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The Historicity of Law in India

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In general, Alejos Grau's book appears as a striking example of the transnational character of topics that scholars have usually treated as national. Although created with nationalistic intentions, the Mexican »diabolical Constitution« exemplifies the broader, global problem of Church and state relations during the 19th and 20th centuries, the age of secularization. Alejos Grau's work allows us to perceive that secular laws regulating the relations between state and Church are by no means unilateral. They are the product of several processes, sometimes conflicting, sometimes converging with

canon law and the clergy's point of view. These perspectives are in constant interaction, on many levels. The book also leaves ample room for comparative studies; after all, in referring to Mexico, the Holy See's agents at times drew connections with »the Colombian case« and the »Brazilian case«. Finally, Alejos Grau's book should be praised for the huge annex of unpublished sources, amounting to more than half of the total of 600 pages. Her close attention to historical documents confers richness and precision to her work. ■

Rahela Khorakiwala

The Historicity of Law in India*

Studies in the legal history of India have developed over time, going through different phases. Mitra Sharafi documented this well in her 2015 survey of South Asian legal history.¹ She traces its development from its beginnings in the 1960s to the important phase of the late 1990s, and explores the future directions it is taking now. Since 2009, there has been a welcome change to this landscape, with legal historical work being done by both historians and lawyers. The edited volume *Iterations of Law: Legal Histories from India* contains nine such essays that define the new wave of literature on Indian legal history from the perspective of South Asian lawyers and historians.

The main premise of the book is to bring together studies by different authors that span different themes but also provide a pan-Indian focus. Early literature in this field was mostly produced by sociologists, anthropologists and political scientists,² a fact acknowledged and explained by the editors of this volume. The underlying question that ties all the essays together is how situated and

everyday practices of law have attempted to transform South Asian legal history. Importantly, the authors highlight how the non-elite engaged with the law in fascinating ways, rewriting the colonial discourse of our shared histories. Each essay documents examples from the field and opens colonial archives that provide a rich text for a new understanding of our engagement with colonial law.

The editors' introduction helps contextualise and connect the volume's nine different studies by grouping the essays into four different thematic clusters – law and convention, law and violence, law and inscription, and law and fiscalism. This thematic classification is useful when reading the essays that cover a vast subject range.

The first two essays fall under the theme of law and convention. Janaki Nair observes the everyday life of law through a »present history« of *Matha* courts in contemporary southern India, and Rashmi Pant looks at how the laws of property inheritance were influenced by a duty to care for the elders in the first half of the 20th century. Both

* APARNA BALACHANDRAN, BHAVANI RASHMI PANT (eds.), *Iterations of Law: Legal Histories from India*, New Delhi: Oxford University Press 2018, 302 p., ISBN 978-0-19-947779-1

1 MITRA SHARAFI, *South Asian Legal History*, in: *Annual Review of Law and Social Science* 11 (2015) 309–336.

2 See BERNARD S. COHN, *Colonialism and its Forms of Knowledge: The*

British in India, Princeton/NJ 1996; MARC GALANTER, *Introduction: The Study of the Indian Legal Profession*, in: *Law and Society Review* 3 (1968) 201–217; and SHARAFI 2015.

these essays address the issue of customary law and obligations that arise out of hybrid legal concepts that form part of the legal pluralism that existed throughout the colonial era. Nair describes the performance of justice in the *Matha* courts where there is a dual source of power – one from the moral-ethical presence of the community leader and the other from the trappings of state power. This highlights the need and importance of understanding legal pluralism in such societies. Pant, albeit in a different context, emphasises the same point through her mention of the »ethico-normative« nature of legal contestation when it came to the act of caregiving. Borrowing a term of Fauzia Sheriff's, Pant reveals the »interlegality« of these situations.³ Both essays are replete with examples as observed and archived in their respective fields.

In the next thematic cluster on law and violence, Neeladri Bhattacharya details the everyday violence of colonialism through the language of the law as seen in cases of *begar* (unpaid forced labour), and Bhavani Raman explores how laws on counter-insurgency were a tool of colonial occupation, an example of the »subsumption of law by governmentality« that made law into a vehicle for targeted oppression. Both authors focus on the interplay of formal and informal modes of violence, illustrated in the context of conflicts between »rebellious« labour and the political class. This is well documented by Bhattacharya when he notes that colonial officials classified *begar* as a precolonial practice and that, in fact, most Europeans claimed a right to *begar*. The petitions of the labourers highlight the profound sense of humiliation they felt. Bhattacharya therefore shows how *begar* was in effect an experience of violence on a daily basis and a metaphor for injustice and oppression. The colony then always becomes a space of exception – where the colonisers made an illegal practice legal in order to justify their use of it. This form of violence operates within the framework of law, and thus, in reality, the »violence is enacted through the law«. Raman develops the same argument by showing how in the region she studied (Wayanad in southern India) the law was neither in

suspension nor in place. Raman refers to this as »hyperlegality«, a term used by Nasser Hussain,⁴ to capture how the colonisers fragmented the legal process and added so many classifications that there was a whole system of law enforcement running parallel to the ordinary courts of law. In this way, both authors trace the oscillations in the coercive powers enforced by formal statutory law *versus* the informal powers exercised in special circumstances.

Law and inscription is the theme that runs through the next four essays by Aparna Balachandran, Nandita Sahai, Philip J. Stern and Shrimoyee Ghosh. Balachandran and Stern show how in the port towns of Madras and Bombay, respectively, documents played a crucial role in the legitimisation of colonial rule. The presence of multiracial merchant populations in these towns created heterogeneous legal situations. Balachandran therefore raises the important point that colonial law co-existed with local legal customs, an argument that counters the literature stating that the British ruined the existing legal systems in India, and indeed utterly failed to understand them. Stern and Balachandran are both able to highlight how the petition was used as a tool in colonial governance and thus one of the most widespread and approved forms of political activity by civil society. Sahai traces how law became inscribed in the emerging documentary legal culture in western Rajasthan, where certain castes began acquiring scribal skills in order to be able to participate in basic legal activities, leading to the transformation of the existing legal culture. For Ghosh, the stamp paper is a documentary artefact through which she discusses how materiality matters to the histories of law. In this context, Ghosh demonstrates how the »visual modalities« of a stamp paper were tied to its authenticity. There was a ceremonial value to this visual document that exceeded its »revenue or real value«. These four authors throw light on how colonial subjects were able to articulate colonial power through the law.

The last essay, by Eleanor Newbigin, discusses law and fiscalism through an examination of re-

3 FAUZIA SHERIFF, Harmony Ideology Revisited: Spatial Geographies of Hegemony and Disputing Strategies amongst the Santal, in: *The Journal of Legal Pluralism and Unofficial Law* 45 (2012) 124–143.

4 NASSER HUSSAIN, Hyperlegality, in: *New Criminal Law Review* 10 (2007) 514–531.

forms in personal law that occurred in the interwar period. According to Newbigin, Indians themselves became agents of social change when they became elected legislators after the constitutional reforms of 1919 and 1935. The author's main argument is that India's transformation into a democracy was not only due to political configurations but was also carried forward by economic management. Newbigin illustrates these concepts through the Hindu joint family's unique position in Indian income tax law, and shows how the economic citizenship granted to women did not reduce the importance given to the HUF (Hindu United Family), which was the primary economic agent. This concept is an elaboration of the work done by Ritu Birla.⁵

The editors have succeeded in putting together an introduction that assists the reader in navigating the book along its varied and complex themes. While the book is extensive in the wide range of topics it covers, it would have also been useful to include authors working on the eastern and central parts of India, to help understand the totality of historical legal cultures from India. Additionally,

the scope of the book could have been expanded by covering more groups of people that interacted with colonial law – not only Hindus, but persons from other religions as well as tribal peoples. This would have offered a holistic view of the legal pluralism that was prevalent across the Indian subcontinent at the time.

This book is an important and necessary contribution to the field of Indian legal history. By covering different subjects and different geographical parts of India, it points out that when law is seen as part of a wider normative field, the various meanings we derive are produced through an amalgamation of social, political and epistemic struggles. The book raises relevant questions regarding currently accepted notions of colonial law and seeks to explain how law at times empowered and created new narratives of history. The bibliography at the end of the book provides an extensive resource for scholars seeking an overview of work done in this and related fields, and is therefore extremely useful. ■

Marcelo Neves

Constituição de Weimar, presente!*

A Constituição de Weimar, republicana, mas oficialmente denominada »Constituição do Império Alemão« [*Verfassung des deutschen Reiches*], foi aprovada pela Assembleia Nacional da Alemanha, no Teatro Nacional Alemão, na cidade de Weimar, em 31 de julho de 1919, tendo sido promulgada em 11 de agosto e entrado em vigor em 14 de agosto de 1919. Teve vida curta, durando menos de 14 anos, pois perdeu a sua vigência, embora nunca formalmente como um todo, com o Ato

de Autorização de 23 de março de 1933, pelo qual o parlamento concedeu plenos poderes a Adolf Hitler, abrindo »juridicamente« o caminho para o Nacional Socialismo como regime totalitário.

Apesar de sua curta duração, a Constituição de Weimar, com o seu ideário social-democrático, influenciou o constitucionalismo tanto da Alemanha quanto de países estrangeiros, tanto no plano da prática quanto da reflexão teórica sobre o constitucionalismo. No nível prático, por exem-

5 RITU BIRLA, *Stages of Capital: Law, Culture and Market Governance in Late Colonial India*, Durham/NC 2009.

* UDO DI FABIO, *Die Weimarer Verfassung: Aufbruch und Scheitern – Eine verfassungstheoretische Analyse*, München: C. H. Beck 2018, 299 p., ISBN 978-3-406-72388-9
HORST DREIER, CHRISTIAN WALD-

HOFF (orgs.), *Das Wagnis der Demokratie: Eine Anatomie der Weimarer Verfassung*, München: C. H. Beck 2018, 424 p., ISBN 978-3-406-72676-7