Chapter Two

“Phantom of the Brain”: Colonialism, Theologisation and the Making of Hindu Law

Or is that Hindu law is a mere phantom of the brain, imagined by Sanskritists without law and lawyers without Sanskrit?

-J H Nelson

2.1 Concerns and Problems

It is a well known and accepted fact that our present day legal system is inherited from colonialism and many of our criminal and civil laws remain practically intact from colonial times. However the making of these secular laws is often seen as a narrative of progress with religion receding from all spheres of life and the secular coming into being due to the process of secularisation. It is assumed that the project of colonial legal reform through the codification of law is an instrument of such secularisation. This narrative assumes knowledge of the religious and the secular as legal categories. The making of Hindu law has been characterised by such assumptions. In this chapter one proposes to understand these assumptions by looking at the narrative of British codification. This narrative allows us to understand why such assumptions are prevalent. In interrogating these assumptions one moves away from taking the religious and the secular as distinct self-explanatory categories. Such a move helps us in moving away from understanding legal categories as being

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1 Nelson (1877,2).
definitional and seeks to identify the processes and structures that generate the legal category of religion.

2.2 The Narrative of British Codification and the Category of “Hindu Religion”

The colonial legal system had its origin in the legal relationship between the East India Company and the British Government. In 1623 the East India Company was granted a charter from King James I to exercise authority over all English persons residing in the East Indies. However the first authority for the introduction of British law into India was granted by Charles II who by the charter of 1661 gave the Governor and Council the power to enforce obedience from Englishmen within their jurisdiction according to English law. In 1683 Charles II granted a charter to the Company authorising it to establish one or more courts at such place or places as it may direct. The court was to consist of a person “learned in the civil law” and two merchants appointed by the company and was to hear all mercantile and maritime disputes within the charter limits of the company. Subsequent to this charter an Admirality Court and a Mayors Court were set up in Madras and Bombay.

Although the Mayors courts and the Admirality courts settled disputes that involved natives, first-hand experience with indigenous customs and forms of dispute settlement only occurred when the East India Company was granted a zamindari of three villages in Bengal through a sanad of the Mughal emperor in the year 1668 (Jain 2009, 30). Such administrative responsibilities as a zamindar involved the administration of civil and criminal justice. These responsibilities necessitated the setting up of judicial institutions and a representation was

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2 A description of these early years is provided by M.P Jain (2009) and Morley (1858).

3 A description of the legal infrastructure set up by the British in Bengal and their attempts to understand local law and custom is provided by Nandini Bhattacharyya-Panda (2008).
made to the Crown requesting the grant of a charter to set up such institutions. Such a charter was then granted “.. for the benefits of Europeans and many of the native who live with you having particular customs of their own...”  

It was prescribed in 1727 that four courts be set up which were the Mayor’s Court, the Court of Appeals, the Court of Request and the Court of Quarter Sessions. There was also the Zamindary Court and the Court of Kutchery which dealt with the administration of indigenous law.

According to Nandini Bhattacharyya-Panda (2008) the Mayor’s Court had the most extensive powers among the newly established courts. She mentions that a prominent feature of the judicial proceedings was their reliance on arbitrators who possessed knowledge of local norms and practices. These were the pundits who were considered the expounders of the Hindu scriptures and the maulvis who were the experts on Islamic religious texts. The British had to rely on these arbitrators as they did not have any knowledge of indigenous law. This was not always the case and she points out that the Company in a particular case regarding indigenous rules of succession instituted an independent inquiry by an Englishman to determine the custom of the country. Such a move indicated the Company’s attitude towards the administration of indigenous law and their desire to gain concrete knowledge of the customs and practices of the people. This was reflected in the writings of British officials in Bengal such as Scrafton, Holwell and Bolts who identified the indigenous rules of governance to be in the dharma sastra, the holy texts which were monopolised by the Brahmins.  

Scrafton (1770) criticises earlier writers for suggesting that there is no law in India saying:

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4 Letter to the Court of Directors to the President in Council at Fort William dated 17 February, 1726 quoted in Bhattacharyya-Panda (2008,39).

5 An account of the narratives of these officials is provided by Nandini Bhattacharyya-Panda (2008).
I am ready to allow, there are no written institutes; no acts of parliament; and that there is no power to control the emperor; but I must assert, that they proceed in their courts of justice by established precedents; that the lineal succession, where there are children, is as indefeasible here as in any country that has no check on the supreme power........(24)

Scrafton perceives an established system of governance and further suggests that the Muslim conquest did not result in Hindu law being overwhelmed as the “Tarters” who required few laws “could distinguish the use of them in the countries they conquered, and accordingly, both in China and India; they made no innovation, so that the old Gentoo laws still prevail (24).”

Where these laws could be found Scrafton had no doubt:

The Bramins say, that Brumma, their lawgiver, left them a book, called the Vidam, which contains all his doctrines and institutions. Some say the original language in which it was wrote in is lost, and that at present they only possess a comment thereon, called the Shastah which is wrote in the Sanscrit language, now a dead language, and known only to the Bramins who study it.(4)

He further adds that:

.....and though all the Gentooos of the continent, from Lahore to Cape Comorin, agree in acknowledging the Vidam, yet they have greatly varied in the corruptions of it: and hence different images are worshipped in different parts; and the first simple truth of an omnipotent Being is lost in the absurd worship of a multitude of images, which, at first were only symbols to represent his various attributes (5).

Scrafton then remarks that the Brahmins have distorted the doctrines of the founder and exceeded the rest in their abuse of power. This narrative of sacred legal texts was carried forward by Holwell (1765) who confirms that:

...... it appears therefore that they date the birth of the tenets and doctrines of the Shastah, from the expulsion of the angelic beings from the heavenly regions; that those tenets were reduced into a written
body of laws, four thousand eight hundred and fifty six years ago, and then by God’s permission were
promulgated and preached to the inhabitants of Indostan. (22)

Holwell also confirms that there has been some corruption in the texts. One thousand years
after they had been revealed, the Chitah Bhadeh Shastah was formed, and five hundred years
later the Aughtorrah Bhade Shastah was produced. Three thousand three hundred and sixty
six years later in the form of the Aughtorrah Bhade Shastah was still being followed. This
corruption provided for a “schism among the Gentoo who had followed one profession of
faith”. This allowed for the Brahmins of the Coromandel and the Malabar to set up their own
faith and scripture. Holwell then expresses regret that:

....... the Goseyns and the Bramins having tasted the sweets of priestly power by the first of these
Bhades, determined to enlarge, and establish it, by the promulgation of the last; for in this the exterior
modes of worship were so multiplied, and such a numerous train of new divinities created, which the
people never before had heard or dreamed of, and both the one and other were so enveloped by the
Goseyns and Bramins in darkness ... (16)

Bolts (1772) decries the fact that Europeans lack knowledge of Sanskrit and have to be
exposed to the ignorance and impositions of the modern Brahmins. He suggests that it is
important to find a true account of the doctrines of the Hindus. This becomes an important
endeavour as the old established laws and actual form of government of the Mogul empire no
longer exists (49).

This perception of the law of the Hindus compelled Warren Hastings to appoint a team of
eleven Pundits to compile a code on Hindu law in 1772. The Dharmasastras were
characterised by the British into two kinds of literature. The original dharmasastras which
were believed to have their origin in the Vedas were the Manu smrithi, the Yagnavalkya

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6 An account of this is provided by Duncan Derrett in a chapter titled “The British as Patrons of the Sastra” in Derrett (1999).
smrithi, the Narada smrithi, the Visnu smrithi and others. This tradition was developed and maintained through centuries by Tikas and Nibandhas. The Tikas provided explanations of the Smritis whereas the Nibandhas were discourses that were assembled by classifying a large number of texts and extracting the rules of dharma from authoritative texts. Thus Vivadarnavasetu, also known as “A bridge on the ocean of disputes” was compiled in Sanskrit on the basis of selected legal materials from these texts. It was then translated into Persian and then into English under the title of A Code of Gentoo Laws by Nathaniel Halhed.

Nandini Bhattacharyya –Panda comments that Hastings saw this codification as a way to reduce the dependence on pundits whom he felt provided inconsistent opinions. He also saw this as breaking the monopoly of Brahmins over this tradition. She further comments that the later Dharmasastra literature in the form of Nibandhas or commentaries could not be considered as codification or attempts to standardise law. They were merely exercises in interpretation and reinterpretation as well as theoretical exercises meant to rationalise certain changes that had already taken place in society. None of these texts were used as standard law text books. Derrett comments that the chapters of the code were compiled on the basis of certain topics. The order of appearance of the chapters did not correspond to anything in the sastric texts and did not have the logic and completeness that a common lawyer would expect, although well digested for a Sanskrit legal work. Hastings later passed the Administration of Justice Regulation of 1780 which provided that inheritance, marriage, caste and other religious usages were to be administered to Hindus according to the laws of the Shaster.

This code was not considered adequate enough to meet the needs of common lawyers and the famous Orientalist William Jones who was a judge at the Calcutta Supreme Court was determined that there should be other sources comparable to Justinian’s Corpus Juris. His intentions were reflected in a letter dated 24th October 1786 that he wrote to C.W. Boughton
Rouse (Jones 1970) where he stressed the need to complete a digest consisting solely of original texts arranged in a scientific method. The materials would be six or seven law books believed to be divine with a commentary on each of nearly equal authority and would be analogous to Littleton and Coke. His collaboration with the pundits yielded another treatise *Vivada-bhangarnava* or “Ocean of resolutions of disputes” by Jagannatha Tarkapancana which was translated by Jones’s successor H.T. Colebrooke. This was still difficult for Europeans to follow which led to Colebrooke commissioning new treatises. There were a plethora of new works between the years 1826 to 1829 such as that of Pitambara Siddhantavagisa’s *Dayakaumudi*. Many other commentaries on Hindu law including those by British authors such as Francis MacNaughten and Thomas Strange followed. Two main schools of law were identified which were the Mitakshara and the Dayabhaga. By the 1860’s the British had developed a body of Hindu law and had done away with the practice of having pundits or maulvis interpret this law. Certain spheres of life were also deemed to outside the realm of religion which led to civil and criminal legislation such as the Indian Penal Code 1869, and the Transfer of Property Act 1882, being enacted.

Despite all these efforts at reform, there were many difficulties in the administration of justice which led to strong protests from British judges such as A.C.Burnell and J.H. Nelson. According to Burnell (1868) the digests or the nibandhas were not intended to be actual codes of law as they were written in Sanskrit which was the monopoly of the Brahmins. These digests also mainly referred to the Brahmins and ignored the “numerous un-Aryan peoples scattered about India”. These usages in the South of India could not be referred to the Dharmasastras. He also suggested that these digests were not authoritative as they were not used by judges and were similar to treatises of jurisprudence in Europe. Since the digests followed one system of interpretation which was the Mimamsa. The differences lie in their interpretation of original texts from Smritis not in their interpretation of local usage.
Therefore the schools of law could be considered to be meaningless and this was not the manner in which these books could be characterised. He further suggested that “custom has always been to a great extent superior to the written law in India” and “By custom only can the Dharma-Castra here be the rule of others than Brahmans, and even in the case of Brahmans it is very often superceded by custom” (xv).

In agreement with Burnell was J.H Nelson a judge of the Madras High Court. In his work on Hindu law (Nelson 1877) he details the legal difficulties that the Madras High Court faces in the administration of Hindu law, being forced to recognise the customs and practices of various social groups whose practices are inconsistent with Hinduism. He remarks that the Austinian notion of law wherein the non Muhammadan social groups have agreed to accept and have been compelled to guide themselves by an aggregate of positive laws or rules set to them by a sovereign or other person having power over them is absent in India. In this context he criticises William Jones for identifying Manu as the law giver in his Institutes of Hindu Law and making the Manu Smriti a law book which was to be characterised in the same manner as the Institutes of Justinian would be for the people of Rome. He further criticises Jones for confusing the Manu of the Manavas an extinct sect with other figures named Manu in mythology. He states that subsequent scholarship such as that of Colebrooke and Strange, have followed this error in assuming that the paramount authority lay in the Code of Manu. This consequently led to the belief in “the ‘four classes of Hindus’ and the continued degradation of the unhappy Sudra (Nelson 1881, 13)”. It would be impossible to prove that a man called Manu lived and set laws to men. This is further confirmed by the lack of evidence of written laws:

If I am rightly informed, there is not a trace of the existence of a set of positive laws such as the twelve tables of Rome, the Code of Draco, or the commandments of the Jews: but on the contrary we have the
evidence of Megasthenes, and of Strabo (quoting Nearchus), to the fact that in old times there were no written laws in India (Nelson 1877, 4)

Nelson also raises questions about the nature of caste in India and the status of Brahmans in being the key interlocutors in interpreting and upholding the Code of Manu. In his letter to Justice Innes (1882) he states that the Brahmans of South India have developed their own peculiar customs and practices and therefore one should not apply the law applicable to Brahmans in the North to them. In investigating the term Hindu, Nelson points out that:

It seems to be at least doubtful, therefore, whether the two leading sects in South India, the Vaishnava and the Saiva, can properly be said to be Hindu, and further it seems that they have heretical books of their own, which part of them regard with the same respect with which the orthodox Brahman regards the Vedas. These books, therefore, need to be perused and anxiously investigated by the zealous student of Hindu law, who must by no means be content to assume that the Dharmasastras of the Brahmans are the sole repositories of the laws and usages of the country. (Nelson 1881, 94)

Nelson also remarks that the groups considered to be Sudra may have their own scriptures propounded by their own Gurus and priests and may not avail of Brahmanic assistance in performing ceremonies and religious services. He arrives at the conclusion that:

There is not, and so far as appears never has been, a Hindu nation or people, in the proper sense of the term: and it would be idle to attempt to discover by research a body of positive laws based in the general consciousness of such a nation or people (Nelson 1877, 11)

In order to ensure adequate governance of the people and remove the quandaries faced by the courts, Nelson recommended that there be an inquiry into the usages and customs of the Indian castes without using concepts from existing Hindu law. A set of practical rules should be in place instead of a manual of Hindu law. An effort should be made to ascertain the role of Gurus and caste heads in the context of authority to interpret customs.
2.3 Analysing the Narrative of Codification

This narrative of codification is the standard account that is provided in Indian legal history. The main thread running through such a narrative is that codification as a project has triumphed over customary law. Such codification was based on the sacred texts of the Hindus which were followed by the Brahmin priestly caste. This codification was carried out despite opposition that it did not represent the true customs of the people of India. This has had implications which are reflected in the questions that have arisen regarding the legal regulation of religion. It is assumed that such codification can represent the customs of the people. If it does not do so, it is assumed that law as contained in codes and as an instrument of the state can effectively represent such customs. For a better understanding of these implications we need to further examine Indian legal history which has not only continued with these descriptions of the category of religion and the process of secularisation but also relied on them to develop further theories of the inadequacies of such codification.

Radhika Singha’s account of the legal discourse around sati that finally led to its abolition is an example of the result of such an account. Singha makes the claim that the abolition of sati had to do with placing public authority at a transcendental level so that “public parley between the juridical claims of the state and those made on the citation of religious belief was to be curbed (Singha 1998, 115)”. She comments that the government was compelled to abolish sati as it was not an imperative religious duty, but also due to it being impossible to prevent its abuses. Its abolition allowed for secular legal categories such as homicide to become applicable. However the application of these secular legal categories did not show

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7 Another proponent of this viewpoint is Marc Galanter (1997).

8 Chapter One “The Impossibility of Regulating Religion” shows the problems behind these assumptions.
the commitment to universalism and the rule of law which should have come with legal
codification. This was noticeable in the category of “voluntary homicide with consent”
which was included in the Indian Penal Code and was meant to cover “voluntary religious
suicide”. Singha’s claim that the category of the public was invoked in the context of
colonial criminal law merely relies on the standard narrative of religion losing importance
and the secular coming into being. Such a claim makes the assumption that the category of
the public which is a secular category follows the receding of religion and the codification of
law is part of this process of secularisation. This assumption is often behind the belief that
law can regulate religion (as law and religion are entirely separated from each other) and can
effectively resolve difficulties of a religious nature which has been detailed in the first
chapter

This narrative of codification is also seen as the setting for utilitarian values. Stokes (1989)
examines the utilitarian influence on the codification project showing how centralisation in
governance and the effort to achieve precision and simplicity in law making was the result of
such influence. It is in this context that this narrative has been questioned. Neeladri
Bhattacharya (1996) draws our attention to the fact that one hundred years later after Warren
Hastings’s attempt to derive law from scriptural texts, efforts were made to codify the
customary laws of the Punjab. He calls this a shift from text to practice and locates this shift
as being a response to the opposition against utilitarianism. He suggests that the late
eighteenth century Orientalist tradition that found immemorial custom in sacred texts and the
project of codifying custom in the Punjab were both rooted in the opposition against
utilitarianism. The Orientalists saw practices as being legitimate only when they conformed

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9 This is visible in other accounts such as Kolsky (2010) who makes the claim that the codification of law
entrenched racial difference in colonial Indian society and the promise of equality before the law was never
realized. Mantena (2010) also suggests that the codification project was integral to the creation of representative
institutions in accordance with native values.
to ancient texts. Present practice could represent perversion. Therefore the Sastras and the Koran that set out the codes of conduct of Hindus and Muslims also defined social relationships and mediated conflict within communities. This tradition was questioned by the utilitarians on the ground that individuals were not bound by ties of community but by a commitment to clear unambiguous rules enacted by a legislative authority. The Punjab tradition reacted against utilitarianism, the colonial administrators and officials seeing custom as being embodied in practices.

Bhattacharya points out that the manner in which the compilation of custom took place relied on textual sources such as the digests compiled by William Jones, Thomas Strange, and H.T. Colebrooke. Therefore “enquiries into such practices remained implicated with in textual processes and were structured by a variety of conceptual assumptions within which these officials operated” (26). He also suggests that there was a similarity between the manner of identification of the texts and the customary practices, informants being important in both. The British identified the pundits as the guardians of the scriptures and in contrast the village elders were considered to be repositories of the knowledge of customary practice.

Bhattacharya further suggests that the authority attributed to the village elders was influenced by a theory of the Patriarchal family (propounded by Henry Maine). Such conceptual assumptions by the British were depended on ideas of precedent i.e. reliance on earlier judicial decisions and the legal doctrine of equity. This was dependent on the attitudes of the various officials who had different methods of verification and thus arrived at different truths about custom. Bhattacharya provides us with two diverse instances of such different truths. In the case of the investigation of customs in the district of Bannu, Thorburn the British official was unconvinced by the initial replies of the Bannuchies. He therefore cross questioned them on the basis of a series of negatives so that he could shape public opinion on the questions that he thought were equitable. In another instance, Gordon Walker who made an
investigation into Ludhiana’s customs found the practice of seeking precedent problematic as it made no distinction between norm and practice. Practices could be used to deny a norm. Tribal feeling was what should be taken into account. Therefore custom could not be judged on precedent or prior practice, but should be based on general tribal opinion (being based on the opinions of leading men in the tribe).

According to Bhattacharya, custom was hybridised by codification, codification appropriating indigenous custom through Western categories and mixed heterogenous traditions. He recognised the perception that customs are frozen through codification is problematic as codes themselves are subject to a variety of interpretations. However the codification of custom seeks to remove the knowledge of custom from the community and vest it in the state.

Bhattacharya also comments that the search for custom was contextualist and the codification of custom in the Punjab was due to its social structure being different from other parts of the country such as Bengal where the social structure was characterised by caste. This prompts us to ask the question whether the attempt to identify law through custom took place only in the Punjab. A contrary answer is provided by Amrita Shodhan (2001) who points out that efforts were made in the Bombay Presidency to identify local customary law.\(^{10}\) She quotes Elphinstone the Governor of Bombay in his Minute dated 22 July 1823 as saying that the ancient treatises known as the Dhurm Shaster which are not clear and consistent by themselves are now buried under modern commentaries. Elphinstone continues:

\(^{10}\) Shodhan’s position on the choice of the colonisers to identify customary law only in particular provinces is that the British administrators were guided by different models of law and governance. In Bengal Warren Hastings and William Jones assumed that Indians already possessed their laws in sacred texts.
Its place is supplied in many cases by known customs founded in deed on the Dhurm Shaster but modified by the convenience of different castes and communities and no longer deriving authority from any written text (Shodhan 2001,49)

Being uncomfortable with reliance on native law officers Elphinstone was convinced that a code of law must be compiled in order to let European judges make decisions independently. The compilation of the customary law involved the collection of exhaustive information on castes. This process of ascertaining the code had to be done by ascertaining in each district whether there was any book of acknowledged authority either for the whole or any branch of law. Secondly one had to ascertain whether there were exceptions to the written authorities and the customs and traditions that existed independently of them. In the Deccan, Arthur Steele was appointed to ascertain the law by identifying the Sastras used by questioning the heads of caste and other persons likely to be acquainted with the law. In Gujarat, Harry Borradaile was appointed for the task of examining the records of the court and extracting the information already obtained on the subject of native law during judicial investigation.

Despite factual evidence that the British made inquiries into the customs of the people including non-Brahmin communities, the narrative of the codification of law based on the sacred texts of the Hindus remains the official and widely accepted account. This may raise the question as to why one narrative has been preferred over the other. However this may merely generate trivial answers such as the complicity of the British colonisers in using such a narrative to subjugate the natives, or the interests of expedient governance.\(^\text{11}\) The question

\(^\text{11}\) This explanation has been provided by Nandini Bhattacharya-Panda who suggests that the dharmasastras were inadequately analysed and identified due to the interests of expedient governance. This merely transforms Europeans into immoral beings. Whereas many Europeans may have been guilty of racial prejudice and bias one could alternatively argue that much painstaking effort and research went into the identification of the texts as illustrated by the efforts of William Jones. Therefore psychologising the colonisers is not helpful. Another explanation that emerges from the narrative is the various regional differences which in certain cases the British acknowledged (as in the codification of law in Bombay) or ignored, such as the case of Madras which was pointed out by Nelson. This however does not explain as to why one model of law was favoured over the other.
or the answers do not help us understand the nature of the narrative of codification. In order to generate an alternative explanation, one needs to identify and unravel the assumptions behind these descriptions.

In order to unravel these assumptions the problem must be analysed differently. One needs to analyse the narrative and its contestations. On examining the narrative it appears to be clear that there are certain interlinked assumptions underlying it. The primary assumption is that despite all the regional differences, there is a peculiar uniformity in the attitude of the British officials in identifying religious texts as legal texts? From Warren Hastings to Nelson in the colonial period, such an assumption has been carried down to contemporary Indian scholars in the twenty first century. Were these texts” religious” and why were they considered religious at all?

The secondary assumption in this narrative is that there must be interpreters for these texts in the form of Brahmin priests. These priests were corrupt and provided faulty interpretations of the texts to suit their own interests. This description of the priests is also peculiarly uniform throughout the various accounts of the colonial administrators.

The contestations to the narrative have a similar line of reasoning. They also assume that there has to be a specific source of law. However where they depart from the earlier eighteenth century discourse is that they assume that law is not to be found in texts but in the custom or the practices of the people. Such practices also have to have interpreters in the form of village elders and caste heads.

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12 Nelson may have questioned the authority of these texts as legal texts but he had no doubt that they formed part of the religion of the Hindus.

13 This is answered to a certain extent by Nandini Bhattacharyya-Panda who shows that these texts were not “laws” but social philosophies. She does not however answer the question as to why they are religious.
These assumptions generate certain questions. Why was it that the texts that were identified as religious were also identified as legal? Why was it the case that there had to be a particular informant in the form of the pundits to ascertain the sacred texts, and the village elders and the heads of caste to ascertain the content of the customary practices? What is the relationship between text and practice and how are textual practices implicated in this? What is the importance of custom?

In order to unravel these assumptions one must take up these questions. In attempting to generate an alternative explanation I will begin my analysis by looking at descriptions of law and religion in an attempt to place these assumptions in a coherent framework. Therefore the first step is to look at the assumption of religious texts also being legal texts. I show that the identification of religious texts as legal texts is not as important as the description that it throws up namely that law is contained in a sacred text guarded by corrupt Brahmins. I look at the questions that such a description raises. The second step is to answer these questions by analysing custom as being integral to the formation of the common law and its transformation in the Western legal tradition. The colonial judicial discourse in the late nineteenth century in the context of the tests applied to custom is then analysed. On the basis of these findings the third step would be understand the dynamic of secularisation present in Western legal history. One then tries to see how the structure of this dynamic recreates itself through the mechanisms demonstrated in colonial judicial discourse and becomes the dynamic of theologisation. Fourthly one tries to understand this dynamic of theologisation in the context of the content that the dual identification of law and religion has thrown up. Over here I resolve the two narratives of sacred texts being in the custody of Brahmins and the quest for customary law in the Punjab. Fifthly I show how the results of this narrative are behind not just the making of the Hindu law in India but our secular Indian legal systems.
2.4 Is Law Religion or is Religion Law?

One is tempted to ask this question looking at how this topic has been framed in colonial discourse from its beginnings in the eighteenth century. We have previously seen how Scrafton, Holwell and Bolts have identified and derived legal rules from the shastras or the Vedas and their comments on the Brahmins as having knowledge of these texts. A greater understanding of such identification is provided by Charles Grant in his essay *Observations on the State of Society Among the Asiatic Subjects of Great Britain, particularly with respect to Morals, and the means of improving it* which he wrote in 1792. Grant quotes various British officials including Holwell, Scrafton and Cornwallis as providing evidence of the degenerate character of the Hindus. He quotes Holwell as follows:

> The Gentoos in general, are as degenerate, crafty, superstitious, litigious, and wicked a people, as any race of people in the known world, if not eminently more so, especially the common run of Brahmins; and we can truly aver, that during almost five years that we presided in the Judicial Cutchery Court of Calcutta, never any murder or other atrocious crime came before us, but it was proved in the end a Brahmin was at the bottom of it (Grant 1813, 32)

In reflecting on the despicable condition of the Hindus whom he viewed as immoral with fundamentally unjust systems of governance, Grant identifies the causes for such a situation:

> But their religion and their laws, both parts of one complex system, still remain; the former in all its authority, the latter also, in its essence and in many of its branches, operative: and these by the principles on which they are founded, and by the rules and precepts which they deliver, have given birth to that spirit, and those practices of oppression, injustice, corruption, in a word, those immoralities which incomparably more than every other cause render the people base and miserable (Grant 1792, 41)

Grant comments that the Hindus see their religion and law as being divinely revealed. He however considers both the Hindu religion and law as inherently defective, being the cause
for the degenerate nature of the Hindus. He reveals more about the nature of such a law by commenting that despotism is inherent in the government of the Hindus and this has affected the law:

....The law, not contending itself with enjoining passive obedience to the magistrate, or sovereign, and with having adue regard to the inequalities in condition, and subordinations in rank, which arise from the constitution of the world, and are plainly agreeable to the will of the Great Creator, rests entirely on the following fundamental position: that certain classes or races of the society are in their elementary principles, in the matter from which they were formed, absolutely of a higher nature, of a superior order in the scale of being, to certain other classes (44).

Grant has no doubt that the superior classes are the Brahmans themselves stating that “this whole fabric is the work of a crafty and imperious priesthood, who feigned a divine revelation and appointment, to invest their own order, in perpetuity... (45).”. He then provides various examples of how laws establish distinctions in favour of Brahmans such as lesser punishments for Brahmans than for others. In his analysis of these laws he also mentions that various misdemeanours such as bearing of false witness is acceptable if it is in favour of a Brahmin

Grant also criticises perceptions of Hindu law being ancient in nature suggesting that the law is inherently defective although it claims to be divine and thus needs an equal authority for its repeal. In his words,” This law was made for the whole Hindoo people; therefore it authorizes and encourages them to rob and plunder each other (53)”.

Grant’s description of law and religion in India makes it much clearer as to why the dual connection between law and religion has been drawn by many British colonial administrators that has led them to identify religious texts as legal texts. However, the question of how religion and law form part of the same system still remains. One sees a peculiar situation in the set of facts that have been presented. It can be observed that at an empirical level the
colonisers see law and religion as the same set of descriptions which are sacred texts that are in the custody of corrupt Brahmins. This seems highly incongruous in light of our knowledge of Western law and Harold Berman’s hypothesis about the disembedded nature of law in Western society. ¹⁴ Why wasn’t the colonisers’ cultural experience of law being an identifiable discourse distinct from religion reflected?

A possible explanation for this dual perception of law and religion can be provided by taking the perspective of historical jurisprudence which places law within an evolutionary framework. Henry Maine’s view that ancient codes including that of the Romans and the Greeks mingled up religious, civil and merely moral ordinances is illustrative of such a perspective. His further comment that the severance of law from morality, and of religion from law belonged very distinctly to the later stages of mental progress (Maine 1931, 13) could also illustrate the negative attitude of the colonisers in seeing Hindu law and religion as being degenerate. Maine’s scholarship on village communities may have also provided a model for the codification of customary law in the Punjab by British officials (as suggested by Bhattacharya). However these are only partial answers and whereas they may reconcile the assumptions in the narrative, they are not able to answer why such assumptions are generated and by themselves are capable of raising alternative objections. For instance why didn’t the colonisers retain the indigenous systems of law if they had beliefs that the indigenous law belonged to an earlier stage in evolution? Why did they embark on a process of codification and reform? I suggest that one focus more on the description that such an identification throws up which are sacred texts guarded by corrupt Brahmins. Is law contained in sacred texts and are Brahmins interlocutors of these texts? Are Brahmins responsible for the degeneration of these texts? For instance if the British felt that the these sacred texts were the

¹⁴ For an explanation of this argument please refer to the annexure. Berman suggests that the distinctive nature of western law in its modern form is its disembedded nature, law being a self contained discourse divorced from religion, politics and society.
law and their guardians were the Brahmins why is it that customary law generated so much debate, and eventually led to the search for the law in the Punjab? In order to answer this question, one needs to look into the status of custom in English law to understand how such contestations to the idea of law in sacred texts arose.

2.5 The Legal Status of Custom and its Role in the Colonial Legal System

A characteristic of the various observations made by British administrators are their conclusions that the practices of the Indian people must be reflected in a cohesive body of writing. This can be seen in Burnell’s observation that custom is superior to written law even in the case of the Brahmins. It appears that the British were actually preoccupied with custom and did not ignore it. This raises the question of the role of custom in the making of the common law.

Custom is often understood as being fuzzy and indeterminate. However this is not the description that it takes in the common law\(^\text{15}\) of England- where it assumes a dual status –it is the basis for the application of other sources of law which are equity (rules and principles mitigating the rigour of the application of law), precedent (application of prior judicial decisions) and legislation and is an independent source of law by itself although its importance is negligible.\(^\text{16}\)

In order to understand why its importance has become negligible, one needs to trace the various steps through which custom was transformed in the Western legal culture. Harold Berman (1983) relates how such a transformation took place in the folk laws of the European

\(^\text{15}\) Common law refers to a legal system where prior judicial decisions or precedent are the main source for decision making by the judiciary. England, the United States and many countries that were previously British colonies have common law legal systems. A good overview of its jurisprudential aspects can be found in Allen (1967) whereas Milsom (1969) provides an account of its historical evolution.

\(^\text{16}\) This is as most rules are in the form of statutes or judicial decisions.
peoples i.e. the Germanic tribes when Christianity arrived in Europe. He calls the emergence of Christianity a unique event which cannot be explained by any social theory. Christianity provided an impetus to the writing down of tribal customs which made it possible to fix customs that might have otherwise been uncertain and also provided an opportunity to make changes in them. The sacred writing of the Bible made writing itself a ritual and brought sanctity to custom. It also brought moral changes to the folklaw bringing about notions of equality and justice. This changed the position of women, slaves and others due to the Christian doctrine of the fundamental equality of all persons before God.

The order of the Germanic folk law was based on custom. Law was thus not consciously made but something that grew out of the patterns and behaviour and mores of the community. Custom was thus not subject to conscious and systematic and continuous rational scrutiny by jurists, but unquestioningly respected. Christianity however challenged the sanctity of custom, kinship and kingship relations without denying their sanctity altogether. It supported folk values and sacred institutions but set them up against a higher alternative which was the realm of God and his law. Thus life was split into two realms, the spiritual and the temporal. The temporal was depreciated in value but not affected. Thus Christianity devalued Germanic institutions without replacing them.

As pointed out earlier, modern law and modern legal systems were first created in the Papal Revolution of the eleventh century. A necessary feature of these systems was that strong centralised authorities both ecclesiastical and secular emerged, and law became disembedded from religion and politics and became an identifiable discourse by itself. The split between ecclesiastical and secular jurisdictions that took place throughout Europe also became the basis for the emergence of the common law. Under Henry III a unified system of royal justice came into existence elevating local custom to the national level. Royal law and jurisdiction was applied upon criminal and civil matters which had previously been under local or feudal
jurisdiction. The common law which emerged was ‘common’ in two respects, it was national law absorbing and replacing the regional law structures of the pre-conquest period-Mercian law, Wessex law etc. and secondly it claimed and exercised with increasing effectiveness monopoly over a wide range of legal matters at the expense of local and transnational courts (Postema 2002,158). Thus the diversity of customs now became subject to objective norms.

What was the nature of the process by which the transformation of custom took place in the common law and could all customs be considered valid? In his interrogation of the sixteenth century text “Doctor and Student” by Christopher St German, Helmholtz (2003) provides us with some answers. He suggests that the medieval ius commune an amalgam of Roman and canon law (which formed the basis for the practice of law in the English church) treated custom as a legitimate source of law. This was explicitly provided for in the Decretum Gratiani the first and basic text of medieval canon law which stated that.”. The usages of the people of God are to be taken as law in those matters where the sacred Scripture has established no certain rule...” Custom could also be treated as a source of harm and an evil way of doing things was treated by the ius commune as a corruption of the law, not a legitimate source of law irrespective of how long it had been prevalent. There were three tests for custom to be valid. It had to be lengthy, open, and uninterrupted, accepted by the community (which had to be of a sufficient size to sustain the observance), consistent with both divine and natural law and reasonable. In the ius commune a custom could validly derogate from written law as well as supplement it. In the laws of England custom was a third source of law after the laws or reason and the law of God. Thus custom could be valid only if it was in conformity with the laws of reason and the laws of God. Helmholtz further suggests through various examples that St German made use of the ius commune to justify the English common law.
The tests outlined in St German’s time still form the basis for present day tests of the validity of custom in English common law.\textsuperscript{17} Firstly, the custom must pass the test of antiquity it must have existed from time immemorial- time ‘where the memory of man runneth not to the contrary’. This in English law is fixed at 1189 A.D. the first year of the reign of Richard I. Secondly it must be continuous, having been practiced without interruption. Thirdly it must be peaceably enjoyed i.e. certain and not subject to dispute. Fourthly it must be certain, there must be proof of its existence. Fifthly it must be consistent with other customs and cannot be set up against positive rules i.e. statutory law. Sixthly it must be reasonable.

This vocabulary of custom in English common law\textsuperscript{18} was firmly embedded in the approach of British judges and administrators towards law. In 1831 it was held by Justice Grey in Doe d. \textit{Jagmohan Rai v Srimathi Nimu Dasi}.\textsuperscript{19}

I have no hesitation in saying that we are bound to take notice of any special customs which may exist among the Hindoos, or which can be considered as the law of any particular part of the country, but then there must be an averment in the pleadings to show that this custom prevails, and ought to be received as the law of that place, notwithstanding that it varies from the general laws of the Hindoos ………. Although in this country we cannot go back to that period which constitutes legal memory in England viz. the reign of Richard I, yet still there must be some limitation, without which a custom ought not to be held good. In regard to Calcutta I should say, that the Act of Parliament in 1773, which established this Court, the period to which we must go back to found the existence of a valid custom, and that after that date, there can be no subsequent custom, nor any change made in the General Laws of the Hindoos, unless it be by some Regulation by the Governor General in Council, which has been

\textsuperscript{17} Stephen’s Commentaries Vol I quoted in Sripati Roy (1911)

\textsuperscript{18} Bhattacharya (1996) comments that the requirements for the validity of a custom in Section 5 of the Punjab Regulation Act, 1872 were continuity, reasonableness, conformity with public policy, equity, justice, and good conscience. However he does not understand these requirements in the context of legal theory but merely as modes of legitimation. This does not help us resolve the question of why such requirements are laid down.

\textsuperscript{19} This is cited as Montriou’s Cases of Hindu Law p, 596.Clarke’s Rules and Orders of the Supreme Court of Judicature in Fort William in the work of Sripati Roy (1911)
duly registered in this Court. In regard to the Mufassil, we ought to go back to 1793, prior to that, there was no Registry of the Regulations, and the relics of them are extremely loose and uncertain. I admit that a usage for 20 years may raise a presumption, in the absence of direct evidence of a usage, existing beyond the period of legal memory.

In administering Hindu law in this Court, there are four distinct authorities which we are bound to recognize.

1\textsuperscript{st}. A usage in accordance with the Sastra contained in the Smritis or original Text Books

2\textsuperscript{nd}. A usage in accordance with the Dharma Sastra being the works of the Commentators

3\textsuperscript{rd}. English Acts of Parliament

4\textsuperscript{th}. Usages in Calcutta prevailing previous to 1774, and in the Mufassil previous to 1793, as their existence for that length of time presumes, that they were established by Acts of Sovereign Authorities.

This case is relevant in understanding how British colonialism perceived practices related to religion. Any religious practice or custom had to be related to a founding textual source of law in the Hindu religion and its interpretation by commentators. Further such an interpretation could not go against the British law itself. Custom also could not be contrary to public policy or morality.\textsuperscript{20}

Further insights on the same lines on the processes behind the recognition of custom are provided in the legal reasoning of the landmark case of \textit{Collector of Madura v Mootoo Ramalinga Sathupathy}\textsuperscript{21} on the recognition of immemorial usage. This was regarding the widow’s right to adopt a son with the consent of her kinsmen against the general rule of adoption with the consent of the husband. The court held that:

\textsuperscript{20} Ghasiti v Umarao Jan 1893 20 I.A. 193

\textsuperscript{21} 1868 12 M.I.A. 397
.....the duty, therefore of an European judge who is under the obligation to administer Hindoo law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the District with which he has to deal, and has there been sanctioned by usage. **For under the Hindoo system of law, clear proof of usage will outweigh the written text of the law.**

Other tests in English common law were also made applicable. In *Ramalakshmi Ammal v Sivanantha Perumal Sethurayar* 22, wherein the question of succession to a zamindar’s estate arose it was held that giving effect to long established usages existing in particular Districts and families in India was important.

.....but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by such means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition remains.

This was further reiterated in *Hurpurshad and Others v Sheo Dayal and Others* 23 which was also a case regarding succession to a zamindary estate. It was held in this case that a custom must be ancient, certain, and reasonable, and being in the derogation of the general rules of law, must be construed strictly. Further in *Umritnath Chowdhury v Goureenath Chowdhury* 24 it was held that a family custom should be predicated on immemorial usage and …” It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back…..”

22 1872 14 M.I.A. 570.

23 1876 3 M.I.A. 259.

24 1870 13 M.I.A. 542.
There were how exceptions made to this way of decision-making particularly in the case of converted communities. In the famous case of the Khojas\textsuperscript{25} Justine Erskine Perry held that that customs conflicting with the express text of the Koran can be valid among a Mahomedan sect. His decision was based on the ground that all tests with respect to a valid custom were fulfilled. He describes custom as being required to be seen as binding by the majority of civilians and that it must be established by a series of well known, concordant, and continuous instances. It is left to the discretion of the judge of how many instances are required but the crucial issue is whether the common consent of the class has been demonstrated by the instances proved. Thus a custom that fulfils these conditions does not require the consent of the ruling power or confirmation in courts of law. The least that is required is the existence of common consent which can be inferred from a uniform series of decisions. Perry significantly held that the criterion of public policy was not a matter for inquiry for judges and the custom of excluding females from inheritance was not unreasonable in the eyes of English law. This resulted in producing a rationality of custom which was static and unchanging even if it was not subject to textual sources.

Therefore the codification of custom did not remove the static manner in which custom had been viewed in western law and society. Bhattacharya’s suggestion that knowledge about custom is transformed once it is taken over by the state overlooks the restrictive perception of custom within western culture and the transformation of customary practice by Christianity.

\textsuperscript{25} Hirabai and others v Sonabae, Gungbae v Sonabae (case of the Khojas) and Rahimatbae v Hadji Jussap and Others (case of the Memons) Vide Perry’s O.C 110.
2.6 Secularisation and Theologisation: The Two Faces of the Narrative of Custom

The narrative of custom in India in the context of the colonial legal system generates various layers of legal discourse. Its dynamic is variable; it needs to conform to textual sources and positive law and at the same time it can detract from such conditions, provided that it shows a long existence and consistency. It may be required to conform to public policy and morality but can also detract from it, if it can show its own internal rationality. Whereas Justice Perry’s remarks on the requirement of the existence of common consent provide us with a direction to understanding this dynamic it does not tell us the nature and conditions of such consent. We have also seen that a similar narrative of custom runs through Western legal history.

What are the possible explanations for the legal discourse generated by the narrative of custom? Such answers lie in further examining its status within common law and what has been previously identified as the subjection of custom to divine and natural reason and the process of transformation of custom in the early days of Christianity. Gerald Postema (2003) provides us an explanation with his theory of the jurisprudence of common law. He suggests that the understanding of common law was reasonable usage (such usage not being predictable patterns of behaviour but practice observed and confirmed in a public process of reasoning where practical problems of social life were addressed). Thus custom was always subject to the test of reason, but reason was embodied in the common practice of law. The “artificial reason” of the common law is not a set of rules but a system of practical reasoning, its rules and norms can be formulated but no such formulation is conclusive and is subject to challenge. Common law precedents did not preclude reasoning rather it invited the focus of reasoning. The authority of precedent lay in its authoritative context of common experience within which such practical reasoning must take place and into which any particular decision must be integrated.
Postema (2003, 25) further suggests in his analysis of the work of Mathew Hale the common law jurist that the binding authority of the common law as the constitution of the people of England needs to be seen in a religious context and not a Hobbesian one. The relationship was not contractual in the context of an exercise of free will but covenantal as a moral relationship between God and his people, (influenced by Calvinist theology). The special relationship between God and His people served both as model for, and ultimate source of, the morally binding civic relationship.

It is unclear as to why the Hobbesian theory of the social contract cannot be understood as having theological foundations, considering that Hobbes was a natural law theorist and understood the source of law as God. However Postema’s insight that the binding authority of the common law lies in it as a covenantal relationship between God and His People is valuable. But it raises a further question. What is the basis and content of this relationship? This may raise many questions in the direction of natural law itself. I do not propose to go down that route although there may be valid findings as it would not completely answer the questions that have arisen on the dual identification of law and religion (such as law being sacred texts and such texts having degenerated due to corrupt Brahmins) in the peculiar context of British colonialism in India. However if one has to understand the narrative in the context of the legal discourse it generates, it becomes important to examine such a relationship. Therefore I propose to re-examine the narrative at a structural level to understand why such legal discourse is being generated.

The narrative may seem inconsistent. But there seem to be some peculiarities to it. It seems to produce a general and a particular as evidenced in the case of Hurpurshad and Others v Sheo Dayal and Others. There is a general law against which a special custom must be set.

26 Supra n.50.
up. It also must be ancient, certain and reasonable, these being the tests by which it gains an existence under the general law. It also has a dynamic with textual law. In other words there is some consistency in its inconsistency. I suggest that one try to find an explanation for this.

One notices that there seems to be a common subject matter that runs through the diverse decisions on custom which is the everyday lives of people and the decisions that need to be taken. How should one regulate the conflicts that arise in people’s lives regarding work, family and community interaction? This leads to a broader question of what is the attitude of people towards everyday existence. How do human beings successfully negotiate the domains of work, leisure, sex and society that they come across in their existence? The dynamic of custom in the colonial legal system poses these questions and tries to resolve them.

I would like to suggest that the underlying mechanism behind the dynamic of custom is the process of establishing a normative order. Whereas the normative orders in all cultures have different ways of dealing with the questions that human life throws up, the dynamic of custom in the colonial legal system is peculiar. This is because it resembles the process that underlies the transformation of custom itself by Christianity in the Germanic folklaw wherein custom was upheld but set up against the alternative of God and his law. Therefore it is the roots of the normative order in early Christianity that one needs to investigate in order to fully understand the dynamic of custom.

The arrival of Christianity in the pagan world brought it into conflict with existing cultural forms. The early Christians were forced to ask themselves what being “Christian” meant. How far was being “Christian” bound to a particular domain of human activity? The need to distinguish religion from what was not religion arose. How did one separate religion from a “way of life”. In other words how does one separate religion from the secular? These were
the questions that framed the making of the normative order occasioned by the arrival of Christianity. Christianity’s struggle to assert itself in a pagan milieu led to a certain dynamic of upholding practice but setting such practices to the test whether they constitute religion or not.

A brilliant account of the making of this normative order is provided by Robert Markus (1998) who calls this process desecularisation. He investigates the dilemmas Christianity faced when it entered the Roman world. For the first three hundred years Christianity remained an outlandish minority sect. Christians saw their community as marked off from the world around them and were a visibly identifiable group in Roman society subject to sporadic persecution. However the mass scale Christianisation of the Roman Empire made Christians a dominant majority and the profession of Christianity respectable thus blurring Christian identity. It was then that the question of *Quid sit christianum esse* or what is to be a Christian became a source of anxiety in the late fourth and early fifth centuries. Such a question found itself in internal debates between Christians and pagans and Christians themselves. How was one to judge whether someone had become truly Christian? Was a man’s religion to be determined by reference to his style of living, the manner in which he honours dead relatives, his literary culture, or even the artistic decoration that adorns his gifts? So therefore how complete was the conversion and the stamping out of pagan ways? If conversion was the reorientation of the soul why was it that many Christians were more bothered about what pagans were doing than what they believed in? Markus relates the story of the conversion of fifth-century Bedouins.

They renounced with their shouts their traditional errors; they broke up their venerated idols in the presence of that great light[Saint Symeon]; and they forewore the ecstatic rites of Aphrodite, the demon whose service they had long accepted. They enjoyed divine religious initiation and received their law instead spoken by that holy tongue[ of Symeon]. Bidding farewell to ancestral customs, they renounced
also the diet of the wild ass or the camel. And I myself was witness to these things and heard them, as they renounced their ancestral impiety and submitted to evangelical instruction (4-5).

According to Markus the exposition of the doctrine was not the decisive moment of their conversion but a sequel. Their conversion was the rejection of the idols. Matters of diet, dress and personal ornament were of religious significance as evidenced by the answers of Pope Nicholas I (858-67) by the recently converted Bulgars. Necklaces given to the sick for healing were demonic phylacteries but the king’s habit of dining alone was not against the faith but offended good manners. When asked about whether Bulgarian women may wear trousers he replied that this was a matter of indifference ‘for what we desire to change not your outward clothing but your inner selves’.

Markus (1998) poses the question of what could be the boundary between the religious and the secular? What would constitute the criteria for relevance? Where does religion end, and the manner of life and secular customs begin? What are the boundaries of Christianity and what would minimally make a convert Christian? As Markus himself points out, the boundaries could change from how sixth century churchmen in France drew them to their colleagues in Italy in the same place. Their predecessors in the fourth century would locate them differently from a modern Western scholar. Such boundaries were not fixed or constant and Markus suggests that one should not understand such a phenomenon as being the progress of Christianisation or the survival of pagan cultural forms and instead cautions that one should be wary of using these concepts. He instead suggests that one should understand this process as ‘desecularisation’. This is not the gradual collapse of ‘secular’ culture or its progressive Christianisation but a change in the nature of Christianity itself and the contraction in the scope of the ‘secular’.

For one of the forms in which this change in the nature of Christianity manifested itself was in the tendency to absorb what had previously been ‘secular’, indifferent from a religious point of view, into
the realm of the ‘sacred’; to force the sphere of the ‘secular’ to contract, turning it into either ‘Christian’ or dismissing it as ‘pagan’ or ‘idolatrous’ (16).

Thus Christianity had to face what was essential to itself and what it was indifferent to.

Markus (2006) then further suggests that what was acceptable and could only be shared with pagans would lie within the secular and what lay beyond that boundary would be proscribed as irredeemably pagan or profane. Markus (1998) provides illustrations of this process of desecularisation in the context of the transformation of secular Roman time into Christian liturgical time and the transformation of the topography of Rome into a sacred topography. Markus shows that the division of history into ages marked the crucial divide that Christ’s coming had inserted into the flow of time. Christian sacred history was projected into sacred sites, holy burials being evidence of those who had borne witness to the Lord and being connected to a wider network of places uniting the entire Christian community in its connection to God. Another process was the application of codes of conduct of monastic communities to lay Christians. Popular festivals and entertainments were “desecularised”, being stripped of idolatrous features and modified to meet the convergence towards religious standards.

What is the basis of this “desecularisation”? Markus (2006) suggests that this has something to do with Christianity itself, particularly the relationship between Christ’s lordship over the Church and his lordship over the world which is schematically represented by two concentric circles. An inner circle in which his rule has been established represents the Church which acknowledge and proclaim his lordship. It is surrounded by a larger circle, the world to which His Lordship is proclaimed but unacknowledged. This outer ring is the sphere of the secular which is destined to disappear altogether. The two circles will always overlap but will never

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27 In this regard he describes the pastoral activity of Caeserius, a Gallic bishop.
coincide. The inner circle is the visible community of believers which is the sacramental anticipation of the future kingdom. The outer circle is the realm which is in a state of waiting for the proclamation to be heard and received. This circle may be wider or narrower but will always be there as a result of the eschatological gap between the proclamation of the message and submission to it. He also adds that the contrast between the present time period and those of the times to come is not between the appearance and reality of Christ’s authority and those of the secular powers (their authority being appearance, to be unmasked when Christ triumphs). It is not that these “powers” will necessarily contest Christ’s victory when that is finally consummated in the eschatological kingdom, but for the present they can either rebel or minister to it.

S.N. Balagangadhara (1994) throws further light on this process of Christianity and its transformation of the cultures that it came into contact with. He however theorises this process differently as being the dynamic of proselytisation and secularisation. Proselytisation takes place through the expansion of Christianity and its efforts to win converts. Worship and idolatry are descriptions of this process. He argues that worship is the means by which religion reproduces itself as it seeks to make the Cosmos intelligible to the believer. Worship and prayer must separate the believers from the non believers. The pagan traditions were transformed into religions by virtue of having certain properties such as worship and became false religion due to false worship, idolatry as a concept drawing the boundaries. Therefore worship describes the reproduction of the community of believers whereas idolatry refers to the reproduction of the community of believers as seen from the community.

This leads to the same question that is asked by Markus i.e. *Quid sit christianum esse*. Balagandhara suggests (as Markus has) that this is not a problem that can be solved by enumerating the properties of a true Christian. It is a question that can be asked within a religious tradition and because religion is a process the answers have the same character. The
nature of these questions reveals that this is an issue of the relation between the religious and the secular and not about the criteria of membership. Therefore it is important to understand the double dynamic of religion which is proselytisation and secularisation. He elaborates on this relation as follows:

As western Christianity expanded, so did the Christian-religious world. The earlier civic, pagan world contracted and was marginalised in this process. ‘Idolatry’ a theological concept drew the boundaries. Once a practice was admitted into the Christian world, after having gone through the purgatory and neutralised of its sin, it could now find a place accorded to it by this world. It is thus that a ‘secular’ world was to emerge later, but within the Christian world. It is a Christian-secular world that comes into being, as generated within a religious world (498).

The key issue that emerges from both Markus and Balagangadhara’s analysis of Christianity is the concept of idolatry. This is crucial in explaining the process as desecularisation or as the double dynamic of religion. Therefore one needs to pose certain questions. What is idolatry? What is its significance in the Semitic religions?

A mundane understanding of idolatry as image worship or worship of idols is insufficient. Idolatry needs to be understood as how false worship becomes defined as false belief. The manner in which the Bible explains what is bad about idolatry is by using images of flaws in human relationships. The basis of the understanding of the sin of idolatry is our moral standpoint with respect to what is permitted and forbidden in interpersonal relationships as described by Halbertal and Margalit (1992):

Idolatry is thus not an obvious ‘primary evil’; rather, its prohibition is based on moral intuitions and views about the character of interpersonal relationships and the various expectations people have of one another. The comparison of idolatry to adultery, for example, depends upon the assumption that adultery is a serious sin in human society. Moreover, within the framework of this metaphor our understanding of this prohibition depends on our ability to identify the element that makes adultery a sin as being present in worship of other gods as well (10).
Halbertal and Margalit explain that the process that anchors the sin of idolatry in another, obvious sin in the framework of human relationships is the reverse of the process that anchors other sins by comparing them to idolatry. For instance the example “A proud person is like an idol worshipper”, the severity of idolatry is considered obvious, and through the image of idolatry an attempt is made to clarify the severity of the sin of pride. Therefore:

Once the sin of idolatry has been elucidated by analogy with other sins, this sin itself becomes a model sin through which the evil in other acts is explained: it is transformed from the represented image to the representing image (11).

A personal anthropomorphic God is necessary for the sin of idolatry. If God was not a person one cannot speak of the act of betrayal. The loyalty demanded by God in the framework of human relations and history makes it possible to create an attitude of betrayal. An illustration of such a framework is the Exodus which is the foundation of the relationship between Isreal and God. The story of the Exodus is often seen described as the story of a marriage or as the master-servant relationship. The exclusivity of these relationships is used to give meaning to the sin of idolatry. The biographical conception of the sin is used to give the relationship a history. The moral metaphor has force because it reflects sexual morality in human society. Such a metaphor serves as a basis for the understanding of man’s obligation to God in terms of a personal obligation. Wherein the worship of God has a historical and personal basis, the worship of other gods is characterised by the lack of a history and a relationship.

Idolatry can be characterised as a complete form of life which is not limited to ritual and belief and encompasses lifestyle issues such as dress, tattoos, hairstyle, entertainment at theatres and stadia, and turning to sorcerers. Therefore “the worship of idols is a symptom of alien belief, and is therefore a sin, but it is a sin derived from the belief it expresses and not primarily from the act itself” (Halbertal and Margalit 1992, 109).
In understanding Markus and Balagangadhara’s formulations about the relation of the religious and the secular world in the context of Christianity, one would like to ask the question as to how could one identify this relation as a legal process or a process that resolves disputes or conflicts? This is important if we need a greater understanding of the dynamic of custom which is a legal process. I would like to suggest that one needs to understand law in this normative order as that process that removes the idolatrous and negotiates the conflict between the religious and the secular. Such a suggestion finds support in the work of Maimonides a Jewish theologian who emphasises the importance of the Ten Commandments.

You know from the repeated declarations in the Law that the principal purpose of the whole Law was the removal and utter destruction of idolatry, and all that is connected therewith, even its name and everything that might lead to any such practices, eg, acting as a consulter with familiar spirits, or as a wizard, passing children through the fire, divining, observing the clouds, enchanting, charming, or inquiring of the dead. The law prohibits us to imitate the heathen in any of these deeds....(Maimonides 1885, 139)

Such an understanding is however incomplete without understanding how Jewish moral law was adopted in Christianity, the specific role of God’s law and the origins of natural law theology. In distinguishing between the conception of law laid down by the prophets and the conception of law that arose with Christianity, Ernest Findlay Scott (1943) suggests that Jesus Christ upheld the moral law as set out by the prophets but detached it from being ritual or ceremony. Christ reaffirmed the teachings of the prophets as to the manner of conduct which is in accordance with God’s Law. However in one respect his teaching was new as his interest was not in what God had commanded but what God was in his essential nature. He illustrates this by stating:
The whole aim of Jesus was to bring men into such a relation to God that they would surrender themselves to his will, and allow it to work in them freely. With him, therefore, all thought of a law, to which men painfully submit themselves, falls out of sight. As children of God they obey him gladly and unconsciously, almost without their knowing (155).

In the Sermon on the Mount Christ insists upon the nature and disposition that must grow on men and take the place of the law. Therefore “their action will have moral value only as it is the natural outcome of the will of God which has taken full possession of them. Thus the purpose of Jesus was not to impose a new law but to make new men (155).”

Scott emphasises that the moral law must not be taken literally as in the case of the Puritans as it produces a character that is distinctly non-Christian. The moral law dictates a sense of compulsion and produces a moral life that is hard and rigid. Thus one feels that in interaction with such a person that the man’s righteousness is different from the man himself. Thus:

The Christian ideal is a life which is not regulated by law, but flows spontaneously out of the new will. Through fellowship with God the man has been morally conformed to God, and acts instinctively according to the higher will (155).

Such a notion of law allowed not only the development of a natural law theology but the application of such a theology to heathens. R.W.Dyson (2005) points out that the idea of a universal, moral order available in an unwritten moral law entered the Christian scriptures by way of St Paul’s Epistle to the Romans:

With God there is no respect of persons[no favouritism]. As many as have sinned outside the Law [of Moses] shall also perish outside the Law; and as many as have sinned within the Law shall be judged within the Law. For it is not those who hear the Law who are justified before God, but those who act on it. And when the gentiles, who do not have the Law, nonetheless do by nature the things that the Law enjoins, then, not having the Law, they are a law in themselves. They show that the
requirements of the Law are written into their hearts, and that their conscience and thoughts testify to them, accusing them and exonerating them accordingly. (Romans 2:11-15 in Dyson 2005, 10)

Dyson suggests that many other figures in Christian thought such as St Ambrose, St Jerome reworked the idea of the law of nature via St Paul. The law of nature is the same everywhere and applies to both Christians and non-Christians.

How is the dynamic of custom that developed in early Christianity present in Western legal history? We have already discussed this in St Germain’s reading of the common law wherein custom could only be a valid source of law after the laws of reason (natural law) and the laws of God. We have also seen that these tests still form the basis of colonial judicial discourse on custom. What is the basis for this dynamic? I would like to suggest that one has to understand this dynamic having originated in early Christianity as being stripped of content but retaining structure. It is not visibly religious as it is no longer dictated by a religious authority. It however needs to reconcile divine law (the religious) with human or customary law (the indifferent or the idolatrous) and seeks to create a sphere by which customary law can be reconciled with the divine by interposing the concept of natural law which is the law of nature present in all humans. Therefore in negotiating conflict between the religious and the secular the dynamic of custom becomes the dynamic of secularisation. Thus customary law becomes secular having been neutralised and free of idolatry and pagan influence.

How did the dynamic of custom acquire such an important place in Western law? Harold Berman (1983) provides us with a brilliant account of this process. He details the logic of Western legal science which was invented in the late eleventh century by canonists and forms

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28 According to principles of natural law, the faculty of reason is present in every human being to enable him to find God and act according to God’s purposes.
the basis of modern legal systems. The Western European jurists attempted to synthesise rules into an integrated whole - attempting to define elements common to particular species of cases but also to synthesise the rules into principles and the principles themselves into an entire system, a body of law or corpus juris. They believed that they had found the written natural law which together with the Bible, the patristic writing and the canons of the church was sacred. Since they were true and just they had to be reasoned from apodictically to discover new truth and justice. But since they contained gaps, ambiguities and contradictions they had to be reasoned from dialectically - problems had to be put forward, classifications and definitions made, opposing opinions and conflicts synthesised. Berman suggests that one of the best examples of this systematisation can be found in the logic employed by Gratian a canonist. The concept of natural law was interposed between the concepts of divine law and human law. Divine law is reflected in revelation whereas natural law also reflects God’s will and can be found both in divine law and human reason and conscience. Custom had to yield to natural law. The theory of Gratian and his fellow canonists provided a basis for weeding out customs that did not conform to reason and conscience. The theory of the relativity of rules was based partially on the politics of competing legal systems but also in the scholastic dialectic which provided a method for placing both customary laws and enacted laws within a larger theoretical framework of the nature and sources of law. The tests that were present in St German’s time and in colonial judicial discourse such as duration, uniformity, and reasonablesness find mention in this scheme.

Berman also suggests that secular law or the law of non-ecclesiastical entities was considered redeemable. Like ecclesiastical law, secular law was considered to be a reflection of natural law and ultimately of divine law. Berman elaborates on this issue by stating:

29 For a detailed account please see the chapter “The Origins of Western Legal Science” in Berman (1983).
Indeed the very division between the ecclesiastical and the secular presupposed the mission of the church to reform the world, and consequently the mission of all Christians (but especially those in holy orders) to help make imperfect secular law conform to its ultimate purpose of justice and truth. (273)

It is with this framework one needs to re-read the judicial decisions on custom. An illustration of the logic and method of western legal science that Berman has detailed can be seen in Collector of Madura v Mootoo Ramalinga Sathupathy wherein it has been explicitly held that custom overrides written usage. In this case wherein the question of whether a widow required permission from her husband’s kinsmen to adopt, the court began by assessing the works of the European commentators such as Colebrooke and Thomas Strange on this issue and noted that they confirmed this point. It then analyses the law on this question as follows:

The remoter sources of the Hindoo law are common to all the different Schools. The process by which those Schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent Commentaries. The Commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India; Schools with conflicting doctrines arose. Thus the Mitacshara, which is universally accepted by all the Schools, except that of Bengal, as of the highest authority, and which in Bengal is received also as of high authority, yielding only to the Daya Bhaga in those points where they differ, was a commentary on the Institutes of Yagnawalcyya; and the Daya Bhaga, which, wherever it differs from the Mitacshara, prevails in Bengal, and is the foundation of the principal divergences between that and the other Schools, equally admits and relies on the authority of Yagnawalcyya. In like manner there are glosses and commentaries upon the Mitacshara which are received by some of the Schools that acknowledge the supreme authority of that Treatise, but are not received by all.

The court’s analysis indicates two findings. Firstly the doctrines of the schools have an original source. Whereas there may be differences, such differences have to be reconciled by referring to the source which they come from.

30 Supra n.48.
On the point of the Widow’s right to adopt the court states:

All the Schools accept as authoritative the text of Vasishtha, which says “Nor let a woman give or accept a Son unless with the assent of her Lord” But the Mithila School apparently takes this to mean that the assent of the Husband must be given at the time of the adoption, and therefore that a Widow cannot receive a Son in adoption, according to the Dattaca form, at all. The Bengal School interprets the text as requiring an express permission given by the Husband in his lifetime, but capable of taking effect after his death; whilst the Muyookhu and the Koustubha Treatises which govern the Mahratta school, explain the text away by saying, that it applies only to an adoption made in the Husband’s lifetime, and is not to be taken to restrict the Widow’s power to do that which the general law prescribes as beneficial to her Husband’s soul. Thus upon a careful review of all these Writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the Husband, than to the authority to adopt being independent of the Husband.

The Court then begins a second level of reconciling conflicting statements. The various statements by these schools are subordinated as being the interpretation of a principle laid down by another text. It then remarks that the judge is not required to find out whether a disputed doctrine is fairly deducible from the earliest authorities, but ascertain whether it had been received by the particular school which governs the District and has been sanctioned by usage. What is the process of doing so? The Court looks at the treatises that have been adduced which are the Mitakshara, the Smriti Chandrika, and the Madhavyam (the latter two treatises being from the Dravida school) and two treatises on adoption the Dattaca Mimamsa of Nanda Pandita, the Dattaca Chandrika of Devananda Bhatta and the Dattaca Mimamsa by the author of the Madhavyam. It is noted that the Mitakshara is silent on this topic, the Dattaca Mimamsa of Nanda Pandita is opposed to adoption, and the Dattaca Chandrika allows a widow to give a son in adoption if there is no prohibition by the husband. The Smriti Chandrika permits a mother to give a son if authorised by an independent male. The Madhavyam is unclear on this point. However the Dattaca Mimamsa by the same author
explicitly lays down the right of the widow to adopt with the consent of the Husband’s kinsmen and that this supported the propositions laid down by Colebrooke and Thomas Strange thus arriving at a third level of reconciliation. What is the result of this reconciliation? In the court’s words:

The evidence that the doctrine for which the Respondents contend has been sanctioned by usage in the South of India consists partly of the opinions of Pandits, partly of decided cases. .......The opinion of a Pundit which is found to be in conflict with the translated works of authority may reasonably be rejected; but those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the Country.

In confirming whether usage is sanctioned by a doctrine the court sets up a dialectic between the customary law and the received law. In making this move customary law becomes positive authority and is no longer simply usage. The court further remarks that:

.......positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural development of the Hindu law, or upon analogies real or supposed, between adoptions according to the Dattaca form, and the obsolete practice, with which that form of adoption co-existed, of raising up issue to the deceased Husband by carnal intercourse with the Widow. It may be admitted that that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient Treatises above referred to, and in particular by the Dattaca Mimamsa of Vidya Narainswamy, the Author of the Madhavyam; but as a ground for judicial decision these speculations are inadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention.

In creating the structure of the dialectic, the court subjects it to tests of morality and reasonableness which is evident in it rejecting the argument that the form of adoption raising issue to the deceased husband by carnal intercourse with the widow.
It may be argued that most legal interpretation proceeds on the basis of a hierarchy of sources. However the peculiarity of such a dialectic is that it **creates the hierarchy of the sources**. For instance the statements made by various schools of Hindu law can be read as stand-alone statements applicable to a particular fact situation or to a particular group of people, not merely being subordinate to another text. They can also be read as parallel statements to the text that subordinates them. An example of this is the manner in which pundits themselves responded to the questions raised by the British. In the case of *Radha Kishen v Sham Serma, Ramdeb Serma Pulta Ram Sahoo, Kishen Sahoo and Others* in 1818\(^{31}\) before the Sudder Dewany Adawlut in Bengal, a question came before the court on whether a jujman (or member of a Hindu family) who employs a prohit or a priest is at liberty to discard the priest and employ others while performing sacrifices or other religious duties. The court consulted the pundits asking them the following questions:

Is a jujman authorised, under any circumstances, to discard a faultless prohit, whether he be a family prohit, or one appointed by himself by the jujman? If a jujman discharge a faultless prohit, and pay the fine, must he afterwards employ the same prohit or not?

The pundits answered that the jujman could not discharge a faultless prohit without paying a fine, whether he be a family pundit or one appointed by himself, if the prohit be without fault and is not disqualified. In response to the second question the answer was:

If a jujman discard a faultless prohit and pay the fine due for that offence, it is necessary for him to perform prayschyt (atonement) and to reappoint the prohit; for ritwik and prohit are equal: and it is incumbent on them, that they, in all matters laid down in the shaster, be careful to do everything for the advantage of their jujmans, and to remove harm from them: if any discharge a prohit, who should be looked upon as father, mother and gooroo, he is guilty of such a crime, as excludes him from eating and drinking with his tribe in this world, and will cause him to be herafter born in the body of a rakhis,

\(^{31}\) 1818 S.D.A 622.
or demon. This crime is called Oopu-patuk. Moreover, it is necessary to serve such a person (a prohit) as a father or mother: and the person who takes away (or withholds) the dukshina, or other gifts usually given by jujmans, which are the means of subsistence of Brahmins, is guilty of a serious offence. Let the person who discards his prohit, having paid the fine to the Raja, and made the atonement (prayuschut) laid down in the shaster in retribution for that offence, again appoint the prohit to his office. This is enjoined by the shaster. It is also incumbent on the Raja to levy the fine from any of his subjects who acts contrary to his duty, and to compel him to keep to his duty.

Unlike the first answer which relies on one authority to answer the question, the second answer given by the pundits relies on multiple authorities to answer the question and is therefore pertinent in that respect. In providing the answer the pundits rely on multiple statements, some of which are provided are as follows:

...Byas Munee written in the Prayuschut Muta’uchura. “A mother, father, husband, a teacher of munturs, an instructor, an elder brother, a prohit...are (esteemed in the light of) Gooroos”.

.........Munnoo in the Prayyschut Madhub “To forsake a gooroo, the Veds, the consecrated (or sacrificial) fire, or a son: to deny the future state, the Deity, the Ved, or a gooroo is considered to be amount to the crime of Oopupatuk.

......Munnoo in the Kurm Bebak Prekurum quoted in the Prayuschut Madhub. “The person who does not perform service to an instructor, a performer of sacrifice, a gooroo, an adorer of the Deity and the Moonees, shall after death be born in the body of a rakhis or demon.”

.....Munnoo “A person guilty of the crime of Oopufatuk.........must perform penance. This penance is thus described in the Koolook Bhut, let him perform the same penance as he would for killing a cow: or let him, according to his cast and abilities perform the Burut Chandrayuee.”

....Duchmunee in the Achar Madhub. “To support a mother, a father, a gooroo, a wife, an orphan relation, a traveller, the consecrated fire, who are all entitled to support, is proper, and will benefit the supporter in the next world.”

........Berdhuh Jugebuluk. “It is incumbent on the Raja to fine, and keep to his accustomed duty any one who, without cause, forsakes father, mother, wife, son, gooroo, or prohit”.
I would like to suggest that the reasoning of the pundits differs from the reasoning of the judges. Firstly it does appear that they are reconciling statements but the **reconciliation** is in the form of a narrative and seeks to be an interpretation of the statements. It does not seek to lay down a principle that can be followed as a precedent in subsequent cases. It also does not reconcile statements in light of sources or a hierarchy of sources. It is however relevant to note that the court attempts to do so as evidenced in the statement at the bottom of the case.

The doctrine maintained by the bewustas of the pundits of the Sudder Dewany Adawlut in this case is illustrated and confirmed by texts cited in the second volume of Mr. Colebrooke’s translation of the digest of Hindoo Law, Book II, chapter 3 section 113. “On partnership among priests jointly officiating at holy rites.”

What is the structure of the dialectic? This becomes clearer in another case which is *Ghasiti v Umrao Jan* the question of whether the devolution of the estate of an adopted Mahomedan woman should be governed by **general Mahomedan law** or by the customs of the Kanchans (the community that the woman belonged to). This was due to the Kanchans being a community based on prostitution, the male members living off the earnings of the female

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32 Kool has been explained as brahmans and others; kome, one of a male bramin and a female of the chutri, bhys or sooder castes; or of a male chutri and a female bhys or sooder, or a male bhys and female sooder. Sureyna means the tumbolee (fellers of the betel leaf) and other castes; Goon, goldsmiths and others; Janpud, barbers and washmen.

33 For other examples of pundits following such reasoning please see *Sher Bux Singh v The Heirs of Futteh Singh* 1818 S.D.A 630.

34 It is not surprising that the court has made an attempt to record the statements of the Shastris given their reputation for inconsistency. In detailing the procedure by which case reports were compiled in the Bombay Presidency by Borradaile (a collector specifically appointed for the purpose) Shodhan (2001) shows how vyavasthas were recorded by printing passages from the relevant Sanskrit books and then verified with the original and English translations of Jones and Colebrooke. This would prevent deception by the Shastris and would provide a precedent for the guidance of the courts.

35 Supra n.47.
members. The body of members were recruited by adoption, a girl being adopted by a female member. The claim that the adopted woman had a right of succession could not hold as there is no such thing as separate or individual succession upon death, all the members succeeding jointly. It was held by the court that the rules and the customs of the Kanchans aim at the continuation of prostitution as a family business, and as this has a distinctively immoral tendency this should not be enforced. The court further held “as regards Mahomedans, prostitution is not looked upon by their religion with any more favourable eye than by the Christian religion and laws.”

In such a case the dialectic consists of a “general law” opposed to custom and custom requires to comply with this in order to be legally valid. We also learn that morality and reasonableness are required to determine the operation of the dialectic. We gain some insights into the general law in the case of Hindus in *Ramalakshmi Ammal v Sivanantha Perumal Sethurayar* where we have seen that special usages to be proved in the context of succession to the zamindary must be established by clear and unambiguous evidence to ensure that they possess the conditions of antiquity and certainty. In this particular case the court held that the special usage was not proved on the grounds that the evidence provided in the form of declarations by zamindars on the custom of the district was insufficient. This was due to the zamindars not having a unanimous opinion in their view of this custom. Therefore the general law of succession of the Hindoos has to be applied.

So what was “the general law” and how was it to be applied. The court noted that:

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36 A similar form of reasoning was followed in *Ujii v Ha’thi La’lu* 1870 B.HC.R 133 where a custom contracting a natra marriage without a divorce on payment of a certain sum to the caste is an immoral custom tantamount to legalizing adultery and cannot be judicially recognized.

37 Interestingly enough the court also held that the sanction for prostitution in Hinduism was stronger due to the intrinsic connection of prostitution with worship in temples.

38 Supra n.49.
... the rule of succession is not directly declared in Books of authority, or in decided cases, then it must
be deduced from those rules which are settled, and the principles on which they are founded...

In determining this, the court quoted several passages from the Manu Smrithi to establish the
right of the first born son. It further held:

Many of the precepts of Menu have been undoubtedly altered and modified by the modern law and
usage; but his authority may properly be referred to when it is necessary to resort to first principles
in order to ascertain and declare the law. The general doctrines above alluded to are also found in other
old authorities and are treated as part of the foundation of the Hindoo law of succession by modern
Writers and compilers.

So how could custom be set up against the general law? In *Myrna Boyee and Others v Ootaram, Myaram and Taukooram* a case relating to the succession of the estate of an
Englishman who had illegitimate children through different Hindu mothers it was held that

...when the opinion given is apparently irreconcilable with the opinions of approved text writers, those
who give the opinion should be asked to further to explain that which appears prima facie, thus
irreconcilable, so that they may show on what they ground an apparent exception from the
general law whether on general custom modifying texts, on local usage, family customs, or other
exceptional matter.

If among Soodras proper a course of decisions or other evidence of the prevalency of a general custom
, support a heritable capacity of illegitimate Hindus beyond that which the writers’ textbooks establish,
these decisions have not been made known, nor has that custom been established. But a title such as
the present, so wholly irreconcilable with the expositions of any text writer, and, unsupported by any
authority, cannot be established upon the evidence which this case affords

The structure of the dialectic is once again seen in these cases. Custom has to set up an
existence against the general law and thus show that it is compatible with the general law, the
various tests of duration, morality, consistency etc. validating its existence against the

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39 1861 8 M.I.A 400.
general. Once this is done, it becomes positive law being judicially recognised and used as a precedent in future court decisions. Therefore the “specific” which is customary law set up against the general has an existence and can be produced only against the parameters of the general. This therefore determines the content and the description of the specific itself. Only certain beliefs and practices can be described. In this particular case one needs to show practices that establish heritability through the criteria set in the dialectic i.e. only certain practices that show or have the likelihood of showing consistency, duration etc. can be described, not just any practice that can show heritability.

We now have a sketch of the dialectic. It reconciles conflicting statements into a hierarchy of sources. It sets up usage against received law, interposes considerations of morality, reasonableness, duration, consistency etc. and thus transforms customary practice into positive law. It appears that this has the same structure as the dynamic of secularisation present in Western legal history wherein custom is set up against divine law and certain concepts within natural law such as reason are interposed to reconcile customary or human law with divine law. However I would suggest that it merely imitates the dynamic of secularisation as it does not have the conceptual units required for such a dynamic to actively operate. Therefore, I would like to argue that the dialectic seeks to create the conceptual units that are present in the dynamic of secularisation in Western law and thus transforms itself completely by becoming the dynamic of theologisation.

What does the dynamic of theologisation achieve? It brings about the conceptual units that are possible for the legal category of “religion” to come into being. It cannot reconcile divine law with human law as it is unclear about the nature of divine law. Although it may be said that the smrithis, particularly the Manu Smrithi (which had been given premier status by the British due to being identified by the British as the law given by the lawgiver) having their origins in the Vedas would have the status of divine law; it appears that the British are
unsatisfied with these texts (as the texts written by Scrafton, Holwell, and Bolts have shown) and consider them corrupted. What is the possible reason behind this? I would like to suggest that this has to do with the nature of divine law (as God’s Law in Christianity) as being all encompassing and prescribing all moral action for every facet of human existence. The Vedas or the texts representing them cannot perform this action. As Lingat (1993), a scholar of the dharmasastras remarks:

Strictly speaking, the Vedas (samhitas) do not even include a single positive precept which could be used directly as a rule of conduct. One can find there only reference to usage which falls within the scope of dharma. By contrast the brahmans, the aranyakas and the upanisads contain, apart from descriptions of certain practices fit to be invoked as precedents to support some rule, numerous precepts which propound rules governing behaviour (8).

The nature of law as divine revelation becomes obvious in Lingat’s explanation of the Vedas:

...........the word Veda does not mean in that connection the Vedic texts, but rather the totality of Knowledge, the sum of all understanding, of all religious and moral truths, whether revealed or not. These truths are not human entities; they are imposed upon man who must simply submit to them; they exist by themselves and have always existed. They form a kind of code with infinite prescriptions of which only the Supreme Being can have perfect knowledge. This eternal code was revealed by Him to certain chosen ones, and that is what is called sruti. But only a part of that Revelation could be communicated to mankind; a good deal of it has been lost, moreover, due to the weakness of human memory. Therefore the Vedic texts are far from representing all the Veda. When a rule of dharma has no source, we must conclude that it rests upon a part of the Veda which is lost or somehow hidden from view (8).

40 See S.N. Balagangadhara (1994) for an account of the Semitic religions being the only instance of religion. In his analysis of Christianity Balagangadhara suggests that religion is an explanatorily intelligible account of the world. Religion means understanding the purposes of God as the Creator of the Universe, the entire world being the expression of the will of God. Therefore every action of human beings is governed by God. In the non-Semitic religions there is an absence of such a concept of God, the gods of the non-Semitic religions being capricious, unpredictable and ceaselessly interfering in human affairs. Therefore it follows logically that in Christianity the Law of God must embody his Will.
It is not surprising that Lingat echoes the earlier narratives of colonial administrators in respect to the position of Brahmins as being preceptors of these texts. He also states that they were bound to compose manuals in which the teachings were composed in the form of formulae, and appeals were made to Brahmins to arbitrate between parties to a dispute or give advice to which rule should be followed. This brings us to the question as to why the dynamic of theologisation generates a cultural description of Brahmins upholding and controlling the law.

2.7 A Cultural History of the Dynamic of Theologisation in Colonial India

Perusing many of the narratives on this question it appears peculiar that the British despite finding Brahmins corrupt and unreliable still depended on them as conveyors of the meaning and content of the “laws of the Hindus”. It also appears peculiar that a century later there was a completely different quest for customary law in the Punjab and the British identified an entirely different set of interlocutors which were the village elders. There have been different explanations such as that of Neeladri Bhattacharya’s which attributed this difference to a distinct caste structure. Whereas this may be true in the context of making claim as to a set of social relationships, it does not tell us how an interlocutor can be identified and the basis for this identification. I wish to argue that there lies one theoretical framework for the identification of the Brahmins and the village elders as interlocutors. In doing so I would like to examine the common frame that is normally used in answering these questions which is that of historical jurisprudence.

The most important figure embodying this frame in the context of colonial India is Henry Maine. In his work on early law and custom Maine (1883) outlines the objects of such an endeavour as trying to “connect a portion of existing institutions with a part of the
primitive or very ancient usages of mankind and of the ideas associated with those usages.\footnote{Preface (Maine [1883] 1985).}

In his analysis of what he terms as the sacred laws of the Hindus, Maine rejects the findings of William Jones on the Manu Smrithi suggesting that the Code of Manu was not acknowledged by all Hindus and that “customary rules reduced to writing, have been very greatly altered by Brahmanical expositors, constantly in spirit, sometimes in tenor (7)”\footnote{A recent work on Maine’s scholarship by Karuna Mantena (2010) makes an argument for such a position. Mantena argues that Maine’s scholarship allowed nineteenth century social theory to conceptualise the dichotomy between traditional and modern society. The model of traditional society held together by custom and kinship being the theoretical foundation of the imperial ideology of indirect rule which was based on preservation, protection and collaboration. The ancient, medieval, and primitive were subsumed under the generalisable category of tradition, poised in common opposition to the uniqueness of the modern West.}. He suggests that Indian law consisted of a great number of local usages and the Manu Smrithi was one set of customs reduced to writing, pretending to be divine, extending a great influence over the others and tending to absorb them. In this context the customary laws of the Punjab which have been the subject of an official inquiry by Tupper were evidence of the Hindu law prior to the Brahmanical expositors taking over it. Maine further suggests that codification in the East and West proceeded differently. Codification appeared at a later period in Eastern societies and was characterised by the compulsion of religious oligarchies to consolidate their influence. He states that the monopoly of legal knowledge by the elites allowed them to impose rules not actually observed; but rules that they in their position of being the priestly order considered proper to be observed. The Code of Manu was an illustration of this monopoly, being fabricated recently and should not be considered antique.

It is possible to criticise Maine’s comparative jurisprudence as being an imperial project to place the East at a lower civilizational footing within a historical frame thus justifying the project of colonialism as essential to bring civilization to less developed peoples.\footnote{However to do so would be to merely criticise the results of such a frame of historical jurisprudence}
but not criticise the frame itself. What is the framework within historical jurisprudence which enables Henry Maine in arriving at his conclusions? Maine appears to be very clear about the nature of such a project. In his study of early legal institutions among various peoples in Europe, Maine remarks about the influence of the Roman Empire and its origins:

For many races, it actually repealed their customs and replaced them by new ones........For others it introduced or immensely stimulated the habit of legislation; and this is one of the ways in which it has influenced the stubborn body of Germanic custom prevailing in Great Britain. But wherever the institutions of any Aryan race have been untouched by it, or slightly touched by it, the common basis of Aryan usage is perfectly discernible; and thus it is that these Brehon\textsuperscript{43} law-tracts enable us to connect the races at the eastern and western extremities of a later Aryan world, the Hindoos and the Irish\textsuperscript{(Maine, 1875,21)}.

Maine’s objective in understanding early legal institutions was motivated by understanding the common basis of European civilization as being preserved in the customs of an Aryan race which existed in the Indian subcontinent.\textsuperscript{44} In describing the institutions of the early European peoples such as the Celtic and Sclavonic (Slavic) peoples. Maine is merely attempting a comparative study of Aryan institutions across peoples of Aryan origin. Therefore his work needs to be understood as constructing a history of Europe.

What is the theoretical framework behind Maine’s study of primitive law? It appears that his findings rest on the historical fact that there was an invasion by a Sanskrit speaking people who arrived in India thousands of years ago and spread their language and culture among the

\textsuperscript{43} Maine is referring to the Old Irish Laws.

\textsuperscript{44} Mantena acknowledges this frame but chooses to ignore its significance commenting that India represented the “living past” of Europe and the study of contemporary Indian social and political institutions thus cast light upon the past history of Aryan societies and peoples due to the stagnation of Indian social institutions at an early stage thus preserving their ancient character. In understanding Maine’s work as being used to illustrate the dichotomy between East and West, she criticises the results of such a historical framework which is the application of epochs and concepts within such a history. She ignores the theory that sustains the historical framework.
indigenous population. This fact appears to be crucial to Maine as in a discussion on forms of barbarism he mentions that these usages can be found in certain tribes “which took refuge in the hilly regions of Central and Southern India from the conquest of Brahmanical invaders whether or not of Aryan descent ([1913]1985, 16)”. In this context Maine refers to such barbarism as being prior to the organisation of human society into Family groups, such as these tribes observing “practices which are not found to occur universally even in animal nature (16)”. In dismissing objections that his theory of kinship and the Patriachal family are not applicable to the non-Aryan, non Semitic and non Uralian races he comments that these races “still follow practices which it would be incorrect and unjust to call immoral, because in the view we are considering they are older than morality (Maine 1875, 67)”. Therefore the practices of the Aryan race (and those that can be affiliated or show a similarity to it) assumes importance as it shows the foundation of morality itself.

The Aryan Invasion theory has generated heated discussion and debate45. Proponents of the theory argue that that an Indo-Aryan people characterised by the Sanskrit language and the Vedic religion arrived in the Indian sub-continent and subjugated its indigenous inhabitants known as the Dravidians who were driven to the south of the subcontinent. Detractors of this theory often known as the indigenous Aryanists argue that the Indo-Aryans were indigenous to the sub-continent and did not have an external homeland. The argument for the Aryan Invasion theory proceeded on the underlying assumption that the groups that were identified and named as Aryan or Dravidian were linguistically and racially different. Such linguistic and racial difference was sought to be substantiated by historical evidence to show that the two races had different origins.

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45 Edwin Bryant (2001) provides a good overview of the sides of the debate.
The model for such an historical enquiry has been criticised by both Bryant (2001) and Trauttmann (1997) as being based on Biblical history. They show how Orientalists studying the ancient Indian languages and colonial administrators such as William Jones, Holwell and Nathaniel Halhed implicitly accepted the historicity of old Testament chronology. In the Biblical version of history, Noah’s three sons Japheth, Shem and Ham were accepted as being the progenitors of humankind. Prior to the construction of the city of Babel there was one human race speaking one language. Due to various events such as the flood and the collapse of the city this linguistically and racially unified people were scattered throughout the earth. Trauttmann (1997) describes how the Biblical frame structured William Jones’s ethnological goal of making language the basis of the common origin of the five Asian nations which were the Indians, the Tartars, the Persians, the Arabs, and the Chinese. Trauttman shows that linguistic evidence was insignificant in Jones’s goal of reconciling the history, language and racial characteristics of Asia with the account of Genesis which he calls Mosaic ethnology.46

Not being an expert in linguistics or archaeology I do not wish to comment on this debate. However for the purpose of understanding Maine’s comparative study of Aryan institutions I would like to formulate a hypothesis on Maine’s comparative study drawing from this debate. Let us make the following assumptions in this regard: 1) The Aryans and Dravidians are racially and linguistically different and there is adequate evidence to prove the same 2) The Aryans have an external homeland in Central Asia or the Caucasus which has also been proved historically 3) There is genetic evidence that various European peoples have a common ancestor in the Indo Aryans. However what still remains unusual is the assumption by Maine that a common linguistic and racial origin also leads to a common legal origin.

He appears sceptical about the connection between language and race but accepts it:

46 For a detailed account of this description please see the chapter “The Mosaic Ethnology of William Jones” in Trautmann (1997).
For the new theory of Language has unquestionably produced a new theory of Race. The assumption, it is true, that affinities between the tongues spoken by a number of communities are conclusive evidence of their common lineage, is one which no scholar would accept without considerable qualification; but this assumption has been widely made, and in quarters and among classes where the discoveries out of which it grew are very imperfectly appreciated and understood (Maine [1913] 1985, 209).

Maine then suggests that India has more to offer than just comparative philology or comparative mythology but can provide a new science of comparative jurisprudence:

For India not only contains (or to speak more accurately did contain) an Aryan language older than any other descendent of the common mother tongue .............but it includes a whole world of Aryan institutions, Aryan customs, Aryan laws, Aryan ideas, Aryan beliefs, in a far earlier stage of growth and development than any which survive beyond its borders (Maine [1913] 1985,210-211)

The underlying assumption behind Maine’s project of correlating the legal institutions and laws of various European peoples and analysing the absence or presence of certain features in them against the common source of what he terms as Indo-Aryan law appears to be cultural in nature. This is illustrated in his views on the sale and consumption of oxen. He mentions that there were restrictions on the sale of oxen along with land and slaves in the primitive Roman law. He then states that:

 ..........the legal dignity of this description of property among the Romans appears to answer to its religious dignity among the Hindoos. Kine, which the most ancient Sanscrit literature shows to have been eaten as food, became at some unknown period sacred, and their flesh forbidden; and ultimately two of the chief ‘Things that required a Mancipation’ at Rome, oxen and landed property had their counterpart in the sacred bull of Siva and the sacred land of India( Maine 1875,148).

Maine further adds that the consumption of oxen may have been related to preserve land for tillage and restrictions on his alienation may have had the same effect. He also adds that the importation of slaves into the Roman commonwealth and the relationship of peasants to the land were measures of the same nature as alienation of the ox and its consumption for food.
In this context Maine does not appear to be to be describing common legal relationships but seeks to reconcile social, economic and legal processes to a common cultural origin i.e. the restrictions on consumption of oxen among the Hindoos. This approach is characteristic in his efforts throughout the book. He compares the Brehon law of distress with the Hindoo practice of sitting dharna and he also remarks that what characterises and distinguishes Brehon law from that of the Hindoos is the influence of Roman law and Christianity. The tribal chief also lacks the position of power that Brahmins have among the Hindoos.

What sustains Maine’s narrative? It appears that there are two things that sustain his narrative which is knowledge of India and knowledge of Roman law:

......of India, because it is the great repository of verifiable phenomena of ancient usage and ancient juridical thought –of Roman law, because, viewed in the whole course of its development, it connects these ancient usages and this ancient juridical thought with the legal ideas of our own day(( Maine [1913]1985 , 22).

I would like to suggest that this narrative and the theory that sustains it can only take place within a biblical framework and Maine’s project is not different from other colonial scholars such as Jones, Holwell and Halhed. In this scheme, a unified humankind dispersed over the earth. Some of them rebelled against God and fell into idolatry, thus violating the Mosaic Law. In the case of the Indo-Aryans this was caused by the Brahmins who corrupted the Law. The Mosaic Law could be still found in an age prior to its corruption. Therefore the customs and the practices of the Indo-Aryans at the earliest stage are important. What is the perfect illustration of the Mosaic Law? In Maine’s own words it is the Twelve Tables of Rome which is “descended from a small body of Aryan customs reduced to writing by the fifth century before Christ (Maine 1875, 9-10)”. Therefore what is the difference between the Romans and the Hindoos? Maine answers this question by suggesting that the chief advantages which the Twelve Tables conferred was protection against a religious oligarchy. In the context of India
the social order had descended into caste due to this religious oligarchy. According to ethnology the Romans and the Hindoos had sprung from the same original stock and there was a striking resemblance in their original customs. However:

Even now, Hindoo jurisprudence has a substratum of forethought and sound judgement, but irrational imitation has engrafted in it an immense apparatus of cruel absurdities. From these corruptions the Romans were protected by their code............The Hindoo law has been to a great extent embodied in writing, but ancient as in one sense are the compendia which still exist in Sanskrit, they contain ample evidence that they were drawn up after the mischief had been done (Maine, 1931,16-17)

How was the religious oligarchy responsible for this? Like many colonial administrators before him, Maine has no doubts:

.....the codified law-.Manu and his glossators –embraced originally a much smaller body of usage than had been imagined; and next, that the customary rules reduced to writing, have been very greatly altered by Brahmanical expositors, constantly in spirit, sometimes in tenor. Indian law may in fact be affirmed to consist of a very great number of local bodies of usage, and of one set of customs, reduced to writing , pretending to a diviner authority than the rest, exercising consequently a great influence over them, and tending, if not checked, to absorb them. ( [1883]1985,7-8)

Where could the source of the uncorrupted Hindoo law be found? Maine has no doubt about this:

There is in India a province, the Punjab, the country of the Five Rivers, which was the earliest seat of the Aryan Hindus on their descent from their original home into the Indian plains. The laws and institutions of this province have quite lately been the subject of an exhaustive official enquiry (‘Punjab Customary Law’ edited by C.L. Tupper, Calcutta 1881). Among several results of great interest which seem to have been reached, one is that we have in the Punjab the Hindu institutions very much in the state in which they were before the Brahmanical expositors took them in hand. The traces of the religious ideas which profoundly influenced the development of what is known as the Hindu law are here extremely slight; and few things can be more instructive to the legal archaeologist than the comparison of the Punjab rules with those worked out in Brahmanical schools far to the south-east.
This Punjab Hindu law exhibits in fact some singularly close resemblances to the most ancient Roman law (Maine [1883]1985, 8).

Maine’s views was characteristic of many others who studied Hindu law and provided a foundation for the debate that “different laws” existed, the law of the Aryan Hindus not extending over the entire population. A.C. Burnell\(^47\) observes that the study of Indian languages and literatures especially Sanskrit has led to the conclusion that all Indian civilization now existing “originated with a small tribe in the extreme North-west of India” This tribe extended its reach over the peninsula which was inhabited by other “savage tribes closely allied with the natives of Australia”. Burnell then suggests that this led to a civilization of a “mostly imitative character” where the most prominent were termed Sudras, but the others were left to adopt caste divisions of their own choosing. This line of thinking was pursued by J.H.Nelson (1881) who in analysing the origin of the Dravidas speculates that they may have been an Aryan tribe driven south and could also include a large part of the Andhra population that did not follow Brahmanism. He comments that there is no proof that any of the existing tribes and castes which form the bulk of the non-Arya population of the Madras Province were made Sudras by the Aryan conquerors. In his letter to Justice Innes (1882) he asks:

\[
\text{Are the one million and odd Brahmans of the Madras Province, many of whom are as dark-skinned as puny as Pariahs, Brahmans pure and undefiled, true descendants of the white faced warriors who first overran and in a sense civilised the North of India? I for one cannot believe that they are such (7).}
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According to Nelson (1877) it was likely that the “bastard Hinduism” that was prevalent in South India had been spread by small groups of Brahmins emigrating from the North. However if they were indeed Brahmans descended from ancestors who came from the Punjab, one cannot also assume that their ancestors brought with them from the north, and

\(^{47}\) Arthur Coke Burnell, Private Papers, India Office Record Room, the British Library.
during many long centuries maintained intact all or most of the laws by which the early Brahmans may have guided themselves in the Punjab. It was likely that these customs and practices were not maintained by Brahmans in the South.

This appears to have motivated the study of customary law in the Punjab. Tupper was clearly inspired by Maine’s study of village communities as pointed out by Bhattacharya but it is a mistake to understand the basis of his study as being anthropological and not legal. His quest is very clearly outlined in his suggestion that such an uncorrupted law devoid of Brahmanical influence can be found:

I would say that the assumption made in the Punjab Civil Code and repeated in the fifth section of the Punjab Laws Act, that custom modifies either Hindu or Muhammadan law, appears to me to state the exact converse of the truth. It is not, I think the custom which has modified the law; it is the Brahmanical law occasionally, and the Muhammadan law more often, which has modified the custom. If usage is as I conceive it, a fairly popular description of it might be given by saying that it has a general resemblance to Hindu law stripped of its refinements and ceremonials, and uncomplicated by any sacerdotal theories. It is a simplified and primitive version of the Hindu system, with the omission of the distinctions needed at a later phase of development, and with the additions required by vigorous village life (Tupper 1881, 86).

The observations of Tupper, Maine and other colonial administrators provide us with certain insights about the dynamic of theologisation. Firstly it allows us to place the village elders and the Brahmins as interlocutors for the law in one theoretical framework, which is that of Biblical history. Secondly, placing them in their role as interlocutors for the law in one framework, yields conceptual insights about the nature of colonial law, and the legal transformation of the Indian social order. This is evident in Maine’s observations about Hindu law:

Here we have one of the chief drawbacks on the historical usefulness of the sacred Hindu laws. In the course of their growth they have probably absorbed much customary law from without; but even in the
earliest of them it probably has been changed in transmission, while in the latest it may have been borrowed from several different bodies of usage, irreconcilable from the principles from which they start. (Maine [1883] (1985, 45)

Maine further specifies what he means by this irreconcilability:

The codified or written law of the Hindoos, then assumed to be include their whole law, consisted of a large body of law regulating the relations of classes especially in the matter of inter-marriage; of a great body of family law ....................There were some law of Contract and some law of Crime; but large departments of law were scantily represented, or not at all,............ (Maine [1913] 1985, 51)

Maine’s problems with the nature of Indian law as being fundamentally incomplete allow us to understand the various problems of colonial administrators such as Holwell and Bolts and a twentieth century scholar like Lingat. The agenda of colonial legal reform is now more clearly visible. The remarks of colonial administrators that the Hindu religious texts were corrupted, and that one could not find a true account of the doctrines of Hinduism assume significance. The nature of these texts differed considerably from the Bible. Unlike the Bible the modes of action prescribed by these texts were not subordinated to the Will of God. If the Universe was the expression of the Will of God and religion was the way to understand God’s Will, and religious texts had to reflect this law governed Universe. 48 However the texts that the British understood as Hindu religious texts were completely different. They were based on usage and were the result of contemplation on practices within human society and thus reflected the differences, preoccupations, contradictions and limitations of those human societies themselves.

As mentioned earlier, Biblical history sought to see the history of the world as its own. The “Hindus” were identified as one of the peoples who had rebelled against God and had fallen into idolatry. The Brahmins who were their priests, were responsible for them turning to

48 Balagangadhara (1994).
idolatry. Therefore the law had been corrupted by them. The true law had to be found in the Punjab, the home of the Aryan peoples whose usages and practices reflected society in India prior to the act of falling into idolatry. The need to remedy the faulty state of indigenous dispute resolution thus coexisted with the search for the Mosiac law. The characteristics and structure of the Mosaic Law were unreflected in Indian legal institutions and the agenda for legal reform set to remedy the inherently defective nature of Indian legal institutions. As we have seen Hindu law could not be reconciled to one original source, the courts making efforts to create a hierarchy of sources in an attempt to reconcile divergence, such a process being an illustration of the dynamic of theologisation. However I would like to argue that the dynamic of theologisation was not confined to the making of Hindu law but was also present in the creation of the secular legal systems. Therefore, the process of legal reform and change must also be seen as an illustration of this dynamic.

The productivity of this cultural history of the dynamic of theologisation that I have outlined lies in the theoretical framework that it unearths. In doing so, it departs significantly from current forms of historiography that sees the colonial project as being dependent on a chronological perspective of history that seeks to build a narrative of progress from the primitive to the modern. It also departs from merely understanding history as a set of shifts such as Bhattacharya’s argument that legal reform is a shift from text to practice and functioned as opposition to utilitarianism, (Bhattacharya 1996). This approach allows us only to characterise the surface of the debates on legal reform, not the structures that generate it.

49 Gelders (2010) provides a critical analysis of the theoretical framework that let Europeans perceive Brahmins as priests. He traces this to the protestant Reformation wherein Catholic priests were seen as corrupt and immoral. They misinterpreted the word of God thus leading the masses astray. Some of the implications of this perspective is analysed in Chapter Five “Identifying Doctrine: Tracing Theologisation in Legal Narratives of the Place of Worship in India”.

50 An illustration of this is Mantena’s historical narrative placing the Brahmins and village elders in a chronology and suggesting that legal reform and governance by the colonisers were meant to bring progress to the uncivilized natives (Mantena 2010).
By analysing the theoretical framework that this cultural history produces, we realise that there is an ideal to the structure of law that enables us to understand the discourse that it produces. The colonial legal project sought to transform indigenous forms of dispute resolution into a cohesive body of law that would resemble the structure of the Mosiac Law. The creation of secular legal systems in the agenda of legal reform sought to move towards this ideal.

What does one mean by the structure of Mosaic Law? As already mentioned such laws could not consist of varied usages contradicting each other but needed to reflect the Will of God who is perfectly good and perfectly consistent. However human beings could never be as perfect as God. They could only make efforts to understand God’s purposes for mankind. As we have seen, Christian doctrine lays down that God has written the law of nature into the hearts of men (both heathen and believer). This carries with it certain assumptions about the nature of human beings which include knowledge of the law being contained in their very disposition. However such knowledge is insufficient to reach God, one must act upon such knowledge of the law.

What is the significance of acting on such knowledge of the law within Christianity? Such knowledge of the law is necessarily linked with the process of being and becoming a Christian i.e. the process of religious conversion. As shown by Sarah Claerhout (2010) the scope of conversion was redefined during the Protestant Reformation. Conversion was no longer seen as a matter for the individual believer. Society as a whole (including its laws) had to facilitate the process of conversion for the believer. Claerhout argues that conversion is both a moment and a process where there is an acceptance of God and a movement towards God. As a human being one is inherently sinful and the acceptance of God’s grace is not sufficient. One must live life according to God’s purposes for mankind. Therefore conversion involves two aspects which is the ideal and the route to the ideal. She further argues that one
of the learning entities in the process of conversion is the law of God. In trying to achieve what this law sets out (and necessarily failing) the believer makes his way on the path of salvation.

The colonial project of legal reform has to be considered in this light. It was not that the ideal in respect to the law could be achieved but there had to be a movement towards the ideal. However the colonisers came across a significant problem. The conditions for the ideal and the movement towards this ideal were absent in India and therefore they had to be created.

2.8 Codification or Custom: The Making of Hindu Law and the Indian Legal System

In the late eighteenth century British colonial officials such as Verelst believed that Indians were not fit to be governed by English law. He succinctly explains the same:

All free governments have their foundation in the natural equality of mankind. The forms of such governments, by distributing political power among several orders of men, nurture this principle in the minds of a nation; while the principle itself gives life, vigour, and effect to the laws. These forms, these laws, and this principle, without which the laws would be worse than a dead letter, are, nevertheless the growth of ages. Their gradual progress and the aid which they mutually afford to each other, cannot be better understood than from the history of our own country, whose government is a model of political perfection. But the execution of our laws supposes a people educated under them; and were it possible to infuse this spirit into the natives of Bengal, we instantly emancipate them from subjection to ourselves (Verelst 1772, 144).

Verelst (1772) provides further examples of reasons why the Indians could not be governed by English law. He mentions practices such as polygamy that would normally be unlawful in England appear to be acceptable among the Indians. He states that this practice is due to the hot climate which makes women marriageable at an early age. It is therefore natural that men
take many wives. He also mentions that introducing laws of rape or evidence would not be feasible due to the practice of early marriage wherein consent is not taken.

Verelst’s reluctance to introduce English law, and his views that this would free the natives from colonial subjection, stand in extreme contrast to the attitudes of colonial administrators a hundred years later. A plethora of enactments were introduced such as the Indian Penal Code 1860, the Indian Evidence Act 1872, the Indian Contract Act 1872 and the Transfer of Property Act 1882 amongst many other enactments. What was the reason for this extraordinary reversal? I would like to suggest that what occurred over these one hundred years was a reorganisation of categories. This reorganisation was characterised by a process that allowed both the colonisers and the colonised to recognise these categories. Such a process was rich and varied and the dynamic of theologisation in the formation of the legal category of religion can only be a hint of this process. However the understanding that “secular law” such as criminal and civil legislation were brought into being as a result of spheres of life being withdrawn from the “religious” is incorrect. As shown later in the thesis, secular legal concepts such as the law of trusts and property contributed actively to making the legal category of the religious place possible. Therefore the legal rationality behind the secular and the religious were the same.

The process of the making of law in its ‘secular’ and ‘religious’ forms has been understood as the rationality of codification vis-a-vis the unpredictability of custom or native institutions being destroyed by unfamiliar legal systems. It has also been understood as a mechanism of strengthening the colonial state’s power (Guha 1987). Whereas one cannot deny the results of codification or that the Indian legal system may have strengthened the colonisers it does not

51 An illustration is Colebrooke’s treatise on contract law (Colebrooke 1818) where he attempts to reconcile the English law of contract with what he perceives as the “Hindu law of contract” using English legal categories of consent, fraud and agency.
tell us anything about the **conceptual choices** that the colonisers had in strengthening their power over the colonised through law and the effects that this had. What were the structures and forms of law that the colonisers had access to? We have already seen that the ideal of the Mosaic Law was the objective of the colonisers. Such a structure expressed in the form of the common law dictated the conceptual choices of the colonisers in making law.

Therefore for an understanding of these conceptual choices, we need to focus on Postema’s explanation of the common law that we have identified earlier. We have been able to understand in the earlier sections, the roots of the tests of custom within the common law in the larger framework of Western legal history, and have also understood how it forms a dynamic of secularisation having inherited this structure from Christianity. We now need to understand Postema’s explanation of the “artificial reason” of the common law as not being a set of rules. His description of the common law as a system of practical reasoning, its rules and norms being capable of being formulated with no such formulation conclusive, needs to be understood along with our discovery of the ideal of the structure of the law being the Mosaic law. In doing so the debates on codification vis-a-vis the common law are of relevance.

The most prominent work on this question is that of Eric Stokes who suggests that the process of codification was influenced by Benthamite ideas. He shows that in James Mill’s writings about government, law had to create property by defining rights and securing them under the threat of punishment (the pain inflicted was outweighed by the pain prevented). The law therefore had to be efficient, clear, easily intelligible, simple and readily available. If its action were automatic, if every infraction of right met with peremptory punishment, crimes and litigation would soon cease and human conduct would be channelized into beneficial and harmless courses. To realise this ideal, it was necessary that all law should be scientifically
embodied in a written form in codes. This ‘panominium’ would contain the whole of law expressed in simple rational language accessible to every man.

Jon Wilson (2008) suggests that the codes that Mill and other utilitarians had in mind were very different from the texts that William Jones produced in his attempt to codify Hindu law. For Jones and his successor Colebrooke the law was not an abstract aloof set of doctrines or principles handed over generations or articulated by a legislator. It was something that one made and participated in. Jones was suspicious of having abstract texts as the source of all law. For him the English common law was a complex network of practices and remedies, maxims and principles that made sense in the detail of everyday judicial practices but could not be abstractly codified as a systematic set of rules. Law was the consensual practice of the inhabitants of a particular place which was articulated within judicial institutions. The nature of this consensual practice is elaborated by him in a letter to Thomas Yeats:

It was the opinion, in short of the late ingenious Henry Fielding that the ‘Constitution of this island was nothing fixed, but just as variable as its weather’ ....................... Now of all words easy to be comprehended: the easiest in my humble opinion is the word Constitution; it is the great system of public in contradistinction to private, and criminal law, and comprises all those articles, which Blackstone arranges, in his first volume, under the rights of persons....................This constitutional or public law is partly unwritten, and grounded upon immemorial usage, and partly written or enacted by the legislative power; but the unwritten or common law contains the true spirit of our Constitution: the written has often most unjustifiably altered the form of it; the common law is the collected wisdom of many centuries...........

Jones further adds that statutes often contain the whims of a few individuals and it is the unwritten law that is favourable to the rights of men and not the written law which is hostile. He then makes a further clarification as to the nature of this law:

52 Letter dated 7th June 1782 to Thomas Yeats in Jones (1970) at pp551-553.
But though this inestimable law be called unwritten, yet the only evidence of it is in writing, preserved in the public records, judicial, official and parliamentary, and explained in works of acknowledged authority

Jones’s views on the common law would find agreement not only with a contemporary legal theorist like Postema but with a seventeenth century jurist such as John Selden (Christianson 1984) who sought to justify the ancient constitution of England on the basis of pre-Roman usage.

In this context how does one understand the debate on codification vis-a-vis the common law? Henry Maine’s views on this topic are of relevance. In an essay on the role of Roman law in legal education, Maine stresses the role of Roman law as being the foundation of English jurisprudence. He states:

It is not because our own jurisprudence and that of Rome were once alike that they ought to be studied together –it is because they will be alike. It is because all laws, however dissimilar in their infancy, tend to resemble each other in their maturity; ........... (Maine[1913] 1985, 332).

Maine holds that English law is now accustoming itself to the legal thought and conceptions of legal principles to which the Roman juriconsults had attained after centuries of experience. He points out that Roman law consists of problems solved by authority in order to throw light on the rule. English law was conceived to have this character and “was regarded as existing somewhere in the form of a symmetrical body of express rules, adjusted to definite principles” However the Roman legal thought that had seeped into English law in the form of legal phrases have now merely become popular expressions- as expressions which serve to eke out technical phraseology. He regrets that the:

The technicalities of English law have lost all their rigidity and accuracy.....Nothing harsher can be said of a legal vocabulary, than that it consists of technical phraseology in a state of disintegration, and
of popular language employed without even an affectation of precision. Yet this reproach is the literal truth as respects the law of England (Maine [1913] 1985, 347-348)

What were the possibilities of reviving English law to a position of grandeur? Maine has no doubt that it is the study of Roman law. Roman jurisprudence could be used to improve the field of legal terminology. In this context how was codification important? It is interesting to note that Maine did not see a conflict between the Roman law and the proponents of codification such as Bentham, He comments that the “disconnexion between Roman law and the philosophy of Bentham exists in form rather than in substance (343)”. The followers of Bentham had declared their preference for the phraseology of Roman jurisprudence.

So where was the disagreement? In elucidating his difference with the Benthamite school of thought and the nature of codification itself, Maine remarks that the codification of Roman law by Justinian was a ‘second’ codification signifying the “conversion of Written law into well Written law (364)”. He agrees that English jurisprudence is not codified if one has to understand codification in this context. However it was premature to ask for a code as one needed legislators trained in legal terminology and with adequate knowledge of legal expression and classification. Uncodified law that was badly expressed was better than badly expressed codified law as it was possible to manipulate and understand it to give it effect. However the same was not possible with badly expressed codified law as knowledge of it was hard to seek.

Maine’s differences with the Benthamite school thus revolved not around the desirability of codification but its inability to produce the results that codification should bring i.e. a scientific law that is precise and intelligible. Maine’s views came from the importance that he placed on the law of nature. According to him (Maine 1935 [1861,] the Roman juriconsults had a theory of natural law that allowed them to have a vision of the perfect law. The natural law was conceived of a system that ought to gradually absorb civil laws without superceding
them, as long as they remain unrepealed. In the modern period natural law had become speculative and not a theory guiding practice.

It does appear that the nature of the difference between Maine and the utilitarians revolves around the **results of codification** and not its **desirability**. The question that arises is whether codification will achieve the aim of a scientific law. One therefore needs to view the debates on codification between the utilitarians and the others in Europe in this prism. Such debates were not about **the objectives of law** but **achieving its objectives** thus becoming an internal debate within the western legal tradition.

How does one view the debate on codification in India? It is interesting to note that Maine played an active role in the codification of law in India being a Law Commission member. Why did he oppose codification in England but participated in it in India? Maine was of the view that native institutions had degenerated due to British rule but he did not seek to retain these native institutions. Although he believed that each country should be governed by its customs it appeared that;

............the interpretation of these notions and customs has given rise to the widest differences of opinion, and it is the settled habit of the partisans of each opinion to charge their adversaries with disregard of native usage (Maine [1913] 1985 27).

Maine mentions that the authoritative native treatises on law are so vague that anything can be drawn from them.\(^{53}\) There are vast gaps and interstices in the substantive law of India and subjects on which no rules exist, making the application of rules haphazard. Therefore there is need for legislation and the local governments must press for it.

Therefore Maine’s position did not eventually differ from that of the utilitarians. In making the suggestion that Maine’s position was “ambivalent” and his aims of codification involved

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\(^{53}\) Minute dated October 1, 1968 in (Maine [ 1913] 1985)
harmonising law in the context of bringing modernity to a traditional society (Mantena 2010), one merely renders him disingenuous. It is therefore important to understand the conceptual choice that the colonisers had, which was the objective of a scientific law mirrored in the Mosaic Law in the biblical framework. Therefore their concerns in codification need to be seen in the spirit of reform in order to reform existing law so that it meets these objectives.

These concerns and dilemmas appear to be prevalent in the Reports of the Indian Law Commission. The Indian Law Commission report of 1879 rejected the suggestion that while particular sections of civil law are formulated, the idea of having them combined in a single and general code be abandoned. The rationale for this was not merely the question of legislative draftsmanship i.e that statutes had to be framed with reference to a central group of ideas, but involved larger questions of legal and philosophical reasoning:

The impressions received from a study and application of one branch of the law cannot be cast off in expounding and applying another; nor is it possible that really just and philosophical conceptions of law as an organic structure should gain possession of the minds of the community, or even of the legal profession unless the minor generalisations embodied in particular laws centre in higher generalisations drawn from the elementary truths of human nature and experience.

The problem with special laws was that the logical development of one set of rules based on an underlying conception may become inconsistent with a group of ideas in another set of special laws. It then becomes necessary to subjugate one principle to the other. However in the case of a Code these issues do not arise. This is as the leading ideas of legal relations govern the whole and the development of each part is worked out harmoniously on the general basis of rights and duties.

In elaborating on this question the commission remarked that English law cannot be used as a model and only aspects of it that are viable with local Indian conditions should be used. It is important that one is acquainted with the circumstances of the community, the minds of the
people and “in the moral preparation made by them for the reception of some necessary
development or some new combination of principles”. Therefore it was essential that there be
**conditions for reform;** that the community was prepared to receive the laws.

The theme is further explained by the commission who was also of the view that one cannot
oppose scientific uniformity on the ground that there are different social conditions and
stages in different parts of the country. An illustration is provided by the contrasts in
civilisation in the several provinces of the Roman Empire. Such differences were not allowed
to prevent the growth and application of a uniform system of legal principles. As the
conditions in India are similar one must try to ascertain the suitability of law to the varying
circumstances of the different provinces.

The **conceptual choice** of the colonisers becomes more succinct in the statements of the
commission when it observes the following:

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........neither the purely abstract principles involved in laws, nor their historical relations, however
necessary a study of these may be for their full comprehension, and for their scientific reconstruction,
afford a safe or convenient basis for their arrangement........The State moreover does not and cannot as
such come forward in its lawmaking capacity until society is already formed and tolerably well
advanced in a rudimentary civilisation. Its very existence as a political power presupposes a community
already by common consent submitting in many things to fixed laws.
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Therefore the **conditions** that would allow a scientific law to prevail, was a form of social
contract which was based upon people consenting to the law and accepting the rationality
behind the law. In other words society had to be **prepared** to receive the law akin to the
believer who upon receiving God’s grace realises the importance of acting upon the law.
This was an essential condition for legal reform. What was the result of such legal reform?

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It is the characteristic of sound and fruitful principles to embrace an ever-widening mass of details
within their operation. Contradictory rules and reasonings are either modified or perish before them.
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Those principles which in themselves are consistent with the elementary facts of human nature are sure as matters progress to be recognised as the proper complement of others already accepted. Thus, from step to step a logically organised system is formed, while by a process of reaction the character of the community itself in which this process is going on is moulded insensibly to a development in which the maximum of its beneficial energy can be put forth in the manifold lines of activity which the law leaves invitingly open in every direction consistent with the common welfare.

The purpose of legal reform was to reform the character of Indian society in a manner so as to build a conception of common welfare i.e. matters that the entire society had to accept as crucial to its survival as a “society”. This allowed for matters being understood as involving the “interests of the public”.

What were the processes that allowed Indian society to finally accept colonial legal reform? The process is rich and complicated and beyond the scope of this thesis. It has however been detailed by others. I seek however to understand the colonial project of creating secular legal systems as part of the process of theologisation. This is investigated in the other chapters.

Conclusion

I would like to summarise the findings of this chapter. We have seen that our legal history is read in a certain chronology which sees the religious recede and the secular come into being. The making of the legal category of “Hindu religion” is perceived in this background. This raises a problem about the universality of secularisation. The codification of law is seen as part of this narrative of secularisation.

54 The implications of the concept of the public is discussed in later chapters.

55 Lata Mani’s (1998) study of the legal regulation of sati is an illustration of the same.
In order to resolve the problem raised by the universality of secularisation, we have begun with an analysis of the narrative of codification and have interrogated the assumptions that hold it together. In order to unravel the assumptions we seek to see the questions that such assumptions generate. These are religious texts being seen as legal texts, priests who are Brahmins being interlocutors for these texts, the debate on whether texts should prevail over custom, and the question of who should interpret custom. In answering these questions we analyse the status of custom and come across the dynamic of secularisation in the West which is linked to the nature of the expansion of Christianity.

We then examine the manner in which the dynamic of secularisation in India has been transplanted in India through colonial judicial discourse on custom. We see that this dynamic is forced to transform itself into the dynamic of theologisation. Such theologisation is due to the conceptual units of the dynamic of secularisation not being available in India due to the absence of “religion”. To further unravel the assumptions behind the narrative, we embark on a cultural history of the dynamic of theologisation which reveals the objective of creating a scientific law based on the Mosaic ideal. The movement towards such a scientific law is embodied in the project of codification which seeks to reform Indian society in a manner akin to knowledge of God’s Law within Christianity.

How does one further theorise theologisation? As one has already suggested, the manner in which the colonial legal system has been formed has been rich and varied involving a number of conceptual frameworks imported from the West. The arrival of Christianity in the West and its secularisation of practice led to the development of certain conceptual frameworks and categories which reflected the attitudes that it tried to create. The growth of law and the development of legal categories in the West need to be understood as reflecting this process of secularisation.
The making of the Indian legal system has involved the importation of these secularised conceptual frameworks and categories. The development of the legal category of religion as theologisation cannot be understood in isolation from these processes. It is thus important to identify the secular structures that are behind the process of theologisation. In order to further understand the compulsion of this dynamic we need to understand the actual processes behind the making of the legal category of religion. Therefore I take an instance of a specific legal category i.e. the religious place or the place of worship. In the fourth and fifth chapters, I analyse the legal category of the place of worship or the religious place showing how the secularised conceptual frameworks such as the secular law of trusts and equity have contributed to the making of religion as a legal category.