Asia, contrary to the American situation, it would not be possible to convert in Christianity the numerous populations they wanted to rule for high profits but with limited expenditures.The costs of implementing common law for indigenous people, they realized, was too heavy for uncertain interests. Then, in a nearby area, the writing in the beginning of the eighteenth century of Tamil custom (the *Tesawalamai*) by Dutch colonizers in Sri Lanka was also significant of how the Western conquerors, purporting to maintain local traditions, could provoke the transformation of oral and social uses in written (first in Dutch language, before being translated in Tamil) and westernalized rules[5]. For this reason all the conditions were met for the 'invention of a tradition' by creating new legal rules from an indigenous background through the mechanisms of 'Orientalism' studied (with express reference to India and to the works of William Jones) by Edward Said[6].

Faced with such multi-faceted situations, there were evident problems of methods for a legal historian. First a Western point of view, as ours, can be suspected to overestimate the weight of Western transplants in India and to incorporate, in an apparently neutral discourse, a complete misconception of Eastern legal systems based for a long time upon others legal conceptions. If the risk is clear, it can be assumed and one can also consider that Indian writers are prone to defend the seniority of purely Indian 'legal concepts' through a very understandable nationalistic reaction after centuries of colonialism[7]. The debate about 'Eurocentrism' and attention to Asiatic pre-colonial customs in the field of Law of Nations[8] is a good illustration of these prejudices in the two directions. We have to be able to overcome these difficulties by explaining our methodological viewpoint and by accepting critics resulting from other approaches. Knowing that the definition of law we use is *our* concept of law does not prevent us to propose a universal, and not parochial, legal theory[9].

For a French writer, Edward Said's thesis is perfectly consonant with Michel Foucault's theory of 'power-knowledge' and the conviction that no learned discourse is formed without intention and realization of a powerful domination[10]. Let us try to study the extent and the impact of Western transplants in India without thinking for a second that there were beneficial effects of civilization linked with the 'White Man's Burden'[11]. We know what were the prejudices of colonizers when we read these words of James Fitzjames Stephen : 'Our law is in fact the sum and substance of what we have to teach them. It is, so to speak, the gospel of the English, and it is a compulsory gospel which

---

[4] Lauren Benton, *Law and Colonial Cultures. Legal Regimes in World History, 1400-1900*, Cambridge, Cambridge University Press, 2002, at 119.
[5] L. J. M. Cooray, *An Introduction to the Legal System of Sri Lanka*, Pannipitiya, Stamford Lake, 2003, at 141-142.
[6] Edward Said, *Orientalism*, New York, Vintages Books, 1978, at 78.
[7] This denunciation of colonialism seems today predominant, whereas Indian lawyers were more indulgent towards the influence of English transplants in the first decades following the Independence : K. Lipstein, 'The Reception of Western Law in India', *International Social Science Bulletin*, 1956, p. 85-95; Motilal Chimanlal Setalvad, *The Common Law in India*, London, Stevens & Sons, 1960.
[8] R. P. Anand, *Origins and Development of the Law of the Sea. History of International Law Revisited*, The Hague-Boston-Leiden, Martius Nijhoff, 1983.
[9] Joseph Raz, 'Can There be a Theory of Law?' in *Between Authority and Interpretation*, Oxford, Oxford University Press, 2009, at 32-36.
[10] Michel Foucault, *Power/Knowledge : Selected Interviews and Other Writings 1972-1977*, C. Gordon ed., Pantheon, 1980.
[11] Upendra Baxi, *The Future of Human Rights*, Oxford-New York-New Delhi, Oxford University Press, 3rd ed., 2008, at 34.

admits of no dissent and no disobedience'[12]. Historians must be aware of this use of law as an instrument of imperialism to forbid any devaluating judgment about other legal cultures. Let us try to make an enquiry that supposes a previous definition of what counts as law. And for the readers, let them accept that legal transplants are possible _ contrary to Pierre Legrand's thesis[13]- and that they have unforeseeable effects through the new meanings given to transplanted statements. It is also the matter of how the Indian legal order has received and transformed Western transplants until today : acting as 'legal irritants', in the words of Gunther Teubner[14], foreign inputs in the Indian legal order have produced many noteworthy outcomes, especially in constitutional and international law. With legal transplants we have to accept that law is "a generalization denoting a collage of legal artefacts"[15].

Another problem of Hindu law before colonization is the qualification of the rules described in the *Dharmaśāstras* from a positivist point of view. Contrary to the common opinion, and to the reproach made by advocates of pluralism against Kelsen's normativism, Kelsen has not identified legal norms with State legislation. He has admitted that, before the emergence of modern States and centralized legal orders, there were 'decentralized legal orders', where the subjects made for themselves the conventional rules that characterize positive law. If the positivist conception of law as an artefact supposes that societies could exist without law[16] - contrary to the Latin proverb '*ubi societas, ibi jus'* (where there is a society, there is a law) - , Kelsen considered that the apparition of judges with a coercive power was contemporary of the origins of law. For this reason he wrote, in his 1945 *General Theory of Law and State,* that the antique Babylon, the tribe of Ashantis in Western Africa, Switzerland and United States had in common some features of a legal system[17].

We need not hide our impregnation with this aspect of Kelsenian thought, that is not very consistent with other conditions set down by Kelsen for identifying a static (i.e. the conformity of the inferior norm with the superior one) and a dynamic (that supposes a superior norm authorizing the production of the inferior one) legal order. Furthermore, many polities have known judges without developing a legal order, if we follow Hart's definition of law as a set of primary and secondary rules[18]. If every society knows primary rules, what are the rules of human conduct, for example about marriage, contracts or offences and punishments (what Hart calls 'pre-legal rules' and the French Hellenist Louis Gernet, 'pre-law'[19]), the presence of three secondary rules, of recognition, of change and of adjudication, is not proven in all polities and their absence, especially the one of an explicit or implicit rule of change, seems to us a criterion to distinguish legal orders from other prescriptive systems. Law can be

---

[12] Eric Stokes, *The English Utilitarians and India,* Oxford, Clarendon Press, 1959, p. 302.
[13] Pierre Legrand, 'The Impossibility of Legal Transplants', 4 *Maastricht Journal of European and Comparative Law*, 1997, 111-124 and the answer from Alan Watson, 'Legal Transplants and European Private Law', *Electronic Journal of Comparative Law*, 2000, 9.
[14] Gunther Teubner, 'Legal Irritants : Good Faith in British Law or How Unifying Law Ends Up in New Divergences', *The Modern Law Review*, 1998, p. 11-20.
[15] Michele Graziadei, 'Comparative Law and the Study of Transplants and Receptions' *in* Mathias Reimann, Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, p. 471.
[16] Joseph Raz, *Practical Reason and Norms*, Princeton, Princeton University Press, 1990, p. 154.
[17] Hans Kelsen, *General Theory of Law and State*, Cambridge, Harvard University Press, 1945, translated by Anders Wedberg, reprinted 1999, at 19-20.
[18] Herbert Lionel Adolphus Hart, *The Concept of Law*, Oxford, Oxford University Press, 1961, p. 92-94.
[19] Louis Gernet, *Droit et institutions en Grèce antique*, Paris, Flammarion, 1982, p. 9.

described as a 'technology of change' and supposes that legal norms can be abrogated and replaced by others[20].

If we follow this stricter positivist conception of what counts as law, as a purely formal, but universal definition - it is very doubtful that there existed any Hindu Law before the recognition of these rules, first inside the legal order of the Mughal Empire, then with the British colonization. The question is not about the eventual confusion between religious and legal norms[21]. Legal orders with religious foundations, like the Jewish law, the Islamic law or the Canon law, know the possibility of legal changes, despite the importance of a dogmatic core unlikely to be abrogated. From this point of view the Mughal Empire, and prior to it the Delhi Sultanate[22], had undoubtedly a legal order as all Islamic polities combining the application of the *Sharia* to Muslims and the recognition of personal laws for non-Muslims. The problem concerns the legal character of Hindu rules in Indian polities not subjected to an Islamic power or as personal status of Hindus subjected to these Islamic polities. First, we have no historical proof of any legislation of one Hindu king imposing, as positive law, the rules contained in the *Dharmaśāstras*. The so-called 'Law Code of Manu' was never promulgated and its content does not show that the mentioned rules (sometimes contradictory to each other) were binding for the judges[23]. Then, the judicial records, that have been kept and studied, do not quote at any time this Law Code of Manu, for instance in Kerala[24].

It remains as the only possibility to recognize a genuine Hindu law before the action of foreign conquerors to defend, as Werner Menski has made in a pluralist approach, the idea that it was a complete 'customary law'. Werner Menski agrees with the fact that we have no proofs of quotation of the *Dharmaśāstras* by courts before the seventeenth century[25]. However, he considers that the picture of the Code of Manu as a formalized legislation is a bad interpretation of texts under the influence of Western positivism. He thinks that there was 'no need for State law' in classical Hindu society and that a pluralist legal order existed based on spontaneous customary law. Werner Menski rests on this axiom: "We have no evidence to suggest that early Hindu law was not, in essence, a customary legal system"[26]. We cannot agree with this postulate supposing, in the absence of contrary proof, that the lack of legislation supposes necessarily the empire of customary law. Such a negative proof is based again upon the hypothesis that all society had its own law, either statute law or customary law: if one form is not

---

[20] Jean-Louis Halpérin, 'The Concept of Law : A Western Transplant ?', *Theoretical Inquiries in Law*, vol. 10/2, July 2009, p. 333-354.

[21] J. Duncan Derrett, *Religion, Law and the State in India,* Oxford-New York, Oxford University Press, 1968, reprint. 1999, p. 75-118 has expressed doubts about this confusion.

[22] Muhammad Basher Ahmad, *The Administration of Justice in Medieval India*, Allahabad, Allahabad Law Journal Press, 1941, p. 98 about the influence of the Abbasside institutions, without the recourse to specialized courts for non-Muslim communities.

[23] *The Law Code of Manu*, translated by Patrick Olivelle, Oxford, Oxford University Press, 2004, Introduction, p. XXXVIII ; Richard W. Larivière, 'Dharmasastra, Custom, Real Law and Apocryphal Smṛtis', *in* Bernhard Külver (ed.), *Recht, Staat and Verwaltung im klassischen Indien*, München, R. Oldenburg, 1997, p. 97-110.

[24] Donald Richard Davis, *The Boundaries of Law : tradition, 'customs'and politics in late medieval Kerala*, Ph. D. Austin (Texas), UMI Dissertations service, 2002, at 83, 119, 149 and 204.

[25] Werner F. Menski, *Hindu Law. Beyond Tradition and Modernity*, New Delhi, Oxford University Press, 2003, p. 106. Menski criticizes at many times the views of Robert Lingat, *Les sources du droit dans le système traditionnel de l'Inde*, Paris-La Haye, Mouton & Co, 1967 (*The Classical Law of India*, Berkeley, University of California Press, 1973).

[26] Werner Menski, 'The Role of Custom in Hindu Law', *in Recueils de la Société Jean Bodin, La Coutume,* Bruxelles, De Boeck, 1992, vol. 53, p. 314.

attested, the other should have existed. But precisely, the problem is to determine whether the prescriptive norms (known through written sources, and not studying a complete oral civilization) are legal ones or not. To be sure that it was customary law, we need positive proofs (which must also be written) that these rules were recognized as law and that they could be changed by a legal process. Due to the lack of these proofs for Hart's test, we can say that there were customs -probably local customs and not a uniform custom for all India - but not a customary law. Saying that, we do not think to practice a 'narrow' positivism, identifying legal systems with westernized state law[27], but we deny a 'spontaneous' character to the legal technology. Arguing that 'non-legal forms of normative ordering' can be considered as law is not only a contradiction, but a 'folly' extending law to all forms of social control[28]. Again, this is not the case of restricting the origins of law to Western cultural areas or of denying the existence of sophisticated polities in India outside the foreign influences.

The salient aspect about India is the extraordinary richness of the literature of *Dharmaśāstras*, which contains, besides reflections about cosmogony, politics (in internal as well as external sphere[29]) or Brahmins' duties, primary rules of conduct likely to be identified as 'pre-law'. As the *Dharmaśāstras* spoke of judges, witnesses, offences, punishments, contracts, damages and even situations considered elsewhere as classical law topics like acquisition *a non domino* (Laws of Manu, VIII, 201-202), treasuries, and above all, successions in the treatises (*Nibendhas*), it was understandable that the Muslims conquerors, and then the Mughal emperors had conceived these primary rules as legal ones. We would need more documents about the judicial practice to know exactly which Hindu rules were recognized, and perhaps changed, inside the Islamic legal order[30]. Unfortunately the Kazis' records have been lost and we know that Aurangzeb tried to extend the application of Muslim law[31]. During the same time, forms of hybridisation between Muslim law and Hindu tradition are attested, like the succession exclusion of women. There is also much uncertainty about the judicial practice in the Maratha polity during the eighteenth century with perhaps a differentiation between royal justice, caste justice and Brahmins' justice, the last one applying to the *Dharmaśāstras*[32].

The British colonizers did not find, without any doubt, a situation of legal vacuum[33] when the East India Company established its domination first in factories in the seventeenth century, then in Bengal with the 1765 *Diwani*. However, there is a strong feeling that the administration of justice was rather relaxed or corrupt in many parts of the Mughal Empire, a kind of regression from a pre-modern State (during Aurangzeb's

---

[27] Werner Menski, *Comparative Law in a Global Context*, *The Legal Systems of Asia and Africa*, Cambridge, Cambridge University Press, 2006, 2nd ed., p. 28.

[28] Brian Z. Tamahana, 'The Folly of Social Scientific Concept of Legal Pluralism', *Journal of Law and Society*, 20/2, 1993, p. 192-215.

[29] The fact that *Dharmaśāstras* include advices to kings about war and peace (or more generally relations with foreign powers) does not mean that they contain rules of a so-called 'international law', which did not exist even in Western countries before the seventeenth or the eighteenth centuries. If B. C. Nirmal, 'International Humanitarian Law in Ancient India', *in* V. S. Mani (ed.), *Oxford Handbook of International Humanitarian Law in South Asia*, New Delhi, Oxford University Press, 2007, p. 25-38 admits the old presence of 'rules of war' in India, we cannot agree with the qualification of law for these rules presented as only instructions for the kings.

[30] Werner Menski, *Hindu Law… op.cit.*, p. 152-154 about the use of Brahmins as assessors of kazis.

[31] Jadunath Sarkar, *Mughal Administration*, M.C. Sarkar & sons, Calcutta, 4th ed., 1952, p. 109, especially with the 1672 *Farmân* that can be compared with a small penal code.

[32] Vithal Trijmbak Gune, *The Judicial System of the Marathas*, Ponna, Deccan College Postgraduate and Research Institute, 1953, at 124-125.

[33] Sumner Maine spoke however of a country 'empty of law': Motilal Chimanlal Setalvad, *op. cit.*, p. 23.

time[34]) to a weaker polity that lacked a clear definition of 'personal laws' recognized by courts and a true control of the Kazis' powers. Not many causes seem to have been judged by the Kazis and probably a great lot of disputes among Hindus were decided by the elders of the Brahmins in the villages and the powers of Zamindars were extended to impose arbitrary decisions of 'local satraps'[35]. In this way, British colonization can be understood as a 'fundamental break' with the ancient legal heritage[36]. The door was now open for a massive transplant of Western law accompanied by a complete transformation of traditional personal laws. While the British excluded during the same time, the implementation of common law, as in Australia, there was also a large room for a long process of acculturation of these legal irritants, a process which gave birth to many original features of Indian law today, including some aspects of international law. If it has been observed that many former colonies, as they became independent States, have kept some legal texts from the colonial period, India is a special case of 'hybridisation' or 'bricolage' between different legal components and perhaps the best illustration of the complex indeterminacy of legal orders.

A LARGE RANGE OF SPECIFIC TRANSPLANTS AND METAMORPHOSIS

Beginning with the first English factory in Surat, in 1612, the British colonization implied legal transplants with the judicial developments in the Presidencies of Madras, Bombay and allover Calcutta. While there were no regular courts in Surat, English judges were appointed in the Presidencies and the 1765 *Diwani* set the problems of how British colonizers wanted to deal with Kazis' justice and Hindu law. For this reason, there are advantages of distinguishing direct transplants from English law, especially in Crown courts, and reshaping of personal laws by indirect transplants into the Anglo-Hindu and the Anglo-Mohammedan Law. But in fact the two policies were linked with the interests of the East India Company and, before as after the endorsement of the Government of India by the Crown (1858), the legal fabric had created specific institutions which differed as well from common law rules as from Indian traditions.

A. *The imposition of English-modelled legal institutions under the East India Company*

The first step towards massive legal transplants was the foundation of English courts, intended to hear disputes between Englishmen in the Presidencies of Madras (since 1639), Bombay (since 1668) and Calcutta (1690). The first case judged in Madras with grand and petty juries, of Mrs Dawes charged of a slave murder and finally acquitted in 1665, can be considered as an extraordinary extra-territorial justice (without any participation of lawyers), rather than an attempt to introduce an English system of administration of justice[37]. However, the first feature of English law, whose introduction has been stipulated in principle in the 1661 Charter of Madras, was the association consecrated by the *Magna Carta* between peers judgement and application of the *lex patriae*, that meant English law for English subjects.

Then, the creation of a Court of Admiralty in Bombay (1684, but with a brutal end in 1690) and in Madras (1686-1704, with the first English professional lawyer arriving in

---

[34] Satya Prakash Sangar, *Crime and Punishment in Mughal India*, New Delhi, Reliance Publishing House, 1998, p. 10-21.
[35] Rudhaka Singha, *A Despotism of Law. Crime and Justice in Early Colonial India*, Delhi, Oxford University Press, 1998, p. 17 about the probable decline of authority of kazis.
[36] M. P. Jain, *Outlines of Indian Legal and Constitutional History,* New Delhi-Nagpur-Agra, Wadhwa and Company Nagpur, 6th ed., 2007, p. 2.
[37] *Ibid.*, p. 14.

1687) of a Mayor's Court always in Madras (1688) were attempts to establish regularity in the administration of justice. It is noteworthy that after the brief importation of the jury, transplanted institutions were chosen outside the core of common law: Admiralty courts had to apply, in India as in England, civil law, Law Merchant and law of the seas, while Mayor's courts supposed the introduction of town corporations with its specific judicial and administrative system. British colonizers have been probably inspired by the example of Portuguese factories, and corporations, and by the necessity to associate merchants of different origins in the administration of commercial justice (in the first stage until 1672 British had promised to keep Portuguese law and customs in Bombay before deciding to introduce English law).

The 1726 Charter issued by King George I generalized the Mayor's Court system in the three Presidencies, transforming these judicial institutions in Crown Courts but without professional lawyers. If this Charter seemed to confirm the introduction of English law in the three Presidencies towns[38], it created an original judicial system which was closely linked with the Governor and the Council of the East India Company. There was no such a separation between executive and judicial functions as in Great Britain, at least for the judges of the Westminster Courts. Through this Charter a lot of English legal institutions were transplanted in India: justices of the peace (conferred to the Governor and the members of the Council) with their powers in criminal procedure (warrants, punishment of minor crimes), quarter sessions with petty and grand juries, writs introduced by persons empowered to act as solicitors, pleading in civil matters. However, there was no room for the civil jury or for professional lawyers as barristers. Otherwise in 1726 the adversarial system, with the assistance of barristers (first for plaintiffs, then for accused persons in criminal procedure), was not yet developed in England[39]. In the absence, wanted by the Company, of persons with legal knowledge (the judges were servants of the Company or merchants whose presence in factories depended from the authorization of the Company), the metropolitan authorities of the Company have sent elementary books with guidelines about procedures in criminal suits and civil affairs. English law was, in this way, stylized and accommodated to Indian territories. The 1753 decision of creating, in each Presidency, a Court of Request for the small civil claims was, on the contrary, an anticipation of the institution of County Courts in England, ninety years later! If one thinks that these English courts could judge Indian parties who have both accepted this jurisdiction, it could be presumed that there was a gap in fair trial with the common standards admitted in England at the same time and a frontal shock for indigenous populations not accustomed to the vocabulary and the niceties of English procedure.

The first decision of capital punishment for Indians, judged in quarter sessions could appear also as a severe break with the most lenient criminal justice of the Kazis. Tere is no doubt that these kinds of legal transplant were synonyms of legal violence, even if it has been argued that perjury of witnesses was easier before English courts, sitting in town than before village justices[40]. The 1774 institution of a Supreme Court in Calcutta constituted with professional judges (English barristers with at least five years of experience) _ as William Jones from 1783 to 1794 _ was certainly a progress in applying English legal rules, but it is not proved that it was a warranty of more fairness

[38] *Ibid.*, p. 36-37 et p. 360-361.
[39] In 1800 almost 70 percent of all Old Bailey defendants were still not represented by counsel: David Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System in the Nineteenth Century', *Modern Asian Studies*, 32, 3, 1998, p. 537, n. 98.
[40] K. Lipstein, *op. cit.*, p. 87.

towards Indians judged by Crown Courts. In Presidency Towns the presence of British professional lawyers[41] (as the one of British or Western litigants) explained the recourse to more technical remedies of the English legal tradition: the writs of *mandamus*, *certiorari*, *procedendo* or *error*.

The 1765 *Diwani* had meanwhile granted the 'civil department', including civil justice towards indigenous people, to the Company beyond the city of Calcutta in the territory of Bengal, Bihar and Orissa. Collecting land revenue (which was its main target), the East India Company could appoint supervisors with unlimited judicial powers in civil affairs and even 'an eye on the criminal courts of the Khazis', although these judges depended normally from the 'Nizamat department' under the authority of the Nawab of Bengal[42]. This was the point of departure of the so-called 'adalat' system in the 'mofussil' territories, a separated system of the Company applying their personal laws to Hindus and Muslims with unavoidable transplants of English adjective law. Although these special courts were staffed by British servants of the Company, the dual system of justice was confirmed by the Act of Settlement passed by the Parliament in 1781 which at the same time abridged the jurisdiction of the Supreme Court of Calcutta.

In 1772, as Warren Hastings was appointed with the new title of Governor General, the Company actually assumed the powers conferred by the *Diwani*. According to Warren Hastings' plan a new system of courts constituted with English judges was established in civil matters: one Collector in each district (and in a parallel way the 'fozdari adalat' of the kazi for criminal cases) and the superior Court of the 'Sadar Diwani Adalat' hearing appeals in Calcutta (this Court was constituted with the Governor and members of his Council, whereas the 'Sadar Nizamat Adalat' consisted of Indian judges[43]). It is noteworthy that the appeal procedure was more a confirmation of the rules used inside the Mughal Empire than a transplant from common law, which ignored such an idea of appeal according to the so called 'romano-canonic' procedure.

With the legislative power vested in the Company and its governors since 1726, the transplant of English-modelled criminal law outside the three Presidency towns could begin with special regulations made by the Governors of Presidency Towns. There were thus three different tracks to impose specific rules inspired by English law, but not identical with English statute law or case law : the Regulating Act of 1773 spoke about rules 'not repugnant to the laws of England'[44]. In Bengal, Governor Cornwallis decided in 1790 to replace Kazis by English judges in criminal matters and, even if Muslim penal law was normally kept in force, it was the means for British colonizers to introduce some features of substantive criminal law as it was known (and described in Blackstone's *Commentaries*) at the end of the eighteenth century. As British colonizers were convinced of the bad effects resulting from the relative mildness of Kazis' criminal justice _ with the paucity of public crimes recognized in the Koran and the quasi-monopoly of action given to victims and their parents in private crimes including

[41] Clause 11 of the 1774 Charter provided for the enrolment of British 'advocates' and 'attorneys-at-law' (probably an imitation of the dual profession of barristers and solicitors in England) to plead in the Supreme Court.
[42] Jörg Fisch, *Cheap Limbs and Dear Limbs. The British Transformation of the Bengal Criminal Law*, Wiesbaden, Franz Steiner Verlag, 1983, p. 3.
[43] This 'Sadar' (or 'Sudder') Court was directed by a deputy of the Nawab (a minor under the tutorship of his mother) and moved from Moorshedabad to Calcutta from 1772 to 1775, then again after 1790: Atul Chandra Patra, *The Administration of Justice under the East India Company in Bengal, Bihar and Orissa*, Bombay-Calcutta-New Delhi-Madras-London-New York, Asia Publishing House, 1962 at 71-72.
[44] Motilal Chimanlal Setalvad, *op. cit.*, p. 17.

the retaliation of murder _, they developed a harsher penal justice, especially for the crime of 'dacoity' committed by gang robbers and looters[45].

After Warren Hastings' plan to reduce slavery in the criminal families _ an idea that did not become law but proved the extreme violence of this imposed justice _, Cornwallis tried to modify Islamic law while invoking the traditional right recognized by the rulers in Muslim countries to interfere with the public sphere in the apparent respect for the Koran. The intent of murder became a more important criterion for capital punishment and the right of the heirs to forgive the victim, was replaced by one of the Governor. Then the mutilations prescribed by the Koran for theft and highway robbery were commuted to imprisonment in 1791. The 1793 Regulations decided by Cornwallis, which included establishment of the organization of people, who by profession were 'vakeel'[46] (already known in Mughal times) to plead on behalf of Indian suitors (with the model of English solicitors, for example a fixed schedule of fees), the abolishing of court fees (imposed again in 1795[47]) and an opportunity for Indians to become 'munsiffs' to judge civil suits up to Rs. 50 in value (a very small concession to natives in comparison with the progressive eviction of Kazis from criminal justice even as advisers of English judges[48]), was authorised as the 'Cornwallis Code'[49]. During the years 1795-1802 the cases of death penalty were extended: this kind of transplant of the so called Bloody Code (in fact hundreds of specific statute laws voted by the British Parliament) was combined with some privileges for the Brahmins and measures against some Hindu institutions (the well known problem of the 'sati' is not the only one, different forms of reprisals were forbidden). If few records of the Courts have survived, it is sure that the use of death penalty grew up as the main outcome of this transplant of English contemporary conceptions of criminal justice. Similarly, one can also argue that the arbitrary power of the judges was limited and the path open towards the Benthamite idea of codification.

The multiplication of Regulations, which differed from one Governor to another (furthermore Madras and Bombay were staffed with their own Supreme Court in 1801 and 1823 respectively), provoked initiatives to consolidate and set in order the Company's regulations that introduced English-modelled institutions, purported to be accommodated in India. One of the best known is the so-called 1827 Elphinstone's Code, a compilation of penal rules made for the Presidency of Bombay where the presence of Hindu law (or Hindu rules recognized as law) was more dominant than the impact of Muslim law. It was in fact a 'digest' of twenty seven regulations (more centred on criminal rules than the 'Cornwallis code' with a Regulation XIV divided in 41 sections defining and punishing different offences) enacted by an admirer of Bentham with the help of a lawyer- William Anderson[50]. From 1828 to 1835 new reforms by Governor Bentinck in Bengal added another layer of judicial policies, a little more in favour of the powers of Indian 'munsiffs' and of the recourse to

---

[45] *Ibid.*, p. 23-38.

[46] Regulation VI of 1793 reserved these functions of 'vakeel' to Muslims and Hindus. Then Regulation XII of 1833 and the 1846 Legal Practitioners Act opened the functions of pleaders before the Company Courts to all qualified lawyers. On the contrary it was not possible for Indian lawyers to plead before the three Supreme Courts.

[47] Atul Chandra Patra, *op. cit.*, p. 20: the pretext was the too great number of plaintiffs, perhaps the proof of the relative success of these courts.

[48] After 1832 there was no more recourse to fatwa of Muslim lawyers.

[49] M. P. Jain, *op. cit.*, p. 133-140; Eric Stokes, *The English Utilitarians and India*, Oxford, Clarendon Press, 1959, p. 174.

[50] E. Stokes, *op. cit.,* p. 149; Motilal Chimanlal Setalvad, *op. cit.*, p. 120; D. Skuy, *op. cit.*, p. 521, n. 27.

'respectable Indians' as assessors in a kind of small jury[51], whereas a Digest of Bengal regulations was prepared by the Company's Judge Millett.

This uncoordinated imposition of local regulations, which transplanted specific rules (and not English statute laws), in the three Presidencies and their more and more extended 'mofussil' territories with a complete lack of uniformity, could be described as a 'savage' (although always in the advantage of the Company's interests) introduction of a Westernalized law. Such a complex situation was the good pretext for the Benthamite reformers to convince the Parliament of Westminster to intervene for promoting a more uniform policy over the whole British India. As it is well known _ one year after the electoral reform, the death of Bentham and the appointment of a Royal Commission to prepare a draft criminal code _, the 1833 Charter Act created the Indian Law Commission to rectify deficiencies in India's legal system then operating in territories under Company's control. The Benthamite reformers, with one of their leaders James Mill (John Stuart Mill's father) who collaborated in the executive of the Company since 1819, saw the opportunity to experiment the codification plans inspired by Bentham in India. It was easier to convince British members of the Parliament that the legal 'chaos' in India (and not in England) required a strong intervention of the State. In the famous Macaulay's speech of 10th of July 1833, preceding the vote of the Charter, two points are as much important as the always repeated formula 'uniformity when you can have it, diversity where you must have it, but in all cases certainty'. First, the mention that codification was the 'only blessing of an absolute government': the link thus made between codification and despotism could justify why it was suitable for colonial Indian submitted to the British 'illuminated despotism' and why it was so difficult to combine it with the Parliamentary Government in Great Britain. Then, the words of Macaulay about the different systems of indigenous laws that had to be kept without 'wounding the feelings' of all the people of India were rather ambiguous: 'But, whether we assimilate these systems or not, let us ascertain them; let us digest them'. It seems that a 'simplified' transplantation of English legal ideas was the best means for imposing Western law with the appearance of the respect of personal laws[52].

It appeared in fact that the task of codification was more difficult than foreseen by the British Utilitarians with the complex intercourse of Company's authorities, plans of reforms debated in England and the works of the lawyers in the successive three Indian Law Commissions (1833, 1855 and 1861). Whereas Macaulay was very active in India and could write a draft of penal code (with the help of Anderson, Macleod and Cameron) as soon as 1837, he left India in 1838 and its project was delayed for a long time, probably in the expectation (finally disappointed) of the outcomes of the Royal Commission and of different penal code drafts for Great Britain[53].

New patterns of legislative transplants during the Raj

The establishment of the *Raj* by the Government of India Act (2nd of August 1858) which proclaimed queen Victoria as the sovereign of India, putting an end , to the powers of the Company and the nominal one of the last Mughal emperor, the adoption of the Civil Procedure Code (1858) as a compilation of drafts prepared by the second Law Commission for different courts, thedecision to fuse Supreme Courts and 'mofussil adalat' courts through the foundation of High Courts in 1861 (the dual judicial system disappeared, but not the dual legal system based on more English

[51] M. P. Jain, *op cit.*, p. 178-188. The same author considers that the powers of the Indian judges were greater in Madras and Bombay.
[52] E. Stokes, *op. cit.*, p. 219.
[53] D. Skuy, *op. cit.*, p. 537.

transplants in Presidency towns than in 'mofussil' territories, let alone to speak of a third legal system in 'non-regulation provinces' annexed after 1849 with their own executive orders), these events were the decisive factors for voting the Indian Penal Code (1860) and bringing it in operation the 1st of January 1862[54]. Along with the Civil Procedure Code, it was the first legal text imposed on the whole of British India and it showed that from then on there would be a specific statute law for India, and not uncoordinated transplants of English-modelled institutions.

The Indian Penal Code has been lauded for a long time as a great monument of codification (the first one in time for English lawyers) and as a clever attempt to accommodate English law with the special situation of India - the legacy of Muslim criminal law, the Hindu system of castes and the respect for religious feelings[55]. David Skuy's study in 1998 has considerably weakened this myth of a successful transplant, explaining its application with few amendments until today. First, there is no real effort to 'assimilate' indigenous rules as Macaulay said in 1833. Living just for three years in India, ignoring any of local languages, Macaulay had superficial and bad judgments about Muslim justice and Hindu tradition and considered it as 'primitive'. In the 1837 draft, Macaulay has just foreseen to punish an intentional act causing someone to lose cast and this article was not included in the 1862 Code, which punished only wounding words or gesture towards religious feelings and authorized defamation actions about insults against religious convictions[56]. Second, the Code followed the play out and the ideas of Macaulay _ with its definitions of illustrations _ that corresponded to the wishes of Benthamite reformers more than to positive criminal law in England, even after the 1861 Acts. Eighty-four differences have been noted in 1890 between the Indian Penal Code and the contemporary English criminal law[57].

Paradoxically this British statute law is influenced by the 1810 Napoleonic Penal Code and the 1822 Louisiana Penal Code (prepared by Livingstone, another admirer of Bentham): one can speak of the indirect transplant of French law (including some case-law about the application of the Penal Code studied by Macaulay) and of an American State proper law. Of course, none of these texts were conceived in relation to India. Third, if the death penalty field was reduced in comparison with the 18th century 'Bloody Code', it cannot be said that the Code marked a progress towards humanity with respect to Muslim criminal law. Macaulay's draft was prepared in the context of the adoption of the 'Thuggee Act XXX of 1836' for Bengal, a very draconian set of rules against professional robbers, based on the prejudice that a section of Indian people were members of criminal communities. The application of transportation _ until this time unknown in India and used in the Code for dacoity _ and the development of imprisonment (with hard labour) are rather proofs of a harsher repression with the clear goal to maintain colonial order against possible resistances, only a few years after a great Rebellion. The return of whipping (not foreseen in the Code) by an amendment in 1864 is another clue of the veiled racism of this legislation[58]. The Indian Penal Code confirmed the idea (now more planned) to transplant a specific British law (British as voted by the Westminster Parliament), a selection of English (the place of Scottish legal ideas does not appear clearly) legal institutionsat the same time simplified (with the naïve intention to make the reception easier for Indians) and reformed (with the action of Utilitarians).

---

[54] Motilal Chimanlal Setalvad, *op. cit.*, p. 124 about the effects of the Mutiny and of the 1858 events.
[55] Motilal Chimanlal Setalvad, *op. cit.*, p. 132; M. P. Jain, *op. cit.*, p. 467-470 is more critic.
[56] D. Skuy, *op. cit.*, p. 543.
[57] M. C. Setalvad, *op. cit.*, p. 133.
[58] *Ibid.*, p. 551-552.

This plan was confirmed with the second great monument[59] of codification tailored for India, the Indian Contract Act (1872). Suggested by the second Law Commission, then drafted by the third one in 1866, this Act knew also a rather difficult (although shorter than the one of the Indian Penal Code) stage of revision by the Legislative Department of India. First the opposition of Henry Sumner Maine, Law Member working in India from 1862 to 1869, provoked acute debates about specific performance, then the double resignation of Maine and of the Third Commission[60]. Finally, James Fitzjames Stephen rewrote the text and introduced some new rules inspired from the New York Draft Civil Code _ a project made in 1860-1865 by the American lawyer David Dudley Field, an imagined law that was more comparable to European civil codes than to the common law tradition. Despite this curious genesis, the Indian Contract Law transplanted, without doubt, many notions of English contract law: promise, consideration, undue influence, unconscionable transaction, restraint of trade, frustration of contract etc. Even though some of these rules were already applied by judges in India, with the conviction that there was no contradiction with Muslim or Hindu law, the transplant of legal materials and vocabulary was massive. On the contrary, it was not a transplant neither of the common law of contracts nor of an amalgam of common law and equity.

The Specific Relief Act was passed in 1877 for equity remedies and the form (a codified statute law with 238 articles, very near to the number of articles concerning contracts in the Napoleonic Code) was without precedent in English Contract law. In some cases, the substantive law was also different from the metropolitan model. Last, but not the least, the Indian Contract Act contained a few clauses more adapted to India than the ones of the Indian Penal Code. The Hindu institution of *damdupad*, limiting the capitalization of interests, inspired probably section 74 of the Act. Capacity of contractors continued to be judged according to the personal laws. As the Indian Contract Act gave illustrations, like the Indian Penal Code, it referred sometimes to Indian situations: for example, about money-lenders in villages (section 16), sale of maunds of indigo (section 19), agreements about restraint of marriage (section 26), mentions of magic beliefs (section 56), interdiction of polygamy according personal laws (section 56) or collecting of zamindar's rents (section 129). On the contrary, the illustrations concerning contracts between a singer and the manager of a theatre appeared to concern rather the colonizers.

Without examining in details each of the numerous Acts promulgated for India during the last decades of the nineteenth century, some general features of these transplants can be settled. First, this legislation was produced by British authorities with the help of British lawyers who wanted to simplify, stylize and rationalize English Law. It was not the matter to transplant British law without any change and, in many occasions, the Indian statute law preceded the British reform. The Indian Contract Act is thus twenty one years prior to the Sale of Goods Act (1893), often considered as the master piece of consolidated statute law in England. The colonizers did not feel necessary until 1930 to write a specific Sale of goods Act for India and to reform the Indian Contract Act in consequence. One can also consider as noteworthy that the 1865 Indian Succession Act ignored the distinction between real and personal property and that the 1882 Transfer of Property Act was very simple in comparison with the niceties of English land law. The 1882 Easements Act had no equivalent in England and corresponded to a special

[59] In chronology, but not in importance, the Indian Contract Act is preceded by the 1865 Indian Succession Act. This Act did not concern Muslims and Hindus and, for this reason, takes place as an intermediate category between statutes destined to be applied by all inhabitants for India and personal statutes for Hindus or Muslims.

[60] M. C. Setalvad, *op. cit.*, p. 71; M. P. Jain, *op. cit.*, p. 449.

subject paradoxically influenced by the scholars' knowledge of Roman law. At the same time, the British colonizers did not realize an Indian Civil Code as some of the members of the Law Commissions dreamt. The Indian codification was something unique, a kind of intermediary model of codification between the continental one in Europe and a few examples of developed statute laws in England _ even the 1881 Indian Negotiable Instruments Act is not identical with its British counterpart, the 1882 Bills of Exchange Act. The reformers did not achieve all their goals, as shown by the failure of a draft of an Indian 'code of torts' , written by Frederick Pollock[61]. The contingent agenda of colonial policy was more important in this uncoordinated outcome than the respect for the personal status (for example, the 1865 Succession Act, supposed not to concern Hindus and Muslims, had a real impact for the new practice of wills by some Hindu people).

It can also be said that the British colonizers developed a specific Indian legislation in legal matters they were directly interested in : the administration of Justice (with the 1858 Civil Procedure Code, the 1861 Criminal Procedure Code, the 1872 Indian Evidence Act and of course the Indian Penal Code) and the security of commercial and land transactions (the Indian Contract Law, the Transfer of Property Act, and also the 1860 Societies Registration Act, the 1912 Cooperative Societies Act, the 1926 Trade-Union Act, the 1932 Indian Partnership Act inspired by the English statute prepared by Pollock in 1890). We can speak of a 'colonial civil law' understood as a special set of rules destined to facilitate the action of British colons and traders and thus to maintain the imperial domination. Especially in penal matters, the large powers given to the police by the Criminal Procedure Code, the long controversies about the application of the 'habeas corpus' to Indians[62] or the difficulties to implement juries in India[63], are different illustrations of a selected transplant in favour of the discriminating interests of the colonizers.

After World War I, the participation of India in the League of Nations and in the International Labour Organizaton, as the political claims for independency provoked new transplants of English Law. If the inspiration coming for English law can be considered as relatively progressive in Labour Law _ with the 1926 Trade Unions Act, the 1933 Child Labour and Children Pledging of Labour Acts, the 1938 Employers' Liability Act _, the 1915 Defence of India Act, modelled on the British Defence of Realm Act (DORA with its emergency power) was clearly repressive.
Before treating 'colonial constitutionalism' as a phenomenon of indirect transplant (or of uncontrolled irritant), we would like to insist upon another kind of legal transplant linked with the British legislation during the Raj. The development of the Indian judiciary and of the judges functions to apply this new legal 'corpus' provoked, as a consequence, the imposition of legal habits coming from England to Indian people who wanted to claim their rights. The British Indian Acts were complemented by the importation in India of the rule of precedent (whose development is for a large part a nineteenth century creation), the imitation of case law reports of the Indian courts from the middle of the nineteenth century[64], the introduction of English law books and, after all, the development of legal education in India and of Indians according to the British patterns. Following the 1862 Indian High Courts Act, the Letters Patent of 1865 empowered the High Courts to enrol 'such and so many Advocates, Vakils and

[61] M. C. Setalvad, *op. cit.*, p. 110.
[62] *Ibid.*, p. 38-41.
[63] M. P. Jain, *op. cit.*, p. 216: the 1923 Criminal Procedure Amendment Act allowed Indian to claim the right to be judged by a jury with a majority of Indians.
[64] M. C. Setalvad, *op. cit.*, p. 48.

attorneys' as necessary. The door was open for Indian natives to act as pleaders before the highest courts in India and to enter the judiciary. The discriminations did not disappear and there were different class of pleaders, British qualified barristers, 'second grade pleaders' with the degree of 'licenciate in law' from a Law College, 'vakeels' (or vakils) with a degree of Bachelor of Law and two years service as article clerk, legal practitioners in the district and subordinate courts without higher education.

In 1862, Gnanendramohan Tagore, a Calcutta native, student of Hindu College, converted to Christianity in 1851, living in England since 1859 (and teaching Hindu Law and Bengali at the University of London), studied in Lincoln's Inn and was the first Asian to be called to the English Bar. He returned to India and was a pleader before Calcutta High Court. A similar way was followed by Womesh Chandra Bonnerjee (called to the Bar in 1867), Amir Ali (called to the Bar in 1872, member of the Calcutta Bar, then justice of the Calcutta High Court in 1890 and finally the first Indian Law Lord in the Privy Council in 1909), Sayyid Mahmud, Mohandas Gandhi (called to the Bar in 1891), Chittaranjan Das (called to the Bar in 1892), Muhammad Ali Jinnah (called to the Bar in 1897), Sarat Chandra Bose (called to the Bar in 1911), Jawaharlal Nehru (called to the Bar in 1912) and so many Indian lawyers and judges acting before or after the Indian Independence. In 1885 there were already 108 Indians called to the Bar in England, among them two thirds were practising in India, in some cases with a very lucrative practice[65]. Majority of these Indian barristers, qualified in England, were the sons of landowners and businessmen belonging to the India's social elite.

A few of them were probably 'scholarship boys' and the Indian Bar _ not yet organized in a national association _ was considered to be overcrowded since the end of the nineteenth century. This sociological diversity was, of course, completed by political differences between 'pro-British' and members of the recently created Congress Party. Whereas Indian barristers educated in England were likely to transplant more English law, advocates or vakeels educated in India (and belonging to other Bar Associations) had specially learnt the different Indian Acts used for examinations. Willingly or not, they were instruments of the acculturation of British transplants, especially if they chose to become judges in the colonial administration of justice[66]. Parts of English legal cultures – we use the plural form to escape the too simple idea of one monolithic legal culture _ were thus transplanted in the social practices of Indian lawyers and this kind of transfer accompanied the transplants of English modelled institutions, as the transmutation of British legal concepts in 'indigenous' personal laws.

The transmutation of Hindu and Muslim Law through English transplants

It is well admitted today that the use of Hindu and Muslim rules, as personal laws of the great majority of Indians subjected to the colonial power, was not immune from processes of 'invention of tradition', redefinition of traditional notions transformed in English legal concepts and 'novation' (in the Roman legal sense, the creation of a new legal object) of old rules trough their writing, translation, if not by passing new English statutes about these matters. All these operations of transmutation can be seen as imposed transplants made by the colonizers, without a real collaboration (let alone, any

[65] David Duman, *The English and Colonial Bars in the Nineteenth Century*, London, Routledge, 1983, p. 132.

[66] Unfortunately we do not have statistics about the number of Indians becoming judges as qualified barristers, members of the Indian Civil Service or vakils admitted in the Bench. Gregory C. Kozlowski, *Muslim Endowments and Society in British India*, Cambridge, Cambridge University Press, 1985, p. 116 evokes a majority of Indian judges in subordinate courts and a few ones in High Courts at the end of the nineteenth century.

initiative) of the native lawyers or representatives, at least before the end of the nineteenth century.

These transmutations have first concerned Hindu Law and, as we have said, the metamorphosis was dramatic, as a kind of invention of the notion itself of Hindu Law, even though this path was carved/created? by the Muslim conquerors. It is not easy to know exactly the contents of information given to the East India Company servants and rulers (among them there was no qualified lawyer until 1784) by non-Europeans 'negotiators' supposed to understand the rules obeyed by Indians. These 'middlemen' form a very mixed group of not only Brahmins, pundits and Kazis, but also Persian, Armenian, European (not English) merchants. It seems that after several decades of informal contacts (important for convincing Company agents that there was something like an Hindu Law[67]), the decisions of Warren Hastings to establish English judges in 'moffusil' territories and to give more security to owners in terms of property rights was a turning point. Whereas Hastings designated eleven pundits as advisers and interpreters for the courts (with in fact a very modest role), he urged the writing of a first compendium of Hindu Law, called 'Vivādarṇavasetu' (a bridge over the ocean of disputes), and translated it in English as the 'Code of Gentoo Laws' (1776). Not only this work begun by Brahmins, convinced (in good faith or bad ?) that there was one Hindu Law valid in all the territories administrated by the Company, it was also rewritten by the English translator _ Halhed made a selection of texts, excluding those about cosmogony or kings duties he thought not 'legal' _, but new rules were deliberately invented about property rights (supposed to be proved by possession during three generations), succession law (based upon a rule of equality between sons, whose statement was never so clear in the Hindu literature) or neglected (for instance, about adoption) to enter a Western (and Romanized!) form of a Code[68]. From this point of departure, what British colonizers considered as 'Hindu Law' was already an Anglo-Hindu Law.

Without any doubt, the subsequent work, directed by William Jones (with the collaboration of the Indian scholar, Jagannāth Tarkapanchānan, whose text in Sanskrit was apparently not very clear), then by his successor Colebrooke with the writing of *A Digest of Hindu Law* (1801)[69], was of better quality. However, at the same time, the transplant of English legal vocabulary without correspondence in Hindu texts was confirmed, especially regarding property rights (this time, rather in favour of Zamindars). The insistence on the power of alienation of the owner was completely foreign to the Indian tradition[70]. The maintenance of possible options between succession in favour of the eldest son or equal partition between brothers was a good indication of the adaptation of the rule of law to the Company's policy in favour of weakening of big Zamindars and supporting the weakest ones.

---

[67] Nandini Bhattacharyya-Panda, *Appropriation and Invention of Tradition. The East India Company and Hindu Law in Early Colonial Bengal*, New Delhi, Oxford University Press, 2008, p. 56 quoted the writings of Holwell in the years 1760 as the first assimilation between 'sastras' and 'law books'.

[68] *Ibid.*, p. 103-114.

[69] This Digest (another reference to the Roman compilation of Justinian, published three years before the Napoleonic Code!) was based on the knowledge of the Laws of Manu (translated by Jones) and of a few treatises (*Nibendhas*), like the Mitākasarā of Vijnaesvara.

[70] Nandini Bhattacharyya-Panda, *op. cit.*, p. 214.

Used as the main reference[71] for Hindu Law by English judges (even after the end of the Company's powers and the new evaluation of Hindu law as 'customary rules' rather than 'sacred legislation' by Henry Sumner Maine[72]), the *Digest of Hindu Law* was also the first step to change traditional rules that the British colonizers disliked. The 1801 text contained thus a discussion about 'sati'practice, which announced the interdiction of this practise in 1829[73]. For a long time the transmutation of Hindu Law was the monopoly of the British courts, from those situated in India to the Privy Council, that used the texts of the Mitāksarā and of the Bengali Dāyabhāga with the (probably misunderstood) idea that they were the sources of two 'Schools' of Hindu Law. Then, in 1856, the Bengal Government took the initiative of passing the Hindu Widow's Remarriage Act, permitting the remarriage of widows under the veil of a good interpretation of Hindu religion and custom. Although this question has been studied by the first Law Commission in 1837, the Act was provoked by a petition of 987 native individuals and could appear as a response to a social answer formulated by Indian reformers. Not only this Act was rather a new transplant of English legal notions in Hindu Law, but it failed to give birth to a notable practice in Calcutta[74]. A step further was the 1872 Punjab Laws Act which recognized clearly the existent of different local customs that had to prevail under Hindu Law in Punjab. Here again, the writings of an English lawyer, Richard Temple, were used by judges as main reference to customs, with probably transmutation through English notions[75]. Finally, the adoption of the 1937 Hindu Women's Rights to Property Act, adopted with the consent of the Central Legislative Assembly was clearly a deep reform of Hindu Law concerning succession rights of women in general and widows in particular. The rupture with the Mitāksarā tradition, denying any estate to widows[76], was certainly influenced by the model of Women Property Rights in English Law.

Concerning Muslim private law, the attitude of British colonizers was more cautious for a long time. It was not the matter, as for Hindu law, to invent a tradition or to suppose a legal system, whose existence was indubitable. There were, however, problems of knowledge and translation for British judges who had to apply Muslim law. The writings of William Jones (his translation in 1792 of 'Al Sivajiyah' and *The Mahomedan Law of Succession to Property of Intestates*, published posthumously in 1807), then of Macnagthen (*Principles and Precedents of Muhammedan Law*, 1825) and Neil Baillie (*Digest of Moohummudan Law*, 1865) participated also in the movement of discrete infusion of English legal vocabulary in Muslim Law. Another interference of English lawyers came from the discretionary choice by the judges _ although they invoked the qualities of the parties _ of one School of Sunni Law (principally the Hanafi School supported by the Moghuls) or of Shiah Law (admitted by the Privy Council since a 1841 case)[77].

It was not until the end of the nineteenth century that the question of an intervention of the British Legislator in Muslim law was raised. The problem was of Muslim

---

[71] With the complements of Macnaghten's *Considerations on Hindu Law* (1824) and *Principles and Precedents of Hindu Law* (1829), as Strange's *Elements of Hindu Law* (1825): M. P. Jain, *op. cit.*, p. 537. p

[72] Henry Sumner Maine, *Dissertations on Early Law Custom*, London, John Murray, 1883, p. 4-7.

[73] M. P. Jain, *op. cit.*, p. 565.

[74] Indraneel Dasgupta, Diganta Mukherjee, 'A Revisionist Analysis of the Failure of the Widow Remarriage Act 1856', *Contemporary Issues and Ideas in Social Science*, April 2007, p. 1-20 shows that only 500 remarriages were acted in Calcutta during the nineteenth century.

[75] Prakash Aggrawal, *Customary Law in the Punjab*, Lahore, Lahore Law Department, 1939, p. 41-46.

[76] Renna Patel, *Hindu Women's Property Rights in Rural India*, London, Ashgate, 2007, p. 46.

[77] M. C. Jain, *op. cit*., p. 551.

endowments and the decision came , first from the Calcutta High Court (1892, *Haji Bikani Miam*'s case, with the dissent opinion of an Indian judge Amir Ali), and then from the Privy Council (1894, *Abdul Fata Mahommed Ishak and others v. Russomoy Dhur Chowdhry*) not to recognize a familial *waqf*[78]. The attitude of judges was probably influenced by the English rules against perpetuities and the (open to discussion) conviction that a Muslim endowment had to be based on religious or charitable purposes. These decisions were criticized by many Muslims lawyers or notables who denounced a misunderstanding of Muslim Law and a threat to the keeping of familial patrimonies. Beginning with proposals from Sayyid Mahmud, a specialist of Muslim Law (especially of Shiah Law), a public campaign directed by Jinnah, new Muslim member of the Imperial Legislative Council since the 1909 Government of India Act, provoked the introduction of a bill in 1911 and an acute debate about the advantages and disadvantages of a British legislator's intervention into the Shariah.

Finally the outcome, the 1913 Mussalman Waqf Validating Act, was a compromise, validating familial endowments only for the future. The principle had however been established that statute law could affect Muslim Law with the precaution of saying that it was the restoration of an 'orthodox' traditional law. The next steps were the 1937 Muslim Personal (Shariat) Law, abrogating the customs supposed to be heterodox of some communities converted to Islam, and the 1939 Dissolution of the Muslim Marriage Act inspired from the Maliki School to enlarge the right to obtain divorce, especially for women. Trough these two Acts, English conceptions of a unitary law with succession rights for women (which were not recognized by heterodox customs) and of possibilities of judicial divorce were transplanted in Muslim law. The originality of the Anglo-Mahommedan Law was thus linked with English transplants, whereas the British colonizers reinforced in the same time a complex relation between separated personal laws and common legislation for all Indians.

A LONG TRADITION OF AN 'ORGANIZED' PLURALISM

As we have seen, the bulk of British transplants in India, during the rule of East India Company, then during the Raj, consisted of English-modelled legal institutions implemented in India to rule private relations between all Indian subjects, or of modified personal laws of a determined group of the population (Hindus supposed to include Buddhists, Jainists and Sikhs, Muslims, Parsis, Christians among other religions). It could appear artificial to separate, to study them a second time, the implementation of rules destined to settle disputes between members of different communities, then to organize the first expressions of indigenous participation in the government of colonial India. Nevertheless, it seems to us that British colonizers were confronted with other and new problems in this second field and that some of their acts were decisive until today to determine the characteristics of the Indian legal order. The colonial power was, by nature, a discriminating lawgiver and colonialism implied a strongly unequal treatment towards colonized people by a minority of colonizers. During the same time however, the British colonizers declared, especially second half of the nineteenth century onwards, that they were establishing a 'rule of law' system based on a certain conception of equality. this was the reason that some features of the struggle against unfair discriminations and in favour of 'reservations' for potentially disadvantaged people began during the colonial period, before being confirmed and amplified the independent India. The Indian Republic thus inherited a 'colonial

[78] Gregory C. Kozlowski, *Muslim Endowments, op. cit.*, p. 139-189.

constitutionalism'[79] and developed a new kind of legal hybridisation, which seems today a characteristic of an 'Indian way' in the concert of Nations.

The British steps towards a discriminations policy

As for other conquerors, the choice made by British colonizers to adopt a system of personality of laws does not resolve all the legal questions about rules to be applied by judges. It was clear, as for the Muslim conquerors , that rules of public and penal law (except in some special cases linked with religion) were general for all subjects of the British domination, it was more difficult to decide which laws to apply in suits implying two persons of different personal status or one (or more) person(s) without clear link with a personal status. If the question was resolved in Presidency Towns by the application of English law, especially where the interests of British litigants were in cause, there was a lesser pressure to find solutions in 'mofussil' territories, where the courts had large powers to settle these kind (unlikely to be frequent?) of lawsuits.

In early 1830s, it is probable that a number of conversions, particularly to Christianity, and the need for the Company to know which personal status her servants (among which they were Anglo-Indians, illegitimate children or persons of uncertain origin) were subject to, gave birth to a new question. It is not a mere coincidence that, under the Governor-Generalship of Lord Bentinck, a 1832 Regulation prescribed that nobody will be deprived of a legal right (probably property rights were concerned) because of religion in suits between persons of different 'persuasions' and the 1833 Charter Act decided that no native shall be disabled to hold any place 'by reason only of his religion, place of birth, descent, colour, or any of them' (one can note the 'modernity' of the listed discriminations)[80].

Then the First Law Commission made reflections about this question of the so-called '*lex loci'* and proposed, in a 1840 Report, to establish English law as the law applicable to persons not governed by a personal status or to cases implying persons of different status. A special draft was prepared, but it was never adopted, probably because of supposed difficulties with Indian judges in subordinate courts. One of the outcome of this reflection was the 1850 Caste Disabilities Removal Act, expressly presented as an extension to all British India (in the expectation of future substantive Acts for whole India) of the 1832 Regulation made for Bengal. Because of claims of missionaries in favour of Christian converts, it was decided that nobody could 'forfeit' a right (especially any right of inheritance) 'on change of religion or loss of caste'. It was not the question to abrogate the caste system[81], that the British kept (if not encouraged, according some historians considering the later census history), but to resolve (in favour of the religion of the colonizers) interpersonal cases with a risk of aggravated discrimination. The way was open to regulate afterwards Christian marriages in India (1852 and 1865, then the consolidated 1872 Indian Christian Marriage Act), succession rights of persons who were neither Hindus nor Muslims (1865), Native Convert's Marriage Dissolution (1866) and, as the first step towards the idea of secularized laws, Special Marriages (by the 1872 Special Marriage Act). Here the transplant of the 1836 'civil marriage' before a Registrar was a timid encouragement to marriages of persons

[79] Ranabir Samaddar, *The Materiality of Politics. The Technology of Rule*, London-New York-Delhi, Anthem Press, 2007, vol. I, p. 19.

[80] M. P. Jain, *op. cit.*, p. 184, p. 411-416 (with the quotation of a 1836 petition from the Armenians of Bengal asking to be subjects to English law) and p. 440.

[81] However the ban for the entry of Untouchables in Indian schools was lifted in 1854. But, two years later, the Government of Bombay Presidency ceded to upper classes pressures and refused the school entry to a Mahar boy.

of different religions. During the same time, British colonizers accepted to take account of the ideas from some Hindu or Parsi reformers, by recognizing specific forms of marriages for limited communities. The 1865 Special Parsi Marriage and Divorce Act and the 1891 Age of Consent Bill established the basis for a personal status for Parsis in family law, later confirmed in 1936. The 1872 Brahmo Marriage Act was more revolutionary as it recognized the legal particularity of the Brahmo Samaj movement and legalized their marriages free from the Hindu rituals. The British Legislator considered that it was empowered to create a new legal group separated from Hindus. The 1909 Anand Marriage Validation Act, recognizing special rules for Sikhs' marriages was the logical consequence of this policy[82].

In a quite different prospect, one of the discriminations based on policy of 'public order', the British classification of 'criminal tribes', inaugurated by the 1871 Criminal Tribes Act prepared by James Fitzjames Stephen (the same lawyer who worked on massive English legal transplants in India), was at the same time the transplantation of racist Western conceptions _ the idea that some persons were 'criminal born' one year before the publishing of Lombroso's *Uomo Deliquente*! _, and a plan to register tribes in order to subject them to a special law with many restrictions on movement[83]. It was not foreseen, of course, that this legislation would be transformed, after Independence, in favour of 'scheduled tribes'. But, the use of the British administration to schedule special districts, from 1874 onwards, in order to exclude them from general regulations, was a new milestone to build a plural legal order in India. In the same year as of the Criminal Tribes Act, began the first great census (there were beforehand smaller census of cities) of India: census is another Western transplant (the first one in England begun in 1801), without which all these legal operations and the whole conception of the cast-system are not understandable[84].

Three decades later _ a few years before a second Criminal Tribes Act (1911) _ the British colonizers wanted to stop disorder phenomena in Bengal, without ceding to the claims of the Indian National Congress. The Morley-Minto reforms introduced the first elections of some Indian representatives in legislative councils through the 1909 Government of India Act. In a period characterized also by Muslim claims (the question mentioned above of familial endowments), the colonial power had interest to divide for reigning. For this reason, British rulers took account of the argument according to which Muslim candidates will be preceded by Hindus in an electoral system based on a majority rule. It was thus decided that Muslims (forming a separate electorate) would be allotted reserved seats in the municipal and district boards. The 1919 Government of India Act, while it expanded the participation of natives in Provincial and Imperial Legislative Councils and used the rulers of the 600 or so Princely States as supporters of the colonial power in the Council of States, confirmed the existence of a separate Muslim electorate in Muslim 'constituencies'. It is noteworthy that the questions of separate electorates, especially for Untouchables, divided the Indian delegates at the Second Round Table Conference. In 1932, they decided first to ask the British Prime Minister to give a binding award on this question, then after Gandhi's fasting, to alter this award with the Poona Pact about reserved seats for Untouchables. We can say that

---

[82] Olivier Herrenschmidt, 'The Indians' Impossible Civil Code', *Archives européennes de sociologie*, L, 2, 2009, p. 316-317.

[83] Sabyasachi Basu Ray Chaudhury, 'Justice in the Time of Transition. Select Indian Experiences' in Ashok Agrwaal, Bharat Bhushan (eds.), *Justice and Law. The Limits of the Deliverables of Law*, Los Angeles-London-New Delhi-Singapore-Washington, Sage, 2009, vol. II, p. 54-55.

[84] Stuart Corbridge, John Harriss. *Reinventing India: Liberalization, Hindu Nationalism and Popular Democracy*, Cambridge-Oxford-Boston, Polity press. 2000, p. 8.

the British award was an 'irritant', more than a transplant, giving birth to an agreement between Indians and facilitating the emergence of future norms about this subject.

Finally the 1935 the Government of India Act was supposed to favour the 'gradual development of self-governing institutions' without making India a real dominion: the Provinces were from then on governed by Indian ministers supported by provincial councils and a 'Federation of India' was planned with a federal government and a federal court. The State Legislatures, which functioned between 1937 and 1939, could have reserved seats for Muslims, Sikhs, Christians, Anglo-Indians, Europeans, scheduled castes, backward areas and tribes. A list of scheduled tribes was established for all provinces, except Punjab and Bengal, and colonial authorities began to identify much depressed communities in the census operations (it is an important reason of the 1931 census until today)[85]. There is no doubt that these Acts draw up the political scheme of the Indian Federation and implemented the idea of reserved seats for minority electorates. Although there is no British precedent to this institutions _ with the exception of a remote analogy with the members of Parliament elected by universities constituencies with a separate electorate until 1950 (a practise imitated in India by the 1935 Act) _, it cannot be denied that colonial constitutionalism was the origin of this kind of affirmative action in favour of political minorities. The 1935 Act has even created reserved seats for women and for representatives of labour[86], which were not kept in independent India.

This British legislation cannot be separated from the movement, begun in princely states, to create reserved seats in the administration for lower castes. The first quoted decision in this direction was one of Kohlapur State in 1902. Then the 1918-1921 Mysore State decisions to appoint a committee and to reserve posts in state service to backward classes is well known. It has been interpreted as a 'response' to popular movements in favour of lower castes[87]. Beyond a bit of scepticism about analysis of law changes as responses to social needs, it is noteworthy that the Mysore King, reinstalled by the British colonizers, had to compromise with the counterweight of a Legislative Assembly and of a High Court (two British institutional transplants). Chief Justice Miller, who presided the Committee and recommended reserved seats, was a Christian, and probably British lawyer. There is again a form of 'legal irritant' at the origins of these decisions. Furthermore, the idea was transplanted from Mysore to other parts of the Deccan: the Madras Presidency in 1921, then the Bombay Presidency in 1931 reserved jobs for Depressed Classes. In that case, the decisions were directly taken by colonial authorities and must be analyzed in connection with the British census, the policy towards tribes and the question of separate electorates. All the debates about affirmative action have their origins in colonial period and in the British legal irritants.

Last, but not least, this British policy, multiplying the legal communities, was concomitant with the application of more and more laws to all Indians. To the above mentioned texts of the Indian Penal Code and other uniform Acts about contract, property and labour, we must add the exceptional case of the 1929 Child Marriage Restraint Act. It was the only law on family and personal status applicable to all Indians during the Raj. It has been supported by Indian reformists _ the members of the legislative committee presided by Moropant Vishvanath Joshi (a barrister from

---

[85] David Keane, *Caste-based Discrimination in International Human Rights Law*, Aldershot, Ashgate, 2007, p. 63.
[86] J. P. Eddy, F. H. Lawton, *India's New Constitution*, London, Maxwell and Co, 1935, p. 212-213.
[87] Barat Bhushan, 'Indexing Social Justice in India. A Story of Commissions, Reports and Popular Responses' in Ashok Agrwaal, Bharat Bhushan (eds.), *op. cit.*, p. 105.

Amravati), Jinnah who insisted upon the adhesion of Muslim electorate, the British authorities[88] and the Women Associations, that could articulate their arguments before the Joshi Committee _ and violently opposed by orthodox Hindus and Muslims. It is generally considered that it was a dead letter during the colonial period. Despite the apparent failure of this British transplant to impose a minimal age of 14 (for women) and 18 (for men) for contracting a marriage, the Act was also reserved after the Independence and reformed in 1978, whereas debates continued about the validity of marriages contracted against these rules[89]. Is there a better example of the contradictions of the British policy, hesitating between equality and discrimination, which constitutes an important part of the colonial legacy in Indian law?

The complex outcomes of Western transplants in the contemporary Indian legal order
To conclude with the recent outcomes of Western transplants in the Indian legal order, we have to take account of different prospects. First, it is well known that the Independent Republic of India has decided not only to keep the colonial laws, until they could be abrogated (a very common attitude in decolonized States), but to maintain English as an official language through Article 343 of the Constitution, then the Official Language Act (1963)[90]. English being kept as the most practical common language for law, the British transplants have been inserted in the Indian legal order in their original form, without the ruptures provoked by an interpretative translation. The Indian State has, until today, decided to continue with 'colonial' laws, some of them being of 150 years age (with the risk to be outdated in comparison with the social and cultural evolutions) or apparently contradictory with some aims of the public policy (for example law of land acquisition).

Secondly, the involvement of the Indian State, since independence, acquired after many decades of struggle against the colonial power, in establishing a constitutional and democratic Rule of Law, based upon the equality principle and the promotion of human rights, is paradoxically linked with Western legal transplants. If the 'monoculture' of human rights can be described as a continuation of Western Imperialism in the world[91], one shall not forget that the Indian delegate in the United Nations Commission, Laskhmi Menon, took part in the drafting of the Universal Declaration of Human Rights. She was particularly influent in a clear recognition of women rights[92]. The framers of the Indian State knew too well how their fundamental rights have been denied during the colonial period to appreciate the impact of some British legal principles like the *habeas corpus* rule. As the American 'rebels' have invoked the common law and the English 'constitution' against colonial rulers in 1774, Indian nationalists have used British legal concepts to denounce the colonial domination and claim vainly for a Bill of Rights in the 1935 Act. The equality principle, partly transplanted in India through some British Acts, was thus 'turned upside down' to claim an equal treatment to Indian 'subjects' and colonizers. The confluence of British and American interpretations of the common law provoked then the transplant of a mixed concept of 'due process of law', that was likely to be nationalized in India.

---

[88] Geraldine Forbes, *Women in modern India*, Cambridge, Cambridge University Press, 1999, p. 85-89.
[89] Werner F. Menski, *Hindu Law, Beyond Tradition and Modernity*, New Delhi, Oxford University Press, 2003, p. 324. The question of the consent age for sexual intercourse was already answered by the 1891 Age of Consent Act. Through an amendment of the Indian Penal Code, this age was changed from 10 to 12 years. The 1891 Act has provoked a lot of oppositions from orthodox Hindus.
[90] Samir Kumar Das, 'The Founding Moment. Social Justice in the Constitutional Mirror' *in* in Ashok Agrwaal, Bharat Bhushan (eds.), *Justice and Law, op. cit.*, p.
[91] Upendra Baxi, *The Future of Human Rights,* New Delhi, Oxford University Press, 3rd ed. 2008, p. 143.
[92] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, Philadelphia, University of Pennsylvania Press, 1999, p. 118, 132, 185 and 315.

Third, the writing of the Indian Constitution was based on a comparative work discussed in the Constituent Assembly to choose the best rules, already implemented in others constitutions, which could be adequate to the Indian situations. There is no doubt that the Indian drafters of the 1950 Constitution have borrowed many elements from the Constitution of the United States _ the introducing formula '*We the people…*', some of the federative institutions, the Supreme Court, judicial review, fundamental rights of the Ten first Amendments, equal protection of laws from the 14th Amendment _, but also from the Canadian and Australian federative institutions and from the 1937 Irish Constitution for the Directive Principles of State Policy[93]. If the idea of a written constitution is not British, the borrowings of the Parliamentary system (including a direct reference in the original writing of Article 105 to the immunities of the House of Commons) and of the 1935 Government of India Act are too clear to be denied. Of course, it is the matter since 1947 of chosen transplants, with a voluntary selection and an independent policy of adaptation of rules from foreign origin in the Indian legislation. The example of the 1960 abolition of criminal juries in India shows how British institutions can be also be repealed on behalf of the Indian governmental interests. The comparison can be made with the implementation of international norms in a dualist system as India _ another transplant coming from the United Kingdom _ that allows a selection through legislation of international rules considered as having a direct impact on Indian citizens.

The implementation of judicial review in India is probably the best avenue for new Western transplants in India. The circulation of constitutional case law, and linked interpretative methodologies or tests, cannot be separated from the influence of the US Supreme Court, of course, but also from the German or more recently the South African Constitutional Court. The American case laws have been quoted many times by the Supreme Court of India, whose decisions have transplanted the ideas of 'reasonable test', 'strict scrutiny' or, more recently, of privacy[94]. It has been suggested that the conference given in India in 1965 by the German jurist Dieter Conrad has strongly influenced the arguments of the barristers in the *Golak Nath* case and would be one of the factors for the emergence of the 'basic structure' doctrine[95]. Here, we are confronted with intellectual influences and cross-fertilization processes, rather than to real transplants. But there is no doubt that the entrenchment of fundamental rights, as a trend that begins with the writing of the Indian Constitution, has transported in India as in other countries, German ideas about judicial review applied to constitutional amendments[96]. Today, as other courts in the world, the Indian Supreme Court is not reluctant to quote, in judges' opinions, the French Declaration of Human Rights or the decisions of the European Courts of Human Rights[97]. These borrowings are however cautious and it is also possible to argue about the non-transplantation of rules judged as inadequate to the Indian situation[98]. If there are some possibilities for new transplants, it is the matter of partial borrowings, transformed and inserted in a very complex case law and specifically Indian rulings.

---

[93] M. C. Setalvad, *op. cit.*, p. 170-173; M. P. Jain, *op. cit.*, 595-596.
[94] Supreme Court of India, *People's Union for Civil Liberties v. Union of India* (1997).
[95] Granville Austin, *Working a Democratic Constitution. A History of the Indian Experience*, New Delhi, Oxford University Press, 1999, p. 199-201.
[96] Supreme Court of India, *IR Coelho (Dead) by LRS v. State of Tamil Nadu* (11/01/2007).
[97] Supreme Court of India, *P. T. Munichikkanna Reddy & Ors v. Revama and Ors* (24/O4/2007) about property law; *Nair Service Society v. State of Kerala* (23/02:2007) about equality principle.
[98] Supreme Court of India, *Askoka Kumar Thakur v. Union of India & Ors* (10/04/2008) about the reject of the American precedents concerning narrow tailoring of affirmative action measures.

As Indian judges are construing rules by the co-ordination of different texts and arguments, a part of which can be the outcome of the Western transplant, the Indian legal order is a system constructed by scholars to describe the empirical and non homogenous reality of all the general norms in force today in India. If we admit that this legal order is an intellectual convention, like all other legal orders constructed by scholars, we can say that the Indian State has given birth to a very complex networking of norms that can explain the success of pluralist prospects in legal studies devoted to India. If we do not share, as we have explained, some of the arguments of the pluralist movement about custom and 'spontaneous' law, we agree with the observation of the large plurality of sources of laws (including laws from foreign origin) in the Indian legal order. Even if they concern a very small number of persons, the keeping of Portuguese family laws in Goa (through the 1962 Goa, Daman and Diu Administration Act) and of the French Civil Code in Pondicherry (through the 1962 Pondicherry Administration Act) is a last example of the insertion of transplanted pieces in the Indian legal web. For analyzing today, the originality of Indian voices in the international scene, we have to take account of this long history of tensions between discriminations and principle of equality linked with the colonial domination. When the Indian State expresses the need to treat differently the negotiations of the developed and developing countries of the World Trade Organization and in the evolution of the Generalized System of Preferences, does not this conception of affirmative action in international law include a part of the legacy coming from a Western 'irritant', if not from a conscious transplant?