

Codification of law in india



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Douglas C. North in his book 'Institutions, Institutional Change, and Economic Performance' talks about the importance of institutions, and how these institutions influence economic performance. Institutions include both informal rules[1] like code of conducts, traditions and customs and formal rules like constitution, laws and property rights[2]. People generally pay attention only to the formal rules that exist in the society and the informal rules don't get the attention and importance that they should get. The British in India did the same thing. But, North argues that these informal rules are also important and they shape the future of the economy. Institutions as defined by North are humanly devised constraints that structure economic, social and political interaction.[3]

Entry of British in India

When the British came to India in 1600s they saw a society which was not governed by any formal laws like the Bible (which was considered to be a divine source of power, law and rules for them) which governed the English; but a heterogeneous society where every individual followed his or her own custom and tradition which were varied. There was no uniformity in the practices that were followed by the people. The concept of formal law like being governed by a uniform system of law or a constitution was an alien concept to the Indians. Kautilya in Arthashastra recognizes existence of four sources of law which are 'dharma' (scriptures), 'vyavahara' (mutual agreement), 'charitra' (local custom) and 'rajashasana' (state decree).

[4]Kautilya says that these were in ascending order and that the state order prevailed above all the scriptures and customary practices, when a conflict would arise. Similarly even Ashoka and Akbar developed laws which were to

be followed by the subjects but they never mandated the people to follow these laws unless their customs were such so as to lead to communal disharmony. Thus, we see that the Indians had complete freedom to practice any norm, practice, custom etc. that they pleased as long as harmony was maintained.

When the British stayed here as traders they did not interfere into these local customs and practices and were least concerned about it. When they came to the sub-continent the political power was weak as the power of the Mughal Empire in the center was crippling, thus making it easier for the British to gain political control and make a strong foothold in India. The English did gain the central control but their supremacy would only be recognized by the people if they would resolve disputes, which encouraged the British to develop judicial system in India. The law provided the British nothing less than a comprehensive ideology through which to rule.[5]

The ideology which was used by the British was as Edward Said talks about in his path breaking book “ Orientalism”.[6]They made the Indians believe that they were barbaric, uncivilized, in darkness and backward and it was their (British) duty to make the Indians civilized, modern, and progressive and bring them enlightenment. There was cultural hegemony which existed and the British believed that they could improve the Indian situation. The image of the cruel and superstitious natives who needed Christian salvation was deliberately constructed by the Evangelists.[7]

Informal Institutions in early India and path dependence

Initially the British tried administering the practices, norms, culture and traditions that were prevalent in the Indian society, but as there was lack of uniformity as everyone followed different customs and traditions the British found the administration to be difficult. James Mill and Thomas Babington Macaulay wanted to codify the laws in India and wanted to conduct an experiment and see how codified laws worked. They wanted to make the laws based on the principal of ‘utilitarianism’ and wanted a code which was “symmetric in all parts”[8]and which would bring in uniformity. Thus, began India’s shift from an informal institution where interactions between parties were based on social norms and customs to formal institutions like codified laws.

The natives in India for centuries had been following their own local “customs and usages”. [9]The Indians had been travelling on a path where they were not mandated to follow a particular law or text and were free to choose the norm or custom that they wanted to follow. Since there were no restrictions on them the Indians had complete freedom. The Indians had been on this path for a long time and thus there was “path dependency”. [10]This means that since the Indians had been traversing this path for a long time taking an alternative path would be difficult and there would be a high price for changing the path. Another definition of path dependency is that which states that history matters and this affects the possible outcomes in future.[11]The change in path in future becomes difficult because of the “increasing returns” or “positive feedback”[12]that is received because it has been being followed for a long period of time by large number of people.

With the idea of the British to bring in formal rules and to codify laws there was a shift in the institution from informal to formal. Shift in the criminal sphere was not difficult as criminal law was universal and was to be applied universally on everyone. Warren Hastings agreed with this codification, but objected to the codification of the personal laws of the Indians as he knew it was dangerous and wanted to stay away from it.[13] Since the British could not impose their ideology[14] Hastings decided that there would be Indian officials like pandits and maulvis who would help the English judges take decision. Since, the English judges were unaware of the Indian jurisprudence, this help by the officials was essential for them to decide upon cases.

Reasons leading to shift in institution from informal to formal

The court wanted specific solutions to complex issues. The colonizers did not pay any importance to the existing diversity and would ask questions of general rule and the pandits would answer keeping dharma in mind.[15] The answers which the British got were never in tandem with the questions asked, as the pandits and maulvis had never faced such a situation before and the answers differed from one pandit to the other; and these answers were then accepted as ' general rule of law' and were imposed upon the people. Different pandits came to different conclusions even when the circumstances were same because they would refer to different texts or scriptures as there was complete freedom to choose the custom that people wanted to. For example if an Englishman would ask how to turn into a Hindu, the method or the procedure told by different pandits would be different as there was no one particular way of doing it. Thus, there was no uniformity.

The pandits in India were not an organization like the Pope of the church. The pandits did not interfere in the political sphere at all; unlike the church where the Pope would coronate the King and then only could he rule. There were varied customs prevailing and every pandit would interpret the text in a different way as there was no single interpretation like there was of the Bible. A well – trained pandit would be in a position to cite numerous versus on particular topics or only those that made a particular point useful to a specific scenario or indeed he might express his own opinion on the matter[16]but these differed greatly from each other. The customs would change from place to place and the British were baffled at this dissimilar existence of customs. Thus, there was no uniformity and certainty in the decisions given by the pandits and the maulvis. This led to a mistrust of them by the British and hence they decided to codify the law. Another reason for codification of the laws were that they believed that there was popular demand for such changes; and the popular demand according to them consisted of group of elite Hindus who were a part of the British administrative structure itself.[17]

Organizations acting as change agents

North in his book also talks about the existence of organizations which are group of individuals bound together for purpose to achieve objectives[18]and are created to take advantage of the opportunities[19]that the existing institution provides them and then either work within the existing institutions or change and alter the existing institutions, depending on the objective to be achieved; and hence the organizations which are created out of the existing choice set act as major agents of institutional change.[20]

When the British realized that administration in India was difficult because of the non-existence of any certain law they finally took the bold step of codifying the personal laws as well. Hastings had wanted to stay away from personal laws as he realized that marriage in India was tied to religion and they had decided on staying neutral towards the native religious affairs and secondly because they thought that their interference might lead to communal violence.[21] But the assistance of the pandits and maulvis was now looked at with mistrust and thus, Hastings selected 11 pandits to codify laws which would then be followed by everyone.

The pandits came up with ‘ Vivadarnavasetu’ which literally means ‘ a bridge on the ocean of disputes’ was the original Sanskrit version. Later on these were translated in English (with which also there were problems which will be dealt ahead) under the name of “ A Code of Gentoo Laws”. The meaning was totally transformed and words like ‘ code’ and ‘ law’ which were never a part of the original text were now legitimized.[22] Then again William Jones appointed Jagannath Tarkapanchanan, the legendary scholar on all branches of the Dharmasastras to compile ‘ Vivadabhangarnava’ which literally means ‘ a break wave on the oceans of disputes’ and it was later translated into English under the title “ A Digest of Hindu Law”. Again the importation of British concepts of ‘ digest’ and ‘ law’ were used to legitimize the transformation of the prescriptive guidelines in the ‘ Sastras’ as legal rules to be administered by the court.[23]

Initially the British gave regard to the customs that were ubiquitous while codifying the laws,[24] but even then they realized that there were uncertainties and they could not trust the Indian officials as there was a

possibility of them defrauding the company for their own benefits.[25] Thus, many English jurists like William Jones, Colebrooke decided to translate the texts into English so that the judges could use it. But the translations were done by European scholars. When translations were done the essential meanings got lost and the entire meaning and its essence could not be understood and translated, as there are certain words the exact word for which might not exist in the other language. For example the word ‘ dharma’ which means ‘ the all en-compassing duty to do the right thing at the right time, at any point of one’s life’, was simply translated as ‘ law’.[26]

The English jurists who translated the texts into English were the organization which objected to the existing informal institution. This organization had the common objective (having political control over India) was the ease of administering laws. The goal which the organization sought to achieve of uniformity and stability could not be achieved with the existing institution of informal norms, code of conduct and behavior; they had to get in something more concrete like formal laws so that there could be certainty and uniformity. This organization emerged because of the existing choice set which was available to them because of the informal rules in place and they took advantage of the position that they had attained and acted as change agents or as North would call them entrepreneurs in economic terms and gave India codified laws.

Importance of informal norms

North in his book also states that move from informal to formal institutions is a slow process.[27] Although formal rules may change overnight due to political or judicial decisions, informal constraints embodied in customs are

much more impervious to deliberate policies. These cultural constraints not only connect the past with the present and the future, but provide us with a key to explaining the path of historical change.[28]

In India if we see the move from informal non-codified laws to formal codified laws was a slow process as the British initially tried to administer the informal rules only, but when the result was not to their satisfaction they decided to move towards codified formal rules. But, if seen from another perspective then we see that the change was all of a sudden as the British imposed these codified laws on the Indians when for a long time they had been following a different path altogether. This imposition of the laws on the Indians could not percolate into the society and could not become a part of the society easily as these were imposed from outside and were not from within the society itself and sometimes were not in conformity with the existing norms.

Change from informal to formal institution has a cost – Transaction Cost

Now this institutional change from informal to formal could not be without any cost. There was a cost which the society had to bear, but this cost was not taken into consideration when the organization was taking the decision of altering the institutions according to its own benefit. The cost borne was the change of many customs that were existing, loss of many customs as they were not codified, freezing of identities, creeping in of foreign ideologies and biasness and death of plurality of customs, traditions and indigenous practices. This cost is known as transaction cost as it is the cost of changing the path upon which one has been travelling for a long period of time (non-

codified laws) to a new path (codified laws). Transaction cost is a result of the institutional change, but this transaction cost also could have brought in Indians a feeling of unity which had not existed before within a group and also led to the abolishment of many evil practices that were being practiced by the people.

Codification of ‘ Hindu law’ was a humongous task because there was no existence of anything called the ‘ Hindu law’ (its existence was presumed by the British keeping in mind the bible which was their source of law) prior to the colonial era, and secondly because what the British mistook to be the source of ‘ Hindu law’ was so vast that they were unable to codify everything as there were various norms being followed in the society which did not come from some ancient scriptures or religious texts. In England there existed a homogenous society with everyone following what the church told them and as already mentioned above the church was an organization and hence their interpretations of the bible (which was the divine source of their law) were also same. So when the English came to India they came with a framework in their mind that, there would be a homogenous society and that this homogenous society would have a divine source of law. But, the British were in for a surprise when they came to India. They realized that a heterogeneous society with various different practices existed in India and they failed to find a ‘ divine source of law’; but were adamant on finding a source of law something which was akin to the cannon law and hence in their desperate attempt to find a source, William Jones who was to then translate the “ sources of law” in to English considered ‘ Manusmriti’ which were the ‘ Memories of Manu’ to be the source of law and the translation came to be

known as the “ Institutes of Hindu Law”.[29]India does not have a canon law which legitimizes a uniform code for all the diverse groups of the community; but, because of this arbitrariness the British started patronizing education and interpretation of the shastras for their own.[30]

The British thought that they would derive the law from the texts and scriptures but this task was cumbersome and impractical. They were influenced a lot by the legal theory especially that of Jeremy Bentham.

[31]Bentham believed in the principle of utilitarianism. Utilitarianism means greatest good for the maximum number of people. In such a scenario it is the minority that is left out and their needs are not taken into consideration; but while codifying these laws the opposite happened. Codification of these laws was done by few pandits who had their own interpretation of the texts and it was done on the demand of a few people with whom the British interacted. Thus, what got codified were just a few traditions and customs and a large number of them were left out and hence got lost.

There was strong impact when colonial law encountered the personal law. It led to customs like property rights which are important for the development of any society being substantially altered in Bengal and rights of women to hold property was also substantially changed.[32]There were two schools of thought that existed in India ‘ Mitakshara’ and ‘ Dayabhag’ with regards to property rights. Mitakshara was followed everywhere except in Bengal where Dayabhag school of thought was followed. When codification was done by William Jones he was influenced by the Dayabhag School and hence, most of their beliefs got codified and beliefs of the other school were left out leading to the death of many customs. The loss of customs was not only because

they were not codified, but also because the judges refused to recognize the existing norms if they did not have any spiritual authority. Customs that the people followed were something which had been developed by the community on their own and had no spiritual backing and hence they were considered invalid by the courts. When there was a conflict between customary law and the official law, then the customary law had to be established and then only would the customary law prevail. But the standard set for proving customary law was so high that hardly any law could meet the requirements and slowly all of them withered away.[33]The judges also had the power to strike down the law on the basis that they considered it to be against public policy. There was no definition given as to what was against public policy and this gave unfettered power in the hands of the judge to decide which laws were valid and which were against public policy. [34]

There was freezing of identities as Hindus were now considered to be a larger group of people and were considered to be a 'community' while on the other hand the Muslims were considered 'outsiders'. [35]This also happened because in courts the judges had to apply Hindu law to the Hindus and the Muslim laws to the Muslims; so now the people had to decide which religious community they belonged to, whereas initially there was no such pressure on them to identify themselves with a particular religion and were free to choose any custom of any religion they wanted to follow. The translation of the code was done by English jurists who were trained in English laws and customs. So when they translated the law they could not keep aside their biasness and facets of English law crept in. Thus, the new

law which came into being comprised of first, the interpretation of the laws by the judges, in the form of case laws acting as precedents and secondly, through codification of the scriptures. They also used the principles of justice, equity and good conscience while deciding the cases. This led to the emergence of Anglo Hindu law.[36]

As Anderson in ‘ Islamic Law’ says[37]:

“ the construction of Hindu law in India by the British colonial government [and] the British effort to “ find” Hindu law...assumed that the Hindu law would be found through...deduction from precedent and a focus on cases. Hindu law gradually came to be based on previous judges’ decisions, not on Hindu sacred texts. These texts themselves were mistranslated and selected according to the conceptions of English civil law, so that Hindu law was ultimately defined in terms of European conceptions of Hindu law.”

But the transaction cost borne also helped as this death of plurality led to removal of many practices that were evil and were rampantly practiced in the society. Various acts were passed which made the social condition better, like the Sati regulation of 1829, the Caste Disabilities Removal Act 1850, the Hindu Women Remarriage Act 1856, and Child Marriage Restraint Act of 1929. Removal of Sati was an important step as this practice was highly followed in Bengal. Sati was so prevalent in Bengal because they followed the Dayabhag School of thought which gave property rights even to women. These acts helped improve the social conditions in the society at least on paper if not reality, as there is evidence to show that sati was more widely practiced after the regulation that came into being. There were

retentionists as well who were unhappy with such codes, and in many areas the customs were not changed in accordance to the code and they still continued; as a stroke of pen cannot completely do away with or abolish customs that had been being followed for centuries. This could have brought in more unity as now the Indians had something to identify themselves with, which were common to all the people.

North says in his book that the resultant path of institutional change is shaped by:[38]

The lock - in that comes from the symbiotic relationship between institutions and the organizations that have evolved as a consequence of the incentive structure provided by those institutions - the new path of codified laws that India started walking on after codification was traversed on for a long time and the path became locked in history and thus, gave India codified laws which exist even today. This codification could only take place because the existing institutions did not provide for the political unity of India which gave British the incentive to codify the laws using their political power; and

The feedback process by which human being perceive and react to change in the opportunity set - keeping aside the costs borne because of codification, from British point of view this process of institutional change was beneficial as it helped in smoother governance of the country and better control over the people.

Bengal as an illustration

Now let's look at the existence of this framework through example of Bengal.

During this time Bengal comprised of Bihar as well and was named Bengal

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presidency. The populace of Bihar consisted of Muslims as well and not only Hindus. As already mentioned above there were two schools of thoughts that existed. One was called the Mitakshara which was followed in all parts of India and the second being Dayabhaga which was followed in Bengal only. There was difference in the two Schools because they had different rules which governed them. for example: in Mitakshara the son had an interest in the property as soon as he was born, while in Dayabhaga School the son got the property after the death of the father.

According to the Dayabhag School the women had substantial property rights. In some cases they managed the property on behalf of the male members and on other occasions they would hold property in their own name after the death of the husband. During the British era in the 19th century the amount of property that would be held by the women substantially reduced than what it was earlier. Their property was vulnerable to competing claims of the local powerful men. This change also happened because in England the British women did not have property rights and when the British saw this new scene in India while codifying the laws they brought this change and the right of women to hold property was substantially taken away.

Warren Hastings had been the governor general of Bengal but towards the end due to financial instability he was replaced by Lord Cornwallis. One central aim of this project was to restore the landlord and property rights that existed a generation before.[39] Lord Cornwallis planned to give a constitution which would protect the personal property of the individual and thus help in the prosperity of the state.[40] Thus, he created new offices and

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courts to collect more revenue which was the aim of the British. When the British came to India they came with their English notions of how property was related to politics. So when they came to India lord Cornwallis could not disassociate this notion and believed that there would be the existence of same relation even in Bengal.[41]

Using their pre-colonial notion of the existing offices and without bothering to understand the existing social institutions they removed Indian officials from important posts and made them mere informants or agents. During Warren Hastings stay he gave importance to the customs and usage of the local area, but when Lord Cornwallis came he thought that the information about the customs could be gained from the inhabitants of the place and thus abolished the office qanungu[42]who was the district officer and would be a ready source of information regarding the existing customs. But Lord Cornwallis removed the office thinking that the post had deep rooted immersion in the historical continuities of a particular society made them easily corrupt and there were chances of them defrauding the Company with the landlords.[43]

This essentially happened because the British wanted to maintain their supremacy and did not want to lose their political power in India, but while being insecure about the hold of power politically they forgot to give due importance to the existing social institutions which would have made their rule easy. The constitution given by Lord Cornwallis had a paradox.[44]It was based on the Burkean philosophies of trust and customary practice, but sadly, when it came to Bengal both were nonexistent as there was severance

and a distance existed between the world of government and the relations it governed.[45]

The judges in the court had officials that would assist them, but then the British started mistrusting these officials who were either pandits or maulvis. Thus William Jones wanted a text which could help the judges decide cases and their dependence on these officials reduced. The book was a translation of Sanskrit commentaries on contracts, property and inheritance laws written by Jagannatha Tarkapanchanam who was the most respected jurist in India in the 18th century. This Digest was not to codify the laws but to compile all the usage so that administration would be easy and not an attempt to codify laws. The text was meant to supplement the decision taken by th