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Title of thesisNature, Law and Historical Transformation: A Comparative Study with
Particular Reference to China and India.

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This thesis examines historical transformation through the prism of legal transformation. The central question it addresses is: what is the nature of historical and legal transformation?

Making demonstrative reference to recent legal change in China and India, and after setting that change within the broadest historical context, the thesis shows that both jurisdictions manifest a gradual though powerful trend towards legal uniformity through the remarkably similar developmental trajectories they each disclose. This it takes to connote a wider trend within the culture of advanced modernity, one that involves a systematic departure from the basic precepts of the natural law. Observance of these precepts, it argues, represents an ineliminable guarantee of maximal individual freedom and cultural diversity.

Explaining these conclusions, the thesis distinguishes three normative orders each allowing a different degree of human volition: the linguistic, the physical and the legal. The third of these orders, the legal, is characterised as an admixture of the other two. Its particular distinguishing feature is that it is in some manner pressure bearing. Amongst the varieties of normative social pressure, a general movement can be detected towards greater formalisation. As legal norms become more formalised, they become less like the norms of language and more like those of physical nature. The degree to which this shift takes place is an indication of the extent to which society has been denatured.

This process of denaturing is rooted in a deeper process of materialisation. The human being is an irreducibly material and immaterial composite whose consequent material and immaterial inclinations need to be satisfied in an ordered fashion giving priority to the former. To the extent that choices are made which try to satisfy immaterial needs with material goods, fundamental distortions arise.

The principal significance of the thesis is that it demonstrates the fruitfulness for comparative analysis of traditional natural law thinking. On this basis it offers a new model for understanding social and legal change

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Nature, Law and Historical Transformation:

A Comparative Study with Particular Reference to
China and India.

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Submitted in Part fulfilment of the Degree of
Doctor of Philosophy

Abstract

This thesis examines historical transformation through the prism of legal transformation. The central question it addresses is: what is the nature of historical and legal transformation?

Making demonstrative reference to recent legal change in China and India, and after setting that change within the broadest historical context, the thesis shows that both jurisdictions manifest a gradual though powerful trend towards legal uniformity through the remarkably similar developmental trajectories they each disclose. This it takes to connote a wider trend within the culture of advanced modernity, one that involves a systematic departure from the basic precepts of the natural law. Observance of these precepts, it argues, represents an ineliminable guarantee of maximal individual freedom and cultural diversity.

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Chapter 1: Introduction

This thesis examines the nature of historical transformation through the prism of legal transformation, and with particular reference to the legal systems of China and India. The central question it addresses is: what is the nature of historical and legal transformation? In the course of answering this question, it also considers a number of additional, closely related questions: how can historical change be understood through the medium of legal change; what conclusions can be drawn about the legal transformations taking place in China and India over the past thirty years; what do the answers to these questions reveal about the nature of advanced modernity and its prospects? By way of introduction, the present chapter, first sets out the context within which the study is situated, it moves on to elaborate the methodological approach employed in answering the questions identified above. Finally, it outlines an appropriate theoretical framework.

A: Context

Frequent attempts have been made to understand the nature and history of human society. In recent decades developments of unprecedented magnitude – in science, politics and economics – have given such attempts a renewed urgency.¹ These developments disclose enormous disruption in every sphere of human life.² At their heart lies an evolutionary dynamic of extraordinary power and complexity. The emergence of this dynamic as a distinctive, structurally elaborate, and integrated world system can be traced back to the sixteenth century, amidst the intellectual, social, and economic tensions that resulted in the European Reformation.³ Well before that time less extensive institutional complexes were constructed in many of the civilisations of the ancient world, but none was able to harness sufficient power to spread itself across the entire globe.⁴ The destruction of medieval European Christendom led to the historically unprecedented phenomena of widespread

¹ In general see: Albrow, 1996; Axford, B., 1995; Beck, 1992, 1999; Castells, 1997; Giddens, 1990; Held, 2000, and Held, et.al., 1999. In respect of scientific developments see: Appleyard, 1999; Fukuyama, 2002; McKibben, 2003; Rifkin, 1998; and Silver, 1998. For political developments see: Beck, U., 1997; Linklater, 1998; McGrew, 1997; Ohame, K., 1995; and Rosenau, 1990. For Economic developments see: Dicken, 1998; Frank, A., 1998; Gray, 1998; Rodik, 1997; and Yergin & Stanislaw, 1998.

² For example in the cultural and linguistic spheres: Dalby, 2002; Harvey, 1989; Robertson, 1992; and Rowland, 2003.

³ For the most well known materialist version of this thesis see: Wallerstein, 1974-1989. For alternatives that depart to varying degrees from Wallerstein's approach but which nonetheless see the Sixteenth Century as, in some sense, structurally pivotal, see: Braudel, 1975, 1981-1984; Fanfani, 2003; Gellner, 1983, 1988; Hall, 1986; and, Tilly, 1974, 1984.

⁴ See: Braudel, 1981-1984; Gellner, 1988; Hall, 1986; Hall & Ikenberry, 1989; Nelson, 1973; Robertson, 1992.

commercial and then industrial capitalist production. This created a mechanism efficient and ruthless enough to accentuate hugely the physical power of northern Europe and, by means of colonisation, to allow it gradually to dominate the world.

The ideological premises upon which this growing dynamic continues to be based are those most clearly elaborated by the ‘enlightenment’ thinkers of the seventeenth and eighteenth centuries.⁵ The central priorities of the enlightenment were to attack traditional and religious modes of thought and organisation, and to replace them with “an exclusive reliance upon human reason in determining social practices.”⁶ These attitudes cohered with a series of ground-breaking discoveries in the natural sciences, and the development of an increasingly materialist conception of humanity, to give rise to a hidden logic of domination, the fundamental requirement of which has been to instrumentalise and exploit all phenomena for the sake of the common objective of material advantage.⁷ Social relationships have been affected by it as much as the physical environment within which they have arisen, and there has resulted both an ever-increasing prominence of instrumental forms of rational action and an increased proliferation of bureaucratic forms of social organisation.⁸

It is a central argument of this study that programmed into this transformational logic at the most basic level is a metaphysic and an anthropology fundamentally at variance with that which had preceded it.⁹ Classical and medieval conceptions held that the universe was composed of a series of natural types representing differential gradations in complexity and reality.¹⁰ The human being was one of these types, occupying a unique position on the borderline between the material and immaterial, and in consequence being privileged unlike other en-mattered types with the capacity for free choice.¹¹ As such, the whole project of ethics and morality was directed towards the cultivation of stable dispositions that would enable the human form to actualise its potentialities to the fullest degree – and as with the individual, so with human society

⁵ See especially, Dupre, 2004; MacIntyre, 1981 and 1998; and Taylor, 1990

⁶ Jary & Jary, 2001

⁷ See here the classic works of the Frankfurt School: Adorno & Horkheimer, 1979; and Horkheimer, 1947, 1972.

⁸ Weber, 1978; Turner, 2000: Parts I and II.

⁹ An argument made previously by many others and stated classically in: Gilson, 1937. See also: Simon, 2001, and Sweetman, 1999. More recently see: Dupre, 1993, 2004; Koselleck, 1988; MacIntyre, A., 1990. For the argument that this rejection is to be understood in explicitly theological terms and the recent revival of interest in political theology, see: Cavanaugh, 2003; Hanby, 2003; Lowith, 1949; Milbank, 2006; Tiryankian, 1996; and Voeglin, 1952, 1975.

¹⁰ Gilson, 1991, 1994.

¹¹ For a masterful overview of classical and medieval conceptions of anthropology and liberty, see: Gilson, 1991: Chapters IX and XV respectively. It is not, of course, being suggested here that there were no significant differences amongst classical and medieval authors, or between the two periods more generally.

as a whole.¹² Indeed, within this framework each perspective – individual and social – necessarily presupposed the other, since human nature was viewed as essentially social and interdependent: society being dependent upon the individual, and the individual upon society.¹³

The post-Cartesian framework which replaced this analysis constituted a fundamental reduction in human understanding of reality.¹⁴ That replacement was a reduction, first, in its determination to view as real in the external world only that which could be directly perceived by the senses. It was a reduction, secondly, in its allied determination to view the human being as an essentially independent and self-reliant individual precedent to the social relations in which it was engaged, and subjectively determinative of the values to which it aspired. Finally, it was a reduction, thirdly, in its exploitative and predatory attitude towards the physical universe, which it characterised increasingly as a mere source of raw materials to be used or combined solely for the sake of human satisfaction.¹⁵ Despite best efforts to sure its foundations, the individualism underlying these reductions was inherently unstable and, thus, ultimately self-defeating. By placing the self at the centre of reality, both in terms of allowing it to determine what counted as reality in the first place, and in terms of allowing it to decide what value such reality should be accorded, it undermined the essentially symbiotic and social supports which render truly autonomous action possible.¹⁶ Based upon an erroneous conception of the human person, enlightenment attempts to secure the position of individual autonomy, have, in consequence, tended to disintegrate into varying forms of Nietzschean and post-modern self-assertion, premised upon a meaningless ‘will-to-power’ and sustained, if at all, by increasingly manipulative and duplicitous cultural forms.¹⁷ Moreover, this extraordinarily powerful process of uprooting and dis-embedding has had the deeper effect of making it more and more difficult to resist the instrumental and expansive logic that has been programmed into the physical world and has become increasingly independent of effective control as the demand for human satisfaction has become insatiable.¹⁸

¹² MacIntyre, 1981; McNerny, 1997.

¹³ MacIntyre, 1981: Chapters 14, 15 and 18. MacIntyre has further pondered and developed these notions of interdependence in: MacIntyre, 1999: esp. Chapters 7-10.

¹⁴ Gilson, 1932; Simon, 2001: Chapter 1.

¹⁵ For a remarkably clear analysis of this reductive world-view see the first chapter in Schumacher, 1978; See also, Schumacher, 1993; and, Smith, 1976..

¹⁶ For an argument similar to the one developed in this study see: Dennehy, 2002.

¹⁷ Jamieson, 1991.

¹⁸ Harvey, 1989; Weil, 2002.

A feature of this dynamic that creates powerful barriers to its understanding, is its tendency to act in a way that shatters and reconfigures alternative social formations which offer resistance to its full development. Much of that reconfiguration is achieved in tremendously subtle, incremental, and thus almost imperceptible ways. This has the effect of cloaking the real mechanisms of transformation in a manner that presents them after a fashion quite different from their true function.¹⁹ This is very similar to what Marx was attempting to explain with his theory of false consciousness, and it signals a need to search for deeper explanatory currents that lie below the surface of social phenomena. In the spheres of continental and Marxist philosophy, this need has long been perceived, but the approaches adopted to tackle it, though instructive, have met with only partial success.²⁰ More recently, writers in the Aristotelian and Thomistic traditions have identified this explanatory deficiency with the inadequate metaphysics such critiques have invariably employed,²¹ a contention, moreover, that is emblematic of a wider trend within certain strains of contemporary thought – in the philosophy of science, sociology, natural law, and virtue ethics – to re-engage the Aristotelian tradition at an increasingly profound level.²²

It is in the spirit of these developments, and, where necessary, drawing upon them, that the present study has been undertaken. In attempting to put forward a comprehensive explanation of historical transformation, it makes three claims. First, it claims that the proper way to account for the processes reconfiguring the contemporary world is through an explanation of man and society grounded upon a non-reductive, pre-Cartesian metaphysic. Secondly, it claims that a peculiarly efficient way to analyse the contours and extent of these processes is to focus upon the development and nature of legal norms. Thirdly, it claims that ultimately only a properly metaphysical account of the variety suggested both fully preserves the diversity that exists between distinct cultures, and provides the coherent underlying explanation necessary to render such diversity properly intelligible.

¹⁹ Adorno & Horkheimer, 1979; Gramsci, 1971; Herman & Chomsky, 2002.

²⁰ Horkheimer, 1971; Habermas, 1984, 1987; Foucault, 1971.

²¹ MacIntyre, 1988; Taylor, 1990, 1995.

²² Archer, et al., 1998; Lisska, 1996; Statman, 1997.

B: Methodological Approach

What is meant by a metaphysical account? Writing in his popular work on Aquinas, Frederick Copelston usefully characterised metaphysics as “inquiry into the nature and structure of the fundamental principles concerning the nature of reality.” As such, he goes on, “[t]he metaphysician concerns himself primarily with things considered in their widest and most general aspect, namely as beings or things...[he] directs his attention above all to things as existing...[he] considers the intelligible structure of things regarded precisely as such and the fundamental relationships between them. He concerns himself...[in other words,] with the categorical structure of empirical reality.”²³ A metaphysical account, by extension, may be said to be an account based of the fundamental principles of reality; or an account that is explicitly co-ordinated within the most comprehensive possible framework of reality.

A metaphysical account of historical transformation involves three major tasks. It involves, first, an analysis of what the principles of dynamic reality are. These define the basic criteria for intelligibility. They also define the criteria for change and development as such. It involves, secondly, an analysis of the distinction between the different types, levels, or degrees of reality. This should clarify what distinguishes human life from other animate and inanimate substances, as well as what distinguishes an individual human being as such, on the one hand, and human beings in society, on the other. Finally, it involves, thirdly, a combination of the principles of dynamic reality with the differing types of reality to ground a consistent conception of social transformation over time.

A metaphysical account is necessary to draw out the fullest implications of the discrete social trends affecting the contemporary world. At the same time, more precise tools are necessary to ascertain the contours of those trends within particular societies and over particular periods of time. For these reasons, the study focuses on specific manifestations of the broad cluster of processes which have conferred upon contemporary human society its peculiarly modern form.²⁴ It does this by focusing upon the changing quality of legal norms, which it thereby employs as prisms through

²³ Copelston, 1955: 35.

²⁴ Crow, 1997.

which the mechanisms of social pressure and reconfiguration can be seen to operate. The debate surrounding the transition to modernity has been both voluminous and contentious. Yet it is fair to say that one of its most noticeable characteristics has been an increasing elaboration of abstract norms or laws, particularly in the form of institutionalised state sanctions. Legal norms, however, have long been seen as extending well beyond the narrow and restrictive ken of the nation-state.²⁵ In the current study, 'law' is defined very broadly as any species of normative pressure. When so defined, it is argued that law offers a peculiarly accurate record of society's structural state, and that it does so at various levels of generality. It is precisely for this reason, it is further suggested, that focusing upon the development and nature of legal norms is a particularly efficient method of analysing the contours and extent of social and historical transformation.²⁶

This examination of legal and social transformation takes place within the particular contexts of China and India over the Thirty-year period from 1978. During this time, each society recognised, more or less explicitly, the validity of a capitalist free-market model of economic development, thereby locking itself into a world economic system that had begun to emerge as early as the sixteenth century, and which, as has already been seen, lies at the heart of the emergence of a distinctively modern and post-modern form of consciousness. What makes China and India, in particular, such appropriate subjects of investigation in the context of present study is not only the peculiar balance of similarities and differences they disclose, but also the fact that, precisely prior to the sixteenth century, and by some accounts right up to second half of the eighteenth century,²⁷ they were materially the most powerful civilisations in the world and should therefore have offered that system the greatest potential resistance.

In effecting such a comparison, the study relies upon the considerable body of detailed secondary material that has already been produced in respect of each country.

²⁵ Chiba, 1989; Griffiths, 1986; Merry, 1988; Roberts, 2005; Woodman, 1998; Twining, 2009:362-375.

²⁶ Cherry, ed., 2004; Cotterrell, 2002; Harding & Orucu, eds, 2002; Glenn, 2004; Goldman, 1999; Kahn-Freund, 1974; Legrand, 1996; Nelken, 1997; Santos, 1995; Teubner, 1988; Twining, 2000, 2009. The present author is particularly sympathetic to Twining's call for the reconstitution of a general jurisprudence on a much broader scale than that conceived by analytic thinkers such as Hart and Raz., Twining, 2009: 21.

²⁷ See in this regard: Frank, 1998; and, Pomeranz, 1999.

This approach enables it to ground an overview of the specific developments in each jurisdiction that is nonetheless sufficient to bring to light the manner in which their transformations have been effected in practice. It builds upwards from this comparative base to a theoretical model that is tied into the contours of detailed and tangible practical developments. It is organised around three sections. The first section - Chapters Two and Three – contextualises the study. Chapter Two sketches large-scale trajectories of human societal transformation overtime, as well as suggesting how the recent histories of China and India can be fitted within this broader outline. Chapter Three mirrors the structure of Chapter Two, though it focuses instead upon underlying changes in the character of legal norms. The second section – Chapters Four to Six – draws out in greater detail the processes of social reconfiguration that have accompanied the systemic acceptance in China and India of the ‘free-market’ paradigm. Chapter Four examines the differing constitutional strategies employed by each country. Chapter Five examines laws dealing explicitly with state activity both in terms of administrative action and in terms of criminal justice. Chapter Six examines developments in the field of family law. The third and final section – Chapters Seven and Eight – works towards an overall explanatory model. Chapter Seven moves from the conclusions reached in Section Two to a more abstract theory of law and legal transformation. This, it is argued, can properly only be understood within the context of the metaphysical explanation of social change elaborated in Chapter Eight. The final Chapter, concludes by drawing together the various levels of argumentation to indicate how they form an integrated whole.

C: Theoretical Framework

1. History and Modernity

The theoretical framework employed in the present study rests upon a particular interpretative strand within wider debates surrounding the definition and origins of ‘modernity’. As such, it is heavily indebted to the long-canvassed, though in recent times powerfully restated, view that modernity cannot be properly understood independent of its rejection of the pre-existing theological cosmos which it grew to

replace.²⁸ In particular, it centres upon the view that the vast complexities of the modern world can be traced back to what Louis Dupre has characterised as a double break-up, “the one between the transcendent...and its cosmic-human counterpart, and the one between the person and the cosmos” which splintered “the onto-theological synthesis” of the high Middle Ages that had come to represent a more-or-less harmonious fusion of classical Greco-Roman and Hebrew-Christian thought.²⁹ In time, the consequences of this break-up gave rise to the distinctive cluster of social, political and economic developments that have spread across the globe with extraordinary speed and power since the industrial revolution.

More profoundly, each of these developments fit within a much broader time-frame in which a unique feature of the human species has been its ability to transform itself and its environment with rational deliberation and to learn from its collective experience. This ability, it is suggested, has opened the possibility of each generation receiving and adding to a common stock of knowledge, and to the gradual accumulation of that stock over time. In the application of this knowledge for material advantage this capacity has enabled man to effect transformations in the physical world of increasing magnitude. Thus, it is a further argument of the present study that whilst modernity in its industrial and post-industrial forms has witnessed an unprecedented reconfiguration and quickening of productive forces and transformation in societal consciousness, it has also moved along a continuous transformational trajectory with earlier historical era.

In the context of long-run human transformation, then, three broad phases are delineated.³⁰ In the first phase – prior to the neolithic revolution and the emergence of the first state structures – human society was characterised by a nomadic, hunter-gatherer lifestyle, co-ordinated predominantly around ties of kinship. In the second phase – running from the neolithic revolution to the industrial revolution – society was characterised increasingly by agriculture and pastoralism which led to the founding of the first state structures and the emergence of coordinative elites in order to facilitate the organisational discipline necessary for settled agricultural production. Finally, in the third phase – running from the industrial revolution to the present – it

²⁸ Cavanaugh, 2003; Hanby, 2003; Lowith, 1949; Milbank, 2006; Tiryankian, 1996; Voeglin, 1952, 1975.

²⁹ Dupre, 1993: 3.

³⁰ Lessnoff, 2002.

has been characterised by co-ordinated industrial production of goods and services, and of a particular form of ‘modern’ and ‘post-modern’ consciousness.

The two revolutionary transitions dividing these historical phases – the neolithic and the industrial – have been rooted in the process of materialisation which is the underlying cause of the process of rationalisation so beloved of social theorists since Weber.³¹ Thus materialisation is characterised as the means by which man’s social life becomes increasingly subject to rational calculation in an attempt to exert greater control over the surrounding world. Connected to this process is a dynamic which operates such as to confer a clear selective advantage upon those societies, and groups, in which the methods of production are comparatively better subjected to rational mastery. This rational mastery enables them to control and to exploit their physical environment more effectively. In order to avoid the risk of being overwhelmed, a less efficient society, or grouping, must imitate or improve upon the techniques employed by its more efficient competitors. A growing portion of social life is thus functionalised in the service of the underlying requirement of physical survival by being increasingly subjected to the disciplines of rational co-ordination and organisational control. Accordingly, the processes of rational calculation within human society rise gradually in efficiency, and also grow more impersonal, predictable and extensive.

Implicit in this framework is the claim that human transformation has been the result of a continuous interplay between material and immaterial forces, but that, latterly, especially with the onset of advanced modernity, the former have come to exercise increasing influence at the expense of the latter. To understand this properly, it is necessary to recognise that the structures that both facilitate and constrain human agency vary both independent of human action and as a result of it. They vary independent of human action consequent upon physical, chemical and biological developments in the ‘natural’ world. They vary as a result of human action consequent upon the continual interaction of agents, and the individual and collective choices those agents make. As such, a person’s development, consciousness, socialisation, hierarchical positioning and physical ‘entitlements’ are conditioned and

³¹ Elster, 2000; Sica, 2000.

determined by a network of pre-existing structures.³² At the same time, the precise nature of those structures are the result of an aggregation of previous individual actions.³³ Materialisation is the process by which those structures that are distinctively human in origin, and thus which do most to habituate and condition social consciousness, take on an increasingly material character. This results from the proportionate increment in actions directed towards material ends over and above those directed towards immaterial ends. The greater this increment becomes, the more powerful becomes the logic of competition to which materiality is inherently related, and, consequently, the more difficult becomes resistance to further incremental advances.

2. Law

In its most general sense, the term law may be taken to connote any general principle of behaviour, and is thus to be contrasted always with the particular event or decision. Beyond this, however, an important distinction opens between laws of physical nature, on the one hand, and laws of human conduct, on the other. The difference essentially consists in two things. First, whilst the laws of physical nature apply to all things in the physical world, the laws of human conduct apply only to human beings. Secondly, whereas physical laws are determinative, it is of the essence of the laws of human conduct that they may be violated. Such violation may be either accidental or deliberate: accidental, since people have finite intelligence and are consequently liable to error; deliberate, because a person is capable of departing from the precepts of human conduct should they wish to do so. In both cases, the capacity for violation resides in man's nature as a free agent. Although debate surrounding the application of the term 'law' to human conduct has been extraordinarily intense, for present purposes it may be said to have given rise to three very broad approaches.

The first approach – the natural law approach – contends that there is an intimate connection between law and the basic precepts of human nature, which are given expression to in the norms of morality.³⁴ Moral norms are, in this context, linked

³² Bourdieu, 1990; Parker, 2000.

³³ Parker, 2000.

³⁴ George, 1992,1999; Finnis, 1982, 1983; Hittinger, 1987; Kelly, 1992; Lisska, 1996; Maritain, 1943,1947,1951; McNemey, 1992,1997.

clearly to the conditions for human fulfilment. They constitute the minimum behavioural standards required for a human community to function in the co-operative manner necessary for its members to realise the highest of their natural inclinations.³⁵ All particular legal rules in accord with morality are seen as perfecting the natural law by laying down prescriptions for particular communities which give effect to its general premises and, for that reason, are also seen as obligatory. Legal rules that are not in accord with morality, on the other hand, if followed, are held to distort the natural order and accordingly are seen as lacking the quality of legal obligation, allowing St Thomas Aquinas to formulate the dictum subscribed to by many natural law theorists: "A law that is not just seems to be no law at all."³⁶

The second approach – the socio-economic approach – had its roots in nineteenth century historical and sociological jurisprudence, and extended subsequently to include a plethora of schools united by a determination to analyse legal phenomena in relation to the social, political, economic and anthropological contexts from which they emerged.³⁷ It pays particular attention to the deeper coordinative, coercive, instrumental and ideological functions of law, and is especially concerned with analysing the contours of power within given societies as well as how these subtly operate to extend the influence of some groups whilst reducing or even excluding that of others.³⁸ Although this approach is often associated with attempts to construct analytical tools to help expose perceived injustice and puncture the claims of ruling elites to be acting in the interests of the common good,³⁹ it also includes conservative attempts to place jurisprudence upon a more economically efficient footing.⁴⁰ Whatever the specific motivations of theorists falling within this category, however, they each are concerned in some way to account for how the law comes to develop in the way it does, and to draw out the implications of this development for the future. Typically, then, it tends also to employ a much broader definition of what counts as law, and is sensitive both to the informal understandings upon which formal legal rules depend, and to the often unspoken pressures that constrain and promote human activities in differing contexts.

³⁵ Lisska, 1996.

³⁶ Lisska, 1996; Veatch, 1971.

³⁷ Cotterrell, 1989,1992; Ghai,et.al., 1983; Hamilton, 1995; Kelly, 1992; Kidder, 1983; Moore, 1978.

³⁸ Morrison, 1999.

³⁹ Unger, 1986.

⁴⁰ Posner, 1981.

The third approach – the positivist approach – contends that questions of legal validity and definition should be separated strictly both from questions of morality and from questions of socio-economic origin.⁴¹ Instead, it holds to the view that law consists of data, such as legislation, decided cases and custom, which can be recognised by relatively simple formal rules, or ‘rules of recognition’. According to the positivist conception this data constitutes the raw material of a science, which it is the lawyer’s task to analyse and order. “In this sense law is a ‘given’ – part of the data of experience...The tests by which legal positivism recognises the existence of law or particular laws are...analogous to those by which a scientist might recognise the presence of a particular chemical.”⁴² Thus the positivist is a thorough-going formalist; for whom the only law is positive, state law which remains law whether it is moral or not. It is this third approach which is most commonly encountered amongst legal professionals, and which is most commonly adhered to, at least explicitly, in the various judicial fora within which they operate.

The present study is primarily concerned with law as a direction of human conduct rather than with law as a regulator of physical nature, though it does ultimately make arguments as to how the two senses of ‘law’ or normative ordering are related. In respect, specifically, of the former, it employs definition that characterises law as normative social pressure. In so doing, it focuses upon a particular category of social phenomena with which all three of the approaches outlined above are in some manner concerned, namely regulative norms instituted by human action. The definition employed is made up of two components. The first component is normativity, which should be taken to mean the abstractive quality possessed by any type of implicit or explicit regulatory standard, rule, or principle. The second component is social pressure, which should simply be taken to mean any type of individual or collective pressure or coercion. The quality of normativity enables law accurately to represent multiple individual occurrences and thus as it changes, to act as a peculiarly efficient medium through which to chart the extent and nature of social transformation over a given period. The quality of social pressure, on the other hand, particularly

⁴¹ Dworkin, 1977,1985,1986; Hart, 1961.

⁴² Cotterrell,1992: 9.

distinguishes law from alternative socially normative phenomena such as language.⁴³ All forms of normative social pressure, taken in this sense, presuppose a number of things. First, they presuppose the existence of socially accepted standards capable of being violated. Secondly, they presuppose consensus that such violation threatens social integrity and, therefore, requires resistance. Finally, they presuppose deliberate effort to uphold standards by actually resisting threatened violations in practice. As such, law understood in this broad manner acts both to give effect to the consensus of society as a whole by disciplining elements which might otherwise threaten its integrity by their dissent, and also, in the process of so doing, to give expression to what, in fact, the present state of such consensus is.

Just as it is argued that law, taken in the above sense, offers an accurate reflection of a society's structural state at any given point, it is also argued that law is uniquely appropriate in elucidating the extent to which a particular society has become alienated from its natural, or truly human, condition. Immediately, of course, this raises the question of how legal analysis enables measurement of such alienation in practice. The answer suggested is that it does so by charting the degree to which a society's legal norms have become formalised. The term formalised here is linked into notions of explicitness and fixation, so that legal norms may be said to become increasingly formalised insofar as they display an increase in each of these qualities. In practical terms, this can be gauged both by examining the character of the laws that structure society through noting the subjects that they deal with, and by noting the increment in the number of formal laws actually being promulgated.

In adopting this approach it is, of course, necessary to prescind initially from questions relating to the morality or immorality of the specific normative structures under consideration. However, this does not mean that such questions need ultimately be denied a place of central analytic importance. Indeed, it is argued here that the process of formalisation referred to above is properly comprehensible only in relation

⁴³ In this regard, it is important to note that, as a normative system regulating the action of free agents, law performs an irreducibly coordinative function such that it can be understood to provide those agents with real reasons for action. This is, of course, a feature it shares with linguistic/communicative normative systems, such that it is possible to speak of the latter as also being to some extent legislative. Yet, whilst allowing for this possibility, the present study attaches the term 'law' exclusively to norms of 'social pressure' precisely in order to distinguish it from those same linguistic/communicative norm-systems. Moreover, and for similar reasons, 'social pressure' is understood in the widest possible sense, ranging from the slightest sense of social obligation within an individual's conscience to the most draconian use of physical force. Thus, it is meant to capture what Hart famously labelled law's 'internal' point of view, including in consequence, the propensity to adhere to such phenomena as the rules of recognition etc.

to a clear definition of human nature and, therefore, of the minimum conditions necessary for the flourishing of a human person and of the human community more broadly.⁴⁴ As the process of formalisation becomes more extensive so, at a deeper level, does the process of rationalisation and thus materialisation, and so, as a necessary concomitant, does society become less observant of those normative patterns of behaviour which are characteristic of it in its most natural or fully functioning state. As such, there is a certain correspondence between the different theoretical approaches to law and the different stages of historical development.

3. China and India

China and India have many things in common.⁴⁵ First, they are inhabited by more than a billion people each. Secondly, they each include the historical foci of civilizations that embody religious, social and cultural traditions that stretch back several millennia. Thirdly, whereas prior to sixteenth century, and by some accounts right up until the late eighteenth century, these civilizations were the wealthiest and most powerful in the world,⁴⁶ they each suffered as a result of Europe industrialisation, and consequently were each subject to some form of colonial penetration.⁴⁷ Fourthly, in reaction to this colonial experience and in order to guarantee a strengthened position of political and economic independence, each country over the past fifty years moved away from a reliance upon agrarian production by embarking upon its own comprehensive programme of large-scale industrialisation.⁴⁸ Finally, during the period with which the present study is concerned, each country has turned away from its initial attempts to secure economic

⁴⁴ Ultimately, then, as should already be evident, this study is forwarding a theory very clearly rooted in the Natural Law tradition of Aquinas and Aristotle. Classical natural law thinking has been noticeably absent from the contemporary debates surrounding comparative law. For works which have tentatively explored the possibility of mutual relevance see Del Vecchio, 1969 and Selznick, 1961. More recently, Twining, in Twining, 2000, though he does not attempt properly to investigate “the potential of recent natural law theory to the study of the problems of globalisation and law.” (n.18., p. 65.), nonetheless acknowledges, that “ideas on natural law are clearly directly relevant to questions about humanitarian law, human rights and related matters at global transnational and other levels.” Twining, 2000: 65. Similarly, an important retrospective essay Gordley, 2003, is strongly suggestive of the role that classical tradition of natural law thinking might play in clarifying and ordering the methodological underpinnings of a more convincing theoretical foundation for comparative legal studies.

⁴⁵ Charlton, 1997.

⁴⁶ Thus Ponting, speaking of the late eighteenth century, states: “The products Europe could make or supply were of little interest to the great powers of India and China that already made a wide range of higher quality products. The Europeans had no technical or military superiority over these states and could deploy little power in the region, certainly not enough to conquer the great land empires. Without the gold and silver of the Americas, Europe would not have been able to buy the products of Asia, make money and gradually infiltrate and gain some of the wealth that could be derived from the trade of the area...” Indeed, although Europe had used the period between 1500 and 1750 to catch up and attain approximately the same GNP per head as the wealthier areas of Eurasia, “China and India were still far bigger economies than any in Europe because of their sheer size in terms of land area, natural resources, and population.” Ponting, 2001: 535

⁴⁷ Hsu, 1995.

⁴⁸ Brass, 1994; Hsu, 1995.

self-reliance and begun consciously to lock itself into the increasingly powerful global system of market capitalism, by pursuing policies of economic liberalisation and international integration.⁴⁹

Alongside these structural and transformational similarities are also significant differences. The most important of these differences is the fact that the diversity found in India runs deeper and is of greater relative consequence than that found in China. This is reflected in a number of areas. First, since in India, unlike in China, the majority religious tradition exists alongside a numerically significant, geographically interspersed, and largely non-assimilable alternative, large-scale communal tension has been a constant theme since the Moghul invasions of the sixteenth century. Secondly, the systems of caste, jati and untouchability have rendered the strict hierarchical differentials evident in both societies distinctly more numerous, profound and inflexible in India.⁵⁰ Thirdly, in China, where the majority is distinguished primarily by ethnicity rather than by religious affiliation, there is a much larger degree of ethnic homogeneity; and although this is accompanied by the existence of numerous ethnic minority groups on the periphery and by considerable linguistic diversity, these diversities are much less significant than their Indian equivalents.⁵¹ Fourthly, whilst both countries have historically suffered from numerous political and dynastic transitions, these have generally had a less de-stabilising effect upon the state in China than they have had on its cognate in India, owing to China's peculiarly enduring and powerful Confucian governmental elite.⁵² Fifthly, this has meant that whilst China has been more resistant to colonial penetration than India, it has also been far more susceptible to revolutionary change from above.⁵³ Sixth and finally, these accumulated differences have together helped give rise to the profoundly different governmental, constitutional and legal systems that presently operate in each country.⁵⁴ so that China is much more authoritarian in nature than is ostensibly democratic India, and has adopted a more coordinative, civil law system, as compared to what might be characterised as India's more reactive, common law approach.⁵⁵

⁴⁹ Brass, 1994; Sachs, et. al., 1999; Tu, 1993.

⁵⁰ Brass, 1994.

⁵¹ Brass, 1994; Charlton, 1997.

⁵² Hsu, 1995.

⁵³ Guang & Muppidi, 1997.

⁵⁴ Chen, 1998; Kusum, 2000.

⁵⁵ Damaska, 1986.

By examining the developments within these societies, it is possible to bring their similarities and differences together to form a coherent picture of what it is argued are the essentially coordinate developmental trajectories each is following, to draw conclusions about the precise nature of these trajectories, and, further, to draw some tentative conclusions about the common forces which underlie them. These transformations are most amply demonstrated in the legal developments that have taken place and have been effected in each jurisdiction over the last three decades. The chapters that follow disclose a situation in which the legal transformations in China and India, though superficially different, are nonetheless each developing in remarkably similar ways. This seems to indicate that such resistance as China and India have offered to the reconfigurative pressures of modernity is being gradually but conclusively undermined.

Part 1

Historical

Part 1 offers a schematic outline for understanding the historical and legal transformations which have taken place respectively in Europe, China and India. One of the central contentions of the present study is the impossibility of comprehending the full implications of contemporary developments unless they are approached from a broad historical and deep-lying conceptual perspective. Not only, then, does Part 1 serve a vital contextualizing function for the more detailed analyses in Part 2, it also anticipates a number of the conceptual precepts that receive fuller elaboration in Part 3. For this reason, a set of clear theoretical commitments will be apparent in each of the following chapters.

In the first part of Chapter 2 this manifests itself in a close engagement with the work of Christopher Dawson. It was Dawson's special contribution to have highlighted the great spiritual currents running through world history and to have argued for their place of central importance. In so doing, he based his analysis, normally implicitly, sometimes explicitly, on a conception of the human person and of human society irreducibly possessed of both material and immaterial aspects. In addition to accounting for the extraordinary diversity of pre-modern cultures, his work contains within it, and in common with a number of other thinkers, a profound explanation of the emergence of the modern world in terms of an increasingly systematic redirection of the spiritual impulses which had shaped the Christian culture of medieval Europe, away from the transcendent towards the immanent such that attempts were made more and more to satisfy irreducible and inexhaustible needs of an immaterial nature with goods of a material and thus exhaustible nature. This redirection has recently and imaginatively been characterized by historian of western legal development, David Goldman, as a replacement of the Holy Roman Empire with a modern 'Wholly Mammon Empire.'

The arguments in Chapter 2 are complimented by a similar framing of the narrative in the first part of Chapter 3 around the work of Heinrich Rommen. Rommen develops an 'inversion thesis' of his own, though this time, one which is more clearly of a normative/conceptual nature, whereby the relationship between the underlying principles of the natural law and the norms posited by particular communities in particular cultural and material contexts, is reversed such that the underlying normative principles shaping society come increasingly to result from contingent uncontrolled individual and collective assertions of the will. Emphasizing the intimate causative interplay between socio-historical and ideological-normative developments, Rommen identifies the roots of modern positivism in a late scholastic turn towards nominalism in a way which corresponds closely to the wider historical narrative set out in Chapter 2.

Importantly, the 'inversion theses' propounded by these authors are premised upon the unprecedented nature of the immanentizing developments at the origins of the modern world such as to explain the concentration in the first parts of Chapters Two and Three upon specific historical developments internal to Europe. Indeed, it is a

crucial part of the story of those developments that one cultural form emerged and came to spread itself across the entire globe. Thus, whilst this culture emerged first in Europe, its transformative implications went far beyond. In fact, it is precisely owing to the spread of this pathological form that whereas prior to the sixteenth century the cultural trend in world history as a whole was towards differentiation, from that time onwards it has tended towards ever-greater uniformity.

Chapter 2: Historical Transformation

A: Conceptual Framework

The purpose of this second chapter is to outline long-term historical transformation. In doing so, it pays particular attention to the gradual emergence of industrial and post-industrial society in Western Europe, and then to how the institutional forms of that society were spread, and began to transform, the traditional societies of China and India. With this in mind it is useful to employ – with important adaptations – a framework suggested by the work of Jurgen Habermas in which he distinguishes differing stages or phases of historical development as characterised by certain core institutional forms which dominate society during the relevant period in question and confer upon it its distinctive nature.⁵⁶ The first of these phases ran from the origins of human society to the Neolithic revolution. Here the core institutional form was constituted by the kinship group which was associated with a type of social interaction characterised by co-option and reciprocity and in which inter-personal loyalty and affectivity tended to be foremost. The second phase ran approximately from the Neolithic to the Industrial revolutions. During this period the core institutional form was the state which was associated with a form of political (or strategic) action characterised by asymmetrical relations of power and control according to which one group is, subtly or not so subtly, subordinated to, or placed under the direction of another. The third and final period, runs from the Industrial revolution to the present; its core institutional form being the capitalist market economy, according to which the most characteristic action is essentially functional in nature, whereby individuals are related to each other as economic producers and consumers.

⁵⁶ Habermas, 1988: 17-24 Whilst Habermas distinguishes a total of four stages in his particular theory of social evolution, for the purposes of the present study, and owing to deeper philosophical differences which centre upon doubts as to the possibility of redeeming the 'enlightenment project', the three principles of organisation he distinguishes will be taken to characterise just three corresponding phases of historical transformation.

B: The Dynamics of Societal Change Overtime

1. Pre-Agrarian

The best estimates seem to suggest that modern humans, with their capacity for symbolic language and collective learning, emerged about 250,000 years ago in sub-Saharan Africa, and that they gradually began migrating outwards to other parts of the globe from about 100,000 years ago, as they evolved technologies which enabled them to live in new environments.⁵⁷ The lifestyle of these peoples was characterised by an essentially reciprocal form of interpersonal interaction, comprising small bands roaming the earth as hunters and gatherers, utilising simple tools and bound together in a social order based upon kinship ties and clan groupings. They led, as Marshall Sahalins pointed out in his famous *Stone Age Economics*, a largely leisured and affluent life, living off the natural produce of the earth and being driven “by no systematic motive for producing more goods than were necessary to satisfy basic needs.”⁵⁸

Even more strikingly, and almost without exception, they were imbued with world-views that “engender[ed] a coherent vision of the social and natural world...[which was premised upon] a *cosmos* in which the natural and the social [were]... not sharply or systematically distinguished...”,⁵⁹ in which language use was “multi-stranded”, performing simultaneously both descriptive and loyalty affirming functions, and in which all aspects of life were conceived in essentially religious terms. Consequently, the dominant semantic structures employed were neither wholly referential nor wholly unrelated to nature: they were both referential and, at the same time, “meshed in with other elements” which prevented them from fusing into a single, purely descriptive, extra-social whole.⁶⁰

⁵⁷ See, amongst other works: Foley, 1995; Klein, 1999; and, Schick & Troth, 1993. On the gradual emergence of nascent state structures more generally, see: Crone, 1989.

⁵⁸ Sahalins, 1974

⁵⁹ Gellner, 1990: 60

⁶⁰ Ibid: 52.

2. The Neolithic Revolution and Early State Structures

The end of the last ice age, about 10-12,000 years ago, marked a crucial turning point in human history, since it was at about this time that a number of hunter-gatherer bands began to cultivate and settle those regions of the world best suited to agricultural production.⁶¹ This is often referred to as the agricultural or Neolithic revolution, but the development of settled agriculture actually occurred at different times in different parts of the globe and took several millennia to reach its furthest extent. In time, however, its cumulative effect was felt with greater and greater force as the increase food surpluses to which it gave rise encouraged significant population growth, the establishment of permanent fortified settlement, nascent forms of urbanisation and eventually to the emergence of increasingly powerful, centralised and socially stratified state structures.⁶²

In crude power political terms, this form of organisation meant that the many groups continuing to live a hunter-gatherer life-style had to face increasingly aggressive competition.⁶³ As the number and size of agricultural societies increased and the political structures which sustained them became more complex, the scene was set not only for the almost complete marginalisation of the hunter-gatherer way of life, but also for mutual warfare and colonisation between the strengthening agrarian states themselves.⁶⁴

In each of these developments, it is important to bear in mind the continuing importance of religious practice and the ceremonial consciousness that went with it. The increasingly sophisticated cultures that emerged alongside the growth of agricultural settlement remained “profoundly religious in their conception” insofar as men learnt to control natural forces “as a religious rite by which they cooperated as priests in the great cosmic mystery of the fertilisation and growth of nature”. For example, the annual “mystical drama” of the Mother-Goddess “and her dying and reviving son and spouse” was simultaneously “the economic cycle of ploughing and

⁶¹ Mellaart, 1975; Smith, 1955; Ward, 1954: 16

⁶² See, for example: Postgate, 1992; and Khurt, 1995.

⁶³ Ibid.

⁶⁴ Ibid.

seed time and the harvest by which the people lived.”⁶⁵ And the material surplus that resulted from the transition to agrarian production resulted in the emergence not only of a specialist coercive or ruling elite, but also that of a class specialist in “cognition, legitimation, salvation [and] ritual”⁶⁶ – in other words, in a priest-hood.⁶⁷ In addition to the possibility this opened up for the much more sustained investigation of the natural world, together with the service that this elite, trained in the newly developed techniques of written communication and record-keeping, could provide in the cause of political expansion, it also gave rise to the possibility of a more sustained, disciplined, penetrating and profound contemplation of spiritual and theological realities, as well as their more systematic collection and transmission.⁶⁸

In time these various processes formed the basis for the development of the great archaic civilisations of the ancient world during the sixth and fifth millennia B.C. – those which appeared in Sumer and in Egypt, in the Indus valley and along the Yellow River in China.⁶⁹ Yet, whilst, in the process, there was “realised an enormous material progress – relatively the greatest perhaps that the world has ever seen – this progress was strictly limited.”⁷⁰ The tribal community may now have been altogether more elaborate, but the social order as a whole remained inextricably bound up with the processes of the natural world and with an “absolutely fixed ritual form from which it could not be separated.”⁷¹

Nevertheless, these largely riverine empires continued to expand and consolidate their territorial control at the expense their weaker neighbours until sometime in the third millennium B.C.⁷² From this point they began to be exposed to a series of barbarian invasions by peoples of Indo-European stock possessed of extraordinary but largely destructive vigour, invasions which came to press down from the north along the entire frontier of the archaic world.⁷³ In time, these repeated waves of destruction cracked open the pre-existing ritual and civilizational orders and of throwing into

⁶⁵ Dawson, 2001: 94. This section follows very closely the accounts given by Dawson in Dawson, 1997 and 2001. It will be quite apparent that the narrative developed in this Chapter owes a considerable debt to the thought and writings of Christopher Dawson more generally, though it also seeks to extend and update his argument in relation to more recent developments. For the recent revival of interest in the work of Dawson, see esp: Caldecott & Morrill, 1997.

⁶⁶ Gellner, 1990: 17.

⁶⁷ Dawson, 2001: 104 & 109.

⁶⁸ Gellner, 1990: 17 & 74. See also, Bright, 1996.

⁶⁹ Burenhult, ed., 2003.

⁷⁰ Dawson, 2001: 97.

⁷¹ *Ibid.*

⁷² Wittfogel, 1957.

⁷³ Dawson, 2001: 98.

question the eternal verities that those orders had previously appeared to guarantee. Minds were rudely forced beyond the unquestioned cultural horizons of the past, losing the capacity to accept existing conditions as the whole of reality.⁷⁴ More and more they “compared the world [they] knew with the social and moral order [they] believed in, and condemned the former.” By the middle of the first millennium B.C. this began to presage a cultural change of the most profound order. Indeed, it was during this ‘Axial Age’, as Karl Jaspers famously termed it, that “the transcendent was born” across the widest possible civilizational front “in a ritual form [now] became moralised and spiritualised.”⁷⁵

The longer-term importance of these ideas, however, lay not in the way they were presented by their original exponents, but rather in the precise manner they interacted with the cultures into which they were introduced. Here a common, and striking, thread running through the major oriental civilisations was a tendency for these new ideas actually to undergo a degree of re-absorption into their older archaic cultural hosts.⁷⁶ Thus in Confucian China, for example, the new religious impulse tended to stop short of enquiring further into the fundamental nature of “the Reality the fulfilling of whose laws brought the Great Unity.”⁷⁷ Instead, it turned towards the practice of virtue which, whilst certainly implying the assent of the mind to an inner law of benevolence and justice, also entailed the careful observance of an intricately elaborated external ceremonial which thereby “consecrated and preserved,” though admittedly also “somewhat rationalised” China’s pre-existent cultural forms.⁷⁸

In India, by contrast, “the absolute metaphysical view of life was theoretically triumphant, and ruled the whole civilisation,” involving, in both its Upanishadic and Buddhist forms, a deliberate renunciation of the world for the sake of personal enlightenment. Nonetheless, such a standard proved altogether too austere for the large majority of people, who honoured the asceticism of countless holy men at the same time as they resorted to pre-existing rites and fertility cults. Whilst “[t]he ancient

⁷⁴ Ibid: 99.

⁷⁵ Ibid: 99-101. On the rich discourse surrounding Jaspers’ idea of the Axial Age see: Aranson et. al., 2004; Bellah, 2005; Eisenstadt, 1986; Jaspers, 1953, 1962; and, Voeglin, 1957. Also see the classic study of pre-Axial temple religion in the Near East: Fustel de Coulanges, 2006.

⁷⁶ Dawson, 2001: 112.

⁷⁷ Ward, 1954: 30.

⁷⁸ Dawson, 2001: 112. The schools of Daoist philosophy were, of course, much more absorbed in exploring the fundamentals of reality than their Confucian counterparts, and occupied, to some extent, the gap created by the comparative worldliness of Chinese culture, but, though of sporadic importance, these never came to play more than an ancillary role in official ideology.

myths and rites [we]re interpreted as the symbols of a higher reality by the followers of the new religious philosophy...to the common people they retain[ed] their old meaning and continue[d] to embody the mysterious forces of the physical world.”⁷⁹ Consequently, in the two greatest centres of archaic civilisation, and owing to a certain one-sidedness, the ‘Axial’ breakthrough seems to have been to some extent abortive since the religious impulse to which it gave rise failed to permeate and transform its hosts in a manner sufficient to set them on a fundamentally new developmental path.

Turning to the cradle of western civilisation, namely the eastern Mediterranean and the Greek archipelago, the story seems, at first glance, to be somewhat different. Greek civilisation differed from its ‘oriental’ counter-parts in a number of ways, perhaps the most important of which was the fact that

Greek society lacked the kind of powerful bureaucracy that elsewhere might provide a locus for the formation of an elite culture (for example, in ancient Egypt); its temples were not prominent in the appropriation of economic resources (as was the case in the Near East), and there was no entrenched and hereditary priesthood (as there was in India). Greek culture was thus marked by a focus on the political that is largely absent from Indian culture as it has come down to us...At the same time this focus was significantly different from that of political reflection in ancient China, where even under conditions of fragmentation the scale of political organisation was much larger. In this way the culture of Greece stood out in being what we might call a citizen culture.⁸⁰

Pan-Hellenic resistance to the Persian onslaught during the Persian war sparked a growing consciousness of shared cultural values and life-ways distinctive from those of the archaic East. The great creative achievement (and colonial expansion) to which this, in part, gave rise during the seventh and sixth centuries BC, settled Greek civilisation around the two poles of the free city and a common culture, which duly placed the greatest emphasis upon the free development of individual virtue and character.⁸¹ Moreover, whilst the eastward direction of the second great wave of Hellenic expansion under Alexander the Great and his successors in large part

⁷⁹ Ibid. It must immediately be recognised, however, that these are now no longer, if they ever were, uncontroversial claims. What certainly cannot be denied, however, is the range and diversity of the changes that subsequently took place in these ‘traditional’ cultures, particularly in those of China and India, as it is hoped will be made abundantly clear in the following sections of the present chapter. Nor, indeed, is it intended to deny the extraordinary diversity these cultures demonstrated even during the ‘Axial Age’.

⁸⁰ Cook, 2004: 218.

⁸¹ Dawson, 1998: 135.

facilitated the rise of the Roman Empire to its west whose practicality and genius for administrative organisational efficiency eventually led to the Greek empire's own downfall, Greek culture and ideals were almost wholly taken over by their less imaginative Latin successors.⁸²

Yet, upon closer inspection, the Hellenic world was itself subject to the same spiritual forces at work in India and the Far East, and there are strong indications that it too failed fundamentally to break with the common pattern of ancient civilisation. The cosmic vision of the Greco-Roman world, like that of the rest of the ancient world, was dominated by a cyclical conception of time in which the entire created order was subject to an inevitable cycle of birth, death and rebirth.⁸³ This found particular expression in the theory of the Great Year which infiltrated Greek consciousness from the time of Heraclitus, having had its probable origins in Mesopotamia from which it gradually spread to the rest of the ancient world.⁸⁴

It is only against this almost uniform background that the true uniqueness of the Jewish attitude to the material world and the temporal process that found expression in it can be appreciated.

...to the Jews, history possessed a unique and absolute value, such as no other people of antiquity had conceived... While the philosophers of India and Greece were meditating on the illusoriness or the eternity of the cosmic process, the prophets of Israel were affirming the moral purpose in history and were interpreting the passing events of their age as the revelation of the divine will. For them there could be no question of the return of all things in an eternal cycle of cosmic change, since the essence of their doctrine of the divine purpose in the world was its uniqueness. There was one God and one Israel, and in the relations between the two was comprised the whole purpose of creation.⁸⁵

Indeed, "while the general tendency in the new age was to syncretise the various local cults and to subordinate all these personal divinities to some transcendent impersonal principle... the tendency in Israel was to accentuate the unity and the universality of the national god."⁸⁶ Armed with this deep inner and exclusivist belief that the Jews were uniquely able to preserve their own distinctive religious vision and way of life.

⁸² Ibid: 136-137.

⁸³ See here, the classic studies by Mircea Eliade: *Eliade*, 1971, 1958. See also: Jaki, 1985.

⁸⁴ Dawson, 2001: 118.

⁸⁵ Ibid: 123.

⁸⁶ Ibid.

And it was also precisely by building upon the Jewish prophetic and apocalyptic tradition that Christianity was able to give still wider affirmation to “ the significance and value of history,” the world process now being conceived as a “divine drama whose successive acts were the Creation and Fall of Man, his Redemption, and his glorious restoration.”⁸⁷

It is in this context, that of an unprecedented missionary zeal, the root of Christianity’s extraordinarily powerful dynamic of expansion and transformation, that the ultimate victory of the Church in the 4th Century can be seen as a violent interruption of the religious evolution of the ancient world which forced European civilization into an entirely new conceptual orbit. In the eastern part of the Roman Empire, Christianity maintained its position as the imperial state religion. In the western part, however, where the empire soon collapsed under the pressure of repeated waves of barbarian migration and internal instability, the Church was forced back on to its own devices, taking with it in the process many of the organisational accoutrements of its former host.⁸⁸ Able to survive the disintegration and reconfiguration of the political landscape by creatively drawing upon its own inner spiritual resources, the Church became the one remaining conduit of classical culture. Through a process of conversion among the newly settled barbarian peoples, it represented the single most important factor in forging a new European society of nations.⁸⁹

Consequently, although interrupted in the seventh and eighth centuries by the Islamic conquests of Spain and the Western Mediterranean and by renewed waves of barbarian migration from the north and east in the ninth, the conversion of Scandinavia and Hungary laid the final foundations of wholly new Christian society. Initially, this society focused upon the Frankish kingdom of the Carolingians, whose patronage, together with the reforming impulse of the Papacy, the monasteries, and the Irish/ Anglo-Saxon missionary scholars, produced a great revival of learning and liturgy.⁹⁰ With the passing of Carolingian ascendancy, however, it expanded hugely from its original eleventh century nucleus, over a period of some three or four

⁸⁷ Irenaeus, 1916: 125.

⁸⁸ Dawson, 1998: 138-139. See also: Jones, 1973.

⁸⁹ Dawson, 2001: 131-133. See also and importantly: Brown, 1971; and, Hillgath, 1986.

⁹⁰ Dawson, 1998:139-140.

centuries, right across the heartlands of north-western Europe and deep into the Slavic east.⁹¹

This expansion was inspired, in particular, by a “conception of Christendom as a social unity, which included and transcended the lesser unities of nation and kingdom and city...[and which] found its primary expression, not in a universal empire but in the universal order of the Church.”⁹² At the same time, it was conditioned and limited at every level by the feudal nature of medieval society, which stemmed from Europe’s martial and agrarian bases, and had evolved as a system of land tenure that maintained a stable population engaged in agricultural production and to ensured that levies could be raised in order to meet external threats.⁹³ Whilst this ideologically potent form of theocratic internationalism manifested itself in all aspects of medieval culture,⁹⁴ it also resulted in relatively weak state structures, with relations between lords and monarchs characterised by varying degrees of mutual dependence and consent especially with respect to the raising of taxation and support for collective military enterprises.⁹⁵ Accentuated by the jealously guarded division between the secular and spiritual powers and the forceful assertion of the autonomous prerogatives of the of the latter,⁹⁶ it was the gradual formalisation of these struggles over taxation between the monarch and other elements of society that eventually led to the proliferation “parliamentary” or “estate” assemblies in which key social groups negotiated with the king on economic and legal matters, as well as to a distinctive, and remarkably powerful, form of urban local government.⁹⁷

Despite undergoing an extraordinary process of expansion, consolidation and cultural advance,⁹⁸ then, medieval Christendom was only ever able to forge the loosest of internal unities. Lacking the relatively greater homogeneity of the civilisations of China and India to its east, this fragile compact only precariously overlay the powerful and continuing traditions of the Latin Mediterranean and the

⁹¹ Ibid: 140.

⁹² Ibid. Also see, in general: Anderson, 1974 and Southern, 1979.

⁹³ Bloch, 1942; Duby, 1974; and, Postan, 1975.

⁹⁴ Among other works see: Baldwin, 1971; Baluffi, 1885; Gilson, 1938; Grant, 2001; Gregoire, et.al., 1985; O’Connor, 1921 Panofsky, 1985; Schnurer, 1956; Uhlom, 1883; and, West, 1892.

⁹⁵ Hall, 1986; Poggi, 1992; Mann, 1978; Tilly, 1992.

⁹⁶ Tierney, 1964.

⁹⁷ See especially, Myers, 1975.

⁹⁸ Most evident in the spectacular renaissance of the Twelfth century. See: Haskins, 1957; Klibansky, 1961; Marshall, et.al. eds.; Knowles, 1988.

Germanic/barbarian kingdoms of the north. As a result, with the ultimate failure of the Crusades, the growing wealth of the monasteries, the increasing veniality of the clergy and the proliferation of internal doctrinal and political disputes, there began to set in a process of decay, both intellectual and spiritual, which started to attack the foundations of this unity, destroying the scholastic synthesis and fracturing the alliance between the Papacy and the movement for ecclesiastical reform which had lain at its heart.⁹⁹ At the same time, the older centres of civilisation in the Byzantine east were beginning to decline under the pressure of Mongol aggression that had opened up a vast front across Asia.¹⁰⁰ This shifted the cultural centre of gravity towards the various Italian city-states, thereby propelling the Italian peninsula to the forefront of social, cultural, political and economic development.¹⁰¹ Moreover, the growing intra-regional competition in which this resulted, caused the Papacy to attend more and more to its own narrowly territorial interests and, in becoming one of the principal sponsors of the newer cultural trends,¹⁰² to further undermine the fragile cultural compact upon which Christendom had been based.

An important component of this process of disintegration was the increasingly determined programme of political and economic centralisation engaged in by Europe's major dynastic states.¹⁰³ This seems to have been driven by a rise in the intensity of later medieval warfare together with the development of new military technology and tactics. It required the recruitment, training, equipping and payment of much larger and more permanent armies than had previously been the case. This in turn presaged, and indeed facilitated, the growth of royal bureaucracies, the gradual co-option of alternative sources of power such as the Church and the lesser nobility and the development of much larger, more internally unified states.¹⁰⁴ In consequence, it also led to a growing emphasis upon the authority of their ruling monarchies.¹⁰⁵ A potent early source of the magnificence this concentration of power resulted in was provided by the Italian Renaissance, at the heart of which lay a determined and dazzling re-appropriation of the Hellenic tradition. Having its origins back in the recovery of Greek science and philosophy via the Arabic translators of the twelfth

⁹⁹ See also, on the impact of the Black Death: McNeill, 1976; and, Zeigler, 1982

¹⁰⁰ See the classic study: Oblensky, 1982.

¹⁰¹ Fanfani, 2003:96. See also: Burke, 1999.

¹⁰² Chambers, 2006.

¹⁰³ For an illustrative study of the rise of French absolutism, see: Major, 1997.

¹⁰⁴ *Supra*, note 41. See also: Mallet, 1974; and, McNeill, 1982.

¹⁰⁵ See, in general: Burke, 1999; and, Major, 1997.

century, this gave rise not only to the most extraordinary works of art and music but also to an new spirit of enquiry into the material world which eventually bore fruit in the great scientific advances of Copernicus, Kepler and Galileo and seemed to open up unlimited possibilities of material progress.

As these various processes unfolded and the dynamic map of Europe was recast, the impulse that had underpinned earlier reforming movements in France and Germany continued to manifest itself. It now no longer did so, however, through the traditional monastic institutional channels. Instead, it became increasingly aligned to the dual forces of nationalism and conciliarism and to the much more radicalised, localised and heretical movements of Wycliffe and Huss. In the process it was transformed from being an ally to being an enemy of the Papacy, thereby sowing the seeds for the forthcoming Lutheran and Calvinist reformations which marked the ultimate disintegration of the Christian world.

These many strands of conflict, tension and reconfiguration soon divided the new Europe of sovereign nation-states between two quite different cultural forms.¹⁰⁶ Thus, although in protestant Europe the influence of humanist culture continued to be considerable, “the influence of the Old Testament” became far stronger and gave rise to “a type of character and a way of life that [was] as hard as iron and as irresistible as a steam hammer.”¹⁰⁷ It was this spiritual power that lay “behind the new economic order which was destined to transform Europe and the world” and upon which “there arose a society of godly merchants and shopkeepers and craftsmen who worked hard and spent little, who regarded themselves as God’s elect, and were ready to fight to the death against any attempt of King or bishop to interfere with their religion or their business.”¹⁰⁸ In contrast, the Baroque culture of the Counter-Reformation which came to dominate the greater part of Southern Europe sought more thoroughly to integrate the art and music of the new age, but even it found it impossible properly to assimilate the new movement of scientific thought.¹⁰⁹

¹⁰⁶ Dawson, 1998: 142.

¹⁰⁷ Dawson, 1959: 47.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

At the same time, the state showed an increasing desire to harness the economic potential offered by a growth in Europe's merchant classes and in its levels of urbanisation.¹¹⁰ Under a system which came to be known as mercantilism, these merchant classes were encouraged to maximise their profits from the buying and selling of goods through state sponsorship in the forms of discriminatory controls and tariffs, subsidies and the granting of monopolies. Controls on trade were not, of course new. What changed was that these extra-market controls came to be wholly moulded according to the priorities of national aggrandisement and power consolidation.¹¹¹ Moreover, the state sponsored search for new markets that this led to took place at the very time when Europe, having suffered a final frustration of its eastern ambitions at the hands of the Turks in the last crusades, was being forced to explore new channels of trade and expansion elsewhere.¹¹² This general reorientation of Europe from the Mediterranean to the Atlantic laid the foundations not only for the eventual dominance by Europe of the rest of the world, but also for the still further intensification of intra-European competition.¹¹³

3. The Emergence of Industrial and Post-Industrial Society

a. The Early Modern State

The widespread adoption of mercantilist practices was, in retrospect, an important step towards the development of a distinctively industrial and post-industrial society. At its heart was the development of an increasingly integrated system of capitalist production together with the attendant construction of self-regulating market economies. Prior to the late fifteenth century, private ownership of the means of production had existed to a small degree, anything other than the most minimal capital accumulation was extremely difficult to realise in practice. Under the mercantilist system, in contrast, capital accumulation came to be actively encouraged and a more robust system of private property instituted. Yet two essential components of later capitalist production – land and labour – continued to be largely shielded from commercial exploitation. The reason why the mercantilism “never [fundamentally]

¹¹⁰ Miskim, 1965.

¹¹¹ Fanfani, 2003: 50-51.

¹¹² Wittek, 1971; and, Kafardar, 1995

¹¹³ Tracy, ed., 1991; and, Tracy, 1990.

attacked the safeguards which protected these two basic elements of production...from becoming the objects of commerce”,¹¹⁴ is clear enough. For although the newly emergent absolutist monarchies were keen to harness the potential of the merchant classes within their respective territories, allowing those same classes to engage in practices that would undermine either their interests abroad or their more traditional dynastic sources of power and authority at home would have been entirely counter-productive.

Nevertheless, in the longer term, the rationale behind this semi-restrictive scenario was prevented from finding fully stable social expression or of containing the partially released forces of market accumulation. The protracted struggles and enormous pressures of inter-state competition that resulted from the emergence in sixteenth century Europe of a multi-polar great power theatre, gradually forced national monarchies to concede more and more ground to the functional requirements of the market.¹¹⁵ In particular, it became increasingly clear that those markets labouring under the least external restrictions were likely to give rise to the most powerful national economies, and that if states were not to be overwhelmed by their stronger neighbours they would have to allow the new techniques of capital accumulation to flourish within their own territories.¹¹⁶ The story of the early-modern period and beyond became the story of a series of concessions by the traditional landed and dynastic elites in favour of their commercial compatriots. These concessions were rapidly generalised across the western world.¹¹⁷

To begin with, the actions of those imbued with the new ‘capitalist impulse’ tended to work indirectly against the old religious order by attempting to ease the restrictions it place upon economic activity. In proportion as Europe was riven by heresy and schism this attack became more explicit. This in turn gave rise to a growing insistence upon the state proclaiming and guaranteeing “freedom of conscience” so that the

¹¹⁴ Polanyi, 1957.

¹¹⁵ Kennedy, 1989.

¹¹⁶ See especially in this regard: Tilly, 1992: 103-104. There he states that: “After 1750, in the eras of nationalisation and specialisation, states began moving aggressively from a near universal system of indirect rule to a new system of direct rule: unmediated intervention in the lives of local communities, households, and productive enterprises. As rulers shifted from the hiring of mercenaries to the recruitment of warriors from their own national populations, and as they increased taxation to support the great military forces of eighteenth century warfare, they bargained out access to communities, households and enterprises, sweeping intermediaries in the process...”

¹¹⁷ Thus, the overall expansion in state activity was of a particular variety, which was at the same time stamped with the character of a increasing level of specialisation. Thus, Christian, developing the classive insight of Karl Polanyi, states that: “For the most part, Modern states intervene more widely and more effectively than traditional agrarian states; but they are also more aware of those areas of economic activity where excessive interaction can be counterproductive.” Christian, 2005: 429.

relevance of religion to economic life could be reduced to an absolute minimum.¹¹⁸ Already prior to the Peace of Westphalia (1648) this had begun to happen with the emergence of a third, secularising alternative. That alternative was represented best by the French Politiques and England's post Civil War generation who, appreciating that the only hope of securing peace and order lay in some form of mutual toleration, "were prepared to sacrifice the principle of religious unity for the cause of national unity."¹¹⁹ In England this resulted in "a regime of limited monarchy and limited religious toleration combined with unlimited individualism and freedom of thought."¹²⁰ In France, there were ultimately abortive attempts to re-impose religious unity, but this was entirely in the context of consolidating royal power and this did nothing to counter the secularising trend.¹²¹ Indeed, it was this tendency, spread throughout Europe via the courts and aristocratic salons, which eventually gave rise to the great counter-religion of the Enlightenment.¹²²

The role of the nation-state in implementing religious toleration was clearly of great importance. But its support for the deeper interests of capital nevertheless remained contingent. Consequently, a further development was necessary before a fully self-regulating market system could emerge, namely capital's co-option of the nation-state itself. This found its most tangible expression in the advent of varying forms of parliamentary and republican government. From a functional point of view, these increasingly operated "as...political instrument[s] guaranteeing that the State...never embrace[d] ideas not shared by members of the community, and...never propose[d] the realisation of programmes injurious to the economic interests".¹²³ of the enfranchised classes, bearing the stamp of commerce and trade. It was through the emerging "political liberties" of these classes that they were able actively to co-operate both in "forming [and controlling] the will of the State". It was no coincidence, then, that the industrial system of capitalist production first emerged in that country which was also the first major European power to institute a system of limited government into which the gentry and commercial classes were drawn as

¹¹⁸ Tilly, 1992: 103-104.

¹¹⁹ Dawson, 1959: 50-51.

¹²⁰ Ibid: 54-55.

¹²¹ Dawson, 2001: 148.

¹²² For an analysis of the conceptual underpinnings of the Enlightenment and their consequences for the modern world see especially the highly influential works of Alasdair MacIntyre to which the present author is much indebted: MacIntyre, 1981, 1988, 1990. See also the important studies: Dupre, 1993, 2004; Koselleck, 1988; Taylor, 2007; and, Toulmin, 1990.

¹²³ Fanfani, 2003: 92.

intimate partners of the older landed aristocracy. Nor further that big industry in Germany, Italy, Japan and Belgium (etc.) was born only after they too had adopted nascent parliamentary forms.

b. The Case of Great Britain

The distinctive potential of British capitalism was demonstrated first in the area of agriculture where landowners raised productivity by introducing innovations on a large scale. Involved in this process was the gradual commodification of both land and labour which had hitherto been protected from the disciplines of the market. This was achieved, in large part, by a programme of enclosure legislation that coercively brought common lands under private ownership.¹²⁴ Not only did this force the peasant communities thus expropriated to seek employment elsewhere on a commercial basis, but by propelling population growth, enlarging markets for agricultural produce and encouraging greater capital investment, the increased economies of scale such enclosure facilitated added further to the pool of labour available for exploitation.¹²⁵

Taking place mainly in the late eighteenth century, this initial wave of industrialisation had little direct economic impact outside of Britain itself, and even the impact of a second major wave of innovation, which facilitated the harnessing of steam power and fossil fuels on a large-scale, was not fully felt until the middle of the nineteenth century. Nevertheless, owing to the fact that Britain lay at the heart of the some of the largest and most vigorous trading networks in history, many of its continental competitors soon became anxiously aware of these changes.¹²⁶ For this reason, serious industrialisation had already begun in Belgium, Switzerland, France, Germany and the United States between the 1820s and 1840s, and by the 1870s this had led to a third wave of innovation giving rise to new industries such as chemical manufactures, electricity and steel-making. The industrial revolution now spread rapidly throughout the Atlantic economies, and became linked to new forms of industrial organisation which, by vertically integrating tasks previously performed by numerous separate enterprises and horizontally integrating what had previously

¹²⁴ Polanyi, 1957. See also: Hobsbawm, 1969; Moore, 1991; and, Thompson, 1963.

¹²⁵ Christian, 2005:416-417.

¹²⁶ Ibid: 432-434.

constituted different sectors of production, facilitated a huge increase in the levels of capital concentration.¹²⁷

During the initial stages of industrial capitalism, competition existed between small factories and mobile labour moved into the burgeoning industrial cities, but owing to hostility from employers, the small scale of units of production and instability in employment, the organisation of workers was rendered very difficult. Although the state did make efforts to regulate the conditions of factory work, such efforts were strictly limited owing to the numerous contemporaneous moves towards deregulation which corresponded to, and were driven by, a rise in ideas of individual freedom and the free operation of the market which extolled both the merits of rational self-interest and an idealised capitalist system,¹²⁸ and which caused the state increasingly to restrict its activities to the protection of capital and the securing of law and order.¹²⁹ Consequently, whilst the first stages of industrial expansion resulted in the lifting of restrictions upon what could be produced, ownership of the means of production continued to be restricted to only a limited section of the population, and the levels both of material inequality and exploitation grew to unprecedented proportions. This was true even though the newly established industrial core displayed a constant tendency to expand outwards to colonise ever-new areas of production.

Moreover, this internal inequality was increasingly mirrored at the international level as vast numbers of people emigrated from Europe overseas bringing with them whole complexes of institutions, ideas and skills for the purposes both of setting up 'advanced' European enclaves and of exploiting vast overseas territories. The result was a world sharply divided between societies that had and societies that did not have industrialised economies. In the process of erecting these enormous differentials Industrial capitalism carried the Modern Revolution to the rest of the world, decimating traditional political, social, and economic systems by the forceful asymmetrical penetration of peripheral economies.¹³⁰

¹²⁷ Ibid: 434.

¹²⁸ Steger, 2003: 31.

¹²⁹ Fulcher, 2004: 38-34.

¹³⁰ Christian, 2005: 435.

c. Initial Counter-Movements

From about 1870, the rapid increment in industrial power began to spark a series of reactive counter-movements. In the first instance, this involved a reassertion of the role of the nation-state pursuant to a breakdown in the Concert of Europe and the fragile post-Napoleonic balance that had emerged, in response to France's revolutionary excesses, under the guise of the restored though modified monarchies of old Europe. As the imbalances unleashed by industrialisation grew so did the levels of felt insecurity as well as the impulse for governments both to protect their economies and to manage their resources in a more directed fashion, with a view to creating militarily strong polities capable of meeting external threats. Initially, this led to the greater internal consolidation of European states themselves, including their greater bureaucratisation and infiltration into the daily lives of their citizens through the mechanisms of expanded taxation, law and order, public health and state education.

As the dynamic of inter-state competition intensified further, it also led to the formal colonisation of huge swathes of overseas territory previously subject to complex and powerful webs of informal influence, though not to direct control. This phase of formal colonisation had the effect of temporarily sublimating the build up of intra-European competition and redirecting it away from dangerous hot spots within Europe itself, but it was a phase that was soon exhausted and, as it was, so Europe moved headlong into an intense and protracted period of internal disintegration and war.

From the second decade of the twentieth century, the threat of German military imperialism, resulting from a mixture of the new ideology of nationalism and the elite led and heavily militarised nature of German industrialisation, caused both Britain and the United States to abandon their previous policies of isolation and to redirect their economic and financial power to explicitly military ends. Resulting in the First World War, this led to the destruction of the "great military empires of Central and Eastern Europe", clearing the ground for the construction of an entirely new social and political system. In the event, however, the attempt by the victorious Western powers "to reorganise Europe and the world on liberal democratic principles did not succeed in meeting the needs of the situation or controlling the revolutionary forces that has

been released.” Instead, “[o]n the ruins of the military empires there arose the new totalitarian regimes of Soviet Russia and National Socialist Germany.”¹³¹ These, “destroyed the emergent democratic national states of Eastern Europe and precipitated the Second World War”, which finally exhausted Europe economically and morally and left it politically and socially divided.¹³²

The reassertion of the role of the nation-state as an independent extra-economic and thus, from a capitalist perspective, essentially irrational force, can nonetheless be seen as fitting within a coherent dialectic whereby latent extra-economic factors with a potential for inhibiting the free functioning of the market are drawn out in a manner which compels them to exhaust and de-legitimise themselves. In a somewhat different manner, a second variety of reactive counter-movement distinguishable from, though nested within, the renewed role of the nation-state, had the longer-term effect of undermining those inequalities thrown up by earlier stages of industrialisation which prevented individuals from being exploited by the market in the most efficient manner possible: namely, according to their natural or inherent capacities as consumers and producers, rather than in line merely with their socially ascribed status-roles.

The growth and expansion of working-class opposition to the inhuman excesses of unregulated industrial capitalism, the very growth and expansion of which, paradoxically, enabled such opposition to become an increasingly organised and enduring presence. As this opposition became more and more powerful, so the state was increasingly forced to intervene, both as a regulator and as a welfare provider, materially to offset the most damaging results of the earlier stages of industrialisation and, in so doing, redistributing its capital proceeds in an altogether more equitable fashion. Fitting in with the greater militarization of the nation-state itself, whose growing conscript armies needed not only to be properly fed, but also to be moderately healthy and even minimally educated, this trend helped to meet the still deeper problem that began to face capitalism towards the end of the nineteenth century, namely overproduction.

¹³¹ Dawson, 1998: 148-149.

¹³² Ibid: 148-149.

Over-production had first become a real issue when it sparked the “great depression” of the 1870s and it was an important cause of the renewed wave of national and international protectionism, which ran right through, via a second major depression in the 1930s, to the end of the Second World War.¹³³ With these developments, it became clear that it was as important for capitalist economies to ensure stable markets and consumption as it was to ensure production and so it was entirely in accord with the functional requirements of the developing capitalist system that, rather than continuing to treat their workers as mere factory fodder, these economies place them in a position where they could act as an effective market, or series of markets, for the goods now being produced in such vast quantities.

Moreover, it was for this reason that governmental intervention in the economy did not tail off after the Second World War, but rather changed in its nature. Whereas before the World Wars state activity had concentrated upon the protection of national and colonial markets, ultimately this was seen to be “a self-defeating strategy, not only generating intolerable military conflict but also partitioning the huge world markets that had fuelled much industrial growth.”¹³⁴ Accordingly, it was increasingly realised that “avoiding cyclical downturns mean[t] maintaining and sustaining markets rather than monopolising them.”¹³⁵ The central problem of twentieth century post-war capitalism came to be how best to create, sustain and expand markets.

This change helps to explain the extensive process of formal decolonisation in the non-white ‘periphery’ and ‘semi-periphery’ which began apace in the late 1940s and was largely complete by the middle of the 1970s as well as “the ethical revolution that has made consumption a virtue as fundamental as abstinence was in the pre-capitalist world.”¹³⁶ Whilst an important part of this latter process was the increasing protection – legal or otherwise – of the individual from external physical violence this needs to be understood in terms of sublimation whereby the methods of social control have become more effective because more internalised¹³⁷ and a potential source of systemic instability has increasingly been brought under control by redirecting, rather than

¹³³ Christian, 2005: 447.

¹³⁴ Ibid: 447.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Elias, 1978.

frustrating, man's primal urge towards competition in a manner which sustains and furthers the interests of capital accumulation.¹³⁸

Likewise, whilst "[t]he spread of contraception and new forms of employment that depend less on physical strength have made it easier for women to take on many of the more specialised roles outside of the household that men had monopolised in traditional societies" and in the earlier stages of industrialisation,¹³⁹ this again has to be seen within the context of a much deeper recasting of interpersonal relations whereby differential gender roles are increasingly undermined and the collective institutional supports which protect them – particularly those of the traditional family – are stripped away as being materially and systemically suboptimal. Importantly, the longer-term dynamic here is not towards the greater accessibility by women to traditionally masculine roles, but rather of their accessibility to debased forms of masculinity which have themselves been systematically distorted by the earlier stages of industrialisation.¹⁴⁰

Consequently, what is actually taking place, is the gradual substitution of both the male and the female by that of the sub-systemic and gender neutral (even androgynous) unit of production and consumption.¹⁴¹ This 'minimal self', as Christopher Lasch has so evocatively labelled it, has the dual characteristics of being both physically inviolable and yet at the same time emotionally, spiritually and metaphysically totally lacking in security so that it is constantly propelled toward superficial impulse satisfaction as a way of staving off deeper inner desolation. As such, "the conditions of everyday social intercourse, in societies based on mass production and mass consumption, encourage an unprecedented attention to superficial impressions and images to the point where the self becomes almost indistinguishable from its surface." In this way, "[t]he consumer lives surrounded not so much by things as by fantasies. He lives in a world which has no objective or independent existence and seems to exist only to gratify or thwart his desires."¹⁴² Consequently, what appears

¹³⁸ This is, of course, the argument developed with such sophistication by various members of the Frankfurt school.

¹³⁹ Christian, 2005: 448.

¹⁴⁰ See the powerful critique developed by Fox-Genovese and other like-minded feminists and 'post-feminists'. Fox-Genovese, et.al., 2000.

¹⁴¹ This argument has been persuasively forwarded by, amongst others, Christopher Lasch, in: Lasch, 1995.

¹⁴² Lasch, 1985: 30. See, in addition: Lasch, 1991 and 1992. There have, of course, been a great many other critiques and analyses along similar lines, as well as those outlining the pathologies of late capitalist societies more generally. See, amongst others: Bellah, 1996; Putnam, 2001; Riesman, 2001; Taylor, 1991. More recently, see: Delsol, 2003 and 2006.

to be personal autonomy emerges as nothing more than superficial and unrestricted impulse satisfaction which undermines rather than supports true personal and interpersonal freedom. This, of course, fits perfectly with a form of 'liberal' or 'democratic' neutrality which eschews any form of public morality that does not support the constant urge to consume and the systematic commodification of ever more areas of life.

d. Second Counter-movements

Although, this peculiar form of consumer morality did not fully come into its own until the last quarter of the twentieth century, it had already begun to find extensive expression in the post-war economies of Western Europe. Even here, however, as earlier noted, state economic intervention continued to act to reduce material imbalances and to offset cyclical instabilities. In Eastern Europe, the Communist states of the mid-twentieth century sought to match the productive capacity of capitalist societies, but in an even more determinedly equalitarian fashion that required much more draconian state intervention and political uniformity. However, beyond a certain stage of development, it became increasingly apparent that this was a project dogged by systemic inefficiencies and sub-optimality. Indeed, even in the Western European and North American states, Keynesian strategies were, by the 1970s and 1980s, looking decidedly strained as materially empowered populations now came to express growing discontent with high taxation, restriction on consumer choice and lack of responsiveness within public services. Exacerbated by growing international competition, this increasingly gave rise to a new free-market orthodoxy which imprinted itself upon governmental policy to an ever-greater degree.

Thus it seems that after sufficient redistribution of resources had been effected, the state intervention thrown up by the initial market restricting counter-movements described above, started itself to become suboptimal, and was in its turn subject to a second reactive counter-move which had the effect of once more de-restricting the market and confining the state within an altogether more specialist regulatory role. Furthermore, insofar as these developments transformed the Atlantic economies, so those same economies came to represent and evermore powerful ideological and material challenge to the East European Communist societies which were forced to

recalibrate their own strategies of government in a way that rapidly led to their collapse and to their eventual assimilation, in differing degrees, to the western democratic and free-market paradigm. There is strong evidence to suggest that these are tendencies which have made themselves felt in the third world also, albeit in a very unequal and variegated manner owing to their differing cultural, political and economic histories and the extent to which their particular models of post-colonial state have been capable of effecting earlier stages of industrial transformation in a compressed form.

C: Regional Contexts

Rather than undertake a full-blown historical narrative, the final sections of this chapter will offer brief accounts of how both Chinese and Indian societies have been specifically subjected to, and remoulded by, the dynamic of industrialisation. To avoid repetition of material contained in Chapter 3, they will concern themselves exclusively with the third and final phase of the overall framework of historical transformation hitherto elaborated. This is the period during which both civilisations lost their comparative material advantages, becoming subject eventually to differing forms of colonial penetration, as the newly dynamised commercial and then industrial European economy provoked a relentless search for investment opportunities. In both societies this involved substantial levels of structural adjustment with the establishment of new institutions conducive to the propagation of colonial markets and industries and the physical construction of extensive networks of communication to facilitate tighter governmental control along with the smooth flow of newly created capitals.

Mirroring the general dynamic of industrialisation globally, this movement of exploitation gradually gave rise to a further period characterised by a reactive counter-movement during which portions of the indigenous populations emerged to resist colonial interference. Paradoxically, in mounting such opposition, these movements came to internalise many of the ideological and institutional precepts of the European industrial state in order to create a sufficient power-base of their own to enable them to assert their independence from colonial control. Eventually, this period was itself superseded by a third and final broad period, beginning in the late 1970s, which saw,

once more, an end to national independence and self-reliance. This found expression in a more or less conclusive re-engagement with the world economy and the opening of domestic markets to greater internal and external competition, something which had been previously resisted, though in different ways, by both countries.

Fitting within this common developmental framework, the differences between the transformations in China and India have nonetheless remained very deep. Primarily these differences have been based upon the profound cultural contrasts and distinctive socio-ethnic compositions that emerged in each country over the millennia prior to the coming of European industrialisation. The consequences of these differences have become increasingly apparent, rendering China less diverse, religiously, socially, ethnically and linguistically than India and possessed of relatively more powerful and enduring state and governmental structures. This has also meant that it has been relatively easier to mobilise the collective efforts of the population in China than it has been in India. As a consequence, whilst China has been more resistant to colonial penetration than India, it has also been far more susceptible to revolutionary change from above. Transposing this logic into the context of the twentieth century, it has further meant that, whilst China has been more effective than India in forwarding its programmes of state directed modernisation/industrialisation, in so far as those programmes have been ill conceived, it has also suffered more greatly from their failures. Still more starkly, when the leadership of each country attempted to by-pass the normal mechanisms of state-power by appealing directly to the masses, this was achieved much more effectively and therefore more destructively in China, whilst in India it enjoyed only limited and very temporary success. Finally, whilst the devastation in China at the end of the Cultural Revolution was truly widespread, once Deng Xiaoping had made the decision that China should undertake comprehensive reform, it was able to do so much more effectively – though not, of course without difficulty – than was India. Indeed, whilst it was clear in India from the very beginning of the 1980s that the old strategy of import substitution and ‘licence-Raj’ had failed, and despite a series of abortive and piecemeal attempts at liberalisation under both Gandhi governments, it was not until 1991 – in the face of a huge loan default crisis – that a firm decision was finally taken to initiate a truly comprehensive programme of reform.

1. China

a. The Colonial Challenge and Industrialisation

During the latter half of the 18th century China began to experience a battery of economic problems.¹⁴³ From 1650 to 1775, the Chinese population had exploded from 60 million to over 265 million, and exerting a huge pressure on food and land. Meanwhile, from about 1660, Portuguese traders operating in Guangzhou had been joined by British merchants supported by the British East India Company in search of tea, silk and porcelain markets. Immensely rich, powerful and traditionally convinced of Chinese superiority, the empire was unwilling to establish direct contact with foreigners on an equal footing, while Europeans were unwilling to be enmeshed in the tribute system the Chinese demanded. With the failure of attempts at formal negotiation with the Qing court in 1793, the East India Company began to establish a clandestine market in China for western goods, and began paying for tea and silk with cheaply imported opium from India.¹⁴⁴

As addiction rates escalated during the early 19th century, Britain's initial trade deficit with China was reversed as China's trade surplus itself became a deficit, meaning large amounts of silver started to drain out of the country in order to meet the growing opium bills. Eventually, deficit and addiction rates became so serious that the emperor issued an edict forbidding further trade in opium. When this was ignored, more than twenty thousand cases of opium from Guangzhou were confiscated and destroyed. The British responded vigorously in defence of the lucrative trade, leading to the first so-called Opium War. After two years of coastal shelling by British gunboats, the Chinese were forced to sign the unequal treaty of Nanjing on August 24th 1842: five coastal ports were opened to British trade, governed according to European laws and customs, and Hong Kong was ceded to the British Crown in perpetuity.¹⁴⁵ In sum, China had to deal with Great Britain on an equal basis. In the years to come, as it became clear that China's military strength was no match for that of the newly

¹⁴³ See: Leonard & Watt, eds., 1992; Millward, 1998; Moulder, 1977; Myers, 1980; Perkins & Chao, eds., 1975; Pomeranz, 1993; and, Rawski, 1972.

¹⁴⁴ See: Gardella, 1994; and, more generally, Spence, 1969.

¹⁴⁵ Some useful works on these events include: Chang, 1964; Polachek, 1992; Wakeman, 1966; and, Wong, 1998.

industrialising countries, a succession of other treaties were imposed on the Chinese by Britain and other European powers, all characterised by territorial concessions and jurisdictions, and humiliatingly unfavourable trading terms.¹⁴⁶

b. The Emergence of Resistance

i. The Experimental Stage

This growth in western influence coincided with rising discontent within Chinese society itself. Rebellions proliferated, precipitated by a mixture of population pressure, land scarcity, rising inflation and growing administrative corruption.¹⁴⁷ It was in response to these mid-century rebellions, the last of which was put down by the middle of the 1860s, that a concerted programme of renewal was launched by the Qing court. Significantly, the goal of the “Tongzhi Restoration”, as this movement came to be known, was not to revolutionise the imperial system.¹⁴⁸ Instead it was an essentially conservative attempt to reverse dynastic decline by re-establishing peace, order and social harmony along traditional Confucian lines. Corruption, political infighting and the overwhelming nature of the problems faced by China in the mid 19th century meant that this lack of willingness to engage in root-and-branch reform only provided a relatively short respite from the deeper structural crises.

By the end of the 19th century, the vigour of the Tongzhi Restoration had largely subsided revealing once again the ubiquitous nature of social unrest and governmental degeneration. This weakness was graphically exemplified in China's defeat at the hands of its traditionally subservient neighbour, Japan, in the Sino-Japanese war of 1894-1895. This humiliation catalysed attempts by reformers, led by Confucian scholar, Kang Youwei, and with the backing of the Guangxu emperor, to conduct a radical reform experiment over a period of a hundred days in 1898.¹⁴⁹ This was dramatically truncated by a conservative backlash, palace coup and subsequent encouragement of the xenophobic Boxer Rebellion which, in turn, led to attacks on the foreign legations in Beijing, the despatching of a multi-national expeditionary

¹⁴⁶ See especially: Fairbank, 1953.

¹⁴⁷ See generally: Chesneau & Bianco, 1972; Perry, 1980; and, Spence, 1996.

¹⁴⁸ Wright, 1966.

¹⁴⁹ Kwong, 1984. Also: Chang, 1971.

force and further military humiliation. Reform of the old imperial system was inevitable.¹⁵⁰

Yet, whilst this was accepted by Qing officials, a younger generation of foreign-educated intellectuals determined that China's problems could only be resolved with the overthrow of the imperial system itself.¹⁵¹ The most important of these reformers was Sun Yat Sen. A western-trained medic and a Christian, Sun was instrumental in establishing China's first serious revolutionary movement – the Tong Meng Hui – from his base in Tokyo.¹⁵² In 1911, revolutionary activity sparked insurrections in cities across China. For support, the Qing court turned in desperation to the military strong man Yuan Shi Kai. Yuan immediately set about exploiting the situation for his own ends. Although powerful in his own right, particular in the south where he had been elected provisional president of a new Chinese republic, Sun chose to stand aside and acquiesce in a plan by which the young Qing emperor abdicated and Yuan became the president of a unified China.¹⁵³ This move was specifically design to legitimate and consolidate the new regime, but Yuan chose instead to bolster his own increasingly autocratic rule. An opposition party - the Guomintang - was formed in an attempt by the nationalists to stabilise the situation, but within five years regional counter-pressures became so strong that China disintegrated into a kaleidoscope of warring regional fiefdoms.¹⁵⁴

Amidst this turmoil, intellectual ferment intensified and western ideas were propagated with increasing rapidity. A watershed came on 4th May 1919, when news arrived that Japan had been awarded Qingdao under the Versailles Treaty. Students demonstrated in cities across China, stimulating intense discussion about the problems facing the new republic.¹⁵⁵ It was in this atmosphere that the Chinese Communist Party was formed, holding its first meeting in Shanghai in 1921.¹⁵⁶ Initially its activities were directed by Soviet Comintern advisers, who urged co-operation with Sun Yat-Sen's Guomintang as the organisation in China best placed as a

¹⁵⁰ Cohen, 1997.

¹⁵¹ See generally: Schiffrin, ed., 1994.

¹⁵² Schiffrin, 1968.

¹⁵³ Mackinnon, 1980.

¹⁵⁴ On the various regional factions, see: Chi, 1976, McCord, 1993; and; Sutton, 1980.

¹⁵⁵ For considerations on the significance of the May 4th Movement see: Schwarz, 1986.

¹⁵⁶ Dirlik, 1980; Meisner, 1967; and, Van de Ven, 1991.

revolutionary vanguard.¹⁵⁷ However, cooperation broke down after the Guomintang's military strongman and leader after Sun's death in 1925 moved against the CPC, killing 300 leaders in Shanghai on 22 April 1927.¹⁵⁸

At the same time as Jiang's actions ended the Comintern co-operation with the Guomintang an abortive rural insurrection in Hunnan brought Mao Zedong, a man of peasant origins, to prominence, and set the scene for a shift in strategy within the CCP towards peasant based revolution.¹⁵⁹ Mao and other rural-based organisers began developing experimental civilian-cum-military governmental structures in the form of Soviet base-areas. By 1931 this had coalesced into the Chinese Soviet Republic and could boast a population of almost 13m people.¹⁶⁰ In response, Jiang moved against the Soviets in a series of bloody "encirclement" campaigns which forced the communists to abandon their strongholds and march north to safer ground in Shaanxi.¹⁶¹

Simultaneously, Jiang's Nationalist forces had to address the growing threat from Japan. By 1936 Japanese incursions and international events had advanced to such an extent that Jiang's own officers persuaded him to conclude a second United Front with the Communists, who were permitted to establish their own autonomous region in Yan'an.¹⁶² Whilst war severely compromised the Nationalist government, the CPC was able to use it to great effect as a period of consolidation. When fighting resumed between CPC and Guomintang forces in 1947, the Communists could capitalise upon their strategic advantages. By 1949, Jiang and several hundred thousand Nationalists had fled to Taiwan to set up a separate government.¹⁶³

ii. Nation-Building

On 1st October 1949, with CCP forces close to controlling the whole of main-land China, the People's Republic of China (PRC) was formally established with its

¹⁵⁷ Wilbur & Lien-yin, 1989.

¹⁵⁸ Wilbur, 1984; and, Stanahan, 1988.

¹⁵⁹ In general see: Schwartz, 1961. For the theoretical origins of Mao's thinking, see: Schram, 1989.

¹⁶⁰ Kim, 1973.

¹⁶¹ Yang, 1990.

¹⁶² Boyle, 1972; Hsiung & Levine, eds., 1992; and, Van Slyke, 1967

¹⁶³ See: Pepper, 1978; Selden, 1971; and, Thaxton, 1997.

national capital in Beijing.¹⁶⁴ The Communist victory brought to power an essentially peasant and rural-based party that had little experience of the large-scale transition to socialism and industrialisation necessary for the consolidation of the Communist revolution. This post-civil war shift of focus towards soviet-style rapid industrialisation inevitably meant an associated shift of emphasis from the countryside to the city.¹⁶⁵ Between 1947 and 1951, CPC adopted a strategy for socialist transition that lay in isolating large landowners and large-scale state sponsored capitalists, together with an allied policy of gradual nationalisation, achieved incrementally by “buying off” commercial capitalist ventures rather than through their forced expropriation.

As basic economic indicators were brought under control, more far-reaching reforms were implemented. Between 1950 and 1953, 113 million acres were distributed to over 300 million landless peasants. The initially moderate programme grew in intensity and violence with China's entry into the Korean War.¹⁶⁶ Over a million former landlords were executed amidst massive campaigns against “enemies of the state”, “capitalists” and “counter-revolutionaries”. They were replaced by increasingly widespread programmes of rural collectivisation for the peasantry left behind.¹⁶⁷

Between 1953 and 1957 China implemented its ambitious First Five-Year Plan, which aimed at a comprehensive programme of rapid industrialisation, an application of Stalinist long-term centralised planning in post-revolutionary China. Premised upon the rapid build-up of heavy industry through concentrated capital goods investment, by 1957 the application of this strategy had managed an impressive annual growth-rate of 8% together with lasting improvements in education and public health.¹⁶⁸

Despite considerable economic growth, however, the leadership became aware that rapid industrialisation could not be sustained without considerable improvements in agricultural performance, and this, together with increased government responsibility for managing China's urban enterprises, required the co-option of many more experts than before. Consequently, the CPC's attitude towards the intelligentsia, which had

¹⁶⁴ See generally: Meisner, 1977; and; Dittmer, 1987.

¹⁶⁵ Shue, 1980.

¹⁶⁶ Meisner, 1977: 100-112.

¹⁶⁷ Wang, 1973.

¹⁶⁸ Andors, 1977: 50-52.; Eckstein, 1977: 50-54; and, Rawski, 1980: 29 and 40.

initially been extremely critical was, by early 1956, considerably slackened under the famous slogan – ‘Let a hundred flowers blossom; let a hundred schools of thought contend’ – in an effort to encourage discussion of party and state that would vindicate the superiority of Marxism-Leninism and speed the conversion of intellectuals to communism. The extent and depth of the criticisms that were finally aired rocked the CPC leadership, and triggered a comprehensive backlash in the form of the Anti-Rightist Campaign of 1957, during which great numbers of ‘Rightist’ teachers, students, lawyers and purged cadres were forced into the countryside to do manual labour.¹⁶⁹

Before this backlash, Mao had entertained doubts about the applicability of the incrementalist nature of Soviet development strategy in China and the direction of Soviet ideological developments after the death of Stalin. Skilfully, he utilised the fear inspired by the Anti-Rightist campaign to shift the initiative to those who felt the time had come for a major break with Soviet strategy.¹⁷⁰ He was thus able to outmanoeuvre his opponents in the Party leadership, and to inaugurate a more militant foreign policy during his trip to Moscow in November 1957 and a much more radical policy for national development at home in 1958 under the heading of the ‘Three Red Banners’ – the general line of Socialist Construction, the Great Leap Forward and Rural People’s Communes.

Socialist Construction and the Great Leap Forward encouraged the political guidance of the country’s scientists and technicians by party cadres, and thus the requisite technical training of cadres in order to create a politico-technical elite. From August 1958, all remaining privately owned agricultural land was to be pooled into a series of 26,000 self-governing communes containing 500 million Chinese peasants. Likewise, the employment of seasonal workers for the construction of heavy industrial plants, canals and irrigations works was inaugurated to increase industrial activity. Mao believed that through these radical policies China could dramatically increase industrial and agricultural productivity.¹⁷¹ From the start, however, these initiatives were unworkable. Peasant motivation to work in the new units was limited at best and the poorly trained communal management led to an immediate slump in production.

¹⁶⁹ MacFarquar, 1974.

¹⁷⁰ Meisner, 1999: 204-216.

¹⁷¹ Friedman, et.al., 1991.

Moreover, unrealistic quotas from the Beijing government, exacerbated by poor centre-local communications, meant that many peasants had no time to produce crops for their own consumption. When the harvests of both 1959 and 1960 failed, millions starved to death.¹⁷²

The complete failure of the Great Leap Forward weakened Mao's position in the CPC.¹⁷³ He was forced to step down as President of the People's Republic in favour of Liu Shaoqi, who, along with Zhou Enlai and Deng Xiaoping worked, between 1961 and 1965, to reverse the worst effects of the preceding years. Despite these setbacks, however, Mao remained a powerful figure and after a brief respite from political activism he became the focal point for those in the Party concerned that China might be on the path to Soviet style revisionism.¹⁷⁴ Mao took a number of initiatives during the mid-1960s to ensure that class struggle remained high on the Chinese communist agenda, most importantly calling for a campaign of socialist education in 1962. His subsequent widening of this campaign to include the whole of the state bureaucracy, led to an increasing polarisation amongst the Chinese leadership itself. It was only with the launch of the Great Proletarian Cultural Revolution that these tensions were finally resolved in favour of Mao and his supporters.¹⁷⁵

iii. The Lurch Towards Populism

Initially, the Cultural Revolution appeared to be similar to any other mass campaign. However, in 1966, with Mao's support a group of Beijing students organised themselves into a political militia – the Red Guard – and within weeks they were organising mass demonstrations on the streets. The Red Guards attacked anything remotely associated with the west, the Soviet Union, the bourgeoisie and any form of 'Revisionist' or 'Rightist' activity. On August 5th 1966, Mao's announcement that reactionaries had reached the highest level of the CCP led to the arrest and eventual death of Liu Shaoqi, the dismissal of Deng Xiaoping and the disappearance of Marshal Peng Dehuai. Between January 1967 and mid-1968, the discredited political

¹⁷² MacFarquar, 1983.

¹⁷³ Dietrich, 1986: esp. 5-6.

¹⁷⁴ Peck, 1975: esp. 57-217.

¹⁷⁵ See generally: MacFarquar, 1997.

establishment was replaced by revolutionary committees comprised of new radical organisations.

Towards the end of 1967, after much hesitation, Mao finally ordered the army to intervene and restore order, and between 1968 and 1969 students were sent out from the cities to the countryside.¹⁷⁶ For the remainder of Mao's life, Chinese politics was marked by a legacy of persistent factionalism and political struggles. In 1975, at the Fourth National People's Congress, Zhou Enlai announced the fundamental reordering of the social and economic priorities of the Chinese state to achieve the Four Modernisations of agriculture, industry, national defence and science and technology. This attempt to re-establish Chinese policy on a more orderly footing was immediately met by determined resistance within the leftist factions of the Party led by Mao's wife, Jiang Qing, and three associates, later known as the Gang of Four.

iv. Re-Engagement and Marketisation

On the 9th September 1976, Mao died. Almost immediately, Hua Guofeng was confirmed as Party Chairman and state premier, the Gang of Four was arrested. By the beginning of 1977 Deng Xiaoping was rehabilitated and re-appointed to his former positions lost after the death of his mentor Zhou Enlai earlier that same year. By 1980, through a series of skilful manoeuvres, Deng was able to consolidate his political dominance by gradually undercutting the influence of Hua Guofeng and initiating a new era of economic reforms. During the Third Party Plenum of the Eleventh Central Committee and the Fifth National People's Congress in 1978, a new constitution was adopted confirming the goals of the Four Modernisations. This was superseded in turn by another constitution in 1982 designed to consolidate the Dengist programme.¹⁷⁷

The 1980s saw a gradual process of economic reform. Moves were taken to decentralise state authority and management and to begin privatising production. This began in the countryside with the introduction of the Household Responsibility System under which agriculture was de-collectivised and the land was divided into parcels that were leased to individual peasant households, which were entitled to

¹⁷⁶ Bernstein, 1977.

¹⁷⁷ See generally: Wang, 1995.

produce whatever they wished and to sell surplus in open markets as long as they first met their contractual obligations to the state.¹⁷⁸ As the rural standards of living rose, reforms of the urban economy were implemented from the mid-1980s in an attempt to replace the command system of central planning with the economic levers of the market. This included reforms of the pricing system, wage payments, legalisation of private enterprises, creation of labour and stock markets, tax reforms and the writing of a code of civil law.¹⁷⁹ The leadership also affirmed its commitment to a policy of opening to the outside world. Five Special Economic Zones were set up along the coasts of Guangdong and Fujien provinces, offering special facilities and attractive financial terms of operation for foreign capitalists.¹⁸⁰ Cognate with this package of liberalising reforms were China's attempts in the 1980s and 1990s to create more cordial relations with its neighbouring states.

In the period up until 1989, economic reform had been accompanied by a degree of political and intellectual openness. Accordingly, a series of political movements throughout the late 1970s and 1980s pushed for the reform to go well beyond what the Dengist leadership were willing to countenance. By the end of 1988, tensions within the Party on this issue, exacerbated by inflation in major cities of 35%, caused reform to slow. In December 1988, disaffected student nationalism bubbled over in demonstrations against African students in Nanjing and when, on the 15th April 1989, Hu Yaobang died of a heart attack, students who subsequently gathered in Beijing to celebrate the anniversary of the May 4th Movement responded with a mass demonstration calling for greater democratic reform and a freer press. Spreading across China and attracting support from an urban population unhappy with corruption and high inflation, the demonstrations escalated to such a point that on the 19th May martial law was imposed. After a prolonged stand-off between the army and protestors, on the 4th June 1989 troops opened fire in Tiananmen Square. Parallel to these student movements were a number of on-going demonstrations by ethnic minorities. Violent protests irrupted in Tibet in the autumn of 1987 and then again in the spring of 1988: both were brutally suppressed. In Xingjiang, a Muslim rising was forcibly put down in 1997.¹⁸¹

¹⁷⁸ Tu, 1993.

¹⁷⁹ Liew, 1997. See also; Meisner, 1996; and, Naughton, 1995.

¹⁸⁰ Park, 1997.

¹⁸¹ Gladney, 1996; and, Smith, 1997.

Following the events of June 1989 and the tightening of political controls, economic reforms were also curtailed and a number of private enterprises were shut down. The drive towards marketisation was reinitiated and given renewed emphasis, however, after Deng Xiaoping made a very public visit in the spring of 1992 to the most developed areas in southern China.¹⁸² Soon China's economy once again became one of the most rapidly growing in the world, but also one that was increasingly dogged by inflation, corruption, provincial disparity and popular unrest. Finally, it was able, early in the new millennium, to secure membership of the World Trade Organisation.

2. India

a. European Penetration and the Emergence of Industrial Society

By the early part of the Sixteenth century the growth of competitive acquisitiveness within Europe began manifesting itself in a number of incursions along the shoreline of the subcontinent.¹⁸³ As early as 1498 Vasco da Gama arrived with an expedition in Calicut and soon after a Portuguese trading empire, centred upon Goa, was established.¹⁸⁴ As in China, the Portuguese were followed by the Dutch, the French and the English who each set up their own small coastal trading posts. Under the auspices of monopoly trading companies these powers competed to secure concessions and privileges from the Mughal empire.¹⁸⁵

A greater willingness on the part of English agents to forge native ties, to intermarry and to acquire local knowledge gave them an edge over their European counter-parts. Acknowledging Great Britain's importance to Bengal in attracting international trade and bolstering the regional economy, this led emperor Farrukh-siyar (r.1713-19) to make Britain a grant in 1717 of thirty-eight villages near Calcutta. With this grant came the privileges of extraterritorial status for British warehouses and the surrounding areas, allowing for the administration of British civil and criminal law as well as the first employment of European trained Indian soldiers known as sepoys for

¹⁸² Yang, 1997.

¹⁸³ Chaudhury, 1978; and; Keay, 1991.

¹⁸⁴ Pearson, 1974.

¹⁸⁵ Vincent, ed., 1990.

their protection. As these enclaves grew in size and success they formed the nuclei of more extensive British administrative zones or presidencies and the services of their sepoy garrisons were increasingly called upon by regional rulers to help in the settlement of local power struggles.¹⁸⁶

Inevitably, this led to an increment in European influence over the internal politics of the subcontinent, but also to a greater belligerence in relations among the European powers themselves. By the mid eighteenth century this manifested itself in a protracted struggle between France and Great Britain for supremacy of influence involving the backing by each of different claimants to the Nawabates of Arcot and Bengal. After the decisive victory at the battle of Plassey (1757) of the British East India Company and the conclusion of favourable terms under the Peace of Paris, Britain emerged as the dominant power, and soon thereafter her agents were conferred effective suzerainty over Bengal, Bihar and Orissa by emperor Shah Alam.¹⁸⁷

However, the increasing bellicosity of the Company as it was drawn into an ever-larger number of conflicts led the British government to move towards the assumption of direct responsibility for Company affairs by instituting a system of 'dual control' in 1784. By the end of 1833 the Company's trading functions had been entirely removed leaving it as a purely administrative body.

At about this time the strands of Evangelical and Utilitarian thinking were gaining rapid prominence in the metropole and these combined to promote a policy of enlightened despotism on the part of successive Governors-General.¹⁸⁸ Prior to the early nineteenth century the Company had shown little interest in the religious and social lives of the general population. It now came to support the work of missionaries, to sponsor the eradication of the most visibly offensive traditional customs and to encourage the introduction of an English education in an attempt to spread liberal ideas and values. The assumptions which underpinned this policy of indigenous uplift were elitist and were clearly premised upon notions of British moral and cultural superiority. Fuelled by a greater ease of access back to Great Britain, these assumptions contributed to the emergence of an extremely insular and yet conspicuously privileged 'Anglo-Indian' elite culture. It was in part as a result of the

¹⁸⁶ Beaumont, 1977; and, Featherstone, 1992.

¹⁸⁷ Bayly, 1983; Keay, 1991; and, Marshall, 1968.

¹⁸⁸ Metcalf, 1994.

hubris that this elitism inculcated and in part the long over-due indigenous reaction to it that the terms of imperial rule in the subcontinent were fundamentally altered by the Sepoy Mutiny of 1857 and the brutal official reaction to it.¹⁸⁹

b. The Emergence of Resistance

i. The Experimental Stage

Already, the introduction of English education into the subcontinent had helped to create a new Indian middle class and to inculcate increasing familiarity with western philosophies and institutions. It now began to elicit a variety of critical responses that would eventually mature to form the basis of a broader political awakening in the 1870s and 80s. Central to these responses was a consideration of the relative merits of Hindu, Western and Muslim traditions. As early as the 1820s Ram Mohan Roy began work through the Brahmo Samaj upon a purifying renewal of Hinduism.¹⁹⁰ This gave rise to a strain of Indian nationalism – represented years later by figures like G.K.Gokhale and M.K.Gandhi – that insisted on the enduring value of Hinduism whilst calling for the reform of the most repressive social practices. In contrast, a reform movement much more insistent upon the superiority of Hindu truths and consequently considerably more resistant to western ideas developed in the 1870s through the Arya Samaj.¹⁹¹

From less than promising beginnings, these opinions mixed together to achieve a degree of institutional coherence in the Indian National Congress.¹⁹² This was established in 1885 in reaction to the failure of a proposal to allow Indian judges to try European defendants and rapidly became the main arena for nationalist agitation.¹⁹³ After an initial period during which Congress focused upon persuading the British to establish and expand representative institutions, a second generation of Congressmen started to advocate a more militant approach using Hindu traditions and symbols.

¹⁸⁹ Metcalf, 1964.

¹⁹⁰ Heinsath, 1964; Jones, 1976; Kopf, 1979. For parallel developments in the Muslim community, see: Hadi, 1970.

¹⁹¹ Jones, 1976.

¹⁹² McLane, 1977.

¹⁹³ Hirschman, 1980.

By the early twentieth century, two distinct factions had emerged within Congress: the 'moderates' led by G.K.Gokhale, were very critical of British economic policy and its 'draining' effects on the subcontinent but were prepared to work for liberal reforms through official channels and according to an incremental timetable; and the 'extremists', led by B.G.Tilak, who rejected western education and western political concepts and sought ways to force the British out of India altogether.¹⁹⁴ The divide was sharpened by the partition of Bengal by Lord Curzon in 1905. A working truce gave way to subsequent power struggles amidst widespread anti-partition rioting and the emergence of nascent terrorist activity.¹⁹⁵

A more significant consequence of partition was the emergence of a distinctively Muslim communal consciousness.¹⁹⁶ Partition meant the formation of a new Muslim majority state in East Bengal. Apart from the inherent benefits this was perceived to convey, Muslims became increasingly concerned by the overtly Hindu character of the anti-partition movement. It was the attempt to placate, and to a degree even co-opt, this concern that lay behind the creation of separate Muslim electorates within the emerging institutions of self-government.¹⁹⁷ Indigenous representation within these institutions had been periodically expanded since their tentative introduction in the 1860s so that by the eve of the First World War elite Indian representation, though somewhat impotent in practice, had become a permanent feature of the Raj. The First World War itself began with an unprecedented show of support and loyalty to the British. However, mounting casualty rates, growing inflation, and a worldwide influenza epidemic quickly led to disillusionment, such that moderate and extremist groups within Congress felt able to put aside their differences in order to stand united in opposition to the British and founded a Home Rule League in 1916.¹⁹⁸

In 1917, as a way of alleviating this rising discontent, a declaration was made in parliament promising the gradual development of dominion style self-government for the subcontinent. The so-called Montagu-Chelmsford reforms, as this initiative came to be known, were enshrined in the *Government of India Act, 1919*. This introduced the principle of dual administration or dyarchy, providing for the sharing of powers

¹⁹⁴ Wolpert, 1989.

¹⁹⁵ Seal, 1968. See also: Sen Gupta, 1972.

¹⁹⁶ Qureshi, 1962.

¹⁹⁷ Das, 1964.

¹⁹⁸ Ellinwood & Pradhan, 1978.

between Indian legislators and British officials, as well as the expansion of central and provincial legislatures and a considerable widening of the franchise.¹⁹⁹ The impact of these reforms were, however, seriously undermined by the simultaneous passage and enforcement of wartime legislation authorising internment without trial and tight restrictions on the press.²⁰⁰ M.K Gandhi, a campaigner recently returned from South Africa, called a nationwide daylong cessation of work or *satyagraha*.²⁰¹ This sparked agitation across the country and was met by forced suppression by the government, culminating in the killing of 479 unarmed civilians at the Jalianwalla Bargh on April 13th 1919. The extraordinary bitterness that this atrocity fostered led Gandhi to call for a campaign of native non-cooperation with the imperial government. By 1922, however, escalating violence caused him to call off the campaign just before he was imprisoned.²⁰²

Despite all of this, Congress refrained from competing in government sponsored elections and, when in 1927, the British appointed an all-white commission under Sir John Simon to recommend further measures for the constitutional devolution of power, Congress responded in 1929 by drafting its own constitution under the guidance Motilal Nehru and demanding full independence. By now, more radical elements in Congress, led by the young Jawaharlal Nehru, adopted an increasingly confrontational mood and their Declaration of Independence Day on January 26th 1930 inspired Gandhi to emerge from his long seclusion and to conduct a 240 mile march from his *ashram* (Sabarmati) to make salt illegally at Dandi in Gujarat, to protest against extortionate British taxes on the same.²⁰³

This led to a nationwide movement of civil disobedience. For the next 5 years, Congress and the government were locked in conflict and negotiation, which eventually culminated in the Government of India Act 1935, which articulated three main goals: first, the establishment of a loose federal structure; second, the achieving of provincial autonomy; and third, the safeguarding of minority interests through separate electorates. The 1935 Act clearly still fell short of aspirations for complete independence and remained, despite Gandhi's overtures, implacably opposed to

¹⁹⁹ Robb, 1992.

²⁰⁰ Moore, 1974.

²⁰¹ Brown, 1977.

²⁰² Minault, 1982.

²⁰³ Moore, 1974.

Muslim demands for separate representation. Relations between the two major religious communities in the sub-continent rapidly deteriorated, such that by 1940 the All India Muslim League passed a resolution demanding an independent Muslim state.²⁰⁴

The real possibility of civil war led the Viceroy, Lord Mountbatten, to announce on 3rd June 1947 terms for the partition of India into the nations of India and Pakistan, with Pakistan itself to be divided into an eastern and western wing, either side of India.²⁰⁵ Thus, at midnight on 15th August 1947, the subcontinent was formally partitioned. The new boundaries of the two nations, which cut through both Bengal and Punjab, led to a mass exodus of over 5 million Hindus and Sikhs from Pakistan, and a similar number of Muslims from India, costing at least half a million lives in the process.²⁰⁶ The situation was only calmed by the assassination of Gandhi in January 1948 by Hindu extremists, who resented his defence of Muslims. Such was the shock of this event that gradually the communal violence receded.

ii. Nation-Building

Quite apart from territorial consolidation, the new government undertook to transform the lives of the Indian population. In so doing it faced a number of obstacles, quite different to those faced by its post-revolutionary Chinese counterpart. Quite unlike China, pre-independence India did not undergo a revolutionary struggle. Instead, the independence movement had as its primary aim the liberation of the subcontinent from alien rule and, in attaining that goal whilst utilising the device of mass campaigning, relied heavily upon the assistance of pre-existing elites and socially dominant interest groups. In consequence, the power of the postcolonial state over existing interests in domestic society was altogether more limited and it was therefore forced to construct a development strategy altogether more accommodating to such interests. The situation was particularly exemplified by the fact that there was a fundamental constitutional continuity between the colonial and postcolonial state and,

²⁰⁴ See generally: Qureshi, 1962. For further background see: Page, 1982; and, Robinson, 1974.

²⁰⁵ Pandey, 1969.

²⁰⁶ Roy, 1990.

although they were given newer ideological and socio-economic missions, it presaged a continuing reliance upon the military, judicial and bureaucratic structures.²⁰⁷

What did appear unique was the extension of the franchise to the entire population, fulfilling a promise implicit in the newly adopted constitution of 1950, which described India as a “sovereign, democratic Republic”.²⁰⁸ Even here, the appearance of innovation did much to disguise the underlying continuity. Indeed, it served to complete a trend of political cooption which had operated under the Raj for some time, acting predominantly as a mechanism through which diverse interests could be mediated in the form of competing and normally elite dominated political parties, thereby legitimising the state and channelling popular agitation away from potentially destructive forms of direct action.

Although enfranchisement “provided a useful mechanism for the accommodation of diverse, conflicting interests”, the situation remained essentially one in which “the masses rarely had a direct say in the governing process”. Within these very real constraints, the objectives of the Nehru government were clear and were shaped by a nationalist mission of a free India, which had as its overriding priority the need to catch up with the West. For Nehru in particular this was the only way in which India could place its newly forged independence on a sound footing and avoid formal or informal client status in the international system.²⁰⁹ In this sense, the postcolonial state remained an essential mechanism of transformation, despite the many constraints placed upon it. It was the only actor in an economic position to undertake rapid industrialisation with an interest in forging a truly national consensus transcending regional divides. Nehru decided to impose linguistic uniformity at least in theory on the whole of the country designating Hindi as the official language of the Union. Whilst this was very much in conformity with his overall modernisation programme, it faced widespread and sustained opposition, especially in the south of the country.²¹⁰

Nehru further attempted a rigorous programme of social and economic reform. Under three successive five-year plans inaugurated in 1951, stretching from 1951-64, Nehru

²⁰⁷ Austin, 1966.

²⁰⁸ Guha, 2007: Chap. 11.

²⁰⁹ Ibid: Chap8

²¹⁰ On the controversies surrounding, and the ultimate failure of, this enterprise, see: Ibid., Chap 9.

took control of the “Commanding Heights” of the Indian economy and planned an orderly transition through the stages of economic modernisation.²¹¹ Despite considerable population growth and monsoon failure in the short to medium term, this policy proved a considerable success with significant increases in grain production, the development of a thriving heavy industrial sector, and the targeted and rapid accumulation of capital. Across the country, industrial complexes emerged, alongside the expansion of research and teaching at universities and institutes of technology and research. Furthermore, Nehru persuaded parliament to pass law abolishing absentee landlordism, conferring titles upon the actual cultivators.

Abroad, the government of India adopted a policy of non-aligned, peaceful coexistence and attempted to dispel tensions created by the Chinese invasion of Tibet by concluding a treaty with China in 1954. In 1959, however, India sustained losses in a confrontation with China over Ladakh, and in 1962 conflicts in Assam escalated into a war in which China proved to be far superior, advancing over India’s north-eastern frontier. This led India to abandon its policy of non-alignment and to conclude a defence treaty with the US. Just over a year later, Nehru’s long tenure came to an end with his death. As his replacement the Congress Caucus or “The Syndicate” chose Lal Bahadur Shastri who presided over the restoration of India’s military prestige in the second Indo-Pakistan war of 1965, triggered by a disturbance over a dispute about Kashmir, in which Indian tanks advanced within 5km of Lahore.

iii. The Lurch towards Populism

When Lal Bahadur died of a heart attack, he was replaced by Nehru’s daughter Indira Gandhi. Almost immediately, Mrs. Gandhi secured American financial support for India’s fourth five-year plan, but this was conditional upon economic restructuring in a more liberal direction and a devaluation of the rupee. Very soon it became clear these expedients were proving a political and economic disaster. When Mrs. Gandhi’s government mutinied, she moved to outmanoeuvre her opposition both inside and outside Congress by reversing her nascent attempts at liberalisation and adopting instead a radical and populist alternative. Accordingly, Gandhi wholeheartedly

²¹¹ Ibid: Chap 10. See also: Hanson, 1966.

embraced the socialist principle by significantly increasing direct administrative control over the economy, nationalising major banks, passing anti-monopolies legislation, foreign exchange regulations and patent laws, and abolishing the former Maharaja's privy purses and privileges.²¹²

A growing rift soon emerged within Congress over Gandhi's style of government and populist appeals. In November 1969, she was expelled from the party and forced to establish Congress (r). At the same time, she moved decisively against the brutal repression of the struggle for independence in East Pakistan. Waiting until she had the moral support of the international community, Gandhi launched a simultaneous attack in western and eastern Pakistan, leading to the total capitulation of Pakistan's forces and the establishment of a new nation, Bangladesh. Gandhi's economic *volte face* (coupled with the great success of the Green Revolution and the introduction of high yield grain) led to an initial surge in industrial growth. It was not long, however, before the cost of the Indo-Pak war, a series of crop failures and skyrocketing oil prices led to renewed economic stagnation and unrest.²¹³ Gandhi, in turn, declared a state of emergency in 1975 (lasting until 1977) under which fundamental rights were suspended and strict censorship of the press enforced.²¹⁴

Whilst the backlash that this move provoked eventually cost her the 1977 election, by 1979 she had made a remarkable political come-back, largely owing to the incompetence and disunity of her opponents, and was once again elected Prime Minister. The continuing mixture of populism and authoritarianism she displayed, however, precipitated renewed unrest and resistance to her rule on a number of fronts.²¹⁵ In May 1984, Khalistani terrorists occupied the Golden Temple in Amritsar, calling for an independent Sikh state, organising a campaign of violence from its precincts. When, in June, Gandhi sent in tanks, two days of conflict resulted in the desecration of the Sikh shrine. The discontent this aroused led one of her Sikh bodyguards to assassinate her.²¹⁶ In December 1984, Rajiv Gandhi, Indira's eldest son, came to power on a wave of sympathy. Under Rajiv there were tentative attempts to revive the policies of economic liberalisation that had been undertaken by his

²¹² Ibid: Chap 19.

²¹³ Saksena, 1993.

²¹⁴ Sahasrabudde & Vajpayee, 1991.

²¹⁵ See Generally, Gupte, 1992.

²¹⁶ Gupte, 1985; Nayar & Singh, 1984; and, Singh & Malik, eds., 1985.

mother during her first term in office. Owing to party tensions and conflict, however, it was possible only to effect reform on a piecemeal basis by targeting specific sectors, such as electronics and IT, in an attempt to spark a more general process of economic growth.²¹⁷

iv. Re-Engagement and Marketisation

By the end of the 1980s opposition to Rajiv Gandhi's rule had rallied under the leadership of V.P. Singh, former Congress minister. In December 1989, Singh managed to form a coalition government. The period of political volatility that followed led to a severe economic crisis in which India came very close to defaulting on international payments. P.V. Narasimha Rao, who took over the presidency of the Congress party to form a broad based coalition government, effected economic reform on a drastic scale, liberalising licence and controlling regulations in order to cede space in the economy for domestic and foreign private concerns. This finally and conclusively moved the government in the direction of greater reliance upon indirect fiscal, rather than direct administrative, controls.²¹⁸

Paradoxically, just as it came to be accepted as a new and desirable reality on the Indian political landscape, economic reform was accompanied by increasing communal polarisation. The communal agenda systematically pursued by the BJP (Bharatiya Janata Party) and its allies seems to have been raised to a new level of permanent constitutional expression.²¹⁹ Broadly speaking this agenda had two strands. First, there has been reluctance on the part of local and central authorities to step in and a growing number of quite gruesome attacks upon Christian and Muslim minority communities.²²⁰ Secondly, it is seen in the determined raising of tensions between India and Pakistan. Communal tensions have had a significant degree of regional expression and this is part of a much wider rise in prominence over the past decade of regional movements and parties in the South, Sikkim, Kashmir and Punjab. Secessionism has become a major theme of Indian national politics and a steady growth of regionalism has been underpinned by a gradual weakening of New Delhi's

²¹⁷ Humbers, 1992; Jain, 1992.

²¹⁸ Jalan, B., ed., 1992; Krueger, 2002; and, Sachs, et.al., eds., 1999.

²¹⁹ Katju, 2003.

²²⁰ Gopal, ed., 1991; Narain, 1993.

grip as the nation's capital. The ensuing instability that this has been accompanied by has taken a significant toll in terms of the absence of consistent policy, leading big businesses and the affluent classes to look increasingly to their own private interest, thereby escalating the gap between rich and poor and leading to increased levels of political corruption.

Chapter 3: Legal Development

A: Conceptual Framework

The introductory chapter defined law as the normative or patterned complex of social pressure occurring within a given human grouping. For the purposes of the present chapter, this definition needs to undergo a degree of decompression. To this end, a modified version of the typology developed by jurist M. Chiba will be employed. Chiba distinguishes three types of socio-legal norm: legal postulates, unofficial laws, and official laws. A legal postulate he characterises as a value principle or value system specifically connected with a particular official or unofficial law, which it acts to found, justify and orientate.²²¹ It is thus linked into the most fundamental notions that a particular society holds as to the moral orientation and organisation or principles governing the institutions of communal living. Unofficial law, Chiba's second category, he defines as: "a legal system not officially sanctioned by any legitimate authority but sanctioned in practice by the general consensus or a certain circle of people, within or beyond the bounds of a country."²²² For the purposes of the present study, this definition tends to restrict itself by association too much to the geographical jurisdiction of a particular state or territory. Consequently, the term informal law will be used as a substitute. Likewise, instead of the term official law, Chiba's third category, which he defines as "a legal system...directly sanctioned by the legitimate authority of the government of the state to have overall jurisdiction over the country,"²²³ the term formal law will be substituted. Formal law, in this sense, as suggested in the introductory chapter, has the character of explicitness and fixation, in terms of the way that it is emitted from distinctive law-making bodies, the way that it is recorded and publicised, and the way it is implemented in practice. In all of these respects, informal law is more or less lacking such characteristics. What distinguishes informal law in this framework from legal postulates is the fact that the norms with which it is concerned are not directly and immediately connected in the minds of the social actor with a moral or religious vision, though they necessarily derive from one.

²²¹ Chiba, 1986: 6-7. This is very much in line with the ideas of Lee Adamson Hoebel: Hoebel, 1958: 158.

²²² *Ibid.*: 6.

²²³ *Ibid.*: 5-6.

In what follows, it will be noticed that there is a deliberate correspondence between this tripartite framework of legal analysis and the tripartite framework of historical transformation around which the second section of chapter two was structured. Thus a tentative attempt is made here to bring these two frameworks together in order to embody an implicit, though necessarily always heavily circumscribed, claim as to the trajectory and shape of legal development. In short, this claim is that as the history of legal development has unfolded, so there has been a gradual shift in preponderant emphasis from legal postulates, to informal law and finally to formal law and that these periods of emphasis correspond broadly to the three major stages of historical transformation. The appellation 'preponderant' is, of course, meant to signify that in each of these periods all three varieties of legal norm have been operative to some extent. The preponderant status of a given variety of norm refers solely to the fact that it expresses the normative *zeitgeist* of a particular phase of development and that during that phase the matrix of forces with which it is especially associated play a central role of control and direction, co-opting other forces and varieties of norm for their own purposes. Finally, it follows from that there is also a certain correspondence between the different stages of legal and historical development and the different theoretical approaches to law outlined in the introductory chapter: the 'natural law', 'socio-economic' and 'positivist' approaches best describing the variety of norm predominant in the first, second and third periods respectively.

The fact that the schools of jurisprudence most characteristic of the 'socio-economic' approach seem to flourish most in the final and not in the second period may at first tell against this last suggested correspondence. To make sense of the apparent contradiction, it is important carefully to distinguish between the varieties of norms to which particular jurisprudential theories refer and the jurisprudential theories themselves. In fact, the increasingly sensitive and sophisticated explication of informal norms is an important part of the transition to positivity and it is certainly part of the co-optive process by which the capitalist state surveils those areas of society not yet brought fully under its control. Consequently, implicit in what follows is also the claim that precisely in proportion as informal socio-economic norms receive greater elaboration, and thereby begin to lose their quality of informality, so the preponderance of the forces upon which they are based is undermined.

B: Legal Change Overtime

1. Pre-Agrarian

In the first period of legal development, during which legal postulates were the preponderant form of legal norm, little distinction was drawn, not just between law and morality as these terms would be understood today, but even between the norms of morality and the overall visions of universal order that would now normally be termed religious. It is in this sense that Ernest Gellner spoke of pre-neolithic man as being bound together by multi stranded networks of normative activities which were at once referential, social, descriptive and loyalty affirming and at the same time metaphysically orientated.²²⁴ Fundamentally, in this pre-agrarian phase of human existence, “mores and laws undifferentiated from the norms of religion were looked upon as being exclusively of divine origin.”²²⁵ The theological cast of law during this stage had two major characteristics: it was “essentially unchangeable through human ordinances and it is everywhere the same force within the same cultural environments.”²²⁶ Where a serious breach of the normative order did take place and an individual or group was wronged, authority to punish for such a breach almost universally resided with the “wronged individual [or group] and his immediate kinsmen” and lasted for only as long as was necessary “to follow through the procedural steps that lead to redress or punishment of the culprit.” Consequently, the very strong tendency was “to allocate authority [to punish] to the party [be it the group on its own behalf or on behalf of one of its members]...directly injured.”²²⁷

2. The Neolithic Revolution and Early State Structures

A second period of legal development began to emerge alongside the development of the first state structures and particularly of the great agro-military empires of the ancient world.²²⁸ As early as 2350 B.C. there is evidence of codes being compiled as a method of consolidating existing ordinances laid down by Mesopotamian kings and as a way of publicising as well, perhaps, as standardising official sanctions or

²²⁴ Gellner, 1988: 44

²²⁵ Rommen, 1998: 3

²²⁶ Ibid.

²²⁷ Hoebel, 1956: 276.

²²⁸ Beck, et.al., 1999; Burenhult, ed., 2003; and, Starr, 1991.

punishments. Over the following millennium, this earliest example was followed by others including the great code of Hammurabi (1700 B.C.), the Ten Commandments and the laws of Manu.²²⁹ All of these early forays into formal law-making, if they can be described as such, represent the earliest examples of a clear shift towards fixed and explicit legal norms. However, it should be remembered that right up to the emergence of the modern nation state round about the time of the industrial revolution and the transition to the third great period of historical and legal development, examples of what might today be termed positive state law, let alone of positively formalised legal systems, remained of limited significance when set against the vast body of informal legal norms, upon which they rested and alongside which they coexisted.

One of the most important consequences of the gradual movement towards greater socio-political consolidation and the growing inter-societal interaction which it implied was the gradual recognition that not all social groupings were organised or regulated in the same way and that consequently not all law was in practice the direct application of unalterable and unchanging divine mandates. As it became clear that a division did in fact exist between regulative norms in different human societies, questions soon began to arise as to the correct moral basis of human authority and to its legitimate scope. Within the West, it was the Greeks who first systematically reflected upon this question, as they did upon the nature of the human being and of human society as opposed merely to the nature of the physical world, and they recorded their reflections in a literature that gave rise to more or less a continuous European tradition. It is for this reason that it is useful to focus in some detail upon the development and transformation of that tradition since it was in Europe that the intellectual, social and cultural developments took place which propelled the first human societies into the industrial age and then, through coercion, spread the processes of industrialisation across the globe, with all the attendant implications that that had for the proliferation of formalised legal structures.

In the earliest examples of the Greek canon – the great Homeric epics – there existed no real sense of law as it might be understood today nor, indeed, of any real normative

²²⁹ Harper, 1904; Johns, trans., 2000; and, Winton, ed., 1958.

customary order at all.²³⁰ Instead there was the much vaguer notion of *themis*, which can best be characterised as a sort of “god-inspired decision or directive or finding” that reflected a “shared sense of what...[was] proper” and of “what was...morally incumbent”, as opposed to what was merely expedient. Alongside, *themis* stood the related concept of *dike*, which only later came to develop a clear sense of its own. R. Kostler characterised the relationship of these two concepts in the following way: “*Themis* is a law of the heavens, *dike* the earthly law which imitates it, the former rests on divine institution, the latter on direction from the law thus instituted, and is therefore derivative law which comes into effect through the sentence of the judge.”²³¹ What is certainly clear is that *themis* came much more to be associated with the religious and the supernatural; *dike* with the earthly and the human. The real importance of these two concepts, *themis* and *dike*, lay in the fact that they distinguished between the supernatural and the human or natural order in a way that, whilst maintaining the fundamental connection between the two, enabled the beginnings of independent investigation into the human condition per se and it is this which lies at the basis of enduringly significant insights handed down under the rubric of the natural law.²³²

Among the forerunners of this natural law was Heraclitus of Ephesus who perceived in the endless rhythm of events, the idea of an eternal norm or harmony within an ordered cosmos, governed by laws which set it apart from disorder, confusion and chaos. Wisdom he went on to define as consisting of “a single thing, to know the thought which governs all things everywhere.”²³³ This thought was to become the *Logos* so familiar to the later Greek philosophical tradition connoting, as it did, reason insofar as it is common to all creatures.²³⁴ The *Logos* embodied a higher or ‘divine law’ with which all man-made institutions must ultimately find harmony and against which they must be tested. Where this harmony broke down and conflict arose, the only proper response was for the individual to remain loyal to the *Logos*, which was the ultimate ground of their being. That such a conflict could arise was given dramatic expression in the *Antigone* (454-450 BC) of Sophocles which, by contrasting Creon’s

²³⁰ Jones, 1956.

²³¹ Kostler, 1997: 7. See also, Koester, 1968.

²³² Kelly, 1997: 7-8. Also Jones, 1956; Koester, 1968; and generally: Bonner & Smith, 1930; Harrison & Robin, 1968-71; and, MacDowell, 1978.

²³³ Heraclitus in Voilquin, 1964:14 See also, generally, Foriers, P. and Perelman.

²³⁴ Voilquin, 1964:14.

edict with the gods' unwritten and infallible law, threw in to relief the tension between Antigone's moral and legal duties with respect to the burial of her brother.²³⁵ The courage she needed to resolve this conflict, even to the point of death, was a poignant testament to the fact that true wisdom often demanded the highest of sacrifices, but also carried with it the implication that ultimately the unseen was even more real and more valuable than the seen.

It is against this backdrop that, at a relatively early stage, a distinction began to emerge between two conceptions of the 'natural law' the ideological consequences of which were to reverberate right down to the present. The first conception, at odds with that intimated by the *Antigone*, is essentially revolutionary and individualistic. It is "bound up with the basic doctrine of the state of nature as well as with the concept of the state as a social unit which rests upon a free contract, is arbitrary and artificial, is determined by utility, and is not metaphysically necessary." The second conception "is the idea of a natural law grounded in metaphysics that does not exist in a mythical state of nature before the "laws," but lives and ought to live in them."²³⁶

The first of these alternatives was developed by the Sophists around the 5th century BC, at a time when the Greek city states were undergoing a significant period of political and social turmoil. What primarily impressed this rather opportunistic group of sceptics was the apparent relativity of human ideas and standards, such that law appeared to be nothing more than the product of expediency and self interest and, therefore, demanding of obedience only on the same basis. They "started from the freedom of the individual, who had to be liberated from traditional religious and politico-legal bonds."²³⁷ For them the polis was not something natural or eternal, nor was law. Instead they spoke of a mankind's 'natural' state in pre-social terms, which they conceived of in abstractly "civitas maxima of free and equal men."²³⁸ The second conception of the natural law, which came to dominate and almost wholly, though not entirely, to supersede the sophistic alternative, was that collectively put forward by Socrates, Plato and Aristotle. Both Socrates and Plato, in particular, firmly resisted the idea that absolute standards beyond the individual were not discoverable and instead,

²³⁵ Rommen, 1998:11n.7.

²³⁶ Ibid: 5. Also: Koester, 1968.

²³⁷ Ibid: 14.

²³⁸ Ibid.

asserted with tremendous rhetorical and literary power, that the true home of the human being was in society with his fellow man.²³⁹ Thus for Plato “the polis and its law were the indispensable means for realizing the idea of humanity.”²⁴⁰ True humanity can only reach its “completion in citizenship, in the ethical ideal of the citizen, of the law-abiding and just man.” Consequently, far from being an apparatus of oppression, the properly functioning state “is the great pedagogue of mankind”, which should function “to bring men to morality and justice, to happiness in and through the moral virtues.”²⁴¹ And, indeed in the *Republic* Plato clearly defines justice as that which conforms to nature.²⁴²

These theories were elaborated and built upon by Aristotle who picked up on the sophist distinction between natural and conventional law, but went on to place this distinction within an essentially Socratic and communitarian framework. Consequently, he distinguished in the *Rhetoric* between two senses of the word law: as particular or positive, on the one hand, and as common or according to nature and thereby applying to the whole of the human race, on the other.²⁴³ Likewise, in the *Ethics* he points to the natural element in justice which applies everywhere and at all times and which does not depend for its force upon particular enactments. At the same time, or Aristotle, natural law did not “merely mean a law which is coextensive with man, or universal” but also “a law which has grown concurrently with man, and is, in a sense, evolutionary – yet not so evolutionary but that man’s ‘art’ has cooperated in its growth.” Consequently, “the antithesis between natural and conventional, which is only a prima facie antithesis,” disappears for Aristotle in favour of “a vision of an historically developed law, which has both a positive quality and a root in the nature of man.”²⁴⁴

The works of Aristotle were, in turn, subsequently built upon and adapted by a later school of Greek philosophy, the Stoics, which had a profound influence on the development of jurisprudence into and throughout the period of Roman political hegemony. For the Stoics, the emphasis was upon the capacity for human beings to

²³⁹ Maguire, 1947.

²⁴⁰ Rommen, 1998: 14.

²⁴¹ Ibid.

²⁴² *Republic*, IV, 444d.

²⁴³ Barker, 1958. See also generally: Miller, 1991.

²⁴⁴ Gierke, 1950: xxxiv-xxxv.

reason, which Aristotle had identified as their distinguishing function. Since, they concluded, reason governed the universe in all its parts, it governed man and ordered his faculties in a way which would enable him to fulfil his true nature as a social being and citizen. Thus when man lived in accordance with his reason, and thus in society with others, he lived naturally. Furthermore, for the Stoics, postulates of reason were of universal force, applying to all men, regardless of the particular societies in which they found themselves. Developing this idea, they drew a further distinction between absolute and relative ideals of natural law, envisaging an idealized golden age without governing institutions, whose emergence connoted a deterioration of the moral substance of mankind, and which inaugurated a subsequent age of relative natural law which demanded of governors and legislators that they approximate the elaboration of their sanctions as much as possible to the original absolute standards.

With the coming of the Roman Empire, many of these ideas were taken over with increasing enthusiasm by its leading statesmen – Cicero, Epictectus, Seneca and Marcus Aurelius – especially after Rome’s annexation of Greece in 146 BC.²⁴⁵ Very ancient Roman law, of course, knew nothing of the natural law since every law was considered, at that point, to be tied to particular political allegiances. However, this mindset underwent modification as Greek ideas gradually penetrated Roman consciousness through the praetor’s edict and the juriconsults’ commentaries each of which drew heavily on the middle Stoicism of Panaetius and Posidonious. This can be seen in the writings of Cicero and in those, years later, of Marcus Aurelius who would state: “My city and country, so far as I am Antoninus, is Rome, but so far as I am a man, it is the world.” Gaius, in book 1 of his *Institutes* developed this notion by drawing a distinction between *Lex Gentium* and the *Lex civile*. Finally, Ulpian elaborated a further distinction between the *Jus Naturale* and the *Jus Gentium* to create a tri-partite categorization: natural law, human law and civil law.²⁴⁶

With the fall of the Roman Empire and the emergence of Christianity, the Catholic Church rapidly became the main institutional conduit for the preservation,

²⁴⁵ See generally: Buckland, 1963; and, Frier, 1985. Also, Watson, 1995.

²⁴⁶ See: Watson, 1966; and, Wieacker, 1981.

development and transmission of the theories of natural law.²⁴⁷ Already in scripture, St Paul had written in Romans 2:15 of a law written on the heart of every man, no doubt influenced by certain Neo-Platonic schools which had purchase upon the minds of educated men throughout the first millennium AD. Moreover, the Fathers of the early Church were keen to make use of Stoic notions of natural law.²⁴⁸ Amidst these principles they perceived the, 'seeds of the Word'.

The Fathers were also quick to take over the Stoic distinction between primary and secondary natural law, which they recast within a theological framework.²⁴⁹ Primary natural law they saw as applying to human nature in the state of innocence prior to its corruption through the sin of Adam. Secondary natural law applied to the condition of fallen nature and had as its necessary correlates bondage, slavery and the coercive authority of the state.²⁵⁰ Much more spectacularly, St Augustine, in his *City of God* developed this theological interpretation into a complete eschatological vision by which natural law is seen as the formulation of a moral and obligatory order in which man participates in the creative work of God by aligning himself with the divine mind. There is a clear hierarchy within this natural order between the inorganic world and living creatures, and between living creatures dominated by the life of the senses, and man who is able to reach out to eternity through the life of the mind.

In a quite different way, the traditional natural law ideas of ancient Roman jurisprudence were also taken up and commented upon in the great Justinian work of the 6th century, the *Corpus Juris Civilis* as well as by Isidore of Seville in his *Etymologies* in the 7th century.²⁵¹ Some time later, the establishment of the University of Bologna in the 11th century led to a marked revival of Roman legal scholarship which, together with numerous commentaries that began to be produced on Gratian's *Decretium* after its publication in 1140, meant that Roman law and the principles underlying it once more became a widely studied subject.²⁵² It was from this newly fertile soil that the great Scholastic interpretations of the natural law begin flower, but

²⁴⁷ See also in respect of nascent notions of natural law in the pre-Christian Jewish tradition, Novak, 1988.

²⁴⁸ Spanneut, 1967.

²⁴⁹ Ibid.

²⁵⁰ Rommen, 1998: 32.

²⁵¹ Watson, 1991. and Watson, 1968. For a useful translation of the Digest: Mommsen & Kruger, eds., 1985.

²⁵² Winroth, 2000. For a critical translation of Gratian's *Decretium*: Thompson & Gordley, 1993. More generally, see: Brundage, 2004; Helmholz, 1996; Kuttner, 1950; Reid, 1991; Reid, & Witte, 1999; Tierney, 1955, 1964. See also, the incomparable scholarly contributions made by Harold Berman: Berman, 1959, 1974 and 1983. Also: Helmholz, 1992.

also that the seeds of their undoing begin to be fertilised and grow into an increasingly powerful alternative.

In the overall development of Scholastic thought a noteworthy and increasingly clear antithesis emerged between “*lex-ratio* and *lex-voluntas*” which “coincided structurally with the doctrines of the respective thinkers concerning God” and which applied not only to theological speculation in general, but also, more specifically, to the nature of law. Natural law conceptions came to be the fruit of doctrines upholding the “priority of the intellect over the will (law is reason) in both God and man, of the knowability of the essences of things and their essential order, their metaphysical being and the ordered hierarchy of values.”²⁵³ Positivist conceptions, on the other hand, resulted from doctrines holding instead to the primacy of the will. Importantly, *voluntas* here meant more than mere will, denoting, in addition, passion and irrational appetite. Accordingly, positivism signified “the renouncing of all efforts to know the essences of things (nominalism), the repudiation of the metaphysics of hierarchized being and value” and it was “the same conceptual pattern [found] in the thinking of the nineteenth and twentieth centuries, even though...concealed under different names.”²⁵⁴

It was in the genius of St Thomas Aquinas working to solve difficulties encountered by Alexander of Hales and his own master, St Albert the Great, that the first of these two alternatives – the dominance of the *Lex Ratio* over the *Lex Voluntas* – was given expression in an ambitious and systematic synthesis of Christian doctrine and Aristotelian-cum-Neo-Platonic metaphysics.²⁵⁵ Aquinas distinguished between four types of law, building upon Augustine’s insight that the most basic of all ordering principles was the mind and reason of God himself, and that natural law is a participation in this more fundamental eternal law in so far as the eternal law concerns human functioning and is discoverable through it. The implications of this vision were clear. Finally, below the level of the natural law, Aquinas further distinguished between the special divine laws revealed in scripture, which attach to a particular time and a particular place, and merely human or positive law, which enjoys legitimacy,

²⁵³ Rommen, 1998:36.

²⁵⁴ *Ibid.*

²⁵⁵ See generally, Knowles, 1988; Post, 1964; and, Simon, 1965.

and indeed its quality, as law, only in so far as it elaborates upon, or at least is not inconsistent with, the fundamental tenants of the natural law.

Very soon after the death of Aquinas, Duns Scotus began to question the supremacy of Divine Reason over the Divine Will on the basis that it appeared to limit divine action. This questioning developed into an altogether more comprehensive critique by William of Ockham and a number of other later medieval thinkers.²⁵⁶ By identifying it with the exigencies of the divine will, the moral law became for Ockham a species of positive law. An action was “not good because of its suitability to the essential nature of man, wherein God's archetypal idea of man is represented according to being and oughtness, but because God so wills.”²⁵⁷ As a manifestation of pure will, law thus had no foundation in the essential nature of things: there existed “no unchangeable *lex naturalis*, no natural law that inwardly governs the positive law. Positive law and natural law, which indeed is also positive law, stand likewise in no inner relation to each other.”²⁵⁸ This was a line of thinking that bore strong resemblance to the arguments employed by Machiavelli in *The Prince*²⁵⁹ and by Thomas Hobbes in *Leviathan*.²⁶⁰ What is certainly clear is that it was intimately linked to the refocusing of attention away from a truly cosmic vision to one centred exclusively on man and his priorities as well as to the great historical departures during the Renaissance and Reformation which lay at the origin of the development of the modern nation state and ultimately to the rejection of all institutional authority which seemed to constrain the mind of the individual.²⁶¹

Whilst the development of this age of rationalism and individualism has already been touched upon in Chapter 2, it has an interesting jurisprudential aspect through which can be charted the gradual redefinition of human nature amongst the leading post-renaissance natural law thinkers and philosophers. Perhaps the turning point in the transition from a metaphysical to a more narrowly rationalistic view of the natural law may be identified in the thinking of Hugo Grotius, whose famous definition runs as follows:

²⁵⁶ Clark, 1971; Freppert, 1988; Oakley, 1961; Tierney, 1988. See also: Mahoney, 1991.

²⁵⁷ Rommen, 1998:52.

²⁵⁸ *Ibid*: 53.

²⁵⁹ Pennington, 1993.

²⁶⁰ Windolph, 1953. Also, Bobbio, 1993.

²⁶¹ Berman, 2003. See also, Elton, 1979.

The law of nature [*ius naturale*] is a dictate of right reason which points out that an act, according as it is or is not in conformity with rational [and social] nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.²⁶²

The fact that the father of the so-called school of Protestant natural law builds here upon the Aristotelian and Thomistic foundation is clear enough. Grotius' distinctive contribution, however, was to have taken Thomas' ideas well beyond their original limits.²⁶³ For Grotius, reason was no longer a reflection of divine nature but was inherent in that of man.

Furthermore, Grotius' emphasis upon the rational nature of man as being the fundamental pillar of natural law meant that he had opened the way to the construction of a system no longer verified by experience but deduced abstractly. And then in so detailed a manner that they seemed to allow little room for the separate though connected body of positive law in the manner that Aquinas and late scholastics such as Suarez had envisaged.²⁶⁴ The fact that he spoke as specifically on the nature of man as opposed to the divine nature meant that he was still able to maintain a voluntarist position whereby good or bad acts were not so with respect to their agreement or otherwise with divine nature, but because God willed or forbade them.²⁶⁵

Grotius' teaching was both confirmed and developed by subsequent thinkers. In particular, Samuel Pufendorf, in his *De Jure Naturae Gentium*, and his *De Officio Hominis et Civis Juxta Legem Naturalem*, in further distancing earth and man from dependence on the divine mind and emphasising man's essential individuality, argued that human laws and the other essential forms of community living evolved not by inherent necessity out of any natural human inclination for social living, but merely because society proved advantageous. Thus, sociality now became merely a capability or an impulse rather than a fundamental requirement.²⁶⁶ It was on this basis that the social contractarian theories began to emerge as a powerful strain in legal and

²⁶² Rommen, 1998: 63.

²⁶³ Haakonssen, 1996. Also, Buckle, 1991.

²⁶⁴ Rommen, 1998: 65. See also, Scott, 1928.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*: 83.

political thought, enduring right down to the present day.²⁶⁷ Thomas Hobbes was particularly drawn to this view, arguing as he did that far from being sociable, man in the state of nature was driven by fear, distrust and a desire to dominate his fellows. Consequently, there arose, out of a sense of intense insecurity, a mutual agreement to alienate the powers of government into the hands of a single absolute sovereign, thereby constructing an artificial leviathan for the protection of all. The law of nature rationally demands respect for this pact in regard to the justice emanating from the sovereign, but the particular sanctions and rules that this sovereign is pleased to impose are nothing other than fiat of his will.²⁶⁸

As an apparent counterbalance to Hobbes' work, but actually developing a number of the themes he had touched upon in terms of fundamental priority of individual self-interest, John Locke, in his *Two Treatises on Government*, endowed man with inalienable natural rights premised upon man's primordial freedom and complete equality, and from here Locke proceeded to assert that no-one could legitimately attack another's life, health, freedom or property, or indeed their right to remain free from political subjugation, save by their own consent.²⁶⁹ Indeed, whilst sanctioning a form of the social contract, by which common decisions are freely vested in a sovereignly constituted majority, such an arrangement could never supersede the pre-existing rights of the individual, which could be legitimately protected by force when not afforded the unconditional respect to which they were entitled. Likewise, Montesquieu's *Spirit of the Laws*, in developing the doctrine of the separation of powers, was essentially driven by the question of how best to guarantee these individual freedoms in practice.²⁷⁰

In fact, what the state actually became on this view was "the utilitarian product of individual self-interest, cloaked in the solemn and venerable language of the traditional philosophy of natural law."²⁷¹ What Locke did in practice was to substitute for the idea of natural law as being rooted in the metaphysical order of the universe, a conception of natural law as "a...nominalistic symbol for a catalogue or bundle of

²⁶⁷ See generally: Tuck, 1979.

²⁶⁸ Bobbio, 1993.

²⁶⁹ Andrew, 1988; and, Grant, 1987.

²⁷⁰ Montesquieu, 1989. Also, Waddicor, 1970.

²⁷¹ Rommen, 1998: 79.

individual rights that stem from individual self-interest.”²⁷² At the heart of this position was the presumption that the common good was nothing real, being “merely the sum of the particular goods or interests of individuals”, such that “the free pursuit of self-interest on the part of individuals who are restricted only by the like freedom of others” would work “like the “invisible hand” of Adam Smith and produce, as it were automatically, a sort of social harmony.”²⁷³ As such, Locke can be seen to have prepared “the way for the destructive criticism of Hume and Bentham.”²⁷⁴

3. The Emergence of Industrial and Post-Industrial Society

The third period of legal development, which corresponded to the beginnings of the industrial revolution and the rise across the world of industrial and post-industrial societies is characterised in particular, as was seen in Chapter 2, by the emergence of autonomous or impersonal authority. It is possible to see how the various schools of jurisprudence which underpin late 18th, 19th and 20th century legal developments, although often apparently contradictory, actually cohere around a uniform developmental logic.

The emergence of impersonal forms of legal authority can, of course, be traced all the way back to the first manifestations of positive law or behavioural rules, which are found in the agro-imperial codes of antiquity. The significant feature of these codes, however, was the fact that they defined the personal power of the ruler or small ruling elite. With the failure of the short-lived republican experiments of Greece and Rome, it was not until the concessions embodied in *Magna Carta 1215* and the development of the English Common Law culminating in the Glorious Revolution 1688 and the *Bill of Rights 1689*, that the tradition of limitations between branches of government or social constituencies began to enjoy continuous, incremental and sustainable development.²⁷⁵ What had enjoyed piecemeal and informal expression in the English Common Law under such jurisprudential luminaries as William Blackstone and Sir Edmund Coke²⁷⁶ eventually attained rigid expression in the *American Constitution*

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid: 79-80.

²⁷⁵ Baker, 2003; Bellomo, 1995; Brand, 1992; Glenn, 2005; Harding, 1973; Hogue, 1966; Ibbetson, 1988; Keeton, 1966; Kenyon, 1966; Milsom, 1981; and, van Caenegem, 1973. See also, for earlier developments: Stein, 1992; and, Wormald, 1999.

²⁷⁶ Blackstone, 1978; Coke, 200. See also, Lobban, 1991; and, generally, the relevant chapters in Baker, 2002.

1787 and its *Bill of Rights 1791*, as well as the French Declaration of the Rights of Man and the post-Napoleonic proliferation of codified systems throughout Europe.²⁷⁷ Expressing some of the central tenets elaborated by Locke and Montesquieu and also, to a certain extent, those of Jean Jacques Rousseau, not to mention the formalism of Kant's Categorical Imperative.²⁷⁸

These emergent structures were initially designed to protect the inalienable rights of the individual *per se* but, as has already been pointed out, Locke's ideas were possessed of a certain internal instability, which tended to lead them in the direction of materialistic and utilitarian positivism. It was indeed in this way that the central jurisprudential tenets of modern formalised legal systems came to be elaborated through the works of Bentham, Austin and Mill in the 19th century, and, most notably, through Kelsen and Hart's analytic jurisprudence in the 20th century.²⁷⁹ The studied neutrality as between differing metaphysical worldviews that each of these theorists espoused actually operated as a mechanism by which the rights discourse of Locke and the American Founding Fathers found itself functionalised in the service of an emerging market economy, whose fundamental requirement was to ensure observance of a set of principles conducive to competition between individual productive and consumptive units. As such:

[a]nalytical jurisprudence can be understood in part as reflecting a demand for a systematic, rational legal science to underpin modern legal professionalism and to accommodate the political idea of law as a technical instrument of government in modern western states.²⁸⁰

Indeed, for Carty, the "rapacious" and "subjectivist individualism" which "is the anthropological foundation for the consumerist market economy" has come to assert itself "through rhetoric about human rights[,]...liberal democracy" and the rule of law.²⁸¹ Thus the Western rights discourse has come to be premised upon an essentially voluntarist foundation rendering individual rights claims little more than "statements

²⁷⁷ See: Cassin, 1956; Friedrich, 1956; Varga, 1991. Also: Berger, 1999; Glenn, 1998; Gordley, 1994; Murillo, 2001; Strakosch, 1967; and, van Caenegem, 1995.

²⁷⁸ Rapaczynski, 1987; also, Covell, C. (1998)

²⁷⁹ Austin, 2000; Mill, 1998; Hart, 1961; Kelsen, 1945, 1967. See also: Schofield, 1998.

²⁸⁰ Cotterrell, 1989: 118. A few pages later (p.123) he goes on to say that: "Insofar as law became seen as an instrument of state policy – and in the utilitarian view an instrument of progress, if used with caution – it was revealed as an amoral and infinitely plastic device of government. Insofar as it regulated increasingly complex and differentiated western societies it could be seen as, above all, a means of controlling the interplay of conflicting interests."

²⁸¹ Carty, 2008:194.

of personal preference” devoid of any truly “transcendent or objective” content.²⁸² This is a perspective that not only accommodates the contractarian bases of classical liberalism, and the various schools of post-modern thought “which see...the world...as a cacophony of...desire,” but also, and most importantly, “the consumerism of advanced capitalism.”²⁸³ In this context, the democratic process degenerates into little more than the “manipulation” and the “manufacture of consensus” writ-large. Law, together with its various elaborate state-sponsored enforcement mechanisms, “comes in to express the conclusion of this process” in order to sustain the consensus thereby reached by enforcing it “against those who [remain]...recalcitrant.”²⁸⁴ In this way “an anarchy of affirmations will, in fact, be resolved through the pressure, if necessary violent, of a preponderance of voices”, and is precisely in this way that “voluntarist individualism fits so well with the market economy.”²⁸⁵

Immediately it is necessary to recognise that in addition to the explicitly positivist legal systems of the nation-state, and their jurisprudential underpinnings, there emerged a growing interest in the historical, sociological and anthropological bases of that law with ever greater sensitivity to the mechanisms by which it was formed. In many ways, this originates in the Romantic reaction of the late 18th and early 19th centuries. Initially it was based particularly on the anti-rationalist and anti-revolutionary philosophy of traditionalism put forward by De Maistre and De Bonald in France and by the German Historical school under the leadership of von Savigny.²⁸⁶ Common to all of these thinkers was their characterisation of law as an organically grown expression of the soul of a people latent in people’s manners and customs.

These historical conceptions of law demonstrate an affinity, in particular, with Rousseau’s conception of the General Will, and they also shared a certain amount in

²⁸² Ibid.

²⁸³ Ibid: 210-211; With respect to post-modernist and post-structuralist schools of thought, Carty’s point has been made by a number of thinkers writing from a broadly Marxian perspective. See: Dews, 2007: 271; and, from a slightly different angle, Callinicos, 1989. More recently, see: Baxi, 2006. Quite different again is the critique developed by Alasdair MacIntyre of what he calls the traditions of Nietzsche, most notably in MacIntyre, 1990 also 2008. For arguments supportive of those made by Carty, only in the context of a study of the overall conceptual underpinnings of the modern world, including communitarian and natural law critiques of rights discourse, see: Glendon, 1994; Lasch, 1992; MacIntyre, 1981; Manent, 1996, 1998; Veatch, 1985; Villey, 1983; and, Schall, 1987 More polemically, though not necessarily less powerfully, see the recent works: Delsol, 2008; and, Kalb, 2008.

²⁸⁴ Carty, 2008: 199-200.

²⁸⁵ Ibid: 198-199.

²⁸⁶ Kantorowicz, 1937. Also: Zimmermann, 1996.

common with Hegel's historical dialectic. It is interesting, therefore, that both of these theorists were consequently to provide the ideological bases for the considerable extension of the power of the modern nation-state.²⁸⁷ Likewise, whilst at first sight, the tenets of the historical school seemed to be fundamentally at variance with the increasingly positivist character of the industrial and post-industrial systems, looked at more closely they were actually premised on very similar ideological foundations. Thus, when faced by the decisive question of a conflict between positive law and natural law (or ethics, as he termed it), De Stahl could only say: "Subjects may not, relying upon the natural law, set themselves singly or collectively in opposition to the positive law; that would be the crime of the Revolution."²⁸⁸

What the reaction of the historical school was mainly directed against was more the lack of subtlety manifested by the positivists' concern with formality and procedure to the exclusion of less formal sources of social pressure often of equal if not greater practical significance. Once more, then, the possibility opens up of a real movement of cooption whereby the developmental logic of industrial society, which had initially thrown up blunt instruments of formal state regulation were inevitably given greater sensitivity and, therefore, effectiveness in relation to the social realities with which it was faced. This transformational potential was recognised with increasing explicitness in the later schools of sociological jurisprudence and legal realism, which continued and extended the insights of their historical forebears. Typical of these disciplines was the approach outlined by Jhering who saw law merely as an instrument the purpose of which was to "further and protect the interests of society."²⁸⁹ Moreover, since the true interests of 'man' were frequently at variance with his individual and selfish desires, the major problem faced by the society was "to reconcile selfish purposes with social purposes, or to suppress social purposes when they clash dangerously with social purposes."²⁹⁰ For this reason, the state was required to "employ devices to encourage the social purposes"²⁹¹ which were in the true interests of the individual. One of the chief methods of doing so "is to identify his own selfish interest with some larger social interest. This is done by the two principles of Reward and Coercion."²⁹² The

²⁸⁷ Getzler, 2003.

²⁸⁸ Rommen, 1998: 104.

²⁸⁹ Dias & Hughes, 1957:411.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

echoes of Adam Smith here are palpable and the emphasis placed upon the utilisation of law as a means of achieving social purposes bear a strong resemblance to the later legal realist interventions of Pound, Holmes and Llewellyn in the United States of America and of Hagerstrom and Olivecrona in Scandinavia.²⁹³

When turning, particularly, to the more recent schools of anthropological jurisprudence, the situation is slightly more complex.²⁹⁴ A significant amount of work has been concerned with bringing to light the sophisticated nature of traditional societies as a way of emphasising their inherent cultural value and encouraging respect for the subtle interactions upon which they are based. Here again, however, although much anthropological work has been concerned to protect traditional societies from the coercive encroachments of colonisation and the alien structures of the modern industrialising state, this has not always been so,²⁹⁵ and in fact the more sensitive understanding of such societies and the complex normative structures which underpin them has actually performed the function of high-level surveillance which enables these structures etc., in the longer run, to be more effectively co-opted and then subsequently conclusively undermined. In this regard Richard Abel pertinently pointed, some time ago, to the way in which “the capitalist state actively seeks to undermine, displace and co-opt other forms of social control.”²⁹⁶

It is in this spirit that certain Marxist inspired thinkers have been pertinacious in highlighting the dangers of the various forms of relativism that have often come to be associated with many anthropological schools of thinking and this critique has extended most biting to take in post-modernist or post-structuralist schools of thought. As indicated earlier in the suggestive quotation from Carty, these stand accused of complicity in the pathologies of the capitalist system by adopting the posture of radicalism whilst neutering any potential it might have for sustainable resistance through adherence to a hyper-voluntarist ontology. In this context it might come as a surprise that even the determinedly realist and objectivist schools of Marxist jurisprudence have been capable of undergoing subtle forms of cooption by a capitalist logic of development. The former, in particular, began, and through its

²⁹³ Some major works in this tradition include: Holmes, 1897; Hagerstrom, 1933; Llewellyn, 1940, 1962; MacCormack, 1970; Olivecrona, 1939; Pound, 1931; Ross, 1946; Twining, 1973.

²⁹⁴ Diamond, 1973; Krader, ed., 1967; Pospisil, 1971.

²⁹⁵ Maine, 1986.

²⁹⁶ Abel, 1982: 275.

successors in the Critical Legal Studies movement,²⁹⁷ continued, to highlight the complex ways in which individuals and communities were subject to social and economic inequalities which helped to box them into suboptimal functional roles when viewed from a mass market perspective. In this way, the emancipatory though materialist critique with which Marxist schools were, and are, infused, have served very well the purposes of increasing the productive/consumptive efficiencies of the developing mass-market economy. Thus the grievance mechanisms and protective political and legislative counter-movements which such critiques have helped, and continue to help, ground “may be seen as ...[being at the] service of a constantly expanding welfare state, which thereby [helps] socialize...the costs of reproducing capitalism.”²⁹⁸ Indeed, it is precisely because “advanced capitalism requires the planning of consumption as well as production” not only that “[c]onsumer grievances must be satisfied so that consumers continue buying”,²⁹⁹ but also that individuals capable of performing the very role of ‘consumer’ are materially placed in a position in which they are capable of doing so. And it is for these reasons – so that the individual is kept passive and complicit as regards the basic structural and functional premises of the market society, but active as regards the role that such a society requires them to perform – that “it is necessary to generalise to relations of consumption those mechanisms that have been developed to control relations of production.”³⁰⁰

C: Regional Contexts

Having focussed upon the development of the ideological underpinnings of the industrial and post-industrial state legal cultures where they emerged first, namely in Western Europe and North America, attention now turns to the reactive and transformative impact that the coercive spreading of these ideologically programmed state structures has had upon the traditional legal cultures of China and India. Again, reflecting the overall shape of their wider historical reconfigurations, this dynamic is best analysed according to a very broad common framework. This is particularly so in

²⁹⁷ Kennedy, 1976; Unger, 1986,1996.

²⁹⁸ Abel, 1982: 280-281.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

respect of the third major phase of legal transformation which closely mirrors in its complex dynamic the third major phase of historical transformation.

1. China

a. Pre-agrarian

The dearth of available evidence means that very little that is not of an essentially speculative character can be said about the forms of normative pressure extant in China prior to the Neolithic revolution and the emergence sometime thereafter of various forms of nascent state structure. What does seem to be clear from various archaeological finds centring around early turtle shell and oracle bone inscriptions is that the earliest forms of Chinese pictograph seem to be heavily bound up with religious rites and sacrifices. This seems to anticipate not only later practices during the Shang and Chou dynasties where a distinctive class of religious functionary emerged to monopolise the written form and thus in its turn anticipate the subsequent emergence of a uniquely powerful scholarly class, but also, given the various nature related pictographic motifs, the religious significance of the natural world for subsequent Chinese religious development.

b. The Traditional System

The traditional Chinese legal practice, of which there is much greater evidence, built upon an unprecedented period of almost 2,400 years of legal activity which, whilst undergoing significant internal development, displayed a remarkable degree of continuity. Much of this continuity was based upon the rigorously cultivated religious, philosophical and ideological bases of social interaction with which the various levels of Chinese society were imbued. The two principal threads with which that conceptual fabric was woven were, first, the semi-religious practice of ancestor worship, which had been part of Chinese culture since earliest times, and, secondly, the philosophical precepts developed by the itinerant sage Confucius in the fourth century B.C.³⁰¹

³⁰¹ See generally; Bodde & Morris, 1967:3-51; Dawson, 1978; de Groot, 1894; Fung, 1948; Hsiao, 1979; and, MacCormack, 1996:1-17.

The core principle of ancestor worship was the continuity of the patriline. This was premised on the notion that the human community comprised both living and dead members. When members of the basic communal institution – the family – died, it was thought that they continued to live on in Heaven with similar needs to those they had on earth, though now, owing to their altered state, without the capacity to satisfy them. Instead they were possessed of new and supernatural powers to intercede on behalf of their living descendants thereby to secure their families protection and good fortune.³⁰² This system of mutual rights and obligations depended heavily upon the continuity of the male line because only males were able efficaciously to carry out the ceremonies on earth that were necessary to propitiate their ancestors in Heaven. Moreover, only males were remembered beyond the third or fourth generations in the ancestral line. Consequently, it was of crucial importance that the male line be secured, both for the sake of the familial continuity and for fear that the ancestral host, being starved of the ceremonial attention it required, would turn into a series of embittered spirits or ‘hungry ghosts’ wondering the earth and causing disruption and exacting vengeance.³⁰³

The filial piety manifested in the practice of ancestor worship did not, of course, commence upon death. It was a central premise of Chinese society that an individual should show respect to their family elders and particularly to their parents throughout their earthly existence.³⁰⁴ Moreover, since descendants were required to provide support to both the living and the dead, the most filial act was to marry and to procreate: particularly to produce a son. Conversely, the most un-filial act was to fail to do so. The attitudes inherent in the notion of filial piety infused the functioning of the entire legal system, from justifying the grounds of divorce, to specifying the degrees of capital punishment the most serious violations of the criminal law should attract.³⁰⁵ It was also manifested in a more general way in the development during the Song dynasty of a system of landholding designed to ensure that ancestors were provided for in perpetuity. Under this system, special ancestral trusts were established endowing property in the name of an ancestor so that the income from that

³⁰² Dawson, 1978:153-157,143-145.

³⁰³ Ibid: 147-149,151-157.

³⁰⁴ Ibid: 89-90,137-143,149-151.

³⁰⁵ MacCormack, 1996: 65-88,223.

endowment could be used to provide on-going support for the sacrifices his line required. So popular did this practice become that in some parts of southern China almost ninety percent of the land came to be held in ancestral trusts, with the descendants of common ancestors living together in order to enjoy trust benefits. In due course, these communities developed into linear villages in which groups of agnates claiming common descent lived together in one community with their wives and daughters, invariably governed by a system of gradually developed customary law written down in the periodically revised official genealogies, together with the names, titles, deeds and writings of their lineal ancestors. These clans, along the commercial and trades guilds in the cities and other local collectivities thus came to represent extremely important sources of informal rules and dispute settlement, distinct from, though complementary to, the system of imperial law administered by the imperial bureaucracy.³⁰⁶

If individual families were governed by the requirements of filial piety and ancestor worship, so too was Chinese society as a whole. Above all, it was believed that this wider society was held together by the person and practices of its most important living figure, the Emperor.³⁰⁷ The Emperor was a vital link between Heaven and earth, worshiping both his own ancestors and Heaven itself, in order to secure good fortune for the Empire as a whole. The Emperor was the 'Son of Heaven' and the mandate he was granted by heaven legitimised his rule on earth, but it also placed upon him a special responsibility to maintain cosmic harmony and thereby avoid calamities such as floods, draughts and internal disorders.³⁰⁸ Indeed, the occurrence of calamities such as these in too great a number would indicate loss of the heavenly mandate and provide justification for rebellion.³⁰⁹ The idea of the Emperor embodying the connection between Heaven and earth acted as a central tenet in the traditional conceptualisation of a universe in which nature and society were so intimately conjoined that any disorder within society could effect a disorder within the natural world. This of course, has strong associations with Daoist notions of natural harmony according to which human beings should practice non-action in order to remain in accord with the rhythms of the natural world. It was, in particular,

³⁰⁶ Ibid: 18-20,23-27; Dawson, 1978:3,10-11; Hsiao, 1960: 454-462; Freedman, 1958; Lui, 1959; Yang, 1945. On guilds, see: Burgess, 1948; Fried, 1983 and, MacGowan, 1886.

³⁰⁷ Dawson, 1978: 7.

³⁰⁸ Ibid: 17.

³⁰⁹ Ibid; MacCormack, 1996: 22. See also: Hucker, 1966; Turner, 1990.

associated with the dualist concept of yin and yang (originally meaning the dark side of the hill and the light or sunny side of the hill) connoting the positive and negative elements in nature that was applied to many aspect of natural and social life.³¹⁰ It was essential that the yin – used to characterise things that were dark, wet, female, passive, or of the earth as well as the autumn and winter months – should be kept in balance with the yang – applying to things that were light, dry, masculine, active, of Heaven and also the spring and summer months. Indeed, any significant imbalance could lead to a fundamental disturbance of the cosmos.³¹¹

The implications of this theory of the cosmos for the legal order were numerous,³¹² there was strict adherence to the principle that the punishment should fit the crime since any criminal act disturbed the balance of nature and therefore had to be re-balanced by an equivalent punishment.³¹³ For this reason great emphasis was placed in the Imperial Code upon determining exactly the correct punishment – no more, no less – since doing so was a question of no merely individual but of cosmic importance. Moreover, any magistrate discovered to have imposed an incorrect punishment would himself be punished, particularly if his error had led to the punishment of an innocent person.³¹⁴ Secondly, great emphasis was placed upon the merits of voluntary surrender, stressing, in particular, the importance of an offender surrendering himself before the offence had even been discovered. A culprit's willingness to admit their mistake and offer some reparation had the effect of more quickly rebalancing any natural disturbance caused and therefore attracted an appropriate discount on the standard punishment.³¹⁵ A third implication was the emphasis placed upon performing legal acts at the most appropriate and propitious times. Thus executions had to be carried out, wherever possible, in the autumn when the yin principle predominated and things were dying. For this reason, there were many days during the year upon which magistrates were prohibited from hearing cases. Occasionally, also the Emperor would see fit to order general amnesties in the face of some natural calamity with an eye to rebalancing natural harmony.³¹⁶ Fourthly and finally, there were implications in terms of legal responsibility. Since Heaven

³¹⁰ Dawson, 1978: 55-57, 75-76. MacCormack, 1996:70-71.

³¹¹ See generally, de Groot, 1894; and, Legge, 1867.

³¹² See generally, MacCormack, 1985,1989, 1990, 1991; Liu, 1993; and, Wu, 1967.

³¹³ MacCormack, 1996: 48-50,1990.

³¹⁴ MacCormack, 1996: 164-165,199,210. See also, Metzenger, 1973.

³¹⁵ MacCormack, 1996: 9-10,138-140,158-159,209-210.

³¹⁶ MacCormack, 1996:13,45-51,210-212.

delegated to the Emperor the authority to rule as well as the duty to maintain natural and social harmony, so the Emperor too delegated these responsibilities to his subordinates, and this process delegation reached right down to the heads of individual households.³¹⁷ For this reason the dual notions of authority and responsibility operated as extraordinarily pervasive justifications for the enforcement of strict obedience of subordinates to their superiors, thereby intimately intermingling ethics and law.³¹⁸ At the same time, since disturbance in the social order was seen as a failure on the part of those to whom the responsibility to maintain it had been delegated, there was also strong pressure to conceal problems and avoid all forms of public querulousness.³¹⁹

Coupled to the strong tradition of ancestor worship and the cosmic vision it embodied was an equally powerful influence of Confucianism as moderated from the mid third century BC by certain significant principles of legalist philosophy. The great debate between the Confucianists and the Legalists took place between the fifth and third centuries BC. It essentially concerned what might today be termed issues of political philosophy, with Confucianism emphasising a more consensual approach to social control in the face of the Legalist emphasis upon a more coercive approach. The central concept of Confucianism was adherence to the *li*, which can roughly translated as 'right-conduct'; it was by such adherence, rather than by force, that the virtuous ruler's example should become the basis of society's government. According to Confucius society manifested a natural and inherent hierarchy, in which people were unequally endowed, both in terms of ability and in terms of inclination.³²⁰

Consequently, important divisions emerged which meant that people in society could not be given the same roles or treated as equals. In particular, a distinction was made between the 'great men' and the 'small men', corresponding to the two types of work which individuals engaged in within society – the mental and the physical. The 'small men' engaged in physical work: they were the farmers, the artisans and the merchants, concerning themselves with production of goods and services. The 'great men' in contrast, particularly the scholar-officials, focussed upon study and the acquisition of virtue. 'Small men' were expected to serve 'great men' who were considered to be

³¹⁷ MacCormack, 1996:73-74,80,83-84. For a very interesting dimension of this cascading network of rights, responsibilities and liabilities, see Dutton, 1992.

³¹⁸ See: Guangwu, ed., 1991; Ho, 1964; Hsiao, 1979; and, Schwartz, 1987: 1-10.

³¹⁹ See: Shapiro, 1981.

³²⁰ Dawson, 1978: 6-8,15-17,51-53; MacCormack, 1996: xv,3,6-11,52-56,62-68.

essential to the correct functioning of society.³²¹ Within this wider framework of superiority and inferiority, social relations were structured further with reference to the 'five human relationships' arranged in order of priority as a way of more precisely specifying the principles underlying correct behaviour, which if observed would avoid conflict and enable society to function as it should. These were, first, the relationship between ruler and subject; secondly, that between father and son; thirdly, that between husband and wife; fourthly, that between elder brother and younger brother; and finally, that between friend and friend.³²² Embodying, as already mentioned, at its heart an essentially consensual approach to government, the Confucian ethic placed a great value upon compromise wherever disputes arose. Consequently, if one felt wronged, it was better to suffer the wrong stoically than to cause further disturbance by insisting upon redress, or to reflect critically upon one's own conduct to see if there was anything in one's own behaviour that could be improved in order to remove the source of disturbance which was leading the other party to behave in an apparently inappropriate way. As such, a virtuous man did not insist upon his rights, but strove to settle disputes through mutual concessions which enabled each party to maintain their dignity and to save face.³²³ Indeed, the pressing of a lawsuit involved a significant loss of face, since it implies either that the person themselves was too obstinate or lacking in virtue to avoid going to court, or that he was insufficiently respected by other members of the community for them to make concessions and thereby avoid litigation. It is for this reason that a great deal of emphasis was placed upon achieving compromise, and upon the role of various forms of intermediary in helping to do so.³²⁴

In the wider context, this led to an attitude within Confucian ideology which considered both law and punishment to be profoundly inferior methods of social control particularly in comparison with a correct observance of *li*. The former relied upon the existence of the threat of external violence, whereas the latter depended upon the cultivation of internal self-discipline. As a result, on the Confucian view, law was at best a regrettable necessity and lawsuits represented a disturbance in the natural harmony that should exist within society. A much better way to resolve disputes was

³²¹ MacCormack, 1996: 111-120.

³²² The first three of these were considered of particular importance and were referred to as the 'three bonds'. Ibid: 8,56,73-74,83-84.

³²³ Ibid: 6-11. See esp: Shapiro, 1981: 157-161, 181.

³²⁴ Ibid. Also: Cohen, 1966: 1201.

through moral suasion. Punishment, then, was seen as a mere supplement to moral discipline. Moreover, punishment without education was considered to constitute a form of tyranny.

The Confucianist approach contrasted with of its great rival the *fa jia* or legalist school. Much more coercive in its approach, according to the legalist thinking good government should be founded upon a strong and centralised state administration in which the ruler governed by strict rules and heavy punishment applied equally to all ranks.³²⁵ Virtuous example, lauded by the Confucianists, was considered to be completely without use by the legalists. It was this legalist approach which found general employment during the Third century B.C in the state of Chin both before and after it achieved the unification through conquest of all China. Amongst other things, the Chin dynasty compiled a code of punishment,³²⁶ divided the country into districts administered by local magistrates and imposed collective responsibility for crimes,³²⁷ with families grouped into units of ten under a head responsible for the conduct of all those individuals within his jurisdiction.³²⁸

Despite the great power this form of government afforded to the Chin in terms of military expansion, once that expansion had ended it proved in the longer term to be altogether too harsh a basis upon which to construct an enduring political settlement.³²⁹ In consequence, it was not long before the Chin found itself deposed by the Han dynasty which determined to re-establish a Confucian based approach to government, beginning a period in which it was entrenched as the essential state orthodoxy which was to last right up until the revolution of 1911.³³⁰ Whilst Confucianism returned to a place of central importance in imperial governmental thinking, however, the influence of the legalist did not altogether disappear. Instead, the Han rulers produced a sort of syncretic mix of Confucianist and legalist thinking which meant that both traditions found some expression in subsequent Chinese legal operations.³³¹ In particular, legalist institutions such as the publication and re-

³²⁵ Dawson, 1978: 12; MacCormack, 1996:4-6,21,52-53,190-192,195-196.

³²⁶ MacCormack, 1996: 211-212.

³²⁷ Hulsewe, 1987; Liu, 1993; and, MacCormack, 1990.

³²⁸ Dutton, 1992; and, Hsiao, 1960.

³²⁹ Liu, 1993; and, MacCormack, 1990.

³³⁰ See generally: Bodde & Morris, 1967; Dawson, 1978; de Groot, 1894; Fung, 1948.

³³¹ MacCormack, 1996: 62-68,192-193,198. See also: Hulsewe, 1987.

publication of legal codes,³³² the penal emphasis of the legal system,³³³ and the practice of dividing the empire into counties presided over by imperially appointed magistrates,³³⁴ continued to be of enduring significance alongside the distinctively Confucian practices of recognising in law differing status groups and their special entitlements,³³⁵ the characterisation of criminal acts according the hierarchy implied in the five human relationships,³³⁶ and the process of selecting administrative officials on the basis of successful performance in imperial examinations the substance of which tested examinees familiarity with the Confucian classics.³³⁷

c. The Impact of European Expansion

i. Treaty-Ports and Reaction

By the late nineteenth century traditional values and structures in China were facing powerful challenge. The emergence of an internal commodity economy and rebellious unrest mixed together with powerful foreign military, political and ideological pressures to result in the armed extraction of a series of humiliating colonial concessions.³³⁸ The Treaty of Nanjing (1842), which ended the first Opium War, set the standard for the subsequent ‘unequal treaties’, and was followed in 1844 by a treaty with the United States that, in addition to securing trading privileges, established the principle of extraterritorial jurisdiction. This meant that foreign nationals residing in China would be governed by the laws of their native countries. As such, a foothold was established in China for the legal systems, not just of the United Kingdom, but also of France, Russia, Germany, Sweden, Norway, Belgium and eventually Japan also. In addition to the self-questioning that these humiliating concessions, together with the enormous unrest manifested in the Taiping rebellion, caused among the traditional Chinese Confucian elites, they also provided a powerful and permanent conduit through which western jurisprudential ideas could enter China. Moreover, even in the initial ‘conservative’ response to these challenges embodied in the Tongzhi Restoration, the Imperial bureaucracy under Prince Kung was forced to

³³² MacCormack, 1996: 211-212.

³³³ MacCormack, 1990: 91-95, 138-143; Shapiro, 1981: 165-166.

³³⁴ Dawson, 1978: 6; and, Watt, 1972.

³³⁵ MacCormack, 1996: 48-50.

³³⁶ *Ibid.*: 13, 48-50, 54-56; Guangwu, ed., 1991; and, Schwartz, 1987.

³³⁷ Myasaki, 1976.

³³⁸ For a useful summary see the relevant chapters of: Chen, 1999. More specifically, see, Fairbank, 1978.

engage in unprecedented institutional innovation with the establishment of a nascent department for foreign affairs in the guise of the Tsungli Yamen (1861) to supplement to the work of the Six Boards. Eventually, with the ultimate failure of this attempted restoration, the further devastating humiliation of the Sino Japanese War in 1895 and the Treaty of Shimonoseki, and the debacle surrounding the 'Hundred Days Reform', the palace coup and the Boxer Rebellion, more extensive reform became inevitable. Indeed, the failure of the Boxer Rebellion finally caused the Empress Dowager to issue an edict calling for suggestions from high officials as to the revision of China's laws along western lines and ordered ambassadors residing abroad to examine and report upon the laws in the jurisdictions to which they were accredited.³³⁹ In May 1902 two senior officials were ordered to re-edit all the laws then in force to bring them into line with international commercial obligations,³⁴⁰ and in May 1904 a Law Codification Commission was appointed.³⁴¹ The establishment of this commission marked a serious and significant institutional commitment to long-term legal transformation and it soon initiated a comprehensive two-stage programme of reform. During the first of these stages it swiftly revised the old law to respond to western criticism. During the second, codes were drafted to provide the basis for entirely new systems of judicature, criminal justice, criminal and civil procedure and economic law.³⁴²

At the same time, an equally important process of constitutional reform was begun with the dispatch of a separate commission to 1905 to Japan, Europe and the United States to study the operation of their various constitutional arrangements.³⁴³ Upon its return in 1906 it recommended that the Japanese model be adopted, and an imperial decree was issued ordering high officials to ready themselves for constitutional government.³⁴⁴ The choice of Japan as a model for these reforms was no accident. In view of Japan's success in reversing extra-territoriality and asserting herself as an industrial power, numerous young Chinese scholars had long since travelled to her shores to study the implementation of her legal codes, many of which had been rendered into Chinese. This provided a ready made pool of experience and material

³³⁹ Cameron, 1963: 57-58.

³⁴⁰ Meijer, 1967: 10.

³⁴¹ Cheng, 1948: 179.

³⁴² Chen, 1999: 20. Also: Meijer, 1967: 14-15.

³⁴³ Woodhead, ed., 1926: 615.

³⁴⁴ Cameron, 1963: 102-103.

upon which those in charge of China's reform process could easily draw.³⁴⁵ More importantly, Japan's laws were themselves modelled on those of continental Europe, offering an example of European jurisprudence already successfully transplanted to the orient and showing very clearly that, of the two great European legal traditions, that of the Roman civil law, with its emphasis upon the authority of the state and of the family, was much the better suited to East Asian conditions.³⁴⁶ Thus armed with a body of precedents tried and tested in contexts, historically, ideologically and linguistically similar to China's own, a Committee for Investigating and Drawing up Regulations of Constitutional Government was established in 1907.³⁴⁷ By the time of the revolution in 1911, it had promulgated a series of edicts and constitutional documents covering a wide variety of subjects.³⁴⁸

ii. The Nationalist Legal System

With that revolution and the establishment of the Republic, existing laws were allowed to continue in force insofar as they were not modified by new legislation or found to be in conflict with the principles of the Republic.³⁴⁹ The Provisional Code of 1912 abolished torture, ended collective responsibility for crimes of family members and removed the principle of crime by analogy, and there was a sustained effort to intensify the reform programmes initiated under the Qing. These continued during the vicissitudes of the early Republic, and were greatly accelerated after the establishment of the Nanking government in 1927. Accordingly, "an extensive programme of legislation by the KMT government was carried out, in which draft codes prepared during the Qing reform were re-examined, revised and in some cases promulgated after re-evaluation in accordance with KMT guiding ideologies."³⁵⁰ This ultimately resulted in the famous "Six Codes" of the Republic and the elaboration of an entirely new judicial system based ostensibly upon the European continental model.

Importantly, though there were continuities between late Qing and Republican programmes of law reform, KMT ideology made a number of distinctive

³⁴⁵ Hao, 1997, quoted in Chen, 1999: 21.

³⁴⁶ Cheung, 1948: 285; and, Ping-Shueng, 1930.

³⁴⁷ Meijer, 1967: 40-41.

³⁴⁸ See, Yen, 1968; and Woodhead, ed., 1926.

³⁴⁹ Gilpatrick, 1950-51.

³⁵⁰ Chen, 1999: 23.

contributions.³⁵¹ This ideology was summed up in the *San Min Zhu Yi* of Sun Yat Sen – the “Three Principles of the People” – Nationalism, Democracy and People’s livelihood. Nationalism was the principle of recasting “China into a unified state internally and a strong country...externally; Democracy was the practice of western democratic ideas within a Chinese context; and people’s livelihood was the establishment of a welfare system...and an improvement in the livelihood of the masses...by means of equalisation of land ownership and control of capital.”³⁵² These principles, both authoritarian and instrumentalist in nature, were based upon a clearly hierarchical conception of mankind which Sun divided into those to guide, those to follow and those to be guided.³⁵³ In place of the traditional Chinese focus upon family and clan and the western emphasis upon the rights and freedoms of the individual, *San Min Zhu I* legislation assigned central importance to the interests of the Nation as a whole. Thus though it attempted to breakdown the traditional family system by instituting equality of the sexes, freedom of marriage and spousal property, it did not allow these newly guaranteed freedoms to challenge the integrity of the state which always enjoyed absolute precedence.³⁵⁴ Instead, in providing for tight party control of the legislative process through its Central Political Council and Central Executive Committee, *San Min Chu I* ideology laid down a marker for subsequent legal developments by ensuring highly centralised ideological control.

iii. The Communist Legal System

1. Pre-1949

In the decades prior to the establishment of the PRC, the Chinese Communist Party operated a considerable range of governmental, judicial and extra-judicial mechanisms.³⁵⁵ As with Chinese communist ideology in general, the legislative policies implemented during this period had two main influences. The first of these derived from Chinese cadres trained in Moscow and sent back to China by Stalin to foment Bolshevik-style urban revolution; the second stemmed from rural cadres with experience mobilising the peasantry in the countryside. Upon the death of Sun-Yat

³⁵¹ See generally, *Ibid*: 24-28.

³⁵² Sun Yat-sen, undated. See also: Chu-Yuen, ed., 1989; Escarra, 1936: 152-346; Linebarger, 1937; and, Powd, 1948.

³⁵³ Chen, 1999: 24-25.

³⁵⁴ Escarra, 1936: 165.

³⁵⁵ Chen, 1999: 32-36. The classic study in English of Pre-1949 Chinese communist legal experience is Butler, ed., 1983.

Sen and the shift in Chinese communist activity to the countryside, these influences were embodied in a number of substantive legislative experiments.

The first of these experiments began in 1931 with the CPC's adoption of the General Principles of the Constitution of the Chinese Soviet Republic in Jiangxi.³⁵⁶ The Principles were subsequently augmented with laws and regulations – the Land Law, Labour Law, Marriage Law and Regulations for Punishing Counterrevolutionaries – specifying more precisely the methods for effecting socialist transition.³⁵⁷ Under these arrangements ideologically driven socio-economic discrimination became ubiquitous. Red Army members, workers and peasants were granted the exclusive right to an education, to vote and to stand for election. Courts applied variable punishments depending upon class background. The rural community was sub-divided to facilitate a radical policy of land confiscation and redistribution. Counterrevolutionary suppression committees were allowed to arrest, try and execute criminals and administrative punishment and re-education through labour was widespread. Finally, the idea of 'mass mobilisation' or the 'mass line' was utilised.³⁵⁸

With the Japanese invasion of China in 1937 CPC policy became more moderate. This was consequent upon the formation of the second United Front and reflected the Leninist approach to law which characterised it as a political tool that could be moulded according to the needs of the moment.³⁵⁹ After 1937 these needs were defined as being either the encouragement or the punishment of all those respectively who either aided or opposed the anti-Japanese struggle. As such, the *Programme of Administration of the Border Regions* promised to ensure respect for the democratic rights of all opposed to the Japanese forces. It stressed the principle of equality before the law and included within an expanded category of 'the people': landlords, rich peasants, capitalists and the military personnel of the Nationalists.³⁶⁰ Regulations issued during 1940-41 further protected private property rights and ceased to emphasise land redistribution. Moreover, although real law during this period continued essentially to derive from CPC issued decrees and judicial departments

³⁵⁶ Hazard, 1983.

³⁵⁷ Simons, 1983.

³⁵⁸ Ibid.

³⁵⁹ Mao Zedong, 1975: 315.

³⁶⁰ The text of the *Programme* can be found in South West Institute of Political Science and Law, ed., 1982: 8-10 quoted in Chen, 1999: 33n.13.

were often merged with and dominated by the executive, nevertheless, areas under CPC control theoretically became part of the Guomintang government and in some cases Guomintang legal codes were simply adopted wholesale for application in the communist areas.³⁶¹

A third period began in 1946 and lasted until the establishment of the People's Republic of China in 1949. Victory over the Japanese forces in 1946 marked the end of the second United Front and a return to the bitter fighting between the communists and nationalists which saw each more determined than ever to take control of the nation. As such, the *Constitutional Principles of the Shan-Gan-Ning Border Area* of 1946, the third constitutional document issued by the Communist Party, reflected a clear return to soviet style government, with a renewed emphasis upon violence, terror and class discrimination in the implementation of Party policy and the widespread proliferation of torture and on the spot executions.³⁶²

2. Post-1949

Upon the establishment of the PRC in October, 1949, the first step taken by the CPC in extending socialist legality across China was to dismantle the pre-existing legal system of the Guomintang. In contrast to the arrangements put in place by the Guomintang itself after the fall of the Qing in 1911, the revolutionary thrust of CPC ideology made the continuation of the nationalist legal machinery both theoretically problematic and practically inexpedient. Accordingly, 'The Instruction on the Abolition of the Collection of the Six Laws of the Guomintang' and the 'Confirmation of the Judicial Principles of the Liberated Areas'³⁶³ issued by the Central Committee of the CPC in February, 1949, declared the abolition of all existing laws of the Guomintang regime. This action was confirmed in the *Common Programme of the Chinese People's Political Consultative Conference* in September, 1949, a document, jointly produced by the CPC and the 'democratic parties', which served as a provisional constitution until 1954.

³⁶¹ Ibid: 34.

³⁶² Zhong, ed., 1982.

³⁶³ North Western Institute of Political Science and Law, ed., 1982: 11-13, quoted in Chen, 1998:35. After a brief period of consultation the instruction was actually implemented in March, 1949 by an 'Order of the North China People's Government to Abolish the Six Codes and All Reactionary Laws.'

Between the years 1949 and 1953, the urgency to fill out, in all but the most general of terms, the legal vacuum left by these acts of abolition was little felt by the Communist leadership. Instead, the period was regarded as a time for the consolidation of newly gained power, and one which would benefit from a certain amount of juridical flux.³⁶⁴ Such institutional uncertainty, it was felt, would aid in rooting out class enemies and in effecting the 'transition from New Democracy to Socialism'. To this end, it was also a period characterised by numerous mass campaigns. These campaigns, which included the Land Reform Movement (1949-51), the Movement to Suppress Counter-revolutionaries (1950), the Movements against the Three and against the Five Evils (1952), and the Judicial Reform Movement (1952-53) were each initiated by the top Party leadership to stir 'the masses' into giving effect to policies designed to break down the old social order and to reconstruct society in the image of the revolution.³⁶⁵ For the same reason, ad hoc 'people's tribunals' were set up to conduct 'mass trials' across the country with the power physically to mistreat defendants and to sentence them to death with the minimum of procedural safeguards.³⁶⁶ Whilst a number of these movements did gradually come to be given formal legal expression prior to 1953, this remained of an essentially programmatic and provisional nature, with the correct application of legal rules being a priority clearly subordinate to the implementation of wider policy objectives.

Not until the end of 1952 did the Party begin indicating that this period of power consolidation was drawing to a close and that it was soon to be replaced by one of full-scale economic construction. The latter policy was initially adopted in 1953 along with the First Five Year Plan and was then incorporated into the first full Constitution of the PRC in the following year.³⁶⁷ It was accompanied by official recognition of China's need to establish a proper socialist legal system and of the inadequacy of pre-1949 CPC legal experience as a model for doing so.³⁶⁸

Along with the 1954 Constitution, Organic Laws for the People's Courts, the People's Procuratorates, the National People's Congress, the State Council and the institutions of local government had also been adopted, as had Regulations on Arrest and

³⁶⁴ Chen, 1999: 36.

³⁶⁵ Brady, 1982; Brugger, 1981: 50-88.

³⁶⁶ Chen, 1998: 24-25.

³⁶⁷ Mao Zedong, 1982: 407, quoted in Chen, 1999: 37.

³⁶⁸ Chen, 1999: 38.

Detention. And together with the passage of a number of other interim laws, regulations and decrees, the following three years saw the initiation of an extensive drafting program to prepare the major codes needed to form the backbone of an entirely revamped legal system.³⁶⁹

This effort was abruptly ended with the inception of the Anti-Rightist Movement in 1957. Hundreds of thousands of people were designated as 'rightists' and sent for 're-education through labour', in a process that admitted neither of formal court procedure nor subsequent right of appeal.³⁷⁰ Amongst those acted against were thousands of jurists, lawyers and judges who were accused of using the law to oppose the Party by stressing the independent administration of justice. The prestige of legal institutions consequently fell sharply after 1957 and many lower level courts were merged with their corresponding public security organs and procuratorates. In 1959 the Ministry of Justice was itself abolished, and the formal trial system virtually came to an end.

There was a change of policy direction again in the early 1960s after the debacle of the Great Leap Forward. In February, 1962 the Central Committee explicitly recognised the need for the development of a commodity economy, and work was once again begun on the drafting of basic legal codes in areas of the criminal and civil law.³⁷¹ This renewed program was, however, destined to last for only a short period. First, it was partially suspended during the Four Clean Ups or Socialist Education Movement of 1963-65,³⁷² and then it was completely and comprehensively reversed during the decade long Cultural Revolution of 1966-76, during which time the entire legal system was specifically targeted as a bourgeois construct and virtually destroyed. Indeed, such was the extent of the breakdown in normal legal functioning that the only real source of authoritative guidance came to be the day to day pronouncements of Mao and his closest circle of advisors.³⁷³

³⁶⁹ Ibid: 39.

³⁷⁰ Brugger, 1981: 174-206. See also Suinian & Qingan, eds., 1986.

³⁷¹ Hazard, 1975.

³⁷² Brugger, 1981: 21-42.

³⁷³ Tay, 1976: 417-423.

3. Post- Mao

Indications that the worst excesses of the Cultural Revolution had begun to pass came with the adoption of a new Constitution in 1975. Though this Constitution was much more programmatic and abbreviated than its 1954 predecessor, given the almost complete breakdown in law and order which had immediately preceded it, the fact that it was promulgated at all was significant of a least some intention to return to the barest minimum of legality. Nevertheless, the radicals' hold on power was not conclusively broken until after the death of Mao in September, 1976. In the following month the notorious 'Gang of Four', led by Mao's wife – Jiang Qing –, were arrested and a process of fundamental policy change begun. Thus, at the first session of the Fifth National People's Congress, CPC Chairman, Hua Goufeng, and NPC Standing Committee Chairman, Ye Jianying, both spoke of the need to strengthen the socialist legal system. And in the preparatory meeting of the December, 1978 Third Plenum of the Eleventh Central Committee of the CPC, which marked the replacement of Hua Guofeng by Deng Xiaoping as paramount leader and the decisive victory of the pragmatists. Thus, the final communiqué of the Third Plenum declared that since, in the words of Albert Chen, "the exploiting class in China had basically been eliminated, class contradiction was no longer the dominant contradiction in Chinese society; that economic construction instead of class struggle was now to be emphasised...; that the past practice of mass political campaigns was to be abandoned; and that socialist democracy and a socialist legal system ought to be developed."³⁷⁴

This then, marked a new and enduring departure in CPC policy towards law and the legal system, one intimately linked to the need to revive China's sagging economic fortunes and Deng Xiaoping's strategy of gradually re-engaging the world economy. As will be seen more clearly in the following chapter, this policy has become more and more explicit as the reform period has progressed and as this has happened so legal reforms have grown at an astonishing pace. In particular, the sheer volume of new legislation on all manner of issues has expanded exponentially. This is just the most obvious sign of China's concerted effort to rebuild its legal system and to fit it

³⁷⁴ Chen, 1998:33-34. See, *Communique of the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party of China*. See also, *Resolution on Questions of Party History Since the Establishment of the PRC*, adopted at the Sixth Plenary Session of the Eleventh Central Committee of the CPC in 1981.

out in the service of an increasingly pervasive market economy. However, as reform has unfolded, these legislative initiatives have had to be joined by fundamental attitudinal changes within the every level of the Chinese Party-state and indeed of Chinese society more generally. Much the most severe difficulties encountered by the reforming elites have been in trying to effect these attitudinal changes in practice, and the struggle to do so has formed the substance and drama of contemporary Chinese politics.

2. India

a. Pre-agrarian

As with the earliest signs of Chinese normative social ordering, the evidence from the from pre-neolithic South Asian communities is extremely patchy. Once more, all that can be attempted is to try to detect the seeds of the fundamental, largely religious, principles and postulates that take on obvious co-ordinative importance only much later in the historical record. To this end, there are a number of very tentative signs very early on which point to some of the constants in South Asian society. Once more these are largely religious in nature and range from indications in the form of figurines of an early attachment to some form of mother goddess, to humped bull and stone phalluses which carry distant echoes of Shiva worship.

b. The Traditional System

i. Hindu Law

Although the rich body of sanskritic literature dating from Vedic times furnishes little in the way of detailed anthropological description, it does offer a unique insight into the mindset of pre-classical Aryan culture and, as part of that, into the precepts which informed attitudes to interpersonal disputes and their resolution. In particular, it offers insight into contemporary views about the individual's place in the universe, emphasising time and again what came to be the fundamental Hindu conceptualisation of social life, namely, the relationship between macrocosmic order

– *rita* – and microcosmic order – *dharma*.³⁷⁵ In this way, the Vedas, as sacrificial hymns which invoked a pantheon of Vedic gods, rather than laying down rules or codes of law to be followed, expressed in grand mythological terms the overall world view of Aryan society. At the heart of this world view was the idea that the universe constituted an ordered and symbiotic whole in which every component part, including every conscious being, had a determinate role to play. In the concrete life of human society failures to harmonise with this whole led to a constant struggle, both individually and collectively, to repair ruptures in the universal order by developing greater adherence to the path of duty as a way of bringing individual expectations into greater conformity with concern for the common good. Thus, “Hindu law is from the start based on a continuous complex dialectic process.”³⁷⁶ At the heart of this process was an understanding of the notion of *rita* which represented cosmic order or truth which emerged from hidden or uncreated origins and which was given expression through the regularities of nature. The invisible mechanisms maintaining this order involved both gods and men alike and it was through this idea that solemn sacrifices were originally elaborated to ensure the benign nature of the divine influences believed to be so essential to social flourishing in the context of a profoundly interlinked universal whole.

Although it seems that only a certain portion of the community (the Brahmin priests) took an active part in these sacrificial rituals, it appears that they were meant to represent particular sections of mankind.³⁷⁷ Eventually, these rituals came to involve more or less powerful rulers but the continuing fragmentation of the subcontinent prevented these ‘kings’ as a class from becoming important regulators of religious ritual.³⁷⁸ In terms of the regulation of Vedic society there is little evidence of rules being imposed by a sovereign. Instead, law seems to have developed more or less informally from the bottom up and consequently manifested a great deal of local diversity and specificity, and this diversity persisted despite the fact of an overall bias towards the principles of patriarchy and in some instances matriarchy. The diverse origins of Vedic social organization were manifest in the variegated nature of the Vedic literature itself, designated as *sruti* “what was heard” and therefore seen as

³⁷⁵ Miller, 1985. See also: Day, T., 1982.

³⁷⁶ Menski, 1997: 7.

³⁷⁷ Ibid.

³⁷⁸ Kosambi, 1992.

divinely revealed knowledge, nonetheless emerged from an unknown number of ancient sages rather than one identifiable source.³⁷⁹ It is clear that Vedic understanding of ordering gave less importance to the individual than to non-human or super-human elements, and that the Vedas as sacrificial manuals were primarily premised upon the idea of meticulously performed rituals yielding desired cosmic results.³⁸⁰ Quite soon however it appears that many of these rituals fell into disuse as it became clear that reliance upon sacrifice alone was inadequate. Consequently, it is possible to discern a gradual shift to greater emphasis upon the actions of the individual and the concomitant development of a system of norms reinforcing their importance. This shift from ritual action to good action emphasized increasingly the importance of appropriate action or behaviour, with *dharma* or the individual's duty requiring the correct disposition in each situation. Thus whilst "the basic concept of interrelatedness between man and universe remained [the core element] in Hinduism...[it becomes elaborated]."³⁸¹ This is manifested in the gradual emergence of appropriate mechanisms for marriage solemnisation etc. In this way, family relationships increasingly became the principle arena in which the dharma was cultivated.

Building upon the conceptual foundations of the Vedic period, new classes of Hindu literature began to emerge between about 800 BC and 200 AD. The mass of originally oral literature had neither fixed dates nor identified authors, but from about 500 BC it came to be consolidated into identifiable texts. Indeed, the huge body of literature elaborated in this period by the small, literate, Brahminical elite became so diverse that specialization became inevitable and individual texts came to further consolidated or grouped into combinations such as the *dharmasustras*, *dharmasastras*, and *grihyasutras*, each of offering guidance on specific areas of life and behaviour.³⁸² Overall, this body of knowledge referred to as *smriti* or 'remembered truth', whilst possessing great authority, was nevertheless somewhat ill-defined. At its heart lay the central concept of dharma "what is conducive to ordering", "appropriateness". Dharma refers to the obligation of every individual to act correctly in each given circumstance. Thus it is both universalist in its conception but also highly sensitive to

³⁷⁹ Derrett, 1979: 21-36 and 1966: 67-74.

³⁸⁰ Kane, 1968: 1269; Menski, 1997:9.

³⁸¹ Menski, 1997: 9.

³⁸² Menski, 1984. See also: Derrett, 1968; and, Pandey, 1969.

specific contexts. In the past understanding of dharma which is an extremely complex concept has tended to be distorted by an over-emphasis on notions such as *ahimsa* or non-violence when in fact it only truthfully proscribes unjustified violence. To really understand the concept of dharma one has to understand its origins in the larger concept of *rita* which falls during this period into disuse as a somewhat technical term.

Dharma, which came during this period to refer to the eternal order of the universe comprising all levels of existence from the largest to smallest, encompassed in this context all human activity, including inaction, which came to have the most significant consequences. It was during this period also that the notion of *karma* that is “retribution as a result of action” emerged alongside dharma to form “a complex system of moral demands and retribitional threats and promises.”³⁸³ From these linked tenets, the science of *dharmasastra* developed, defining the other principal objectives of human living: worldly possessions (*artha*), sensual gratification (*kama*) and ultimately salvation (*moksa*). These more specialised *dharmas* included *stridharma*, or women’s duty, and *varnasranadharmas*, an all encompassing notion with application to the effect that “each individual’s caste status and their stage of life have a bearing on *dharma*.”³⁸⁴

As with the Vedic records of the *sruti*, *smriti* texts did not elaborate detailed legal provisions, instead they proposed ideal models and thus served a function quite different from that of straight-forward legal textbooks, but a function which is nonetheless of great importance for an understanding of classical Hindu law concepts.³⁸⁵ A few of these *smriti* texts concerned themselves with the position of the Hindu ruler, which indicates a significant conceptual shift towards the end of this period, away from an emphasis on the individual’s self-control toward the idea that self-control needed, in the reality of day to day living, to be supplemented by punishment in order for *dharma* to be preserved at the societal level.³⁸⁶ Consequently, whilst an individual Hindu continues to bear the primary responsibility for the maintenance of *dharma*, its transgression remaining a sin which requires personal

³⁸³ Lingat, 1973; Menski, 1997: 13-14

³⁸⁴ Ibid.

³⁸⁵ Hoadley & Hooker, 1981; Lariverie, 1993. Also, Derrett, 1968: 148ff.

³⁸⁶ See generally: Day, 1982; and, Menski, 1992.

penance and attracts post-mortal consequences, at the same time some violations of *dharma* also turn into a variety of crime attracting punishment inflicted by his ruler or representative who now grows in prominence as the guardian of *dharma*. This arose in what came to be known as *rajadhama* which represents according to some the development of just another specialised branch of the science of duties, but on reflection its particular significance lies in the cognate emergence of functionally distinct state apparatus. According to the smriti texts the ideal Hindu ruler fulfils the function and takes on the characteristics of *varuna*, the divine Vedic version of *rita*.³⁸⁷ (And although the epic sanscritic and pancritic literature provides much evidence of the increasing involvement of rulers and their judicial functionaries in litigation situations and of the *rajadhama*'s emergence as an important subject in its own right, the ruler's main role continues to be not to enforce his own purely man-made positive law but enable each individual to follow their own *dharma*. In this way "the Hindu rule acts as a justice facilitator, not the creator of legal rules." "He makes no law, he administers what his people see to be their law, seeking to ensure thereby that morality is not disregarded and that individual perceptions of law remain within the overriding ambit of *dharma* in its macro and micro cosmic dimensions."³⁸⁸ Thus it is clear that the rule became an important arbiter in cases of competing claims and thus helped contribute to the development of more formal litigation practices. A great deal of evidence exists to show that local notions of 'appropriateness' and customary norms continued to remain the major source of law in day to day practice.³⁸⁹ The rules found in the sastric literature apply, insofar as they did to particular cases, not as binding legal prescriptions, but rather as rules of guidance in no way gainsaying the need to take account of the particular situational context in question.³⁹⁰ Thus although during this period we begin to see, within the overall theoretical context of pre-existing universal order, a gradual shift of emphasis towards the greater external supervision of dispute settlements, the emphasis upon individual conscience and self-determination continues to remain dominant.³⁹¹ As such, despite indications to the contrary in certain written materials such as the *Manusmriti*, the primary source during this period remained that of *sadacara* or 'model behaviour' which derives from the process by which an individual internalises those standards considered to be

³⁸⁷ Manusmriti 9.245.in Buhler, 1975.

³⁸⁸ Menski, 1997: 16.

³⁸⁹ Nikam & Keown, 1962.

³⁹⁰ Derrett, 1968: 156-157.

³⁹¹ Derrett, 1979: 32-37.

right and proper within the local group within which they lives.³⁹² The fact that justice *nyaya* or *yukti* is sought from the situational context rather than through the application of more abstract rules clearly created a situation in which custom and *smriti* came into conflict.

Custom was put under pressure to conform to the ideals of good behaviour laid down in *smriti* texts, yet at the same time there was a strong counter-pressure to maintain differential statuses and different *dharmas* from within the classical customary context. Thus, it remained the fact that it was only in the last resort, when no other guidance was possible, that a classical Hindu would look to the scriptural sources: the *smriti* first and then the *sruti*.³⁹³ The continuing primacy of *sadacara* and localised self-regulation is apparent even in the more coercive developments of classical Hindu law. Ideally, of course, the idea of dharma was that everybody should monitor themselves and adjust their inner inclinations in harmony with the wider cosmic order. The limitations of human selfishness, however, meant that there was increasing evidence of external forces such as *danda*, the ruler's power to punish being used to supplement self-regulation with a measure of supervision to help strengthen and support individual and local self-governing processes in a manner very similar to that developed in the early part of the Chinese empire. Importantly, even here, however, though the temptation to lay down fixed rules would no doubt have increased significantly, even these coercive state interventions remained of an essentially supplementary nature: a fact reinforced by the absence of a strong political centre for most of Indian history. The ruler's function thus remained throughout, limited to ensuring that, "the equilibrium of relativities was not unduly tilted in favour of the more powerful."³⁹⁴

From about 200 AD to 1100 AD, there is a gradual shift towards increasingly tightly supervised self-control, and towards the assumption that formal litigational processes *vyavahara* are necessary as means to uphold order, with the increasing involvement of the agents of the formal law that this involved. It was, of course, largely a question of

³⁹² Ibid.

³⁹³ The Mimamsa school of Hindu philosophy did attempt to develop a theory that the Vedic texts were binding law. However, this school never gained the upper hand owing to the continuing awareness of the practical demands of real life. Derrett, 1979: 32-37.

³⁹⁴ This was visualised in the image of the 'rule of the fish' *matsya-nyaya*, where the big fish devour all of the small fish, which is ultimately not even to the benefit of the big fish. Menski, 1997: 23. See also, Derrett, 1968: 148ff; and, Jolly, 1977.

a change in degree and individual reliance upon situation specific self-control remained pervasive. As an expression of this transformation, it is possible to see the development in later *smṛiti* texts, such as the *Narada*, the *Bṛihaspati* and the *Kaṭyāyana*, of earlier classical concepts and the variety of sources.³⁹⁵ Numerous debates within this period illustrate this gradual undermining of the mechanisms of self-control in favour of more formalised intervention in the resolution of disputes. First, there is the development of the theory of the progressive deterioration of standards within society, declaring older and now unacceptable practices as *Kalivariya*; that is, prohibited in the currently immoral and corrupted era of human existence, the *Kaliyuga*. This enabled older texts to be updated and used as guiding models in new settings. Similarly, there emerged a distinction between *vidhi*, or binding injunction, and *arthavada*, or a descriptive account of how a problem may be solved, which enabled the authors of new *smṛiti* material to develop rules according to their own priorities as a way of reducing the gap between theory and practice. Moreover, unlike earlier *smṛiti* texts which were largely anonymous, these commentaries came to be associated with particular authors.

Increasingly, rulers appear to have been called upon to punish criminals and settle disputes, though they were unlikely to have “come to know of most disputes unless they affected [their]... rule, or occurred in the [their] ...capital, where access to the ruler’s court was less difficult.”³⁹⁶ In this context, the textual material reflects an increasing concern with formal processes in the administration of justice. Thus, as already mentioned, alongside the ruler’s role as maintainer of *dharma* and utiliser of *danda*, there was an increased perception of the need for formal litigation or *vyavahara* along with the involvement of the state that it necessarily presupposed.³⁹⁷ Clearly, then, these texts reflect the strengthening role of feudal rulers as administrators of justice and experts in the *sastra* were increasingly being employed as legal advisors and judges. Moreover, as this emphasis upon formal dispute settlement as a supplement to community based self-control so a distinctive body of procedural rules began also to emerge, the texts coming to elaborate four stages of *plaint*, *answer*, *examination of evidence* and *judgment*. This was accompanied by the

³⁹⁵ These included: new independent works, commentaries upon older ones, dramas, epic tales, and from the 7th century onwards travellers’ reports and other historical records. See: Kane, 1968; and, Lingat, 1973:107ff.

³⁹⁶ Menski, 1997:25.

³⁹⁷ Ibid: 26.

increasing sub-division of texts under distinctive subject titles as a way of making as a way of making their formal utilisation practicable. It was around this time also that a more structured hierarchy of the sources of law was elaborated.³⁹⁸

ii. Islamic Law

With the fragmentation of medieval India and the emergence of a unified central state under Muslim rule, Hindu law continued to operate at the level of the rural village and immediately above. Whilst the new Islamic rulers upheld the ostensible authority of Islamic law for themselves and their courts, the implementation of the sharia rarely extended beyond the precincts of the major cities where most of their Muslim subjects lived. Very quickly these rulers satisfied themselves with applying a more secular approach to the majority Hindu population, being chiefly concerned with the collection taxes and the administration of the criminal law, and being prepared, even in these areas, to allow Hindu chiefs and rulers to remain in place administering local justice so long as they paid the appropriate tribute. Accordingly, both Hindu customary law and the compilation of Hindu texts continued to develop under Islamic rule very much as before. In particular, well-trained pandits exercised an increasing monopoly of knowledge over the ancient *sastric* texts and of the power which accrued through their authentic interpretation. In rural India, village Brahmins or “neighbourhood pandits” acting as self-appointed advisers on *dharma* and *smriti* became increasingly common, having the effect of insinuating *sastric* notions in a manner much akin to a sort of communal form of *sadacara*.

Though it is important to qualify the influence and reach of Muslim law at this time, it nevertheless remains true that it became not only the official law of the land but also the second most important personal law, applying Sunni Hanafi jurisprudence to some of the most intimate dealings of the rapidly expanding Muslim population. At the same time, it is also important to realise that the Islamic law operative prior to the coming of the Raj was far from being ‘pure’ sharia, incorporating as it did in many parts of India a significant amount of pre-Islamic customary law.³⁹⁹ This was the case, for example, with, amongst others, the south Indian Moplas, with the Khojas and with

³⁹⁸ Derrett, 1968: 183.

³⁹⁹ Hai, 1973: 77; Mahmood, 1986: 49-94; and Pearl, 1979: 21.

the Mamas, all of which communities applied variants of Hindu based property and succession law. Moreover, given the traditional reluctance to approach the official court system and the somewhat sporadic nature of the pronouncements delivered by the qadis/magistrates, official Islamic law took time properly to 'bed-down'. Indeed, even when two authoritative juristic texts – the *Hidaya* and the *Fatwa-i-Alamgiri* – did receive a degree of official recognition they were used, somewhat like the Hindu sastric sources, more as sets of persuasive guidelines than as strictly binding legal rules.⁴⁰⁰

Eventually, with the decline in authority of the Muslim rulers in Delhi, so the application of Islamic law became increasingly the province of local landholding elites such as the *Zamindari* who came more and more to exercise authority in their particular localities. The law that these elites applied in practice also increasingly recognised the differential statuses of litigants in violation of the basic principle of equality which theoretically lay at the heart of Islamic jurisprudence.⁴⁰¹

c. The Colonial System

With the coming of the British to India a new phase of formal legal construction began. Initially, this concentrated upon the development of mechanisms for the adjudication of civil and criminal matters arising between members of the colonial staff who were unwilling to submit themselves to the subcontinent's pre-existing legal systems.⁴⁰² Soon, however, attempts were made to extend these mechanisms to cover relations between colonial staff members and their Indian subjects. To this end, and after about 1600, a number of Royal Charters were issued conferring power on the British East India Company to establish courts within the territories it had come to exercise control over and, after a period of some uncertainty, it was required to begin the creation of an entirely new legal system "to enact laws 'consonant to reason and not repugnant or contrary to' and 'as near as may be agreeable to English law.'"⁴⁰³

⁴⁰⁰ Pearl, 1979: 22. See Also: Fisch, 1983.

⁴⁰¹ Banerjee, 1962: 133ff.

⁴⁰² Banerjee, 1984: 1-27.

⁴⁰³ Pearl, 1979: 23.

This continued to be the official approach with the creation by charter in 1726 of the Mayors Courts in the presidency towns of Madras, Bombay and Calcutta.⁴⁰⁴

In due course, however, practical experience across India demonstrated that the application of English law without modification was entirely unsuitable to local conditions. In consequence, custom and customary authorities gradually received an increasing degree of recognition such that it is possible to here perceive the beginning of the co-existence of English and Indian law, at least in the regulation of intimate inter-personal relations.⁴⁰⁵ As time went on calls for restrictions in the application of English law grew increasingly loud, particularly after the East India Company obtained the Diwani rights over parts of Bengal, Bihar and Orissa in 1765. Finally, in 1772, the Governor of Bengal, Warren Hastings, issued his famous regulation in recognition of the need to develop more suitable juridical protocols.

Not only did this declaration signal a final acceptance of the fact that English law would not extend to all areas of Indian life and that a series of so called 'listed subjects' would remain as the exclusive domain of the existing personal laws, it also signalled that the imperial power intended to extend its control over public law matters, according a particular priority to its administration of the criminal law. The great landmark in the development of this approach was the adoption in 1793 of the Cornwallis Code, which brought with it a number of innovations and operated in effect as a general code of laws and regulations.⁴⁰⁶ From the late eighteenth and early nineteenth centuries, and influenced by the powerful utilitarian streak in British legal theory at the time, codification became an increasingly popular mechanism for the administration of justice. Thus an Indian Law Commission, which first began work in 1835, was instituted and tasked under the leadership of Thomas Babbington Macaulay with the preparation of a *Draft Penal Code*, followed shortly thereafter by a *Draft Code of Civil Procedure* and *Draft Law of Limitations*.⁴⁰⁷ The major purpose of this process of codification was, of course, to achieve greater uniformity and certainty than was to be had from the mass of existing laws which hitherto had operated in the

⁴⁰⁴ Banerjee, 1984: 11.

⁴⁰⁵ *Ibid*: 9.

⁴⁰⁶ Jain, 1981: 137ff.

⁴⁰⁷ *Ibid*: 137ff., 411ff.

subcontinent.⁴⁰⁸ For the sake of expediency, the new codes took as their model the relevant law then extant in England, though they also drew, where appropriate, upon codified law utilised in other parts of the western world.⁴⁰⁹

For various reasons Macaulay's draft Penal Code provoke considerable opposition among the British in India leading to its substantial revision and a delay in its introduction as the *Indian Penal Code, 1860* until 1862.⁴¹⁰ In contrast, there seems to have been little effective opposition to its introduction from the native Indian population, though it is doubtful quite how widely it was known of, let alone resorted to, by the wider population. Whatever the case, after 1860 the process of codification expanded rapidly and, in derogation of Warren Hastings' Declaration of 1772, it increasingly encroached upon the area of 'listed subjects' also. Despite considerable criticism about the speed and volume of Indian legislation, this process continued right up until the end of the nineteenth century when vigorous opposition to certain proposed amendments of the Indian Penal Code finally led to a cooling of imperial legislative enthusiasm. Thereafter, the imperial legislature interfered in Indian affair on only a piecemeal and sporadic basis.

i. Anglo-Hindu Law

Hastings' 1772 scheme recognised the need for the proper regulation and administration of indigenous laws. In the process it raised questions both as to the role that the *sastras* should play as a source of law under British rule and as to the relative influence English and Hindu jurisprudential principles should play in the actual administration of Hindu personal law in practice. With respect to the first of these questions, whilst the British demonstrated a genuine concern to discover what Hindu law had been up to that point, this concern was conditioned by a tendency to view all 'proper' law as necessarily being reducible to written form. Indeed, to this end they sought to appoint traditional sastric experts, – the pandits – who were consulted on legal matters in traditional Hindu society, to all levels of the official court hierarchy as authoritative advisers.⁴¹¹ Demanding specific answers to complex problems, and not

⁴⁰⁸ Banerjee, 1984: 171.

⁴⁰⁹ Ibid: 173,177,182. Also: Jain, 1981: 430ff.

⁴¹⁰ Ibid: 187. See also: Anagol-McGinn, 1992; and, Heismath, 1962.

⁴¹¹ Derrett, 1968: 235, 268.

appreciating the inherently provisional nature of the pandits opinions, which Hindu's had previously felt free to accept or reject, what actually resulted from the system was a series of contradictory opinions based upon a variety of textual sources depending upon the particular expertise, taste and philosophical commitments of the pandit in question. Thus, by the time this system of advisers had been abolished in 1864, a new and distinctive variety of Anglo-Indian law had emerged.

The primary reason for this was not only an initial misunderstanding of the role of the indigenous legal experts themselves, but also of the sastric materials, the complex and multi-layered nature of which they failed almost entirely to appreciate. The British had, in fact, determined to restrict the freedom of the pandits by effecting the greater codification of Hindu law in a number of jurisprudential digests. The first of these – the *Vivadarnava-setu* or *Vivadarnava-bhanjana* – was compiled in 1775.⁴¹² Compiled under standard English law headings, it was intended that these would be followed by all court pandits, but what actually seems to have happened is that the pandits simply treated them as merely another source to add to their pre-existing repertoire available to them in reaching their decisions. A number of other attempts at codification followed of which Jaganatha Tarkapancanana's *Vivada-bhangarnava* ('Ocean of Resolution of Disputes') is only the most well known, all of which had the effect merely of magnifying the initial violence done by British misunderstanding of the nature of the *sastra* and creating what Derrett saw fit to label a "hybrid monstrosity."⁴¹³ Indeed, the utilisation of such codified texts in the colonial court system meant that "parts of certain texts...gained a authority which they would never have had in the indigenous system",⁴¹⁴ and the development of case-law as a new Hindu law source,⁴¹⁵ embodying the principle of *stare decisis* "went fundamentally against the most elementary Hindu principles of justice, where...consideration of the facts of every case was paramount."⁴¹⁶

With the development of the Anglo-Hindu case law, the British gradually abandoned their attempts to restate traditional Hindu law and, from about 1850, displayed an increasing willingness to interfere via statute in the 'listed subjects'. Moreover, from

⁴¹² Ibid: 239. See also: Bhattacharyya-Panda, 1995.

⁴¹³ Ibid: 298.

⁴¹⁴ Ibid: 301; Menski, 1997: 40. Also: Banerjee, 1984: 43.

⁴¹⁵ Sarkar, 1940: 37.

⁴¹⁶ Menski, 1997: 40.

1864 increasing reliance was placed upon the principles of ‘justice, equity and good conscience’ as a residual source of law which had originally been made available via the *Administration of Justice Regulation* of the 5th July 1781 and the use of which implied the increasing introduction into the subcontinent of the rules of English law.⁴¹⁷ Importantly, of course, this rather sporadic introduction of foreign law into the newly emergent official south Asian judicial system left many aspects of the customary law actually governing Hindu communities in practice whilst not untouched, then at least with a relatively discrete developmental logic of its own, such that it was increasingly found to be incompatible with the official legal system.⁴¹⁸ It is true that the “importance of custom was recognised and administratively regulated in some places” and that it was “judicially fortified in the important early case of *Mootoo Ramalinga*”⁴¹⁹ which enabled any Hindu, in principle, to establish that he/she a not governed by Anglo-Hindu law in a particular instance. In practice, however, it remained extremely difficult to invoke customary norms in the Anglo-Indian courts.

ii. Anglo-Mohammedan Law

Turning to the development of Islamic law under British rule, it is clear that starting from a position of relative strength as the legal system of the then ruling classes, it suffered a significant loss of status.⁴²⁰ Under the 1772 scheme, Islamic law, like Hindu law, was to apply only to the ‘listed subjects’ which related primarily to the inter-personal relations of the Muslim community. Initially characterised as the ‘laws of the Koran’, in 1793 the wording of the scheme was changed to read ‘Mohammedan law’ and this reflected an increased appreciation of the real complexity of Islamic law and its sources, which were now recognised to include not only the Qu’ran, but also the Sunna, the ijma and the qiyas. Moreover, already under the Mughal emperor Aurangzeb a digest of mainly Hanafi statements of the law – the *Fatwa-i-Alagiri* – had been commissioned by as an aid to the administration of Islamic law.⁴²¹ Owing to the internal structure of Islamic law, the Maulvis, who acted as legal advisers to the colonial courts between 1772 and 1864 enjoyed a higher degree of authority vis-à-vis the British judges than did their Hindu counter-parts. This was because, under Islamic

⁴¹⁷ Derrett, 1968: 68,289,311.

⁴¹⁸ Ibid: 252,279,286. See also: Dirks, 1987; and, Price, 1979.

⁴¹⁹ Menski, 1997:42. On the details of this case, see: Desai, 1982.

⁴²⁰ Mahmood, 1986: 49-94.

⁴²¹ Banerjee, 1984: 35; and, Mahmood. 1982: 16.

law, the status of the two primary Islamic judicial offices, those of the mufti and the qazi, were such that only a qazi could legitimately reject a mufti's opinion. As such, British judicial officers, as unqualified infidels, were closely bound to the opinions of these Islamic officials which, moreover, operating within a long and venerable juristic tradition, argued that the textual authorities upon which they relied, provided ascertainable rules for most, if not all, situations and thereby circumscribed the scope for appeal to residual sources of law such as 'justice, equity and good conscience' to a much greater extent that was the case with Hindu law.⁴²² It was on this basis that a body of authoritative Anglo-Mohammedan case law built up which was in substance a "judicial restatement of the principles of Islamic laws as considered applicable in south Asia."⁴²³ Moreover, in subsequent cases the courts relied rather formulaically on these precedents, imbibing the doctrine of the 'closing of the gates of *ijtihad*' and the principle of *taqlid* or imitation to forestall attempts to re-interpret earlier authorities.⁴²⁴ In addition to this system of precedent, and in harmony with it, there also arose the practice of academic juristic compilations or textbooks which extended the tradition of digestion by collecting legal opinions and both paraphrasing and systematising them for use in future cases.⁴²⁵

Perhaps one of the most controversial areas in the development of Anglo-Muslim jurisprudence was the area of customary law. Pointing to the way in which the British seriously misunderstood the position of custom and usage in Islamic jurisprudence, Tahir Mahmood has highlighted two cases in particular decided in 1874 by the Supreme Court of Bombay relating to Muslim women claiming a share in their father's estate which had been denied them by male relatives relying upon customary laws that excluded daughters from inheritance.⁴²⁶ On the basis that the women in question belonged to former Hindu communities which had continued to follow Hindu customary law in certain matters, the court held that these customs, being proved, prevailed over the more usual Islamic law provisions. The controversy and unrest that this sparked off and the protracted tensions it gave rise to over several decades finally resulted in the *Muslim Personal Law (Shariat Application) Act, 1937*

⁴²² Ibid: 31.

⁴²³ Menski, 1997: 44. Also Mahmood, 1982: 14ff.

⁴²⁴ Wilson, 1921: 44.

⁴²⁵ Ibid: 45.

⁴²⁶ Mahmood, 1977: 19-20.

which purported to significantly limit the role of custom in the further development of south Asian Muslim law.⁴²⁷

An interesting further reform in a somewhat more liberal direction can be found two years later in the *Dissolution of Muslim Marriages Act, 1939* which gave Muslim women the right to ask for a divorce on the basis of none specific grounds. This, interestingly, drew upon a similar logic of justification to that which had underpinned the *Muslim Personal Law (Shariat Application) Act, 1937* by explicitly relying upon earlier authoritative sources which had preceded the pronouncements of later Islamic jurists. Beyond the sphere of intimate interpersonal relations which have traditionally fallen within the ambit of the personal law, the development of India's general law, not surprisingly, saw much more intrusive interference with traditional Islamic jurisprudence; Islamic criminal law being modified and then altogether superseded with the promulgation of the *Criminal Procedure Code* in 1859 and the *Criminal Penal Code* in 1860, and the Islamic law of evidence being replaced by the *Indian Law of Evidence* in 1972.⁴²⁸

d. The Modern Indian Legal System

Upon independence in August, 1947 India inherited a complex legal system which superficially looked increasingly like that of a western secularised state but, in fact, retained many of its pre-modern conceptual roots which continued to infuse legal practice and to underpin a plurality of legal norms as they interacted and reacted with a large and growing nucleus of secular, general law. Institutionally, as has been seen, this body of general law had been under construction since the eighteenth century, though latterly it came to place increasing emphasis upon autonomous and bureaucratic power at the expense of privatised economic interests. The shift towards the gradual separation of powers that this disclosed preserved, at least in form, the dominance of the imperial power, but it also reflected a general transformation of state legal structures that had been taking place in Europe since the sixteenth century and which had grow rapidly in application after the French Revolution as the apparently perfect constitutional midwife for commercial and then industrial capitalist

⁴²⁷ Wilson, 1921: 34-39. See also; Hindayatullah, ed., 1982: 22ff.; and, Pearl, 1979: 35.

⁴²⁸ Banerjee, 1962: 58,68-180; and, Derrett, 1968: 318. See also: Fisch, 1983; and Malik, 1994.

development. In the subcontinent, after the First World War, this process continued to receive growing expression, but it was now coupled with significant moves towards self-government. Consequently, under the terms of the Montagu-Chelmsford reforms and the *Government of India Act, 1919*, a system of 'Dyarchy' was established whereby limited provincial responsibilities were transferred to Indian ministers under a national parliamentary government run along Westminster lines. These moves were extended from 1937 when, under the terms of the *Government of India Act, 1935*, responsible government by Indian ministers was fully established in the provinces of British India. Plans for the further establishment of a comprehensive All-India federal structure and Federal Court were interrupted both by the Second World War and by India/Pakistan partition, but they were preserved, in part, in the Constitution of the Indian Republic promulgated in 1950.

These aspects of the constitutional division of powers,⁴²⁹ the regionalised and federational structure,⁴³⁰ communal differentiation, and the specific mechanisms for lower caste uplift,⁴³¹ not only formed the basis and parameters for the constitutional settlement of post-Independence India, but also more profoundly reflected the deep diversities within Indian society which simply could not be ignored by any sustainable governmental structure. Consequently, unlike China there was no wholly revolutionary rupture between pre and post-Independence Indian law. Instead, upon Independence in 1947 India thus inherited a complex legal system that manifested an extreme plurality of differing types and levels of legal norm.⁴³² In theory at least, these were built around a large and growing body of secular and general law, to which was added in 1950 the Constitution of India, itself subsequently to be amended with great frequency in order to keep it in line with the changing realities of post-independence India's political climate.⁴³³ Embodied in the Constitution was an ambitious programme of political, social and economic development. This was largely set down in the Fundamental Rights and Directive Principles of State Policy sections of the Constitution, the development and interaction of which has placed them at the

⁴²⁹ *Constitution of India*, Articles 66, 67, 74, 75, 79, 80, 89, 168(1), 194, 124-147, and 214-273.

⁴³⁰ *Ibid.*, Articles 1, 168(1), 194, 308 and the Seventh Schedule. Also the provisions for the preservation of linguistic diversity in Articles 29, 350 and 350A.

⁴³¹ Special Rights under Section III of the Constitution, Articles 15, 23, 24, 29 and 131. Also the Directive Principles of State Policy, under Section IV of the Constitution, esp., Articles 40, 42, 43, 46 and 45.

⁴³² Most obviously within the Constitution itself, but also beyond and especially within the various personal laws both formal and personal. *Constitution of India*. Articles, 89(1) and 368(a)-(e).

⁴³³ Under the amending provisions of the Constitution: Articles, 89(1) and 368 (a)-(e).

heart of post-Independence legal development. Essentially, they represent a balance between the secular and Western instinct for uniform legal regulation and the pluralistic necessity of differential communal regulation, such that, immediate guarantees of individual rights are matched and supplemented by a programme of future state mandated governmental objectives. In this way, the constitutional settlement as a whole was infused with an inherently dynamic logic designed gradually to overcome what were perceived as traditional societal tensions and contradictions, to reduce inequality and caste discrimination and to alleviate material poverty. Thus, the rights to equality, to the freedom of religion and conscience and against exploitation authoritatively laid down the Bill of Rights, or Section III of the Constitution, were supplemented in Section IV, the Directive Principles section of the Constitution, by a programme for the future which included Directives for the securing of the more equitable and balanced livelihoods of all Indian citizens, the establishment of an effective bottom-up democracy and, most controversially, the abolition of separate personal laws and the substitution of a Uniform Civil Code. They were also supplemented by a series of positive discrimination provisions ensuring reservation of a minimum level of legislative representation, education and government employment for traditionally the poorest and most discriminated against sections of society – the Scheduled Castes and Tribes and Other Backward Classes.⁴³⁴

In order to begin realising the ultimate aim of a standardised secular legal system which the Directive Principle in Article 44 embodied, a strategy was adopted whereby attempts would be made first to codify and reform the majority Hindu personal law, and to enact what amounted to an optional Uniform Civil Code which was embodied in the *Special Marriage Act, 1954*, and under the terms of which individuals could opt to have their relationships regulated by an entirely secular legal scheme.⁴³⁵ (Guha,2007:226-241). It was determined that these two laws should then gradually be brought substantially in line with one another. Once this was accomplished, it was planned gradually to bring the minority personal laws under statutory frameworks substantially in line with the reformed Hindu and secular laws. Finally, these would be replaced by a fully-fledged Uniform Civil Code.

⁴³⁴ Galanter, 1984.

⁴³⁵ For the political background to this compromise see Guha, 2007: Chap 11.

As it turned out there was considerable and sustained opposition to the plan even to impose a unified Hindu code.⁴³⁶ And it proved impossible to enact the unified statutory scheme originally drafted and put forward by the then law minister, B.R. Ambedkar. In consequence, it was not until after the 1952 general election and the return to power of Nehru with a much increased majority and much greater personal control over the Congress party itself that reform of the Hindu Personal Law was finally enacted, not in one comprehensive code as previously been proposed, but in a series of separate statutes – the *Hindu Marriage Act, 1955*; the *Hindu Succession Act, 1956*; the *Hindu Adoption and Maintenance Act, 1956*; and the *Hindu Minority and Guardianship Act, 1956*.⁴³⁷ Moreover, in each of these statutes, despite the modernising agenda they laid down, provision was made for the continued operation of customary practices where their existence could be sufficiently well established.⁴³⁸

During the period of Nehruvian consensus when the emphasis was upon ‘modern’ centralised and secular state-building, the approach to constitutional operationalisation was noticeably positivist in its orientation, as will be explained more fully in chapter four. Despite the inevitable limitations that the realities of Indian life placed upon any development strategy, the Nehruvian strategy was a marked attempt to bolster the military-industrial power of the nation state as a way of asserting the strength of its political and economic independence and this required in its legal aspect that there be a positivist assertion that state law enjoy jurisprudential supremacy. With the death of Nehru and the rise to power of Indira Gandhi, frustration at the slow rate of socio-economic uplift that this strategy was supposed to effect provided an opportunity to create a populist power base outside the normal mechanisms of state power. This led to a noticeable de-juridification of Indian politics which reached its high point in the emergency of 1975-1977 and which, though notably less marked than the like phase taking place in China at the same time was nonetheless both notable and powerful.⁴³⁹ Moreover, as with China, the failure of this experiment in hyper-centralised, personal rule, not only led to a reengagement with the normal mechanisms of legal functioning but also to a gradual and growing engagement with the world economy; though once more to a much less marked

⁴³⁶ Derrett, 1957.

⁴³⁷ Ibid.

⁴³⁸ See, for example, Sontheimer, 1977.

⁴³⁹ See: Dhagamwar, 1989: 76. And generally: Mahmood, 1982: 5; Menski, 1990; and, Parashar, 1992.

degree than in China. In India, given its much deeper diversities, what this process has involved in legal terms is a much greater sensitisation of its jurisprudential structures to the realities of Indian life, both in terms of the more effective operationalisation of the programme of socio-economic uplift embedded in the Constitution itself and in terms of the extant indigenous norm-system upon which any programme of transformation is forced to work. As a result, in the post-emergency period, an apparently paradoxical re-indigenisation of the overall legal system has taken place alongside the opening of India's international market forces, but this, as will be seen, is an entirely coherent though complex propaedeutic development by which society is increasingly prepared for much deeper transformation.

Part 2

Contemporary

In Part 2 the study narrows somewhat in order to focus upon legal developments which have taken place in China and India over the past three decades. This grounds the study in a sufficiently robust empirical base which nonetheless does not obscure the deeper lying theoretical precepts it is being employed to verify. The developments covered in this section occur during a period of gradual and apparently conclusive engagement with the international economic system that has lain at the heart of emerging industrial and post-industrial society. As has been seen in Part 1, this engagement embodied an acceptance of the ultimate failure of each society to resist the deeper logic of that system's apparently insatiable expansion. Thus, though they have handled this transitional acceptance in different ways, ways that have undoubtedly and important things to say about the nature and levels of resistance which may be offered to marketisation by different cultural forms, they nonetheless each manifest decentralization and functional specialization consistent with the gradual process of marketisation.

In detailing the manner in which this has taken place in practice, Chapter Four, by examining, at their broadest constitutional levels, the differing legal strategies employed by each country, shows how a tension between attempts at government control, on the one hand, and deeper currents of economic development, on the other, have structured in both countries a comparatively more ordered and staged integration into the world economy than would otherwise have been the case – though with noticeably more effect in China than in India. Chapters Five and Six examine in greater detail, beyond the enormous though relatively uncontroversial developments in those areas touching directly upon the China and India's transforming economies, how the logic of those transformations have come gradually to reconfigure areas that have traditionally operated either outside or in a way super-ordinate to the economic. Thus Chapter Five details the incremental cooption of the state and its role in the incremental insinuation of a battery of procedural norms functionally consistent with market expansion, whilst Chapter Six explores how these norms are gradually expanding even into the most intimate areas of family and social life.

Chapter 4: Constitutional Strategies

In the period of reform China and India have moved towards greater economic liberalisation and increased marketisation in an attempt to kick-start their waning developmental strategies. This has not only meant the gradual retreat, in both states, from a micro-managerial to an ownership and then eventually to an essentially regulatory involvement in the economy, but also to an increasing juridification through the principled application of governmental power. As the state has delegated more and more economic decision-making to non-state enterprises and entrepreneurs, so it has inevitably become more specialised, if not always more disciplined, in the activities it continues to perform. Indeed, in gradually ceasing those of its activities that most obviously inhibit the operation of a market economy, so simultaneously it has been steadily co-opted as a mechanism for the reconfiguration of those factors that might frustrate the market's further growth. This ever-finer division of labour and specialisation has manifested itself, both in terms of subject matter and in terms of geography, with state involvement being redefined first in those areas of life most likely spontaneously to find co-ordination within the market dynamic and in those regions enjoying a natural comparative market advantage.

In each of these areas significant differentials open up between China and India when examined in greater detail, with the ostensibly autocratic China exemplifying the trends pointed to, and thus the overall transformative effect of increasing marketisation, to a much greater extent than does the ostensibly democratic India. Once more this is linked to the relative capacity of each society to engage in collective action or, more specifically, the capacity of their respective governments to mobilise such action. Even at the very broadest level, the formal constitutional arrangements which historically operated within either jurisdiction have manifested this contrast. In China the major changes in policy direction since 1949 have resulted in a series of entirely new constitutions signifying a greater capacity of its government/leaders to mobilise society in the particular manner it sees fit at a given point in time, in India similar changes in policy have had to be accommodated within one continuously functioning constitutional framework, which, though subject to important changes in its internal structural dynamic, has expressed a fundamental

socio-political compromise the essential content of which it has not been possible to renegotiate. One very significant consequence of this contrast, has been the fact that whilst the turn to populism in China during the Cultural Revolution led to the almost complete breakdown of the legal order, in India, similar attempts to by-pass the normal mechanisms of government were ultimately much less successful.

Consequently, whilst in India there was, after the Emergency, a noticeable reassertion of judicial and parliamentary power, this took place firmly within the parameters of the pre-existing constitutional order which had survived the several attacks upon it. In China, on the other hand, since the assaults on the legal and governmental orders had been so much more destructive, the attempts to reverse the worst excesses of the Cultural Revolution, required the almost complete reconstruction of the entire legal system.

A: China

1. General

Over the past two decades the Chinese leadership has succeeded in ensuring economic growth while implementing policies engineered to allow gradual integration into the world economy in a more or less managed fashion. Economic liberalisation, it was felt, was the only way that China could regain the material vigour it had so clearly forfeited through the autarkic and anarchic policies of the Cultural Revolution, and, in the process, close the alarming resource mobilisation gap that had opened between it and its East Asian competitors. At the same time, it was feared that too abrupt and comprehensive a transformation, as was later attempted in Russia and other CIS countries, would threaten the political and ideological integrity and control of the Party-State. Consequently what was initially sought was a form of measured and controlled engagement with the market, which would act as a supplement to the planned economy. As it has increasingly been appreciated that the market represents the most effective mechanism for the provisioning and expansion of the Chinese economy, so market forces have gradually been allowed a greater and greater role by China's policy makers.

A proper understanding of these developments requires them to be set within the context of the gradual institutionalisation of power which has been increasingly apparent throughout the reform period.⁴⁴⁰ This institutionalisation has been characterised not just by the growing elaboration of explicit normative structures, but also by the de-concentration of personal power through a process of growing functional differentiation. The gradual nature of this process has been the result of a bottom up pressure by which the successes of initial and tentatively experimental reforms have propelled greater and more general acceptance of the expansive logic upon which they have been based.⁴⁴¹ In this way, the full structural implications of this logic have only been realised and accepted by degrees. As this has happened, so, according to the assessment of one commentator:

...the Party has...turned over – or, perhaps more accurately, been forced to turn over – much of daily governance to the usual state actors: the legislature, executive, and judiciary.

As such:

The retreat of the Party has resulted in the transfer of power from the Party both to the state and to society. Furthermore, just as there has been a retreat of the Party, so has there been a retreat of the state...[With power devolving from] the government at all levels to society.⁴⁴²

In fact, the sequence outlined here, whilst quite accurate in its identification of the major bases of structural change, is probably the reverse of what has happened in practice. What has actually tended to propel the gradual differentiation of Party from State has been the prior differentiation of Party-State from society or, more particularly, from the economy. Moreover, as this horizontal relocation of power has taken place, so it has been accompanied, within the structure of the state itself, by a complementary vertical relocation of power from higher to lower levels of government and administration in order better to sensitise the state to the developmental potentialities and challenges of differing geographical regions. Along both axes, as these potentialities have been released so the further decentralisation and institutionalisation of governmental competences have been propelled by the

⁴⁴⁰ For the specifically legal aspects of this process see, in general: Chen, 2004; Clarke, 2003, 2008; Gellhorn, 1987; Keith & Lam, 2001; Lubman, 1999: 1-10; Orts, 2001; Peerenboom, 2002; Potter, 2008; Qin, 2008; and, Saich, 2000.

⁴⁴¹ Fewsmith, 2006.

⁴⁴² Peerenboom, 2002:188-189

functional requirements of increasingly powerful market forces, which have, in their turn, gradually secured for themselves an increasingly determinative role over the direction of China's economic, social and political make-up. The fact that this process has been an incremental rather than a sudden one is attributable, in part, to the fact that the power of the Party-State, though transforming both in form and extent, has continued to factor as an independent variable. It has also been crucial in allowing for the gradual overcoming of political and ideological resistance both to reform and to the market per se, and thus also to introducing reforms, despite the considerable difficulties encountered along the way, in an apparently sustainable manner.

2. De-Centralisation

a. State, Economy and Society

Economic reform began upon a somewhat piecemeal basis. Thus, as initial experiments revealed their worth, they were subsequently widened and made more systematic. It started by focusing upon the Agricultural sphere which, during the late Seventies, witnessed the experimental introduction of a Household Responsibility System in selected localities and then, a little later, nationally.⁴⁴³ After dramatic initial successes, the size of household plots were gradually increased and greater autonomy granted to producers such that by 1984 the Responsibility System had emerged as by far the dominant agricultural arrangement.⁴⁴⁴

At the same time as the agricultural system was being restructured, restrictions on non-agricultural activities in rural areas were gradually relaxed, permitting enterprises to sell their products at market prices.⁴⁴⁵ This very rapidly led to a precipitate rise in the number of individually or collectively owned enterprises in China's townships and villages. Not only did these township and village enterprises (TVEs) absorb a significant percentage of the surplus labour created by the increasing efficiency of the agricultural sector,⁴⁴⁶ they also constituted a rapidly growing and flexible non-state sector subject to much tougher market constraints than their government managed

⁴⁴³ Qian, 1999.

⁴⁴⁴ *Central Committee Circular on Agricultural Work*, January 1st 1984.

⁴⁴⁵ Qian, 1999: 11-12.

⁴⁴⁶ Lin, et.al., 1996.

counter-parts thereby creating an ideal environment for the development of entrepreneurial expertise and competition. Consequently, by the early 1990s there were more than 19 million TVEs employing more than 100 million workers out of a total rural workforce of 430 million and contributing almost a third of China's overall GDP.⁴⁴⁷

In the state sector, reform proved to be slower and significantly more complicated, but in the longer term came to be equally, if not more, dramatic. Reforms began by focussing upon the gradual expansion of managers' decision-making powers and enterprises resources in order to give them greater responsibility for their own profits and losses.⁴⁴⁸ This led, in 1987, to the eventual introduction throughout the country of an industrial 'contract responsibility system' under which enterprises were leased to their management for three to four year periods.⁴⁴⁹ After a brief hiatus following the events of Tiananmen Square in 1989, Deng Xiaoping reinvigorated the reform process with his famous southern tour in 1992 and, later that year, the Fourteenth National Congress of the CPC laid down for the first time the goal of creating a 'Socialist Market Economy'.⁴⁵⁰ This resulted, over the following decade, in a process of incremental privatization, which built upon a series of preparatory legislative acts in the 1980s and early 1990s.

The final area of reform fell under the rubric of trade liberalisation and the policy of open door. Up until 1979, foreign trade was monopolised by the Ministry of Foreign Trade through 12 state owned Foreign Trade Corporations (FTCs). Reform involved the separation of government administration from enterprise management by progressively replacing the national FTCs by many smaller enterprises with foreign trade power. It also involved the comprehensive devolution of the authority of the import and export corporations to provincial and municipal authorities and a precipitate reduction in the number of items under state quota or licensing control. It also involved after 1991, as China began to push for resumption of its GATT

⁴⁴⁷ Peerenboom, 2002: 192-193.

⁴⁴⁸ Chen, 1995: 80; Chow, 2000: 49. See also Hua & Du, 1990: 75.

⁴⁴⁹ Zhao, 1987, quoted in Chen, 1995: 83-84. Entitled: 'Advance Along the Road of Socialism with Chinese Characteristics', *Report Delivered to the Thirteenth National Congress of the Communist Party of China* on October 25th, 1987. See also: Chamberlain, 1987; and, Xi, 2005.

⁴⁵⁰ See Jaing, 1992: 1-3. Entitled: 'Accelerating the Reform, the Opening to the Outside World and the Drive for Modernisation, so as to Achieve Great Successes in Building Socialism with Chinese Characteristics' *Political Report delivered to the Fourteenth National Congress of the Communist Party of China*, 21st October, 1992.

membership, publication of internal regulations, abolition of mandatory trade plans, unification of foreign trade policy and regulation in line with international standards and the restructuring of FTC internal governance systems. Lastly, foreign trade liberalisation was accompanied by increasingly comprehensive reform in the area of direct foreign investment, as this was allowing an ever growing role in the development of China's post-Mao economy, leading to a growing uniformity as between domestic and foreign investment enterprises, whilst continuing to allow certain special concessions for foreign investment as a way of attracting foreign technologies and capital.

Despite the extraordinary economic transformation to which reform has given rise, as the incentive structures of Chinese society have changed so numerous problems have arisen, resulting both in social disorder and in various forms of economic dislocation.⁴⁵¹ In part this has resulted from the speed with which the new policies have taken hold coupled with the failure of Chinese society to keep pace, but it has also resulted from the re-emergence of more traditional social practices. In particular, familial values and clientelist relationships suppressed under Mao have regrouped and taken on even greater importance in the context of the growing market economy. The uncertainties resulting from the implementation of reform have been particularly potent in causing ordinary people to feel unsure about which public ideas to invoke and to rely increasingly upon trusted personal contacts as a way of compensating for their growing insecurity. At the same time, the numerous opportunities for corruption, for short-term exploitation, and for unjust discrimination that these newly revived systems of patronage offer have been a continuing source of systemic inefficiency.⁴⁵²

Underlying these various difficulties has, of course, been the extraordinary increase in income inequality both within the general population and as between China's various regional units.⁴⁵³ Acceptance that some had to get rich first to act as a developmental motor for the rest of the nation marked a sharp departure from the policies implemented during the 30 years of Maoist rule. Income inequality has led to the conspicuous growth in social unrest, resulting in violent social clashes as the traditional support

⁴⁵¹ See, among other works: Aubert & Xiande, 2002; Cannon, ed., 2000; Chan & Zhang, 1999; Chen & Alexander, 2004; Guo, 2001; He, 2003; Hiroshi, 2003; and, Pils, 2005;

⁴⁵² See: Chamberlain, 1987; Froissart, 2005; Hsing, 2006, 2006a; Kolenda, 1990; Lu, 1999; and, Seymour, 1988.

⁴⁵³ Among the many relevant works, see: Aziz & Duenwald, 2001; Breslin, 1999; Cannon, ed., 2000; Fan, 2001; Goodman, 2004; Jian, et.al., 1996; Lin, 2003; Lyons, 1991; Marton, 2000; Ravailon & Chen, 2004; and, Tian, 1999.

structures of the Maoist state has been gradually rolled back.⁴⁵⁴ This has led to an extraordinary increase in the population of impoverished, insecure footloose labour which, having migrated from the countryside, floats in search of seasonal occupation with no entitlement to the already limited welfare benefits.⁴⁵⁵ As a compounding factor, these challenges have been met by a government apparatus that is itself increasingly disjointed and enfeebled by the proliferation and divergence of the interests generated by economic change.⁴⁵⁶ In particular, attempts by the national leadership to devise and implement effective overall strategies have been hampered by local and provincial governments rent by conflicting personal and regional loyalties, as well as, in a worrying number of cases, by systemic corruption.⁴⁵⁷ Perhaps the most important reason for this has been the fact that reform has transformed a significant number of local officials into 'cadre-entrepreneurs' as they seek simultaneously to maintain their personal authority within the local community by minimizing local hardship and to enable themselves, their families and their friends to capitalize upon the new opportunities offered by the changing economic environment.⁴⁵⁸ Clearly, it has been particularly difficult effectively to balance these various interests whilst operating within the policy directives of the central government. Overall, this situation has resulted in a tendency towards the half-hearted implementation or only partial implementation of central directives that has often seriously hampered the national leadership's attempts at macro-policy management.

Yet, whilst it is, of course, important not to under-estimate the difficulties that have been encountered in this process and indeed in the reform process more generally,⁴⁵⁹ when understood properly, they do not appear to negate the clear longer-term trend outlined above. Precisely how this trend is being driven in practice is an important question to which Michael Dowdle has recently provided a sophisticated and, to this author's mind, broadly convincing answer.⁴⁶⁰ For Dowdle, despite the ostensibly non-democratic nature of the Chinese government, the organisation and articulation of discrete social interests – women's rights, environmental protection,

⁴⁵⁴ Guo, 2001; Hsing, 2006a; He, 2003; Oi, 2003; Li & O'Brien, 2002; and, O'Brien, 1996.

⁴⁵⁵ A great deal of richly layered and sophisticated research exist in this area. See: CECC, 2005; Chan & Alexander; Froissart, 2005; He, 2003; James, 2007; Solinger, 1991, 1996; Stein, 2006; and Zhu, 2003.

⁴⁵⁶ Breslin, 1996; Howell, 2004; Chen, et.al., 2002; Choate, 1997; He, 2003, and Schram, 1985.

⁴⁵⁷ Fu, 2005; Fu & Cho, 2004; Lubman, 1999: 160-172; and, Zhang, 1996.

⁴⁵⁸ Guo, 2001; and, Zhang, 2004.

⁴⁵⁹ On the gradual emergence of a nascent Chinese civil society, see, for example: Zhang, 2004; Zhang, 2003; and, Ling, 2001. See also on developing local democracy: Choate, 1997; Horsley, 2003; Howell, ed., 2004; and, Jakobson, 2004.

⁴⁶⁰ Dowdle, 2002.

professional/regional/labour interests – have nonetheless found ways effectively to express themselves within the socio-political set-up.⁴⁶¹ A number of factors have contributed to this “growing fragmentation of interest’s within China’s socio-political environment”.⁴⁶² The first of these, Dowdle identifies is that of stabilisation over time. As the social set-up stabilises, “distinct social interests gradually overcome collective action problems”,⁴⁶³ facilitating the growing articulation of diverse social interests. Secondly, he identifies the importance of the growing privatisation of the Chinese economy. As different segments of the economy open up to private exploitation, economic interests increasingly challenge “collective action problems”: in sum, economic diversity translates into articulated social diversity. Further, this articulated social diversity prompts a fragmentation in the political sphere. The diversification of social interests widens the range of interests influencing political behaviour as a result of which China’s dominant political structure, namely the CPC, exhibits increased internal competition and “institutional stress”.⁴⁶⁴

To understand precisely how this ‘institutional stress’ has resulted in growing political diversity, it is necessary to recognize the fundamental role played in CPC rule by “reciprocal patterns of loyalty” as manifest in a highly complex monocratic web of patron-client relations.⁴⁶⁵ The fragmentation of China’s social and political environments foments division and dispute between the clients within this network of relationships. Resolving such disputes forces patrons to choose among clients, with the disfavoured client perceiving a breach of the whole patron-client system. This has two important consequences. First, it diminishes clients’ incentives to loyalty. Secondly, it weakens the institutional capacity of the party to discipline its members. A highly significant response to this dilemma is for patrons to locate the settlement of inter-client disputes in an independent forum, which (vitaly) is visibly out of the patron’s control (but, also, does not impinge upon the patron’s private political interests). The resolution of disputes in this way lessens the tendency for losing clients to attribute their losses in disputes to a lack of patronal support. Thereby, Dowdle implies, an independent forum for dispute resolution address the issues of diminishing loyalty and weakened disciplinary capacity outlined above. Thus, it is precisely in

⁴⁶¹ Ibid: 53.

⁴⁶² Ibid: 55.

⁴⁶³ Ibid: 55.

⁴⁶⁴ Ibid: 58.

⁴⁶⁵ Ibid.

order to maintain a “hegemony over the political environment as a whole” that the CCP imparts dispute-settlement power to an independent arbitrator of disputes.⁴⁶⁶ It is in this context that Chinese constitutional development – providing non-party apparatus with which widening political discourse and debates can be arbitrated – should be seen. Given the function of the constitutional apparatus in terms of this widening discourse, its normative and structural aspects are given increasing social weight, and this, in turn, results in “an ever growing constitutionalisation of the political environment.”⁴⁶⁷

b. Party and State

Gradual redefinition of the role of the Chinese Party-State with respect to wider Chinese society has been accompanied by cognate attempts to redefine the relationship between the state and the Communist Party (CPC) and in particular to move away from the mass populist politics of the Cultural Revolution.⁴⁶⁸ This has been seen as a necessary accompaniment to disciplined and meaningful reform. An important component of this strategy has been attempts to effect a clearer separation between the party and the state. The importance of these attempts has already been noted in connection to the question of enterprise management and the need to prevent unfocussed ideological and discretionary interventions which might inhibit functional and productive efficiency. Similar considerations have factored strongly in the area of China’s governmental machinery.⁴⁶⁹

Perhaps the principal way in which policymakers have sought to effect such a separation in practice has been through the reinstatement of a functioning legal system together with a strong emphasis, at least in official pronouncements, upon the need for laws, once made, to be obeyed.⁴⁷⁰ Likewise Party leaders frequently emphasised the role of law in creating a social order conducive to economic development; so much so that Deng Xiaoping early on called for a “Two-Hand” policy, with the economy being strengthened, on the one hand, and the legal system, on the other.⁴⁷¹ This commitment

⁴⁶⁶ Ibid: 60.

⁴⁶⁷ Ibid: 75.

⁴⁶⁸ Brookings Institution, 2008.

⁴⁶⁹ Chamberlain, 1987; Deng, 1984; Schram, 1984; Seymour, 1988; Stavis, ed., 1987; Von Senger, 1985. Also: Yang, 1984.

⁴⁷⁰ See especially, Clarke, 1985; Deng, 1984, Schram, 1984; Seymour, 1988. See also: Von Senger, 1985.

⁴⁷¹ Zhao, ed., 1990: 574.

was subsequently confirmed both by the extensive programme of law-making embarked upon in the four years prior to the drafting of the 1982 State Constitution, and by the terms of reference for the Constitution itself.⁴⁷²

The result was a Constitution considerably more detailed than its predecessors and one which contained significant statements as to its own status and as to that of law in general. These statements were found in the preamble, which declared that the Constitution was “the fundamental law of the state and has supreme legal force”, and that “the people of all nationalities, all state organs, the armed forces, all political parties, all social organisations, enterprises and institutional units” were required to “uphold the dignity of the Constitution and ensure its implementation.” They were also found in Article 5, which affirmed “the uniformity and dignity of the socialist legal system” and declared that “no organisation or individual may enjoy the privilege of being above the Constitution and the law”. Additionally, Article 33 guaranteed, for the first time, the right of citizens to equality under the law, signalling a notable departure from earlier practices of categorising the population according to historic family and class associations. Likewise, the CPC Constitution, also adopted in 1982, affirmed in its General Programme that, “The Party must conduct its activities within the framework of the Constitution and other laws”. Nevertheless, these many statements were balanced by equally strong, if not stronger, affirmations of the Four Basic Principles and the role of the CPC as the guiding force of the PRC.

Moreover, there was no doubt that the PRC remained essentially a one party state, with other parties, and indeed the policies of the state government, being permitted to exist only in a manner which was complementary to the priorities of the CPC and firmly under its control.⁴⁷³ The ideological leadership of CPC was, and is, recognised in the State Constitution not only through its avowed adherence to the Four Basic Principles, but also its reflection of the periodic developments in CPC ideology and in the Preamble’s explicit proclamation of the CPC as the “vanguard of the Chinese working class, the faithful representative of people of all nationalities in China, and the force at the core leading China’s cause of socialism”. In particular, this was given effect by interlocking state and party structures at every level, by control of state

⁴⁷² See Deng Xiaoping’s speech to the Politburo in August, 1980, in Deng, 1984: 322. Also: Barrett, 1983; Kwan, 1984; Saich, 1983; and, Weng, 1982.

⁴⁷³ Lin, 2000; and, Lu, 1990.

appointments through the *nomenklatura* and electoral systems, by leading Party member and primary party organisations and by political-legal committees. In this context, China's jurisprudence continued to be dominated by an essentially instrumentalist approach to law which was seen simply as a peculiarly effective tool for the implementation of party policy, or as a mature form of policy, rather than as an end in itself. This was further seen in the speed with which legislation was rushed through in the initial years of reform in order simply to create an effective policy implementation machine as soon as possible without showing any real concern with deeper philosophical issues of fostering a culture of respect for the law and its authority.

Despite this enduring attachment to the instrumental and pragmatic role of law, there is nonetheless a clear sense that the inherent authority of law and the overall need fully to legalise and institutionalise the exercise of power in the PRC, independent of its shorter-term expedient value, has gradually received greater and greater operative and ideological sanction. Moreover, this has taken place just as there has been an increasingly sophisticated development, some would say fundamental alteration, of traditional Marxist thinking in order to accommodate the reform programme.⁴⁷⁴ In both respects, this has, of course, been particularly notable since the inauguration of "package reform" and the goal of creating a "socialist market economy" during Deng Xiaoping's 1992 southern tour. Thus, references to "socialism with Chinese characteristics" and "Deng Xiaoping Theory" have been given formal Party and Constitutional sanction, as has the redefinition of the time-scale for transition to a fully socialist society. Likewise, more recently, Jiang Zemin's idea of "Three Represents",⁴⁷⁵ which he had been elaborating since the fiftieth anniversary celebrations of the founding of the PRC in 2001, has further loosened the Party-State's links with traditional class ideology, introducing into the state Constitution the idea that the CPC now represents the vast majority of the Chinese population. Such notions of political equality are an important component in western 'rule of law' ideology and with good functional and economic reason. Since early 1996, this along with its other aspects has been increasingly highlighted as Jiang Zemin and other top leaders have engaged in an officially sponsored discourse on "ruling the country

⁴⁷⁴ See here especially, the excellent analysis in Chen, 1996.

⁴⁷⁵ Fewsmith, 2003; Killion, 2005; and, Lam, 2004, 2007.

according to law”, creating a “legal system state” and finally “creating a rule of law state”. It has been on this basis that the “rule of law” finally found its way by constitutional amendment into Article 5 of the PRC Constitution in 1999.

The clearest and most important example of this trend in practice has been the growing assertiveness of the National and Local People’s Congresses.⁴⁷⁶ Under the terms of the state Constitution the NPC – as the PRC’s official legislature – has always technically been the most important decision and law making body in China, followed by its Standing Committee and then the State Council, bodies which are replicated, along with their hierarchical inter-relationship, at every subordinate level of the state structure.⁴⁷⁷ However, until relatively recently it had generally been accepted that, in the actual exercise of power,⁴⁷⁸ this order operated in reverse. Consequently, the State Council acted as the real nexus of central state power, with the NPC and, to a lesser extent, the NPC Standing Committee, performing purely affirmatory or ‘rubber-stamp’ functions at its behest. In particular, the State Council drafted a very large number of the laws that were placed before the two other bodies with the expectation that they would be approved with little difficulty, having been initiated by, and received prior approval from the central apparatus of the Party. As the reform programme has unfolded, however, this situation has begun to change, so that now the NPC and its subordinates, as part of the overall trend towards greater institutionalisation, have come to exercise in practice more and more of the power allotted to them by the Constitution in theory.⁴⁷⁹

3. Devolution

a. Explicit Constitutional and Administrative Models

With its embarkation upon the process of economic reform, transition to a market economy, and the winning of foreign trade and investment, China has also increasingly given rise to a multitude of relatively discrete regional economies.⁴⁸⁰ Under the Maoist regime, such regional differences had been suppressed by

⁴⁷⁶ Cho, 2002; Dowdle, 2002-3, 2005. See also, the earlier work of Murray Scott Tanner: Tanner, 1994.

⁴⁷⁷ Cheng, 1983-84; Gasper, 1982; Lin, 2000; Keller, 2000 and, Wu, 1990.

⁴⁷⁸ Weng, 1983-84.

⁴⁷⁹ Dowdle, 1997: 6,9,32-33; 2002: 3-4.

⁴⁸⁰ Lyons, 2004: 3-4.

preferential investments in the least advantaged areas. With the adoption of the open door policy, this approach has been reversed and measures implemented in order to exploit inherent regional differences and to drive the coastal strip ahead of other regions so that it can act as an “engine of growth” for China as a whole. Accordingly, since 1st July 1997, the PRC has divided into four constitutionally specified administrative zones – National Autonomous Areas (especially in the west of the country), the area of normal regional and local state government, Special Economic Zones and Special Administrative Regions – each governed according to a specific set of provisions, and each corresponding very broadly to a different level of economic development and loosely identifying a different stage of integration with the world economy.⁴⁸¹

Under the principle of the ‘people’s democratic dictatorship’ the Chinese state is organised according to a hierarchically structured system which is divided vertically into five different levels. First, at the highest level operate its central institutions: the National People’s Congress,⁴⁸² the President of the PRC,⁴⁸³ the State Council,⁴⁸⁴ the Central Military Commission,⁴⁸⁵ the Supreme People’s Court⁴⁸⁶ and the Supreme People’s Procuracy.⁴⁸⁷ Secondly, below these, at the provincial level, are 23 provincial governments, 4 municipalities directly under the central government, 5 autonomous regions and the two Special Administrative Regions of Hong Kong and Macau. Thirdly, below the provincial level are 265 cities of prefectural rank, 32 prefectures, 30 autonomous prefectures and five ‘unions’ (all of which are situated within the Inner Mongolian Autonomous Region). Fourthly, below the prefectural level operate 2,861 county equivalent units, including 393 cities of county rank and 808 city districts. Finally, below the county level, exists the level of towns and townships which comprises considerably more than 46,000 separate units.⁴⁸⁸

⁴⁸¹ Yang, 1997: 29.

⁴⁸² Chapter III, Section 1., *PRC Constitution*. esp. Articles 57 and 65.

⁴⁸³ *Ibid*: Chapter III, Section 2.

⁴⁸⁴ *Ibid*: Chapter III, Section 3.

⁴⁸⁵ *Ibid*: Chapter III, Section 4.

⁴⁸⁶ *Ibid*: Articles 124 and 127.

⁴⁸⁷ *Ibid*: Articles 130 and 132.

⁴⁸⁸ Chen, 1998: 52.

i. Regional and Local State Organs

At the heart of this hierarchy is the system of people's congresses. Article 2 of the Constitution stipulates: "All the power in the PRC belongs to the people. The organs through which the people exercise state power are the National People's Congress and the local people's congresses at various levels." The people's congresses, or 'organs of state power',⁴⁸⁹ are distinguished from the 'organs of state administration' (the State Council and the people's governments at various subordinate levels),⁴⁹⁰ the 'adjudicative organs' (the people's courts)⁴⁹¹ and the 'organs of legal supervision' (the people's procuratorates).⁴⁹² All other state organs are created and supervised by and are responsible to the people's congresses at their corresponding levels.⁴⁹³ At those levels below the centre, they are also accountable to their own hierarchical superiors.⁴⁹⁴ This allows for a degree of functional differentiation, that nonetheless falls well short of a fully-blown inter-institutional separation of powers.

This structure, which stretches across the country, incorporates a hierarchy of legislation and governmental power which decreases in breadth the further down one moves. Devolution here consists in the delegation of legislative, appointment, and economic development powers to the various regional and local state organs. Firstly, legislative autonomy enables the formulation and promulgation of local regulations by the People's Congresses of provinces, autonomous regions, municipalities directly under the central government, provincial capitals and relatively large cities "...in the light of the specific conditions and actual needs of their respective administrative areas".⁴⁹⁵ It also allows for local people's governments at the same levels to "formulate rules" of an administrative nature.⁴⁹⁶ With respect to powers of appointment of officials, in addition to the right of People's Congresses at every level to make senior appointments,⁴⁹⁷ a measure of direct electoral democracy is in place at the village level, where triennial elections are now held for over 3 million village

⁴⁸⁹ Article, 85, *PRC Constitution*.

⁴⁹⁰ *Ibid*: Article 105.

⁴⁹¹ *Ibid*: Article 123.

⁴⁹² *Ibid*: Article 129.

⁴⁹³ *Ibid*: Article 3.

⁴⁹⁴ Chen, 1998: 51.

⁴⁹⁵ Article 6, *PRC Constitution*, and Article 7, *Organisational Law of the Local People's Congresses and Local Governments of the PRC, 1979*, (as amended in 1986). See also: Articles 8(1)-(4) and 27, *PRC Constitution*.

⁴⁹⁶ Articles 35 and 36, *PRC Constitution*, and Article 60, *Organisational Law of the Local People's Congresses and Local Governments of the PRC, 1979* (as amended in 1995).

⁴⁹⁷ Articles 7(4)-(8) and 28(7)-(9), *PRC Constitution*.

leaders.⁴⁹⁸ More recently, officials have started to experiment with grassroots direct elections in urban areas, and, on a more limited scale, with polls for township chiefs. By giving people an institutionalised way of expressing their potential dissatisfaction with cadres, the government intends to defuse less orthodox – and more destabilising – political protests. Finally, in terms of economic development, conspicuous resource mobilisation powers and spending responsibilities have been devolved to local governments.⁴⁹⁹ Local governments have also increasingly become entrepreneurs and major stakeholders in local enterprises, seeking to maximise employment and revenue-raising opportunities in the areas under their jurisdiction.

ii. National Autonomous Areas

In addition to the normal or standard bases there exist two further special bases for delegation of local power. The first special basis is ‘national’ or ethnic in character and operates primarily through the five National Autonomous Areas (NAAs), principal home to China’s 55 officially recognised ethnic minorities. The regional autonomous governments are designed to recognise the pre-revolutionary predominance of non-Han ethnic groups. They represent an attempt by the central authorities to both stave off potential ‘splittist’ upsurges and at the same time promote economic growth and development.⁵⁰⁰ To this end, Chapter III, Section VI of the Constitution and the 1984 *Law on National Regional Autonomy (LRNA)* jointly proceed to elaborate a detailed system of autonomous rule for concentrated national minority communities.⁵⁰¹ This allows National Autonomous Areas devolved legislative and administrative power over a number of specified subjects,⁵⁰² in addition to a limited power to disapply higher level policies and legislation.⁵⁰³ Yet, in practice, this represents an essentially paper autonomy.⁵⁰⁴ Thus, at the same time as they are permitted to exercise considerable independence over ‘non-essential’ issues, on matters considered of greater interest to the Party-State this autonomy is heavily circumscribed. Powers granted over subjects concerning cultural, ethnic or religious

⁴⁹⁸ *Organic Law of Villages’ Committees*, 1998. See Also: *Electoral Law of the NPC and LPCs*, 1979 (as amended 1982, 1986 and 1995) and *Organic Law of Urban Residents’ Committees*, 1989.

⁴⁹⁹ Articles 7(1)-(3), 8(1)-(4) and 28 (1)-(4), *PRC Constitution*.

⁵⁰⁰ See: Bovington, 2002; Pahn, 1996; and, Potter, 2005.

⁵⁰¹ See also: *The State Council’s Circular on Implementing the 1984 Law of the PRC on National Autonomous Regions (1991)*.

⁵⁰² Chapter 3, *Law on National Regional Autonomy (LRNA) 1984*. With respect to the secondary literature, see: Pei, 1995; Potter, 2005; Sautman, 1999; and, Schram, 1986.

⁵⁰³ *Ibid*: Article. 20.

⁵⁰⁴ Danspeckgruber, ed., 2002.

identity constitute instead an attempt to placate minority sentiment and thereby tranquillise any ill-feeling that might result in challenges to the unified state. Similarly, the slightly expanded powers touching upon economic development⁵⁰⁵ likewise serve central state priorities and are explained by the relatively backward condition of most NAAs, and the consequently more delicate socio-economic balance which needs to be appreciated if economic instability is to be avoided. The state thus co-opts autonomous organs to sensitise its overall strategy to those conditions and thereby make it more effective. At the same time, it ensures that this sensitised version follows the broad parameters of market decentralisation and subsumes it “under the guidance of state plans”.⁵⁰⁶

iii. Special Economic Zones

The second special basis for the delegation of local power is economic. This operates through the device of the Special Economic Zone. Special Economic Zones (SEZs) first originated from a proposal put forward by the Guangdong province, which was approved by central authorities in 1979. Soon afterwards four SEZs were established in Guangdong (Shenzhen, Zhuhai and Shantou) and Fujian (Xiamen). In 1988, Hainan island was also conferred SEZ status, having first been separated off to form a province in its own right.⁵⁰⁷ At the same time other areas were being established on a slightly less formal basis: by 1995 China had designated a total of 260 “coastal open areas”, 14 “coastal open cities”, 30 “economic and technological development zones”, 18 “open provincial capitals”, 13 “bonded zones”, 52 high-tech “industrial development zones”, 6 “riverine open cities”, and 13 “border open cities”, all of which were permitted various preferential policies designed to promote foreign trade and to attract overseas investment. Initially, SEZs were provided for by a regulation of the standing committee of the National People’s Congress devolving regulative power to the appropriate provincial congress.⁵⁰⁸ In the early 1990s this power was further devolved to city governments and county level standing committees.⁵⁰⁹

⁵⁰⁵ Articles, 6 (3) 33, 34 and 35, *LRNA*.

⁵⁰⁶ *Ibid*: Article. 6 (3).

⁵⁰⁷ Yang, 1997: 57

⁵⁰⁸ *Decision of Standing Committee of NPC*: 21st meeting, November 6th 1981.

⁵⁰⁹ *Decisions of Standing Committee of NPC*: 26th meeting, 1st July 1992 (Shenzhen); 22nd meeting, 2nd conference, NPC, 1994 (Xiamen); 8th NPC, 4th Annual Conference, 17th March 1996 (Shantou/Zhuhai).

Situated within the context of the more general move towards decentralising the economy, SEZs thus emerged as selected areas which were allowed to take control of their own economic policies outside of the state plan and which were actively encouraged to pursue the path of marketisation. In particular, they reflected the strategy of prompting the coastal economy to forge ahead so that it could “radiate both inward and outward”, becoming a pivot in the development of the country as whole.⁵¹⁰ This strategy envisaged that the coast would channel foreign investment and capital into obtaining advanced technology and equipment. This would form the basis for transforming China into a global economic power, which in turn would channel yet more investment into the economy, thus creating an upward spiral.⁵¹¹

In order to boost local incentives, the SEZs were permitted to retain 100 per cent of earnings generated through export during 1982-90, vis-à-vis the 25 per cent granted to normal provinces. SEZs have since steadily grown to identify a geographically relatively coherent area characterized by its advanced marketisation and by the increasingly limited scope of central and local government. While the former is progressively disengaging itself in a move towards consistent market-friendly decentralization, the latter is reduced by the adoption (by local party officials) of the philosophy of small government.⁵¹² Overall, the SEZs have provided the PRC with a valuable institutional device not only to regulate the geographical pace of China’s integration into the world economy, but also to identify and anticipate in a controlled manner the emergence of market-driven social tensions.

iv. Special Administrative Regions

The final model of devolution, which exists wholly outside the normal structures of the state, was originally put forward as an example of Deng Xiaoping thought in the late 1970s to solve the Taiwan issue.⁵¹³ In order to enable re-unification of Taiwan with mainland China without threatening the former’s economy, it was decided to grant Taiwan special status within China as a whole. Later this idea was transplanted to solve the problems of Hong Kong and Macao and crystallised in the form of

⁵¹⁰ Yang, 1997: 27.

⁵¹¹ Park, 1997: 3-7.

⁵¹² Yang, 2001: 26.

⁵¹³ Chen, 2003, 2002; and, Danspeckgruber, ed., 2002.

Special Administrative Regions.⁵¹⁴ The basic idea is that two systems should be allowed to exist within the confines of one unified and sovereign country. The constitutional basis for this regime is found in Article 31 of the 1982 Constitution.

In both cases, the “systems to be instituted” were agreed and broadly defined in two international treaties between China and the countries relinquishing control.⁵¹⁵

Furthermore, a drafting committee was established in each case to draw up a Basic Law, in effect akin to a mini-Constitutional instrument, laying down the form of government – legislative, executive and judicial – according to which each territory was to operate.⁵¹⁶ In practice, this has resulted in a “high degree of autonomy”⁵¹⁷ for the populations of both territories, whereby basic rights and political freedoms have been assured, the pre-existing legal systems of each preserved, and the power to legislate on most matters other than defence and foreign affairs guaranteed.⁵¹⁸

Importantly, it has also meant that the principal offices of state have been occupied by members of the local population, rather than by appointees from the mainland.⁵¹⁹

The benefits that a properly managed re-incorporation of these territories, especially of Hong Kong, would bring to China in terms of national prestige and of economic strengthening was clear from the beginning. The constitutional provision for the establishment of special administrative regions was conceived to facilitate this process. Nevertheless, it was also conceived to preserve the Beijing government’s ultimate control both in form and in practice. Consequently, in the case of Hong Kong, Beijing retains the crucial power to issue final interpretations of the Basic Law.⁵²⁰ a form of ‘apex control’ which has already been used to contradict a ruling of the Final Court of Appeal on a point that was perceived as threatening the strict control of immigration from the mainland.⁵²¹ Here again, whilst there has been a determination to tie these territories to the mainland and reap the rewards they might

⁵¹⁴ See: Clark, 1991 and Fifoot, 1994.

⁵¹⁵ *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the People’s Republic of China on the Question of Hong Kong, 1984; Joint Declaration of the Government of the People’s Republic of China and the Government of the Republic of Portugal on the question of Macao, 1987.* See also: Chen, 2003; and, Ghai, 1997.

⁵¹⁶ *Basic Law of Hong Kong Special Administrative Region of the PRC, 1990 (BLHKSAR).* See also: Goodstadt, 2000; and, Xiao, 2001.

⁵¹⁷ *Ibid:* Articles. 2 & 12.

⁵¹⁸ *Ibid:* Article. 17.

⁵¹⁹ Wang, 2004: 213.

⁵²⁰ See: Article 158, *BLHKSAR.* See also: Elliot & Forsyth, 2000; Morris, 1991; Li, 2000; Lin, 2000: Chap 6; and, Lo, 2000.

⁵²¹ *Ng Ka Ling v. Director Of Immigration et.al.*

bring, there has also been a determination that this should not occur on terms that undermine the fundamental authority of the PRC leadership in Beijing.⁵²²

b. The Slowing Effect of Constitutional and Administrative Devolution

Despite the fact that each of these models has been cast in terms of strengthening and unifying the Chinese nation state, it is clear that they have reflected and recognised a deeper drive towards international integration. In this way, each one broadly reflects a different level of economic development. Moreover, since different levels of economic development correspond to different regions, each model also displays a certain regional specificity in its operation. This is because each level has required a distinct strategy of economic advancement since each has posed different challenges to its realisation. As such, the various models of devolution loosely signify different stages of enmeshment within the global economy. These devolutionary correspondences have been extremely significant in allowing China to integrate with the global economy in a relatively controlled and gradual manner. This has been achieved by using the state's power to regulate and discipline its overall advance. Here it is important to recognise the extent to which the Chinese state retains power of its own to balance, and even to counter-act, market forces. Although the track of economic development involves the gradual diminution of that power, at any stage prior to the market's complete dominance, it continues to factor. Accordingly, as long as the effect of China's policies is not fundamentally to confute the thrust to market integration, it retains power enough to structure and pace its advance. This is precisely what the policies of China's leadership have been doing during the reform period. In choosing to incorporate and implement what amounts to a programme of staged marketisation within its developmental strategy, the Chinese State has trodden the path of international economic integration in a slow and controlled way.

This has been achieved by the state's insistence on introducing marketisation, where possible, according to its own timetable. As a result, economic liberalisation was first implemented in a limited, experimental, and geographically defined manner. Only

⁵²² Fu, 2005; Hong Kong Law Journal, 2007; Lau & Kuan; and, Pepper.

later was it introduced in a staged manner more generally. This enabled the market's initial infiltrations to take place in a risk-averse fashion and prevented its disorderly advance. It also led to the separating out of the various levels of integration and allotting to them relatively clear, controllable, geographical parameters. In this way, the market has not had a free hand. Instead, what has emerged in China is a governmental grid, instituted by law, which allows and encourages variable rates of economic development, but insists that they all cohere under its discipline. Furthermore, it is a grid that has a real impact on the specific geographic patterns of economic integration.

The gradualism that has resulted from this control means that the government has the time to use its power to restructure China in a way that prepares it for an ever-increasing degree of marketisation. What the framework of devolution has done, is to distinguish between different levels of resistance to such a process. By delineating the extent and contours of resistance at the macro-level, this has resulted in targeting the state's restructuring power in a much more effective manner. Whilst in strategising for social and national control it may not be clear to state functionaries that they are serving the priorities of the market, what in fact is being instituted is an ingenious continuum.

B: India

1. General

Owing to its contrasting social and political makeup, the juridico-developmental issues in the last decades of the twentieth century were quite different in the Indian sub-continent to those in China. For one thing, it has not been necessary for the India to undergo the same substantial process of legal construction and re-construction as it has been for China since the experiment in India with mass populist politics in the late 1970s was able to run much less deep than was the parallel experiment in China under Chairman Mao. The endurance in India of the basic constitutional governmental and legal structures not only spoke of the inability of even the most determined and charismatic of leaders to disregard the socio-political settlement they embodied, but also meant that the return to more conventional forms of government involved the re-

engagement of a pre-existing developmental framework which necessarily conditioned the nonetheless significant innovations of the reform period. Chief among those innovations was, of course, the shift away from detailed state control of economic decision-making through extensive public ownership, detailed state regulation and protective national tariff walls towards a less interventionist, deregulated and market-centred approach. Ultimately, this shift resulted in the inauguration of a full-scale New Economic Policy by Narashima Rao's government in 1991.

Accompanying this de-regulative and devolutionary shift within the economic sphere was an increasingly apparent indigenisation of the governmental and legal structures, particularly through the activation of the higher judiciary in terms of taking much greater account of the traditional normative systems operating within wider Indian society. This phenomenon, which was accompanied by a similar and marked growth in regional disparities, should be seen in terms of the increasingly effective activation of India's basic developmental strategy which, as a prelude to systematic transformation, require more subtle account to be taken of the social and political realities upon which it was necessary for it to work. In this sense, the growing processes of indigenisation and regionalisation are quite compatible with that of marketisation; they being a form of structural decentralisation the functional role of which is to surveil extant power relations more closely and thereby to increase the capacity for their more efficient and effective co-option.

Consistent with this analysis is the fact that, not only has greater recognition of social diversities been coupled with subtly strategic attempts to adduce and then undermine them, but also that these regional diversities and disparities have very gradually been shifting their emphasis from cultural, linguistic, ethnic and religious bases, to purely economic and material bases.⁵²³ The framers of the national constitution in 1950 clearly already appreciated the need to recognise the deep diversities within Indian society even whilst negotiating a longer-term programme to overcome them. As such, "the entire national political structure after independence was, in fact, built upon accommodation of these linguistic, religious and caste sentiments and structures as the

⁵²³ In general see: Austin, 1999.

only way to accelerate national integration, enhance the legitimacy of the political system, and maximise the peaceful adjustment of social conflicts that arise during the development process.”⁵²⁴ Consequently, the constitutional settlement which found expression in what remains the largest national constitution in the world was premised upon a complex recognition of a number of forms of diversity inherent in Indian life.

2. Post-Independence Settlement

a. Linguistic and Geographic

The first form of diversity was essentially geographic and linguistic, being reflected in the federal or quasi-federal nature of the Constitution. Substantially modelled on the pre-independence *Government of India Act, 1935*, Article 1 of the 1950 Constitution provides for a “Union of States” whose component sub-national units are afforded their own legislatures separate from those of the Union⁵²⁵ and exercising their own set of powers.⁵²⁶ Moreover, in the Union legislature, in addition to the directly elected lower house (the House of the People or Lok Sabha),⁵²⁷ the states’ interests are represented through an upper house (Council of States or Rajya Sabha),⁵²⁸ composed largely of states’ representatives elected by their respective legislature⁵²⁹ and chaired by the Union Vice-President.⁵³⁰ Moreover, whilst the Constitution can itself on most matters be amended by a special majority of the Union legislature,⁵³¹ amendments to those provisions touching upon the role, structure and functioning of the States require, in addition, the consent of at least half of the states’ legislatures.⁵³²

Overall division of legislative power as between the States and the Union legislatures is laid down in the Seventh Schedule to the Constitution in three lists: the Union list, specifying those matters which fall exclusively within the competence of the Union legislature, the States’ list, specifying those matters falling solely within the competence of the states’ legislatures, and the Concurrent list, over which both Union

⁵²⁴ Frankel, 1978: 20. See also: Singh & Deva, 2005.

⁵²⁵ Article 168(1), *Constitution of India*.

⁵²⁶ *Ibid*: Article 194

⁵²⁷ *Ibid*: Article 79

⁵²⁸ *Ibid*: Article 80

⁵²⁹ *Ibid*: Article 80(1)(b), (4) and (5)

⁵³⁰ *Ibid*: Article 89(1)

⁵³¹ *Ibid*: Article 368(1)

⁵³² *Ibid*: Article 368(2)(a)-(e)

and states' legislatures exercise jurisdiction. Mirroring these structural and substantive divisions in legislative power, provision is further made for separate states and Union executives.⁵³³ The nominal head of the latter, the President of India, is elected every five years by an electoral college comprising members of the both the Union and states legislatures,⁵³⁴ whilst the Vice-President is elected solely by the Union legislature.⁵³⁵ Real power resides, beneath the President, in the Union Council of Ministers or cabinet, according to whose advice the President is normally bound to act.⁵³⁶ This is headed by the Prime-Minister who is usually the leader of the largest political party in the Lok Sabha.⁵³⁷ The Union government is divided into a number of ministries or departments headed by a minister who sits in the Council of Ministers⁵³⁸ who is assisted by a large number of competitively appointed civil servants comprising what are collectively known as the Central Services. This arrangement is largely replicated at the state level, with the executive power of each state being vested in the state Governor appointed by the President of India on the advice of the Union Council of Ministers for a term of five years,⁵³⁹ but acting on the advice of the state Council of Ministers headed by the state Chief Minister who him/herself is normally the leader of the majority party in the lower or only house of the relevant state legislature.⁵⁴⁰

Reflecting the strong post-independence pressure for greater recognition of linguistic diversity, and also the importance of greater linguistic homogeneity to administrative efficiency at the state and regional level, the States Reorganisation Commission, recommended in its 1955 report that state boundaries be redrawn to mirror the linguistic divisions of the country more closely.⁵⁴¹ As a result, fourteen states and six territories were created in 1956, each of whose boundaries corresponded to a dominant regional linguistic grouping. Subsequently this number was periodically added to in response to rebellion, agitation and sometimes even mere expediency.⁵⁴² Whilst there is no doubt that the “impact of linguistic federalism has been an

⁵³³ Ibid: Article 52-79 (Union) and Articles 153-167 (States)

⁵³⁴ Ibid: Articles 52, 54(a) and (b), 55 and 56

⁵³⁵ Ibid: Articles 66 and 67

⁵³⁶ Ibid: Article 74 as amended by the *Constitution (Forty-Second Amendment) Act, 1976* s.13

⁵³⁷ Ibid: Article 74(1), (2), (3) and (5)

⁵³⁸ Ibid: Articles 74 and 75

⁵³⁹ Ibid: Articles 153, 154(1), 155 and 156(3)

⁵⁴⁰ Ibid: Articles 163(1) and 164(1) and (4)

⁵⁴¹ Tremblay, 1997: 164.

⁵⁴² Ibid: 163.

increased sense of regional identity of which the leaders of the dominant language groups have been able to take advantage”,⁵⁴³ and that the reorganisation of states’ boundaries along linguistic lines afforded such identities a direct channel into national politics, it is not clear that anything less would have avoided the wholesale disintegration of the country. From this perspective, “...the survival of the Indian federation [has] largely [been] the result of the national leadership’s accommodation of the influential regional groups in the national political structure.”⁵⁴⁴ Indeed, it is precisely by avoiding confrontation that the central government was able to adopt “a posture of mediation and arbitration between contending linguistic cultural forces” as long as they did not fundamentally threaten territorial integrity.⁵⁴⁵

Two factors have ensured that the regional variations recognized in the executive and legislative structures are nonetheless prevented from becoming too strong. The first is the fact that under certain circumstances the Union can, and on several occasions has, dissolved the executives and legislatures of individual states, imposing governor’s rule under the direction of the Union Government and the President.⁵⁴⁶ Secondly, there is the more permanent feature of a unitary judicial and court structure which, though administered separately through the Supreme Court at the centre⁵⁴⁷ and the High courts together with their subordinates in each state,⁵⁴⁸ is nonetheless fused into a unitary hierarchy with no distinctively federal structure. Consequently, the Supreme Court acts as the final tribunal of review in all areas of law, not just those falling within the subject areas of the Union List or impinging upon the Constitution, as well as exercising its own original jurisdiction in disputes between the Union and the states or between the states *inter se*, and having the power to issue writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *certiorari* and *quo warranto* for the enforcement of the Fundamental Rights.⁵⁴⁹ Likewise, the state High Courts, which mirror the structure of the Supreme Court in being themselves composed of a Chief Justice and a number of Puisne Judges,⁵⁵⁰ not only hear appeals and act as courts of revision for the subordinate courts and tribunals within their particular state

⁵⁴³ Ibid.

⁵⁴⁴ Ibid: 164.

⁵⁴⁵ Brass, 1994: 151.

⁵⁴⁶ Article 356, *Constitution of India*.

⁵⁴⁷ Ibid: Articles 124-147

⁵⁴⁸ Ibid: Articles 214-237

⁵⁴⁹ Ibid: Article 32

⁵⁵⁰ Ibid: Article 216

territories,⁵⁵¹ but also have the power themselves to ensure the enforcement of Fundamental Rights of their state citizens, through the issuing of the various writs,⁵⁵² as well as exercising original jurisdiction in certain civil matters and in admiralty cases.⁵⁵³ Finally, below the level of the High Courts, the subordinate courts are divided according to whether they exercise civil or criminal jurisdiction. The civil courts consist of District Courts to whom an initial appeal lies from lower munsif courts and courts of subordinate judges.⁵⁵⁴ The criminal courts consist of courts of session to which initial appeals lie from the magistrates' courts of first and second class.⁵⁵⁵ Finally, specialised tribunals, such as Income Tax Appellate Tribunals, Company Law Review Boards, Sales Tax Tribunals, Consumer Forums, Central and State Administrative Tribunals and Debt Recovery Tribunals operate within particular states territories under the superintendent of the relevant High Court.⁵⁵⁶

b. Personal Laws

The second major way in which the diversity of Indian society was taken account of in the 1950 constitutional settlement was in the continuance of the pre-existing system of personal laws which governed those areas of a primarily familiar nature, which were apt to touch upon particularly deep seated and especially strongly held religious and communal convictions. Importantly, building upon the practices of the Raj before it, not all self-identifying religious communities were allowed their own separate personal laws; only those with the most divergent of religious practices so that both the Sikh and Buddhist communities to name only the most prominent examples, were assimilated under Hindu personal law. Moreover, Hindu law, being the law of the majority community, it was felt could be brought under statutory regulation without too much political agitation as a way of imposing upon it greater uniformity and regularity. This was achieved not in the Constitution itself, but soon after its institution in a series of Parliamentary Acts often collectively referred to as the 'Hindu Code'.⁵⁵⁷ These, read together with Article 44 of the Constitution specifying

⁵⁵¹ Ibid: Articles 225-231

⁵⁵² Ibid: Article 226

⁵⁵³ Ibid: Article 225.

⁵⁵⁴ Ibid: Articles 233-237 and Section 100, *Civil Procedure Code*.

⁵⁵⁵ Sections 374, 376 and 376G, *Criminal Procedure Code, 1973*.

⁵⁵⁶ Article 227, *Constitution of India*

⁵⁵⁷ *Hindu Marriage Act, 1955; Hindu Succession Act, 1956; Hindu Adoption and Maintenance Act, 1956; and Hindu Minority and Guardianship Act, 1956.*

as a Directive Principle of State Policy that “the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India”, indicate the dynamic nature of the settlement in this area which, though finding it necessary to recognize the personal and religious diversities of the Indian population at the time of its negotiation, nevertheless, clearly determined to effect the ultimate undermining of those diversities through in the longer term, through a process of uniformization. Importantly, however, even in the various provisions of the ‘Hindu Code’, there remained embodied a realism as to the limits of what could be achieved in practice even within the law of the majority community, so that the *Hindu Marriage Act, 1955* in particular contained a number of provisions preserving customary forms of marriage and divorce.⁵⁵⁸

c. Socio-Economic

The third and final major area in which the Constitution recognized diversity was in the area of socio-economic positioning. The huge economic disparities that existed within the polity of India were clearly appreciated by nearly all the major ideological factions represented within the Constitutional Assembly. Moreover, there is little doubt that the vast majority were committed, not only to reducing the inequalities within India that had traditionally been endemic, but also to raising the overall prosperity of the nation for the purposes both of increasing its material strength in the face of potential external threat and, more importantly, in order to raise the vast majority of the Indian population out of the grinding hand to mouth agricultural existence to which they had hitherto been subjected. In order to achieve these goals, the Constitution embodies in effect a three pronged program of socio-economic uplift. The first prong was found in the catalogue of Fundamental Rights guaranteed in Section III of the Constitution. These were conferred upon all citizens and took precedence over all other extant law. They included the standard political rights to equality⁵⁵⁹ and to freedom,⁵⁶⁰ including to the right of the freedom of religion and conscience, and associated practices, which represented the common core of most liberal democracies. At the same time they also included rights specifically designed for the Indian context, and aimed at expunging or remedying forms of social

⁵⁵⁸ Section 29(2)

⁵⁵⁹ Articles 14,15 and 16, *Constitution of India*.

⁵⁶⁰ *Ibid*: Articles 19, 20, 21 and 25-28.

exploitation such as untouchability,⁵⁶¹ caste discrimination,⁵⁶² traffic in human beings,⁵⁶³ and forced labour⁵⁶⁴ which had been endemic in parts of the Raj in pre-independence India. Finally, they also added to the standard liberal and democratic rights of western democracies by protecting the rights of minorities to utilize their own distinctive languages, preserve their cultural identities, and establish and administer their own educational institutions.⁵⁶⁵

The second prong of the constitutional development program was found in the Directive Principles of State Policy set out in Section VI of the Constitution, which were to be read together with the Fundamental Rights in Section III. Although the Directive Principles were not directly enforceable, they were nevertheless stated to be “fundamental to the governance of the country”⁵⁶⁶ and were meant to operate as long term programmatic guidelines for creating the type of social order of liberty, equality, fraternity and political and economic justice which was enunciated in the Preamble to the Constitution. These principles were of variable specificity: they included stipulations that the state should “direct its policies towards securing... that the ownership and control of the material resources of the community is so distributed as to sub-serve the common good”,⁵⁶⁷ that it should encourage the provision of just and humane conditions of work,⁵⁶⁸ that it should promote the social and economic interests of scheduled castes, tribes and other disadvantaged groups,⁵⁶⁹ that it should try to ensure all citizens work at a living wage,⁵⁷⁰ and that it should attempt to provide for free and compulsory education for all children up to the age of fourteen.⁵⁷¹ More contentiously, as has already been seen, it was directed that the state should endeavour to secure a uniform civil code for all citizens of the country, and under Article 44, partly as a concession to the Gandhian sentiment at the time of the Constitution’s negotiation, it was provided that village Panchayats should be

⁵⁶¹ Ibid: Article 29

⁵⁶² Ibid: Article 15

⁵⁶³ Ibid: Article 23

⁵⁶⁴ Ibid. See also Article 24 (abolition of child labour).

⁵⁶⁵ Ibid: Articles 29, 350, 350A, and 30.

⁵⁶⁶ Ibid: Article 37

⁵⁶⁷ Ibid: Article 39

⁵⁶⁸ Ibid: Article 42

⁵⁶⁹ Ibid: Article 46

⁵⁷⁰ Ibid: Article 43

⁵⁷¹ Ibid; Article 45 now amended by the *Constitution (Eighty-Sixth Amendment) Act, 2002*.

organized as a way of giving effect to a form of bottom up rural democracy and self-government.⁵⁷²

Intersecting with the Fundamental Rights and the Directive Principles of State Policy the third prong of the Constitutions' development programme focused upon the preferential treatment of a number of hitherto disadvantaged groups within Indian society, in order to construct a sophisticated system of affirmative action. Working upon the principle that to treat like situated groups similarly conduced to social and economic justice but to treat dissimilarly situated groups similarly militated against it, the constitution identified those disadvantaged groups requiring state assistance under two broad categories. The first was designated the Scheduled Castes and Tribes, and the second was given the broad title of 'Other Backward Classes'. In the case of the Scheduled Castes and Tribes, responsibility for a enumerating and updating the groups to be so scheduled was conferred upon the President and the state Governors,⁵⁷³ with the groups falling within the category of 'Other Backward Classes' to be decided upon in conjunction with periodic investigative commissions appointed by the President to enquire into their conditions.⁵⁷⁴ It was also provided that a Presidentially appointed officer for Scheduled Castes and Scheduled Tribes should have the power, "to investigate all matters relating to the safeguards provided" for them.⁵⁷⁵ Specifically, in Part XVI of the Constitution, a series of "special provisions relating to certain classes" were laid down, including the reservation of seats in the Lok Sabha and the state legislatures for members of Scheduled Castes and Tribes, and for government appointments insofar as they did not interfere with administrative efficiency. Overall then, the constitutional settlement of 1950, in seeking to guarantee equality, recognised the inevitable need to take account of the huge diversities of Indian life in order to create a dynamic that would progressively realise that objective in practice whilst raising the overall level of material prosperity.

⁵⁷² Ibid: Article 40

⁵⁷³ Ibid: Articles 341 and 342

⁵⁷⁴ Ibid: Article 340

⁵⁷⁵ Ibid: Article 338. See also the *Constitution (Sixty-Fifth Amendment) Act, 1990*

3. The Emergency: Reassertion and Recalibration

Between 1950 and the 1970s, the strategy adopted by the government of India for the operation of this constitutional programme, embodied in the Nehruvian consensus, and despite the various minority guarantees was, wherever possible, a fundamentally centralising one which concentrated upon heavy state-led economic intervention, self-reliance and centralised planning. The ultimate failure of this strategy to fulfil the promises contained within the Constitution of greater and more balanced material progress, eventually precipitated a crisis in the Indian Polity as Mrs Gandhi sort to bypass the normal mechanisms of government, first, by increasingly populist appeals to the masses and, then, by a whole-sale suspension of those mechanisms during the Emergency of 1975-77. This crisis precipitated a fundamental redirection in the legal and constitutional system. At one level, this redirection entailed the greater indigenisation of India's developmental state and thus a greater manifestation of its numerous latent socio-cultural diversities. At another level, however, this growing indigenisation can actually be seen as a necessary and prerequisite sensitisation of the developmental state as prelude to the much more effective and sustainable transformation of Indian society. From this angle, a proper perspective on post-Emergency Indian legal, governmental and constitutional development can only be secured if the numerous indigenising tendencies are read together with the gradual shift in India's political economy from a commitment to a mixed, heavily planned model towards commitment to an increasingly marketised one. In this way, it is possible to see that, just as in matters pertaining to the modern, industrialised sectors of the Indian economy there has been a controlled and limited devolution of power into the hands of entrepreneurs, producers and consumers in a manner that increasingly co-opts them in the service of more efficient economic development, so too the processes of indigenisation can be seen as a prelude not only to the developmental state's more subtle and therefore more effective transformation of Indian society, but also to the strategic co-option of certain portions of traditional society where functionally appropriate to the particular stage of development reached in the overall and longer term service of that transformation.

a. Constitutional Amendment

Outside of the specific reforms in economic policy, there were four major areas of in which the fundamental redirection and much greater developmental activation of the post-Emergency legal system has been exhibited.⁵⁷⁶ The first was represented by the *Forty-Second* and *Forty-Fourth Constitution (Amendment) Acts* of 1976 and 1978. The first of these – the *Forty-Second (Amendment) Act* – passed during the course of the Emergency itself by Mrs Gandhi, sought to change the functional dynamic of the Constitution by protecting laws which purported either to implement any of the Directive Principles of State Policy or to prohibited anti-national activity or the formation of anti-national associations from being declared un-constitutional on the grounds that they violated Fundamental Rights. And it added an entirely new section to the Constitution specifying Fundamental Duties which sought “to promote harmony in the spirit of common brotherhood among the people of India, transcending religious, linguistic, regional or sectional diversities.” Moreover, although after March 1977, when the first election after the Emergency returned a new Janata dominated Parliament, the *Forty-Third* and *Forty-Fourth (Amendment) Acts* revoked some of the more draconian aspects of the *Forty-Second (Amendment) Act*, thereby reasserting the authority of normal constitutional government, significant portions of the *Forty-Second Amendment* programme were nonetheless retained. In particular, the *Forty-Third* and *Forty-Fourth Amendments* retained the *Forty-Second Amendment’s* re-emphasis upon the Constitution’s fundamentally ‘socialist’ nature, by which was meant its inherent developmental logic in support of social uplift. Indeed, significantly, this re-emphasis was taken even further in the *Forty-Fourth (Amendment) Act*, which – the Janata government having reasserted the precedence of Fundamental Rights over the Directive Principles of State Policy – nonetheless determined to abolish or at least qualify the fundamental right to property by stipulating that: “no person shall be deprived of his property save by authority of law”.

Whilst superficially these developments could be viewed as marking an advance, or at least a reconsideration, of the old Nehruvian state socialist agenda, given the

⁵⁷⁶ The author is indebted to Professor Werner Menski for the suggestion of this four-fold division.

particular composition of the Janata leadership and the fact that the Emergency itself represented part of a populist by-passing of the normal state structures, they are better understood as part of the much wider process of post-Emergency indigenisation. As such, the *Forty-Second*, *Forty-Third* and *Forty-Fourth (Amendment) Acts* marked a signal departure in Indian constitutional jurisprudence. In this context, it has been pointed out by a number of scholars that the redefinition of property as being held on trust not just for the individual but for the benefit of the public in general, the introduction of stronger Directive Principles on equal distribution, legal aid and environmental protection, and in particular the constitutional specification of Fundamental Duties, clearly reflect indigenous and traditional Hindu concepts of interlinkedness, Dharma and the promotion of the public interest harmoniously with that of the individual as the basis for proper communal living. Moreover, in the early 1990s, these trends were given important further institutional expression under the terms of the *Seventy-Third* and *Seventy-Fourth Constitution (Amendment) Acts* which instituted, in conformity with the Directive Principle embodied in Article 40 of the Constitution, a third tier of government – in addition to those of the Centre and the states – in the form of elected rural and urban bodies.⁵⁷⁷ Building upon the Gandhian ideal of a network of self-governing ‘village republics’, and in states with a population of more than two million, these bodies comprise three levels: the village panchayats at the lowest level, the block panchayats at the intermediate level and district panchayats at the uppermost level. Three types of municipality were also instituted in urban areas (again depending upon population size): municipal corporations, municipal councils, and Nagar panchayats. These bodies were all brought under Part IX of the Constitution, “to ensure in the Constitution certain basic and essential features of Panchayati Raj Institutions to impart certainty, continuity and strength.”⁵⁷⁸ Consequently, the Eleventh and Twelfth Schedules, added to the Constitution along with the *Seventy-Third* and *Seventy-Fourth Amendments*, indicate the transfer of a total of twenty nine subjects to the panchayats and eighteen subjects to the municipalities.⁵⁷⁹

⁵⁷⁷ Matthew, 1997: 105.

⁵⁷⁸ Venkataswamy, 1991.

⁵⁷⁹ Matthew, 2000: 108.

b. Legislation

In addition to, and wholly in line with, these radical constitutional reformulations, there were, from as early as 1973, a number of legislative interventions designed to tackle specific social justice issues such as to render the legal system as a whole more ‘emancipatory’ or ‘people oriented’. These included: extending the secular maintenance provision, via sections 125 and 127 of the *Criminal Procedure Law* 1973, to cover all divorced wives until death or remarriage regardless of their communal affiliation; several acts to effect the prohibition of dowry payments;⁵⁸⁰ the prohibition of child labour;⁵⁸¹ the explicit prohibition of bonded labour together with criminal sanctions and institutional provisions to ensure its implementation;⁵⁸² and the passage of consumer⁵⁸³ and environmental protection laws. Finally, in the early 1990s, it also involved controversial attempts to operationalise a system of affirmative action in favour of the materially disadvantaged ‘backward classes’ as recommended by a commission appointed within the terms of Article 340 of the Constitution under the chairmanship of B.P.Mandal (*Indra Sawney v. India*).

c. Judicial Activism

The third major area in which this post-Emergency redirection manifested itself was in the activation of the higher judiciary. Prior to the Emergency, the jurisprudence of both the High Courts and the Supreme Court tended to be conservative in nature, and its interpretation of constitutional provisions somewhat restrictive. On those occasions when it did show signs of activism, this tended to be limited to smoothing the way for the implementation of the Nehruvian strategy of heavy industrialization. The collapse of the Supreme Court’s power during the worst excesses of the Emergency together with the prospect of its long-term impotence in the face of the executive, shocked it as a body into action after normal constitutional government was restored in 1977, and it developed a number of strategies to shore up its somewhat precarious position. First, it determined both firmly to reassert its right and responsibility to review legislative and executive acts where these threatened to violate the “basic features” of the

⁵⁸⁰ *Criminal Law (Second Amendment) Act, 1983; Dowry Prohibition (Amendment) Act, 1984; Maintenance of List of Presents to the Bride and Bridegroom Rules, 1985; Dowry Prohibition (Amendment) Act, 1986; Dowry Prohibition Rules (Kerala), 1992.*

⁵⁸¹ *Child Labour (Prohibition and Regulation) Act, 1986*

⁵⁸² *Bonded Labour System (Abolition) Act, 1976*

⁵⁸³ *Consumer Protection Act, 1986*

Constitution and to institute procedures to protect the independence of the higher judiciary from being interfered with under the guise of administrative convenience. Secondly, it determined gradually to institute a series of systemic innovations in order to enable the more effective implementation of Section III rights, taking account, in particular, of the social and economic conditions in which the large majority of Indian citizens found themselves. This involved both the loosening of procedural rules for access to the Supreme and High Courts where it was alleged that citizens' fundamental rights had been violated and the considerable expansion of *locus standi* requirements so that public interest cases could be more easily taken up by public spirited individual on behalf of the downtrodden. Finally, it determined to adopt an altogether more purposive approach to the interpretation of Section III of the Constitution itself. In addition to a transformation in the reading of Fundamental Rights individually, this manifested itself, in particular, in the expansion of the area over which they were operative and in a more holistic interpretation of their relationship with the Directive Principles of State Policy contained in Section IV.

Underlying these various strategies, was a more conventional determination on the part of the judiciary to reassert its constitutionally mandated role as the state's final interpretative authority against the excessive incursions of an over-mighty executive, but also a growing appreciation of the fact that its power ultimately depended upon the support of the Indian population itself. Consequently, these developments have exemplified an increasing determination creatively to activate the Constitution as a mechanism of social uplift so that the Court is better able to be seen as an ally rather than an enemy of the downtrodden and thus better able to build a constituency of support among the masses which elected politicians can no longer ignore.

The subtle and sensitising role of the judiciary has been of crucial importance also in the fourth and final area of post-Emergency jurisprudential transformation; namely, in the gradual realignment of India's heterogeneous personal law system. Here too it is possible to see powerful evidence of the increasingly effective cooption of traditional structures and communities into the wider developmental process and into the overall logic which underpins it. As such, after a strong initial impulse to impose legal uniformity top down via incremental legislative reform, it became increasingly clear to the higher judiciary, particularly given its newly activated mindset, that any

straight-forward application of such provisions in particular cases would result, at best, in injustice, and, at worst, in wholesale, even violent, rejection of the project of legal uniformity. Consequently, what has begun to emerge from the late 1970s/early to mid-1980s has been a much more sophisticated strategy whereby the Supreme and High Courts have worked to implement various extant statutory provisions in a manner and at a rate that prove socially sustainable. In particular, this has involved gradually eschewing somewhat grandiloquent, even damaging, demands for the implementation of a comprehensive Uniform Civil Code as mandated under Article 44 of the Constitution, and redirecting energies towards ensuring that substantive justice is done in particular cases, taking full account of the specific contexts within which disputes have arisen. Importantly, this has increasingly involved judges drawing upon, though also subtly changing and extending, indigenous notions of 'right order' and 'appropriateness'. This has not led to a fundamental reversal of the overall trend towards legal uniformity and the dual principles of equality and individuation presupposed in the institution of a market sympathetic morality. Rather it has made that process more insidious and effective because it has rendered it simultaneously more gradual and more subtle. In consequence, following a path of gradual case-based incrementalism, it has proved less and less possible for the forces of tradition to offer wholesale and effective resistance.

4. Geographic Disparities

As with China the process of liberalization and economic opening in India has led to the emergence or exacerbation of a number of regional disparities, the most noticeable of which have been between those states in the north and the east of the country, which have tended to become economically more backward, on the one hand, and those states in the south and the west of the country which have tended to become economically more forward, on the other. At once, however, it must be noted that this process has been much less clear cut in India than in China. Indeed, the fact that India's constitutional and federal structure has increasingly been forced to take account of latent linguistic and ethnic diversities is indicative of the fact that they have been much more disruptive of, and resistant to, the emergence of a purely economic logic than their less extensive counter-parts in China. Almost paradoxically, however, it seems that the very factors which have tended to inhibit competency and

consistency of approach and thus to make overall collective action at the national level more difficult, have also made any really concerted and unified resistance to central level reform initiatives almost impossible. In particular, they have acted to quarantine and localise disaffection in a manner that makes longer term interregional alliances extremely difficult to sustain. Consequently, whilst accepting that India suffers greater resistance to the emergence of an autonomous and purely economic logic of development than does China, which has been able to engage the market in an altogether more disciplined and determined fashion, it is, at the very same time, also true that India's "federal political structure has been an extremely important ingredient in helping to make its economic reform programme politically sustainable". This has particularly been the case in the way it has helped to reduce "pressure on political decision-makers in the central government to abandon reforms."⁵⁸⁴ What this has meant in practice is that, as liberalisation policies have been introduced at the centre, states have been less and less able, even if they have so wished, to protect themselves against the disciplining effects of a market and investment dynamic which has increasingly favoured those environments most conducive to its propagation.

It is important to recognise that what is new is not the fact of interstate competition *per se*. Prior to reform there was already a great deal of such competition, but it was a form of competition channelled and mediated through the central government such that most "strategies were formulated with a view to getting crucial resources from the centre, whether in the form of the location of private sector factories or public sector resources."⁵⁸⁵ With the abandonment of the location policy in 1991, states have now been enabled, even indeed obliged, to "bypass the centre and go directly to the business houses and foreign investors." This has caused a transformation in the nature of interstate competition "from a vertical to a horizontal one" which has meant that, "even if only some states do better than the rest in the race, there is a change in the way all states conceive (or can potentially conceive) of their role in shaping economic policy."⁵⁸⁶ In this way, states have been subjected to the disciplining effects of the market to an unprecedented degree and this has forced them to pay a growing

⁵⁸⁴ Jenks, 1998: 8.

⁵⁸⁵ Sinha, 2004: 35.

⁵⁸⁶ Ibid.

economic price for allegiances and commitments which are not in line with, or which serve to frustrate, the operation of the market.

Put a slightly different way, the new centre-level policies have enabled Indian and foreign capital freely to identify those locations likely to provide the best investment returns, and, for this reason, the amenability or otherwise of the local policy environment has become an increasingly important factor in India's regional politics. The fact that "state governments have become a crucial point of contact for entrepreneurs" has set off an "intense competition among state governments to attract investment, resulting in a proliferation of tax incentive schemes and promises of speedy administrative procedures, the expedition of land acquisition for industrial uses, and efforts to maintain a conducive industrial relations climate."⁵⁸⁷ Whilst it has clearly not been the case that sub-national ethnic, linguistic and religious tensions and identities inhibitory of a fully functioning market dynamic have ceased to factor strongly as determinants in India's investment environment, states have increasingly been forced to pay the economic price for their persistence. Thus, in a 2001 joint study by the World Bank and the Confederation of Indian Industry, it was found that the cross-state variation in investment environment was clearly reflected in the disproportionate share of investment – especially foreign investment – attracted by more 'investor-friendly' states (Maharashtra, Gujarat, Karnataka, Andhra Pradesh and Tamil Nadu) to the detriment of the more 'investor-hostile' states (Uttar Pradesh, Bihar, West Bengal). Moreover, this situation has led to an increase in the variation of state growth rates and has even seen a deceleration in the less advantaged states as compared to the 1980s.⁵⁸⁸ In addition to provoking considerable unrest, this has meant that even very stubborn state governments are likely more and more to be coerced into streamlining their activities according to the contours and priorities of the market.

Tellingly, this is also a situation which has found expression in the differential functioning of the sub-state decentralisation policies introduced by the *Seventy-Third* and *Seventy-Fourth Constitution (Amendment) Acts*.⁵⁸⁹ Underlying these amendments was:

⁵⁸⁷ Ibid.

⁵⁸⁸ Ibid..

⁵⁸⁹ Sapovadi, 2003.

the premise that effective decentralization of the authority and responsibility along with resources, for local development to elected representative local bodies will help ensure that programmes are better adapted to local needs, that stronger pressures will be generated to ensure that the works are completed, maintained and managed properly, and that the have-nots and underprivileged can exert effective democratic pressure on the local government to assess their needs.⁵⁹⁰

And it does indeed seem that, where these reforms have been effectively implemented and have begun to bed-down, so to speak, greater transparency has indeed been “forced on the functioning of the locally elected representatives and bureaucrats” such that it has become easier for “local people to identify and expose corruption.” This has consequently meant that “the proportion of intended benefits reaching target groups has increased substantially ever since they have been channelled through decentralised local self-governments.” In this way, these new policies of sub-state decentralisation have been shown to be an “an effective means of involving people in improving the local delivery system of local public goods,”⁵⁹¹ as well as achieving greater allocative efficiency in their provision.

⁵⁹⁰ Sathe, 2002: 54-55.

⁵⁹¹ Thimmaiah, 1977: 112-113, in Matthew, 1997.

Chapter 5: The State

As the market has been allowed greater scope, and decision-making powers have devolved on to individual entrepreneurs, enterprises and consumers, so also there has been an inevitable transformation in the activities of the Chinese and Indian states. The tightening division of labour spurred by reform has had an effect well beyond the conventional spheres of direct economic concern for government. In both jurisdictions there has been a growing use of the state to constrain the state in a manner that attempts to reduce the discretionary and arbitrary exercise of power over the population and to secure its more focused exercise according to a philosophy both of more efficient bureaucratic functioning and personal autonomy which is increasingly in harmony with the functional requirements of the market. It is, of course, important to recognise that these are tendencies that are evolving within a prolonged transitional phase and thus the situation, when taken at any given point over the past three decades, far from approximates to the purported ideal type of a full-blown market society. Further, what is to be particularly noted in what follows is the gradual and growing shift in the direction of such a type and what that reveals about the dynamic socio-economic forces reconfiguring each jurisdiction. Once more, it will also be seen that these tendencies have manifested themselves in China and India in quite different ways. In China, they have involved both the elaboration of an increasingly comprehensive and detailed administrative and criminal law system based upon a growing recognition of individual rights and, to a limited extent, even freedoms and also, as part of this process, the gradual de-politicisation of the normal mechanisms of state power. In India, much of the apparatus for the control of state power have existed since the beginning of the Republic and certainly there were a comprehensive set of personal freedoms and closely delimited governmental structures laid down in the Constitution. Rather than having to fundamentally re-institutionalise the exercise of state power in the way that China has had to, then, in India it has been much more a question of engaging and activating more effectively mechanisms which already existed, and in this the focus has very much been on the operationalisation of the Fundamental Rights section of the Constitution followed by the substantially expanded public interest basis by the higher judiciary.

A: China

1. Administrative Law

In China the idea of controlling the activities of Party-State operatives within a tight normative framework ran counter to both the traditional ideological understandings of the ‘dictatorship of the proletariat’ and leadership of the Communist Party and to the decades of pre-reform practice in which state structures, insofar as they were respected at all, were utilised as tools in the service of mobilisational drives under the direction of ideologically primed Party cadres.⁵⁹² Realisation of the inimical nature of this situation to sustainable long-term economic development was of course part of the comprehensive overall reaction against Maoist rule, but owing to the weight of ingrained expectations and habits, both legislative and institutional requirements for a systematic reversal of this situation have only gradually and by stages been accepted and realised in practice as the reform process has unfolded. As early as the 1982 Constitution, Article 41 stated that: “Citizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with the law” and this principle was reaffirmed in Article 121 of the *General Principles of the Civil Law (GPCL) 1986*.⁵⁹³ In the intervening years a number of laws and regulations in the rapidly developing Chinese legislative environment had purported to provide individuals offended by administrative decisions the right to appeal to the People’s Courts and some attempt had been made to provide for such appeals, first, by bringing them under the general scope of civil procedure and, second, by experimenting on a limited basis in the early 1980s with specialised administrative chambers in some local courts.⁵⁹⁴ In this way, nascent forms of administrative litigation began to supplement and then gradually to supersede traditional “letters and visits work” on the part of governmental bodies, which had been the more informal and personal way by which aggrieved Chinese citizens registered their objections to administrative activities which affected them adversely.⁵⁹⁵

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⁵⁹³ Chen, 2004; Lubman, 1999.

⁵⁹⁴ Article 3, *Law of Civil Procedure (provisional) 1982*.

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a. Litigation and Review

A major event in the development of China's administrative law system was the passage in 1986 of *Security Administration Punishment Regulations (SAPR)* governing the extra-judicial punishment of citizens by the police and public security agencies. The regulations purported to provide penalised persons with the right of review by the courts of decisions made under their terms,⁵⁹⁶ and led almost immediately to a steep increase in administrative cases being dealt with by the People's Courts. Relatively soon afterwards, in October 1987 at the Thirteenth National People's Congress of the CPC, it was decided to strengthen the system of administrative law congruent with recognition in the *Seventh Five Year Plan* of 1986 to 1990 of the need for greater legal regulation of administrative management, and in so doing, it was determined that further laws on the organisation, powers and liabilities of administrative organs should be passed along with procedures to deal with their violations.⁵⁹⁷ Consequently, in addition to the establishment of permanent administrative divisions in most courts, a revised version of a draft administrative procedure law published in late 1988 was adopted by the National People's Congress in April 1989 as the *Administrative Litigation Law (ALL)*.⁵⁹⁸ This law was of considerable importance in laying down procedures for challenging administrative acts in the People's Courts,⁵⁹⁹ and thus for beginning to realise the promises of redress for administrative abuses laid down in the Constitution. In particular, it conferred on the courts the right to quash illegal orders, modify unfair administrative sanctions and compel action where state functionaries were failing in their duties.⁶⁰⁰ Thus, in theory at least, the courts for the first time enjoyed a general power to control the acts over subjects ranging from personal liberty to licensing and property rights. Moreover, the law placed the burden of proving that the action being challenged before it was lawful upon the agency whose action it was, rather than upon the complainant,⁶⁰¹ and notably

⁵⁹⁶ *SAPR*, Article 39.

⁵⁹⁷ Chen, 2004: 256.

⁵⁹⁸ See: Potter, 1994. More generally, see: Finder, 1989; and, Lin, 1996, 1999. For the situation prior to 1988 see: Liu, 1988.

⁵⁹⁹ *ALL*, Articles 2, 5, and 11.

⁶⁰⁰ *Ibid*: Article 54.

⁶⁰¹ *Ibid*: Article 32.

excluded the possibility of administrative litigation being settled by means of mediation.⁶⁰²

Although the *Litigation Law* permitted aggrieved citizens to institute suites in the People's Courts, it continued to subject the right of review to a number of important limitations.⁶⁰³ Perhaps the most notable of these was the restriction of the courts to investigating the legitimacy of "concrete administrative acts" as opposed to "abstract administrative acts" such as the legislative enactments of administrative organs.⁶⁰⁴ These remained subject only to the system of invalidation by the NPC Standing Committee, the State Council and their subordinates.⁶⁰⁵ The courts were also prevented from reviewing acts of state relating to matters of defence and foreign affairs,⁶⁰⁶ the appointment, removal or disciplining of administrative organ personnel,⁶⁰⁷ and also to administrative acts that the law provided should be final.⁶⁰⁸ Lastly, from a procedural point of view, administrative actions were not permitted to be suspended unless public interest would have suffered irreparable harm had they been allowed to stand and it was open to administrative agencies to declare documents relating to the decisions in question as internal and thereby to place those decisions beyond the scope of public judicial investigation.⁶⁰⁹ Nevertheless, the *Administrative Litigation Law* has been crucial in opening up the courts to an apparently ever increasing volume of administrative law cases in the years subsequent to its enactment and this has further propelled the more systematic elaboration of administrative law structures.⁶¹⁰

Important examples of this were both the formalisation of the administrative reconsideration or review system as a complement to administrative litigation law, and the revival and then growth in importance of the administrative supervision system through the State Council's Ministry of Supervision. Administrative review was initially subject to regulations of the State Council adopted in 1990,⁶¹¹ but

⁶⁰² Ibid: Article 50.

⁶⁰³ See here: O'Brien & Li, 1995.

⁶⁰⁴ *ALL*, Articles 11 and 12. See also, *Opinions of the Supreme People's Court on Some Issues Relating to the Implementation of the Administrative Litigation Law (For Trial Implementation)*.

⁶⁰⁵ Chen, 2004: 227.

⁶⁰⁶ *ALL*, Article 12

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid.

⁶⁰⁹ Lubman, 1999: 207.

⁶¹⁰ Ibid: 209. Also: O'Brien & Li, 2003; and, Michelson, 2006.

⁶¹¹ *State Council Regulations on Administrative Review 1990*. See also: Chen, 2004: 228.

subsequently came to be developed further when these were superseded by the *Law of Administrative Review* in 1999. Prior to 1990, administrative reconsideration provisions existed only in a dispersed fashion throughout numerous pieces of individual legislation without any overall procedural or jurisdictional framework. Although the 1990 regulations permitted aggrieved parties to seek review of reconsideration only of specific acts of an administrative organ and excluded the review of “abstract administrative acts”,⁶¹² the 1999 *Law* extended this right to cover rules issued by departments of the State Council, of local governments above the county level, and of village and township governments.⁶¹³ This in itself represented a significant extension of the administrative law system. Finally, in addition to provisions on how to identify the correct reviewing authority,⁶¹⁴ the 1999 *Law* also lays down the procedures to be used and provides that an administrative decision may be revoked, varied, or declared unlawful if based upon insufficient evidence, the wrong application of the law, or if it is manifestly inappropriate and unreasonable.⁶¹⁵

b. Supervision and Compensation

Alongside the mechanisms for administrative reconsideration and review has been the growth of a complementary system of administrative supervision exercised by state administrative supervisory organs led by the Ministry of Supervision. The ministry, after having been abolished in the Cultural Revolution, was re-established in 1986 by a Decision of the NPC Standing Committee,⁶¹⁶ and it subsequently established thousands of subordinate supervisory organs throughout the country at the county level and above. The basic principles and procedures governing its work were laid down in State Council *Regulations on Administrative Supervision* in 1990. The Ministry of Supervision and its subordinates were tasked with investigating violations of laws, regulations and policies as well as complaints of official misbehaviour⁶¹⁷ and were empowered to recommend both the rectification of deficient administrative acts and the disciplining of errant officials.⁶¹⁸ In 1997, with the passage of the *Law of Administrative Supervision (LAS)*, this power of recommendation was transformed

⁶¹² Chen, 2004: 257

⁶¹³ *LAR*, Article 6. See: O’Brien & Li, 1995, 2003; and, Michelson, 2006.

⁶¹⁴ *LAR*, Articles 12-15.

⁶¹⁵ *LAR*, Chapters 4 and 5 esp. Article 28.

⁶¹⁶ Chen, 2004: 259.

⁶¹⁷ Now, *Law of Administrative Supervision, 1997*, Articles 6 and 18.

⁶¹⁸ *LAS*, Article 23.

into a power of imposition⁶¹⁹ in spite of the fact that the Ministry of Supervision had been merged in 1993 with the Central Commission of Discipline and Inspection of the CPC. Whilst this merger led some commentators to complain of a “further blurring of the lines between state and party”⁶²⁰ an alternate interpretation might be that this is evidence of a process by which the Party itself, in so far as it wields de facto power, is gradually being brought within the scope of state regulation. Certainly, with the passage of time, there is evidence that the growing trend towards differentiation and specialisation seen in society and the legal system more generally has begun manifesting itself in the administrative law system. Indeed, as its litigational and procedural frameworks have been laid down, there has been a growing shift towards the elaboration of more subject specific norms. This can be seen most notably in adoption of the *Administrative Punishment Law* by the NPC in 1996 and the *Law of Administrative Licensing* in 2003 which will be dealt with more fully in the following section. There is evidence that more and more areas of Party-State power are, at least notionally, being brought within the ambit of the system of a whole.

The final major component of that system, embodied in a promise of compensation for abuses of administrative power laid down in the Constitution, was sought to be put in place by the enactment in May 1994 of the *State Compensation Law (SCL)*. This provided that organs of the State were liable for injuries caused by their illegal use of administrative power⁶²¹ and it even allowed for the personal liability of individual officials if they “intentionally committed errors or committed grave errors.”⁶²² Moreover, it extended cover beyond administrative acts to include acts such as assault, battery and torture and also went well beyond the *Law of Administrative Litigation* to include within its competence unlawful acts done by judges and procurators.⁶²³ Accordingly, it provided for two types of state compensation: administrative compensation and criminal procedure compensation,⁶²⁴ these being related either to violations of the rights of the body or violations of citizens property rights.

⁶¹⁹ *LAS*, Article 24.

⁶²⁰ Lubman, 1999: 213.

⁶²¹ *SCL*, Article 2.

⁶²² Lubman, 1999: 211.

⁶²³ Chen, 2004: 216.

⁶²⁴ *Ibid*: 260-261.

c. Punishment

As with all jurisdictions, those activities of the state which had the greatest consequence for its individual members' personal integrity and freedom fall in China under the criminal law and are regulated by the criminal justice system. Importantly, as will be seen a little later, this fact has not meant, and still does not mean, that punishment of its citizens by the state, or even punishment involving the deprivation of personal liberty, falls exclusively within the province of the criminal law.⁶²⁵ Rather, it embodies the judgment that whereas the more minor sanctions of the state can be adequately governed by the administrative law system and procedure, beyond a certain level of severity more extensive and carefully regulated procedural mechanisms are required. In both cases, that of punishment and sanctioning of citizens by administrative organs and by the criminal justice system, there has been an extensive development of official apparatus and institutions. Perhaps more than in other areas of post-Mao Chinese law, the history of this development is significant of the turn away from mobilisational and mass-based politics.⁶²⁶

Throughout the pre-reform, and especially the cultural revolutionary, period the mass political campaigns that were characteristic of China focused particularly upon the restriction of individual liberties and the confiscation of personal property among those elements considered 'enemies of the state', 'counter-revolutionaries' and 'capitalist-roaders'.⁶²⁷ It is an inheritance from the attitudes that these activities embodied that public security organs in particular continue to retain the power to impose extra-judicial punishments as a way by which the Party-State could continue to exercise a degree of flexibility in dealing with potentially subversive elements.⁶²⁸ Nevertheless, even if it continues to be the case that not all of the Party-State's punitive sanctioning powers can at present be subsumed under the normal mechanisms of the criminal law, there is some evidence of a gradual move in the direction of greater juridification. Just as the criminal justice system and its procedural norms have concurrently undergone extensive legislative development and regulation, connoting a shift in emphasis from an exclusive concern with social and

⁶²⁵ As such, see: Biddulph, 2007. More generally, see: Keith & Lin, 2001: 178-231; Lo, 1995; and, Lubman, 1999: 160-172.

⁶²⁶ Bejesky, 2002-3; and, Lubman, 1999: 160-172.

⁶²⁷ Leng, 1967; and, Mao, 1957. See also: Shih, 1996.

⁶²⁸ Clarke & Feinerman, 1996; Hung, 2002; Novak, 2005, 2006; Qi, 2005; and, Tanner & Green, 2002.

political control, so the various forms of extra-judicial sanctioning have also been subjected to purportedly greater regulation and normative discipline.⁶²⁹ Perhaps most notable in this respect has been *Law of Administrative Punishment (LAP)* passed in 1996 by the NPC which states that: “administrative punishment is invalid if there does not exist a legal basis for it or the procedure prescribed by law has not been complied with.”⁶³⁰ It goes on to lay down procedural rules to be applied in all cases of administrative punishment,⁶³¹ to specify rights of appeal to administrative authorities and on occasion even to the courts, and to specify certain rights to be enjoyed by the defendant to be notified of the punishment and its basis and to be heard in their own defence.⁶³² It also provides for detailed investigation of cases before the appropriate authority decides on the question of administrative punishment,⁶³³ stipulates that such punishment must be subject to the principles of justice and openness,⁶³⁴ and that it should be proportionate to the circumstances and nature of the illegal behaviour.⁶³⁵ Finally, as well as providing for a hierarchy in the forms of administrative punishment it also requires that the most severe forms of sanction, especially those involving the deprivation of personal liberty, must be authorised by norms of greater authority in the legislative hierarchy.⁶³⁶

Specifically concerning those forms of administrative punishment involving detention or the taking into custody, additional legislative instruments which often anticipate more fully developed administrative laws had been promulgated as the reform period has progressed, touching upon issues both of procedure and of substance. In addition to the pivotal *Security and Punishment Administrative Regulations* of 1986, which were amended in 1994, these included the 1979 *Supplementary Provisions on Re-education Through Labour*, the 1982 *Provisional Measures on Re-education Through Labour*, the 1990 *NPC Standing Committee Decision on Drug Control*, the 1995 *State Council Measures on the Compulsory Rehabilitation of Drug Addicts*, the 1991 *NPC Standing Committee Decision on the Strict Prohibition of Prostitution* followed by the

⁶²⁹ However, see, in respect of the on-going problems of corruption: Fu, 2005, 2007; and Fu & Choy, 2004. Also, in relation to the ongoing abuse whereby ‘problematic’ individuals continue to be subjected to informal or ‘non-criminal’ forms of punishment and or psychiatric detention/treatment, see: Biddulph, 2007; Du, 2004; and, especially Munro’s remarkable work in: Munro, 2000, 2002, 2006.

⁶³⁰ *LAP*, Article 3.

⁶³¹ *Ibid*: Article 4.

⁶³² *Ibid*: Articles 6, 31 and 32.

⁶³³ *Ibid*: Articles 36-41.

⁶³⁴ *Ibid*: Articles 4 and 42.

⁶³⁵ *Ibid*.

⁶³⁶ *Ibid*: Articles 9-13. Chen, 1999: 263.

1993 State Council Measure on Custody and Education of Prostitutes and their Customers, the 2000 Ministry of Public Security Management Measures on Centres of Custody and Re-education, and the 1982 Measures on the Custody and Repatriation of Vagrants in Cities.⁶³⁷

2. Criminal Law

a. Substantive

Turning to the Criminal Justice system itself, since 1979 it has, at least in theory, been regulated by two comprehensive legal codes – the *Criminal Law* and the *Criminal Procedure Law*. This alone is significant given the fact that they were the first such laws since the abrogation of the Nationalist codes in 1949, and to this extent, their passage marked a signal break from the previous reluctance to lay down substantive definitions and specific protocols.⁶³⁸ Moreover, their promulgation also marked an end to the practice of classifying the population according to socio-economic class categories and, on this basis, to designating whole sections of the population as political outcasts deserving of more severe punishment merely because of their familial ties.⁶³⁹ Despite these not inconsiderable concessions to legality, however, the 1979 *Laws* continued to bear strong traces of the past. The *Criminal Law*, in particular, was characterised by a relatively simplistic, moralistic and programmatic style, it gave the politically charged category of “counter-revolutionary” crime a place of central prominence, and left considerable scope for judicial innovation by explicitly allowing that defendants could be punished by ‘analogical application’ where there had been no specific breach of an existing law.⁶⁴⁰

Almost immediately after the Code was promulgated, numerous other laws, regulations, provisions and interpretations of the Supreme People’s Court began to appear supplementing and amending the primary statute, and, over time, these were joined by an increasingly large number of offences created by other laws determining

⁶³⁷ For some interesting reflections on the whole area of prison reform see: Dikotter, 2002; and Peerenboom, 2004.

⁶³⁸ In general, see again: Bejesky, 2002-3; Clarke & Feinerman, 1996; and, Lubman, 1999: 160-172.

⁶³⁹ Thus one of the basic principles of the *Criminal Law 1997*, Article 4, is that any one who violates the criminal law shall be treated equally in the application of the law. It thereby incorporated into the *Criminal Law* a principle already found in the *Law of Criminal Procedure* Article 4 (1979) and Article 6 (1996) and the *Law of Civil Procedure 1991* Article 8. See: Leng & Chiu, 1985: 123-167; and Shih, 1996.

⁶⁴⁰ Berman, et.al., 1982: 257. See also: Clarke & Feinerman, 1996; and Fu, 2005.

to impose criminal liability for activities whose significance, or anti-social character, had not been appreciated in the earliest years of reform. Especially, note-worthy was the growing number of activities which were seen to constitute a threat to the efficient functioning of the economy as reform in this area led, as has already been seen, to a veritable explosion of regulatory legislation.⁶⁴¹ For this reason, consideration of a comprehensive amendment to the *Criminal Procedure Law* and the *Criminal Law* had already progressed quite some way by the time of the Tiananmen incident in 1989 only to be put on hold until renewed once more in 1993. It was not finally, however, until 1996 that a new *Criminal Procedure Law (Cr.PL)* was adopted, to be joined in March of the following year by a new *Criminal Law (CL)*.⁶⁴²

Perhaps it was unsurprising given the wider trajectory of reform that the new *Criminal Law* in particular was marked strongly by a further apparent drive towards overall de-politicisation, but it should always be remembered that the reform process has frequently had a much more provisional look to those most intimately involved in its unfolding than to those gifted with the advantage of hindsight. There is certainly no doubt that these amendments, taken as a whole, signalled the culmination of a significant development in the attitude of China's governing elites.⁶⁴³ The most notable feature of this de-politicisation was the much greater attention given in the "Special Provisions" section of the new law to the elaboration and indeed enumeration of non-political crimes. The numerous new economic crimes that had emerged in the previous two decades already referred to constituted a large proportion of these additions.⁶⁴⁴ They included the new crimes of smuggling, counterfeiting, insider trading, defrauding investors, market manipulation and making false statements in corporate or financial documentation reported to government departments or to the public.⁶⁴⁵ Additionally, the list of crimes against social order underwent significant expansion and tighter definition, with the former somewhat vague crime of 'hooliganism' being replaced by four specific crimes relating to fighting in public and the mistreatment of women. Finally, in line with wider attempts

⁶⁴¹ Chu, 1996; Townsend, 1989; Kolenda, 1990; and, Zhang, 1996.

⁶⁴² Lawyers Committee for Human Rights, 1998; Finder & Fu, 1997.

⁶⁴³ Clarke & Feinerman, 1996; Dutton, 1997; and, Dobinson, 2002.

⁶⁴⁴ Surpa., note 50.

⁶⁴⁵ See Chapter 3 of Part II of the amended Code (*CL'97*) now entitled, 'Crimes Damaging the Socialist Market Economic Order' – with a new division of this chapter into eight sections each with its own sub-category of crimes.

better to discipline the activities of state bodies, liability for state personnel was added in relation to a number of offences.⁶⁴⁶

In many ways, of course, the amendments represented a consolidation and incorporation into the code of the many new crimes that had emerged in the various supplementary regulations and other associated laws since its initial promulgation. Nevertheless, they also extended beyond this to cover significant amendments to the 'General Principles' section of the *Law*. Most importantly, these have included the prohibition of analogical reasoning by the Courts as an acceptable manner of extending criminal liability, so that in Article 3 of the new *Law* the principle is now clearly laid down that an act will not be criminal unless defined as such by law. Similarly, the category of "counter-revolutionary" crime has been abolished and replaced by "crimes endangering national security".⁶⁴⁷ Admittedly, this new category includes many crimes that were formerly classified as "counter-revolutionary",⁶⁴⁸ but, in a jurisdiction such as the PRC where official terminology is considered to be of such importance, the change in terminology is by no means insignificant, and the list of such offences is in any case considerably shorter than it was under the 1979 *Law*. Similarly, though it is undoubtedly true that the PRC continues to punish activity it characterises as criminal with extreme harshness,⁶⁴⁹ reflecting a continuation of the pre-reform attitude that severe and exemplary sanctions are indispensable for their deterrent function to be effective, and though mobilisational and campaigning tactics continue to be used as a way of implementing the criminal law,⁶⁵⁰ it is once more important to remember that recent developments are part of an overall process of transition which has still very far from run its course.

⁶⁴⁶ Lubman, 1999: 161.

⁶⁴⁷ *CL'97*, Chapter 1 of Part II. See also: Fu, 2005.

⁶⁴⁸ See esp. *CL'97* Articles 102-110. See: Hu, 2002; Lu & Zhang, 2005; and, Palmer, 1996. See also: Novak, 2006.

⁶⁴⁹ The amended Code provides for four types of 'Principal Punishment' (Article 33) namely: 'Control and Supervision' (Articles 38-4), 'Criminal Detention' (Articles 42-44), 'Fixed-Term Imprisonment' (Article 46) and the death penalty (Articles 48-51). Additionally, it provides for three types of 'Supplementary Punishment': fines (Articles 52-53), 'Deprivation of Political Rights' (Articles 54-58) and confiscation of property (Articles 59-60). Prior to the 1997 amendments, it had been argued by a number of Chinese scholars that there should be a reduction in the number of capital offences. Whilst the 1979 Code had provided for 28 such offences, more than 60 additional capital offences were introduced by separate enactments prior to 1997. The 1997 amendments incorporated these into the Criminal Code without engaging in the hoped for review and reduction. (Chen, 2004: 240-241)

⁶⁵⁰ Chen, 2004: 240. See also: Bejesky, 2004.

b. Procedural

If this is true of the criminal law proper, it is equally, if not more, true of the institutional system which has been elaborated for its application. As such, the *Criminal Procedure Law* of 1979 continued to reflect the basic processual divisions which emerged during the years immediately after the 1949 revolution. To the Public Security organs it assigned the tasks of criminal investigation, detention and arrest;⁶⁵¹ to the Procuracy, the supervision of arrests, the process of investigation leading to formal charges and prosecution;⁶⁵² and to the courts, the role of conducting the trial, the passing of sentence and the hearing of appeals.⁶⁵³ At the same time, however, it also sought substantially to alter the practice of these institutions, not only by formally setting down the parameters of their operation, but also by laying down a relatively detailed time-frame according to which each phase of the criminal process – particularly in relation to the period prior to the trial itself – was obliged to abide. The gradual and difficult nature of this alteration, may be seen by its somewhat jagged progression.⁶⁵⁴ Placing controls on the Public Security Organs in particular was a novel and, in many quarters, unwelcome departure, which it was felt potentially compromised the ability of the Party-state to deal effectively with the many anti-social currents that economic reform threatened to throw up.⁶⁵⁵ It was on account of precisely these sort of concerns that soon after the promulgation of the *Criminal Procedure Law* in 1979 and in apparent contradiction of its rationalising drive, China's leadership determined to expand the powers of its Public Security apparatus. This was done via a series of legislative interventions by the NPC Standing Committee between 1980 and 1984 providing for the extension of the new time-limits and a dilution of the rights of those accused of certain violent crimes.⁶⁵⁶ These alterations were, moreover, an important prelude to the implementation of a series of 'strike-hard' campaigns in the mid to late 1980s designed to stem a worrying rise in the overall level of crime.⁶⁵⁷ Nevertheless, that these developments, when viewed in a broader context, were more in the nature of systemic recalibrations than of full-scale

⁶⁵¹ Now the *Code of Criminal Procedure, 1996 (Cr.PL'96)* Articles 18, 50-57 and 59-61.

⁶⁵² *Ibid*: Articles 59, 66, 67,69, 71, 129, 135,145 and 237. Also see the Supreme People's Procuracy *Rules of Criminal Procedure, 1999*.

⁶⁵³ *Ibid*: Articles 150-205.

⁶⁵⁴ In general, see: Clarke & Feinerman, 1996; and, Keith & Lin, 2001: 160-172.

⁶⁵⁵ Clarke & Feinerman, 1996; He, 2008; and, Tanner & Green, 2008.

⁶⁵⁶ Lawyers Committee for Human Rights, 1998a.

⁶⁵⁷ *Supplementary Provisions of the Standing Committee of the National People's Congress Concerning Time Limits for the Handling of Criminal Cases*. Adopted, July, 7th 1984.

reversals is clearly demonstrated by the fact that they only ever purported to operate as exceptions within the wider scheme of the 1979 *Law*; they never sought to abolish it.

This being said, there is no doubt that the actual functioning of the law prior to 1996 was far from what might have been expected by one furnished solely with the statutory texts.⁶⁵⁸ In practice, a great deal of what took place on the ground operated outside of the written law and was based merely upon accepted practice. This was certainly true of the form of detention used by the police called “shelter and investigation” which enabled them to incarcerate a suspect almost indefinitely under the pretext of preliminary inquiries,⁶⁵⁹ it was also true of the unlimited power the Procuracy enjoyed to request the “supplementary investigation” of a case by the police.⁶⁶⁰ Additionally, with respect to minor criminal offences, the Procuracy frequently announced a decision not to prosecute in such a way so as to convey a clear determination of guilt without allowing for any come-back from the suspect in question.⁶⁶¹

Quite apart from these examples, the pre-1996 *Criminal Procedure Law* continued to be marked by a strong bias in favour of the prosecution during the trial process itself. There was no right to counsel until the point at which a defendant’s case was handed over by the Procuracy to the court for trial, and it was, in any case, only required that the defendant be given seven days notice of the date of the trial.⁶⁶² Moreover, it was extremely rare for a court to find a defendant not guilty. The role of the trial continued to be that of demonstrating guilt rather than of freely inquiring into guilt or innocence. If important questions were raised about the evidence during the course of the trial, the trial was normally adjourned so that the bench could continue its considerations privately. In practice, this meant that a case was rarely transferred to the court until a determination of guilt had been made and that access to a lawyer was more for the purposes of preparing a plea in mitigation than of constructing a defence against substantive charges.⁶⁶³ This situation was well summed up by the popular dictum

⁶⁵⁸ On this subject see: Lubman, 2006.

⁶⁵⁹ Here, see again the tactics employed in relation to psychiatric incarceration charted by Munro: Munro, 2002.

⁶⁶⁰ Wong, 1996.

⁶⁶¹ Lawyers Committee for Human Rights, 1998a: 45.

⁶⁶² Lubman, 1999: 164.

⁶⁶³ In general, see: Alford, 1996; and, China News Analysis, 1994.

“decision first, trial later” and it was further exacerbated by the limitations to which the defendant’s right of appeal, though clearly laid down in law, was subjected in practice. These included, most significantly, the power of the appellant court, to send a case back to a lower court for retrial where it considered the facts unclear, with the potential consequence that the sentence could be increased, as well as the power to retry the case itself.⁶⁶⁴

Against this background, the 1996 reforms to the *Criminal Procedure Law*, at least on their face, seemed to mark a considerable step in the direction of greater systemic integration and rationalisation, expressing “a concern for defendants’ rights” that went “beyond all previous PRC legislation.”⁶⁶⁵ The practice of “shelter and investigation” was completely done away with and the number of times the Procuracy could request “supplementary investigation” was limited to two.⁶⁶⁶ The minimum period of notice the defendant facing trial was obliged to receive was increased from seven to ten days and his/her right to counsel was significantly expanded.⁶⁶⁷ A defendant is now entitled to representation by a lawyer as soon as his/her case has been sent to the Procuracy and, moreover, must be told of this right.⁶⁶⁸ It is also permitted now for lawyers to begin assisting a suspect while his/her case is still under investigation by the police as soon as the suspect has been formally questioned or detained, though the suspect need not be told of this right.⁶⁶⁹ In certain circumstances, where “state secrets” are involved, the police are permitted to deny access to a lawyer, but the passage of a joint regulation by the Ministries of Justice, Public Security, and State Security together with the Legal Work Committee of the NPC, the Procuracy and the Supreme People’s Court has had a significant impact in ensuring the proper exercise of this power.⁶⁷⁰ Finally, the 1996 revisions considerably restrict the power of the Procuracy to forgo prosecutions in which it nonetheless indicates that the accused is guilty.⁶⁷¹

⁶⁶⁴ Lubman, 1999: 165.

⁶⁶⁵ Ibid: 168. Bejesky, 2002-3; Fu, 1997 and 1997a.

⁶⁶⁶ *CPL '96*, Articles 40 and 61(6) and (7). See also: Fu, 2005.

⁶⁶⁷ Ibid: Article 151.

⁶⁶⁸ Ibid: Article 96. Nonetheless, on the limitations of these reforms in practice, see: Fu, 2005; Fu & Choy, 2004; and, Human Rights Watch, 2006.

⁶⁶⁹ Ibid: Article 96

⁶⁷⁰ Chen, 2004: 206. See also: He, 2008; and, Tanner & Green, 2008.

⁶⁷¹ *Cr.PL '96*, Articles 142(2), 144 and 146.

With respect to the trial process itself,⁶⁷² there were important moves to limit the degree to which trial judges might consult with more senior judges forming a court's Adjudication Committee and not directly involved in the hearing of a case. This power is now supposedly restricted to "difficult, complicated, or important cases" and must be at the initiative of the trial bench itself.⁶⁷³ The court has also been forbidden from reviewing criminal cases before proceeding to trial and from sending cases of doubtful evidential quality back to the Procuracy for further investigation.⁶⁷⁴ Lastly, the burden of arguing a case has explicitly been placed upon the prosecution and defence counsel and Article 12 seems to go some way towards enshrining the presumption of innocence by stating that: "In the absence of a lawful verdict of the people's court, no person shall be determined to be guilty."

Not all of the revisions, it must be admitted, were in the same direction. Pre-trial detention, for example, was in certain circumstances actually increased. Thus the police were authorised to hold suspects, with the Procuracy's consent, for up to thirty days where they were thought to have committed crimes in different places, repeatedly, or jointly with others.⁶⁷⁵ Similarly, in "major, complicated cases where the scope of the crime is broad and gathering evidence is difficult," a two-month extension of the detention limits is permitted, with the possibility of a further two-month extension if the crimes in question are punishable with a sentence of ten-years or longer.⁶⁷⁶ Moreover, it is unclear how effective provisions such as those purporting to secure the independence of trial-benches are in practice.⁶⁷⁷ Nevertheless, these apparent counter-examples do not confute the overall thrust of the revisions and are even more insufficient to confute the longer term developmental trajectory of reform in this area since 1979, the true nature of which has become clearer and clearer as the period has progressed.⁶⁷⁸

⁶⁷² In general, see: Liebman, 2008; Liu, 2008; Lubman, 2008; Shen, 2008; and, Zhou, 2002.

⁶⁷³ Lubman, 1999: 166.

⁶⁷⁴ *Cr.PL '96*, Article 150

⁶⁷⁵ *Cr.PL '96*, Article 69(2).

⁶⁷⁶ *Ibid*: Article 60.

⁶⁷⁷ Fu, 2003.

⁶⁷⁸ Alford, 1996, 2003; and Bejesky, 2002-3.

B: India

Unlike China, a sophisticated system of public, constitutional and administrative law had been in place in India since well before it gained its independence in 1949.

Deficient though this system was in many respects, it had provided the subcontinent with significant and continuous experience of judicial oversight and control of the nascent executive and legislative bodies which had emerged with the growth of self-government. With the passage of the Constitution of India by the Constituent Assembly, the ambit of this oversight and control was invested with much greater potential scope. Drawing upon constitutions from across the western world, it firmly entrenched the Montesquiean principle of the separation of powers, with the Supreme and High Courts as the principal interpretative guardians of its provisions. Moreover, these bodies were also assigned the primary role in interpreting, protecting and applying the Fundamental Rights section of the Constitution. Despite the fact, however, that India did not have to undergo quite the same degree of legal and institutional construction during the reform period as its East Asian neighbour, it did have to undergo very considerable transformation in the manner in which its enduring constitutional structures were operationalised in practice. In this regard it is possible to delineate three broad phases within the post-Independence period. These correspond very broadly to the years of Nehruvian consensus and Congress dominance, the years of Indira Gandhi's ascendancy along with her increasing popularisation and deinstitutionalisation of politics culminating in the Emergency of 1975-77 and the post-Emergency period of heightened judicial activism.

1. Stages of Development

In the first of these phases, with the exception of its jurisprudence regarding the right to property, the judiciary adopted a posture of maximum deference to, and cooperation with, the legislative and executive branches of government. Steeped in the black-letter and positivist traditions of English and colonial jurisprudence, this posture was most clearly exemplified in the case of *A. K. Gopalan v. State of Madras* which held that the requirement in Article 21 of the Constitution that no one be deprived of their liberty except in accordance with a "procedure proscribed by law" would be satisfied by a procedure laid down in a normal statute, such that Article 21

rights were entitled to no additional or 'special' protection. Whilst, on matters of personal liberty, the Supreme Court was prepared, on occasion, creatively to deploy the more conventional tools of administrative law and even to legislate interstitially, whenever it thought that the "executive should not be embarrassed, particularly where issues of national security were involved, it trod cautiously."⁶⁷⁹ Moreover, although the courts did adopt a less positivist, more activist approach in relation to the rights of labour, this was fully in line with the dominant welfare state philosophy of the Nehruvian government, and even here they felt bound by the text of the Constitution to remain within certain limits. With respect to the right to property, the one area where there was a serious clash between the Supreme Court and the other branches of government, Parliament was nevertheless left with the last word and the legalism with which the issue was approached, since it presupposed a "narrow role for the Court...did not anger the political establishment."⁶⁸⁰

During the second phase, the occasions for conflict multiplied. This was due more to a change in the tempo and nature of Indian politics than it was to a change in attitude of the higher level judiciary. From at least as early as the 1967 general election, Indira Gandhi began actively to popularise and de-institutionalise national-level politics in an attempt to assert her independence from the traditional elites which had hitherto controlled the Congress party by bypassing its leadership to appeal in increasingly radical terms directly to the electorate. Not only did this threaten established interests within Congress, increasingly it was felt also to represent an implicit threat to the constitutional order itself. Indeed, the more effective Mrs Gandhi became in exercising her personal power on the back of carefully cultivated popular enthusiasms, the greater the danger was that she would see her way clear to bypassing the normal mechanisms of constitutional government. It was in the context of its growing unease at a *de facto* change in the terms of India's overall post-independence settlement, that the Supreme Court felt it necessary, from the late 1960s onwards, to assert its authority with increasing force in the face of repeated attempts to extend executive power through Constitutional amendment.⁶⁸¹ Most significantly, in the case of *I.C. Golaknath v. State of Punjab*, the Court overruled its earlier decision in *Shankari Prasad Singh v. Union of India*, and held that Parliament had no power to

⁶⁷⁹ Sathé, 2002: 61.

⁶⁸⁰ Ibid: 62.

⁶⁸¹ Ibid.

curtail any of the Fundamental Rights laid down in Section III of the Constitution.⁶⁸² By changing the distribution of power between Court and Parliament, *Golaknath* had profoundly political implications,⁶⁸³ and with the resignation and unsuccessful Presidential bid of the then Chief Justice, Subba Rao, together with the judicial invalidation of Mrs Gandhi's attempts to nationalise fourteen of the country's major banks and to abolish the privy purses of the Indian princes,⁶⁸⁴ it was followed soon after by further apparent evidence of the Court's apparent politicisation.

The fact that these developments took place at the same time as Congress had split and Mrs Gandhi's more radical faction had barely survived in government with the support of the Communist Party meant that the Court seemed not just to be supporting Mrs Gandhi's opponents but, in so doing, to be backing the forces of reaction against those of progress and social responsibility.⁶⁸⁵ Consequently, when Mrs Gandhi won a landslide victory in the election of 1971 partly on the basis of making changes in the Constitution and then subsequently went on to pass the *Constitution (Twenty-Fourth Amendment)* (*Twenty-Fifth Amendment*) and (*Twenty-Sixth Amendment*) Acts which determined respectively to restore to Parliament the unqualified power of constitutional amendment, to further restrict the right to property and to abolish the privy purses, the stage was set for a major constitutional collision. The response of the Supreme Court came from a bench of thirteen judges in the case of *Kesavananda Bharati v. State of Kerala* in which challenges to the above amendments were heard. By a majority of seven to six, it was held that whilst *Golaknath* was wrong to have ruled that the fundamental rights were *per se* un-amendable, there were, nevertheless, certain portions of the Constitution which could never be subject to amendment for fear that such amendment would violate its 'basic structure'.

Although *Kesavananda* was to have significant longer-term jurisprudential consequences, it was less than successful in meeting the immediate challenge to the Court's authority. Indeed, within only a few days of the judgment having been rendered, the executive made a bid to punish the *Kesavananda* majority by taking the unprecedented step of appointing Justice A. N. Ray as Chief Justice to replace the

⁶⁸² Ibid: 65.

⁶⁸³ Ibid: 67.

⁶⁸⁴ *R.C. Cooper v. India; Madhavrao v. India.*

⁶⁸⁵ Ibid: 68.

retiring Chief Justice Sikri in preference to three judges senior to him – Shelat, Hegde and Grover – all of whom had voted against the government in *Kesavananda* and all of whom resigned in protest. This left the Court severely weakened and subsequently precipitated its near collapse in the face of Mrs Gandhi’s 1975 declaration of emergency government. This collapse manifested itself, in particular, in two judgments: *Indira Gandhi v. Raj Narain* and *A.D.M. Jabalpur v. Shiv Kant Shukla*. The first concerned a pre-emergency decision of the Allahabad High Court by which Mrs Gandhi’s own election to the Lok Sabha was set aside on the ground that she had engaged in corrupt practice. On appeal to the Supreme Court the execution of the High Court’s decree had been stayed subject to certain conditions, but before a final appeal could be heard, the emergency was declared and the *Constitution (Thirty-Ninth Amendment) Act, 1975* was passed as a way of preventing the Court’s further scrutiny of Mrs Gandhi’s case.⁶⁸⁶ The legitimacy of this amendment was itself challenged before the Supreme Court but, though the amendment was struck down as violative of the basic structure of the Constitution, the Court clearly demonstrated its inability to sustain a head on confrontation with the executive by nonetheless upholding the validity of Mrs Gandhi’s election on the facts. Still more seriously, in the second case, *A.D.M. Jabalpur v. Shiv Kant Shukla*, the Court upheld the validity of a presidential order issued under Article 359 of the Constitution and after the declaration of emergency which purported to suspend the right to move any court for the enforcement of the fundamental rights guaranteed under Articles 14, 21 and 22 of the Constitution.⁶⁸⁷

The third phase of post-independence jurisprudential development, which began after the shock of the emergency and the restoration to normality of the legal system, saw the Supreme Court take a lead in the re-establishment both of its own authority and that of the Constitution. This took the form, in particular, of a much greater awareness of its need to cultivate respect and support amongst the large majority of the Indian population and to play its part in realising the promises of social uplift embodied in the Constitution itself.

⁶⁸⁶ Clause (4) of Article 329-A inserted by the *Constitution (Thirty-Ninth Amendment) Act, 1975*.

⁶⁸⁷ Sathe, 2002: 73-77. See also: Kalhan, 2009.

2. Judicial Strategies of Defence and Reassertion

To this end, the Court developed three major strategies to shore up its previously precarious position. The first was the more conventional one of firmly reasserting its constitutionally mandated role as the final interpretative authority of the state in clear response to the attempted curtailments of such authority in the *Constitution (Thirty-Ninth Amendment)* and *(Forty-Second Amendment) Acts*. Thus, in the highly significant case of *Minerva Mills Ltd v. Union of India*, building upon and expanding the principles laid down in *Kesavananda Bharati v. State of Kerala*, and to a lesser extent in *The Prime Minister's Election Case*, judicial review was finally and unequivocally declared a 'basic feature' of the Constitution and the higher courts the principal guardians of the fundamental rights it purported to guarantee. Specifically, the Supreme Court invalidated Article 31-C as amended by Section 4 of the *Constitution (Forty-Second) Amendment Act, 1976* which provided that no law enacted in pursuance of any of the Directive Principles of State Policy could be challenged on the grounds that they violated the rights guaranteed by Articles 14, 19 and 31.⁶⁸⁸

In addition, the Court also felt it necessary to protect the independence of the higher judiciary from being undermined by extra-legal or administrative means, especially in light of the supersession scandal in which it was embroiled after its judgment in *Kesavananda*. Consequently, in a series of cases, beginning in 1977 with *Union of India v. Shankalchand H. Sheth*, and after attempts were made by the executive to transfer a justice of the Gujarat High Court to the Andhra Pradesh High Court without consulting the Chief Justice of India in apparent derogation of the requirement for such consultation under Article 222 of the Constitution, the Supreme Court became increasingly pertinacious in its supervision of the terms of judicial employment. In particular, it held that all transfers of the higher judiciary required deliberation between the Chief Justice of India and the President on the basis of full and identical facts. Indeed, further to confirming these basic requirements, the so-called *Second* and *Third Judges* cases, building upon *S.P. Gupta v. Union of India* (or the *First Judges Case*), asserted that in the transfer of judges of the High Court the opinion of the

⁶⁸⁸ Sathe, 2002: 87. See also: Andhyarujina, 1992.

Chief Justice of India not only has primacy over that of the President, but is also determinative, and they have elaborated a number of additional procedural requirements, involving at least four other members of the Supreme Court, by which the Chief Justice's opinion is to be arrived at in practice.⁶⁸⁹

Once the initial objectives of securing its independence and judicial functions had been achieved, from the late 1980s there was a shift of emphasis in the constitutional role played by the Court. The growth in the power of regional parties and the inception of a prolonged era of minority governments at the centre meant that amendments of a deeply controversial nature became increasingly difficult to get passed the relevant legislative hurdles. As conventional party-political restrictions became more powerful, so there seems to have been less need for the Court to act as a counter-majoritarian bulwark.⁶⁹⁰ Instead, the focus of court based constitutional struggle shifted away from challenging legislative towards challenging executive acts, and, in particular, to reviewing exercise by the President of his power under Article 356 to suspend state governments. In the past Article 356 had been overused and many state governments had been suspended for reasons that clearly went beyond its intended scope. It was an index not only of the changing political scenario, but also of the new and strengthened position that that scenario presupposed for the Court, that political disputes surrounding the utilisation of Article 536, and indeed a whole host of other issues, became more common and more significant and that the Court was increasingly resorted to as a mechanism for their settlement. In the past such disputes had had limited significance owing to the extraordinarily dominant hold the Congress Party had on government, and the judgments of the Court itself had been perceived to pose a much greater threat to those in power. Now the more immediate danger came from other quarters and it became expedient to utilise the Court as an independent arbitral body, first, to confer legitimacy upon government actions in general and, secondly, as a forum for taking decisions on highly controversial subjects the settlement of which by government itself threatened to undermine popular support for the ruling party of the day. All of this necessarily presupposed an acceptance of the Court's decisions in such matters as final, together with a renewed interest in the maintenance of its authority.

⁶⁸⁹ Also, on the appointment of the Chief Justice, see: Sharma, 2009.

⁶⁹⁰ See the relevant section in: Austin, 1999. However, also see: Albert, 2009.

With respect specifically to Article 356, it had already been held in *State of Rajasthan v. Union of India* that the exercise of such a power was reviewable and capable of being invalidated if found to be *ultra vires* or *male fide*. Moreover, a commission appointed under Justice Shakaria on Centre-state relations, reporting in 1988, had strongly criticised the practice of union governments taking victory in elections to the Lok Sabha as an excuse to use Article 356 to dismiss their opponents from government at the state level. However, the Court did not really come into its own on the issue until the case of *S.R.Bommai v. India* which dealt with dismissals of BJP state governments in Madhya Pradesh, Rajasthan and Himachal Pradesh pursuant to controversy surrounding the alleged connivance by the Uttar Pradesh state government in the demolition of the Babri masjid in December, 1992. Displaying a considerable degree of political shrewdness, the Court dealt, in the same case, with earlier dismissals for different reasons under Article 356 of the state governments of Karnataka, Meghalaya, and Nagaland. Whilst it held – by a majority of six judges to three – that the dismissal of the governments of Karnataka, Meghalaya and Nagaland was unconstitutional and void,⁶⁹¹ it held that the dismissal of the governments of Madhya Pradesh, Rajasthan, and Himachal Pradesh were valid since the demolition of the Babri masjid and other acts that followed upon it were a threat of secularism which constituted part of the basic structure of the Constitution and that these governments were unlikely to carry out consequential bans by the central government on several communal organisations. In other words, it was held that “the Presidential action in furtherance of the protection of secularism was justified.”⁶⁹² This continued the Court’s practice of elaborating the list of those aspects of the Constitution which it considered to be part of its basic structure in a suggestive rather than mandatory manner through *obiter* statements as a way of making its mind known in as non-confrontational a manner as possible. This gave the relevant authorities the opportunity to avoid situations in which they were likely to risk losing face, and it is further evidence of growth in the Court’s *de facto* influence. At the same time, the *Bommai* judgment cleverly backed government action in such a way and in such a manner that strengthened its own power at a time when the government required the Court’s support to maintain its own credibility.

⁶⁹¹ Sathe, 2002: 151-152.

⁶⁹² Ibid: 97.

The Court's manner of operation as instanced in the *Bommai* case clearly demonstrates a heightened political self-awareness and whilst it has been willing to continue to deal with controversial issues in a firm and even forceful way, it also seems to have become much more aware of the limitations of its new found power in the area of Constitutional jurisprudence. Thus it has, on occasion, also found it necessary to demonstrate a prudent caution especially with respect to issues of a highly charged political or communal nature where the government of the day has sought to use the Court as a way of avoiding taking controversial or unpopular decisions itself. Indeed, it was in just such a context, namely the controversy surrounding the demolition of the Babri masjid, that the Court, for the first time, refused to give an opinion in response to a query made by the President through his power of presidential reference under Article 143 of the Constitution.⁶⁹³ What is clear is that, even in instances of such caution, the Court demonstrated that it had become, by the early 1990s, a key and increasingly secure player at the heart of the Indian polity, which could no longer be bullied or ignored by the political establishment.⁶⁹⁴

3. Procedural Innovation

The second major strategy that the Courts developed in the post-emergency period was gradually to institute a series of procedural innovations as a method of more effectively implementing Section III rights in practice, taking account, in particular, of the social and economic conditions in which the majority of Indian citizens found themselves.⁶⁹⁵ In the first instance, this involved the loosening of procedural requirements for access to the Supreme and High Courts under Articles 32 and 226 of the Constitution where it was alleged the citizen's fundamental rights had been violated. Clarifying what were to be considered 'appropriate proceedings' in the former of these two articles, the Supreme Court had stated in its 1961 case *Daryao v. State of U.P.*:

⁶⁹³ *Ismail Faruqi v. India*,

⁶⁹⁴ This has led to problems of over-extension: Kirpal, et.al., 2000; Singh, 2005; and, Robinson, 2009. It has also led to criticisms of constitutional imbalance: Dam, 2005, 2007.

⁶⁹⁵ In general, see: Ahuja, 1996; Atwood, 2002; Austin, 1999; and, Kappur, 1998. Most recently, see: Deva, 2009.

The appropriateness of the proceedings would depend upon the particular writ or order which he claims and it is in that sense that the right has been conferred on the citizen to move this Court by 'appropriate proceedings'.

In the 1980s, this early concentration upon the form and nature of the order etc. being sought, was conclusively superseded by an altogether more purposive approach. Indeed, when those proceedings related to the enforcement of the fundamental rights of the poor, the illiterate, the weak, or the otherwise disadvantaged, a simple "letter addressed by... [an individual to the Court could]... legitimately be regarded as an 'appropriate proceeding.'"⁶⁹⁶ Such a letter did not even need to be in any particular form, nor even addressed to the Court or its justices: post cards, faxes and telegrams were all treated as 'appropriate proceedings.'⁶⁹⁷ Establishing a special Public Interest Litigation cell to deal with the burgeoning 'epistolary jurisdiction' that resulted, the Supreme Court determined to exercise a very wide discretion in framing writs or other measures.⁶⁹⁸ to protect the fundamental rights of its petitioners, refusing to dismiss petitions simply because they were vague or because they prayed for the wrong remedy.⁶⁹⁹ Moreover, it clearly took advantage of the fact that, in its own words, its "power...is not only injunctive in ambit...preventing the infringement of a fundamental right, but...is also remedial in scope and provides relief against a breach...already committed."⁷⁰⁰ Similarly, whilst by no means dismissive of the normal canons of judicial procedure, it has, under Article 32(2), seen fit to exercise a degree of creativity in devising appropriate procedures in its enforcement of citizens fundamental rights, holding that, beyond the normal adversarial procedures utilised in standard court proceedings, inquisitorial or other procedures may, on occasion be suitable to achieve the overall objectives of Article 32. For this reason the Court: "has evolved the practice of appointing commissions for the purpose of gathering facts and data in regard to a complaint of breach of a fundamental right made on behalf of the weaker sections of the society."⁷⁰¹

Still more striking has been the Court's increasing use of judicial directions as a form of remedial relief, which it has extended considerably through its power under Article 141 of the Constitution to declare the law of the land, in the course of hearing cases

⁶⁹⁶ *Bandhua Mukti Morcha v. Union of India*.

⁶⁹⁷ *Mohan Lal Sharma v. State of U.P.; Pratul Kumar Sinha v. State of Orissa*.

⁶⁹⁸ *Safai Mazdoor Sangh v. Municipal Corpn.*

⁶⁹⁹ *Chiranjit Lal Chowdhury v. Union of India*. In general, see: Galanter & Krishnan, 2004; and, Rao, 2004.

⁷⁰⁰ *M.C. Mehta v. Union of India*, (1987).

⁷⁰¹ *Bandhua Mukti Morcha v. Union of India*.

brought before it. Initially, of course, this was designed to give constitutional recognition to the doctrine of *stare decisis* which was traditionally premised upon a distinction between a cases's *ratio decidendi* and its *obiter dicta*, with only the former enjoying the status of binding precedent. As the reform period has progressed, this distinction has – at least in relation to Public Interest suites – been rendered otiose,⁷⁰² with the Supreme Court showing its willingness to lay down increasingly comprehensive directions in cases with prospective legislative effect in a whole host of areas.⁷⁰³ Thus, amongst other things, it has given directions concerning the procedure to be followed in relation to inter-country adoptions;⁷⁰⁴ for the effective implementation of gender equality in the work place;⁷⁰⁵ for the better tackling of the problem of child labour;⁷⁰⁶ as to how the children of prostitutes should be educated;⁷⁰⁷ for the protection of the environment against pollution and citizens against road traffic accidents;⁷⁰⁸ on what the fee structure should be for private medical and engineering colleges;⁷⁰⁹ on how the CBI should be protected from inappropriate influences whilst investigating those holding high office;⁷¹⁰ for the prevention of deaths owing to starvation;⁷¹¹ as to how blood should be collected, stored and given in transfusion;⁷¹² and even as to how a bank should operate a loan scheme in favour of rickshaw pullers.⁷¹³ Finally, this more than expansive attitude led to an acceptance in the case of *Rudul v State of Bihar* of the principle that Articles 32 and 226 impliedly permit the courts to award monetary compensation to citizens who suffer damage as a result of breaches of their fundamental rights. As such, it was recognised that one of the best ways to prevent such breaches was “to mulct violatore...” since this might act as “...some palliative to the unlawful acts of instrumentalities which act in the name of the public interest and which present for their protection the powers of the State as a shield.”⁷¹⁴

⁷⁰² Jain, 1978:143.

⁷⁰³ *Vineet Narain v. India*.

⁷⁰⁴ *Laxmikant Pandey v. India*.

⁷⁰⁵ *Visaka v. Rajasthan*.

⁷⁰⁶ *M.C. Mehta v. State of Tamil Nadu*.

⁷⁰⁷ *Gaurav Jain v. India*.

⁷⁰⁸ *M.C. Mehta v. India* (1998).

⁷⁰⁹ *TMA Pai Foundation v. Karnataka*.

⁷¹⁰ *Vineet Narain v. India*.

⁷¹¹ *Kishen v. Orissa*.

⁷¹² *Common Cause v. India* (1996).

⁷¹³ *Azad Rickshaw Puller's Case*.

⁷¹⁴ See here: Singh, 2008

4. Locus Standi

In addition to freeing up of procedural requirements for the protection of Fundamental Rights, the Supreme and High Courts also began greatly to expand the *locus standi* requirements so that public interest cases could be taken on behalf of the downtrodden by public-spirited individuals.⁷¹⁵ Specifically, the Court has stated that whilst it would not “intervene at the instance of a meddling interloper or busybody and would ordinarily insist that only a person whose fundamental right is violated should be allowed to activate the Court,”⁷¹⁶ such reasoning would break down in:

the case of a person or class of persons whose fundamental right is violated but who cannot have resort to the Court on account of their poverty or disability or socially or economically disadvantaged position and in such a case, therefore, the Court can and must allow any member of the public acting bona fide to espouse the cause of such a person or class of persons.

Thus the Court has allowed various individuals and organisations to bring petitions on behalf of under-trial prisoners,⁷¹⁷ prison inmates,⁷¹⁸ bonded-labourers,⁷¹⁹ pavement-dwellers,⁷²⁰ children of prostitutes,⁷²¹ those suffering exploitation in the sex trade,⁷²² women in protective custody,⁷²³ raped nuns,⁷²⁴ stone quarry workers,⁷²⁵ mental hospital patients,⁷²⁶ and asbestos industry workers,⁷²⁷ as well as individuals blinded,⁷²⁸ tortured and killed,⁷²⁹ as a result of police action or in police custody. Moreover, on some occasions, it has even ordered payment of costs to the litigant in appreciation of their services.⁷³⁰ Additionally, in the case of *Municipal Council, Ratlam v. Verdichand*, *locus standi* was for the first time extended to petitioners seeking to vindicate their collective or group rights where these had been violated and where the injury fell upon a diffuse class of people. Lastly, beyond the scope of the enforcement of fundamental rights, standing has also been granted to individuals and

⁷¹⁵ Baxi, 1982; Epp, 1998; and, Krishnan, 2006

⁷¹⁶ *Rudul v State of Bihar*.

⁷¹⁷ *Hussainara Khatoon v. Bihar*.

⁷¹⁸ *Sunil Batra v. Delhi Administration*.

⁷¹⁹ *Banda Mukti Morcha v. Union of India*.

⁷²⁰ *Olga Tellis v. Bombay Municipal Corporation*.

⁷²¹ *Guarav Jain v. India*.

⁷²² *Vishal Jeet v. India*.

⁷²³ *Upendra Baxi v. U.P.*

⁷²⁴ *Gudature M.J. Cherin v. India*.

⁷²⁵ *Banda Mukti Morcha v. Union of India*.

⁷²⁶ *Supreme Court Legal Aid Committee v. M.P.*

⁷²⁷ *C.E.R.C. v. India*.

⁷²⁸ *Katri and Others v. Bihar*.

⁷²⁹ *Dilip K. Basu v. West Bengal*.

⁷³⁰ *Sheela Barse v. Secretary, Children Aid Society*.

groups seeking to litigate questions of larger public importance more generally, particularly those questions which might touch upon aspects of the 'basic structure' of the Constitution, or which concern its proper functioning.⁷³¹ In this way the Court has sought, once more, to co-opt the citizens of India not only in aiding it in the implementation of its own programme for the better enforcement and functioning of the Constitution, but also in actually suggesting where the bounds of that programme should lie given the real problems and challenges with which they, as citizens, are actually being faced.

The final component in the newly developed 'procedural' matrix of the post-emergency period has been a huge increase in the scope of justiciability both in relation to the matters subject to review and in relation to organisations falling under the discipline of the High and Supreme Courts' Articles 32 and 226 writ jurisdictions. With respect to the latter, there has been a precipitate expansion in the scope of *mandamus* beyond its traditional and somewhat tentative function of ensuring that bodies charged with positive public duties carry them out, towards a much more intensive and directive superintendence of how public duties should be carried out in practice, which has involved an increasing intrusion into areas previously thought to be subject to administrative or executive discretion. Thus numerous orders have been made to the CBI concerning what should be investigated and how such investigations should be conducted. Orders have been made as to, amongst other things: medical treatment and equipment in hospitals; public health and public safety; safe and tolerable working conditions; the proper education of children as well as the equitable running of educational institutions; the proper functioning and administration of the judicial system; and as to the mandatory investigation of corruption cases, including the novel procedural device of continuing *mandamus*.

With respect to the former, there has been a similarly noticeable increase in the scope of "other authorities" under Article 12 of the Constitution. Thus in the course of time the Supreme Court has developed the thesis that "any body, statutory, non-statutory, administrative, quasi-judicial, which can be characterised as an 'instrumentality' of the government, can be regarded as an 'authority' under article 12."⁷³² And that

⁷³¹ See also: Atwood, 2002.

⁷³² Jain, 2001: 58.

carrying on its business “through statutory corporations, government companies and other bodies with legal personality...[would] not...liberate the State from its basic obligation” to respect its citizens’ fundamental rights.⁷³³ The factum of whether or not a body constituted a government ‘instrumentality’ was to be determined by the dual questions of funding and control, and in due course a whole host of bodies have come to be characterised an ‘authority’ for the purposes of Article 12.⁷³⁴

5. Purposive Interpretation

The third and final major post-emergency strategy for the activation of the Constitution was to adopt an altogether more purposive approach to the interpretation of Section III rights themselves. In addition to a transformation in the reading of Fundamental Rights individually, this manifested itself, in particular, in the expansion of the subject areas over which they were operative and in a more holistic interpretation of their relationship with the Directive Principles of State Policy contained in Section IV. In particular, the Court has moved away from its pre-emergency practice of reading them as being in conflict with, as well as being subordinate to, the Fundamental rights.⁷³⁵ Indeed, it has been precisely this tendency to read Sections III and VI of the Constitution together and in harmony with one another that has led to the dramatic increase in the scope, depth and number of rights falling under the protection of the Court’s writ jurisdiction.⁷³⁶

A particularly crucial component in this overall process has been the retrieval and extraordinarily dramatic activation of Article 21. As has already been seen, *Gopalan*, a very much criticized decision, held the field for over twenty-five years, during which period the ‘right to life’ did not have much security. The judicial attitude, however, underwent a metamorphosis after the traumatic experiences under the internal emergency imposed in 1975 which was lifted in 1977.” In particular, the pivotal case of *Maneka Gandhi v. Union of India*, held that the ‘procedure’ in article 21 must not be “arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all, and the requirement of article 21 would not be satisfied”, and the Court went on

⁷³³ *Som Prakash v. Union of India*.

⁷³⁴ *Sheela Barse v. Secretary, Children Aid Society*.

⁷³⁵ *Umi Krishan v. State of Andhra Pradesh*.

⁷³⁶ Alston & Bhuta, 2005; Kumar, 2007. See also on the development of free speech: Chima, 2008.

to hold that the concept of reasonableness must be protected by such a procedure owing to the link between Articles 21, 19 and 14. As such, *Maneka Gandhi* conclusively overruled the reasoning in *Gopalan*, precipitating a completely new departure in the interpretation of Article 21, and the emergence, thereafter, of an increasing emphasis upon procedural propriety and safeguards similar to that embodied in the American constitutional jurisprudence surrounding the 'due process' clause in the Fifth Amendment.⁷³⁷ This has been particularly important in the area of Criminal justice,⁷³⁸ but it has also been used by the Supreme Court as a tool for improving the population's quality of life. In the process, the Court has inferred from Article 21 a number of rights concerned not just with the preservation of life, but with ensuring that life can be lived with a minimum level of human dignity.⁷³⁹ Lastly, it has also been held to include the right to honest and efficient government, and this has led to a number of cases concerning the proper functioning both of the administration and of the Constitution itself.⁷⁴⁰

⁷³⁷ *Abdul Rehman Antulay v. R.S. Naik*.

⁷³⁸ Baxi, 1980. On security laws more generally, see: Kalhan, 2007, 2009.

⁷³⁹ *Francis Coralie v. Administrator, Union Territory of Delhi*. See: Crossman & Kapur, 2008; Rao, 2006; Razzaque, 2007; Rosencranz & Jackson, 2003; Singh, 2005; Sharma, 2008; and, Vempalli, 2006. See also, on gender justice: Sood, 2008.

⁷⁴⁰ *D. C. Wadwa v. State of Bihar*; *S.P. Gupta v. President of India*; *Sri Kumar Padma Prasad v. India*.

Chapter 6: Family

One of the essential components of the market economy, if it is to function effectively, is the existence of consumers and producers who are not inhibited from acting in an essentially self-interested manner, according to the relevant market signals. At the heart of such a society is a world-view that is reluctant to place any extra-economic constraints upon the satisfaction of material want. This represents a fundamental difference between it and a non-market or pre-capitalist society.⁷⁴¹ The distinctive morality which applies in this situation has been described by Erich Fromm of the Frankfurt School as an ethic of fairness according to which each individual is given a fair chance to compete with his fellows and is not fundamentally frustrated from utilising his capacities in the process. For this to be the case, each individual must be treated as of equal initial value and be free to act upon his decisions as long as his action do not interfere with the capacity of others to do the same.⁷⁴² Given the basic principles upon which this ethic of fairness is based, namely, material equality and social individuation, the extent to which each of these have found expression in a society's principal institutions of reproduction and socialisation is one measure of how far that society has been transformed in a way which is fundamentally sympathetic to the functioning of a market economy. In this regard, the development of family law constitutes a particularly powerful indicator of the manner in which the societies of China and India have been, and are being, transformed by their respective reform processes. Family law purports to govern and to reflect some of the most intimate relationships of an individual's life and thus some of the most cherished of a society's values. Given this, such values also often prove to be some of the most resistant to change. It is in this socio-structural context that the development of post-reform/post-emergency family law reflects the resisted progression of marketisation that has underpinned the gradual integration of both China and India into the international economy.

⁷⁴¹ Fanfani, 2003: 59.

⁷⁴² Fromm, 2002: 168.

A: China

In examining how this has logic played itself out in the context of post-Mao China, it is important to note that Post-Mao reforms in family law mark only the latest stage in a longer-term drive by the modern state to reconfigure traditional Chinese family life according to its changing economic and developmental priorities. This began as early as the nineteenth century with the influence of western missionaries and the experimental social institutions set up in the Taiping rebel kingdoms. It continued through the fall of the Chinese empire into the Republican regimes of the nationalist Guomindang government, which not only embodied the principle of sexual equality in its law codes but also that of mutual consent. In the Communist base areas too, these principles were developed in line with traditional Marxist ideology and there was a keen attempt at least initially to drive out all forms of “feudal superstition” and social hierarchy. Whilst it is true that the various campaigns for social transformation depended in terms of their intensity at any given time upon the exigencies of political expediency and therefore frequently had to be tempered in light of male peasant resistance, they nevertheless formed an important basis for the later family policies of the PRC. In this way, many of the priorities of the base areas in relation to the family were reflected in the 1950 *Marriage Law* which was in force throughout the pre-reform period.⁷⁴³ Despite there being formal legislative continuity in relation to the framework governing the Chinese family prior to 1979, in reality there were a number of attempts by Chairman Mao fundamentally to interfere with its terms of operation. In the most extreme cases this manifested itself in an effort effectively to abolish the family altogether and to replace it with forms of communal care and living. More generally, it involved reducing the role of the family as much as was possible to make way for alternative institutions which could be more effectively controlled by the central Party-State. The failure of this policy was essentially the failure of wider policies of central control and autarky and its replacement was likewise linked to a more extensive strategy of reform and decentralisation. This involved the revival of long-neglected institutions and a change of attitude to the traditional bases of Chinese society from one of contempt to one of recognition, intelligent engagement and of co-option: hence the host of laws, regulations, decisions and judicial opinions designed to

⁷⁴³ In general see: Diamant, 2000; Meijer, 1971; Jamieson, 1921; and, Shiga, 1978.

re-establish the Chinese family as a primary unit of production, socialisation and care.⁷⁴⁴

1. Marriage and Divorce

As the primary institutional locus of reproduction, the PRC has long been keen to procure the widespread registration of marriage.⁷⁴⁵ It has seen registration as one of the principal ways for it to monitor the population's most intimate personal dealings. This represents a significant departure from traditional practice, which, even down to the present, has tended to characterise the validity of marriage in terms of celebratory rituals such as betrothal, presentation of the bride to the groom's family and ancestors and public banquets.⁷⁴⁶ Given this background, the Party-State's desire for surveillance has not always been successfully realised. With the inception of the reform period such practical difficulties have multiplied, resulting in frequent attempts to realign law and policy.

The starting point was the provision laid down in the 1980 *Marriage Law (ML '80)* that marriage was only completed once a certificate had been issued.⁷⁴⁷ This was strengthened significantly in the 1980 and 1986 *Marriage Registration Regulations (MMR '80, '86)* which added, in particular, the requirement that a couple intending to marry appear in person at the Registry. Moreover, the 1986 *Regulations* stipulated that those who register their marriage would have their lawful rights and interests protected by law,⁷⁴⁸ which by implication meant that those who did not register risked their rights going unrecognised. Despite the fact of clear requirements for the registration of a valid marriage there has been continuing tension within the Chinese judiciary between the strict application of the registration requirements and the real potential for injustice that could result from a failure to recognize *de facto* unions. Consequently, *de facto* unions continued to be treated as valid in a large number of circumstances throughout the 1980s.

The desire to reassert control over this most fundamental of social institutions,

⁷⁴⁴ Palmer, 2005: 176-177.

⁷⁴⁵ As early as 1931 the requirement of marriage registration had been laid down in article 8 of the *Chinese Soviet Republic Marriage Regulations*. This was followed after 1949 by its subsequent legislative reaffirmation and reinforcement both in the 1950 *Marriage Law* and in the 1955 *Marriage Registration Regulations*.

⁷⁴⁶ See: Diamant, 2000; and, Meijer, 1971.

⁷⁴⁷ *ML '80*: Article 7.

⁷⁴⁸ *MMR '86*: Article 2.

resulted in the Supreme People's Court issuing an important series of *Opinions on the Determination of Cases Involving Co-habitation in the name of Husband and Wife without Registration of Marriage*. Article 1 of these *Opinions* stated that if the couple in question had commenced their co-habitation before March the 15th 1986, when the revised marriage registration regulations had come into force and if at the time of the hearing they met the essential conditions of marriage specially those of age they would be recognised to have a legally protected husband and wife relationship. However, under Article 2 if on the other hand they commenced their cohabitation on or after the 15th of March 1986 or did not at commencement of cohabitation meet the essential conditions of marriage then the court would consider their relationship one of unlawful cohabitation and the provisions for both property division and custody would therefore be less favourable to the interest of the women. This position was reaffirmed in the 1994 *Regulations on the Administration of Marriage, (RAM '94)* which confirmed that cohabiting couples who failed to register their union would not be allowed to characterise them as matrimonial in nature. Since the primary intention of these moves had been to enhance the Party-State's control over family life, particularly, as will be seen later, with a view to enforcing its birth limitation and eugenics policy, it is a clear example of the priorities of gender equality in this instance being trumped by the more pressing priority of state control.

The likelihood of this more rigorous approach proving sustainable in the long run, however, was always open to question since the logic, particularly of family farming under the Household Responsibility System in the countryside and the widespread desire of China's peasantry to avoid the reproductive restrictions, exerted an "apparently unrelenting downward pressure on marriage ages in rural areas."⁷⁴⁹ It is noteworthy, therefore, that by the turn of the millennium policy makers were prepared to countenance some relaxation in the application of registration provisions. Thus in a major amendment to the 1980 *Marriage Law* in April 2001 (*ML '01*),⁷⁵⁰ in addition to introducing significantly clearer statutory rules on invalid marriage, Article 8 now allows for retrospective registration for a hitherto *de facto* marriage, stating that : "In the absence of marriage registration, the man and woman should go through registration procedures." At first blush, Articles 10, which declares a marriage invalid

⁷⁴⁹ Palmer, 1996: 121.

⁷⁵⁰ In general, see: Ogletree & Alwis, 2003-04.

if “the minimum legal ages of marriage have not been attained” and 12, which states that a void marriage is invalid from its inception, seem, when taken together, to exclude underage marriage from the possibility of retrospective recognition.⁷⁵¹ To understand their implications properly, however, they need instead to be read in conjunction with the first of two subsequent interpretations of the Supreme People’s Court expanding upon the provisions of the revised Marriage Law and passed very soon after the latter’s enactment in 2001.⁷⁵² Under Article 4 of that interpretation it was stipulated that, in the case of underage and unregistered unions, the relationship should be characterised as marital from such time as the substantive conditions for legal marriage were satisfied by both parties. Consequently, although it is indeed the case under the new regime that underage unions will not subsequently be registered, they will nevertheless be recognised as valid *de facto* marriages by the courts. More generally, under Article 5 of the 2001 *Interpretation*, registered couples seeking divorce will be considered *de facto* married if both parties satisfied the substantive conditions for marriage prior to the 1st of February 1994 (when the 1994 *Regulations on the Administration of Marriage Registration* were promulgated). If they only satisfied the conditions subsequent to that date, then their union is required to be registered before the court will allow any further progress in matrimonial proceedings.

In light of all this, it is clear that towards the end of the 1990s there occurred a shift of policy, “in favour of some degree of recognition of *de facto* marriages,” and that this occurred, “primarily in recognition of the fact that wedding celebration without marriage registration remains the predominant social practice in rural areas.”⁷⁵³ On one interpretation, this represents a shift towards greater tolerance of more diverse as well as of more traditional forms of family formation. On another interpretation, it represents a significant and continuing failure on the part of the state to implement one of the key components in its strategy for effective social surveillance. Perhaps more accurate, however, is the view that it constitutes a recalibration of official policy to take account of the clear realities of Chinese society. On this view, it represents an acceptance that traditional unions continue to be formed contrary to the explicit preferences of the state, but also an attempt to construct mechanisms that will both

⁷⁵¹ Ding, 2003.

⁷⁵² The two interpretations are: the 2001 *Interpretation of the Supreme People’s Court on Several Problems Concerning the Application of the Marriage Law of the PRC (1)* and the 2003 *Interpretation of the Supreme People’s Court on Several Problems Concerning the Application of the Marriage Law of the PRC (2)*.

⁷⁵³ Palmer, 2005: 180.

mitigate the consequences of the breakdown of such unions and make it easier for them to be brought back within the ambit of the preferred official framework. In respect of this last point, it is particularly noteworthy that one of the principal components of the 2003 *Marriage Registration Regulations (MRR '03)*, which replaced the 1994 *Regulations on the Administration of Marriage Registration*, was the concept of remedial marriage registration laid down in Article 8 which reinforced and elaborated upon the provisions of the 2001 law.

Whilst the issue of registration has been of central importance in China's post Mao marital law regime it has been accompanied by continuing efforts to emphasise both sexual equality and consent. Communist ideology has, of course, always been critical of traditional customary marriage practices which violated these dual principles. Thus, for example, the 1950 *Marriage Law* not only affirmed the principle of consent but also outlawed concubinage, bigamy, child betrothal and interference in the remarriage of widows. In post-Mao China, however, the attack on customary inequality and forms of social constraint has taken on a new significance in light of the increasing desire to shift the country towards a more market-friendly society and the perceived need to compliment attempts to rebalance Chinese population disequilibria with a reevaluation of the role of women. Not surprisingly then, in Articles 2, 3 and 4 of the 1980 *Marriage Law*, the principle of consent is reasserted with some force and any interference in a decision to marry is strictly prohibited. Likewise, throughout the 80s and 90s, attempts were made by various government agencies to ensure that interference in the remarriage of elderly parents was prohibited. Moreover it is noticeable that, building upon provisions of the 1996 *Elderly Persons Law*, the 2001 revised *Marriage Law* at Article 30 explicitly requires children to refrain from interfering in parental remarriage, stating that "The children's duty to maintain their parents shall not terminate with a change in their parents' matrimonial relationship."⁷⁵⁴ It also supplemented the prohibition on forced marriage by rendering such a marriage under Article 11 of the voidable at the request of the compelled party for dissolution of the marriage contract within one year of the date of marriage registration or within a year of his or her freedom being restored.

⁷⁵⁴ See: Foster, 1999.

Notably the provisions relating to interference in freedom of marriage built upon a number of Decisions of the Standing Committee of the National People's Congress in the early 1990s specifically designed to apply more effective criminal sanctions to practices which degrade and tend to lead to the coercion of both women and children such as those forbidding prostitution, the patronage of prostitutes and for the strict punishment of people dealing in women or children. Tellingly, the revised *Marriage Law* and subsequent Supreme Court interpretations indicate a further extension of these concerns in the context of domestic violence and other forms of abuse as they tend to move emphasis away from dealing with these matters through conciliation and mediation towards regarding them increasingly as infringements of the social order and sometimes of the criminal law which require punishment.

Finally, with the growth of a more economically unequal society, especially with the rise of a class of rich entrepreneurs, combined with the endurance of 'traditional' notions of concubinage, the late 1990s saw an undermining of the principle of monogamous marriage. Consequently, the 2001 revised marriage law also has provisions designed to combat both bigamy and concubinage. First it allows for the possibility under Article 10 of the revised *Marriage Law* and Article 7 of the 2001 *Interpretation*, for the possibility that grassroots organisations who become aware of bigamous or similarly irregular marital unions can request as "interested persons" that the People's Courts declare that a particular marriage is void. Secondly, it effectively makes concubinage a ground for divorce under Article 32 of the revised law and allows for compensation to be awarded to the wronged party in divorce cases involving bigamy and concubinage under article 46.

Turning to the question of divorce itself, the figures show that there has been a considerable increase in its occurrence since 1979 when the annual ratio of divorce to marriage was just 3 percent whilst in 1997 it had reached 13 percent and in some areas as high as 20 percent.⁷⁵⁵ This it has been suggested has resulted not only from the gradual easing of the requirements in contested divorce cases but also from a more restless youth which is growing acclimatised to the freedoms of an increasingly marketised society as well as a younger, more professional judiciary.⁷⁵⁶

⁷⁵⁵ Palmer, 2005: 185.

⁷⁵⁶ Ibid.

The basis for the law governing divorce is found in Articles 24 and 25 and the 1980 law. The first of these Articles reaffirmed the provision of divorce by mutual consent. Divorce by mutual consent is a direct hangover from traditional Chinese law and was therefore recognised earlier not only in Article 17 of the 1950 *Marriage Law* but also in the law of Republican China. In the context of the post-reform period, this relatively relaxed attitude to this form of divorce embodies the judgement that where parties to a marriage are agreed, and provided, first, that provision has been made for their offspring, its custody and upbringing, and second, that an agreement has been reached as to the equitable division of the marital property, it would be more destructive to social harmony were dissolution of the marriage to be refused than were it to be allowed.

It is important not to overlook this form of divorce, since it is one of the few areas in contemporary PRC family law where the Party-State treads with a relatively light foot. Given what is known about the social dynamics of a developing market society, it has been, and is likely to continue to be, an area of significant growth. This is primarily because the more intangible forces of social pressure are reducing tolerance of familial tension among younger generations of Chinese citizens at the same time as there is an increase in exogenous strains on family life as society becomes more competitive multiplying the instances of economic insecurity and flux.

In the area of contested divorce, which is regulated under Article 25 of the 1980 *Marriage Law*, it appears at first sight that official attitudes there represented were slightly more liberal than those represented in the 1950 *Marriage Law* since, unlike its predecessor, the 1980 *Marriage Law* introduced a single but specific ground, namely “breakdown of mutual affection”.⁷⁵⁷ In practice, however, whilst Article 25 appears to recognise the principle of freedom of divorce, in continuation of the almost mandatory requirement for mediation which operated in the pre-reform period, there was strong evidence of judicial conservatism throughout the 1980s.⁷⁵⁸ This was clearly resistant to the concept of no fault divorce and insisted upon several rounds of

⁷⁵⁷ Article 25 reads, “If one party alone desires a divorce, the organisation concerned may carry out mediation or the party may appeal directly to a people’s court to start divorce proceedings. In dealing with a divorce case, the people’s court shall carry out mediation; divorce shall be granted if mediation fails because mutual affection no longer exists.”

⁷⁵⁸ Bailey, 1995; and, He, 2006.

mediation before entertaining a petition. It was in part for this reason that in 1989 the Supreme People's Court issued its *Opinions on the Determination of Breakdown of Mutual Affection Between Husbands and Wives in Divorce Proceedings* in an effort to press judges to adopt a less obstructive approach in contested divorce cases. In particular, it laid down a number of specific grounds, in the presence of which marriage should automatically be dissolved. Under a number of these grounds, the court was required further to examine whether the mutual affection of the couples could not *in fact* be maintained or whether there was a possibility of reconciliation quite apart from the couple's assertion of those facts. Thus, though these clarificatory *Opinions* undoubtedly made the securing of a contested divorce easier to obtain, they gave rise to a situation in which, "the judges [we]re expected to prevent "rash divorces" and thus place considerable emphasis on the need to reconcile the parties...[and in which] more conservative judges [continued] generally [to be] unsympathetic to divorce suits."⁷⁵⁹

With the passage of the revised *Marriage Law* 2001, there has been a significant extension of the right to divorce in contested cases but one which, nonetheless, continues to reflect the moralistic policy that was evident in the earlier 1989 Supreme People's Court *Opinions*. Furthermore, these had themselves continued to reflect the earlier conservative reluctance to make the granting of divorce easier, especially upon the application of a "guilty party". The fact that under Article 47 of the revised law there are attempts to put in place a more explicit system for the definition and determination of fault, and for the awarding of damages in the context of marital breakdown, shows that this attitude is far from being a thing of the past.

Nevertheless, the fact that the requirement under Article 7 of the 1989 *Opinions*, namely "a separation of three full years with no prospect of reconciliation", has been reduced so that now, where incompatibility of a couple is cited as the ground for divorce, the couple need only have lived apart for a minimum of two years, means that the amended *Marriage Law* has in fact made it significantly easier to obtain a divorce in contested cases. Moreover, it is quite certain that this reflects the gradual easing of the more inflexible attitudes to marital breakdown that existed in the earlier

⁷⁵⁹ Palmer, 1988-9: 75. See also: Huang, 2005.

reform period when an older and thus more traditionally minded generation of Communist leaders were in power.

It is clear when looking back upon the developments in marriage and divorce law that subtle but nevertheless very significant changes have been taking place within the People's Republic of China since 1979. In particular, these seem to reflect in social relations, though perhaps after some time delay, what is taking place in economic relations. That is, they reflect a gradual though noticeable freeing up of China's citizenry from frameworks, which were not designed to give expression to their individually felt needs but rather prioritised in the specific case the needs of the social collective. Plainly, of course, this shift represents the progression towards a significant devolution of decision-making from the collective to the individual. In economic terms, such devolution, contrary to Maoist conceptions, is not only not incompatible with the interests of the collective as a whole but actually necessary to their more efficient realisation. As this attitude has gained currency and influence within the Chinese economy, it is clearly possible to see from the foregoing analysis that it has gradually broken out into other areas of Chinese life.

2. Population and Birth-Planning

The most infamous way in which the post-Mao State has attempted to influence the functioning of the Chinese family has been through its comprehensive policy of birth limitation.⁷⁶⁰ In order to achieve its economic goals and to attain GDP levels comparable to those of its advanced western competitors within the defined 60 or 70 year timeframe it was calculated that population growth needed to be kept below 1 billion by the year 2000. On this basis Deng Xiaoping sanctioned in 1979 a policy of encouraging all couples to restrict themselves to one child.⁷⁶¹ Accordingly, when the 1980 *Marriage Law* was passed, in addition to changes to the procedures governing marriage and divorce, it also set down a number of provisions designed to curb population growth. Most notably, under article 5 of the 1980 law the minimum legal age for marriage was increased significantly to 22 years for men and 20 years for

⁷⁶⁰ For earlier approaches to population, see: Aird, 1972, 1978, 1990; Tien, 1973, 1980, 1991; Fraser, 1987; and, Goldstein & Wang, 1996. On its intellectual history, see: White, 1994, 1994a.

⁷⁶¹ This was announced in an unusual Open Letter issued in September 1980. Greenhalgh, 2001: 43.

women and under a large number of provincial family planning regulations these were set still higher. Under article 6 it prohibited first cousin and other forms of close kin marriage, as well as the marriage of anybody suffering from incurable leprosy or “any other disease which is regarded by medical science as rendering a person unfit for marriage”. Articles 8 and 16 sought to encourage uxorilocal marriage as part of the wider strategy to enhance the status of female children. Finally and most significantly, whereas the 1978 Constitution had stated in Article 53 merely that, “[t]he state advocates and encourages family planning,” Articles 2 and 12 of the 1980 *Marriage Law* specified that the practice of family planning should be mandatory with Article 49 of the 1982 Constitution subsequently repeating the precise terms of Article 12 that “both husband and wife have the duty to practice family planning.”

Thus, throughout the 80s and 90s a primary goal of PRC family law has been to restrict each family to the bearing of one child with only rare exceptions being made in specifically defined and extraordinary circumstances. It has also been concerned to ensure that, where births do take place, they are of the highest productive quality. The fact that these goals remain of central and continuing importance in official thinking and that they are framed primarily in terms of demographics rather than in terms of the rights of the individual is clearly shown with the promulgation in 2001 of the first national *Law on Population and Birth Planning*.⁷⁶² This not only reaffirms the dual objectives of the population policy but also provides for the first time a systematic guiding framework within which the various provincial regulations should operate.

From its inception the birth limitation policy has gone through a number of phases. Initially, provincial regulations, which until 2001, were the manner in which Constitutional and *Marriage Law* injunctions for family planning were implemented, tended to concentrate on rewards to encourage conformity with the policy. However, it soon became clear that, as a result of inflation, rapid enrichment of families under the Household Responsibility System and local cadre corruption, this approach was not having its desired effect. Consequently, as the 1980s progressed, new sets of provincial regulations were introduced across China which were more detailed and which coupled rewards with often quite draconian punishments for non-compliance

⁷⁶² Hampton, 2003-4.

with family planning rules. Although efforts were made to relax birth limitation policies in the late 80s and early 90s, the huge mushrooming of economic migration and the consequent floating population, as well as high rates of population increase in economically backward areas unwittingly promoted by direct state assistance, led to its considerable tightening.⁷⁶³ In particular, it augmented new measures governing the migrant population introduced by the State Planning Commission in 1991 and a much more activist approach by the State Council from 1989 in terms of linking state relief with birth limitation work. With the passage of the 2001 *Law on Population and Birth Planning (LPBP'01)* many of the specific policy strategies developed in the provincial regulations have been brought together and updated. In particular the 2001 law codifies the system of rewards and punishments developed in the mid-80s. Thus under Article 26 of the new law rewards continue to accrue to individuals who undergo specific procedures such as sterilisation and abortion. Likewise, families who undertake a general and public commitment not to have more than one child and to use birth control, thereby qualifying for the award of a single child family certificate, may qualify for: monthly subsidies, free healthcare, remission of school fees, preferential housing allocation, extended leave and more generous old age schemes. For those who marry and give birth later in life significant one off leave bonuses are granted.

On the negative side, penalties for breaking birth limitation rules include most significantly the payment of a social compensation fee which amounts to a fine often being equivalent of 50 percent of a poor family's annual income and which is according to Palmer, "officially seen as 'compensation' to society for the burden placed on it by a birth not permitted by the Plan."⁷⁶⁴ Secondly, where a family, having being awarded a single child family certificate, gives birth to a second child is required to return all funds and subsidies awarded to it and is debarred from getting any further benefits. Finally, there are punishments for people who transgress birth

⁷⁶³ In the early 1980s, attempts had been made to enforce the One Child Policy with a series of draconian campaigns. This produced a backlash especially in the rural areas. See here: Greenhalgh, 1994; Greenhalgh & Li, 1995; Rosenthal, 2000. See also: Croll, 1994; Wassestrom, 1984; and, Zhang, 1999. In 1984, the policy was therefore liberalised to a degree, allowing those in rural areas to have a second child, and cadres were forbidden from using coercion. In the event, both cadres and the rural population 'over-responded'. See: Greenhalgh, 1994. Fertility rates rose considerably in 1986-7, in reaction, it was decided to 'stabilise' the policy in respect of allowing for a second child in certain specified circumstances, but coupled with this an insistence on strengthening the policy's enforcement. It is this re-enforcement which sparked the tightening reforms of the early-mid 1990s. Greenhalgh, 2001: 43. On the 1980s in general, see: Banister, 1984; Hardee-Cleaveland & Banister, 1988; Greenhalgh, 1986,1990,1994; and Tyrene, 1991,1994.

⁷⁶⁴ Palmer, 2005: 199.

planning regulations in other ways such as the removal of IUD loops, assaulting family planning workers and either giving or receiving bribes in relation to family planning work.

Importantly, the eugenic concept of population quality continues to receive close attention in the 2001 law carrying on the themes found in earlier legislation. As will be recalled, Article 6 of the 1980 *Marriage Law* prohibits persons with common paternal and maternal grandparents from marrying each other as a way of reducing of congenital defects. In 1990 such prohibitions were joined by the growth of compulsory medical examination prior to marriage registration and in 1994 the mother and child health care law was introduced containing a number of important provisions on population quality. Nearly all of these measures have been brought in to the ambit of the 2001 *Law*.⁷⁶⁵ Whilst individual instances can be pointed to where particular provisions of more recent population regulations, such as those adopted by the Beijing Municipality in 2003, are less stringent than those of earlier regulations they nevertheless remain profoundly eugenic in nature. Whilst it should be noted that one child per couple is the norm, Article 18 of the 2001 *Law* continues the policy developed during the 1980s of allowing provision for a second child in certain circumstances where a couple have applied for permission in accordance with the relevant regulations. The circumstances include: where the first child has developed a nonhereditary disability that will make it difficult for it to support either itself or its parents in later life and also where families living in the remote countryside, and whose main source of living is agriculture, are likely to experience real difficulties without more than one offspring. Lastly, exceptions to the single child rule continue to be permitted in respect of some certain minority nationalities for historical, cultural, ethnic and religious reasons.

Finally, concern at the population's ongoing gender imbalance is seen in the codification of a number of pre-existing provincial bans on foetal testing and selective abortions in Article 35 of the 2001 *Law* as well as a number of other provisions attempting to raise the status of women and to combat discrimination against them.⁷⁶⁶

⁷⁶⁵ *LPBP '01*: Article 11

⁷⁶⁶ There is a raft of evidence concerning the sex imbalance and gender discrimination that has resulted from the One Child Policy. In general, see: Li & Xizhe, 2000. For earlier years and sub-regional break-downs, see: Yuan & Skinner, 2000. For more on discrimination against infant girls, see Human rights in China, 1995; Johnson, 1996; and, Johnson, et.al., 1998. Added to this

Despite the fact of ongoing and renewed emphasis upon the necessity of all sectors of society taking responsibility for population control and the implementation of birth limitation policies, there is much evidence to suggest that strong resistance continues to be encountered in China's rural areas where welfare and economic policies are "themselves creating powerful pressures for large patrilocally based families."⁷⁶⁷ At first sight, of course, the entire apparatus of population control and eugenics, not to mention the thrust of the one child policy itself, seems quite incompatible with the principles of individual autonomy and decision making which are the usual concomitants of the increasing marketisation of society. In fact, however, two things need to be borne in mind in order to gain a correct perspective on the true functional efficacy of the Party-State strategy in this area. Firstly, whilst it may be true that what applies to economic decision-making in terms of allowing individual producers and consumers to make their own decisions should in the last analysis apply also, for purposes of maximal efficiency, to questions of reproduction, China is still a society in transition and decisions which might be most rational in the context of a more developed market society may be inhibited by incompatible social and cultural attitudes at this stage of its development. The judgement embodied in the population policy therefore need not necessarily be at all incompatible with functional requirements of a developing rather than a developed market society, and in fact may constitute a strategic use of state power which, in attempting to create more rapidly the conditions favourable to the establishment of a market society, may be entirely rational. Secondly, the fact that China has now for almost thirty years implemented a policy, the effect of which has been substantially to nuclearise the family, means that in the long run it may actually have served very well the socio-structural requirements of a market society, which, it has been argued throughout this paper, depends upon the formation of equal and therefore essentially transferable productive and consumptive units. Thus objections that the one child policy has produced several generations of "little emperors", whilst possibly not an attractive prospect from a

has been a whole host of other consequential social and health problems. For the effect on women's health, see: Kaufman, et.al., 1992; Li, 1999; and Ni & Rossignol. On the plight of 'black' (unregistered) children who have, under the terms of the policy, been illicitly conceived, see: Fan & Yuan, 1989; and, Chan & Zhang, 1999. For more on the related operation and significance of the household registration system, see: Cheng & Selden, 1994; Mallee, 1995; and Chan & Zhang, 1999. Finally, on other, more general long-term difficulties resulting from the policy, see: Watson, ed., 1997; Du & Tu, 2000; Jing, ed., 2000; and, Tuljapurkar, et.al., 1994.

⁷⁶⁷ Greenhalgh, 1994; Greenhalgh & Li, 1995; Rosenthal, 2000. See also: Croll, 1994; Wassestrom, 1984; and, Zhang, 1999.

human point of view, may point to a phenomenon which ultimately proves to be functionally quite apposite.⁷⁶⁸

3. The Post-Reform Family as a Provider of Socialisation and Care

In addition to natural means of expanding the family unit through procreation, Chinese society also has a long tradition of adoption, particularly, where a couple has proved infertile or incapable of giving birth to a son, such tradition being the adoption of a male child for the purposes of continuing the patriline and ensuring provision for themselves both in old age and in the life hereafter.⁷⁶⁹ Originally, the Chinese Communist Party was keen to condemn such practices as manifestations of ‘feudal superstition’. However, within the reform period, as the state has increasingly pulled back from Maoist ideas of total central control and instant revolutionary transformation, and as the family has increasingly been co-opted and made a major unit of production, so it has also been co-opted as a means of social welfare and security. In this context, the institution of adoption has not only come to be tolerated but also actively promoted as part of a battery of services providing family care of the very young and very old. Consequently, from the beginning of the reform period the right of adoption has been revived and periodically reaffirmed. Thus both Section 14 of the 1979 Supreme People’s Court *Opinions Concerning the Implementation of Enforcement of Civil Affairs, Policy, Cases and Law* and Article 20 of the 1980 *Marriage Law* enjoined, amongst other things: the protection of “lawful adoptive relations”, the safeguarding of the rights and interests of parties stemming therefrom, and the need for free consent.⁷⁷⁰ Subsequently, these principles have been reinforced both in the 1991 *Adoption Law (AL’91)* and in the 1998 amended *Adoption Law (AL’98)*.⁷⁷¹

One of the most significant features of both adoption laws is the protection that they give to the rights both of the adopted child and of the adopting parents, and although relations must benefit the adopted minor they must also follow the principle of

⁷⁶⁸ Jing, ed., 2000; and, Watson, ed., 1997.

⁷⁶⁹ See here: Chikusa, 1978; Johnson, 1921; Van der Spenkel, 1962: 15-17; Waltner, 1984; Watson, 1975; and, Wolf & Huang, 1980.

⁷⁷⁰ Palmer, 1987, 1988.

⁷⁷¹ Gate, 1999-2000.

equality.⁷⁷² Consequently, the adoption regime is premised upon the principle of mutuality in which the rights of the adopter are held to be almost as important as the rights of the adoptee. Article 4 stipulates that a child being adopted must be under 14 years of age and disadvantaged either because the child is: an orphan, or a foundling, or in circumstances where its natural parents cannot rear it because they are burdened with unusual hardship. In this context, it is interesting that there is no right of anonymity since the state has been keen to encourage as much as possible that not only should an adopted child know his natural parents but also that it should continue to maintain moral bonds of support and affection with them. Moreover, the adopting parents should be childless and capable of rearing and providing an education for the adoptive child. Initially, it was required that the adopters must be at least 35 years old but this has been amended downwards to 30 years of age. This is a significant concession to make the formation of adoptive relations easier but it still reflects the desire to delay adoption until it is clear that a couple cannot have children of their own.⁷⁷³ This ensures that children requiring adoption are more effectively targeted at those couples who are themselves most in need of the security that comes in old age from having a productive child. The one exception to this rule under amended Article 8 is the allowance of couples with their own children or who have already adopted, to adopt an orphan, foundling or handicapped child in the care of a social welfare organisation thereby helping to alleviate the state of responsibility for the care, upbringing and welfare which wherever possible is in all these provisions delegated to the individual family unit. Another concession which continues to be permitted in the revised law is recognition given to the customary practice of the adoption of an agnatic nephew for the purpose of continuing a patroline which would otherwise be extinguished. In many ways this represents an “acknowledgement of the fact that there are limits to the state’s ability to control the family in rural areas”,⁷⁷⁴ and the judgment that it is better to recognise and regulate practices that would continue to take place regardless rather than not to regulate them at all.

Interesting here, is the renewed emphasis in the 1998 *Law* upon formalities. In the 1991 *Law* under Article 15, these were limited to the requirement of a written agreement between the parties unless one party required the services of a notary

⁷⁷² *AL '91*: Article 2.

⁷⁷³ Bouman, 2000.

⁷⁷⁴ Palmer, 1996: 130.

public. Under the amended law it is stipulated that “adoptions should be registered with civil affairs departments at county level or above” with adoptive relations commencing from the date of registration. Whilst this does not make registration compulsory it does suggest a trend which in the future will lead to a system which does. In the adoption law regime that there is a clear emphasis upon utilising the family not only as the primary institution of socialisation but also of care and social security which whilst, closely regulated by the state which will relieve it as much as possible of the considerable burdens which the provision of such services which would inevitably place upon it, and in this sense it is consistent with the drive of the entire reform period to both controlled decentralisation and efficiency.

In relation to the responsibility for the socialization and care of children generally,⁷⁷⁵ Article 15 of the 1980 *Marriage Law* specifies that “parents have the duty to educate their children” as well as prohibiting the causing of children harm. Article 17 enjoins parents both to discipline and requires them to compensate those who have suffered economic loss in consequence of their children’s behaviour. The 1991 *Law* for the protection of minors specifies in greater detail how the interest of minors should be protected and their development as “successors to the socialist cause (article 1) promoted and the 1992 law for the protection of women’s rights and interest provides additional protection and support – especially under Articles 16 and 17 (education rights), Article 22 (prohibition of employment of girls under the age of 16) and Article 35 (prohibition of infanticide) – for the position of young girls.⁷⁷⁶ Finally in Articles 21, 22 and 23 of the 1980 *Marriage Law* stepparents, grandparents and elder brothers and sisters are each required to provide care for children where the need arises, thereby further utilizing traditional lines of family responsibility to ensure that the state is not burdened in times of crisis with additional responsibilities.

Turning to the care of the elderly, the 1996 *Law for the Protection of the Rights and Interests of the Elderly* (60 years and above) augments and develops provisions in the marriage, criminal and inheritance laws and is similarly “constructed so that the principal substantive burdens continue to fall on the household rather than the

⁷⁷⁵ See: Palmer, 1993

⁷⁷⁶ On the problem of female infanticide, see: Hom, 1991-2.

state.”⁷⁷⁷ It built upon the principle of mutuality of rights and obligations in an attempt to ensure that the status of this traditionally most respected section of Chinese society is not undermined. The basis for the approach, which was clearly enunciated in the third paragraph of Article 49 in the 1982 Constitution, states “parents have the duty to rear and educate children and minors and children also who have come of age have the duty to support and assist their parents.” Already in Article 3 of the 1980 *Marriage Law* it was stated that “maltreatment, desertion of one family member by another shall be prohibited,” and both the *Marriage Law* at Article 15 and the 1979 *Criminal Law* at Article 183 make it an offence for a child to fail to perform his duties to support an aged parent, as well as in Article 182, to abuse a family member more generally. This was supplemented by Article 35 of the *Women’s Protection Law 1992* which makes it an offence to “abuse or forsake elderly women.” The Inheritance Law of 1985 at Article 7 additionally allows for disinheritance of an heir who has committed “a serious act of abandoning or maltreating the deceased”,⁷⁷⁸ whilst at the same time providing under Article 13 that those who have provided care and support for the deceased be allowed the largest shares in the deceased’s estate rather than those who “had the ability and were in a position to maintain the deceased but failed to fulfill their duties”. In the 1996 *Elderly Persons Law*, Article 10 reaffirms primary responsibility of the family for providing support to the elderly and at Article 11 reaffirms the particular obligations of their children. Article 16 extends these obligations explicitly to the spouse of an elderly person and to younger siblings when brought up by their older brothers and sisters. At article 15 it also states that such duties cannot be excused an obligated individual simply by him renouncing his or her rights of inheritance. In altogether more exhortatory terms Article 35 provides “traditions of mutual assistance between neighbours shall be promoted and voluntary social work for the elderly shall be encouraged and supported”. Finally, Article 31 of the 1985 *Inheritance Law* provides explicitly for the formation of inheritance-care agreements whereby individuals who may be unrelated to elderly persons, can nevertheless agree to look after them in their old age in return for rights of inheritance upon their death.⁷⁷⁹ In all of these areas, the concern to provide as much as possible for the support of the elderly in the community is clearly manifest. In some ways this

⁷⁷⁷ Palmer, 2000: 104.

⁷⁷⁸ See: Davis, 1999; and Foster, 1999.

⁷⁷⁹ See: Foster, 1999; and, Palmer, 1988. On the norms of inheritance embodied in traditional Chinese law and for a sense of how they are reflected here see: Jamieson, 1921; and, Shiga, 1978. For the situation during the early years of the PRC, see: Meijer, 1971: 251-264 and for a little later on, see: Foster-Simons, 1985.

runs counter to the marketising dynamic since it aims to re-bolster the position of an unproductive sector of society which, unlike in the case of children, has little prospect of becoming more productive with time. However, apart from the obvious requirement already noted not overly to burden the state with the expense involved in elderly care, there is also a sense in which these provisions are defensive in nature, thereby reflecting how far market forces have already cut away at the traditional social fabric.

The final area in which the state manifests its concern to encourage equality but also to avoid potential destitution is that of post-divorce maintenance and custody rights. Under Articles 29 and 30 of the 1980 *Marriage Law*, basic principles were laid down for the post-divorce custody of children resulting from a marriage and for the reasonable division for provision of its living and educational expenses. This was supplemented in 1993 by *Opinions of the Supreme People's Court in Determination and Support of Children in Divorce Cases*, and Article 48 of *The Revised Marriage Law, 2001* has reaffirmed the duty of the court to make judgments in such cases and also in the areas of maintenance and division of property.

Under Article 33 of the 1980 *Law* either party to a divorce is enjoined to provide for the other whenever they are facing financial difficulties, preferably by agreement but if that fails, by petition of the People's Court. *Some Specific Suggestions Concerning Problems Encountered by the People's Court when Hearing Divorce Cases* also provided guidance for the more general division of property under Article 31 of the 1980 *Law*.⁷⁸⁰ Despite these provisions, however, the rapid social and economic developments taking place during the 1980s and 90s soon rendered them inadequate. Consequently, the 2001 *Revised Marriage Law* together with the 2003 *Supreme People's Court Interpretation* has now laid down an altogether more sophisticated framework for the division of the marital estate distinguishing different types of property both for the purposes of continuing entitlement and liability and also providing for more sophisticated guidance as to what types of property should form part of the matrimonial estate and which that of the individual spouse.⁷⁸¹ First, taking account of the increasing complexity of negotiations between parties for the division

⁷⁸⁰ Palmer, 1995.

⁷⁸¹ Palmer, 2007

of the matrimonial estate, it has been provided in Article 47 of the *Revised Law* that a party discovered to have concealed or alienated the relevant property, or to have created false debts, will be penalized by, among other things, receiving a smaller share of the estate. Secondly, in relation to the newly significant category of intellectual property, and in order to strike a balance between monetary incentivisation and the principle of spousal equality, it has been stipulated in Article 17 of the *Revised Law* that whereas earning from intellectual property rights will be categorized as spousal property, ownership of the property rights will remain the property of the inventive spouse. Thirdly, much clearer guidance has been given to judges concerning the separation of individual and matrimonial property more generally, specifying, amongst other things, that the matrimonial estate is to include investment income, endowment insurance, and other property and benefits acquired during the marriage.⁷⁸² Explicit guidance is also given in relation to the issue of betrothal gifts. Fourthly, a number of guidelines have been laid down in connection with spousal property relations arising out of property that concerns such normally extra-familial areas as business dealings, equity, debt and partnerships which have come, in one way or another, to be entangled in the martial estate.⁷⁸³ Finally, and reflecting the general shift from housing provided by the work unit to that owned privately, it is provided that a home rented before marriage by one spouse, but thereafter purchased together is to be treated as joint property even if registered in only one name. Moreover, if the property is not sold, the people's court may award occupation to one of the spouses depending upon the circumstances of the case.⁷⁸⁴ Article 42 of the *Revised Law*, confirmed by Article 27 of the 2001 *Supreme People's Court Interpretation*, encourages a husband whose work unit has provided accommodation for a married couple to assist in continuing to provide such accommodation to his estranged wife. In all of these matters, Article 17 states that husband and wife should enjoy equal division of the matrimonial estate and it continues to encourage negotiated settlement wherever possible. Nevertheless it is appreciated that significant imbalances, particularly gender imbalances, continue and so the 2003 *Supreme People's Court interpretation* provides for the right of the parties to bring an action in the People's Courts if disputes arise over either custody or

⁷⁸² Article 18. *Revised Law* (see also Article 13) and Article 11, 2003 *Interpretation*.

⁷⁸³ Thus Article 17 of the 2003 *Interpretation* specifies the several options open when one of the divorcing spouses is a partner in a partnership, and Article 23 concerns itself questions relating to the incurring of a family debt.

⁷⁸⁴ Articles 20 and 21, *Revised Law*.

property settlements.

B: India

As with China, the development of family and personal law in India is a good indicator of the manner in which Indian society as a whole is gradually being reconstructed in accordance with the functional requirements of a market economy. Unlike post-Mao China, however, the transformations which have been taking place in India since the Emergency have been more protracted, more subtle and less explicit owing to the considerably greater degree of diversity, the larger number of sectional, communal and localised identities and the more participatory, less determinedly state-directed, nature of Indian society. Connected with this fact is that whilst in China communist ideology of a fundamentally totalising kind sought to undermine the traditional family structure in favour of the collective, and thereby had to be subject to a radical reversal during the reform period, in India, whilst the socialistic philosophy of the Nehruvian consensus undoubtedly had a certain equalising influence upon interpersonal relations, it was limited not just by the ubiquitous structural impediments to reform already mentioned, but also by its own continued ideological commitments to basic political liberties and democratic institutions. Just as the Indian state found it comparatively more difficult to reconfigure the family to suit a centralised, state-led development strategy prior to the late 1970s, so, thereafter, it has also found it comparatively more difficult to render the Indian family amenable to the various stages of its new, post-Emergency, development strategy. Despite this fact, however, there is clear evidence that significant transformations have nonetheless been taking place which represent notable shifts in the terms of India's familial and interpersonal relations.

1. The Question of Uniformity.

In particular, it is clear that the developments taking place in the realm of Indian family law since the late 1970s have involved what amounts to a strategic recalibration of the way in which the goals of the Constitutional settlement are to be

realised in practice.⁷⁸⁵ Just as in the economic sphere there have been growing efforts to recognise and co-opt local and individual energies in the service of more effective material uplift, so there has also been a reappraisal of family and personal law policy involving the higher judiciary determining to do what it sees as justice in the individual cases brought before it. This case by case strategy supplemented by very cautious occasional legislative interventions, has, in functional terms, involved the growing recognition by the state of the differences within Indian society as a prelude to their much more effective transformation.

It was, of course, never possible for the state to ignore India's diversities, nor indeed, to fail to recognise these in its formal constitutional and legislative mechanisms. Thus, particularly with respect to the Indian family, the pre-Emergency constitutional and legislative strategy undoubtedly bore the hall-marks of compromise. Specifically, it had long been appreciated by the varying governments of the subcontinent that legal uniformity in this sphere could only be achieved, if at all, on an incremental basis. Colonial legislative interventions consequently tended to be both piecemeal and sporadic in nature, focusing upon removing those aspects of the various communal regimes that posed an immediate threat to the smooth functioning of law, order and commerce. Whilst the essentials of this gradualist approach continued after independence, the newly ensconced nationalist elite determined to effect an altogether more proactive policy designed comprehensively to transform India's personal laws by stages into fully a uniform system. For this reason, whilst preserving, under Articles 13 and 327 of the Constitution, the variety of pre-existing community specific personal laws until subsequently superseded by Act of Parliament, it also determined to lay down very clearly – as a Directive Principle of State Policy – the longer-term goal of complete legal uniformity.

Within this framework, it is possible to identify at least four broad stages in post-independence attempts to move closer to the objective of legal uniformity. The first stage involved the institution of a secular personal law – under the auspices of the *Special Marriage Act 1954* – according to which marital relations could be governed on the basis of consent and which was thus, in effect, to operate as an optional

⁷⁸⁵ Menski, 2001: Chap 6.

uniform civil code.⁷⁸⁶ It also involved the passage of a series of Parliamentary Acts in relation to the majority Hindu law, often collectively referred to as the 'Hindu Code'.⁷⁸⁷ These represented an attempt to unify and standardise the law of the majority community and also to subsume under its terms, where possible, those closely related minority groups – Jains, Buddhists, Sikhs etc. – which, it was judged, would be least likely to resist such a move with violence. The second stage of the uniformisation strategy was the statutory reform of the majority law to bring it more in line with the secular law. This was in large part achieved under the terms of the *Hindu Marriage (Amendment) Act 1964* and the *Marriage Laws (Amendment) Act 1976*. This was followed by a third stage, in which the judiciary began to call, in the context of cases of patent injustice being brought before it and at a time when it was minded to adopt an altogether more activist approach, for the introduction of a Uniform Civil Code as envisaged by Article 44 of the Constitution.

In the famous case of *Mohd. Ahmed Khan v. Shah Bano Begum*, for example, which dealt with Muslim post-divorce maintenance law under the general law framework provided for in Sections 125 and 127 of the Code of Criminal Procedure according to which a husband had an ongoing responsibility to maintain his divorced wife, Chandrachud C.J. called for the implementation of a UCC in the following strident and uncompromising terms:

It is also a matter of regret that Article 44 of our Constitution has remained dead letter...There is no evidence of any official activity for framing a UCC for the Country...A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies...It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has legislative competence to do so... We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But a beginning has to be made if the Constitution is to have any meaning.⁷⁸⁸

Similarly, in the case of *Jorden Diengdeh v. S.S. Chopra*, decided less than three weeks after the *Shah Bano* case, and involving the application of the provisions of the *Indian Christian Marriage Act, 1872*, Chinappa Reddy J was moved to write:

⁷⁸⁶ Bagga, ed., 1978; and, Bhattacharjee 1996.

⁷⁸⁷ Bhattacharjee, 1994.

⁷⁸⁸ Paras. 32-33. On the controversy surrounding this call, see: Mahmood, 1976, 1986, 1993.

The present case is yet another which focuses attention on the immediate and compulsive need for a uniform civil code. The totally unsatisfactory state of affairs consequent on the lack of a uniform civil code is exposed by the facts of the present case...[T]he law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the time has now come for a complete reform of the law of marriage and [to] make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases....We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves.⁷⁸⁹

Some ten years later, these calls for action was renewed once more, this time in the context of a case – *Sarla Mudgal* – concerning problems caused for women and children when a Hindu Husband decides to convert to Islam in order to be able to contract a polygamous marriage. There Kuldip Singh J. cited the need for a UCC as a decisive step towards national consolidation:

When more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of “uniform civil code” for all citizens in the territory of India.⁷⁹⁰

He went on to state:

Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law.⁷⁹¹

and to criticise “successive governments” which have been, “wholly remiss in their duty of implementing the constitutional mandate under Article 44 of the Constitution of India.”⁷⁹²

The fourth and final stage, which originally arose alongside the third stage, but became increasingly dominant from the mid 1980s onwards, has seen a greater recognition and utilisation of the self-regulating mechanisms subsisting within Indian society. In part, this has been consequent upon a growing appreciation of the

⁷⁸⁹ At pp. 935-936 and 940

⁷⁹⁰ At para. 1532.

⁷⁹¹ At para. 1538.

⁷⁹² At para. 1539. See also the comments of R.M.Sahai J. at para 1540.

injustices to women and children that result from a more formalistic approach whereby they may be left with little or no support from men willing to use the law to escape from spousal and parental responsibilities apparently freely entered into.⁷⁹³ In part, it has been consequent upon the wider strategy of ensuring that the already overburdened Indian State is not needlessly hampered in its overall programme of material uplift by being burdened with destitute women and children thrown on its mercy by dysfunctional social support mechanisms.

2. Marriage Formation

With respect to marriage formation and solemnisation, this trend has been expressed with particular clarity in the majority Hindu law.⁷⁹⁴ Here the courts have been increasingly willing to recognise the validity of marriages when solemnised according to 'unorthodox', unusual or even nonexistent ceremonial formalities where such recognition appears to resonate with local practice. Since 1955, the formation of Hindu marriages has purportedly been regulated by section 7 of the *Hindu Marriage Act*. In line with the pluralistic strategy forced upon the post-independence government, subsection (1) clearly shows that the legal validity of Hindu marriage is not to be determined according to statutory procedures laid down by the State, but according to Hindu custom itself. For this reason, the role of custom has been explicitly recognised in section 3 (a).⁷⁹⁵

An early attempt to impose top-down uniformity in this area related to the Tamil community of 'self-respecters' who devised their own less elaborate and costly forms of marriage solemnisation which required no recourse to the high caste Brahmins. In the case of *Deivaini Achi v. Chitambaram Chettiar*, and in the face of evidence establishing the extensive employment of these simplified practices, the Madras High Court held that, in order to be valid, a fully fledged sastric marriage ceremony was required, thereby instantly rendering thousands of marriages void. A similar approach was likewise adopted in relation to Section 7 of the *Hindu Marriage Act*, 1955 under

⁷⁹³ On earlier calls for a code, see: Dhagamwar, 1989; Diwan, 1972, 1985. On the debate in general, see: Deshta, 1995; Khan, 1996; Khodie, ed., 1975; Kumar, 2000, 2003; Patro, 1994; Pereira, 2002. See now, especially: Fisher, 2002; Kishwar, 1995; Mathew, 1995; Menski, 1990, 1990a; Omer, 1995. Nevertheless, see continuing calls in: Deolekar, 1995; and, Ratnaparkhi, 1997.

⁷⁹⁴ In general, see: Jain, 1996; Kapoor, 2002; Mathew, et al., 1994; Rathnaswamy, 1995; Roy, 2000; and, Saha, 1996.

⁷⁹⁵ On customary forms of Hindu marriage in general, see: Banerjee, 1896; Bhandari, 1989; Derrett, 1976; Madan, 1973; Mishra, 1994; Menski, 1983, 1984, 1985, 1987; and, Uberoi, 1995.

the leading case of *Bhaurao Shankar Lokhande v. State of Maharashtra*, which held that 'custom' required the performance of sapatapadi.⁷⁹⁶

Congruent with the overall shape of post-emergency reconstruction and judicial sensitisation, this approach began to undergo substantial modification in the middle of the 1980s. This is at first easily missed unless two different categories of solemnisation case are not carefully distinguished. The first category relates to Hindu husbands seeking to avoid prosecution for contracting bigamous or polygamous unions; the second category relates to women claiming marital and post-marital maintenance entitlements. In the first line of cases it has been consistently held that only marriages conducted according to a fully ritualised rubric will receive complete legal recognition. In the second line of cases it came to be held that such rituals were not always essential for full recognition. This line of cases began to emerge at about the same time as the overall growth of judicial activism and was consequent upon the increasing realisation that in cases concerning the financial entitlements of women and children, a more formalistic approach would, in the context of Indian society, lead to their widespread dispossession and even destitution which the post-colonial state simply could not afford to deal with. Importantly, however, rather than effecting a dramatic departure from *Bhaurao Shankar* by explicitly overruling it, the Supreme Court simply began to resile from demanding strict proof in the cases of this kind which came before it, applying instead a widely drawn presumption of marriage. In this regard the key turning point appears to have been the case of *Sumitra Devi v. Bhikan Choudhary*.

Subsequent to *Sumitra Devi*, numerous differing customary forms of marriage solemnisation, involving occasionally even entirely un-ritualised unions, have been held legally valid. It would, of course, be wrong to pretend that the development of this second line of cases has been entirely smooth, as can be seen, in particular, from the 1994 case of *Surjit Kaur v. Garja Singh and Others* – concerning a Sikh widow's claim to share in her deceased husband's property – which seemed to mark a dramatic return to a more formalistic approach to Hindu marriage solemnisation. When seen in the a wider context, however, this seems to have been a somewhat

⁷⁹⁶ On *Bhaurao Shankar*, see: Majumdar, 1966; and Mathur, 1962. More generally, see: Diwan, 1984.

anomalous decision, and is counter-balanced by a continuing flow of cases – including Supreme Court cases – holding to the more substantivist approach.⁷⁹⁷

Just as the growing indigenisation of solemnisation cases directly concerning the material well-being of women and children indicates a co-optive strategy by which society is made to bare the financial burden of marital breakdown etc., so too, despite criticisms that it reflects pro-male bias, does the continuing formalist approach demonstrated by judges in solemnisation cases related to bigamy and polygamy prosecutions.⁷⁹⁸ Indeed, it is clear after a moment's reflection that the capacity of a convicted (and very possibly imprisoned) bigamist to support his marital and post-marital dependents is severely compromised. Therefore, it is entirely coherent that whilst the formation of a marriage should be more easily established in maintenance cases, it should, at the same time, be harder to establish where criminal punishment is at issue; and this is, indeed, what has come to be the case.

3. Divorce

Marriage dissolution has been another area of controversy over lack of uniformity within the personal law system. In fact, here too it is possible to detect a very clear longer-term trend towards convergence, but always at a rate and in a manner that is thought to be sustainable. Consequently, whilst there has been a recent freeing up of the restrictions on divorce in those communities (notably the Christian community) where it had previously proved extremely difficult to obtain,⁷⁹⁹ there have also been parallel attempts in other areas, and in the face of concerns that the process of liberalisation has gone too far, to ensure that divorce is not granted too easily.⁸⁰⁰

As with marriage formation, the provisions governing Hindu marriage dissolution included a comprehensive saving provision – under Section 29(2) of the *Hindu Marriage Act, 1955* – which allowed for the continuance of customary forms of divorce and which needs to be read along side the numerous statutory grounds for divorce introduced by Section 13. Importantly, the existence of Section 29(2) gives

⁷⁹⁷ See especially in this regard: *S.P.S. Balasubramanyam v. Sutturayan*. See also and in general: Jain, 1996

⁷⁹⁸ Agnes, 2000; Diwan & Diwan, 1997; Jain, 1996; Joshi, 1995; Menski, 2001, 2003; and, Shah, 1998. On child marriage, see especially: Menski, 2003: Chap 9. See also: Chandra, 1998; Sagade, 1981.

⁷⁹⁹ Champappiily, 1994; Singh, 1993; and, Tilak, 1995.

⁸⁰⁰ Derrett, 1978, 1981; and, Menski, 2001.

the lie to the contention that traditional Hindu law did not recognise divorce, and it is therefore wrong to see Hindu divorce as in any way an invention of the *Hindu Marriage Act*.⁸⁰¹ Rather Section 29(2) was further recognition of the practical limitations of state power. It was a failure, or indeed an unwillingness, to appreciate the full extent of these limitations that lay behind initial post-independence attempts to extend the grounds for divorce in imitation of the models operating in more 'advanced' western nations. These grounds were significantly enlarged, first, by the *Hindu Marriage (Amendment) Act* of 1964 and then again by the *Marriages Laws (Amendment) Act* of 1976. This latter act was a complex reform designed not only to provide extra grounds for divorce, but also, more generally, to harmonise the *Hindu Marriage Act* with the *Special Marriage Act*. In particular, in addition to significantly reducing the waiting period for petitions to just one year, it also made mutual consent a ground for divorce under a Section 13-B, thereby signalling a movement towards recognition of the breakdown principle.

In due course the interpretation of Section 13-B became a point of considerable contention centring on the question of whether or not an initial giving of consent was sufficient to fulfil its requirements, or whether consent had to be ongoing up until the point at which the divorce decree was granted. In a by now familiar pattern, whilst earlier cases on the issue tended to hold that consent once given was irrevocable, thereby exemplifying judicial willingness to move towards *de facto* introduction of the breakdown principle, from about 1988 much greater weight was given to the argument that mutual consent – to be effective – should be ongoing. Finally, after significant dispute at the High Court level, the Supreme Court gave authoritative sanction to this latter interpretation in the case of *Surestra Devi v. Om Prakash*.

The second major ground introduced by the 1976 Act was that of cruelty. Prior to 1976 cruelty had been a ground for separation under Section 10 of the *Hindu Marriage Act, 1955*, but not for divorce.⁸⁰² This was now changed under Section 13(1)(ia), and it rapidly became a surrogate for the considerable liberalisation of Hindu divorce law in general. Indeed, by the early 1980s it had become possible to

⁸⁰¹ Beckwith, 1988; Chawla, 1983; Derrett, 1963 On alternative remedial resources in classical Hindu law, see: Lariviere, 1991.

⁸⁰² On the complex of interrelationships between dowry claims/violence and the cruelty grounds, see: Bhatnagar, 1996; Dewan, 2000; Dhagamwar, 1987; Dhar, 1988 ; Diwan & Diwan, 1991, 1995; Jain, 1996; Kumar, 1986, ed., 2000; Kusum, 1993; Mathew, 2000; Menski, 2001: Chap 1, 2003: Chap 8; Mohite, 1993; Nawaz, 1989; and, Trivedi, 1998

secure a divorce under this ground on the basis of even the slightest fault, from the burning of a husband's PhD thesis to enforced 'desertion' of the family home. As with divorce by mutual consent, however, by the end of the 1980s judges began to adopt an altogether more restrictive approach, conscious of the fact that further movement towards the effective introduction of no fault divorce would accentuate worrying and destructive trends within wider Indian society: trends that more often than not redounded primarily to the disadvantage of its weakest members. Indeed, whilst earlier cases such as *Ms. Jorden Diengdeh v. SS Chopra* had unabashedly called for irretrievable breakdown to be made a separate and standard ground for divorce, by the 1990s the Court increasingly adopted the more nuanced position of dissolving marriages on the basis of irretrievable breakdown under its Constitutional Article 142 jurisdiction only in exceptional cases where it felt it necessary to cut the Gordian knot of intractable litigation and only in such cases as the parties would not subsequently prove a financial burden to wider society. Thus in the important case of *Bhagat v. Bhagat*, a year after it had exercised its Article 142 jurisdiction in *Chanderkala Trivedi v. Dr SP Trivedi*, the Court acted to end a marriage which it considered bore absolutely no chance of retrieval.⁸⁰³

The lead given in *Bhagat v. Bhagat* has been followed in a number of subsequent cases, each of which have emphasised the exceptional nature of the jurisdiction exercised, and each of which have been careful not to set a general precedent for the dissolution of marriage on the ground of irretrievable breakdown. From the Court's point of view, this decidedly more flexible approach has had the benefit of allowing it to dispose of cases that were bogging down the judicial system, whilst at the same time protecting society from having to bear the burden of spouses rendered severely straightened by un-requested divorce. It also allowed it the discretion to protect a wronged spouse – normally a wife – from being unfairly forced into a situation which was not of her own making. To this end, the Court has been clear that it will not exercise its special jurisdiction in cases where the petitioner seeks to rely on his or her own wrong, a position that was forcefully reiterated in the case of *Chetan Das v. Kamla Devi*.

⁸⁰³ Diwan & Diwan, 1991; Menski, 2001; and, Pant, 1996.

Despite more recent attempts to regulate and indeed slow the rate of change in a way that will be more socially sustainable, there can, nevertheless, be little doubt as to the overall direction and longer-term significance of that change. In this respect, despite repeated claims from certain quarters that Muslims have failed to submit themselves to uniform family law regulation, there is a strong sense in which Indian secular and Hindu laws have been gradually adjusted to approximate more and more closely to Muslim law.⁸⁰⁴ Thus whilst it continues to be the case that Muslim men, in virtue of their powers of *Talaq* and their capacity to negotiate *Mubarat* (or divorce by mutual consent),⁸⁰⁵ remain outside any real framework of statutory regulation, in substance, this position is not so different from the position in which the recognition of customary forms of Hindu divorce places the Hindu male. Moreover, it is balanced against both the customary capacity of Muslim women to negotiate for themselves a *Talaq-r-Tafwid* (a form of delegated divorce) or *Khula* divorce and, more importantly, their capacity to bring themselves under the terms of the *Dissolution of Muslim Marriages Act, 1939*, which, among other things, allows for divorce on the basis of cruelty and/or the failure of a Muslim husband to perform his marital obligations. Likewise, if there are difficulties in Muslim women bringing themselves under these provisions and of availing themselves of these options in practice, then there is ample evidence that they are difficulties the substance of which is shared by their Hindu counterparts. Finally, when all of the above is read together with the increasing disincentives placed upon too easy exploitation of the traditional mechanisms for Muslim divorce, the evidence of convergence is striking.

It seemed, then, that by the mid-1990s both the secular law and the two main personal laws allowed divorce on a large and growing number of grounds, even if the rate at which those grounds had been introduced underwent significant moderation by the various apparatus of the post-colonial state in order to ensure their ultimate social sustainability.⁸⁰⁶ Moreover, by that time the Parsi law on divorce had also been brought into line with these other laws under the terms of the *Parsi Marriage and Divorce (Amendment) Act, 1988*, such that only the Christian divorce law continued to remain substantially out of step. The sticking point, in this regard, had been the terms of the *Indian Divorce Act, 1869*, which had codified Christian divorce law “at a time

⁸⁰⁴ In general, see: Pearl & Menski, 1998.

⁸⁰⁵ See: Ahmad, 1994; Carroll, 1985; and, Pirzada, 1996.

⁸⁰⁶ Rathnaswamy, 1995.

when divorce was granted with the utmost reluctance and only in the most exceptional circumstances.”⁸⁰⁷ Here again, rather than utilising the blunt and potentially destabilising instrument of primary legislation which, unlike, the earlier reforms to the Parsi law, would have had to have been effected in the face of strong opposition of the leaders of the Christian community, the initiative for change was left instead to the courts; in particular, to the Kerala High Court.⁸⁰⁸ Thus after several attempts to loosen up the provisions of the 1869 Act, a full Keralite bench took the dramatic step, in the 1995 case of *Mary Sonia Zachariah v. Union of India*, of judicially redrafting the offending statutory provisions on its own authority so as to enable Christian wives to seek divorce on grounds of cruelty like every other Indian wife. The broad, though reluctant, acceptance of this development as a *fait accompli* amongst the Indian Christian community seems to have meant that by 2001 the Union Parliament was finally willing to take back the reform initiative. Consequently, on the 24th November, 2001 it passed the *Indian Divorce (Amendment) Act, 2001*, providing ten grounds for the dissolution of a Christian marriage, plus an eleventh for wives who proved that their husband had “also since the solemnisation of the marriage, been guilty of rape, sodomy or bestiality”, thereby finally bringing Christian divorce provision in line with the secular law and that of the other Indian communities.

4. Maintenance

Of particular importance in the emergence of India’s post-emergency family law strategy have been the various developments in the area of post-divorce maintenance.⁸⁰⁹ This is because it is in this area that the courts have had to deal with the results of the final and conclusive breakdown of the normal mechanisms of socialisation and mutual support, and also the area in which they have had to undertake the very difficult and subtle task of balancing both the interests of substantive justice, on the one hand, and the realistic capacities of the Indian state. Perhaps not surprisingly, the actual implementation of this strategy has had to be accompanied by a dramatic rise in judicial activism in the whole area of maintenance law. With respect specifically to Hindu maintenance law this manifested itself in the growing context sensitive operationalisation of pre-existing statutory maintenance

⁸⁰⁷ Menski, 2006.

⁸⁰⁸ Bhattacharjee, 1994; Champappilly, 1994; and, Menski, 2001.

⁸⁰⁹ In general see: Agnes, 1992; Menski, 2001: Chap 4, 2003: Chap 12; and, Pearl & Menski, 1998: Chap 7.

provisions contained within the major Hindu law Acts of the mid-1950s. These provisions primarily focused upon four areas: the traditional entitlement of a Hindu wife to maintenance during the subsistence of her marriage, which was recognised and strengthened in Section 18 of the *Hindu Adoptions and Maintenance Act, 1956*; the right of a Hindu widow to share in joint family property, laid down in Section 14 of the *Hindu Succession Act, 1956*; the entitlement of Hindu wives to receive support during the pendency of litigation, which was secured under Section 24 of the *Hindu Marriage Act, 1955*; and, finally, the right of a divorced Hindu wife to permanent alimony, recognised under Section 25 of the *Hindu Marriage Act, 1955*. Initially, the case-law on these sections either adopted a restrictive interpretation or interpreted then in a way which was contrary to the interests of Hindu women. This was particularly evident in cases such as *Akasam China Babu v. Akasam Prabati Bankim* and *Chandra Roy v. Anjali Roy* which were proved to be totally inadequate to the social context within which they were decided.

From the late 1970s, however, and particularly from the early 1980s, the courts began to deliver judgements that were much more concerned with the substantive goals of protecting Hindu women and their children from destitution than with the somewhat blunt application of statutory formulations which, it was increasingly appreciated, could not be adequately operationalised unless proper account was taken of the inherent inequalities and complexities of Indian life. Consequently, husbands' attempts to escape maintenance liability were increasingly met with judicial presumptions of validity, forcing them to pay maintenance either on the basis either of subsisting unions or as divorcees. With respect to Section 7 of the *Hindu Marriage Act, 1955*, this strategy of judicial presumption has already been seen in connection with the post *Sumitra Devi* marriage solemnisation jurisprudence, but it has also been adopted, to a limited extent, in relation to the general law provisions contained within the Code of Criminal Procedure, 1973. Thus in the 1981 case of *Boli Narajan Pawye v. Shiddheswari Morang* the Gauhati High Court held that strict proof of marriage is not necessary to establish the status of 'wife' under section 125(1)(a) of the 1973 Code, and consequently that a void or voidable marriage does not debar a woman from receiving maintenance in the absence of a final declaration from a competent court. More particularly, with respect to polygamous and bigamous unions, it had been held in *C. Obula Konda Reddy* that the expression 'Hindu Wife' within the

terms of section 18 of the *Hindu Adoption and Maintenance Act*, 1956 meant “a Hindu wife whose marriage had been solemnised” and therefore included a Hindu wife who found herself party to a polygamous union.⁸¹⁰ Likewise, in *Shantaram Tukaram Patil v. Dagubai Tukaram Patil* it was declared that “section 25, Hindu Marriage Act, confers upon a woman whose marriage is void or is declared void, a right of maintenance against her husband” and in *Rudramma v H.R.*

Pattaveerabhadrapa, the High Court of Kerala held that a court could not, in the course of hearing a maintenance petition, go into the validity of a marriage even if it was obvious on the facts of the case that the union to which the petition related was a polygamous one.⁸¹¹

With respect property of the joint family, after a number of decisions to the contrary, it was held in the 1977 case of *Vaddeboyina Tulasamma v. Vaddeboyina Sessa Reddi* that Section 14 of the *Hindu Succession Act*, 1956, in fact, afforded a Hindu widow an absolute estate in her deceased husbands coparcenary property, since such property was “merely in recognition of her right to maintenance which was...pre-existing...”. And it was also firmly established that a Hindu wife enjoys absolute ownership over property given to her at or about the time of her marriage.⁸¹² Likewise, in relation to the payment of maintenance itself, it has been held both that Section 24 of the *Hindu Marriage Act*, 1955 offers the Court a wide discretion in fixing the amount of interim assistance to be awarded⁸¹³ and that, what matters in calculating an award, is not so much whether the person liable to pay maintenance actually has sufficient property to discharge his obligations, but rather whether he has sufficient earning capacity to do so.⁸¹⁴ Finally, it has been held that, as in China, responsibility for indigent family members extends beyond the limited bounds of marriage, child care and post marriage maintenance to embrace that of children – of both sexes – for their parents. Thus in *Vijaya Manohar Arhat v. Kashirao Rajaram Sawai* a married daughter found herself liable for the maintenance of her aged father and his second wife.⁸¹⁵

Turing to the Muslim maintenance law, the new activism has been altogether more

⁸¹⁰ Menski, 2001: Chap 4; and, Sagade, 1996.

⁸¹¹ Ibid.

⁸¹² Ibid.

⁸¹³ *Anil Kumar v. Laxmi Devi*.

⁸¹⁴ *Durga Singh Lodhi v. Prembai*.

⁸¹⁵ Ibid.

controversial – even at times explosive – but in the final analysis no less marked.⁸¹⁶ It has centred, in particular, around the interpretation of Section 125 of the *Criminal Procedure Code, 1973* which, being part of the general law, applies to all Indians regardless of communal affiliation. The crucial innovation contained within Section 125, which was a reform of Section 488 of the earlier *Criminal Procedure Code, 1898*, was to redefine the term ‘wife’ to include a divorced wife,⁸¹⁷ thereby clearly leaving it open for Muslim wives to claim maintenance from their ex-husbands beyond the three month post-divorce *iddat* period laid down in traditional Islamic jurisprudence.⁸¹⁸ Although always simmering beneath the surface, the issue did not really come to a head until the famous *Shah Bano* case of 1985. Well before that decision, the Supreme Court had established in *Bai Tahira v. Ali Hussain Chotha* that a Muslim ex-husband had an on-going obligation under Section 125 to make sufficient maintenance provision to his former wife to enable her “to keep body and soul together” and that until such a requirement was satisfied he would not be exempt from further payments. However, this was not enough conclusively to undermine opposition to the new law. The peculiarly incendiary nature of the *Shah Bano* case consisted in the fact that in it the Supreme Court, sitting as a bench of five Hindu judges, purported conclusively to put pay to ongoing Muslim demands for exemption from the terms of Section 125, granting Shah Bano – who had been divorced by her husband of forty years – the right to claim full maintenance entitlement until death or remarriage.⁸¹⁹ In doing so, it made the controversial exegetical claim that India’s secular law on post-divorce maintenance and Islamic law as found in the Qu’ran did not conflict. It went on to say that, even if they did so conflict, that the secular law would take precedence over the communal law; and it added that, to avoid such disputes in the future, India urgently required the imposition of a Uniform Civil Code as mandated in Article 44 of the Constitution.

The severe national unrest that the *Shah Bano* decision sparked was widely regarded as having given rise to its comprehensive statutory reversal under the terms of the hastily enacted *Muslim Women (Protection of Rights on Divorce) Act, 1986*.⁸²⁰ That

⁸¹⁶ Menski, 1994.

⁸¹⁷ Das, 1987; and, Diwan, 1985

⁸¹⁸ Wani, 1995, 1996.

⁸¹⁹ Mahmood, 1985.

⁸²⁰ For the heated controversy surrounding this statute, see: Abdulkaher, 1986; Ali, 1986; Carroll, 1986; Chandra, 1986; Kaur, 1990; Iyer, 1987; Sewlani, 1992; Subzwari, 1996; Tonapi, 1995; and, Vijayan, 1987.

the Rajiv Gandhi government was keen to present the Act in this light, there can be little doubt, and it certainly had the effect of quietening down the immediate communal tensions, even if it did so at the price of considerable longer term rancour. To appreciate the true effect of the Act, however, it is necessary to pay close attention both to its precise wording and to case-law according to which it was subsequently applied. When this is done, it becomes clear that, despite a (prudent) fifteen year silence on the part of the Supreme Court, from as early as 1988 the more activist state High Courts, exploiting an ambiguity in the wording of Section 3 of the 1986 Act, actually began interpreting it in line with a general standard according to which Indian husbands of all communities were required to provide for their ex-wives until death or re-marriage. Specifically, it was held that, according to Section 3, not only did a Muslim ex-husband have to maintain his ex-wife during the traditional *iddat* period, he also had to “make and pay”, during the *iddat* period, sufficient provision to his ex-wife for her life thereafter. Consequently, once the *iddat* period had come to an end, it was open to a divorced Muslim woman to make further claims against her ex-husband. Paradoxically, this actually placed Muslim men in a worse position than their non-Muslim counterparts, since whilst the *Criminal Procedure Code, 1973* placed an upper limit of Rs. 500/- (subsequently raised to Rs. 1500/-) on an ex-wife’s maintenance entitlement, the 1986 Act specified no such limit.⁸²¹

Having allowed such an interpretation to gain a foothold at the High Court level and in the absence of a repeat of the widespread unrest that greeted the *Shah Bano* decision, the Supreme Court felt able tentatively to revisit the subject of post divorce Muslim maintenance law *obiter dicta* in the case of *Noor Saba Khatoon*, and in the 2001 case of *Danial Latifi v. Union of India*, it finally recognised a Muslim ex-wife’s entitlement to post-divorce maintenance beyond the *iddat* period under the 1986 Act. Moreover, two days after the *Danial Latifi* was handed down, on 24th November 2001, the Union legislature passed the *Code of Criminal Procedure (Amendment) Act, 2001*. This did three things. First, it removed the earlier maintenance ceiling of Rs. 1500/- in Section 125(1) of the *Criminal Procedure Code, 1973* placing all Indian husbands in same position as their Muslim counter-parts. Secondly, it introduced new provision for maintenance *pendente lite* or interim maintenance on the model

⁸²¹ Menski, 2001: Chap 4.

provided for under Section 24 of the *Hindu Marriage Act, 1955*, in recognition of the routine difficulty encountered in implementing the law in this area. Finally, it also provided for the more speedy disposal of such cases by laying down a time-limit of sixty days from the date of the service of notice by which they were to be disposed.⁸²²

⁸²² See now: Shukkur, 2003. More generally, see: Mullaly, 2009; Raj, 2001.

Part 3

Theoretical

In Part 2 a broad picture emerged with respect to the dramatic transformations that have been taking place in China and India over the past three decades, whereby, despite their apparently quite different speeds and trajectories, and despite some initial more detailed appearances to the contrary, they are indeed being reconfigured by a set of common processes which are very gradually but very powerfully acting to undermine their differences. Part 3 now attempts to articulate a deeper theoretical framework which, it will be argued, is latent in these developments and, indeed, in the longer-term developments outlined in Part 1. It will thus serve to explain the mutually illuminating fit between the two previous parts, whilst at the same time, receiving a degree of empirical verification from them.

In particular, it elaborates an understanding of human society and human transformation in the tradition of Aristotle and Aquinas, premised upon the irreducibly material and immaterial nature of the human person. In so doing, it makes the central point that it is only when the basic norms proper to human functioning/flourishing – precisely those which find expression in the basic precepts of the natural law – are fully adhered to, that maximal human freedom, and thus diversity, results and that, in so far as these norms are departed from, such freedom and diversity is undermined. In the first place, this serves to emphasize that individual and collective diversity is indeed an undeniable indication of human flourishing upon a natural law understand of the variety being forwarded. Secondly, it furnished the basis for a coherent account of how that diversity arises and what are its preconditions. Thirdly, it also furnishes the basis for an explanation, not only of how that diversity can be, and is, undermined, but also of the longer-term consequences of that process. In the first instance then, Chapter 7 offers a Natural Law based account of the inextricable link between law, defined as normative social pressure, language and society. Thereafter, Chapter 8, building upon but also extending the insights developed in Chapter 7 by setting them within a wider metaphysical framework, presents a more completely developed Natural Law based understanding of historical transformation.

Chapter 7: Nature, Language and Law

Discussion to this point has presupposed the possibility of speaking intelligibly about the subjects under review. Such a presupposition is, of course, indispensable for any form of philosophical or sociological analysis. Nevertheless, it carries with it certain implicit epistemological claims. It is the purpose of this chapter to render these claims a little more explicit and also to explain how, within the context of an Aristotelian/Thomistic account of human nature, it is possible to speak of human action and the social realities to which it gives rise over time. In order to do so, an account is offered, first, of how the human mind is able to attain basic cognitions of the objects in the world to which it finds itself directed. Secondly, a further explanation is given as to how these basic cognitions are gradually built into altogether more systematic, scientific, understandings. Thirdly, on this basis, a still further analysis is developed as to how scientific knowledge acquisition operates specifically in relation to the human action-system, and as to how it exposes the inherently surface/depth character of that system consequent upon it being that of an embodied intellect. Fourthly, it is shown why a comprehensive account of human action requires elaboration not only of normative systems underlying possession of the mere capacity to engage in rational action, but also of the norms that govern or specify the correct use of that capacity – namely, the precepts of the natural law – together with their mutual inter-relation. Fifthly, and finally, these various considerations form the basis for an explanation of why and in what manner the varieties of ‘human law’ – defined broadly, as the norms of social pressure – afford an effective means of indicating and analysing social change as well as disclosing the fundamental forces that are driving it. The execution of first two stages in this programme are likely to appear all too compressed, but they are necessary preliminaries for what follows.

A: Cognitive Underpinnings

Knowledge, for both Aristotle and Aquinas, is the cognitive conformity of a knowing subject to the reality that is known.⁸²³ It refers to the state in which the human form is enriched or expanded by becoming, or in some way being assimilated to, the thing of which it has cognition. The basis for understanding this is the Aristotelian theory of hylomorphic composition. This theory holds that there is in each living being, a form or soul - a vital principle – which animates, organises and gives life to the body of that being, and which consequently causes it to be the type of being it is. The human being, since it is an embodied substance, has as its primary objects of cognition individual material substances. These it accesses through its five senses by means of sense perception. Sense perception is a highly complex process,⁸²⁴ but in facilitating sense cognition, it confers access only to an individual cognate as an individual and not as an individual falling within a general category or under a general description. For this, a more eminent form of cognition needs to take place, requiring that the distinctively human powers of the intellect be engaged.⁸²⁵ With both types of cognition, a certain degree of formal assimilation between cognising subject and the object of cognition takes place. It is on this basis that the object is said to become actually (and really) present in the subject. By formal assimilation is obviously not meant here that an individual ‘parcel’ of informed matter is brought into the cognising subject precisely as that individual ‘parcel’ of matter. Instead, the type of assimilation involved in cognition – standardly referred to as intentional assimilation; its resulting assimilates as intentions – by contrast to that involved in, for example, eating and drinking, results in no loss either to the subject or to the object.⁸²⁶ Whilst the same form comes to exist in the knower as exists in the known, it does so according to a different mode. This modal difference “results from difference in recipients: the form of colour exists naturally in the wall, but intentionally in the eye, because wall and eye are different kind of recipient...”⁸²⁷ In the first instance, the ‘form’ of the object is made bodily present in the cognising subject by means of a sense-impression, or a

⁸²³ In general see: Haldane, 1993; Jenkins, 1991; Kenny, 1993; Owens, 1992; Ollivant, 2002; and, Perler, 2000. This clearly represents a ‘direct realist’ epistemology. For reasons for rejecting alternative nominalist and idealist epistemologies, see the important works by the founding of the Critical Realist school of thought: Bhaskar, 1997, 1998; as well as the classic work, Gilson, 1983.

⁸²⁴ For relevant recent research on sensory processes, see, for example: Noe, 2004. See also, for this section in general the more comprehensive review of recent research by Paul Vitz, in: Vitz, 2006.

⁸²⁵ Aquinas, *SummaTheologiae*[ST]Ia.12.4c; Kretzmann, 1993: 139.

⁸²⁶ Wallace, 1996: 18. On intentionality more generally, see: Crane, 1998; Deely, 1968, 1972; Haldane, 1996, 1998; Kenny, 1984; Sheehan, 1969.

⁸²⁷ Kretzmann, 1993: 150.

series of sense-impressions. “The extra-mental object causally affects the medium between that object and the sense it affects; the medium in turn makes an impression on the senses...”⁸²⁸ The senses, being here in a state of potency, are essentially passive or receptive.⁸²⁹

In this way, sense-impressions come to embody the form of the cognised object by way of wholly sensory processes.⁸³⁰ They constitute a sort of vital reflection of the cognised object whereby its form is re-particularised in the matter of the cognising subject.⁸³¹ It is for precisely this reason that, as with animals, human beings are possessed of sensitive cognitive powers that give them access to the particular corporeal substances and accidents that inhabit the material world. For this process to be fully realised, it is necessary to postulate, in addition to the five external senses of sight, hearing, smell, taste and touch, four ‘internal’ senses. The external senses are distinguished from one another by the objects or qualities – normally referred to as ‘proper sensibles’ – capable of affecting or stimulating them. Owing to their highly specific and necessarily aspectival nature, the outer senses are incapable, by themselves, of producing a complete representation of the sensed object as it subsists in the extra-mental world. For this to be achieved, the raw sense data to which they provide access, have in some way to be combined. This is the function of the internal senses, characterised as such because, unlike external senses, they “have no end organs that face out on to the world.”⁸³² They are normally taken to be four in number: the common or central sense, the imagination, the estimative sense and sense-memory.

Over and above these sensory capabilities, and in order for them to cognise universals proper, human beings possess further, intellective powers “by which they are able to transform the en-mattered, particularised forms existing in sensible objects, into...intelligible species.”⁸³³ Apprehension of these ‘intelligible species’ is a necessary precondition for the cognition of the nature, essence or ‘quiddity’ of a given substance, since “forms existing in matter are not actually [but only potentially]

⁸²⁸ Stump, 2003: 263.

⁸²⁹ Aristotle, *De Anima.*, II 23.547. in Kretzmann, 1993: 139.

⁸³⁰ Gibson, 1966, 1986.

⁸³¹ Frede, 2001; and, King, 2006.

⁸³² Wallace, 1996:123

⁸³³ MacDonald, 1993: 161. See also, and especially: Deely, 1971 Lonergan, 1993. Further important works here include: Spruit, 1994, 1995; and, Klima, 1996..

intelligible.”⁸³⁴ A ‘quiddity’ is that within a substance which constitutes its fundamental definition. It is this more complete mode of cognition that is the proper object of the intellect. Thus, just as sense cognition consists in the subject actually having formed within itself material impressions of the object being cognised, so intellectual cognition, consists in the subject’s intellect being assimilated to that which is intelligible in the object by being informed by its intelligible species.⁸³⁵ The abstractive processes by which intelligible species are made actually rather than merely potentially intelligible, build upon the Aristotelian principle that “[t]hings have to do with the intellect to the extent to which they can be separated from matter.”⁸³⁶ Thus Aquinas is frequently at pains to point out that the intellect is not the form of any organ.

To have cognition that depends upon “abstracting...form...from individuating matter,...is to have cognition of that which is in individuating matter, but not *as* it is in such matter.”⁸³⁷ This is to reverse the order of causation found in sensation. In sense cognition, it is the sense perceptible object that acts upon the sense organ to produce within the subject an impression of the thing sensed. In intellectual cognition, by contrast, it is the intellect that must first act upon the sense-impression in order to bring to light the basic constituents of intelligible reality virtually contained within it. This reflects the fact that whilst material objects are actually sensible because sense has to do with that which is individual and it is precisely as individuals that material objects actually exist in the external world, they are only potentially intelligible, since that which is intelligible has to do rather with that which is universal.⁸³⁸

In accounting for this capacity to bring the mind into contact with the basic constituents of intelligible reality, both Aristotle and Aquinas further distinguished two powers within the structure of the intellect itself: the ‘agent’ or active intellect that acts upon sense-impressions to produce intelligible species, and the ‘possible’, passive or receptive intellect, upon which intelligible species are ‘impressed’.⁸³⁹ Whereas the ‘agent’ intellect constitutes as sort of natural intellectual ‘light’ which,

⁸³⁴ *ST*a.79.3.

⁸³⁵ *ST*a85.2, ad.1., in Kretzmann, 1993: 138.

⁸³⁶ Aristotle, *De Anima*.III4,429 b. 21., in Kretzmann,1993: 140.

⁸³⁷ *ST*a.85.1c., in Kretzmann, 1993: 140.

⁸³⁸ For a sophisticated and much fuller analysis of why this must be so according to Aquinas see, in general: O’Callaghan, 2003. See also: Pannacio, 2001.

⁸³⁹ See here especially: Braine, 2002. Additionally see: Adler, 1993; Barzan, 1981; and, Davidson, 1992.

by its own power, brings out that implicit within a sense-impression which is formal or potentially universal, the ‘possible’ or receptive intellect constitutes a type of intellectual memory, in which the formal or universal reflections, once produced, are stored.⁸⁴⁰ The reason why both active and passive functions of the intellect are required in this process is because the intellect contains no innate ideas. As such its initial state is one of mere potency,⁸⁴¹ and it is, therefore, “necessary to postulate a [further] power belonging to the intellect, to create actually thinkable objects by abstracting ideas (*species*) from their individual conditions”, namely the power know simply as intellectual abstraction.⁸⁴²

Cognising one thing without simultaneously cognising another – abstracting by simple consideration – is properly done only insofar as the first thing can be understood without the other entering into its definition.⁸⁴³ This can be achieved either by apprehending a whole/universal independent of its parts/ particulars (total abstraction) or by apprehending form independent of sensible matter (formal abstraction).⁸⁴⁴ The former method involves the apprehension of “a universal nature, while signifying the concrete individual subject in a potential and indeterminate way.”⁸⁴⁵ It is the type of abstraction that forms concepts such as ‘man’ or ‘animal’: concrete concepts referred to by concrete nouns. The latter method, by contrast, involves considering a “universal nature as though [it] were something concrete in itself” and thus “prescinds from the individual subject” altogether. It involves considering some formal aspect of a subject independent of that subject’s other aspects, and thus gives rise to concepts such as ‘humanity’ or ‘animality’: abstract concepts referred to by abstract nouns.⁸⁴⁶ Neither alternative requires that the two things under consideration be actually independent of one another. In fact, the process by which one thing is understood as being actually independent of another is not strictly to be taken as a type of abstraction (*abstractio*) but of separation (*separatio*),⁸⁴⁷ since it involves an additional mental determination (a judgment).⁸⁴⁸ This further mental determination can be simply that that one thing is *capable* of

⁸⁴⁰ O’Callaghan, 2003: 219.

⁸⁴¹ Aristotle, *De Anima*, 429a 20-25

⁸⁴² *ST* I a.84.1c., in Kenny, 1993:46; *ST* I a.85.1.1.; Kretzmann, 1993: 141.

⁸⁴³ See especially here: Sokolowski, 1979, 1998.

⁸⁴⁴ Aquinas, *Super Boetium De trinitate*, Q.5,a.3., in McInerny, 1982: 19. See also: Barzan, 1981.

⁸⁴⁵ Sanguineti, 1992: 30.

⁸⁴⁶ *Ibid.*

⁸⁴⁷ McInerny, 1982: 88.

⁸⁴⁸ Martin, 2006.

existing separately from another – a judgment of entitative independence. It can also be judged that one thing in fact *does* exist independently of another – a judgment of existential independence. Strictly speaking, whilst a judgment of entitative independence is a negative judgment, which *separates* one entity from another, a judgment of existential independence couples such a negative judgment to an additional positive judgment which *joins* the thing in question to existence.

Two further points should be noted here. First, the abstractive process engaged in by the agent intellect does not require that it posses some pre-existing criteria according to which a selective discrimination can be made.⁸⁴⁹ Instead, Aquinas “speaks of ‘turning to’ sense experience simply, not to look at some aspects of it and not others, but to use sense experience as an instrumental cause.”⁸⁵⁰ The material aspects of sense-experience are not taken into the intellect because, strictly speaking, they are not intelligible at all, and can be known by the intellect only indirectly or by inference. Cognition is always of the entire subsisting reality to which the mind is directed. In so far as intelligible distinctions are attended to within a given object, they are real, intelligible distinctions within that object itself and not imposed somehow by the intellect from without. It is the object that regulates the subject and not the other way around. Abstraction is thus best characterised as a process of ‘developmental growth’ whereby the mind moves “from understanding the *same thing* generally and without distinction at first to understanding it just as generally but now distinctly.”⁸⁵¹ It is a process by which the mind is made to register real intelligible distinctions with increasing clarity.

Secondly, since the human intellect is an embodied intellect, its proper objects are the quiddities or natures of material substances, and these, by definition, exist in corporeal individuals. True cognition of a stone thus requires knowledge that it is a particular stone. Yet, since the particular is apprehended only by the senses and the imagination, it follows that the intellect must “examine the universal nature existing in the particular” by turning to sense-impressions.⁸⁵² This it must do not only in the initial process of coming to know, but also in the utilisation of knowledge once

⁸⁴⁹ O’Callaghan, 2003: 220-221.

⁸⁵⁰ Ibid: 221

⁸⁵¹ Ibid: 222.

⁸⁵² *ST*1a.84.7.

attained. Even after abstracting the intelligible species from an object, the intellect can exercise its knowing activity only by turning its attention to sense-impressions. Being proportioned to its natural object, the intellect simply does not think without the presence of sense-impressions.⁸⁵³ Its essential and permanent orientation requires them to act as instrumental causes of its cognition. It is precisely for this reason that “when someone is struggling to understand something, he provides for himself certain sense experiences in the manner of examples, in which he may examine as it were what he is striving to understand.” It is also for this reason that the intellect is enabled to attain real though indirect knowledge of particulars, even though their very particularity would seem to take them outside the order of intellectuality.⁸⁵⁴ Thus, whilst true that the intellect cognises directly only that within a thing which is universal, by linking universal ideas with sensory experience the mind can nevertheless come to know individuals and form singular propositions.

B: Scientific Systematisation

In moving from the mind’s initial contact with reality to build a more substantial body of knowledge, the first, or apprehensive, operation of the intellect differs from, but also works in harmony, with the second operation of the intellect, namely, the making of affirmative and negative judgments.⁸⁵⁵ Taken in itself, the first or apprehensive operation of the intellect does not admit of truth or falsity since it is concerned with the production of simple apprehensions which neither affirm nor deny anything. Yet although true that the intellect cannot be deceived about what it actually does apprehend, it can fail by simply not turning its attention to a given portion of reality in the first place. Strictly speaking, this is not an error since “in such cases [the intellect] hasn’t said anything false about the object, because it hasn’t conceived of the object at all.”⁸⁵⁶ In contrast, the second operation of the intellect, judging, “consists in uniting or separating simple apprehensions by means of a copula, namely, the verb *is*. A judgment is true when what it affirms, or denies, adequately agrees with reality.” As indicated above, affirmative judgments the intellect makes by joining together or ‘compounding’ concepts acquired by means of its first operation, whilst negative

⁸⁵³ *ST*a.85.I, ad.5., in Kretzmann, 1993: 141.

⁸⁵⁴ *ST*a.86.Ic.

⁸⁵⁵ In general, see: Martin, 2006.

⁸⁵⁶ Pasnau, 2002: 325.

judgements it makes by ‘dividing’ them. In this manner, the intellect determines, through judgment, to affirm “that things are, when they are, or that they are not when they are not...”⁸⁵⁷ It employs “universal concepts in declaring how things stand in reality, whether actually or potentially, whether in general or in the particular case, and whether in the past, the present, or the future.”⁸⁵⁸ In so doing, the judgments the intellect makes are themselves rendered either true or false. Finally, a third operation of the intellect functions to compound and divide the judgments produced by the second operation, thereby forming ever-more complex analytical chains and making possible the emergence of scientific understanding in the full sense.

In all of this, a crucial distinction needs to be drawn between superficial or commonsense knowledge and deep or truly scientific knowledge. Whereas “someone who cognises certain things perfectly can distinguish, up to the finest details, their acts, powers, and natures”, someone who cognises them imperfectly “can distinguish only at the level of universal.”⁸⁵⁹ This is to employ a definition of scientific knowledge as “the systematic and mediate knowledge of beings and their properties, by means of [their] causes,”⁸⁶⁰ which extends well beyond its usual contemporary characterisation as applying exclusively to empirical phenomena.⁸⁶¹ To start with the intellect possesses only an imperfect grasp of the objects to which it is directed, at which point the knowledge it gives rise to is indistinct or, to use Aquinas’s term, “*sub confusione*”. To grasp things “*sub confusione* is to grasp them indiscriminately [and] to lump objects together at the expense of their salient differences.”⁸⁶² Only gradually is this confused grasp of the various aspects of an object transformed into the more ordered, explicit, and internally coherent knowledge, characteristic of the sciences.⁸⁶³

In moving from relative ignorance to this richer type of knowledge the human intellect thus proceeds only incrementally and in a rather piece-meal fashion. Whilst the mind may, upon first contact with a given object, automatically generate a

⁸⁵⁷ Gilson, 1955: 378.

⁸⁵⁸ Carlson, 2008: 122.

⁸⁵⁹ *ST*Ia.108.3c, in Pasnau, 2002: 321.

⁸⁶⁰ Sanguineti, 1992: 178.

⁸⁶¹ Barnes, 1969; and, Falcon, 2005. See especially, Maritain’s classic and foundational study on the different types or ‘degrees’ of knowledge according to a Thomistic understanding: Maritain, 1995. See here also, on the ‘New Essentialist’ approach that has recently grown in popularity with some of the leading contemporary philosophers of science such as Nancy Cartwright: Cartwright, 1992, 1999, 2007; Ellis, 2002; Elder, 2004; and Molnar, 2003. More recently still, this has come to be accompanied by an increasingly determined and sophisticated defence of Aristotelian/Thomistic essentialism per se: Klima, 2002; and, Oderberg, 2007.

⁸⁶² Pasnau, 2002: 320; *ST*Ia.85.3c.

⁸⁶³ Aquinas, *Super Librum Dionysii De divinis nominibus*[In *DDN*]VII.2.713., in Pasnau, 2002: 324.

universal idea sufficient to enable the attachment of a word to it for the purposes of speech, the initial content of that idea is of a nonetheless thin and attenuated nature. The mind's real effort consists in working upon its initial apprehensions, through the processes of composition and division, to assemble complex propositions and, through the process of reasoning, to infer one proposition from another. In this way, and with the constant assistance of impressions furnished it by the internal senses,⁸⁶⁴ it 'thickens up' its initial ideas by exercising its distinctive capacity to "weave many things into one."⁸⁶⁵ In so doing, it determines to take highly universal, confused ideas and to reach as distinct a grasp of the discrete content of those ideas as is possible, employing, in the process, its various operations in ways that are both complex and inherently interactive.⁸⁶⁶

The production of what Aquinas terms the 'mental word' represents a final stage in the cognitional 'circuit', being a formed concept in the full sense.⁸⁶⁷ It differs from the 'thin' ideas of the intellect's first operation, both in terms of the depth and scope of the penetration it facilitates and in terms of the extent of entailments it discloses, but no less than with the products of that first operation, it is proper to the mind in a state of simple, contemplative apprehension. Thus, Aquinas states: "the inquiry of reason ends with a simple understanding of the truth, just as it begins with a simple understanding of the truth considered in first principles",⁸⁶⁸ since comprising "a kind of interweaving", it "begins with one thing, works through many, and ends with one."⁸⁶⁹ Moreover, even once this point has been reached, there remains more to do. The full implications of thing's nature are never understood completely, and it is this that furnishes the scientific endeavour with its inexhaustible fecundity.

Far from being random, the processes involved in acquiring truly scientific knowledge operate with precise objects in view. A given science, insofar as it is scientific, will "single...out a concrete portion of reality for its research, and leave...aside the rest."⁸⁷⁰ It is the specific kind of being a science studies that distinguishes it from

⁸⁶⁴ Pasnau & Shields, 2004: 192.

⁸⁶⁵ In *DDN* VII.2.713., in Pasnau, 2002: 325.

⁸⁶⁶ Aquinas, *Super Evangelium S. Iacobi [In Joh] Lecture* 1.1.26 in Pasnau, 2002: 327-328.

⁸⁶⁷ Pasnau, 2002: 321-322. See here, especially, the old study by Rabeau, 1938, and that by Deely, 1971. Also see the relevant section in Kenny, 1993.

⁸⁶⁸ In *DDN* VII.2.713., in Pasnau, 2002: 325.

⁸⁶⁹ *Ibid*; O'Callaghan, 2003: 223-224.

⁸⁷⁰ Sanguietti, 1992: 183.

other sciences and constitutes its special object. In so far as objects of cognition are differently freed from the constraints of matter, so they constitute the proper objects of different categories of science. Moreover, in distinguishing these categories, Aquinas specifies as particularly, though not exclusively, appropriate to each the three methods of ‘removing’ (*remotio*) from matter outlined above: ‘total abstraction’, ‘formal abstraction’ and ‘separation’. ‘Total abstraction’ – which is the abstraction of the whole essence of a natural thing from the matter that individuates it – yields objects sufficiently free of matter to be intelligible, but objects into whose definition matter nonetheless enters, and which require instantiation in matter for their real existence (flesh, bones etc.). These are the proper objects of the natural sciences (including the psychological and social sciences). ‘Formal abstraction’ – the abstraction of form from matter – when specifically concerned with the form of quantity, yields objects into whose definition matter does not enter, but which do nevertheless depend upon matter for their real existence (lines, numbers, shapes etc.). These are the proper objects of the mathematical sciences. Finally, the negative judgment involved in *separatio* yields objects abstracted from all matter such that matter neither enters into their definition nor is required for their real existence (substance, being, potency etc.). These objects are the proper objects of metaphysics.⁸⁷¹

Importantly, although the three groups of sciences – natural, mathematical and metaphysical – can be distinguished in this way, their division should not be understood too rigidly. In practice, not only are all three levels of ‘abstraction’ employed in the spontaneous acquisition of pre-scientific knowledge, within the particular sciences themselves, they are frequently found to imply one another. Moreover, it has long been recognised that many modern scientific disciplines are properly characterised as what Aristotle called ‘mixed sciences’: that is, as sciences whose proper objects are physical, but whose mode of treating those objects is mathematical.⁸⁷² Finally, even within the first level of abstraction, that appropriate to the proper objects of the natural sciences, there exists abstractive hierarchies both

⁸⁷¹ *Super Boetium De trinitate*..5,a.1., in McNemy, 1982.

⁸⁷² Aquinas, *In octo libros Physicorum exposito*[*In II Phys.*]lect.3.in Sanguitetti, 1992: 200.

between and within particular sciences whereby two objects are properly studied in the same manner, but the more general before the more specific.⁸⁷³

An indispensable role in building up systematic knowledge is played by the formulation of norms and principles. In relation to the physical sciences these are usually referred to simply as ‘scientific laws’. Although there has been a great deal of discussion over the precise status of these ‘laws’, a growing number of contemporary philosophers are minded to account for them in more or less Aristotelian terms. According to those terms, such laws are universal propositions expressing the common properties of sensible things. In explicating regularities or patterns underlying the behaviour of observable phenomena, they express the inclinations of natural bodies to give rise to certain specific activities.⁸⁷⁴ Thus, a law in this sense is taken to connote “the active potency of a body by virtue of which it is the constant and universal cause of certain effects.”⁸⁷⁵ As a science progresses and an increasing number of these regularities are translated into propositional form, so they too provide material for the elaboration of further, more abstract, and therefore more universally valid, propositions. This results in a propositional net of growing complexity and integration that draws the richness of reality into explicit communal consciousness to an ever-increasing degree.⁸⁷⁶

C: Human Sciences

Whilst there is significant epistemic and methodological continuity among different types of science, a crucial distinction opens up, on an Aristotelian-Thomistic account no less than on its alternatives, between the physical sciences and those standardly referred to as the ‘human’ sciences. Human sciences, in this sense, are sciences specifically related to the human person and the communities to which human persons give rise. They study the many different dimensions of human being – social, psychological, and historical – but although each enjoys its own legitimate province, in order not to have a distorting effect on reality, each must also be set within the

⁸⁷³ In general, see here: Maritain, 1995.

⁸⁷⁴ In particular, Cartwright and others have argued that even the practice of modern scientists, despite frequent claims to the contrary, are concerned with cataloguing *observed* regularities. Instead, more in line with the picture painted by Aristotle, they are principally concerned with uncovering hidden natures/ powers on the basis of a few specialised experiments on the basis conducted under highly artificial conditions. *Supra.*, note 43.

⁸⁷⁵ Sanguineti, 1992: 232.

⁸⁷⁶ Ashley, 2006: 309-310; Aristotle, *PhysicsII*, chap5,196b10ff.

overall context of a correct and philosophically grounded anthropology. In particular, each must allow for the primitive and indispensable fact of human freedom; not, indeed, a completely unlimited freedom, but a freedom which, even when heavily constrained by specific individual or communal circumstances, nonetheless continues to remain – precisely because ontologically primitive – of at least some explanatory importance.⁸⁷⁷ Moreover, as set within this wider anthropological context, the various human sciences are also distinctive in that they each concern the powers of, or the products of the powers of, the very beings whose cognitive expansion, as sciences, it is their purpose to facilitate. In other words, unlike the physical sciences, they are not merely concerned with understanding the external, material world, but are concerned with understanding it precisely as it reflects back upon, or manifests indispensable regularities underlying the products of, personal and inter-personal activity. In this sense, they are sciences in which the knowing mind studies its own operations and operational prerequisites.

According to an Aristotelian/Thomistic metaphysic, of course, it is only ever possible to know a being – any being – by becoming aware of its action in the world since it is only owing to the palpability of such action that an observer is enabled to conclude there exists an underlying substantial and abiding centre or activity at all.⁸⁷⁸

Nevertheless, whereas in the non-human sciences the mind's primary objects are (external) material beings, in the human sciences, the objects of the mind's special study are the acts it engages in itself.⁸⁷⁹ Indeed, precisely because "it is connatural for our intellect...to look to material things...it follows that our intellect understands itself according as it is made actual by species abstracted from sensible realities."⁸⁸⁰ Just as in the process of cognising (external) material substances so too in the cognition of itself the mind proceeds from that which is more extrinsic. Thus it is said that objects are understood before acts, acts before powers, and powers before "the essence of the soul."⁸⁸¹ Yet, it is different from the cognition of (external) material substances since it implies something more, namely, that the act by which "the intellect understands a

⁸⁷⁷ Artigas, 1990: 63.

⁸⁷⁸ Norris-Clarke, 2001: 34-35.

⁸⁷⁹ *STa.87.1* in O'Callaghan, 2003: 226.

⁸⁸⁰ *Ibid.*

⁸⁸¹ O'Callaghan, 2003: 227.

stone is other than (and additional to) the act by which the intellect understands itself understanding a stone.”⁸⁸²

As an embodied being, the actions of the human mind are ordered to finding expression in bodily behaviour the results of which are observable in the same way that all other external phenomena are observable. From observation of this bodily behaviour “which is the externalisation of the mind’s interior operations,” it becomes possible to infer the existence of these operations.⁸⁸³ Importantly, it follows from this that the mind learns about its operations, not only from reflecting upon the consequences of its own activity, but also by observing and reflecting upon the activity of other minds with which it forms a knowing and acting community. This in no way reduces the significance of its distinctively capacity for properly reflexive knowledge, because it is only possible to draw self-referential conclusions from the actions of others in so far as the mind is aware that it shares with them a common nature and this itself implies a precedent reflexive, epistemologically foundational, judgement. What it does point to, however, is both the inherently communal nature of human knowledge acquisition, and the fact that all forms of human self-knowledge inescapably presuppose a stable underlying ontological reality from which that knowledge derives.

This reflexive capacity goes a long way to explaining the persuasiveness of Jurgen Habermas’s suggestion that the human/social sciences are properly understood as ‘reconstructive’ in nature. With the term ‘reconstructive’ Habermas means to point to those sciences whose proper function it is to ‘reconstruct’ generative systems of rules/norms from the kaleidoscope of particular human actions.⁸⁸⁴ It is these generative systems, he suggests, that help account for the non-determined yet thoroughly ordered nature of such actions, affirming both their real freedom and meaningful content. Setting these suggestions within the context of an Aristotelian/Thomistic account of reflexivity, offers a basis for their creative completion by preserving the unique value they undoubtedly offer for a truly adequate social epistemology, whilst prescinding from the limitations of Habermas’s wider post-Kantian, anti-metaphysical commitments.

⁸⁸² *ST*1a.87.1.in O’Callaghan, 2003: 226.

⁸⁸³ Pope, ed., 2002: 146.

⁸⁸⁴ Habermas, 1979.

Equally important is the role that implicit or, as Michael Polanyi termed it, ‘tacit’ knowledge plays in the Habermasian account. Thus, essential to the procedure of the reconstructive sciences, properly conceived, is the transformation of “a practically mastered pre-theoretical knowledge (know-how) of competent subjects into an objective and explicit knowledge (know-that).”⁸⁸⁵ In other words, a reconstructive science, transforms implicit into explicit knowledge, by explicating the inherent human tendency to behave in an ordered and rule-governed manner. At the same time it is not simply concerned to reconstruct any and every practically demonstrated competence, but only those of a universal or species defining nature.⁸⁸⁶ It is this that enables the social critic to tease out the most significant structural implications of the tendencies underlying human action, as well as the types of capacity its manifestation presupposes, what constitutes the correct or healthy functioning of those capacities, what constitutes their malfunctioning, how the variable degrees of healthy functioning and malfunctioning might be measured, and the longer term consequences of each.

A moment’s reflection makes clear that, to be at all credible, the ‘pre-theoretical’ knowledge required by this account must be premised upon some mechanism of habit formation, and it is the elaboration of just such a mechanism that has been a peculiarly distinguishing feature of the Aristotelian tradition. It is in writing within this tradition, whilst trying to make sense of more recent conceptions of linguistic competence, that Polanyi has pointed to the inherently self-contradictory notion of explicit knowledge devoid of ‘tacit coefficients’, since this would render “all spoken words, all formulae, all maps and graphs... strictly meaningless.”⁸⁸⁷ Quite to the contrary, from its earliest age, nearly every child engages in a vast range of behaviour underpinned by a set of norms of apparent infinite complexity which are intelligible, if at all, only to a handful of experts, and it does so because its “striving imagination has the power to implement its aims by the subsidiary practice of ingenious rules of which [it] remains focally ignorant.” In so doing, suggest Polanyi, the child has in fact discovered a whole new system of tacit grammar, and its imagination enables it to apply this to each new

⁸⁸⁵ Ibid: 15.

⁸⁸⁶ Ibid: 14.

⁸⁸⁷ Polanyi, 1969: 95.

situation it encounters.⁸⁸⁸ Of particular importance for Habermas are the generative systems underlying communication.⁸⁸⁹

Although 'communicative action' performs a less constitutive/substantivist, more properly characteristic, role relative to healthy human functioning in the systems of Aristotle and Aquinas, the central position Habermas affords it here nonetheless resonates strongly with the premium his predecessors place upon the inherently social nature of the human person, and the way each consequently asserts with the greatest possible emphasis the indispensable nature of socially mediated action and interaction in the attainment of human flourishing. "If man is by nature a political animal," states contemporary Thomist, John O'Callaghan,

it stands to reason that his political life, which necessarily involves communication, is the flower of his more basic vital activities or *forms of life*....[Thus][h]is political life is his flourishing, the 'more perfect existence' that the individual naturally seeks, without which his individual existence is naturally incomplete and naturally less than perfect.⁸⁹⁰

It follows that "[b]eing rational, linguistic, and political are the specifically human ways of being an animal."⁸⁹¹ As Aristotle himself states, "everyone needs to communicate his thoughts to others" and it is communicative action taken in the widest sense, action of which language as normally understood is the central or paradigm case, that makes this possible. "Through language, men interact with one another, using meaningful expressions", and it is this which "enables them to live together as a community."⁸⁹² It is the handmaiden of a completing unity forged "across time and space" propelled by the common, fundamental human "desire for knowledge, understanding and wisdom."⁸⁹³

Moreover, the indivisibly material and immaterial nature of human being confers inherent meaningfulness upon properly human action which brings together communicative and expressive qualities in virtue of which both the internal operations, acts and thoughts of the human spirit are externalised in the material world and the intelligible aspects of reality are made simultaneously available to more than

⁸⁸⁸ Ibid: 200 & 205.

⁸⁸⁹ Habermas, 1979: 1,3.

⁸⁹⁰ O'Callaghan, 2003: 291.

⁸⁹¹ Ibid.

⁸⁹² Aquinas, *In I Peri hermereias*. [*In I. Perih.*]lect. 2. in Sanguinetti, 1992.

⁸⁹³ O'Callaghan, 2003: 292,296.

one mind. In this way, it can be seen that “conceptual [and volitional] functioning on the part of the human animal is naturally ordered toward expression in non-linguistic and linguistic acts alike, forming through these linguistic and non-linguistic acts social and political communities.”⁸⁹⁴ Moreover, even within the context of an individual’s private conceptual functioning, it would seem that some sort of organised symbolic system is necessary owing to the fact, noted earlier, that all human thought, being that of embodied intellect, is essentially orientated towards cognition of universals in particulars. Consequently, “[t]o fix and recall items from the flux of experience, to be able to use this recalled knowledge in inferences and association, we need words to stand as... recallable proxies for the things we want to argue and think about.”⁸⁹⁵ In order for this to be possible, thought needs to take on a quasi-embodied existence “it must be something symbolically encoded, something the believer can retain and think about.” In this way language makes possible thought “about absent things, about generalities and about possibility and impossibility.”⁸⁹⁶

It is important to note here that it is precisely the embodied nature of the human intellect and thus of the mind’s conceptual functioning that renders the human being a *rational* being ordered towards activity of a distinctively *rational* kind.

Communicative action represents both a subset of the wider category of rational activity as well as being its most complete expression. Crucially, it also follows from this that all distinctively human action will itself be possessed of a certain dual character. On the one hand, the basis for the underlying unity it displays is the capacity of the human mind to become conceptually enriched by intelligible aspects of reality. As intelligible, and therefore immaterial, these aspects and the concepts into which they are formed are, at least in principle, inherently communicable to all other human minds. It is for this reason that all human languages are capable of some form of translation and, indeed, why individual persons are capable of engaging in mutually intelligible discourse at all. On the other hand, as the human mind is that of a being composed of essential immaterial and material metaphysical co-principles, whatever conceptual content the mind possesses or seeks to communicate, must

⁸⁹⁴ Ibid: 298

⁸⁹⁵ O’Hear, 1997: 37.

⁸⁹⁶ Ibid.

necessarily be in some manner embodied, and it is this embodiment that forms the basis of linguistic diversity.⁸⁹⁷

That diversity exists at a number of different levels. It exists, first, at the relatively superficial level of phonology or physical notation, where it is accounted for by the inherently conventional nature of linguistic signifiers. Secondly, diversity exists at the level of individual grammars, which bring together a natural grammatical endowment with its particular realisations through a series of conventionally mediated, though nonetheless tightly constrained, choices. Finally, diversity also exists at the level of conceptual enrichment. This is because, just as different people will know different things about the world, so too, at the level of communal understanding, given the various traditions of enquiry, environmental interactions, and condensations of experience, different languages will have developed different conceptual vocabularies, idiomatic expressions and forms of speech, each of which group together meanings, both singularly and collectively, in quite distinctive, though not of course, mutually untranslatable ways. The surface/depth character that all this confers upon the human action-system manifests itself not just as between particular actions, but also as between whole clusters of actions premised upon the development by their agents of habituated propensities to act in one way rather than another. Finally, and perhaps most significantly for the present study, owing to the inherently social nature of the human being, this surface/depth character, also manifests itself in the embodied propensities of whole communities to act in one way rather than another.

D: The Precepts of Right Use – The Natural Law

At this point, an important distinction needs to be drawn between the possession of a capacity to act, on the one hand, and the employment or use of that capacity, on the other. This corresponds to a distinction Aquinas draws between virtues of the intellect and those of the appetite. By doing so he points to the fact that it is possible to develop both intellectually and morally. It is possible to develop intellectually by acquiring “a more refined capacity to reason to conclusions from...[the first] principles [of a science], a deeper understanding of life, a more discerning sensitivity

⁸⁹⁷ See, in general: Adler, 1973; Kretzman, 1974; Mascall, 1957; and, O’Callaghan.

in making practical judgments, and a more adept skill at making things.”⁸⁹⁸ It is possible to develop morally by developing habits such as those of treating people justly and of responding appropriately to one’s various desires.⁸⁹⁹

At the same time it is also important to notice a qualitative difference between these two types of habit.⁹⁰⁰ Thus, because intellectual virtues, whether those of the theoretical intellect, or of the practical intellect, confer “only aptness to act”, not the “right use of that aptness”, they are correctly taken to be virtues only in a relative or analogical sense, whereas, virtues of the appetite are virtues properly so called or virtues without qualification.⁹⁰¹ “Only habits that dispose appetite give both capacity and the bent to use that capacity well.”⁹⁰² indeed the tendency to act well is precisely the capacity that they are said to confer. It follows from this that any human action capable of being “appraised technically can also be appraised morally”,⁹⁰³ and that these two appraisals remain analytically distinct. In particular, whereas moral appraisal relates to the good of the whole person, technical appraisal relates only to the good of the particular work done.⁹⁰⁴

The paradigm case here is, of course, art. Art concerns itself primarily with the production of things external to the agent, and is thus to be contrasted with the “the pure inwardness of knowing”,⁹⁰⁵ which is the proper concern of science. Yet this basic distinction admits also of a degree of mutual overlap. Consequently, there also exist certain peculiarly “speculative arts which are at the same time sciences”. Logic is the most obvious example. “[S]uch scientific arts”, writes Maritain:

“perfect the speculative intellect, not the practical intellect; but the sciences in question retain in their manner an element of the practical, and are arts only because they involve *the making of a work* – in this case a work wholly within the mind, whose sole object is knowledge, a work which consists in putting order into our concepts, in framing a proposition or an argument. The result is then, that whenever you find art you find some action or operation to be contrived, some work to be done.”⁹⁰⁶

⁸⁹⁸ Pope, 2002: 34. See also: Jacobs, 2002.

⁸⁹⁹ *ST IaIIae*.58.3.

⁹⁰⁰ Aquinas, *Quaestiones disputatae Virtutibus in Comuni*[*QDVC*].q.un.,a7,ad2.in, Reichberg, 2002:141.

⁹⁰¹ Aristotle, *Eth.Nic.*2.6 (1106a 22-23); *ST IaIIae*,56,a.3,c., in Reichberg, 2002: 121.

⁹⁰² McInerney, 1993: 204.

⁹⁰³ *Ibid.*

⁹⁰⁴ Maritain, 1947: 6.

⁹⁰⁵ *Ibid.*

⁹⁰⁶ *Ibid.*: 3-4.

Thus there is a sense in which all distinctively human action, that is, all rational action, and then, by further implication, all communicative and linguistic action, involves the cultivation and practice of some art or arts. To understand, then, something of the generative mechanisms that underlie such action is not yet to have a grasp of the human-action system as a whole. It is, instead, merely to understand how it is possible for individual creative acts to be engaged in, or to understand something of the manner in which the unique products of the human mind are bodied-forth in the world. This is to deal with the method of bringing about the goods internal to those individual products. There are deeper questions it leaves untouched which relate to the functioning of the human-action system as a whole – which is, of course, synonymous with the good of the human person as a whole. These questions require separate consideration, and lie precisely within the province of the virtues of the appetite, of which the basic precepts of the natural law are simply a normative expression. As Ralph McInerny crisply explains:

The will as intellective appetite bears on things the mind sees as good, and there are certain things that are seen to be necessary components of the complete human good. Indeed, the mind grasps them as goods to which we are already necessarily inclined. Virtue, as second nature, is the perfection of a natural inclination towards the good; Judgments about goods to which we are naturally inclined from the starting points or principles of moral discourse. If particular choices are analysed in terms of a kind of syllogism that applies a moral rule to particular circumstances, the principles are nongainsayable precepts that we articulate when less general guides for action are questioned. The set of the principles of moral discourse is what Aquinas means by natural law. These judgements as to what one ought to do cannot be coherently denied. In this they are likened to the first principles of reasoning in general, and Aquinas has in mind the way in which the principle of non-contradiction is defended.⁹⁰⁷

Within the moral order the equivalent of the principle of non-contradiction is “Good should be pursued and done and evil avoided.” It makes no sense to commend evil because, in doing so one must commend it under the form of the good, namely, as desirable and worthy of pursuit. As Aquinas puts it:

[w]hatever a human being seeks, it seeks under the aspect of the good (*sub ratione boni*), and if it does not seek it as its perfect good, which is its ultimate end, it must seek it as tending to that perfect good, since any beginning is ordered towards its culmination.⁹⁰⁸

⁹⁰⁷ McInerny, 1993: 210.

⁹⁰⁸ *STa.IIae.1.6.*

The other exceptionless moral principles are articulations or specifications of this basic one.

This is the foundation of all the other precepts of nature's law, such that whatever things practical reason naturally grasps to be human goods pertain to natural law's precepts as to what is to be done or avoided.⁹⁰⁹

And as regards the basis upon which practical reason properly judges something to be a human good, or a constituent of comprehensive human flourishing, he has the following to say:

Since good has the character of an end and evil the contrary character, all those things to which a man has a natural inclination reason naturally grasps as goods, and consequently as things to be pursued, and it grasps their contraries as things to be avoided.⁹¹⁰

Now, human beings have, in common with everything, an inclination to preserve themselves in existence; in common with other animals, they have an inclination to mate, have young, and care for them; and they have a peculiar inclination following on their defining trait, reason – to know and to converse and to live together in society.⁹¹¹

The fact that the generative mechanisms which underlie and make possible the exercise of meaningful human action are capable of being analysed independent of the deeper precepts of the natural law, should not be taken to imply that they bear no relation to it; clearly they do. Indeed, a proper observance of the natural law is vital to maintaining the fundamental integrity of the overall action-system. In so far as its precepts come habitually to be departed from, to that extent truly interpersonal and reciprocal, that is, fully communicative, human action starts to become problematic. Here such departure may usefully be contrasted with potential departures from basic linguistic or grammatical norms. Thus, if the grammatical principles underlying meaningful discourse are disregarded, if a person starts to speak ungrammatically, it soon becomes clear that they are speaking nonsense. They will simply not be able to

⁹⁰⁹ *ST Ia.IIae.94.2.*

⁹¹⁰ *ST Ia.IIae.94.2.*; McCabe, 2003: 63, 66. In addition, see also and especially: Mirables, 2008 and Llano, 2008. For varying views on precisely how this all operates and the intense controversy which exists between 'new' and 'old' natural law theorists see: Boyle, et.al., 1987; Donnelly, 2007,2006; Finnis, 1982, 1983; George, 1988, 1994; Hassing, 2008, Lisska, 1996; MacDonald, 1991; MacIntyre, 2004; Maritain, 1942, 2001; McNerny, 1992,1993,1997. See also now: Silar, 2008 and Spaemann, 2008. For a work as, if not more, impressive than that of John Finnis, and arguing for broadly similar, though at points also importantly different, see: Rhonheimer, 2000.

⁹¹¹ On this, see: McNerny, 2004; Oderberg, 2007; Richardson, 2007.

achieve their communicative purposes. In contrast, the consequences of breaching basic precepts of the natural law take much longer to manifest themselves, though those consequences are altogether more insidious and profound.

E: The Indicative Nature of Variations in Human Law

Now, given the surface/depth nature of human action, the principles of the natural law are incapable of manifesting themselves in an unmediated form. They must always be found either to have been transgressed or to have been complied with within the context of an agent or group of agents executing a particular judgment or set of judgments, or in the context of the development by those agents of habituated propensities so to do. For this reason, systematic departures from the precepts of the natural law eventually become manifest in its mediating norm systems. In other words, they eventually become manifest in changes to the normative schemes which individuals and communities through their actions have purposed to create.

Here it should be at once realised that *both* the normative networks specific to particular human languages and those specific to particular sets of ‘human law’ are examples, though of differing varieties, of just such mediating norm systems, and are thus, in some sense, deeply connected one to another.⁹¹² What really distinguishes the legal and the linguistic in this context, is that whilst law taken in the broad sense employed in the present study concerns some form of social pressure,⁹¹³ the normative networks specific to particular human languages are the result of action that is of an un-coerced, fully reciprocal, nature. This is not, of course, to suggest that there are not many examples of particular languages being both structured and employed in coercive and discriminatory manner. What it does suggest, however, is that, to the extent that they are so employed, they begin to lose their properly linguistic or communicative qualities and take on qualities that are of an essentially non-linguistic nature. There is a sense, then, in which both the mediating norm

⁹¹² George, 1999: 108-109. On this subject, see also: Bradley, 1975; Brewbocker, 2006-7; and Waestberg, 1995-6. See now also, Selles, 2008.

⁹¹³ Whilst the principles of right action – the precepts of the natural law – can be said to regulate action that is fully compliant with them (that is, properly linguistic/communicative action), they only manifest themselves as norms of social pressure when there is some resistance to their observance. In other words, it is at the precise point at which particular bodies of normative social pressure become necessary that the underlying precepts of the natural law are re-characterised as pressure generating, and this is a quality they continue to retain, at least to some extent, short of society’s wholesale departure from them.

systems proper to particular languages and those manifest in specific bodies of law are being theorised here as something akin to ideal types. Yet whilst it makes sense to speak of more or less pure 'linguistic' forms, it makes rather less sense to speak thus of the various systems of law since there is a considerable qualitative range in the differing forms of social pressure they inevitably disclose, from the most subtle and tentative to the most explicit and coercive.

Here it is useful to contrast law as a system of regulative norms not only with those of particular languages, but also with that of physical nature. Unlike law, the norms of language and physical nature are not susceptible to fundamental qualitative variability. This is not, of course, to suggest that they do not allow for variability at all, just that the variability that they do allow for operates at a uniform qualitative level. By stating that they operate at a uniform qualitative level, what is meant here is that they each permit a specific degree of human freedom or volition. At one extreme, the various linguistic norm systems, which can be said to manifest man's being in its natural, fully socialized, state, allow human volition to the maximal degree. They allow, in other words, for maximal, spontaneous and un-coerced expression, which is nonetheless guaranteed and made intelligible by the largely unconscious employment of regular underlying patterns. At the other extreme, the laws of physical nature exclude the exercise of volition altogether, though they do, of course, allow some forms of non-volitional indeterminacy. In contrast to both these extremes, law, like language, incorporates the idea of volition, and therefore is distinguishable from the laws of physical nature, but, unlike language, implies some degree of restriction on the scope of that volition. Thus, law implies a distinction between actions that are permissible and those that are not. In this sense, law can, in fact, be said to represent an admixture of these other two varieties of norm system; or, more precisely, to occupy a variable intermediate point between the two qualitative extremes they respectively represent.

Now, the very existence of law, in the above sense, presupposes that at least some individuals within a given community have developed tendencies to breach the deeper regulative principles of human nature, that is, to breach the basic precepts of the natural law, such that it has become necessary to ensure the observance of those precepts by some form of social pressure. In this sense, the emergence of law as it is

being characterized here is consequent upon some sort of dysfunction. Were there no such tendencies to breach the precepts of the natural law, were those precepts adhered to by all in an entirely spontaneous fashion, then the norms of fully rational action, that is, of communicative or linguistic action, would be entirely sufficient as would the particular regulative and coordinative normative systems to which they give rise in given contexts. Given the fact that no such halcyon community of absolute virtue has ever obtained in practice, norms of social pressure – laws – have, in fact, existed in all real communities and they have done so in a great variety of forms, placing differing degrees of restriction upon human volition.⁹¹⁴ Underlying this variety, however, can be detected a very general overall movement towards more formal manifestations and away from informal ones. Indicative of a cognate overall rise in social fixation, this process of formalisation, understood properly, also references a general trend towards ever-greater diminution in the scope of un-coerced human volition. Indeed, as the norms of social pressure become gradually more formalised, they become proportionately more inflexible and restrictive. They also begin to emerge in a more determinate and less spontaneous fashion. In each of these respects they become less like the norms of language and more like those of physical nature. It is precisely in this sense that the degree to which the norms of social pressure have been formalised within a society offers an indication of the extent to which it has become alienated from its natural, maximally human, state. In order properly to understand the foundations and wider implications of the arguments that have been put forward here, it is necessary to set them within the overall metaphysical context of human nature and action, and it is to this task that Chapter 8 now turns.

⁹¹⁴ If serious misunderstanding is to be avoided, it is important to note two quite different functions that norms of social pressure can perform. Where they serve to enforce observance of the precepts of the natural law (by deduction) or actions compliant with it (by determination), and thus operate, within Aquinas' framework, as forms of human/positive law properly so-called, they are correctly understood as manifesting the *consequences* of restrictions upon human volition: the original source of those restrictions being violations of the very precepts it is has now become so necessary to uphold. Where, in contrast, norms of social pressure serve to effect behaviour that is in breach of the precepts of the natural law (thereby losing, on Aquinas' schema, their qualification as human/positive law properly so called), they become themselves the very site at which restriction upon volition takes place. In the first instance, lawful authority is used to protect individual and communal freedom, in the second, normative pressure is used as a method for its violation. It should go without saying, of course, that this understanding depends upon a 'positive' conception of freedom quite different to that beloved of the modern liberalism. In the final chapter, it will be argued, amongst other things, that advanced modernity manifests a shift from the employment of the norms of social pressure in the first sense, to their employment in the second.

Chapter 8: The Metaphysics of Legal and Historical Transformation

In this final substantive chapter, it is intended to set what has been argued in chapter 7 within a wider, metaphysical frame. To this end, what follows begins with a brief outline of the principles upon which a Thomistic metaphysic is based. It then proceeds to situate within that framework, a Thomist/Aristotelian account of the human person and society, integrating in the process some of the suggestive insights of more contemporary theorists. From there, it attempts to extend these principles in order to elaborate the metaphysically based theory of historical transformation implicit in what has been argued in Chapter 7. Finally, it undertakes to draw out the relevance and explanatory function of this theory with respect to the contemporary developments in China and India detailed in Part 2.

A: Fundamental Principles of Reality

For Aquinas the whole of reality is subject to a fundamental metaphysical distinction between actuality and potentiality. In so far as anything exists, it is actual, but in so far as it can exist and does not, it is merely potential. Whereas actuality is a type of ontological perfection, potentiality is a limit upon perfection since it restricts both the scope of what a thing can become, and the order in which that becoming can take place. Indeed, it is a condition of a thing being able to receive further determinations that it be finite or imperfect. On this basis, Aquinas speaks of multiple grades of being which differentiate the universe vertically according to a hierarchical order ranging from Pure Act to Pure Potentiality. The higher the grade of being a thing has, the more actuality it possesses and the less potentiality, and this compositional balance changes proportionately the lower down the scale of being one moves until one reaches Pure Potentiality (or Prime Matter), which has no actuality at all and thus can be said to exist only as a mental abstraction. Greater or lesser actuality is, in this sense, said to come from participated being. “When something receives particularly, that which belongs to another universally (or totally), the former is said to participate in the latter.”⁹¹⁵ It is precisely to the extent that each individual thing participates in

⁹¹⁵ Quoted in Wippel, 1993: 93.

being as such,⁹¹⁶ that it discloses a particular degree or intensity of existence and it is this degree or intensity that is said to be specified by a thing's essence.⁹¹⁷

The hierarchically ordered compositions of 'existence' and 'essence' are the first and most basic manifestations of Act and Potency,⁹¹⁸ but they are joined by two others. These relate to being as differentiated this time along a horizontal rather than a vertical axis.⁹¹⁹ Where change gives rise to a thing that previously did not exist, Act and Potency are said to realise themselves in the distinction between substantial form (*morphe*) and prime matter (*hule*).⁹²⁰ Whilst form specifies what a thing is, matter allows for several things to exist with the same substantial form by individuating them in space and time. Prime matter, which is always determined by some particular form and thus has no independent existence of its own, also explains substantial change. Without the principle of continuity prime matter provides it would not be possible to have a real *transition* from one mode of being to another. Instead, it would be necessary to postulate a sequence of wholly unrelated beings, each undergoing successive stages of spontaneous emergence and total annihilation. The final manifestation of Act and Potency occurs where a thing, despite undergoing change, remains essentially the same. Here Act and Potency find expression in the distinction between accidents and substance. Accidents are what determine the non-essential mode or manner of existence of a thing,⁹²¹ whereas substance connotes a thing's perduring or underlying reality.⁹²² Just as the form/matter composition is nested within the essence component of the existence/essence composition, so too the accidents/substance composition is nested within the form component of the form/matter composition. It is precisely for this reason, that movement from the composition existence/essence to that of form/matter and finally to that of accidents/substance is movement to an evermore focused specification of the overarching composition of act and potency.

⁹¹⁶ Ibid.

⁹¹⁷ Thus, Norris-Clarke can write: since "every essence is a certain measure of being and perfection", it follows that "the universe reveals itself [as] a society made up of superiors and inferiors." Norris-Clarke, 2001: 250-251.

⁹¹⁸ Ibid: p. 152.

⁹¹⁹ Ibid: 152-153.

⁹²⁰ Thus Aristotle's metaphysical analysis of nature is usually referred to a *hylomorphic*.

⁹²¹ Aristotle grouped accidents under nine basic 'heads' or 'categories' of being in addition to substance.

⁹²² Taken together, these three sets of distinction constitute an "interlocking system of metaphysical compositions on different levels within a single real being" Norris- Clarke, 2001:158.

Implied, here, is a more specific account of how the hierarchy of being plays itself out in the material world. Every material being is, of course, a combination, on this view, of form and matter. Yet within the broad category of material being a number of further sub-divisions exist as between those substances of less and those of greater qualitative perfection. The first of these divisions is that between inanimate and animate being. The term *Anima*, as used, classically, in Aristotle's work *De Anima*, is normally translated here as 'soul'.⁹²³ What is meant by soul in this context, however, and contrary to modern usage, is merely the first principle of vital activity. Thus to say that something has a soul is to say nothing more than that it is alive: the distinction between the inanimate and the animate being simply that between the non-living and the living. Within the sub-category of the living, further distinctions arise between vegetative, sensitive and rational being, each of which has its own peculiar mode of operation made manifest through the exercise of specific sets of powers clustered in groups and themselves ordered hierarchically. At the vegetative level are found the three powers of nutrition, growth and generation, at the sensitive level, the powers of locomotion, appetite and perception, and at the rational level, the powers of will and intellect. Accordingly, the orderly and arranged hierarchy of living beings is "made complete by the orderly and arranged hierarchy of their operations, and in such a way that the bottom of the higher degree invariably comes into contact with the top of the lower."⁹²⁴ Moreover, among the three types of living being and their associated powers, there exists a real order of prepossession. Consequently:

as one moves up the ladder new elements appear, the exemplification of which implies the possession of lower level capacities – but not *vice versa*. Thus, any species of organism which is capable of generation has the power of nutrition, and any which can perceive its environment is also capable of movement through it. Similarly at the level of souls rather than individual powers, whatever has a sensitive soul also has a vegetative one, and whatever has a rational soul has both. But once again the relationships are not symmetrical. Possession of a vegetative soul does not imply possession of any other sort and something may have a sensitive soul without having a rational one.⁹²⁵

Importantly, this should not be taken to imply that there exists in any living being more than one soul (or form). The relationship as between higher and lower types of

⁹²³ *De Anima*, 412 a 29-412 b 9.

⁹²⁴ Gilson, 1957: 251.

⁹²⁵ Haldane, 1994: 53-54.

soul is instead one of subsumption or inclusion. Thus, in human beings “there are not three souls or principles of organic life but only one which subsumes the powers which are in turn definitive of lower forms of animation.”⁹²⁶ A human being constitutes a single compound made up of a body, which plays the part of ‘matter’, and of a ‘substantial form’, that acts as his vital organising principle.⁹²⁷

B: Human Being

Human being, then, is distinguished by its simultaneous possession of material and immaterial qualities and capacities, where matter is taken to be the principle of individuation in space and time and thus to be that which makes possible spatio-temporal succession.⁹²⁸ A human person, as a rational being, is an individual material substance, but one of a peculiar kind since it is distinguished from other material substances by its capacity to transcend the circumspections of particular bodily existence. It does this through a combination of its intellect and will which are distinctive human capacities included in the more general range of cognitive and appetitive capabilities possessed by all sentient beings.

A purely material being is conditioned by the forces of the material world. It is either a passive channel through which those forces pass and upon which they act, or it is equipped with diverse, inherited mechanisms of stimulus-response that give rise to determinate patterns of behaviour characterised by differing levels of complexity. Even the most sophisticated of sub-rational animal species remains classifiable in terms of the physical realities within which it is submerged. It is a material object, though one of a special type since it does not exist all at one time,⁹²⁹ and because it is such an object its individual members exist not for the sake of themselves, but for the sake of the species as a whole. In contrast, the human person is held to be distinguished by the simultaneous possession of material *and* immaterial qualities. Moreover, it is precisely these latter qualities that enable the person to be “a substance so complete as to be past absorption in a wider substantial unity”,⁹³⁰ or put another way, to be capable of existing in and for itself thereby being a whole rather

⁹²⁶ Ibid. p. 54.

⁹²⁷ For more recent and contemporary considerations, expositions and defences of this view see: Braine, 2002; Cross, 2002; Lee, 2004; Lee & George; and, Oderberg, 2005.

⁹²⁸ Sokolowski, 1970.

⁹²⁹ McCabe, 2003: 43.

⁹³⁰ Gilby, 1953: 202.

than a part. This does not mean that the material qualities of the human person are without significance. Materiality remains essential to the Thomistic understanding of the person, since it is its materiality that renders the person an embodied rather than a disembodied being. The person, therefore, remains internally and indivisibly composite; immaterial reality plunged into the constant flux of material reality in an essential rather than merely contingent fashion.⁹³¹

It follows from this that the human person is also, on this view, capable of being possessed of a certain tension. For in so far as it is a material individuality, it has a precarious unity that is constantly in danger of slipping “back into multiplicity,” and of becoming subject to an “network of forces and influences” over which it has little real control. In so far as it is a person, however, it is entirely self-subsisting, possessing within itself an inner “principle of creative unity,” marked by both freedom and independence.⁹³² In this way, it becomes clear not only what differentiates the personal and individual aspects of the human being, but also how those aspects are properly related one to another. Whilst material individuality, being a condition of human existence, is certainly not something considered bad from an Aristotelian-Thomistic perspective, nevertheless insofar as it is considered good, it is good specifically in its relation to personality and then precisely to the extent that it facilitates the realisation of personal ends. What is bad is allowing the individuality of the human being to enjoy predominance in human action,⁹³³ and it is only by ensuring that this does not happen, that what is truly distinctive in the human person will be permitted to flourish as its nature demands.

C: Human Action

For Aristotle and Aquinas, the good of any being is determined by the proper ends of its natural activities. This follows from the inherently active nature of being in general. When Aquinas, following Augustine, states that “goodness and being are really the same”, he is using the term ‘being’ as more-or-less equivalent to what is

⁹³¹ On this point see especially: Oderberg, 2002 also, 2005, and, more generally, 2009.

⁹³² Maritain, 1954: 56-88.

⁹³³ Ibid.

actual or existing.⁹³⁴ The ubiquity of this activity introduces a fundamentally teleological dimension into the overall drama of existence. A being flourishes more fully by more fully realising the proper ends of its activities, since in so doing it more intensely realises its specific act of existence.⁹³⁵ By its specific act of existence Aquinas meant the same as its substantial form or nature, in virtue of which it is the kind of being it is, and according to which it has the specific or ‘species-defining’ powers it has.⁹³⁶

A given being cannot hope to achieve its final end as a fully realised or actualised specimen of its kind without exercising the powers or capacities with which it is endowed precisely in virtue of being the kind of being it is. It follows, that: “[t]he end, completion, or perfection of a natural substance is its having fully actualized its specifying capacity [or power].”⁹³⁷ Moreover, since existence and goodness are co-extensive, it also follows that the proper exercise of a being’s species-defining powers must also make for its goodness. For “since the state or activity that constitutes a substance’s full actuality is that substance’s end and an end is good, that state or activity constitutes the substance’s good.”⁹³⁸ In this respect, Phillipa Foot has spoken of a sort of ‘natural goodness’, which “depends directly on the relations of an individual to the ‘life form’ of its species.”⁹³⁹ Thus, the goodness in plants and animals, for example, may be said to nest within “an interlocking set of general concepts such as *species*, *life*, *death*, *reproduction*, and *nourishment*, together with less general...ideas such as that of *fruiting*, *eating*, or *fleeing*.”⁹⁴⁰ Similarly, Herbert McCabe points out that it is precisely because human being is “possessed of a nature, or an ontological structure which is a locus of intelligible necessities, [that it]...possesses ends which necessarily corresponds to [its] essential constitution and which are the same [for all]...”⁹⁴¹ Human fulfilment or flourishing, then, entails actualizing and “bring[ing] to the proper fullness, that structure in man which is

⁹³⁴ Aquinas, *Summa Theologiae*[hereafter *ST*]Ia5.1.; *ST*Ia48.2; *Quaestiones disputatae de malo*[*QDM*]1.1ad1; Augustine, *Confessions*VII.12.

⁹³⁵ *ST*Ia6.1. See also: Francis, 1996, 2000.

⁹³⁶ *ST*Ia76.1.; Ia5.5; IaIa85.4.

⁹³⁷ MacDonald, 1991: 100. On the whole controversy surround the Fact/Value and Is/Ought objections, and how these fail within an Aristotelian/Thomistic ontology, see, among many other works: Geach, 1967; Martin, 2007, 2008; and, Zagal, 2008.

⁹³⁸ *Ibid.*

⁹³⁹ Foot, 2001: 27. See also here, the extremely important contemporary work of Michael Thompson: Thompson, 2004, 2008.

Also, the more populist writings over several decades of Mary Midgley, especially: Midgley, 1995.

⁹⁴⁰ *Ibid.*

⁹⁴¹ McCabe, 2003: 45.

characteristic for him.” Namely, that “structure of self-governance and self-possession.”⁹⁴²

What really distinguishes human being in this respect is the fact that, because it is endowed with capacities enabling it to transcend the circumstances of the particular environments in which it find themselves at any given moment, its active potentialities are possessed of a much greater range than those of even the most sophisticated of sub-rational species.⁹⁴³ The reason for this is that, “[t]he human will, as the soul’s faculty of action flowing from its intellectual nature, is also a spiritual faculty like the intellect.” As a result, “no finite good can command its adherence by necessity.” Instead, a person’s will “remains free to choose its own path toward the infinite among all finite goods.” It is for this reason that it is able “to turn away on the conscious level from its own authentic Good towards other [merely] apparent goods.”⁹⁴⁴ In this way, whilst it can be said with some truth that “...human morality is entirely concerned with doing what [a person] want[s] to do,” in human beings, unlike other animals, it is necessary to reckon with “several levels of wanting” such that a person can “only truly do what [they] want, only truly be free, if [they] get the priorities right.”⁹⁴⁵ Although, then, the ultimate ends of the human person are indeed set, the means by which those ultimate ends are to be attained are subject to the judgment and free decision of the individual person and/ or of the community of which he/she is part.

All people aim, according to Aquinas, at those things that will fulfil them in an ultimate sense, and would, if faced with an unmediated and absolute, or unlimited, good, be impelled towards it as a matter of absolute necessity, however, the world as it is structured and given in real, immediate and embodied experience never places them in such a situation. In the world of such experience the ultimate ends of the human person are always mediated through the world of material particulars, which can sometimes facilitate the attainment of a person’s ultimate ends and yet sometimes frustrate them. In so far as they facilitate the attainment of those ends they form a true basis for full human flourishing. This is linked to the fact that, given the human

⁹⁴² Wojtyla, 1979: 151

⁹⁴³ Adler, 1993: 137.

⁹⁴⁴ Norris-Clarke, 1993: 36.

⁹⁴⁵ McCabe, 2003: 45.

person's nature as an essential composite of material and immaterial qualities and capacities, his/her wellbeing is necessarily attained through a mixture of both material and immaterial goods. Whereas the goods of the physical world pertain, not to the human being in his/her specific nature, that is to the human being as such, but rather to that part of his/her nature which he/she shares with other sentient animals, immaterial goods are those goods the attainment of which fulfils a person's distinctively human capacities, and which, through their intelligence and will, take them beyond the particularities of the material world. Thus, there are two great orders of goods the possession of which it is necessary to attain in order for human life to flourish. Those goods which are of intrinsic value and desirable, therefore, for their own sake, and those goods which are merely useful, and which derive their value conditionally from their ability in particular circumstances to facilitate intrinsic goods. Consequently, the real world of lived experience both enables and requires judgment and choice to be made as to what, in a given situation, is likely to contribute to the overall realisation of human flourishing.

Moreover, after a moment's reflection, it becomes clear that it is precisely this capacity to choose as between different material particulars, that enables a person to choose in a great variety of ways which are conducive to, support, and further his/her proper functioning. It is this capacity, indeed requirement, for human beings to choose between material particulars in the real world that grounds the huge and entirely natural diversity of individual people and of the societies they constitute. Indeed, because "he is able to choose this or that" in the process of selecting "his own course of action" in any particular situation, he is able, in a very real way, to choose between the many real and concrete routes towards the realisation of his ultimate good. What is more, the very act of making of these choices "bears not only upon his will and deeds, but more importantly upon himself." Since, it is "[b]y making up his mind, [that] in a true sense he makes himself."⁹⁴⁶

It is for this reason that, whilst the requirements of the human nature remain the same for all people and all human communities in terms of laying down the parameters of what is, and what is not, in accord with the full flourishing of the human form, they

⁹⁴⁶ Maurer, 1979: 18-19.

far from *specify*, within those parameters, what actually constitutes such flourishing at a particular time and in a particular place. Rather, it is precisely in respecting the requirements of human nature, and not acting in a way which is contrary to them, that individual and collective diversity is enabled to reach its fullest extent; that the option for flourishing open to human beings and their communities are at their greatest. In other words, it is only in obeying the basic requirements of human nature that individuals and their communities are given the greatest number of opportunities for free action. In this sense, adherence to the requirements of human nature opens up possibilities; it does not close them down. It is a failure to respect those requirements that closes possibilities down and makes both individual persons and the culture to which they belong both less spontaneous and ultimately less interesting. In this way, on a Thomist view, a true adherence to the fundamental requirements of human nature offers the promise of maintaining a perfect and harmonious balance between unity and diversity.

At the same time, an inevitable consequence of this process of self-making or self-activation is the fact that it simultaneously presupposes a capacity for a form of personal corruption. In other words, it simultaneously opens up the possibility of a person making choices that fundamentally frustrate rather than further his proper functioning. Again this is linked to the correct order for which goods should be striven. Insofar as the human person enjoys useful or material goods in a way that does not frustrate the attainment of intrinsic or immaterial goods, it is appropriate to speak of his healthy development and at least partial fulfilment, since his life is fundamentally coordinated by goods which satisfy definite and specific needs of his personal being. If, however, the human being aims at the attainment of useful or material goods in the place of intrinsic or immaterial goods, it is correct to speak of a degree of personal corruption, since this involves a person failing properly to recognise what is *really*, as opposed to merely superficially, in accord with the inherent, existential logic of his basic inclinations.

Whilst intrinsic human goods, are of value without qualification, material, or merely useful goods, are of value in certain circumstances but not others, and thus are capable of losing their value altogether in circumstances where they serve rather to frustrate than to support the attainment of intrinsic goods. Since the human person is,

by its nature, endowed with certain needs that can be satisfied only by intrinsic or immaterial goods, the attempt to satisfy those needs with merely useful or material goods, has the potential to turn inappropriate striving for those useful goods into an inexhaustible and unlimited thirst. Indeed, although this form of striving is frequently accompanied by a great increase in the levels of physical movement and restlessness, it actually represents an over-all decrease in the intensity of truly personal activity. It represents an attempt to satisfy desires naturally directed towards the immaterial and therefore the unlimited with goods of a merely limited nature. Indeed, the inexhaustible potentialities represented by a person's inclinations towards immaterial goods can be fully brought to act only through the equally inexhaustible satisfaction offered by immaterial goods. Consequently, when attempts are made to satisfy such inclinations with merely material goods, the inadequacy of the exhaustible satisfaction they provide gives rise to a habit of constant and uncontrolled movement from one such material good to another which becomes increasingly competitive in character owing to the fact that the enjoyment exhaustible goods by one person prevents their enjoyment by another.

D: Powers and Habits

Here, it is important to distinguish between innate powers, acquired dispositions or habits and particular actions. The powers of the human person can be described as those of its capacities for action it possesses precisely in virtue of its nature as human. In contrast, whereas a 'power' is a capacity for action, an 'act' is a concrete exercise of a power on a given occasion, and is thus the concrete bringing to expression of what is merely potential in the power of which it is such an expression. Finally, between a 'power' and an 'act', a 'habit' is an intermediate state which, whilst predisposing a person to exercise a power in a particular way, falls short of the actual exercise of that power.⁹⁴⁷ Typically acquired over time, and with varying degrees of difficulty, they are characteristics which become "natural and enduring through long practice, thereby making the individual, in one way or another" who they are.⁹⁴⁸ In this way, the overall collection of habits with which a person is endowed – their

⁹⁴⁷ *STaIae*.49.2.; 51.1; Adler, 1993: 145.

⁹⁴⁸ Adler, 1993: 116.

overall state of habituation or *habitus* at any given point -- comes to constitute a sort of second nature. Being of a relative enduring character, these dispositional sets make it harder, but never impossible, to alter ingrained patterns of behaviour and the attitudes which accompany them. It is these sets of dispositions, building upon the huge potential for diversity in concrete human action, which account for the gradual building up of differing styles of individual and collective behaviour together with the distinctive mentalities that implies. Like the human actions lying at their root, these dispositions have an inherently teleological character which confers upon embodied human existence its inherently narrative structure, and causes each life to be lived out in light of a future in which "certain possibilities beckon...forward and others repel...some seem already foreclosed and others perhaps inevitable."⁹⁴⁹

Importantly, habits, like acts, can contribute either to the development or to the corruption of the human powers of which they are specifying expressions. Insofar as they contribute to the development of those powers, they are called virtues, and insofar as they contribute to their corruption (or, systematic misdirection), they are called vices. In this sense, 'virtues' are nothing more than stable dispositions to act well, whereas 'vices' are nothing more than stable dispositions to act badly.⁹⁵⁰ Since human conduct is that of a rational animal it should be conformed to the standards or precepts of right reason. The precepts of the Natural Law as these standards are normally termed comprise precisely that body of dictates or norms required by the very existence of reasoning or rational being and it is through the power of such reasoning that they are grasped. Human being inevitably sees all of its properly human acts in relation to these precepts, and it mentally pronounces upon the agreement or disagreement of those acts with the fundamental standards the natural law spontaneously erects.⁹⁵¹ The accuracy of such pronouncements can, of course, be flawed by undisciplined passions or inaccurate analyses owing to the concupiscence and the weakness of the human intellect, and the more particularised the judgments of the practical intellect become, so the more they are susceptible error. It is in this way that the human agent can be said to be better or worse habituated to the making such judgments. Thus a traditional way of describing the inherent link between the

⁹⁴⁹ MacIntyre, 1981: 200-201

⁹⁵⁰ *STaIae.54.4*. See here, Murillo, 2008, where the analogy between health or 'bodily flourishing' and moral probity or fully 'personal flourishing' is explored with considerable insight.

⁹⁵¹ On the harmony between the virtues and the natural law see: Hittinger, 1994; and, Hursthouse, 1999. On the parameter setting function of the natural law see Gonzalez, 2008.

virtues/vices and the precepts of the natural law is to describe the former as the 'internal' and the latter as the 'external' principles of human action; the former being a description of the degree of aptitude with which a given subject is endowed for attaining to the latter.

E: Human Society

Inextricably linked to the human person's partial inhabitation of the immaterial order is its capacity, indeed need, to live in a society of other human beings transcending the biological. Since material being, as individual, exists in a largely determinate manner, it is, from a Thomist perspective, incapable of truly opening itself to another. It lacks any real interiority, and because of this its self-identity is sufficient only to form fixed, external relations. This means that it is incapable of being more than a part within a wider whole. On the other hand, the person, precisely because it goes beyond the material, is capable both of a recursive self-consciousness and of a self-determination which confers upon it enough unity, inward presence and self-possession to enable it to give itself fully to another without any loss of its own identity. In fact, the more the person becomes interiorly present to itself and the more it comes to an appreciation of the truly universal nature of its distinctively human capacities, the more it is impelled to reach out to other persons in communicative dialogue, and thereby to constitute, to use Aristotle's evocative phrase, a community of 'other selves'.⁹⁵² In this context it is possible to understand that truly personal goods are always, in some sense, truly common goods. As properly perfective of a person's being, their realisation requires and is signified by greater and greater sociality. A person leading a fully human and satisfying life becomes in the process a true good for all other members of society, a real satisfaction of their most basic needs, as they become, to the extent that they live flourishing lives, a real satisfaction of his or her most basic needs. Moreover, each person, as a flourishing individual, contributes to the good of others in a unique and unrepeatable manner, so that a person's failure to so flourish is also a real loss to those other persons with whom they live in community who require the distinctive contributions he or she can make to realise the distinctive possibilities of their own personal beings.

⁹⁵² Norris-Clarke, 1993: 76.

In this way, human self-identity is increased in direct proportion to a growth in its own inherently dialogical character.⁹⁵³ Thus whilst “[h]uman society in general, not just societies in the plural, extends to all human beings, the total number of members of the animal species *homo sapiens*”, it is also important not to draw a straightforward equation between the human species and human society.⁹⁵⁴ As with the human person, the distinguishing feature of human society is that which goes beyond the biological.

[W]hat [in particular] makes human society a special case compared with societies of other species is the development of culture, ways of acting, thinking and feeling which are transmitted from generation to generation across societies through learning, not through inheritance. Culture includes language and technology, both of which involve the communication of ideas and a possibility of sophisticated action.⁹⁵⁵

Speaking of human society, then, encompasses the totality of human relationships. It includes relationships between biological organisms – *homo sapiens* – and all that has been biologically transmitted to them. It also includes cultural relationships that arise from those distinctively human creations, both past and present, which involve the use and transmission of symbols and artefacts and have involved the active development and successive reconfigurations of human consciousness and of the material world.⁹⁵⁶ In this respect, and in the processes of social interaction over time, human beings – consciously or unconsciously, explicitly or implicitly – construct and reproduce relational complexes and institutions which go beyond the individual and which come to obtain a certain autonomy from their original creators. These build upon:

... sequences of social practices which are widespread, impersonal, subject to, and yet always resistant to control. Practices are shaped in customs, conventions, usages, rituals, styles, manners, fashions, tastes, plans, projects, laws. They are lodged in the world such that people relate to each other in certain material settings with practical ends in mind.⁹⁵⁷

From an Aristotelian/ Thomistic perspective these diverse structural complexes must ultimately result from the aggregation of concrete individual and collective decisions rooted in the deeper capacity of the human person to choose between material particulars. Now, as has already been seen, this capacity stems from the irreducibly

⁹⁵³ Ibid.; as well as: Buber, 1971. More recently, see especially: MacIntyre, 1999; Massim-Correas, 2008; and, Llanes, 2008.

⁹⁵⁴ Albrow, 1999: 5.

⁹⁵⁵ Ibid. 6-7.

⁹⁵⁶ Ibid: 6-7.

⁹⁵⁷ Ibid.17-18.

composite nature of the human person. Consequently, a focus upon its explanatory importance entails a simultaneous recognition that “the body and bodily presence... [are, in some way] central to the production, reproduction, and transformation of social structures,”⁹⁵⁸ but also, that that presence is an expression of a deeper reality which, in being truly personal, is in some way also more than the merely bodily. Furthermore, because human action takes place within a pre-existent habitual context, so, by extension, it must also be right to speak of a habitual order within which social complexes and institutions are embodied: an habitual order which finds expression both in the personal *habitus* of individual actors, but also in external material environments whose precise configurations are the result of activities the relevant complexes are structured to sustain. Indeed, to extend the terminological and conceptual patrimony of Aristotelian and Scholastic philosophy in this way,⁹⁵⁹ by speaking of a sort of social *habitus*, is to emphasise that:

[t]he analysis of objective structures... is inseparable from the analysis of the genesis, within biological individuals, of the mental structures which are to some extent the product of the incorporation of social structures; inseparable, too, from the analysis of the genesis of these social structures themselves.⁹⁶⁰

By emphasising the utter dependence of social structures, in terms of their external manifestation, maintenance and reproduction, upon the actions of individuals, the precise character of which is, in turn, dependent upon the set of dispositions they have come to acquire over time, such an account serves to overcome the usual dichotomies between ‘micro’ and ‘macro’ levels of social interaction, and between ‘public’ and ‘private’ spheres. Indeed, it is through prolonged processes of interaction, socialization and acculturation that individuals develop tendencies (below the level of consciousness) to behave in certain ways in certain situations. These ways of acting, reacting and interacting represent “[v]alues, norms and ideals... [that are] fixed in the body as postures, gestures, ways of standing, walking, thinking, and speaking,” such as to become a sort of ‘second nature’ for the individuals concerned. They represent patterns of socially significant behaviour ‘coded’ into personal *habitus* “in such a way that individuals are able to act in routine [socially and institutionally appropriate] ways without having to think consciously about what they ought to be doing.”

⁹⁵⁸ Lopez & Scott, 2000: 90.

⁹⁵⁹ Jenks, 1992: 92-93; Lopez & Scott, 2000: 74; Panofsky, 1967. See also: Bourdieu, 1977, 1990, 1995.

⁹⁶⁰ Bourdieu, 1990: 14.

Social action can, in a very real sense, then, be thought characterised as a form of “skilled accomplishment” which, like “human skills of all kinds...are complex, embodied tendencies or dispositions that are acquired through learning and long practice.”⁹⁶¹ Through the development of these dispositions that common relational and institutional structures, which are none other than internalised and generalised expressions of actual social conditions faced by individuals in their actions, come to condition individual behaviour in a manner coherent with wider social functioning. It is precisely in this way that “the outcomes of interaction and agency” can be seen to “have emergent relational properties that are different from those of the individuals and interaction that produced them.”⁹⁶² These relational properties are “relatively durable (historical, systemic or ‘macro’)” and, as such, serve to “condition subsequent interaction, but are [also] open to become the target of (individual, agentic, or ‘micro’) efforts to reinforce or transform them. Thus actors cannot avoid being constrained by structures but they can do something about the specific form the constraints take.”⁹⁶³ Those constraints are linked into positions individuals occupy within particular social spaces, or, what Pierre Bourdieu describes as ‘fields of activity’. It is according to an individual’s position within a given ‘field’ that his/her access to unequally distributed sets of resources is determined. The norms and social relations that individuals produce, reproduce and transform in their actions are established in their struggles over these resources. Consequently, whilst ‘society’ never actually causes behaviour “it can make some behaviour easier or more costly.” Such action then “becomes a matter of personal determination and responsibility as to whether the opportunities are seized and obstacles surmounted.”⁹⁶⁴ It is precisely in this way that the socially embodied collections of sophisticated social practices which, continually expressing themselves in institutional form, come to exercise influence over, but not to determine, subsequent human action, enable one to speak intelligibly of the transmission and accumulation over time of human learning, and thus also to speak of social development or corruption in the widest sense of those terms.

E: Social and Historical Transformation

⁹⁶¹ Bourdieu, 1994: 79. Lopez & Scott, 2000: 101.

⁹⁶² Parker, 2000: 23. In addition see: Archer, 1988, 1995, 1998. More generally see: Bhaskar, 1986, 1997.

⁹⁶³ Parker, 2000: 73-74.

⁹⁶⁴ Archer, et.al., 1998; Parker, 2000: 236.

At this point it becomes pertinent to re-call the tightly interconnected nature of the human action system and the need, if it is to be understood adequately, to treat it as a dynamic whole. It is also important to re-emphasise the central position of the will both in stabilising that system, or, if disordered, in undermining it. Now, given what has already been said about the socially embedded nature of the human person, it should come as no surprise that, insofar as this analysis is transposed from individual decision-making to the wider social arena, it can be seen to ground a similarly dichotomous dynamic, one that was highlighted long ago in an altogether more eschatological context by the great Fourth century theologian, St Augustine.⁹⁶⁵ For Augustine, every human society finds its constituent principle in a common will or love. Indeed, it is a characteristic of love “that it becomes the bond of society which springs up spontaneously around it.”⁹⁶⁶ As such, a society can be said to be composed of a “multitude of rational creatures associated in a common agreement as to the things which it loves.”⁹⁶⁷ To the extent that “any group of men [is] united by a common love for some object” it is possible to speak of human society, and thus to speak, in some sense of there being as many societies or, to use Augustine’s term, ‘cities’ “as there are collective loves.”⁹⁶⁸ Yet there underlies each of these loves, just as there underlies each individual act of the will, one of two basic orientations: either towards genuine human fulfilment, or away from it. Thus, just as individuals are able, because of their self-making/directing capacities, also to choose in ways which frustrate or undermine their full flourishing, so too the collective social complexes to which their actions give rise have the capacity not only to be perfective but also corruptive of human society.⁹⁶⁹

This highlights, of course, the irreducibly moral dimension of every social institution, but it also points to its irreducibly cognitive content as well. Reflecting the Thomist view that intellect and will mutual include and influence one another, this means not only that each institution or complex of institutions gives rise to, or embodies, an ethos sustaining more or less humanly flourishing patterns of behaviour, but also, and by the very same token, that it imparts a sort of tacit knowledge or belief as to precisely what ends that flourishing consists in. It is not just that those meaningful practices and

⁹⁶⁵ Copelston, 1950; Gilson, 1961: 171.

⁹⁶⁶ Gilson, 1961: 172.

⁹⁶⁷ Dawson, 1957: 59.

⁹⁶⁸ Gilson, 1961: 172.

⁹⁶⁹ In general, see here: Boyle, 1994; Elton, 2008; Harrison, 2007; and, MacIntyre, 1998, 2004; and, Mauri, 2008.

meaning giving perceptions that have been internalised and converted into dispositions of mind and body situate individuals in different social circumstances, it is also that they cause those individuals to approach their circumstances “as bearers of a particular social identity”⁹⁷⁰ and it is this, in turn, which, to a very large degree, pre-programmes the very terms of social and moral discourse with a background set of assumptions tending, in aggregate to give unspoken preference to one set of cognitive and inclinational orientations over another. In this way,

the plain person acquires a belief in the efficacy or truth of certain principles, not by taking in part of dialectical discussions about the first principles and the conclusions which may be drawn from them, but, rather by ‘taking in’ the principles that underlie contemporary conduct and belief while immersed in social institutions – and the practices they support – as well as by reflecting upon them.⁹⁷¹

If institutions are well-integrated and properly directed towards the real goods of the human person and society – then the plain persons involved in their operation and touched by their activities will acquire a tacit understanding of the goods of human flourishing. If, on the other hand, institutions and the practices they support, are in some way dysfunctional, then those same persons are likely to develop a tacit knowledge of, and aptitude for, acting in accordance with principles that are not conducive to human flourishing.

When this is scaled up to greater levels of generality from individual institutions or apparently relatively discrete complexes of institutions, to entire cultures or forms of life, it becomes clear that here too it is correct to speak of their preponderant cognitive and inclinational orientations. This is not in anyway, of course, to deny the difficulties involved defining the precise perimeters of any given cultural form, be it large or small, nor is it to deny the likelihood that within those aggregate forms there will be many differing counter-orientations which cause them to manifest considerable internal conflict and complexity. What it does involve is the claim that, to the extent that such cultural units can be so defined, once these various conflicting currents and complexities have been taken into account, it is, indeed must be, correct to speak, in theory at least, of some overall orientation. Finally, given that human society and its

⁹⁷⁰ Ibid.

⁹⁷¹ Rowland, 2003: 61-62.

institutions are embodied in a manner no less essential than the individual persons from whose actions and interactions they arise, it follows that the life of these institutional/cultural forms is itself temporally located and possessed of an irreducibly narrative character, along with the cognitive content and inclinational orientations they sustain. Indeed:

[j]ust as an individual explores her identity by continually, as it were, rewriting her autobiography (not of course, to change the past but to find new significance in it), so a culture, an institution, a church must continually rewrite its history. This is not precisely because the previous autobiography or history was mistaken (though it may well have been; self-deception and chauvinism, for example, are constant temptations), but because we find new questions to ask and answer.⁹⁷²

It is for precisely this reason, that a living tradition is, in a very real sense, a sort of “historically extended, socially embodied argument,” to quote Alasdair MacIntyre once more, and “an argument precisely in part about the goods which constitute that tradition.” As such, “within a tradition,” embodied as it necessarily is by a range of temporally extended institutional forms and complexes “the pursuit of goods extends through generations, sometimes through many generations.”⁹⁷³

Now, in addition to institutions and complexes of institutions conditioning and, at least in part, constituting individual and collective practices or habits of a particular inclinational character, they also embody the consequences of the actions in which those practices issue-forth in a way that goes beyond what is merely imminent in human society and its members to leave a mark on the material environment. To understand this, it is necessary to set it within the context of a fuller explanation of the logic underlying disordered human action, and of how such action is implicated in a profound process of personal and inter-personal alienation characterised by a more or less systematic materialisation of the human form. Precisely to the extent that this happens, a person and the society in which he lives, finds itself trapped in an imprisoning web of forces that are essentially alien to the nature of human being as a locus of free and self-directing agency. Now whilst, it is true that the human being is inherently embodied, that within it that transcends the material, which is its highest and specifically distinctive part, if subordinated to the material, has the effect of

⁹⁷² McCabe: 2002:199

⁹⁷³ MacIntyre, 1981: 222

dragging it down in its entirety, so to speak, both in its material and immaterial aspects, and of powerfully distorting the social and material environments within which it is situated. The reason for this is that human being's status as a metaphysical material/immaterial hybrid makes it simultaneously continuous and discontinuous with the material world. To the extent that it is continuous with the material world, every action a human being undertakes necessarily involves some reconfiguration of the material. To the extent that it is discontinuous with the material world, each of his actions are capable of both elevating or distorting the material. They are capable of elevating it – of personalising it, so to speak – since every action, when, in good order, is directed towards the reconfiguration of the material world for personal ends, for ends which go beyond the material. They are capable of distorting it, since, when not in good order, such action, whilst not appropriating the material world to personal ends, does not leave it unchanged. Instead, it appropriates the material world to the processes of personal distortion. As such, the consequences of human action are always both intransitive and transitive, that is, they effect a transformation both in the agent himself and in the external world. This means that there will only be a real, rather than a merely apparent, satisfaction of human needs insofar as the effort to secure goods in the external world are of a character that they support rather than violate the internal harmony of the material and immaterial aspects of the human person.⁹⁷⁴ To the extent that they violate that harmony, they will have succeeded in fabricating less a home than a prison. Indeed, in the process of a person pursuing an external material good for its own sake, and without regard to the simultaneous cultivation of his virtues, the object of his action loses its capacity to qualify as a real personal good and instead becomes something of an alien nature. The more this happens, the more a person is alienated from, and then gradually subordinated to, the products of his own labour.⁹⁷⁵

⁹⁷⁴ As Wojtyla puts it: "...that which is transitive in our culturally creative activity and is expressed externally as an effect, objectification, product, or work can be said to be a result of the particular intensity of that which is intransitive and remains within our disinterested communion with truth, goodness and beauty. This communion, its intensity, degree and depth, is something completely internal; it is an immanent activity of the human soul, and it leaves its mark and brings forth fruit in this same dimension. It is from this communion that we mature and grow inwardly." Wojtyla, 1993: 263-279.

⁹⁷⁵ It is precisely in this regard that Alasdair MacIntyre, has argued that for collections of habituated propensities to act, which he terms practices, to be in good order, in fact, for them to be practices properly so called at all, they must necessarily involve the possession of internal goods which he suggests are non other than the internal or intransitive consequences of action to secure external good. MacIntyre's much discussed reluctance to contemplate vicious practices, may well be explicable on the basis that groups and settled habits of action are only deserving of the name insofar as they are, in fact, involved in bringing the human person to act, insofar as they are not, they are merely apparent rather than real practices. For convenience, the term practice, the few times it is employed in this study, is used in a more agnostic manner. See, MacIntyre, 1981: 187-188.

By the term social development, then, needs to be understood those transformations within society and its institutional forms and material environment that conduce to the attainment of truly human ends and to the overall flourishing of its individual members. Societal development in this restricted sense can be spoken of insofar as institutions, or forms of collective action, arise which enable and encourage members of society to go beyond their individuality and to engage in forms of cooperative action which deter them from seeing their interests as in fundamental conflict with those of their fellow human beings; thereby to transcend the evolutionary thrust of the purely biological world. It is in this context, that the social dimension of traditional norms of morality should be understood. Namely, as abstract expressions of practices which, respecting the distinctive nature of human society, conduce to cultivate stable dispositions or virtues that make for the fulfilment of the human person and therefore the flourishing of society through mutuality and cooperative activity in the spheres of physical necessity, productive engagement, and moral, spiritual and cultural development. These norms of morality point to the deep inclination within human nature towards sociability. It furnishes him with reasons not only not to act antisocially and therefore to avoid competition, but more than this, to act with and through others in a reciprocal manner as an absolute prerequisite for the attainment for the highest of the human goods.

In contrast, just as the emergence of institutions fundamentally directed towards cooperation, reciprocity, and mutuality are signs of healthy societal development,⁹⁷⁶ so those which are coordinated by competition are indicative of a degree of social corruption. It has already been seen that competition is linked to the inappropriate pursuit of material or merely useful goods and equally this is the case in respect of institutional or social competition. It is in this sense that social competition may be seen to indicate, or to be inherently linked to, a process of social materialisation, whereby the higher, immaterial dimensions of the human person are collectively and systematically subordinated to its lower, material dimensions. Consequently, just as societal development can be seen as respecting the parameters of the healthily functioning society through the observance of moral norms, so societal corruption takes place where institutions fail to adhere to those norms, allowing themselves to be

⁹⁷⁶ There are, of course, many institutions which are only superficially directed towards such ends.

coordinated instead by interpersonal and inter-societal competition and by the evolutionary principles of the material world.

It is precisely this competitive logic that lies at the root of the gradual rationalising process of societal and institutional evolution whereby certain types of institutional organisation are seen to confer greater physical and strategic power on those who take advantage of them. This is what Hall and Ikenberry have termed neo-episodic evolution whereby: “Certain basic changes in the historical means of social organisation have changed the terms according to which all societies must operate.”⁹⁷⁷ Once a society develops a means of organising its activities which confers upon it a significantly greater material strength than its potential competitors, those competitors are either forced to imitate this new pattern of organisation or else to be overwhelmed by the society which developed it. Importantly, the overall dynamic which drives this process is certainly not a conscious one. As Hall and Ikenberry go on to point out that: “historically: the breakthroughs which matter tend to be the result of fortuitous openings rather than the result of some inexorable logic, since most social organisations try to adapt their circumstances to achieve an equilibrium with them. Fundamental social change tends to be something which positively goes against the grain of social actors and their organisations. The makers of fundamental change therefore are best conceptualised as adaptive failures.”⁹⁷⁸ Overall, this evolutionary process connotes a gradual shift from what Michael Mann has termed ‘despotic’ to ‘infrastructural’ forms of organisational power, since those societies which develop limitations upon the arbitrary activities of their individual rulers or functionaries tend to be more highly efficient generators of overall and sustained material energy than those which do not.

Whereas most social theorists, particularly those who have recently led the revival in institutional explanations of economic development, have seen the anonimisation of power that these developments connote in broadly positive terms, from the point of view of the present study this, clearly, must be taken as an evaluative mistake; one, it might be added, conditioned by the very materialist attitudes towards human well-being whose historical and organisational origins those same theorists have often done

⁹⁷⁷ Hall and Ikenberry, 1989: 20

⁹⁷⁸ Ibid: 20

so much to elucidate. Instead, it needs to be appreciated quite how fundamentally this longer-term historical trend towards more integrated forms of ‘infrastructural power’ is, in fact, an expression of the increasingly systematic materialisation and thus alienation of the human form.

Now, it should be obvious from the above that whilst there is an almost infinite scope for the development of different forms of human flourishing, different styles of life and habits of cultural sensibility within the broad parameters of human nature, the fact that it is, as has been argued, possible always to ask the deeper question of any practice sustaining institution or group of institutions, whether on balance it is well ordered or disordered, means it should also be possible to ask that question at any given time of humanity in general, and when this is temporally extended, with due caution, of any period of human history. Put a slightly different way, it should be possible to ask of each period, how far the human form is, in fact, realising its true end, and how far it is, in the alternative, alienated from that end, that is, in present terms, materialised.

In this context, it can be said that, most fundamentally, there are just two ‘cities’ to which all other human groupings can be reduced. For Augustine, of course, these two cities were conterposed as ‘the City of God’ and the ‘City of Man’, but it is possible to prescind from his explicitly theological terminology and speak instead in terms of human flourishing and frustration. In other words, it can be stated that to the extent that society is associated in a love of what is good; it will be good; but if associated in a love of what is bad; it will be bad, with all the attendant results that this entails. It is precisely once the nature of these two cities has been properly grasped, that “moral philosophy...expand[s] into a philosophy of history, and beneath a multiplicity of peoples and events,” it becomes possible to see “how the two cities have persisted from the beginning of the world” as well as to “extract a law permitting [a]...forecast [of] their destiny.”⁹⁷⁹ Of course, from this it does not follow, nor is Augustine claiming, that these ‘two cities’ are easily identifiable, or distinguishable historically, the one from the other. Indeed, quite the contrary, for in his view they each are, in this world at least, inextricably intertwined. Thus, they “have been running their course

⁹⁷⁹ Dawson, 1957: 59.

mingling one with the other through all the changes of times from the beginning of the human race, and shall so move on together until the end of the world.”⁹⁸⁰

Now, for present purposes, it is just at this point that Augustine’s theory needs to undergo a sort of creative completion. In the first place, it is necessary to recognize a little more clearly, that the two loves, and thus the two cities, mingle not just within each given human epoch and association, but also within the heart of each individual. No doubt, this is not something that Augustine himself would have denied, but owing to the explicitly theological context in which he developed his ideas, and his commitment to maintaining an ultimate distinction between the ‘elect’ and the ‘reprobate’, it sometimes risks occlusion and so it is as well to emphasize it. In the second place, and more fundamentally, although Augustine speaks quite clearly of the mingling of the two cities throughout history, he says nothing of the relative influence of the one over the other, nor whether this balance of influence is liable to change. To address these further questions it is vital to recognize that the two loves underlying Augustine’s two cities are expansive and not merely static. Thus, when considering the long-range dynamic of historical transformation, it is important not only to recognise that there are two principles of change – growth and decay – the mutual balancing of which have properly to be appreciated in order to ascertain the structural character of human society, in its most general sense, at any given point, but also to recognise that each of these principles manifests a discrete expansive logic of its own. When this is done it becomes possible to detect a remarkable coherence in the overall trajectory of human society through time as the relative compositional balance between these two principles undergoes change.

To start with, the balance is in favour of healthy societal development, that is, of growth. This, though tinged to a degree with societal corruption, is not overwhelmed by it in the sense that, once the corrupting factors with which it is intermixed are factored into the general equation of societal transformation, there remains an overall increase in societal improvement. In time, however, the relative influence of the principle of societal decay as opposed to that of societal growth increases. The reason for this is that, although the principle of societal growth is a dynamic one, its

⁹⁸⁰ Ibid: 60.

dynamism is premised upon a respect for stable underlying regulative structures of the human action-system, whereas the principle of societal corruption has as one of its essential characteristics the implicit or explicit challenging of the parameters set by those structures. Thus the more the principle of societal corruption develops, the more it changes the present structural premises upon which society finds itself based, away from those structures which facilitate its maximal flourishing and thereby away from the structural premises which underlie societal growth. Consequently, as history unfolds, so the margin which societal growth enjoys over that of societal corruption gradually decreases until a point is reached where the principle of social corruption claims a greater influence upon society in general than the principle of societal growth. It is at this nodal point, that society as a whole changes its direction and character from one of overall human growth and improvement to one of overall decay.

To better understand this, the above account of how human action and its aggregate results condition future action should be joined to the distinction drawn towards the end of Chapter 7 between virtues of the intellect and virtues of the appetite, or virtues properly so-called. There it was explained that whereas virtues of the intellect, both speculative and practical, confer upon their possessors only an 'aptness to act' or a particular skill in doing or making, virtues of the appetite confer a further tendency for the right, or morally appropriate, use of those aptnesses or skills such that it is the peculiar role of the appetitive virtues to ensure people use their creative skills and aptitudes in ways fully consistent with human flourishing by preserving the integrity of the human action-system and thus its truly personal and inter-personal character. Now it is this which explains the distinction in habitual effect drawn above between societal growth and societal decay, and also the reason why it was claimed that whilst the former is driven by action which respects and is fully coherent with the overall integrity of the human action-system, the latter results from action which ultimately serves to undermine that integrity. It is, of course, precisely the purpose of the appetitive virtues to ensure that human action is coherent with that systemic integrity and not violative of it. To the extent that such coherence is achieved there is no need for further alteration of the present terms of inclinational habituation since to that extent it achieves the ends to which it is properly ordered to an optimal degree. Rather, what undergoes expansive alteration in the context of societal growth, and then again only to the extent of that growth, are solely the habits of the intellect.

Indeed, it is precisely because – in societal growth – there is no movement away from this optimal inclinational state, that expansive developments in the sphere of the intellectual habits together with the products to which resulting actions and clusters of actions give rise, are guaranteed to increase the overall human good rather than to undermine it. It is when there is movement away from this optimal inclinational state that societal decay or corruption starts to set in. Moreover, once this optimality is lost, although it can, in principle at least, be restored, it is in the very nature of habituation in general, and of socially aggregated habituation in particular, that the further away from optimal inclinational habituation a human society moves, the more difficult it is to re-establish.

What in summary is being claimed here, then, is that in respect of any stage of human history it is possible not only to speak of human society as a whole owing to the possession by all human beings of a common underlying form, but also to speak of the qualitative state that human society as a whole finds itself in. It is further claimed that the vigour of human development results at each moment from an admixture of growth and decay resolving itself, to start with, into a period of overall growth but then transforming into one of overall decay. It is precisely in the context of this latter phase that the developments which have provided the major empirical focus of the present study need to be understood. For through them, an attempt has been made, in somewhat greater detail than would have otherwise been possible, to expose a fundamental coherence in the forces underlying advanced modernity and the propagation of the forms of social life peculiarly compatible with it. In particular, and for this reason, emphasis has been placed not upon the geographical region in which these forces first began to take on a systemic form but rather upon those areas and civilisations which had until recently offered the most radical alternatives to modernity. By concentrating on a period in which each civilisation, after long and complex histories of large-scale resistance to expansion of the originally ‘Western’ conduits of distinctively modern forms of material provisioning, seemed deliberately to accept and consciously internalise these forms, it has been possible to explore the manner in which profoundly different cultural substances have reacted to a common, institutionally mediated, ideological acid. It also serves now, and from the retrospective vantage-point of the larger-scale metaphysical backdrop presented by the present chapter, to highlight a particularly important moment in the systematic

consolidation of those global and alienating forces which, it has been argued, are the expression of a coherent process of overall social materialisation.

At this point, it is important to distinguish this analysis from a more fully materialist conception of history. The most famous formulation of such a conception was, of course, that put forward by Marx in his *Preface to the Critique of Political Economy*:

In the social production which men carry on they enter into definite relations that are indispensable and independent of their will: these relations of production correspond to a definite stage of development of their material powers of production. The totality of these relations of production constitutes the economic structure of society – the real foundation, on which legal and political superstructures arise and to which definite forms of social consciousness correspond. The mode of production of material life determines the general character of social, political and spiritual processes of life. It is not the consciousness of men that determines their being, but, on the contrary, their social being determines their consciousness.⁹⁸¹

What exactly Marx meant by this and the many other related, more opaque, statements he made in this area has been the subject of enormous controversy. These exegetical questions need not be entered into. It is sufficient to note that, according to the understanding being advanced in the present study, the extent to which man's social activity is under the control of material forces is the extent to which it is exclusive of real human agency or volition, and to which such indeterminacy as it does disclose is of the variety existing in the subhuman, material world. Now, in this context, it must at once be admitted that to use the terms growth and decay in the manner outlined above is, of course, to invite comparisons between human society and biological organisms, and thus to raise precisely the sceptre of the type of deterministic materialism just spoken of.⁹⁸² Upon closer reflection, however, it should be abundantly clear that what is being proposed is very far from such a materialist understanding. What instead is being suggested is a process rather of *materialisation*, whereby the capacities grounding the freedom, creativity and thus expressive diversity of the human form, though not in their nature subordinate to, nor determined by, the forces of the material world, are, if improperly employed, capable of becoming, and in the context of advanced modernity have, in fact, become,

⁹⁸¹ In Bottomore and Rubel, 1961.

⁹⁸² Though a form admittedly different, in significant respects, to that put forward, on any reading, by Marx himself.

increasingly so subordinate. In other words, in proportion as there has been a failure in human action to attain to truly human or natural ends, so in proportion the human form has been subjected to the norms of material nature and has sunk back into that species of determinism found in the material realm. Moreover, as this process has progressed, so it has come to take on an increasingly systematic and integrated character. As this has happened so the overall scope of human freedom has been diminished along with the capacity of individual or collective human action to offer resistance to the forces propelling further materialisation. Whilst this capacity for resistance is never actually extinguished, it grows ever weaker.

Now, despite insisting upon the importance of freedom and human agency in historical development, it should nonetheless be obvious from all that has been said, that the *overall* course and shape of the historical trajectory thus sketched does, in fact, result from an existential logic programmed into the very structure of the human form. This in itself is a controversial claim, open to many potential misunderstandings grounded upon well-worn objections to theories of large-scale historical coherence and directionality. But it is a claim rooted, in short, in the fact that there simply can be no such thing as wholly unregulated freedom in human action, just as there can be no such thing as unregulated randomness, chance or indeterminacy in the realm of physical nature. Rather, always implied in each manifestation of indeterminacy is a set of terms upon which that indeterminacy must operate for the outcomes into which it is capable of being resolved to qualify as comprehensible, and that set of terms will always serve in some manner to constrain the possible range of those outcomes in ways that are, at least in principle, intelligibly describable.

To conclude, then, the question may be asked: exactly what *is* left open to the exigencies of human agency on the present account? Two important things should at least receive mention. First, in a most basic sense, is the very fact of historical degeneration or corruption itself. Human freedom only opens up the possibility of such degeneration, it does not mean, strictly speaking, that such corruption actually *will* take place. Of course, should it be the case that there is a propensity within the human form itself to fall short of its natural end, it is likely that the occurrence of such a possibility, at least at some point, will, in fact, and given enough time, amount to a practical certainty; but it must be insisted that a practical certainty can never, without

profound categorical confusion, be equated to a logical certainty, so as to make such a falling short inevitable in *stricto sensu*. Secondly, even if such corruption does take place, and its *overall* trajectory and shape is regulated at the most general level by the nature of the human form, neither the speed at which that degenerative transformation unfolds nor the *precise* expression it takes will be predictable or indeed describable independent of the precise decisions or results of decisions individuals and groups of individuals take overtime. As such, it is never enough simply to construct an artificial exclusivity with respect to either determinacy or to human freedom, it is always necessary to ask, instead, where the precise balance lies between the one and the other, and it is here that the historian will always find his challenge.

The Relevance to China and India

It is hoped by this stage that the shape of the overall theoretical framework within which it is being attempted to set the present study has been made sufficiently clear. It remains necessary, however, to draw out more explicitly its relevance and explanatory function with respect to the contemporary developments in China and India detailed in Part 2. In doing so, it is proposed to show how the normative transformations within each society, in expressing, as explained above, the deeper processes of modernisation as a form of alienating materialisation, serve to establish specific heuristic benchmarks against which the unfolding of those processes can be more effectively measured. Immediately, it is necessary to recognise the dangers of the mind being seduced by a certain inescapable ideological and functional banality underlying even the most sophisticated of these developments such that the truly negative inflection with which their overall shape needs properly to be viewed is constantly in danger of being obscured.

Primarily for this reason, it is necessary to distinguish with greater clarity between two forms of corruption; the first more obvious and identifiable, the second, more subtle but ultimately more profound and far-reaching. Thus, it is most common, and of course to an extent quite proper, to complain of the inequality, arbitrariness and general governmental ill-discipline which results from a failure to adhere to the forms of normative ordering – both procedural and institutional – commonly associated with the distinctive set of values which underpin advanced modernity. As such, a great deal

of discussion was deliberately devoted in Chapters 4 to 6 to a consideration of the extent to which each jurisdiction can, in fact, be said to express a normative regime in which action in accordance with these values is more or less supported. The story was, of course, a not unobvious one of movement and counter-movement, and always in question was the extent to which explicit legislative enactments etc. were truly expressive of the realities they purported to regulate. In this respect, it is important to keep in mind the primarily heuristic function legal analysis performs in the present study, one which involves no denial of the importance of law itself as a substantive agent of social transformation, but which does not make that a central focus. What was being argued for then, was that tracing the dynamic of change as reflected in the formal legal systems of China and India, when understood within a properly elaborated theoretical frame, in which the boundaries of law were delimited in a 'semi-autonomous' manner such as to emphasise the radical continuity of law with other social phenomena, represents a uniquely effective method of mid-range sociological analysis.

In this context, and giving all due allowance to the many undeniable short-term variables and contingencies, it was argued that the thirty year period under review disclosed a clear and marked movement in the direction of greater functional harmony with the structural precepts of a market-oriented, materialist morality through increasing juridification, formalisation and functional specialisation. In China, this manifested itself in both a fundamental programme of legal construction and reconstruction as well as and staged programme of progressive subsequent modification. In India it found expression in the re-engagement with, and dynamic recalibration of, a pre-existing system the fundamentals of which were already in place prior to the period under review.

Of course, it would be quite wrong to deny that the gradual, if sometimes halting, formal systematisation that these changes seemed to connote, held out the promise of remedying much real human suffering and injustice. Indeed, it is precisely for this reason that they tended to be embraced with such enthusiasm. Yet just in so far as this more obvious form of corruption was overcome – together with the procedural irregularities and particular battery of human vices that go with it – so it has tended to be replaced by a second, more fundamental form of corruption, that most

characteristic of advanced modernity. At one level, this can be seen as being linked to a form of Weberian ‘rationalisation’, but, in line with earlier arguments, it is more properly understood as manifesting a deeper process of social materialisation.

Here, it is necessary to set individual developments within the context of a wider, dynamic whole. For what appears from one angle to be the remedying of injustice, from another angle can be seen as the purging of systemic dysfunctionalities qua a deeper materialist logic which is quite insensitive to these irregularities qua injustice, and which uses any approbation that their resolution may attract in a manner which ultimately facilitates its own advance. And yet if the argument of the present study is to be believed, it is precisely such an advance – the progressive unfolding, and increasing influence, of a materialist logic – which leads to much more profound and intractable forms of injustice and de-humanisation. Thus it is absolutely indicative that, in addition to appearing to remedy procedural and formal injustices, this deeper form of corruption also undermines alternative, non-materialist conceptions of the good life. This it does either by their cooption or by their coercion and marginalisation. Overall, the material contained within Part 2 must be seen in terms of a somewhat dialectical tension between the forces underlying these two forms of corruption, with a very gradual, and as between China and India quite differently characterised, but for all that, unmistakable, resolution in favour of those underlying the latter.

All of this carries embedded within it a somewhat strong ‘modernisation’ thesis, though one which is both analytically and evaluatively to be distinguished from more the more classical ‘Modernisation Theory’ of the 1950s and 60s.⁹⁸³ With respect specifically to legal development in China, such a thesis has recently been well, if rather starkly, characterised by Albert Chen as one which:

...not only affirms [as characteristically modern] principles of legality or the Rule of Law that as a matter of world history first emerged in the West, but also implies that as non-Western legal systems transform and remake

⁹⁸³ This built upon Parsonian foundations, and saw ‘modernisation’ as an essentially unilinear master-process which led to increasingly positive development outcomes for societies as they entered the modern world through a process of staged development. Perhaps its most famous exponent was Rostow. See, Rostow, 1966. It has subsequently come under several waves of powerful criticism. For a extremely useful analysis of its provenance and development see, Joas and Knobl, 2004.

themselves in the image of modern Western legal systems, they will be modernised and adapted to the conditions of modernity.⁹⁸⁴

This narrowly jurisprudential thesis is invariably linked to wider accounts of social and historical transformation and is also intimately related to more recent 'globalisation' accounts which suggests that once a country with a centrally planned economy has been opened with a view to international economic integration there is no alternative "than to develop a...system that provides a hospitable environment for business..." such that "the logic of economic globalisation" can "to a significant extent [be seen to] dictate the direction and content of...reform."⁹⁸⁵ Moreover, it is movement a that ultimately carries with it almost limitless cultural, social and political reconfigurations.

Now, until relatively recently 'modernization' theories were held in a certain amount of contempt by the majority of social theorists.⁹⁸⁶ It was only in the course of the 1990s that mounting evidence of a renewed phase of international and inter-cultural integration led to a re-appropriation of more subtle and sophisticated forms of modernization discourse owing to the relevance they were perceived to have with respect to the burgeoning field of globalization theory. What is quite clear, however, is that despite considerable fluctuation in academic sensibility, the justificatory self-descriptions undergirding official policies in both China and India have continued to adhere closely to some variant of the modernization paradigm. Thus Chen notes the significance of the fact that:

...official and mainstream scholarly discourse of law in China in the last three decades has not resisted Western notions of the Rule of Law on cultural grounds. Baptised in the Marxist tradition, most Chinese scholars of law adopt a critical perspective towards the law, legal and political institutions and legal culture of "feudal" China (referring to the long pre-modern era of imperial rule), and accept that modern ideas of the Rule of Law that emerged in the era of the "bourgeois revolutions" represented forces of historical progress. The official and scholarly reservation regarding total conversion to Western notions of law and legality stems rather from fidelity to socialism.⁹⁸⁷

⁹⁸⁴ Chen, 2010: 34.

⁹⁸⁵ Ibid: 35.

⁹⁸⁶ In general, see again: Joas and Knobl, 2004.

⁹⁸⁷ Chen, 2010:37-38. He goes on to write: "What is currently advocated in China is not the Rechtsstaat (the Rule of Law state), but the socialist Rechtsstaat, not Rule of Law, but socialist Rule of Law.106 Thus embracing the Rule of Law does not mean giving up or diminishing the leadership of the CCP. On the contrary, the Chinese authorities' "conversion" to legality may be

This highlights the fact that long before the reform era and for the greater part of the twentieth century, China's various leaderships were wedded to world-views which had at their heart some form of essentially materialist understanding of development. A similar picture can be traced, in broader, extra-legal terms, in the case of India. Thus pre-reform policy here also embodied an intensely 'modern' and materialist conception of development in the "[t]he goals and objectives set out for the nation":

...namely, the rapid agricultural and industrial development of [the] country, rapid expansion of opportunities for gainful employment, progressive reduction of social and economic disparities, removal of poverty and attainment of self-reliance.⁹⁸⁸

And its 1991 reforms were undertaken in recognition of the need to make:

"changes on many fronts to break away from the earlier approach which was characterized by extensive government control over private sector activity, a preferred position for the public sector over the private sector, high levels of protection to encourage domestic production and a restrictive approach to foreign investment."⁹⁸⁹

Indeed, both countries, though their primary objectives may have been national self-strengthening, have long envisaged the way to achieve that goal in terms of the sorts of material increase facilitated by large-scale and rapid industrialization, implying a distinctively 'modern' form of socio-economic organization. To this end, their successive leaderships have been spurred on to implement rather single-minded and descriptively explicit policies of economic catch-up. Consequently, the socio-economic recalibrations which began to be undertaken by both countries in the late 1970s, are properly characterized as the gradual substitution of more efficient and effective forms of material advancement for less. In other words, they represent crucial turning points in the process by which the functional demands of the unfolding logic of materialization were more accurately understood and embraced.

Congruent in important respects with the official hermeneutic of economic and

interpreted as an attempt to use the legitimacy of law to bolster the legitimacy of the CCP at a time when the ideological attraction of communism has all but disappeared. And although notions of checks on and supervision of the exercise of power have been incorporated into official discourse in contemporary China, issues like "separation of powers" and "multi-party elections" are still within the "forbidden zone" of discourse."

⁹⁸⁸ Government of India Ministry of Industry, 1991: Para 3.

⁹⁸⁹ Ahulwalia, 2005: 2

institutional transformation in which Chinese and Indian reform has been framed, what is being argued here is that a significant degree of success has indeed been attained by both countries in effecting the transformations at which they have aimed. However, it is also being contended, first, that this success is, by its own lights, somewhat incomplete, and, second, that it is a success which is essentially pyrrhic in nature owing to the corrupting forces which lie at its heart. It is the burden of the present chapter as a whole to vindicate the second of these qualifications, but it is also necessary strongly to emphasize the first, not least for the light that it can throw upon the ‘transitional’ and ‘conflicted’ nature of the Chinese and Indian reform process. This has, of course, been well recognized both officially and unofficially. Thus Chen again usefully counter-poses two quotations in order to capture the commonly held view of Chinese legal reform over the past thirty years, that much has been ‘accomplished’, but that much nonetheless remains to be done. Thus, Stanley Lubman is able to write that:

The accomplishments of the legal reform to date are impressive given the need to overcome the burden of Chinese tradition, thirty years of Maoism, and the hostility of the institutional environment in which reform must take place. Law has gained more importance than it has ever possessed in Chinese history.⁹⁹⁰

But equally, a recent government White Paper acknowledges ‘difficulties’ still to be overcome:

China’s legal construction is still facing some problems: The development of democracy and the Rule of Law still falls short of the needs of economic and social development; the legal framework shows certain characteristics of the current stage and calls for further improvement; in some regions and departments, laws are not observed or strictly enforced, violators are not brought to justice; local protectionism, departmental protectionism and difficulties in law enforcement occur from time to time; some government functionaries take bribes and bend the law, abuse their power when executing the law, abuse their authority to override the law, and substitute their words for the law, thus bringing damage to the socialist Rule of Law; and the task still remains onerous to strengthen education in the Rule of Law, and enhance the awareness of law and the concept of the Rule of Law among the public.⁹⁹¹

This latter quotation highlights the variegated nature of resistance to the ‘optimal’ or ‘pure’ logic of marketisation. In so doing, it explains the need to apply a strategic or

⁹⁹⁰ Lubman, 1999: 2.

⁹⁹¹ Chinese Government, 2008: Concluding Section.

tactical interpretative frame if the developments detailed in Part 2 are to be understood in a proper manner. It is only within such a frame that many of those developments can be recognized as actually advancing the logic of marketisation rather than hindering it, throwing up as they often have various compromise formations strategically appropriate to the particular stage of 'development' reached. It has, thus, been important to appreciate but also to disaggregate the types of structural resistance, direct and indirect, offered by more conventional forms of corruption, by administrative dysfunction, by incongruities and outright opposition stemming from traditional cultural and religious life-ways,⁹⁹² and from tensions between the raw logic of market expansion and official policy. Moreover, if this has been true of China, it has been still more true of India whose ethnic, religious and linguistic differences are seared into the national psyche at an even more profound level. It too has been subject to immense inter-locking problems of corruption, insurgency, social unrest, administrative inefficiency, and many other structural challenges;⁹⁹³ and one need advert only to the well known fact that by the first years of the new millennium "there were almost 13 million cases pending in the lower courts, and 3.5 million cases in high courts"⁹⁹⁴ to see that many of these difficulties have deeply effected the administration of justice also. It is only by engaging these various forms of resistance that it becomes possible accurately to understand the subtle but powerful way in which the logic of the market has played them off one against the other in service of its own advance and thus of the overall increase in social materialization it represents.

Though apparent throughout, this dynamic was perhaps most obvious from a system-side perspective, that is, from the point of view of the differing overall strategies employed by each country and the manner in which they have subsequently unfolded. It is in this context that Chapter 4 sought to chart, in broad terms, their major constitutional recalibrations. These recalibrations embodied a recognition by each country of its inability to continue acting in a manner fundamentally at variance with

⁹⁹² Also should be mentioned here are the dramatic upsurges of interest in various forms of religious and semi-religious practices and movements. In particular, there was the extraordinary phenomenon of the Falun Gong prior to its official suppression in 1999, but also the more enduring and significant explosion of interest in an adherence to Christianity amongst the Chinese population as a whole, not to mention the reinvigoration of Islam in areas where that religion has traditionally been important. In India, of course, there is the upsurge of Hindu nationalism under the banner of Hindutva and various manifestations of re-indigenisation in general. In general, also see the evidence and debates contained in Peri, 2006 and Peerenboom, 1998.

⁹⁹³ In general see: Baxi, 2004; Gilley, 2005; Manor, 2005; and, Pasha, 2000.

⁹⁹⁴ Peerenboom, 2008: 7.

the priorities of the world economy. Clearly the most noticeable developments during the periods of reform took place in areas directly touching upon the rapidly transforming economy of each. These developments have been of both extraordinary scope and unmistakable direction. The economy is, of course, at the very heart of industrial and post-industrial society. Consequently, as these two enormous jurisdictions have embraced the free market so a whole battery of repeals, revisions and innovations in their economic legal apparatus have taken place. In each case, this has involved the loosening of legal restrictions upon private enterprise and initiative, as the expansive logic of the market has propagated outwards into every area of life. Now, although this has been consistent with the historical trajectory of the world economy more generally, in the cases of China and India over the past three decades, it has nonetheless been a relatively gradual and 'resisted' progression. Neither state has accepted the free market entirely upon its own terms. Rather they have offered complex forms of implicit and explicit, conscious and unconscious counter-pressure. Whilst these have not served fundamentally to confute the overall trend towards marketisation, they have nonetheless proved powerful enough to ensure that that trend has manifested itself in an altogether more incremental and, therefore, perhaps paradoxically, more sustainable manner.

Subsequent to the decision of 1978 in favour of overall economic and political redirection, the Chinese leadership adopted two closely connected and controlled strategies of decentralization to liberalise the economy and thereby make it more effective. The first strategy of decentralization, embraced upon an initially somewhat piecemeal and experimental basis, was that from government to basic economic units: from government to households and various form of economic enterprise. The second strategy of decentralization, was the gradual and staged devolution of economic power from central government to local government. These two forms of decentralization proved, in time, to be mutually reinforcing. Thus:

The decentralization from the central to local government gave greater incentives to local governments for revenue creation and economic development. It also allowed many regions to experiment with new and flexible policies, such as the setting up of special economic zones with favourable policies to attract FDI.⁹⁹⁵

⁹⁹⁵ Li and Nair, 2007:150.

These new forms of economic and governmental devolution locked into a constitutional matrix in which freedom was seeded to the logic of the market in an incremental, resisted and therefore relatively more controlled manner than would otherwise have been the case. This led to a degree of geographical differentiation corresponding to the different models of devolution operating within the overall context of the Chinese Party-State such that each of these models came to reflect a different level of economic 'development' and international integration which, in turn, allowed for the more focused adoption of correspondingly appropriate strategies.

An important contributing cause of this gradualism was the subtle incongruity which existed between the official policy of securing the continued leadership of the Communist Party and strengthening the Chinese state, and increasing marketisation. It was only gradually that the extent to which these priorities were underpinned in the short to medium term by embracing more fully the expansive logic of marketisation was accepted and that appropriate policy changes were made in a staged fashion. This led both to a greater differentiation of the state from the economy and of the state from the Party. Yet overall, it was also this increasing embrace of the market that had the longer-term effect not so much of functionalizing the market in service of the Party-State, as the Party-State in service of the market.

In India a similar market driven de-regulative and devolutionary shift operated, but one, importantly, which seems to have been significantly slower and more resisted than in the case of China. The reason for this lies, it would appear, in the deeper diversities characteristic of the Indian polity as a whole as expressed in the basic terms of the post-Independence constitutional settlements. Nevertheless, and despite the fact that unlike China the period of reform did not entail in India a process of wholesale legal reconstruction, the de-regulative shifts in the Indian economy were accompanied by a re-engagement with, and reactivation though also significant transformation of, a pre-existing developmental framework. It was also accompanied by an increasingly apparent indigenization of governmental and legal structures through the activation of the higher judiciary in terms of a taking much greater account of the traditional normative systems operating within wider India society. This phenomenon, linked as it was to a similar growth in regional disparities,

expressed an increasingly effective activation of India's basic developmental strategy, since not only has the recognition of these social diversities been followed by subtly strategic attempts to undermine them, but also evidence exists of very gradual shift of emphasis in regional diversity away from cultural, linguistic, ethnic and religious bases towards more purely economic and material ones.

At a slightly lower level of generality than the system-wide perspective adopted in Chapter 4, it was possible to extend subsequent analysis into other more specific areas of law. Thus, Chapters 5 and 6 concentrated attention upon public and family law to demonstrate the powerfully colonising effect that marketisation has been having within each country, as it has increasingly reconfigured and co-opted the various sources of extra-economic power, reducing their ability autonomously to set the goals of legal policy. In this respect, the developments charted in each chapter serve to emphasise that, beyond the important role growing marketisation performs in 'freeing up' capital investment, is the role it performs in driving forward specialisation and effecting a more efficient division of labour. In particular, they demonstrated that the gradual freeing of the market from legal constraints has not meant the overall retreat or shrinkage of the state in either jurisdiction as a law-making or norm-propagating body. Rather, it has involved its greater functional specialisation as an institutionally regulative core that ensures the tighter adherence to the overall priorities of a wider market society, disciplining or removing counter-systemic anti-market structural inhibitors.

Accordingly, it has been seen, most notably in Chapter 5, how, in a growing number of cases, the state has begun to use its power gradually to ensure an increasing level of procedural regularity and systemic integrity with respect to those institutions whose efficient functioning are likely to be crucial in helping further the goals of economic development and national strengthening. Whilst this has received more explicit acknowledgment in China than in India, in both jurisdictions it has been seen quite clearly how an increasingly important part of the state's role has ostensibly been devoted to ensuring the procedural propriety of its own functionaries in the exercise of their powers on its behalf. This has been accompanied by an altogether more 'proceduralist' drift in the sort of behaviour that the state considers as its duty to enforce, away from more substantive notions of the good. This, of course, accords

well with the precepts of 'liberal neutrality' that, in turn, fit so well with an atomic view of the individual citizen as an economic consumer/producer, though this trend has, of course, been to only partially disguise the fact that such a 'proceduralist' approach has at its heart its own substantive conception of the good, one which, even when dressed up in the rhetoric of modern rights discourse, is entirely materialist in nature.

Moreover, in increasingly operating in this fashion, the growing tendency of the state to refashion traditionally extra-economic institutions in a way which is functionally appropriate to the development of the market should be clear. Thus, as the period of reform/recalibration has progressed and the state has been increasingly co-opted by the market, there is a sense too in which it has been increasingly utilised in its turn to co-opt the institutions of society more generally. This it was the major contribution of Chapter 6 to demonstrate, focusing as it did upon the transforming nature of the state's purported regulation of the family. Here, even more so than in Chapter 5, the process of a sort of 'moral re-habitation' was seen gradually though powerfully to be taking place as the precepts of a market sympathetic morality so crucial to the institution of a market sustaining society have propagated. Accordingly, in each jurisdiction it has been possible to detect a gradual freeing of citizens from frameworks not designed to give expression to their individual felt needs but rather which prioritised in the specific case the needs of the social collective.

This, it was argued, is true despite a number of indicators which, when understood superficially, seem to indicate the contrary. Thus in both jurisdictions, it was seen in Chapter 6 how important developments took place, consistent with the state's cooption of the traditional family as way of providing both for the socialization of its youngest members and support of those who are most vulnerable, which have involved greater recognition of more traditional (and collective) forms of family structure. This, however, can be explained, first, by the fact that each society is still locked into a prolonged transitional phase in which it is quite logical to make use of a number of transitional forms. Indeed, in a transitional economy, particularly one which has not achieved the economic standards of living of the more advanced western societies the delegation of such a responsibility for personal care and welfare upon the wider society is not only a rational strategy but also a necessary one.

Moreover, it is one that has had the effect, in China and India, of ensuring as much as possible, though obviously with quite different degrees of success, that economically unproductive members of society do not substantially interfere with the processes of 'development' and the efficiency of the wider economy, at the same time as trying to ensure that as few as possible of its citizens face the economically sub-optimal situation of destitution. In the second instance, the very processes by which these more traditional forms of socialization and care have been co-opted have prepared the way for their more effective longer-term transformation, since it has meant that the actual dynamics of their functioning has been subject to much closer scrutiny which has also enabled the state more subtly to use wherever possible its still very considerable powers to redefine structures in line with the priorities of the market.

Although, then, it is important in all of this not to lose sight of the halting nature of the transformations which China and India have undergone over the past three decades, an overview of the various legal transformations as they have unfolded under the pressure of worldwide economic forces, propelled by the resisted but unmistakable outworking of the materialist logic of market expansion, nonetheless provides ample evidence of the deeper form of corruption spoken of earlier and of the social materialization to which it is linked.

Now, whilst such a claim grows less obviously appropriate as a heuristic key the more detailed and temporally confined the focus of legal analysis becomes, when set at the much broader level at which Chapters 4 to 6 were pitched, it is capable of being deployed with a greater degree of confidence. Indeed, an important contention upon which the overall methodological approach of the present study is premised is the idea that the more generalized and extended a trend becomes, the more probative it is of deeper forces of social change. Although this in no way dispenses with, but rather more insistently demands, the requirement that such a trend be empirically verified, explanations of even quite specific events and movements are impoverished precisely to the extent that a wider frame within which to set them is dispensed with. Moreover, it follows that the wider the focus of analysis is, the stronger the basis grows for making future predictions. Such predictions are notoriously unreliable in relation to specific events and configurations, and owing to the ultimately irreducible contingency of human decision-making, have proved frequently misguided even at an

altogether more general level. Indeed, part of the burden of the present study has been to distinguish various levels of analysis in a mutually illuminating fashion. It is this which lay at the heart of the claim towards the end of the previous section, that whilst it is correct to speak with a degree of certainty as to the shape and potential trajectory of human corruption in the most general sense, since it is regulated by the human form, the actual expression of the developments connected to that corruption if and when it does occur, together with their peculiar speed and character, need to be the target of specific, historically focused, research. It was precisely to ground more specific claims as to the essentially increasingly corrupt and systematic nature of the phenomena linked to modernity in its advanced and advancing forms that a more specific normative heuristic structured around legal change was elaborated and applied to the particular contexts of China and India during the period of reform.

The particular understanding being argued for here then, takes ‘modernisation’ to be an ultimately negative and regressive process, and it thus, as earlier noted, stands in stark contrast to classic forms of ‘modernisation theory’. It also differs from classic ‘modernisation theory’ insofar as it recognizes a profound variation in the way different societies have undergone the transition to modernity. As such it emphasizes the inevitable tension between unifying and diversifying forces, but also points to a convincing manner of harmonizing them that is both shapely and empirically honest. A comparative rather than unitary study was conducted precisely in order to highlight and explore the way in which a coherent set of underlying forces meet, operate upon, react with and are resisted by quite different cultural forms. Importantly, it was exactly a lack of sensitivity to the different types or forms of ‘modernisation’ that initially threw ‘modernisation theory’ per se in to such theoretical disrepute. Yet even in the midst of its unpopularity there were always theorists, of whom perhaps the outstanding examples were Barrington-Moore and S.N.Eisenstadt, who attempted to advance more subtle and sophisticated versions.⁹⁹⁶ Eisenstadt, in particular, popularized the notion of ‘multiple modernities’ which has received a growing number of adherents in recent years.⁹⁹⁷ This centres around the idea that, under the pressure of European expansion, “there developed a great variety of modern and modernizing societies’ whose “differences crystallized out of a selective

⁹⁹⁶ Moore, 1966; Eisenstadt, 1963,1973 and 1987.

⁹⁹⁷ In general see again: Joas and Knobl, 2004. More specifically, see Katzenstein, 2006; Kaya, 2003; Roniger and Waisman, 2002; and, Smith, 2006.

incorporation” and combination of their own “symbolic and institutional premises” and those of the western hegemons.⁹⁹⁸

Though embracing the emphasis this places upon “the centrality of contingency, complexity, timing and context”,⁹⁹⁹ the argument being forwarded here asserts more strongly than do the “multiple modernists” the historically, and indeed qualitatively, distinctive nature of modern industrial society owing to the systematic integration of the materialist logic which underlies it. It is also much less sanguine about the longer-term survival of these differences. This is because it postulates that each variety of modernization, distinctive as it might be, is rooted in the ultimately deadening and culturally flattening process of social materialization. What it does allow for, however, is the interim emergence of many different forms of structural and cultural resistance to this process as well as for variability in the levels, effectiveness and longevity that such forms might take. Here the divergences between China and India in the present study are of direct relevance. For though much has indeed been made of the very powerful and gradually converging nature of developments in both countries during the past three decades, it has also been clear throughout that they are still transforming at different rates and along significantly different paths.

From a structural and jurisprudential point of view, this contrast is once more reflected most obviously in their basic constitutional and political regimes. It was suggested throughout, of course, that these are more the result of the particular histories, attitudinal dispositions, cultures and overall depth and quality of diversity within the communities they purport to regulate than the result of adventitious political decisions in favour of authoritarianism or democracy. Yet whatever the underlying reasons which led to the adoption and survival of their different governmental and constitutional strategies, it seems incontestable that these strategies represent differences which have been profoundly consequential for the character and speed of reform in each country. As such, India has found it much more difficult to push through its reform agenda than has China, and its implementation has consequently been marked by much greater inconsistency. This is apparent enough from a simple reflection upon the recent political and governmental histories of each

⁹⁹⁸ Eisenstadt, 1987: 5.

⁹⁹⁹ Smith, 2006:4.

country. Thus, Li and Nain list the succession of administrations holding power in India between 1991 and 2004 in the following terms:

The Rao administration, which embarked upon reforms after it came to power in 1991, was voted out of power in the next election, in 1996, because of voter concerns about the adverse impact of reforms – such as the loss of secure public sector jobs. This made the subsequent administration wary of pursuing reforms, viewing them as risky to its tenure in power. Therefore it slowed down and even suspended some of the reform initiatives. At the same time, political uncertainty increased because of what has been termed as the era of “coalition politics”. Governments were often based on alliances of convenience among partners with conflicting objectives. Paradoxically, sometimes the smallest partner in the coalition was the most powerful..., as it could topple the government by switching allegiance to a dominant rival. Such shifts explain the power changes evident between 1996 and 1999, when, during a span of 4 years, four different administrations governed the country. It was only after the 1999 election that some stability returned, when the Bharatiya Janata Party – Indian People’s Party (BJP) leading the National Democratic Alliance (NDA) (comprising 24 political parties) was able to remain in power until 2004. However, this coalition failed to receive a strong mandate in the 2004 election, despite the high economic growth rate during its tenure. According to analysts, the NDA’s loss can be attributed to voter frustration about the asymmetrical impact of reform, with most benefits going to people working in certain sectors and living in urban areas.¹⁰⁰⁰

This contrasts markedly with the more or less steady leadership in China during the same period:

China’s leadership...enjoyed a long tenure allowing the pursuit of long-term policies. Deng remained in power from 1978-1992, and Jiang served as party leader from 1992 to 2002. The reforms in China were initiated and sponsored by the top leadership. Political entrepreneurs, Deng Xiaoping, and his colleagues all capitalized on Mao’s failures and seized the opportunity to initiate reforms. Their ability to promote the reforms was strengthened by the authoritarian political system.

This contrast, which is amply reflected in each more specialized area by the considerably greater speed and depth at which China has come to exemplify the various indicies of marketisation, would seem to support the contention that, all other things being equal “authoritarian regimes tend to outperform democratic regimes at

¹⁰⁰⁰ 155-156, Li and Nair: 2007

relatively low levels of economic development.”¹⁰⁰¹ Yet it is also significant if, as seems to be the case, the different types of regime rooted in the fact that Chinese society is relatively more homogenized than Indian. For it does not follow that because China’s marketisation has been facilitated and speeded along at earlier stages of economic ‘development’ by its ability to engage in more efficient forms of collective action that after a certain point it will not be impelled towards a the institution of a more representative or apparently ‘democratic’ forms of government. In fact, as the market ‘beds down’ so to speak, the division of labour that is so noticeable an accompaniment of economic ‘development’, and in particular, of marketisation, may very well demand precisely this scenario. It is for this reason that the present author is minded to agree with the Randall Peerenboom who has argued that China’s future is “likely to be one of authoritarian resilience with ongoing reforms leading eventually to a communitarian or other non-liberal variant of democracy.”¹⁰⁰²

Of course, it would also follow from this that the diversities grounding of pre and post- ‘development’ democracies are of a fundamentally different nature and quality: the one based upon the much deeper and humanly rich diversities of ethnic, religious, cultural, linguistic and political life, the other, much more superficial, grounded upon the variables of felt material preference subserving the efficiencies of an ever-finer economic division of labour. This would certainly fit in with the progressive advance of social materialization being argued for above as well as with the ultimately toxic effect this process is having upon human communities in general. However, perhaps most markedly of all, it points to the fact that, insofar as India has resisted, or slowed,

¹⁰⁰¹ Peerenboom, 2008:11 See also, the following comments by Peerenbooms in the same pieces, pp. 7-8: “The public good nature of legal reforms has been a barrier to reforms in democracies: even though reforms would be welfare enhancing overall, the benefits are widely dispersed, leading to collective action problems. Individual beneficiaries of reforms may not have the incentive to become politically active. Those with a vested interest in maintaining the status quo inside or outside the government however are motivated to block reforms or to undermine reforms at the implementation stage.

In China, the government has been able to push through welfare-enhancing legal reforms despite opposition from certain sectors. To be sure, even in China, the policy-making process is contested, and compromises are frequently required to get reforms passed. Nevertheless, the Party generally retains the authority to resolve disputes between different state organs when necessary.

Democratic India has been unable to pursue the same policies as authoritarian China because of its political structure. As noted, India has largely avoided neoliberal trickle-down economics and opted for slower but more equitable growth...[T]he Congress Party, United Front and BJP all avoided politically tough decisions such as reductions in subsidies and curtailment of financial support to loss-making public enterprises. The result has been slower growth but less social dislocation than in China, where many SOEs have been privatized and workers have been laid off in large numbers. Apparently, many Indian citizens prefer this approach (as do many Chinese, as reflected in rising discontent over inequality, a sharp increase in protests and demands for social justice).” Finally, see also: Barro, 1996.

¹⁰⁰² Ibid: 12. n. 56. See: Peerenboom, 2007, also 1998. On the whole debate surrounding this issue and for alternative views see, amongst others: Dickson, 2003; Manor, 2007; and, Pei, 2006.

the implementation of market-oriented reform more than has China, it might actually find itself in a humanly preferable position: a suggestion in need of many qualifying subtleties, but one nonetheless diametrically opposed in its underlying rationale to nearly every other contemporary analysis.

Chapter 9: Conclusion

It has been the central purpose of this study to analyse and explain the nature of historical and legal transformation. In doing so, it has put forward three closely related sets of argument. First, it has aimed to examine historical transformation on the basis of a metaphysically robust account of human nature and society. Secondly, in order to facilitate that examination, it has used law – broadly defined – as a prism through which the mechanisms of social pressure and reconfiguration can be seen to operate. Thus it has also made a number of arguments about the irreducibly contextual and thus indexical nature of law understood as normative pressure. Thirdly, since historical and legal transformation do not exist in the abstract, the study has concentrated in particular upon China and India over the past thirty years. It has focussed upon these two jurisdictions because prior to the European Reformation and possibly as late as the Industrial Revolution, China and India were materially the strongest civilizations in the world, and therefore offered the greatest potential resistance to the processes, which, spreading from Europe, emerged to transform the modern world. It has focused upon the thirty-year period in question because it is precisely during this period that each society has begun conclusively to reengage the world economy. Structuring these different sets of argument in relation to one another has enabled the study both to emphasise their mutual interdependence and to elaborate more effective ways that the implications of the processes with which they are centrally concerned can be systematically drawn out. It is useful briefly to revisit these sets of argument in in reverse order.

A: China and India

The extensive developments charted in the Part 2 of the study were intended to detail, and indeed empirically corroborate, how much broader processes have been playing themselves out during the course of human history. Clearly by focusing upon the period of legal transformation in China and India over the past thirty years, what it was the purpose of Part 2 to examine was the manner in which these two legal systems have begun finally to accept the full implications of the processes underpinning advanced modernity, and to embrace its distinctive, ultimately pathological, forms. It was necessary to execute that examination in some detail not only to elaborate the power and subtly with which quite diverse cultural forms have been and are being reconfigured by common underlying processes, but also to demonstrate to a much greater level of specificity than would otherwise have been possible the precise 'bite' of the broader historical and theoretical frameworks being developed. At the same time, it was another central contention of the study that attempting to understand the more specific developments in Part 2 independent of these frameworks itself opened the way for a serious misunderstanding of them.

B: Law

To avoid this, it was necessary, firstly, to understand Part 2 within the wider context of the history of legal transformation in general, which it was the particular task of Chapter 3 to outline. There three major phases in that history were identified, characterised, it was argued, by three preponderant though not exclusive forms of legal norm. The first of these phases, running until the Neolithic revolution and the emergence of the first state structures, was characterised by the preponderance of legal postulates whereby the norms of social pressure tended to be tightly integrated with the norms of religion, tended to be seen as divine in origin and tended to be enforced according to the principles of collective responsibility.

A second major phase of legal transformation stretched from the Neolithic to the Industrial revolutions. From its earliest stages this phase disclosed a gradual increase in the processes of codification and the emergence of a growing number of fixed and explicit legal norms. Despite this fact, however, right up until the emergence of the

modern nation-state and the Industrial revolution itself, these examples of formal law remained of limited significance, resting upon and coexisting alongside, a vast body of informal legal norms that were this phase's preponderant legal form.

In addition to a growing recognition within this phase of the differing varieties of legal norm both within individual societies and between them, as well as the varieties of communities they were apt to sustain, there was also a deepening understanding of the philosophical bases upon which they rested and against which they could be justified. Within the western legal tradition, this reached its apogee in the realisation of the essential balance between what was termed *lex ratio* and *lex voluntas* – between the intellect and the will – with precedence given to the former, if society was to realise a stable and flourishing regulatory form. It was, it was argued, the disturbance of this balance and the gradual subordination of reason to will, first conceptually, and then increasingly in ever-growing institutional forms, that lay at the heart of those developments propelling the emergence of the third major phase of legal transformation. Linked to the concomitant emergence of industrial society and the modern nation-state, this phase has come increasingly to be characterised by the preponderance of formal legal norms in the sense that the institutions to which they seem most intimately to be linked occupy a more and more central position of control and direction. These formal legal norms have been driven by the growing autonomy of legal authority as will and its institutional embodiments have emerged from under the control of reason. Moreover, these same embodiments, manifesting themselves in a commitment to an etiolated form of human rights, democracy and the rule of law, have proved the perfect institutional accompaniment to the market economy

Now, in so outlining the history of legal transformation, a definition of law was first stated and then employed, the full implications of which only began to receive development and more complete justification in Chapter 7. This it did very clearly within the Natural Law tradition of Aristotle and Thomas Aquinas, according to which the human action system is understood to be underpinned by a set of fundamental behavioural principles adherence to which is required in order for individual human beings and the communities they comprise to function in the cooperative manner necessary for them to realise to the maximum extent the full complement of their natural inclinations and thereby to become maximally flourishing

specimens of their kind.

On this basis it was then suggested that law should be understood as a set of regulative norms distinguishable, on the one hand, from language, and on the other, from the norms of physical nature. In drawing this distinction it is, it was argued, possible to identify something peculiarly definitive of legal norms, namely, that they imply some form of social pressure. Social pressure, was characterised here in the widest possible sense such that it is capable of manifesting itself in a great variety of forms. It can both physical and non-physical, and can even include the process by which individuals voluntarily regulate and discipline their more unruly natural proclivities in order to live up to standards of social propriety to which they themselves give free intellectual assent.

In contrast to law, language and the norms of physical nature operate, it was argued, at the same qualitative level. The norms of physical nature are not susceptible to any real relevant variation at all, whilst language may and necessarily does vary in its particular personal and communal manifestations but remains constantly underpinned by a set of universal governing principles which ensure that those manifestations, to the extent that they are indeed truly linguistic, sustain maximal human expressivity. With this taxonomy in mind, it was argued that law should, in fact, be understood as an admixture of these other two varieties of norm system; or, more precisely, that it should be seen as occupying a variable intermediate position between the two extremes they respectively represent. In this way, language can be seen, at one extreme, to manifest man's being in its most natural state, since it represents a perfect balance between structure and volition. It allows for maximal, spontaneous and uncoerced expression, which is nonetheless guaranteed and made intelligible by the largely unconscious employment of regular underlying normative patterns. At the other extreme, the laws of physical nature exclude any such notion of volition, and represent a more or less impersonal, though not necessarily by that token wholly determined, unfolding of the physical universe. In contrast to both these extremes, the concept of law, like that of language, incorporates the idea of volition, and therefore is distinguishable from the norms of physical nature, but, unlike language, implies some degree of restriction on the scope of that volition. Thus law, in its very nature, implies a distinction between actions that are permissible and those that are not.

It was also noted in Chapter 7 that upon a Thomistic understanding, the precepts of the Natural Law – that is, the behavioural precepts of common human nature – must find expression, if at all, in particular contexts such that they can be found either to have been breached or complied with in the execution of each individual and collective judgment. Not only should it be possible at this stage, and in light of the above, to see that such breaches or fulfilments collectively manifest correlate variations in the actual texture of the norms in which they are embodied, but also to see that an integrated approach to the tripartite typological taxonomy of those embodiments outlined at the beginning of Chapter 3, and an understanding how the balance between these embodiments has changed over time, offers a uniquely effective method for the recording and measurement of long-term social and historical transformation. Thus, in distinguishing, as Chapter 3 did, between legal postulates, informal law and formal law, each of which refer, from a Thomistic perspective, to a particular variety of human law, and then in tracing the preponderance of each in three very broad chronological periods, it was possible to detect a long-term trend towards increasing formalisation, understood as connoting increasing levels of normative explicitness and fixation, a process it was further argued, which discloses a cognate process of social fixation. Accordingly, as the norms of social pressure preponderant in each era gradually take on more formality, as the history of legal development shifts from a preponderance of legal postulates, to one of informal law and finally of formal law, so those preponderant forms of social pressure become, relatively speaking, less like the rules of language and more like the norms of physical nature. Moreover, since it is language which underpins the man's most natural, free and sustainably varied forms of activity, so the extent of such a shift in the direction of greater formality must also indicate the extent to which mankind has grown alienated from its natural, maximally flourishing state, and to which its individual and communal diversity has been undermined. Finally, it also serves to chart, on the widest temporal scale, the gradual shift in overall function of normative pressure away from enforcing the observance of the precepts of the Natural Law or actions compliant with it, towards enforcing behaviour that is in breach of those precepts.

C: History

Just as it was necessary to set the more recent legal transformations taking place in China and India within the wider sweep of the history of legal transformation, so too, it was necessary, secondly, to understand legal transformation as embedded with the wider sweep of historical transformation in general. Indeed, it is, it was argued, precisely because legal transformation is so embedded that law is able to serve the indexical function that is claimed for it. Moreover, within the context of a fuller understanding of historical transformation and its underpinnings it is possible to gain a much better appreciation of exactly how law is able to perform that function.

Accordingly, Chapter 2 outlined historical transformation according to three broad chronological phases, anticipating the three phases of legal transformation outlined in Chapter 3. The first of these phases, it will be recalled, covered that long period in human history prior to the Neolithic revolution during which man moved from a pastoral and nomadic existence to a settled and agricultural one. This phase was marked by the organisation of individuals within close personal kinship groups with few formalised rules outside accepted common codes of behaviour and moral norms guaranteeing the integrity of the community. Here the primary social structure was linguistic and the linguistic communities thus constituted, though small, were extremely numerous, suggesting that local (and therefore individual) diversity and autonomy was considerable.

The second phase of human development, inaugurated by the Neolithic revolution, was caused because some communities were forced, by their growing numbers and geographical limitations, to exploit their environment more efficiently. The agricultural forms they developed inadvertently gave them a competitive advantage over neighbouring communities, forcing these in their turn to adopt similar forms in order to redress the imbalance and survive. As a function of this need for greater exploitation, human labour itself had to be more efficiently exploited and co-ordinated, thus there gradually arose a division of labour between co-ordinating and co-ordinated sections of society accompanied by the increasing power differential that implied. In this division is found the origin of the state, in its many guises. With the development of the state came the development also of gradually more rigorous and explicit codes of conduct, as it became clear that the more explicitly structured a state

was, the more efficient would be the ruler in effecting his will and, therefore, the more powerful. Again this was a dynamic driven by institutional competition. One additional factor that contributed to a state's competitive advantage was its size and homogeneity. Thus though this phase in human development was accompanied by a considerable increase in overall population, it was also accompanied by an overall decrease in the number of autonomous communities, a fact which in time eventually expressed itself in intrastate linguistic homogenisation.

At the same time and running parallel to these developments, there was the growth of an evermore systematic and concentrated exploration of the various aspects of reality by the many emergent priestly and scriptural castes. Although their knowledge was frequently co-opted by those engaged in political power-struggles, with whom they were themselves too often complicit, this did not prevent an extraordinary increase in genuine religious and philosophical insight. Thus, whilst the emergence of state structures meant a great intensification in the power and destructiveness of human conflict as well as inter-personal exploitation, it also gave sufficient leisure to enough people thereby able to devote their lives to delving deep into the depths of reality such as to result in rich harvests of knowledge which otherwise would have been impossible. This led not only to that great trans-cultural elevation of human consciousness known as the Axial Age, but also to the forging of systematic traditions of enquiry that were able to elaborate increasingly integrated and powerful visions of the cosmos which came to represent, and in their turn further spawn, some of the greatest achievements of the human mind and spirit.

The inauguration of third phase, was marked by the second great transition in human history; the Industrial revolution. In this phase – the economic – structure has become increasingly dominant at the expense of the apparent autonomy even of the ruling classes, prompting Max Weber to speak of an iron cage of rationality. Here the co-ordinating centre of human relations is an increasingly complex economic core more and more resistant to effective control. It is also marked by an evermore explicit and rigorous set of governing norms and structures. Since this core is so much more efficient than any other mode of organisation in directing resources and physical power, it is gradually having the effect of colonising and expanding into every area of human life, and of functionalising all autonomous human resources in its service. In

particular, the great institutions of learning and devotion, together with the disciplined practices to which they have given rise, are no longer subject merely to piecemeal co-option, but now to systematic exploitation and reconfiguration.

Once more, the full implications and theoretical underpinnings of the historical account set out in Chapter 2 did not receive full development until Chapter 8. It was the purpose of Chapter 8 to set that account, and ultimately, by implication, the account of the history of legal transformation, within the context of a more complete, metaphysically integrated, account of human nature and society. There it was explained that, according to the Aristotelian-Thomistic tradition, human nature is an irreducibly material-immaterial composite with inclinations stemming from both of these dimensions. It was further explained that each of these need to be satisfied, or 'brought to act', if an individual human being is to flourish as a fully actualised specimen of its type; that in order for such integrated satisfaction to be achieved, material goods should only be sought with an eye to the securing of immaterial goods and never in place of them; and, finally, that a person's metaphysically composite nature renders him inherently social with a natural sympathy towards other persons and causes each of his actions, even his most intimate, to give rise to irreducibly social consequences which effect a habitual trace both in his being and in that of society in general. It was on this basis, that the basic precepts of the Natural Law were explained to set the basic parameters for individual and collective flourishing; that flourishing being guaranteed by adherence to them, and individual and collective corruption by their flouting. Moreover, it was explained that just as individual and collective flourishing results from due proportion being given to material and immaterial goods, involving as it does prioritising the former, so corruption results from the preference of material goods in place of, or at the expense of, immaterial goods, since this involves attempting to satisfy unlimited immaterial inclinations with exhaustible material goods. Finally, on this basis, a theoretically integrated account of historical transformation was elaborated whereby socially embodied growth and socially embodied decay were seen to operate through time with a preponderance of social growth very gradually being replaced by a preponderance of social decay, as the socially habituated adherence to the precepts guaranteeing, sustaining, or making easy, the realisation of human flourishing came to be undermined.

D: Synthesis

By way of a final conclusion, it is now possible to draw these various levels of argument together into some form of tentative synthesis.

Since nature is hierarchically ordered, systematic, and harmonious, it exhibits certain underlying regularities which co-ordinate its over-all shape. Man, gifted with the capacity for abstract thought, has the potential to ponder and lay bare these regularities. At the same time, being himself part of nature and acting through it, his own activities and thoughts are also structured in a regular manner. This is as true of his collective as it is of his individual practices. It is in this context that the notion of law must be conceptualised: as regulating and thereby exposing the underlying structures of the human action system, and, after a somewhat different fashion, through the medium of law, offering an abstract indicator of its current state. Since the natural state of man is signed by freedom, it follows that the socially embodied structures that manifest his action-system in its natural state must disclose maximal volitional freedom. This is precisely what the co-operative, non-conflictual structures of language do. Likewise, as the de-natured state of man, being signed by materiality, excludes volition, it follows that the socially embodied structures which manifest his de-natured action-system must themselves disclose maximal volitional restriction. Since, at any given point in history, the socially embodied human action-system has been found neither entirely in its natural nor in its entirely de-natured state it follows that there should be found a third type of structure which – mixing the characteristics both of language and the laws of physical nature – is signed partly by volition and yet partly by determination: this is law as defined in its broadest sense. Moreover, since human society is in a dynamic state, it also follows that the composition of human law as an admixture of the other two structures, is itself variable. By looking at the state of human law within a given society or historical epoch, it is therefore possible to delineate the extent of human alienation.

As the process is one of ever-greater materialisation, so it follows that the structures manifesting human interaction become increasingly explicit and fixed, in other words, they become more and more easily locatable in space and time. This accounts for the differing types of positive legal norm and the gradual trend towards formalisation.

These norms also come gradually to change their function. To start with, informal moral norms serve the purpose of maintaining the integrity of society in its natural, maximally flourishing, state. Gradually, however, as the process of materialization progresses, and the overall margin shifts from social growth to social decay, the norms of social pressure are gradually and increasingly utilised at the service of the integrity of denatured society. Thus, after a certain point, the more de-natured human society becomes, the more integrity a denatured model of human society develops at the expense of its natural alternative, the less resistance its further decay encounters. Moreover, since human society in its maximally flourishing state, is characterized by maximal diversity, a fact reflected in maximal linguistic diversity, to the extent it has been denatured, so this diversity is undermined and a forced uniformity substituted, something, it would seem is increasingly indicative of advanced modernity. Finally, since in this process of denaturing and materialisation man's immaterial dimensions – his intellect and will – though subordinated are not, by virtue of that fact, at the same time destroyed, they continue profoundly to affect the acts in which he engages in and to capacitate him far in excess of other living beings. Just, then, as he is able to complete and harmonise the hierarchy of material being by acting according to his true nature, by acting, in a disordered manner, in opposition to it, he is also able fundamentally to distort that hierarchy. Indeed, it is of the essence the denaturing/materialization process that human society gradually externalises itself in the material world. Thus, it is perhaps not too fanciful to speculate that the trajectories and pathologies of advanced modernity suggest the gradual construction of a uniform, materialized and alienated form of human being.

Much, of course, remains to be elaborated in the content of what has been argued in the present study. Its conclusions are necessarily of a tentative nature, and it is intended that they should offer a basis for more concentrated analysis and empirical verification. It is hoped that the structure and nature of the present study has at least pointed in the direction of how such analysis and verification might be undertaken, but it must be recognised that what has been presented here has been nothing more than a preliminary intervention, and should be received in that spirit. Nevertheless, its implications, if correct, are both profound and wide-ranging, they are also of profound human concern. It is hoped then that they will be considered worthy of the further study that they require; should they receive such attention, it is further hoped that they

will help make some contribution, however small, to understanding our current predicament.

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