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COMMON PROPERTY RESOURCES, CUSTOMARY LAW AND RURAL SELF-GOVERNING INSTITUTIONS IN COLONIAL NORTH INDIA

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> "It should be a relief to us to renounce omniscience, to recognize that every generation, our own included, will, must inevitably, understand the past and anticipate the future in the light of its own restricted experience, must inevitably play on the dead whatever tricks it finds necessary for its own peace of mind. The appropriate trick for any age is not a malicious invention designed to take anyone in, but an unconscious and necessary effort on the part of "society" to understand what it is doing in the light of what it has done and what it hopes to do. We, historians by profession, share in this necessary effort" (Becker, 1935: 253).

Introduction

The construction of history depends very much on the political homogeneity of a region and therefore we take recourse to examining the institutions of self-governing communities in a narrower region of the north – the Punjab. This frontier Province was first defined by the boundaries laid by the British in 1858. Hence, we continue with this imperial category. The geographical configuration of the Province was dictated by the dynamic river systems emerging from the snow-fed Himalayas which provided the natural frontier on three sides of the Province. This Province saw the maximum cross-fertilisation of cultures not indigenous to the mainland sub-continent. The Mughals had occupied the Punjab till the eighteenth century when the Sikhs took over and held sway for almost a century.

The Sikhs and after them the British collected revenue from the people of the region who were partially settled to sedentary agriculture. Large bands of pastoralists roamed over the arid areas of the doabs or inter-riverine land and on the slopes of the mountains on three sides of the region. The system of organising property rights was distinctly characteristic of Northern India, this has been more or less documented by scholars who have analysed the Sikh

agricultural system[1] and by those who have researched on the British revenue system (Bhattacharya, 19??; Bannerjee, 1982; Ali, 1989).

The most important and almost unanimous description of contemporaneous nineteenth-century observers (Fortescue, Martin, Lawrence, Thomason, Metcalfe, Steinbech) had been the cohesive nature of the corporate units functioning as fiscal agents and custodians of the customary usages and rules which regulated the civil conditions of the lives of those who resided within the cosmology of a "tribe" or fairly wide group. Even nomadic groups had unwritten codes which regulated their rights and obligations. For the most part the codes "engraven on the minds of the people"[2] were a set of rights and obligations for not only related groups of families or members of a clan, but also for those who performed services in return for the privilege of residence.

These were ways in which order was maintained at least on a day to day basis. Joint decisions were challenged whenever anyone flouted rules but these were dealt by the juridical authority of a council of elders whether at the village, clan or tribal level. These councils at different levels functioned not only in matters of religious import but also in matters concerning secular affairs. It must not be imagined that matters were always dealt in a peaceful manner or equitably.[3]

There was a definite bias in favour of those who wielded economic power or were a dominant family or group within a larger set-up. There was certainly a gender bias.[4] However, so far as resources were concerned, there was a built-in element of protection for the rights of ownership, management and use of the group which paid the revenue collectively.

Theoretically, the individual was "free" (Boulnois and Rattigan, 1876: 66) but his existence was rule-ordered by concentric circles of authority, first of the family, then of the immediate community of the proprietary body and last of the community at large — the clan and the tribe. He could not for example act unilaterally in matters related to his share in the village assets either in the land which his family actually held and much less in the communally held resources.

The history of Punjab enables us to examine a very important aspect of Indian society – the organisation of corporate management of both the social and economic orders of two major streams of people, namely the agriculturist and the pastoralist. Further the annexation of the Province coincided with the Indian sub-continent becoming a part of the formal colony of the British Empire. This made a major difference in the imperial impact. The Punjab witnessed a major shift in the character of imperial governance – which the rulers themselves perceived as an extension of Pax Britannica on the lines of Pax Romana in an earlier imperial context. This serendipity led to greater care bestowed on indigenous institutions of property, law, and conditions affecting the civil life of society in the course of the nineteenth century.

The introduction of the notion of judging the people by their own system of laws became the subject of a fairly intense debate both in India and in Great Britain. Enmeshed with this was the conflicting response of those who represented the imperial rule in the Province. There were some in the Punjab government who held it desirable to uphold the local elites of society[5] while the others who condemned the rent-seekers as drones and therefore backed the more humble sections of rural society.

The above transition in Punjab society was documented by the civil and judicial arms of the colonial government. The participants in the process were (a) those who remote-controlled the Government of India, from the imperial seat in London; (b) those who represented the imperial rule in British India, in the province, in the district, in the tehsil and in the village; and (c) the representatives of the people themselves like heads of the "tribe," the clan and the family.

In this whole imperial arrangement the Settlement Officers became the kingpin whose reports were expected to mirror[6] ground conditions as they were, without altering them in any revolutionary manner. Yet the de facto executive and judicial powers they wielded affected the ordering of rural society. For example, they also had legal authority to adjudicate. But in recording the individual rights to the land on which they paid revenue, the settlement

officer could not avoid the group whether it was the family, or the clan to which the family belonged, or the corporate group to which the family was attached. This was a noticeable feature of the entire region which fell within the Sutlej and the Jumna River, which was the first area of the Punjab controlled by the British between 1803-1849.

Common Property Resources and Customary Law

Communal control over resources was a customary and integral feature of collectivities in rural north India in early nineteenth century. The British marvelled at the survival of these "village republics" and attributed their endurance to the institutions set up for governing the economic and social relationships within and with the world outside. But, in the process of settling revenue payments of each revenue-estate, the colonial administration "fixed" the identity of each unit to a territorially-defined village which initially (at least) overlooked the extra-territorial attachments and loyalties of each village group. The land-owning revenue-paying residents were tied by intricate mechanisms of control exercised by a larger network of relationships operating in an entire region.

These relationships were ordered by institutions of "reciprocal rights and duties" and enforced by rules of monitoring and sanctioning conceptualised by self-governing collectivities in the Punjab. The observations of contemporary juridical historians, like Henry Sumner Maine, underlined the secular character of these customary arrangements based on usages. And although the rural communities bore resemblance to medieval Teutonic communities according to Maine, yet he pointed out that the Indian Village Communities unlike their European counterpart were "the source of a land law which, in bulk at all events, may not be unfairly compared with the real property law of England" (Maine, 1881: 18).

These observations of scholars like Maine and British officials were important contributions to a historical perspective of law; for, as Vinogradoff reiterated in 1925 that "the historical development of law starts

with custom. Rules are not imposed from above by legislative authorities but rise from below, from the society which comes to recognise them. The best opportunities for observing the formation and application of custom are presented when primitive societies are living their life before the eyes and under the control of more advanced nations."

Therefore, this paper will attempt to follow the Colonial government's efforts to integrate nineteenth-century customary usages in rural Punjab into a system of Customary Law. This was a bid to rule the people by their own laws. Codification of customs and customary usages which regulated common lands in the Punjab villages provides a window to observe the transformation of institutions of self-governance as a result of the modernising influence of the Colonial Government.

We support that:

- "In reality the Indian civilisation is built on blendings between patrilineal, matrilineal and bilateral customs" (Derrett, 1977: 272).
- That property was originally joint and only became individual by degrees (Maine, 1861: 271). Corporate bodies in North India were the source of customs which were guided by secular usages conceptualised and institutionalised as complementary to a system of property rights in land and other resources.

We argue that:

- Customary Law even more than Hindu Law gives emphasis to the superiority of the male-line. Henry Sumner Maine, attributed this to Indian religion and law. Indeed, as Derrett opines, this is a survival of Aryan theory "which was in practice constantly modified by contact with non-patrilineal people" (Derrett, 1977: 272). The Punjab is an example of how Aryan theory was both exaggerated and modified.

  The emphasis on male inheritance can be explained by the shortage of labour and for defence in a region which faced all the invasions into India (except the British). This goes against the opinions of both Marx and Maine that rural communities were necessary complement of Oriental despotism (Marx, 1970: 35,40) or that "the Indian village communities always submitted without resistance to oppression by monarchs surrounded by mercenary armies. Thus the causes which gave importance to young men in primitive societies was lacking" (Maine, 1881: 24). These village collectivities were foundations of a representative form of government capable of holding out against both environmental and political uncertainties. They countered uncertainty and a high mortality rate, by inheritance laws which preserved the hold of the family and the community on the land for example male-inheritance of property and that of the brotherhood in case of heirless deceased proprietor particularly in land. The customs of PAGVAND and CHUNDAVAND provided for all sons in the family. When a man had one wife all sons inherited equally

(pagvand=pag was the headgear of the man). When a man had two wives then the estate was divided into two and the sons in each division inherited equally (chundavand=chunda is the headwear of the woman) These reservations to males, were a sort of plebian adjustment to the law of primo-geniture. Sons were rooted to the soil. Females never inherited land and custom in the main vetoed adoption.

- Customary Law had corporate roots. This was Maine's hypothesis. The notion has received support from other legal historians, as for example Derrett says "Notwithstanding religious emphasis on the individual soul, Indian history shows that persons have enjoyed rights by custom and at law almost exclusively by virtue of membership of a community or a guild" (Derrett, 1977: 272). But Derrett denies that communal villages were the rule and also stresses that both Vedic and classical Hinduism had "a partiality for separate property."

We continue to argue that:

- Customary Law supported joint control over communal resources. This is evidenced by customs of pre-emption,scattering of holdings and equal inheritance, non-saleability of residential sites, and prevention of female inheritance. Partition of common lands were theoretically possible but customarily frowned upon. Any move to withdraw from the system of scattered holdings in the arable and compact holdings in the grazing led to greater externalities than economies not only for the community but more so for the individual. Hence the underlying principle was to make visible the net gains as against losses of collective action. This showed an apparent understanding that human beings may universally be imbibed with pro-social instincts but unlike social insects are not hard-wired to work towards the general welfare of the group to which they belong (Boyd and Richerson, 1985), unless induced or coerced to do so. Further, when human action is far more volatile and much less easy to predict than the conditions of nature, there is every reason for cohering humans as units in society to order their relationships. Thus common-property resources provided collectivities a central rallying point, a collective stake in survival and means of orientation to a large number of actors. "It enables them to co-ordinate their actions by means of orientation to a common signpost" (Lachmann, 1971: 49).

  Uncertainties in natural environment and political situations, as it existed in Punjab further enhanced the need to co-ordinate collective action for sheer survival and this called for rule ordering and rule-enforcement. The origin of such institutional norms may not have been democratic but resembled what Weber calls OKTROYIERUNG, in the few imposing their will upon the many (Lachmann, 1971: 62).

It is more than historical coincidence that the north was exposed to greater insecurity, that incidence of corporate behaviour pre-dated British entry, that uncertainty and risk to ways of life to both agricultural and pastoral people were strong inducements to reciprocal obligations if not to co-operation. Survival in acephalous societies required communal organisation of monitoring and sanctioning and therefore institutions of self-governance —

customary law – became apparently the mode of maintaining social and economic order.

Customary law in communal organisations provided the "glue" to keep collective decision making possible by reducing conflicts between reality and ideology of a group or groups. When disputes actually occurred, the resolution involved deliberation and consultation to recapitulate the circumstances in which the custom was designed rather than to provide an unilateral judgement. Flexibility was an in-built quality of traditional systems of law and law enforcement.

In the course of this paper, I wish to establish that customary norms were institutions of self-governance which were "sets of working rules" (Ostrom, 1990) which determined who would decide any action and how they were to be executed when and where. Customs were then rules which ordered social and economic relations in a situation when (a) there was environmental uncertainty which threatened survival and (b) when the State control was weak or predatory at the grass-root level. The questions that arise here are whether the unwritten codes of customary usages were efficient surrogate legal systems? Were systems of customary law better adapted to suit changing social circumstances? Could customary law unilaterally bring about reform in both the economic and social order? Can self-governance be stable forms of ordering than the rule of law imposed from above by a bureaucratic state? This brings us to the conclusion that law is bound with the statutes of the State as "the organisationally coercive order" while custom would be its traditional counterpart risen from the opinions and practices of the people like "mists from a marsh" (Moore, 1978, 1983: 14).

Law and Customary Law

There are in the world two spheres of law distinguished by their origin. One which has "grown" from antiquity and another which has been "created" in the recent past.[7] In the first category could be included systems like that of Common Law as in England and Customary Law as it was discovered in the

nineteenth century in Punjab, Kashmir, Kerala and elsewhere in India and in other parts of the world.[8] Any legal system established by statute or imitation would fall in the second category. Roman Law, for example, has been the basis of legal systems in large parts of Europe and an attempt had been considered to introduce it in India as early as the seventeenth century.[9] It is a matter of historical coincidence that Rome and England shared a common experience of imperialist domination on the legal systems of a large part of the world. Pax Romana could be said to have influenced even British effort to induct the customary usages of rural communities into a system of customary law in the Punjab (Tupper, 1881, vol. 1).

Roman Law, English Law and India

Although the British had been in India since the seventeenth century, and the East India Company's courts were beginning to be reorganised from 1772, "the possibility of calling upon even the English legal system in the 1770-1830 period was at best problematical and intermittent" (Derrett, 1977, vol. 2: 169). Sir William Jones (1783-94) and Henry James Colebrooke (1810) were both familiar with the Hindu Law and were also seriously contemplating the utilisation of Roman Law in India. Colebrooke may have actually solved many a problem by applying the more "universal" or "logical" or "naturally just" principles derivable from Roman Law. Colebrooke "believed that a training in Roman Law would fit a man for judicial service in India" (Derrett, 1977, vol. 2: 172). It was in fact this lacunae of training in continental law of the judiciary in India which may have contributed to the difficulties in making use of the Roman legal system. However, there were exceptions like Mr. Justice William Holloway at Madras (Derrett, 1977, vol. 2: 179).[10]

In the meantime, the French Revolution had given a helpful stimulus to Utilitarian theories in England. Therefore any rabid innovation of the Indian legal system was hindered. Besides, the English system had been seriously "discredited by Jeremy Bentham and the utilitarian approach to law" (Derrett, 1977, vol. 2: 172). By the end of the eighteenth century it became apparent that the wholesale importation of the English law would be unjust. The Privy

Council, the highest court of appeal in India, constantly strove in the period between 1834-1870, to ascertain what rule would be most universally approved and where "Roman Law supported the English Law they felt happier in applying it, while in other cases they indicated a desire that the development of law in India be guided by consideration of rules in force in other countries besides England" (Derrett, 1977, vol. 2: 174). The personal laws of the two major religious groups were accepted as the Hindu Law based on the Dharmashastra, and the Muslim law based on the Shara. The Punjab was amalgamated into the British Empire in 1849, just a few years before India was declared a formal empire in 1858. True to the letter of Dalhousie's Despatch[11] and later of Victoria's proclamation in 1858, "native institutions" like Customary Law was made the basis of the legal system of the Punjab.

Induction of Customary Law

The process started even before 1849 with the official acceptance of the joint character of land and revenue management by the proprietary body in the Delhi Territory in the first quarter of the nineteenth century. The subsequent formalisation of a judiciary with an apex court in 1866 led up to the passage of Punjab Laws Act in 1872 by which customary law was inducted into the legal system of the new Province. This was not just a self-conscious reaction against the analytic jurisprudence of the Anglo-Indian Codes but inspired by the belief that the customary rules which governed civil life and property in Punjab were not rooted in either the Hindu Codes or the Muslim Shara. Consequently common lands, being the joint property of the entire village proprietary body was governed by the customs declared by them.

Customary Law and Self-Governance

Consequently, Punjab became the pillar of Pax Brittannica; and, indigenous institutions, the foundations on which it stood. The resemblance to the Teutonic communal organisations accorded the village communities the dignity of a hoary past with a repository of an unwritten set of customary usages.

Self-governance by "assemblies of the entire governing body" amongst the republics in northern India existed in Vedic times. According to J. Duncan M. Derrett, medieval India was not so highly organised, but there was evidence of "representation of the public." Derrett asserts that the legal texts and inscriptions provide evidence that the public was a force to contend with — "we learn of the common activity of villages, paying revenue, entering into contractual relations with neighbouring villages, joining with other villages of the district to achieve some common object, settling disputes or taking steps to have disputes settled."[12]

The recognition of a communal system of land management in the Cis-Sutlej and later in the legal system of Punjab owed much to Henry Sumner Maine, who in the 1860s, saw the village community of proprietors as central to a system of land law. This perception of communal system of property was elaborated further by one of the first judges of the Punjab Chief Court, Charles Boulnois, who noted in his commentary on Customary Law in 1876 that "whilst the individual householder may be the supreme head of his own homestead, he is still bound as a member of the community, to confirm strictly to all the village rules and usages with regard to rotation of crops, the right of pasturage, the alienation of lands and the liability to share in the village burthens." (Boulnois and Rattigan, 1876). In other words, to customary usages. Thus like the Mughals, the British also conceded a certain amount of independence to the village communities to continue their possession and management of their own affairs subject only to the State right to collect its dues. But, as they saw it. Unlike the previous rulers, they tried to base their policy, in intention at least, on a moderate assessment. This was to be backed up by "adequate enquiry, an exhaustive record of rights, and full protection to non-engaging (mainly non-proprietors cultivating) members of the village community."[13] The Settlement Officer was enjoined to "(unite) the object of ascertaining and recording the fullest possible information in regard to land tenures, interests and privileges of the various classes of the agricultural community."[14] In addition, the officers were to pay special

attention to the recording of usages connected with the landed tenures "more specially where several persons may hold interests in the same subject matter of different kinds and degrees."[15]

The findings of the Settlement Officers were recorded in the Village Administration Paper which was not exactly the wajib-ul-arz but had a section which contained conditions laid down about various matters concerning revenue distribution, partition of the shamilat (common lands) and its cultivation and clauses regulating tenancy.[16] This document was the genesis of what became the Wajib-ul-arz. as it was to be a record, according to the Regulation, "of matters which would not necessarily be the subject of judicial awards, and might rather be the subject of village agreement, adjustment, or general usage" (Boulnois, in Tupper, 1881, vol. I: 148). This document "though not conclusive evidence, is (was) admissible as prima facie proof of all matters relating to village custom" (ibid.).

This document had been drawn up for the early settlements in Delhi (1817-22), Sirsa (1829), Karnal (1824) and Rohtak (1837-38). It had the same legal force as the settlement records "and the provisions could be altered in the same way as entries in the Records, i.e., by agreement, by judicial decision, or according to facts subsequently occurring" (ibid.). The opinion of the settlement officers who conducted these exercises proved powerful in official quarters as some of these settlements were conducted by men like George Campbell, W. B. Martins, Gubbins and most important of all John Lawrence.[17] Lawrence as the main architect of Colonial Punjab had great influence on the Despatch of 1849. But on the other hand settlement officers also had a hand in doctoring the village administration papers, as was discovered in some of the districts like Ludhiana;[18] here the settlement papers in 1850 did not really contain "either the customs or the agreements of the people" but expressed rather "what the settlement officers thought to be the proper rules for guidance in the matters concerned."[19]

The Despatch, however, expressed the hope that: "With the knowledge now generally prevalent regarding the village co-parcenary bodies d is no

apprehension that our officers will not exert themselves to maintain these important bodies in all their integrity. . . The popular institutions will be improved and consolidated by our measures, and the Native system of accounts and reports may also be adhered to without any radical deviation so that the only material alteration will consist in the introduction of Europeans as supervisors and executive officers."[20]

The Despatch introduced substantive civil law into the Punjab and continued to serve as a guide to law after the Indian Councils Act was passed in 1861 till the Punjab Laws Act was enacted in 1872. Between 1849 and 1872, there was an attempt on the one hand to incorporate customs into the system of administration, and on the other to draw up the framework of a modern system of Government. The Board of Administration set up in 1849 was abolished in 1853, the Punjab was put under a Chief Commissioner and under him was appointed a Judicial Commissioner. John Lawrence was the first Chief Commissioner and Robert Montgomery was the first Judicial Commissioner.[2*] Courts were set up in the Punjab soon after annexation.[22] The Judicial Department which was set up in 1853, had to provide the courts with written law which they could administer (Tupper, 1881, vol. I: 206). The Judicial Commissioner, Montgomery, appointed Richard Temple to draw up what came to be known as the Punjab Civil Code in 1854. This was the first attempt of the colonial government to give "custom the effect of law; and it was the principal object of Lord Lawrence that it should be so."[23] An official wrote that it was "founded on common sense and equity, as little repugnant to the feelings and practices of the people of Punjab, and for the rest no doubt, it fulfilled this intention."[24] The Punjab Civil Code was intended to be an All Punjab Manual of reference for settlement officers but since it was prescribed by the Judicial Commissioner of the Punjab and was backed by the entire Executive Government it came to be "regarded as law."[25]

There was a choice between the tribe and the village as the unit of society. On the one hand the Afghan Frontier had hardly advanced "beyond that of joint ownership of the tribe, where the only law recognised is the decision

of the Tribal Council (jirgah) and where private wrongs must be redressed by private vengeance and whose ideas of law and custom were primitive while on the other hand in the Eastern Punjab the tribes though clearly marked, have been largely sub-divided into 'gots' and clans and these again into separate communities" (Rattigan and Roe, 1895: 19). In the event, the village rather than the tribe or the clan was chosen as the unit of society, or rather of administration. And there was further subdivision: within the village, rights in land were increasingly looked upon as matters affecting groups of agnates — the warisan yak iaddi — rather than the village brotherhood generally. The village proprietary body and its individual members had both been given recognition by the revenue settlements, even in those areas where tribal settlements and bonds of union were strong as in the Afghan Frontier districts. Villages were created where they did not exist earlier, as in Kangra and Sirsa districts.

In all the districts where the villages could be dated from the first settlement the customs of the inhabitants would invariably then be those followed by a tribe from which it became a splinter group or resemble those of neighbouring groups of villages. These village societies each had a set of customs and rules built in as a part of the system whereby their joint character could be maintained, if for nothing else at least for the joint revenue responsibility which they shouldered. Thus it was that blood'ties were replaced by the tie of land and over time as the proprietary rights got increasingly sub-divided then all the land which was kept as shamilat became the basis for coherence.

Hence, Customs and Customary law of rural Punjab had to be looked at from two angles and there was a clear distinction between them. These were customs which regulated "the transmission or devolution of private rights, such as inheritance, and those which related to the internal economy or administration of the general affairs of the village community" (Boulnois and Rattigan, 1876: 19).

The laws and customs of inheritance could not, for example, be based on the peculiar wants or requirements of a particular age but rather upon a general notion of equity and justice that the nearest kin should succeed to a man's estate, "while it was but natural that the local, social and particular kind of influence would be at work" (ibid.), on those customs which regulated the affairs of the village economy. These latter customs had nothing to do with religion; they governed alike the Jats and the Sayads and the Brahmin, for upon their general observance depended the "maintenance of the village political organisation" (ibid.: xxiii).

The customs of inheritance among the various tribes created a real problem in the Punjab in the early years of colonial legal institutions. The Hindu Law and the Muhammaddan Code had some influence on tribal custom, but it was not known to what extent. It was well known by early administrators like Robert Montgomery that the Sikh ruler Ranjit Singh had employed Hindu Pandits[26] like Gouri Shanker, a native from Delhi at Lahore as bywastha navees (Boulnois and Rattigan, 1876: xxi). But it was not clear how far the Hindu and the Muhammadan Codes were "merged in local custom and in what places they altogether yield (ed) to that unwritten code that is engraven in the minds of the people."[2^] Besides, it was apparent that there was a great degree of variety as the "practice of the Sikh sect, the manners of the hill and frontier tribes, all claim consideration."[28] Tupper commented that to the extent that "the Punjab Civil Code rendered minute enquiry into the Muhamaddan and Hindu Law unnecessary, to that extent it was a successful and creditable attempt at simple codification in our early days" (Tupper, 1881, vol. I: 127, 130).

First Phase:

Village Customs in Wajib-ul-arz — 1855: In the meanwhile, the Wajib-ul-arz in the settlements of the various districts continued to record village customs following the instructions sent by the Financial Commissioner in 1855. A list of headings was prepared by the patwari in his own hand. This was to include any additions which the community wished to have adopted

for the future. This was authenticated by the signatures of at least three of the lambardars and principal shareholders.

The wajib-ul-arz was to be drawn from this paper; if any objection was raised, the malikan-deh and other residents were to discuss and provide substitutes, and then the patwaris were to draw up a supplementary statement embodying these modifications.[29] If any further question arose, it was for the Courts to decide "keeping in view the real object, which is (was) to ascertain the actual and true custom prevailing at the time."[30] Thus the wajib-ul-arz became an important document "in a country, in which it is but lately that the rights in the land have been declared or adjudicated at all."[31]

In spite of the recording of the customs in the wajib-ul-arz. Edward Prinsep when he came as the Settlement Commissioner in 1864, wrote to the Financial Commissioner that the records did not contain the mention of trees, sugar presses etc., which may have been exclusive property but were entered as "common to the whole village"[32] so that disputes erupted the moment rights to them were exercised. He noted that the rights were recorded in insufficient detail. Also the judicial officers were not familiar with the customs and hence unwilling to exercise their judgment or of spending their time over these disputes.

Prinsep stated that the time had "come when land has become so valuable, that if the new records did not embrace the registration of property in its minute aspects, a large mass of disputes would still come into courts after the close of the settlements; for the easy decision of which it is feared the Settlement Records would avail but little."[33] Hence, Prinsep recommended the detailed recording of rights of trees, rights of user of roads, johads or marshy reservoirs as he called them, rights of irrigation, dams, repairs of water courses etc.

Consequently, the Financial Commissioner issued a circular for the information of the officers of the Amritsar Division that even though the revisions of settlement were not imminent, they should familiarize themselves

with "the great importance of a minute record of rights", so that litigation be obviated. Prinsep's letter was attached listing the rights to record. The Financial Commissioner's instructions were for only the areas outside the abadi. All disputes regarding the abadi or houses within it were cognizable only by the Civil Courts, by an earlier Circular sent in I860.[34] Prinsep's letter to the Financial Commissioner was also evidence of the beginning of the Lal Dora, which was a red line used to mark the outlines of the abadi on the village map, continued till today, to indicate the limits of the expansion of the village. This marked the area of jurisdiction of the Civil Court in the village, and this matter of jurisdiction was to be "adopted elsewhere like wise throughout the Province."[35] Secondly, once houses could be constructed outside the abadi. the village was technically a town as was proved in the cases brought to the Chief Court, such as (86 PR 1867)[36]. (This happened to villages which were incorporated into the city of New Delhi when it became the capital of the country).

The record of rights, particularly the record of customs contained in the early Administration Paper, was not very detailed. As land became valuable, disputes over various rights could not be settled easily by reference to either the Settlement Records or to the Punjab Civil Code. E. A. Prinsep, as the Settlement Commissioner, 1864-67, made an attempt to rectify this lacunae by preparing a Settlement Paper (no. 39) in 1866 which was a memorandum urging the preparation of a record of lex loci in the sub-divisions of districts. This would have been the beginnings of a Code of Agricultural Customs if his scheme had been taken up. Under his direction Lt. P. Nisbet, Prinsep's Assistant in Gujranwala, translated a specimen of questions and answers on usages in a group of villages in the sub-collectorate of Zufferwal. Chapters III, IV, V and VI of this paper dealt with several usages connected with the shamilat. Chapter III dealt with conditions governing cultivation of the shamilat. Chapter IV contained questions and answers related to the principles governing the division of the shamilat; while V and VI detailed the customs related to the construction of sugar-cane presses and dunghills. In

some respects Prinsep's scheme was the forerunner of the revised wajib-ul-arz constructed in the rules of the Punjab Land Revenue Act of 1871 and a step towards the codification of Tribal and Agricultural customs.[37]

Second Phase:

The Chief Court; The Chief Court was set up in 1866.[38] It consisted of a Bench of two judges instead of the Judicial Commissioner. The Chief Court did all it could to support the Executive in establishing the legal force of the Punjab Civil Code but it was open to any judge or counsel or any person to question the validity of this body of codes. Such questions caused great inconvenience if not embarrassment leading to considerable delay in the dispensation of justice.

Besides, there was conflict between the Executive and the Judiciary at the top level as to whether Regulation VII of 1822 had ever been introduced into the Punjab as law. John Lawrence and Richard Temple were of the view that Regulation VII of 1822 was never introduced into the Punjab at all, but was only held up as a guide to settlement officers (Tupper, 1881, vol. I: 124). But Edward Prinsep, the Settlement Commissioner, held that the Regulation was law and in this he was supported by the Chief Court. This controversy had important ramifications for the revenue and the judicial departments. Edward Prinsep as Settlement Commissioner, 1864-67, had reversed "an immense number of decisions which had been given by the early settlement courts" (ibid.), according to his perception of Regulation VII of 1822. As a result, a large number of court cases, for example from the Amritsar District, came back into court because Prinsep had made a revision of the rights of several thousand tenants. In 1867, the Chief Court decided one such case valued at just Rs.30/- as a result of which 27,000 revisions of settlement were upturned which had been effected at "great expense to the State and the result of years of labour in the Settlement Department were decided entirely nugatory."^[9] The Punjab Government was perturbed, as shown by the comments of Henry Sumner Maine in a letter to The Times on Feb. 15th, 1870. "The old law gave them [settlement officers] a power to revise the Record. I hold myself

that the power intended was a power to correct errors of detail, not errors of principle, even supposing them to have been committed; since otherwise I see no escape from the conclusion that subordinate Indian officials can create an agrarian revolution once every 20 or 30 years" (Maine, 1870).

There were other problems of the law; Common land disputes were settled by the provisions of Section XXI of the Punjab Civil Code[40] and the Chief Court found these provisions open to interpretations of various kinds. Besides the wajib-ul-arz records were incomplete or loosely compiled. We give two examples here.

Civil Judgment No. 39, 1866[41]:

This was a case which was decided on the basis of P.C.C. Section XXI, clause 8 which stated: "A non-proprietary resident cannot be ousted from his occupancy; but if he desert his house, the ground site reverts to the proprietors who may then dispose of it. If he desires to sell his house, the proprietors may claim pre-emption."[42]

A fakeer had taken possession of four kanals of common land on which he had been for the last eight years. One of the proprietors of the village had given him permission to occupy the land. The fakeer had built a Dharamshala and planted 50 trees. Now the proprietor wanted to oust him. The first court decreed that the fakeer had not the right to the permanent occupancy of the land, and ought not to have planted the trees. He decreed the possession of the land to the proprietors on payment of Rs.32/- to the fakeer. The fakeer appealed to the Deputy Commissioner, who held it was too late now for the proprietors to plead want of consent and that even if the fakeer did not hold the land for 12 years even then "squatters cannot by village law and the Punjab Civil Code, Section 21, clause 8, be ousted, though they acquire no actual proprietary right, as long as they like to remain they can do so, and when they leave the house reverts to the zamindars."

Justice A. A. Roberts, who was the last Judicial Commissioner of the Punjab before the Punjab Chief Court was set up in 1866, pointed out:

1. There was an irregularity because the tehsildar should have got the whole proprietary body to join in the plaint, not just one proprietor;

2. The Deputy Commissioner was wrong to dispose of the case on the basis of Section XXI, clause 8, because the ground of dispute was not a part of the village site whereas the particular section refers to the abadi. The ground under dispute was bunur mumkin.

3. The words "occupancy" and "house" gave the impression that the ground under dispute was in the abadi, but in reality it was part of the common bunjur and the mistake was caused by faulty expression used; and

4. Therefore the Justice remanded the case for fresh decision. The time taken up for a case of such small value caused great irritation to the apex body of the judiciary, particularly since no decision was arrived at.

Civil Judgment 52, 1866;[43]

This was a case which involved Section XXI, para 5 of the Punjab Civil Code: "any person possessing a share or holding in an estate is entitled to his rateable portion on any perquisites or common accessories which may be attached to the general property."[44] The dispute occurred in a village called Secunderpoor in the Jullundur District where the Government had acquired land for public purpose and a compensation of Rs.99-4 annas, was given. One of the proprietors was an erstwhile mafidar and having resumed his mafi, he now obtained a share in the compensation awarded by the Government for the acquisition of the common land of the village. The value of the share was Rs.7/-. The other members of the proprietary body sued to recover this amount from him on the grounds that the mafidar had not previously claimed a share in the common lands or in the income accruing from it, in the 16 years previous to the dispute.

The case went through two courts before it went up in appeal to the Chief Court: In the D.C's court the mafidar was granted the right since the wajib-ul-arz did not have a clause excluding a mafidar. In the Commissioner's court, the decree of the D.C. was confirmed. The appeal to the Chief Court required the judge, Charles Boulnois, to look into the whole issue of mafidar's rights before he could take a decision. According to him, on the whole the mafidar had no intrinsic right to the holding which he resumed

although the status of the mafidar differed in several circumstances. Many mafidars, according to Boulnois were turned out altogether while others were made hereditary cultivators and still others were made malik kabzas without a share in the profits of the common lands. However, there were instances where the mafidar shared in the common lands and in the common income derived from them. In this case the wajib-ul-arz did not specifically exclude them, so the mafidars here theoretically could share in the common profits. However, for them to do so, the mafidars had to prove that in the past they had been sharing in the common profits. This the mafidars could not prove as they had not done so for 16 years. According to the Punjab Civil Code, the mafidars rights would be sustained if they resumed sharing profits within a "reasonable gap" of years.

Boulnois had to perforce take recourse to a precedent set by a case decided earlier, as he could neither use the provisions of the Punjab Civil Code because of its vagueness nor could he take the wajib-ul-arz as conclusive evidence of the mafidar's rights. Thus once again a suit of small value went through two appeals and required so much of time for research, that although the right involved was valuable it was irritating to the judges who had long pending files.[45]

The impact of such cases when added up led to a situation when the Chief Court found itself in arrears[46] and court cases piled up in the pending files. If it asked for additional judges to clear up the backlog, the usual answer from the Government of India was that the Chief Court was dealing with petty cases in terms of the monetary value of the case and therefore did not need a greater number of judges in the bench.[47] T. H. Thornton, Secretary to the Government of Punjab, ultimately replied in 1874, to one such criticism by the Government of India: "It is true," he wrote, "the average value of suits in the Punjab is much less than in any other Province, but it must be remembered that a large proportion of suits, as also 1/3 of the appeals of the Chief Court, are connected with land, and the nominal value assigned is no real

criterion of value of the rights involved, some of them must almost be said to be important in the inverse ratio of their money value."[48]

The situation came to such a pass that the Judges had to take recourse to precedents and as in the case above Boulnois even referred to the English Law.[49] The situation was a result of not only the lacunae in specific legislation but caused by the absence of the very basis of a system of laws. Further the wajib-ul-arz at the time that the Chief Court was set up in 1866, was far from complete to be able to support the judiciary.

That is how Prinsep as Settlement Commissioner in 1864-67, had initiated a record of tribal customs or the Riwaj-i-am, but the then Lt. Governor Donald McLeod opined that such a record could not be held as absolutely binding on the Courts. Besides even if this Code was prepared it had to be sanctified by a legal enactment. Moreover, the situation at that time was uncertain as the Legislative Councils were "wanting in popular element."[50] Therefore, the Government of India commended Prinsep's effort but suggested that "a record of rights and custom (be) limited to the record of customs etc actually recognised and well established."[51]

The uncertainty of the 1860s, was brought to an end by the debate on the Punjab Tenancy Bill of 1868 and by the passage of the Punjab Land Revenue Act XXXIII of 1871 and the Punjab Laws Act IV of 1872,[52] which was regarded as a "new era" in the history of legislation in The Province. The two Acts laid down general outlines, leaving local Governments and the Administration to draft detailed rules, to be approved by the Government of India. The laws were described by the Punjab Administration, as the first of their kind, and were replicated in the Legislatures of the NWP, CP, Sind and Oudh, thus obliterating the legal distinction between Regulation and Non-Regulation Provinces.[53]

The Punjab Land Revenue Act firmly put agricultural customs on the level of recorded usages by which the villages were to be administered and taken as evidence to settle a dispute. Common lands were specifically administered by the wajib-ul-arz.[54]

The wajib-ul-arz was shaped into a standardized village administration paper whose rules prescribed the term of settlement, the relationship of members of village proprietary body (a) to the Government, (b) to each other, and (c) to other persons. Theoretically, these rules were based on the customs declared by the village leaders. The clauses of the wajib-ul-arz were presumed to be true by Section 16 of the Act. However, this was withdrawn by the Amendment of the Act in 1887 which also allowed a change in the wajib-ul-arz only at the time of a settlement. The wajib-ul-arz was intended primarily to define interests in land, but in time it acquired a mixed character; in 1873 Tupper wrote, "It is partly descriptive of the organic constitution, the internal economy and even the history of the village to which it relates."[55] Further, "it is partly a deed of agreement for the term of settlement between various members of the village community."[56] Thus the Misl Hagiyat or the Record of Rights had two sections within the wajib-ul-arz; one giving a brief history of the village and that of the families of the malikan-deh known as the Shajra nasb and the other containing the rules regulating the management and use of shamilat.

The Shajra nasb indicated the customs of inheritance followed and the shares in the shamilat of the families. If the village was homogeneous, as Kanjhawala[57] was, families belonged to the same tribe or clan and in that case, each time any member of the family died, the change in the land holding, if any, was indicated. If a family line was extinguished, it was indicated as la wald or literally, without heirs and the holding was transferred to the shamilat of the Pana, thok or tholla to which the family belonged.[58] This is evidenced in the Shajra nasb of Kanjhawala where a family holding was transferred to the shamilat of the Pana, since there were no heirs. But if it was heterogeneous, like Duryapur, which Prinsep gave as an example, each taraf, patti and thok followed different rules.[59] The recording of shares in this manner made the Shajra nasb not just a repository of village customs but in effect a record of also the customs of inheritance observed by both the Hindus and Muhammaddan tribes.

The most important operative part of the wajib-ul-arz was, however, the agreements regulating the management of the shamilat and the control of the user rights in the commons. These pertained to: (a) the cultivation of the shamilat by the members of the proprietary body, cultivation by the tenants of the village; (b) grazing rights of the members of the proprietary body and the cattle of the other members of the village; (c) the use of wells and the iohads; (d) the use of the abadi and the space round the area; and (e) the right to plant and cut trees from the shamilat areas and around the abadi. These customs varied from area to area and from village to village within the same area, depending on the circumstances of the village, the tribe and the tenure. What is more, as all these factors changed the customs also underwent a change.

From the point of the revenue department, the most effective part of the wajib-ul-arz was "the treatment of tenure of the land, with special reference to the degree to which the disintegration of common right into individual right has been or may be affected. It prescribes (ed) the mode in which the Government revenue is to be paid."[60] The tenure was determined by the manner in which the rights and liabilities were shared and that depended on the constitution of the village. This depended in its turn on the manner in which the village was founded. This was crucial, because the old established villages were bound to be those which had a long history of agreements among themselves, whereas the newer villages which were set up by the Government in the various districts, either adopted the rules or were fitted into a tenurial kind by the nature of land grants that was made to the groups. Examples of such differences in the case of old established villages and the newer ones was to be found in those areas where the waste was extensive at the time of the British entry into the area, for example the district of Sirsa, Hissar, Ferozepur and Kangra.

A certain amount of influence was also exerted by the way in which the settlement officer understood or wanted to understand the constitution of the village, as seen for instance in Sirsa. The settlement of tenure, (dealt with

in Chapter 4) determined the character of the customs regulating the customary distribution of the liabilities and assets of the village. The customary arrangements of the revenue and other liabilities had a counterpart in the manner in which the assets like common lands were held, managed and partitioned. Further any income arising from the common assets were accordingly divided by the tenurial arrangements.[61]

These customary shares in both the liabilities and assets became, after 1871, a part of the contractual relationship between the village and the Government on the one hand; and among the members of the malikan-deh and the others within the village on the other. This meant a change in the customary relationship of the malikan-deh to the village tenants, to village servants and to other residents. Till 1871, these customary relationships were recorded in the wajib-ul-arz no doubt, but acquired a formality of definitive character after the passage of the Punjab Land Revenue Act. Further, since the rules in the wajib-ul-arz were culled from the answers of a standardized set of questions, most of the village statements of customs tended to acquire a close similarity in both character and content. This tended to eliminate the differences between (a) one village and another in the same district, as for example the wajib-ul-arz of the Bisagama cluster studied here (in Part IV); (b) between villages of one district and another; and (c) between villages of longer vintage and those settled after the annexation of the area.[62]

However, marked contrast in historical circumstances existed, and these were not always ironed out. For example, it was more or less a universal custom that only co-sharers in a village had a right to the common land of the village (Boulnois and Rattigan, 1876: 173) and that tenants could not stake a claim to share either the income from the shamilat or the land held in common by the proprietary body. But in the Ferozepur district, it came to be known, mainly in the course of disputes which came into the Chief Court between 1868-72 that the wajib-ul-arz of villages in certain parts of Ferozepur district contained clauses whereby hereditary tenants had the rights to share

both in the income of the shamilat as well as the right to share in the butwara (partition) of the common lands. Boulnois, one of the first two Judges of the Chief Court explained in 1876 the peculiarity in the case of Ferozepur district by the "fact, that when labour was scarce, and the land was kept with difficulty under tillage, from want of water, the unsettled state of the country, . . . the hereditary cultivators of these villages obtained the concession in question from the village proprietors of the old stock" (ibid.: 178).

In spite of the variations, the passage of the Punjab Land Revenue Act of 1871 ended the Administrations quest for conformity. The wajib-ul-arz acquired a standard format. The enquiry into the village customary usage being based on a standard set of questions tended to elicit similar answers or in cases where the queries were inapplicable resulted in a "silent" wajib-ul-arz. This was evident from the wajib-ul-arz in the Bisagama villages, examined in Part IV.

Finally, the Punjab Laws Act, 1872 cleared away uncertainty and removed a mass of regulations and orders, and the British "elected to be governed by customs."[63] Their passion for definition carried great lengths.[64] The Act of 1872 laid down in Section 5, that "In questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partition, or any religious usage or institution, the rule of decision shall be (1) any custom of any body or class of persons, which is not contrary to justice, equity and good conscience, and has not been declared to be void by any competent authority, (2) the Muhammadan law, in cases where the parties are Muhammadans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment etc..." Section 7: "All local customs and mercantile usages shall be regarded as valid, unless they are contrary to justice, equity or good conscience, or have, before the passing of this Act, been declared to be void by any competent authority."[65]

The Act admitted that the Punjab had not reached the stage of development represented by the Muhamaddan and the Hindu Law. It therefore laid down that the proven custom of the country was to guide the courts when not opposed to morality on specific legal declarations. Thus, the Law laid down that custom was to supply the first rule of decision, but that the custom was not to be "contrary to justice, equity and good conscience" (Sections 5 and 7 of the Act).

Similarly, custom was not to contravene "express Statute Law"; which meant that the State was to retain the power to rescind any custom by law. For example if the tenants-at-will and the occupancy tenants had made any improvements on the land they could claim compensation by the Punjab Tenancy Act of 1868, and they could not be refused on the ground that such compensation was not allowed by the custom of the village. Thus the Punjab Laws Act provided against enforcing customs which had been declared void by any competent authority (Sections 5 and 7) (Boulnois and Rattigan, 1876: xlix).

To a certain extent the British were influenced by the system of Common Laws in their own country. Charles Boulnois, one of the first judges of the Punjab Chief Court quoted Disraeli on the Irish Bill to support the incorporation of custom as the basis of the Punjab system of law. The stress was on the flexibility of customs to adjust to changes. "The moment you legalise a custom you fix its particular character; but the value of the custom is its flexibility and that it adapts itself to all the circumstances of the moment as of the locality. All these qualities are lost the moment you crystallise a custom into legislation. Customs may not be as wise as laws, but they are more popular" (ibid.: xlvi).

Custom and Common Law — The English very "naturally" veered towards custom as the basis of law in the Punjab, for England was the home of Common Law which in its turn was based on custom. Common Law was held to be in its essence customary law.[66] In England, Common Law had developed out of the accumulation of precedents. These precedents were really judgments delivered

in courts establishing a custom. However, the difference between custom in England and in the Punjab was not forgotten. This consciousness was apparent in what Tupper wrote in his compilation on Customary Law in the Punjab. "Custom in English law has of course a technical signification. Amongst other matters it must 'have been used so long that the memory of man runneth not to the contrary, as that if anyone can show the beginning of it is no good custom*. Customs that our courts will act upon must be continuous; and (probably) they must be a 'succession of instances from whose constant recurrence a rule is inferred,' but custom 'rivaj' in the native acceptation of the term has a more extended signification. Besides hereditary practices, it includes new rules made to suit new needs, rules spontaneously evolved in a manner most appropriate to the primitive needs of the society in which they appear, by the agency of one of those interesting fictions which have played so large a part in all legal history" (Tupper, 1881, vol. I: 204).

The colonial Government felt that legislation should be at the same level as that of the social progress of the country.[67] The Punjab was a Province of village communities with tribal and clan connections and legislation should not ignore their customs and usages. Besides, although some classes acknowledged the Hindu and the Mohamaddan Codes, "there is often a doubt to what portion of these codes their observance extends, and with what degree of strictness is carried into practice."[68]

However, such customs were not to be fixed in permanency but to be the subject of continuous appraisals either at revised settlements or through judicial investigation at the time of the dispute. In fact, it was visualized there would be a process of change, modification and re-codification in order to justify the use of customs as the basis of law.

Tupper in 1872 opined that it was up to the Government to direct the change in native institutions and that the Courts and the revenue department alone would not do so without some direction from the Legislature like the Punjab Laws Act of 1872. To him social development meant "the break up of primitive groups, and the disentanglement of individual from corporate rights.

whether as regards personal relations or property" (my emphasis). But in the Punjab there would not be enough enthusiasm for progress unless the tribe, the village and the clan was maintained. He listed the advantages that would accrue because of "joint agricultural ownership founded on common descent," the last but not the least would be the contentment among the clans and families and therefore less danger of "political contumacy" (Tupper, 1881, vol. I: 5).

Final Phase;

The Punjab Laws Act of 1872 put the Courts in an "embarrassing" situation as the then existing sources of recorded customs — the wajib-ul-arz (prior to 1871) and the Punjab Civil Code were limited in content and scope while the Riwaj-i-am was still in its infancy. Prinsep had initiated the compilation of the Riwaj-i-am in Amritsar, Lahore, Sialkot and Gurdaspur during 1864-67, but useful though these were, they did not serve the purpose of the Court. Thus, Boulnois pointed out that none of these documents were adequate to meet the requirements of the Courts.

The Judges of the Chief Court had been highly critical of the Punjab Laws Bill before it was passed, but their criticism was overridden.[69] The Judges felt that Section 5 of the Bill did not give sufficient prominence and importance to the customs of the people of the Province."[70] Of all the critics, Boulnois' appraisal was the sharpest and as the Chief Court Judge his opinion should have carried weight, but it did not. According to him. Section 5 of the Act made the mistake of putting "Hindu Law forward as the rule, and custom as the exception, to receive validity only when proved. In the Punjab custom is the rule, and Hindu law as the exception."[71]

Finally, C. L. Tupper was asked to look into the entire question of customs and Customary Law. He compiled two series of questions in 1880-81 which were to be the basis for recording evidence on customs. The first series consisted of all those questions concerning the fifth section of the Act, whereby the Riwaj-i-am could be compiled for the entire district. These were mostly questions relating to the customs regulating the private

conditions of the tribes. The heads of tribes in a district were brought together and the settlement officers put the questions from Tupper's schedule and the answers were then compiled for each district. There was a section on customs by which common lands could be bequeathed. The second series contained all those questions which dealt with agrarian usages. It was this series which concerned the village common lands. This series then formed the evidence in the Village Administration Paper or the wajib-ul-arz.

There was some difference of opinion in the Revenue department with regard to these two series of questions. According to J. B. Lyall, only those questions should have been included which would give "information upon the points regarding which questions may be raised and disputes come into Court" and thus he wanted to remove the question of the tenants' right to grass in the common waste, because according to Lyall the question never came to court. He was however mistaken as subsequent disputes in court showed. Tupper on the other hand was keen to compile a comprehensive code of agricultural customs "equivalent to a complete account of the agricultural system of the country."

However, Lyall's intervention was important in one matter. The question relating to the partition of shamilat, had been incorporated in the first series as it concerned the partition of property. Lyall shifted the question into the second series where it rightly belonged, for the partition of the shamilat was a matter for the village to decide rather than a matter of a private law of partition. "The customs or considerations which govern it rarely have any relation to the tribe or religion to which the proprietors belong; they are generally based upon the tenure of the village, the aspect of the country, or the nature of the surface of the soil."[72]

But finally with some adjustments, two papers on custom emerged out of the series of questions which Tupper compiled in 1880, the Riwaj-i-am and the wajib-ul-arz. demarcating the two classes of customs — one, regulating the private conditions of the members of the various tribes in a district[73] and the other concerning the agricultural conditions regulating the economy of the village. The Government of India expected that these two sets of customs

obtained from the tribal heads and the village headmen would impress the ideas of self-government on the minds of the rural populace — "the appointment of the few to represent the many, and the common action for great public purposes of the selected." It was also hoped that this interaction would bring about "the surest promise of success in judicial and executive administration" (Tupper, 1881, vol. I: 214).

Tupper's three volumes on Customary Law did not draw an enthusiastic response from the then Lt. Governor Robert Egerton. Egerton felt that any attempt to codify custom would fix and perpetuate tribal organisation and tribal custom. According to him, the disintegration of tribal ties and the release of individual energy was what the British administration desired.[74] Egerton's view was apparent from his judgment in a shamilat dispute 1 Rev PR 1873.[75]

There was, thus, difference of opinion in official circles about the need to preserve tribal organisation. Official policy had come a long way from the days of the 1849 Despatch. Revenue policy continued to be based on joint revenue responsibility, but revenue records maintained the recognition given to individual right holders in the land for which revenue was paid. The judiciary also upheld the rights of groups as well as individuals within these groups. Legislation like the Punjab Tenancy Act of 1868 gave protection to a class of cultivators and their rights, while the Punjab Land Revenue Act of 1871 and the Punjab Laws Act of 1872 were ways of bolstering rights of individuals albeit in the framework of customary situations of tribal, clan or family ties. There emerged therefore in the course of the nineteenth century distinct identities of the individual against the group; of the family within the clan and of the clan within the tribe. Change would have come sooner or later, but if the movement from the group to severalty was hastened in the last quarter of the nineteenth century, the role of the colonial revenue and judicial departments were certainly significant.

Recording of Customs — The recording of customs according to the schedule of Tupper's questions was not carried out in all the districts at the

same time. The settlements of the different districts after the passage of the 1871 PLRA started at different points of time as and when they fell due. Some of the Cis-Sutlej districts like Delhi, Sirsa and Karnal started settlements in 1872 and therefore the recording of the Riwaj-i-am and the wajib-ul-arz were both taken in hand then. But in the District of Delhi, Maconachie carried out the schedule of the wajib-ul-arz in great detail but in the case of the Riwaj-i-am, he left it incomplete with the remark "it can have little official value" (Beadon, 1911, vol. XXII: preface). Finally, it was only in the Third Regular Settlement of the Delhi District in 1906-10 that the Riwaj-i- am was completed by Major H.C.Beadon, the Settlement Officer.

This happened in other districts as well, like Lahore. There the wajib-ul-arz was not prepared till 1892.[76] The preparation of this document was difficult as the entries were much disputed and required judicial settlement. Besides, customs had been recorded in 1856 and conditions had changed since then. For example, non-proprietors and occupancy tenants were not allowed to sell or mortgage their houses in the abadi or cut down trees etc., without the consent of the proprietors of the village. But circumstances had caused a change in the status of the classes other than the proprietors after the Punjab Tenancy Act 1868, and hence disputes took place. Such lack of consensus about customs controlling the use of common lands usually led to disputes which were ultimately resolved by the Courts asking the co-sharers of joint property to seek division of the common lands.

The wajib-ul-arz of several districts also underwent modifications specially where new clauses were required. For example, the Public Works Department found it difficult to obtain kunkur from the village common lands for road building as a matter of right, so the Financial Commissioner sent orders in the late 1880s, according to section 42 of the PLRA 1887[77] whereby a clause was to be inserted in the wajib-ul-arz declaring that all kunkur and other produce found on the estate was the property of the Government. Thus the wajib-ul-arz was open to State command.

Codification of Customs — The last two decades of the nineteenth century-saw several economic changes such as demographic growth, increase in the number of cattle, extension in cultivation and the shrinkage of the waste both outside the villages and within them. Recorded customs became increasingly inadequate to meet new situations. The urgency which Maine had impressed in the 1860s, on a Government which intended to record customs and preserve native institutions in Punjab was now lost in 1880s and 1890s. The Punjab Government was bent upon conformity and certainty in Customary Law rather than on flexibility and variety; it was more concerned with change than on the need to preserve traditional rules of the village communities.

The first round: In the meanwhile, litigation in the Punjab was on the increase and the question of the need to codify customs was raised in 1906. Thus began the first round for the codification of customary law. There was however difference of opinion. According to Wilson, (who had considerable experience as settlement officer and Settlement Commissioner in the 1880s) there was "one party (which I think includes most of the lawyers) dwells upon the advantage of leaving custom free to develop in accordance with the changing circumstances of the day. . . ." In the other party, Wilson included most of the officers who approached the subject from the Revenue Officer's point of view and was therefore "in favour of codification, owing mainly to the uncertainty of the present law which encourages ruinous litigation, false swearing and ill-feeling among the people."[78]

Two proposals were sent up in 1906 by those who felt codification necessary. One was to pass a law which incorporated the basic enquiries made by the revenue and judicial officers in the cases which came up in the fifty years of the nineteenth century regarding the feelings and ideas of the land-owning classes. The other was to pass a short Act which empowered the "government to promulgate from time to time such rules as it found to be established by general custom."[79]

The first proposal was made by J. Wilson, Secretary to Government Punjab, who had considerable experience in the matter. According to him, so much

"ruinous litigation" was due to the fact that much weight was given in judicial cases to customs, "but as they were not even presumed to be true, litigants are at liberty to bring evidence to prove that the code is wrong on some particular point, or that their own branch of the tribe has some special custom different from that recorded in the code," and so on. He therefore suggested detailed investigation, tribe by tribe, after which a clear and definite code should be drawn up for each tribe.[80]

Ibbetson, who was officiating Lt. Governor Punjab in 1905, was strongly against "anything that would tend to stereotype the customary law of the Punjab, as it exists at the present moment, or to prevent that law from keeping pace with a process of development which I believe to be not only healthy, but inevitable."[81] He agreed with Wilson that the Punjab Laws Act was the Magna Carta on the subject because the provisions "oblige us to recognise and respect the varying customs of different parts of the province and of different sections of its inhabitants. And this enforced respect is of importance, not because variety is good in itself but because the variations are based upon the varying conditions and sentiments of the people. These changed not only over place but over time."[82] Therefore, Ibbetson strongly deprecated "any attempt to confine Punjab custom within a cast iron jacket of legislation."[83] At the same time he accepted that it was difficult to define a tribe or a clan and therefore the litigation that arose was an evil. On the other hand he observed that excess litigation was only a part of the problem; what he called the more "subtle evil" was the fact that the "Punjab Chief Court as at present constituted, is engaged in 'manufacturing' customary law.[84]

The Chief Court was however not deterred by this criticism. In a letter dated 11th April, 1906,[85] he agreed to the assimilation of the law of civil appeal in the Punjab to that in force elsewhere in all classes of suit, as suggested by the Home Department, except those involving questions of custom. In such cases, they desired to retain the power to enter into the facts in

second appeals coming before them in so far as it might be necessary for the determination of the custom involved.[86]

The Secretary of State, John Morley, in his Despatch in 1907, commented that the "Chief Court arrogates to itself a legislative rather than a judicial authority" in reserving to itself the widest possible powers in the matter of ascertaining custom.[87] Morley did not feel that codification of customs by legislation (which the judges of the Chief Court suggested) would be expedient. He wished "the matter to be further considered before such an undertaking is entered upon."

The second round: The first round of discussion for codifying customs was over in 1907. A second round began when the Lt. Governor of Punjab, Michael O'Dwyer, called a Conference for the Codification of Customary Law in Simla in 1915.[88] The Chief Judge of the Chief Court, Donald Jonhstone, presided. Among the subjects it considered were: (i) whether codification of customary law could prove effective in reducing litigation; (ii) what were the subjects to be included; (iii) whether communities were to be given the power to adopt by declaration specific customs; and (iv) whether it was desirable to substitute legislation for custom and Regulation XI of 1825 in regard to alluvion and diluvion.

The conference came to some very important conclusions, which were in keeping with the experience of the revenue officials both in the field and in the revenue courts; as well as of the experience of the judiciary in the courts as they handled disputes. The conference desired the codification of those customs which were to do with the "enjoyment, devolution and alienation of property," leaving out of the scope of codification all other subjects like marriage and divorce.

It was natural for the Conference to take such a stand because land had become very valuable selling for "as much as 100 times the land revenue."[89] Disputes brought to court were numerous and of a much greater value than that declared for the purposes of registration in courts and appeals to the Chief Court. Hence, there was a likelihood that there would be a greater number of

highly valued suits qualifying for appeal in the Chief Court. That would have meant increasing the staff in the judiciary particularly the number of judges. Thus it was necessary to reduce litigation by codifying customs. The Conference resolved that "the declaration by a large majority of a community as to its wishes regarding the customs which it will follow in the future, irrespective of those followed in the past, should be accepted as having the force of law."[90]

The Conference also unanimously accepted the suggestion that legislation should replace custom and Regulation XI of 1825 in regard to alluvion and diluvion. The Lt. Governor concurred in their conclusion. Michael Fenton, the Financial Commissioner, explained that "disputes occasionally arose owing to the existence of customs, declaring for example that land washed up from the river becomes shamilat or that occupancy rights in it are extinguished from the fact that it has been submerged. A statutory provision that land reclaimed from the river should be restored to its original position on the map and replaced in the hands of the original owners or possessors would accord with natural equity and would prevent disputes."[91]

The Conference was a summing-up of the functioning of customary law as it had been recorded in the wajib-ul-arz and in the Riwaj-i-am. It was clear to the members of the Conference that there was need for customs to be flexible over space and time, for it appeared that the large amount of litigation in court arose out of circumstances changing without a similar change in the recorded customs.

The Conference noted, however, the fact that in some areas as circumstances changed the people's attitude also changed with regard to the rights in the land and the customs related to those rights. Diack, the Financial Commissioner, gave the example of the villages of Shahpur district to show that the people "have abandoned the restriction against the partition of the shamilat in which they bound themselves in the previous settlement. The reason is that under modern conditions agriculture is more profitable than grazing.[n92]

The Conference papers also included a letter from Herbert Risley, Secretary to the Government of India, in 1907, to the Government of the Punjab, regarding the codification of tribal custom, in which he gave the example of the Chenab Colony where the Jats were settled. He believed that the Jats, in a generation or two, had developed their own customs, differing from the tribal customs of the Jat tribe from which they had originally come. He also pointed out that these Jats would follow their own customs in the majority of the cases and in the case of the minority of cases which went to court, the court would decide, and its decision might be different from the decisions and sentiments of the majority of the tribe. Thus since these Jats in the Chenab Colony could not legislate there would appear a growing gap between legislation and customary law which would naturally grow with passing time.[93]

Conclusion: Government's attitude to custom was described by Michael O'Dwyer's concluding lines of his speech at the Conference: "The problem before us in the Punjab is unique. Other Provinces in India, have as a rule, the Dharma shastras and the various commentaries on them for the Hindus and the Shariyat and the Hadis for the Muhamaddans. . . Here we have elected to be governed by custom. We have no body of feeling that condemns our tribal customs as a whole as antiquated or unsuitable. No desire for uniformity, no sense of injustice involved in the maintenance of the existing system. Our function is therefore to uphold, not to destroy."[94]

The Consequence: The process of assimilation of custom into the legal framework of rural society in Punjab was done at various stages but the final shape was given by the enactment of the Punjab Laws Act IV 1872. Therefore, even though the root of Punjab custom was tradition and was in several ways "coincident with popular feelings and necessities"[95] nevertheless they (Punjab customs) became the law of the province by a single statute.

The documents recording these two classes of customs — private law and agrarian usage — were the Riwaj-i-am for the district and the wajib-ul-arz for the village. The customs which regulated succession were important for

the village for it settled the manner in which the distribution of property in land took place. Common lands were specifically regulated. The tribal component of the village proprietors or malikan-deh was thereby regulated by the declared customs of the tribe of the entire district. However the agrarian usages and customs defining "the rights of the proprietors over the village site or 'abadi-deh', those relating to the 'mulba' or village expenses, to the sayer income, to the dues of the village officers and village servants, to the cesses paid by the non-proprietors or cultivators,"[96] all related to the village itself.

The recognition of this class of customs depended on the constitution of the village settled at the time of the revenue arrangements made by the settlement officers at the time of the first regular settlement of the districts. Hence, wherever the village communities did not exist or there were scattered settlements with no cohesion, the imposition of the joint revenue responsibility on "created" villages or village settlements led to the creation of these customs. This was aptly put by Tupper: "Sweep the villages away and right of this class would be annihilated; create the village afresh and these rights would revive."[97]

Villages created: Hence, the Revenue settlements which demarcated villages had a very big hand in creating the framework for the development of the customs of the village. In districts like Kangra, where the tenures did not resemble the tenure on the plains, the creation of hamlets and tikas by Barnes and Lyall between 1849 and 1872 led to the emergence of customs related to usages which are of concern in this study — namely those relating to the use and partition of common lands.

Customs created: Similarly in the districts which were sparsely populated with scarcely any village communities, like Multan and Sirsa for example, the village common lands were "for the most part a creation of our (British) rule and compared with the districts of Central Punjab, Multan presents(ed) comparatively few cases of village shamilat."[98] Thus not only were the villages created but so also were the common lands. Hence the usages

that sprang up resembled those prevalent in the more settled tracts. However the hold of customary authority over the manner in which the common lands were used was naturally less close in the created circumstances, and therefore change was likely to come about more quickly here than in the older areas where the institutions of communal control over the common lands by established communities had a long history. The differences between the customary authority of the malikan-deh in the village of the old established areas of Punjab, such as Delhi and Karnal, and the new areas of 'created' villages in the waste, like the canal colonies and the districts of South west were apparent by a look at the history of the Sirsa and Ferozepur districts. Sirsa offers perhaps the most extraordinary instance of the development of customs in adaptation to changed conditions, particularly the customs related to the rights in land. The district had been at the time of the first settlement in 1837, mostly inhabited by nomadic pastoralists who used the almost "desert prairie," as long fallow within a system of shifting cultivation with no demarcated wastes as village common lands. The tribes hardly had any notions of succession in terms of transferring land from father to son, "they had only the vague right, or rather custom, of pasturing their herds over large tracts of country."[99]

The regular settlement of the district demarcated the boundaries and internalised the waste for the village as common lands. This put an end to their rights on the larger waste and therefore they more or less submitted to the rules and conditions laid down in the wajib-ul-arz. The rights to the individually held land and the common waste were defined. So were defined the relations of the different groups who comprised the village. "All Mussalman tribes who fifty years ago were living wholly pastoral life have now settled down to agriculture and their new custom now attaches quite as much importance to these rights in land, new to the tribe, as does the custom of the Sikh Jats and Rains who are agriculturists from time immemorial."[100]

Thus, it was that the process of inducting customary law into the legal system was done in three stages: (1) at the time of revenue settlements and

of recording rights, (2) by legal enactment, and (3) in the course of disputes brought to court. The last stage will be dealt in chapters 8, 9, and 10.

In the end, Punjab customs were formally incorporated into a system of laws. The intention was to preserve the status of customs and the source from which they emanated. But the attempt set in motion a process of attrition of customs and attenuation of customary powers of indigenous institutions like the panchavat, which fell into disuetude. This was, first, because the British revenue system which set up the village as the unit of both the rural and social economy had cut across tribal and clan ties; hence the recording of landed rights pertained to the village proprietary body as distinct from the tribe or clan. The recording of these rights led to the transformation of the unwritten codes of the tribes to the recorded ones in the wajib-ul-arz and in the Riwaj-i-am. This led to the replacement of the tribal heads as source of customs by the records which became the legal reference points.

Second, the influence of tribal institutions on clans and splinter groups differed from one area to another. Tribes on the western frontier were untouched by modernisation even by the end of the nineteenth century; fire arms were the only modern thing that touched their life. In the south-west plains there were tribes which had sedenterised and also those who still remained nomadic pastoralists in the middle of the nineteenth century. In the Eastern Plains of the Punjab, "the tribes though clearly marked" (Rattigan and Roe, 1895: p. 15, para 17) had been largely sub-divided into gots or clans, and these again were formed into separate communities, therefore even on its own a fragmented settlement became the unit of society. Landed rights even here was a matter of those affecting groups of agnates – the warisan yak jaddi. Hence, the source of customs became a group of families or even a family rather than a clan or tribe. Further, individuals could make claims in court rather than the panchayat or the brotherhood. Therefore, court decisions adjudicating these claims of an individual affected customs.

Third, customs were adopted as a part of the system of law by legislation; and therefore legislation shaped and modified rights to land.

Several customs like those regulating pre-emption, land alienation and those related to occupancy tenants were all modified by specific legislation. Therefore the State became the source of rules and not customary institutions. The Chief Court became a major influence in directing the use of customs in disputes. The evidence brought to Court was obtained from recorded customs. Customs once arbitrated or adjudicated became a precedent; hence a source of custom itself. In time the precedent replaced custom, wherever customs were either non-existent or not recorded.

At the same time the action of the Chief Court in recognising the "will of the majority" in case of shamilat disputes reduced the authority of the malikan-deh which acted on the presumption of consensus. Thus Boulnois, one of the first judges of the Chief Court had pointed out that the "will of the majority" was recognised "often rather, apparently, on general principles than on accordance with usage, which seems to proceed on the assumption that the community will work together" (Boulnois and Rattigan, 1876: 179). On the other hand, the Chief Court refused to allow the voice of the majority to prevail over that of the minority where injury to the latter'a interest in the joint land may have been involved (ibid.).[101] However, the most important change came about whenever it became impossible to use and manage common lands on the basis of consensus or became (Boulnois and Rattigan, 1876: 179) "practically inconsistent with the general wish of the co-sharers" by reason of dispute. The Chief Court increasingly settled these disputes by giving the opportunity to the individual to opt out of the system of joint control over common property resources by allowing partition of the common lands.[102]

This process of decline in customary institutions of common lands took place despite official effort to conduct customary law into legal system of Punjab as was discernible from the disputes over common lands in the Punjab.

Notes

1. Indu Banga and J. Royal Roseberry and Tom Kessinger look at the agrarian system of the sikhs.

2. Charles Boulnois Memorandum, 23/3/1872, Home Judicial Pros 181B.

3. Col. Steinbech served in Ranjit Singh's army and he describes the numerous disputes which occurred all over the Punjab over land; similarly, Lawrence described the disputes in the indigenous courts in the Punjab prior to the setting up of the British courts.

4. See the Customary Law Digests of the different districts.

5. Edward Prinsep and Henry Sumner Maine carried out the argument about tenancy rights and the former upheld what came to be known as the Aristocratic School in the Punjab.

6. In 1860, the Financial Commissioner of the Punjab wrote: "The annual papers are meant to be a photograph of the actual state of the community." Book circular orders issued by the financial commissioner for the Punjab in the revenue department, vol. 3, 1858-1860 (Lahore: The Punjabee Press).

7. "Legal history and sociology have shown in great detail how legal norms have either grown or been created by statute." We have used the terms "grow" and "created" in the same sense in which they have been used here by Walter Eucken (1951: 85).

8. Lord Macmillan (1949), delivering the Andrew Lang lecture, declared: "The civilised world has two legal spheres – the Roman Law and the sphere of Common Law. . . Now the Common Law in its essence is customary law. . . ."

9. "It was felt in the 17th century that Roman Law would provide a much better academic background for future British judges in India than the English system" (Derrett, 1958, republished in 1977, vol. 2).

10. William Holloway had two years of intensive preparation in Haileybury college where "comparative jurisprudence was taught as nowhere else in Britain, during a period when the revival of Roman Law studies on the Continent had at last begotten a response in England. Sir Henry Maine's lectures in London and at Cambridge had had a powerful impact. The relevance of Roman Law and contemporary Civil Law for the Indian Civil Servant whether legislator or judge, was being emphasised in the highest quarters" (Derrett, 1977, vol. 2: 181).

11. Dalhousie was the Governor General and his Despatch of 1849 he desired to "uphold Native institutions and practices, as far as they were consistent with the distribution of justice to all classes." Reprinted in Tupper (1881, vol. 1).

12. Inscriptional evidence of this is provided in J.D.M. Derrett (1968: ch. 7).

13. Regulation VII of 1822, Section 9, was amended as Regulation IX of 1833 and settlements in the Cis-sutlej and the Punjab took place under this Regulation till the Punjab Land Revenue Act was passed in 1871. Settlement Manual 1899: p. 10.

14. Ibid.

15. Punjab Civil Code, 1854. This was a printed set of rules known as Abstract Principles of Law, circulated for the guidance of officers employed in the administration of civil justice.

16. See Jamabandi Records of village Kanjhawla in the settlement of 1842.

17. Selections Records of Government of India, Home Department, 1-5, 1849-50 and 1850-51.

18. Ludhiana Settlement Report, 1878-83, p. 329.

19. Ibid.

20. Dalhousie's Despatch 1849 is reprinted in Tupper (1881, vol. I: 49).

21. Selection Records, Government of India, Foreign Department, No. VI, 1851-52, 1852-52.

22. Ibid.

23. Fitzjames Stephen, speaking on the Punjab Laws Bill, in Tupper (1881, vol. I: 86).

24. T.J.C. Plowden, Under Secretary, Government of India, Home Department, to the Secretary government of Punjab, 13/3/1873, in Tupper (1881, vol. I: 150).

25. Selection Circular Orders, Financial Commissioner Punjab, Revenue Department, circular No. 1, Vol. I, 1853, 1854, and 1855.

26. Boulnois' Memorandum on the Punjab Bill, p. 3, Home Judicial, Proceedings 181B, April 1872.

27. Boulnois' Memorandum on the Punjab Law Bill, p. 3, Home Judicial, Proceedings 181B, April 1872.

28. Ibid.

29. Selected Circular Orders, Financial Commissioner Punjab, Revenue Department, Vol. I, circular No. 18, 20/2/1855, to all Commissioners.

30. Boulnois' Memorandum on Customary Law, 29/11/1872, in Tupper (1881, vol. I: 148).

31. Selections Circular Orders, issued by the financial Commissioner Punjab, Revenue Department, Vol. I, circular No. 18, 20/2/1855, to All Commissioners.

32. Prinsep's letter to Financial Commissioner, No. 130, 14/4/1864 in Selection Circular Orders, F.C. Punjab, Vol. 5, Book Circular 19, circular 32, 11/5/1864, p. 83.

33. Ibid., p. 85.

34. Ibid., Reference in para 4 of Book circular No. XLVI of 1860.

35. Ibid., p. 85.

36. 86 Punjab Records 1867.

37. Settlement Paper 39 prepared by Nisbet inder the supervision of edward Prinsep, Settlement Commissioner, in Tupper (1881, vol. III).

38. Punjab Chief Court Act, Feb. 17, 1866, to be in force from the next day, Hime Judicial Proceedings, 41-56 A, Feb. 1866.

39. E. Harrison, Officiating Registrar, Chief Court Punjab to T. H. Thornton, Secretary, Government Punjab, 20/11/1874 in Home Judicial, Proceedings 10-16 B, February 1875.

40. The Punjab Civil Code. 1854, Section XXI dealt with the Canons regarding Landed Property.

41. 39 PR 1866.

42. The Punjab Civil Code. Section XXI, clause 8, p. 62.

43. 52 PR 1866.

44. Punjab Civil Code, 1854, Section XXI, para 5.

45. T. W. Smyth to Secretary Government, Punjab, T. H. Thornton, 22/12/1868 wrote stating that the Chief Court required a third judge urgently because of the tremendous amount of arrears partly caused by the procedural delays and partly by the fact that cases required research and in that case it was difficult to get a Bench of two judges (as the Chief court had only two judges) when an appeal came to court. Home Judicial, Proceedings 33-35 A, Jan. 30, 1869.

46. E. C. Bayley's Memorandum, para 2: "In 1866-67 the regular appeals in the Punjab Chief Court were double as many as the Bengal High Court and this class of suits gave by far the most trouble." Home Judicial Proceedings 42-54 A, 24th Dec. 1870.

47. Home Judicial, Pros 10-16 A, Feb. 1875.

48. E. Harrison, Registrar, Chief Court Punjab, to Secretary Government Punjab, T. H. Thornton, 20th Nov. 1874, para 19; Home Judicial, Proceedings 10-16A, Feb. 1875.

49. 52 PR 1866, p. 75.

50. The Secretary Government of India, Foreign Department, to Secretary government Punjab, 20/6/1866 in Press List of Old Records in the revenue Department of the Punjab civil Secretariat, Vol. XXIV, 1864-68.

51. Ibid.

52. PAR, 1875-76, p. 21.

53. Ibid.

54. For Punjab Land Revenue Act 1871, see Appendix I.

55. Memorandum of C. L. Tupper, on the means of ascertaining the customary law of the Punjab, 2/6/1873 reprinted in Tupper (1881, vol. I: 158).

56. Ibid.

57. Shajra Nasb (Genealogy Tree) in the Misl Haqiyat (Record of Rights), Mauza Kanjhawla, (revenue estate of village Kanjhawla), Bundobast (settlement) 1906-10.

58. Ibid.

59. Sialkot SR, 1863, Appendix 22-23 (see Appendix II).

60. Memorandum of C. L. Tupper, on the means of ascertaining the customary law of the Punjab, 2/6/1873 reprinted in Tupper (1881, vol. I: 158).

61. Ibid.

62. Sirsa Settlement Report. 1883, p. 52.

63. Lt. Governor Michael O'Dwyer's inaugural speech in Report on the Punjab Codification of Customary Law Conference (1915: 11).

64. PAR. 1875-76, p. 21.

65. The Punjab Laws Act IV, 1872 in The Encyclopedia of Punjab and Harvana Local Acts. 1825-1969; also PAR. 1875-76, p. 21.

66. Lord Macmillan delivering the Andrew Lang Lecture declared: "the civilised world has two legal spheres — the Roman Law and the sphere of Common Law. • . Now the common Law in its essence is customary law. . . ." Printed in Lord Macmillan (1949).

67. Ibid., p. 5. Also, "In a civilised town like Calcutta, it is said, you must govern by fixed rules. On the Punjab frontier such rules are out of place." Minute by the Hon'ble Mr. Stephen on the administration of Justice in British, Chapter II, p. 9, Home Judicial, Proceedings 181 B, April 1872.

68. Boulnois' Memorandum on the Punjab Laws Bill, p. 3, quoting from Robert Montgomery 1854, in Home Judicial, Proceedings 181 B, April 1872.

69. "I do not think it is necessary to take any action upon this communication from the Punjab Judges, as the Act has now become law, and their criticism is not important." E.C. Bayley, Secretary Government of India, Home Judicial, Proceedings 181 B, April 1872, Keep With to the Proceedings.

70. T. W. Smyth, Registrar Chief Court, to E. H. Griffith, Officiating Secretary to Government Punjab, 23/3/1872, Home Judicial, Proceedings 181 B April 1872.

71. Boulnois[1] Memorandum, p. 3, Home Judicial, Proceedings 181 B, April 1872.

72. J. B. Lyall, Settlement Commissioner, Multan and Derajat Division, to Settlement Secretary to the Financial Commissioner Punjab, 28/9/1875, quoted in Tupper (1881, vol. I: 174).

73. In 1877, the orders contained in the Punjab Government's letter no. 336 1/4 29/3/1877, shifted all questions of succession to the Riwaj-i-am (Statement of Customs), in Tupper (1881, vol. I: 211). In 1879, the Financial Commissioner in his letter no. 2195 S, 2/4/1879 ordered that none of the replies declaratory of tribal customs should be incorporated in the Wajib-ul-arz (Village Administration Paper).

74. Report on the Punjab Codification of Customary Law Conference. Sept. 1915, p. 15.

75. 1 Rev PR 1873.

76. Lahore SR. 1893, p. 75.

77. Amritsar SR, 1888-1893, p. 23.

78. Proposed Assimilation of the law of Civil Appeal in the Punjab with that obtaining elsewhere, p. 5, Home Judicial, Government of India, Proceedings 98-100 A, March 1907.

79. Ibid.

80. Ibid.

81. Ibid: p. 6.

82. Ibid., p. 7, para 5.

83. Ibid.

84. Ibid., p. 7, para 7.

85. Home Judicial, Government of India, Proceedings 198-199 A, Oct. 1906.

86. Ibid.

87. The Secretary of State, Secretarq

88. The members of the Conference were:

Justice H.A.B. Rattigan, son of Willam Rattigan.
Justice Chevis.
Justice Shadi Lai.
Justice Le Rossignol.
A. H. Diack, Financial Commissioner.
Michael Fenton, Financial Commissioner.
L. H. Leslie Jones, District Sessions Judge, Montgomery.
Khan Bahadur Khan Abdul Ghafur Khan, District and Sessions Judge, Mianwali.
T. P. Ellis, District and Sessions Judge, Hoshiarpur.
Report on Codification of Customary Law. 1915, p. 8.

89. Sir Harold Stuart, Officiating Secretary, Government of India, to Secretary Government of Punjab, Home Judicial Department, 16/4/1908 in Home Judicial, 16/4/1908 in Home Judicial, para 4, Government of India, Proceedings 95-96.

90. Report of the Conference on Codification of Customary Law, 1915, p. 23.

91. Ibid.

92. Ibid., p. 17.

93. Ibid., p. 81.

94. Ibid., p. 11.

95. Memorandum by C. L. Tupper, on the means of ascertaining customary law of the Punjab, 2/6/1873, quotation from Boulnois in Tupper (1881, vol. I: 159).

96. Ibid., para 10.

97. Ibid., para 9.

98. Multan Gazeteer. 1923-24, p. 326.

99. Sirsa SR. 1879-83, p. 52.

100. Ibid.

101. Minority supported in 76 PR 1873; 70 PR 1866; 40 PR 1875.

102. 34 PR 1869; 20 PR 1869; 70 PR 1868; 40 PR 1868.

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